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NORTHERN DISTRICT OF TEXAS

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

Signed August 22, 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
WITH RESPECT TO THE JOINT MOTION
TO APPROVE SETTLEMENT AGREEMENT,
GRANT CLASS CERTIFICATION AND
APPOINT CLASS COUNSEL AND CLASS REPRESENTATIVE

TO THE HONORABLE JUDGE JOHN H. McBRYDE:

Your Honor has referred this matter to me for my recommendation as to whether You should: grant class certification to creditors who purchased fractional interests in life insurance policies from Life Partners, Inc.; appoint class counsel and representatives for that class; and approve a settlement between the class and LPI. This is not the first time Your Honor has considered these issues. On June 2, 2016, after reviewing my preliminary report and recommendations concerning these same matters, You granted preliminary approval of the motion and referred it back to me with directions that I conduct a hearing to consider final approval, and report back to You with a final report and recommendation. This is that report.

After conducting a hearing on the motion on August 3 and considering the same record that is now before Your Honor, I recommend that You approve the relief requested in the joint motion. Although several objections to the joint motion were filed, primarily by Pillar, I believe that only one of them is credibly persuasive: that the rescission claims asserted here are predominantly monetary claims and, as such, cannot be certified under Rule 23(b)(2). Although this argument has superficial appeal, I conclude that it must be rejected. Any right to rescission damages is predicated upon Your declaration that rescission is warranted in the first place. Thereafter, the calculation of damages is defined and circumscribed by article 581-33(D) of the Texas Securities Act, which essentially authorizes the return of one's basis in the security in question. The manner in which damages are calculated conforms precisely to the characteristics

of "incidental" damages as defined by the Fifth Circuit in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998).

In reaching this conclusion, I have asked myself whether the compelling circumstances of this case have affected my ability to be objective when considering this issue. Ultimately, I do not believe so. Nevertheless, I believe that all parties are well-served by the fact that Your Honor will be the final arbiter of that and all other issues. I do not suggest that Your Honor can or should divorce Himself from the implications of the high stakes that are at issue here, but Your reflective distance from matters that I deal with almost daily will certainly bring more dispassionate judgment and, as a result thereof, more confidence in the final decision by all parties.

With Your Honor's approval, I will not recite the long history that led to LPI's day of reckoning in bankruptcy. Nor will I devote substantial ink to the procedural chronology of the bankruptcy case or the adversary proceeding before You. The parties themselves have devoted substantial attention to those matters and it serves no useful purpose to repeat them here, especially when the parties are urging me to report to you as expeditiously as possible.

If I may, I would like to refer Your Honor to my original report and recommendation and ask that you consider this as a supplement to that document. Also, although it may not be consistent with norms of good legal writing (much less good opinion writing), my report will be primarily in the form of responses to objections to the joint motion, rather than a well-organized, stand-alone opinion. So, with apologies to Your Honor, I turn to those objections.

**The District Court Has Jurisdiction Over the Class Action and,
Pursuant to the Standing Order of Reference,
I Have Jurisdiction Over the Bankruptcy Case**

Pillar[1] argues that the "imposition of a mandatory class action settlement is an [impermissible] attempt to extend the bankruptcy court's jurisdiction. . . ." Pillar Br. ¶ 62. This is so, it says, because the "proposed class action settlement . . . offends the substantive rights of the Investors and other unwilling members of the mandatory class." *Id.* at ¶ 64.

I attempt to respond to this argument while acknowledging that I do not fully understand it. If by "substantive rights" Pillar means its "right" to litigate the issue of ownership, then that right would be curtailed by the class action settlement itself, not any impermissible extension of bankruptcy jurisdiction. Moreover, because the class action resides in the District Court, that jurisdiction is exercised by Your Honor, not by me. And, even though the source of your jurisdiction is the same as mine (28 U.S.C. § 1334), Pillar has not challenged your jurisdiction over the class action settlement.

If by "substantive rights" Pillar means its right to vote on a plan, then Pillar is simply wrong. Pillar has the right to vote against the plan and to object to confirmation. Pillar's real complaint is that a class vote in favor of the plan may dilute the effect of its rejection. Pillar Br. ¶ 53. That may be so, but that is not a jurisdictional defect.

Finally, if by "substantive rights" Pillar is referring to its ownership of fractional interests, then Pillar's logic is purely circular. Its argument is that because it, not LPI, owns the fractional interests, there is no bankruptcy jurisdiction over those interests in the first place. This

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[1] The Pillar group includes Pillar Life Settlement Fund I, LP, Pillar II Life Settlement Fund, LP, Pillar 3 Life Settlement Fund, LP, Pillar 4 Life Settlement Fund, LP, Pillar 5 Life Settlement Fund, LP, Evergreen Lifeplan Fund LP, Evergreen II Lifeplan Fund LP, Evergreen III Fund LLC, and Black Diamond Lifeplan Fund LP. For convenience I refer to these parties as "Pillar."

argument not only starts with a false premise – that Pillar's ownership is certain – but is remarkable in light of positions previously taken by Pillar in my court.

On December 22, 2015, Pillar filed in my court adversary number 15-04106, wherein it asked me to resolve the issue of ownership. As an initial matter, why would Pillar file such a lawsuit if its ownership were not in doubt? Or, stated differently, why would it file it if there were no case or controversy? More importantly, why would Pillar file suit in the very court that it now claims has no jurisdiction to resolve it? Moreover, Pillar did not just "consent" to bankruptcy jurisdiction, it fully subscribed to it. It said, "All claims brought by Plaintiffs are core proceedings." Pillar First Amended Complaint ¶ 1. By so stating, Pillar acknowledged that I have jurisdiction not just to hear the dispute, but to enter a final order on the ownership issue. *See* 28 U.S.C. § 157(b)(1). And, if I possess core jurisdiction to resolve the adversary proceeding, then how can my jurisdiction to resolve the ownership issue through a plan that incorporates a settlement approved by Your Honor be questioned when confirmation is specifically delineated as a core matter in 28 U.S.C. § 157(b)(2)(L)?

There is at least one other reason to reject Pillar's newly-minted objections to bankruptcy jurisdiction. LPI is the record owner of every life insurance policy in its portfolio. Because of that legal title, as well as other legal and factual considerations, LPI has a credible claim of ownership in its own right. That claim, by itself, is an asset of LPI's estate, over which I have jurisdiction. 11 U.S.C. § 541(a); 28 U.S.C. §§ 157(a) and 1334(e)(1); Standing Order of Reference for the Northern District of Texas. When that jurisdiction is coupled with Pillar's acknowledgment of bankruptcy jurisdiction over *its* claim, bankruptcy jurisdiction is fully established.

For the foregoing reasons, I recommend that Your Honor deny Pillar's objection to bankruptcy jurisdiction.

Pillar Does Not Own Whole Interests In Life Insurance Policies

Before moving to the more substantive objections raised by Pillar, I must address certain aspects of the record before Your Honor. Pillar submitted the declarations of Dean Vagnozzi and John Gissas in support of its objections. In those declarations, Vagnozzi and Gissas allege that their firms hold whole or partial life insurance policies. That is not so. At the August 3 hearing, Pillar's counsel acknowledged that, as far as he knew, his clients did not wholly own any policies.

While seemingly minor, these inaccuracies have significant impact. If, in fact, Pillar owned 100% of one or more of the life insurance policies in question, its claim of undisputed ownership would be more persuasive. Likewise, in the context of the class settlement, if Pillar owned 100% of one or more of the policies, one might logically question the fairness of a settlement that required Pillar to forfeit 5% of those policies in order to resolve the ownership issue. Finally, if Pillar owned 100% of one or more of the policies, then the claims of the class representatives would not be typical of Pillar's. But that is not the case. Pillar, like all other investors, owns fractional interests and nothing more.

I Have Not Manufactured a Concern
About Chaos in Order To Expand Bankruptcy Jurisdiction

Pillar suggests that I have impermissibly attempted to expand bankruptcy jurisdiction based upon an unsupported fear that mere determination of the ownership issue would create chaos. Specifically, Pillar states that in my preliminary report and recommendation I stated "without evidence or legal justification that determining the ownership issue could 'plunge the estate into chaos.'" Pillar Br. ¶ 58. I did not say that "determining the ownership issue could

plunge the estate into chaos." Instead, I said that a determination that fractional interest holders own the policies could plunge the estate into chaos. May 13, 2016 Report and Recommendation at p. 14. But the converse is not true. If Your Honor were to determine that LPI owns the policies (a determination that Pillar assiduously opposes), chaos would not ensue. Not only would LPI be administratively solvent, it would be flush with cash and assets, around which it could easily reorganize.

Nevertheless, to the extent that my legal experience and involvement in this case for the past twenty months provide no factual or legal justification for my concern that chaos could ensue if fractional interest holders are determined to be the owners of the policies, I availed Pillar's counsel of the opportunity to correct me at the August 3 hearing.

Against the backdrop of my questions to Pillar's counsel, there are certain facts Your Honor should know. First, LPI has only three categories of assets: its equitable interest, if any, in the life insurance policies; the servicing rights to those policies; and claims against third parties. If fractional interest holders own the policies, then except for those fractional interests owned by LPI itself, the policies themselves have no value to LPI.[2]

While LPI owns servicing rights, many investors allege that those rights are terminable upon thirty days' notice. If fractional interest holders own the policies and have the right to terminate servicing, it is anyone's guess as to whether the servicing asset has value. This is not a small issue. After all, one of the factors that precipitated the filing of the bankruptcy case was LPI's unilateral imposition of a servicing fee, which many investors say they never agreed to pay.

[2] LPI owns certain fractional interests in its own right. Those interests were abandoned to LPI prior to its petition in bankruptcy.

LPI's causes of action against third parties certainly have value, but like all causes of action, the value of that class of assets depends on factors such as likelihood of success, collectability of the defendants, the availability of capital to pursue claims, and the timing of any recovery.

Because of these uncertainties, until two weeks ago LPI had no access to outside capital in order to sustain its business operations, much less a bankruptcy case.[3] Instead, it had to borrow money from policy maturities. If LPI's assets are of such dubious value that neither traditional nor non-traditional lenders would extend credit to LPI on any terms, then it seems safe to predict that a determination that fractional interest holders own the policies would have a profound impact on LPI's access to capital going forward.

If fractional interest holders own the policies and LPI has no readily accessible capital – much less any imperative or authority to spend what capital it does have on non-estate assets – who will service the policies? Who will collect premiums from fractional interest holders? Who will forward premiums to insurance companies? Who will advance premiums on behalf of fractional interest holders who can't or won't pay their share of premiums? Who will manage the policies to preserve cash values? Who will monitor policy maturities? Who will file claims on behalf of matured policies? Who will distribute policy proceeds to fractional interest holders? In short, who will perform the very functions that cause fractional interests to have value? I attempted to procure answers to these questions at the August 3 hearing. Pillar's counsel had no answers save one: Pillar might be willing to buy the fractional interests of other investors. This does nothing to allay my concern that chaos could ensue if investors are determined to be the owners of fractional interests; it only explains who might profit from that determination.

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[3] On August 3, 2016, Vida Capital, a co-proponent of the joint plan, agreed to provide LPI a $10 million debtor-in-possession facility in order to usher LPI through confirmation.

It goes without saying that no court can unilaterally expand its own jurisdiction, whether its goals are praiseworthy or not. But, the suggestion that I have attempted to become a "roving commission to do equity" out of a trumped-up concern is wrong in both its premise and conclusion.

The Class Representatives' Rescission Claims Are Typical of Other Class Members

Pillar devotes much of its brief to the impropriety of certifying a rescission class. But, in the adversary proceeding that Pillar filed in my court it did not assert any right of rescission. And, at the August 3 hearing its counsel confirmed that it does not intend to assert any right of rescission.

Notwithstanding its questionable standing to do so, Pillar volunteers the argument that because certain of the class representatives have rescission claims that have been adjudicated as time-barred, the class representatives do not satisfy the typicality requirement for that class. Pillar Br. ¶ 35. This is so, it says, because time-barred rescission claimants would be required to advance additional legal theories (presumably tolling theories) that are separate and apart from class members whose claims are not time-barred. *Id.* But that is not the test for typicality. A class representative's claims are typical if they arose from the same practice, event, or conduct as other class members and the claims are based on the same legal theory. *Baricuatro v. Industrial Personnel and Mgt. Svcs., Inc.*, 2013 W.L. 6072702, at * 7 (E.D. La. Nov. 18, 2013). Here, the rescission claims arose from LPI's sale of securities in violation of the Texas Securities Act. The fact that some of the putative class representatives may have claims as to which LPI could assert the affirmative defense of limitations does not gainsay the fact that their claims arose from the same practice, event, or conduct and that their claims are based on the same theory of recovery as all other members of the rescission subclass.

At a Minimum, Christine Duncan and John Ferris Are Adequate Representatives

Pillar's objection to typicality is really an objection to the adequacy of the class representatives. Pillar's argument is that those class representatives who have time-barred claims have a conflict of interest by purporting to represent those class members who do not. In effect, Pillar argues that the class representatives should never have sought relief for victims of LPI's violations of Texas securities laws who failed to sue within three years of the date they bought their securities. This is so even if many – if not most – investors did not know such a cause of action even existed until the Dallas Court of Appeals and Texas Supreme Court declared so in 2013 and 2015, respectively. Moreover, Pillar suggests that LPI should never have agreed to waive its limitations defenses in the class-action settlement. It is ironic that this steadfast concern for those who timely asserted securities law violations comes from entities who not only do not seek rescission themselves but in fact purchased their fractional interests only *after* the Dallas Court of Appeals ruled that fractional interests are securities under the Texas Securities Act.[4]

I respectfully submit that Your Honor need not linger long on the dubious equity of Pillar's argument. Pillar's timeliness objections apply, if at all, to Michael Arnold, Janet Arnold and Steve South. *See Arnold v. Life Partners, Inc.*, 416 S.W.3d 577, 590-92 (Tex. App. – Dallas 2013). Neither Pillar nor any other party has asserted that the rescission claims of Christine Duncan and John Ferris are barred by limitations. And, the "adequacy-of-representation requirement is satisfied as long a one of the class representatives is an adequate class representative." *Local Joint Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 n. 2 (9th Cir. 2001). For this reason alone, I recommend that Your Honor

[4] This fact came to light at the August 3 hearing.

determine that, at a minimum, Christine Duncan and John Ferris are adequate class representatives.

Ownership Claims Are Not Predominantly Claims for Monetary Relief

Pillar argues that class certification is not proper here because each class member is entitled to an individualized award of money damages. Pillar Br. ¶ 18, citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011). Pillar argues that this is so with respect to both ownership class members and rescission class members.

Focusing first on Pillar's argument as to the ownership subclass, Pillar argues that ownership claims are predominantly claims for monetary relief. Pillar Br. ¶ 24. It quotes *Wal-Mart Stores, Inc. v. Duke*, 564 U.S. 338, 363 (2011) for the proposition that "[i]n the context of a class action predominantly for money damages . . . absence of notice and opt-out violates due process." *Id.* ¶ 19.

As putative support for the proposition that Pillar's claims are for individualized money damages, Pillar submits the declaration of Vagnozzi and Gissas, who each declare that their "damages are different than the other class members." Vagnozzi Dec. ¶ 9(2); Gissas Dec. ¶ 9(2). Given its argument about the predominance of money damages and its insistence that its damages are different than other ownership class members, one might think that Pillar would have sought them. But it didn't. In the complaint filed in my court Pillar seeks *no damages* whatsoever. It asks only for declaratory relief. Pillar Amended Complaint ¶¶ 21-22. While it does ask for attorneys' fees, it never identifies what authority, if any, would entitle it to an award of attorneys' fees for the declaratory relief it seeks. Moreover, Pillar filed its adversary proceeding well after LPI filed its petition in bankruptcy and, in the absence of any substantial contribution claim (which Pillar does not assert), attorneys' fees are not recoverable in any event.

See Pride Companies, L.P. v. Johnson (In re Pride Companies, L.P.), 285 B.R. 366 (Bankr. N.D. Tex. 2002). So, Pillar has never sought actual damages and to the extent that it states a claim for any monetary recovery at all, that claim is not allowable as a matter of law.

No reasonable person would disagree with the notion that a declaration of policy ownership one way or the other would produce an economic consequence. Pillar itself would not have filed suit if the answer to the ownership question were purely academic. But, the mere fact that an economic effect will follow the resolution of ownership is not the tail that wags the dog.

In this case, thousands of investors just like Pillar claim that they own equitable interests in the policies. And, they say this for the same reasons: the operative documents and LPI representatives led them to believe so when they purchased fractional interests. The specific documents or oral representations that support their claims of ownership may differ, but the relief they seek is the same. In response to this demand for declaratory relief, the settlement offers ownership class members three options, one of which is to retain 95% of their fractional interests. Under that option, the remaining 5% is to be contributed to an ownership trust for very practical reasons, not the least of which is to keep all policies in effect if some fractional interest holders default on their premium payments. So, the relief sought by ownership claimants is the same, and the class settlement offers a group remedy that affects class members in the same way. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998).

The fact that this global resolution may have a different economic impact on Pillar because it purchased, say, 50% of a $5 million policy on a particular insured, whereas another investor purchased 5% of a $10 million policy on a different insured does not compel the conclusion that ownership is predominantly for individualized, monetary damages.[5] If Pillar

[5] This is purely hypothetical.

receives $2,375,000 (95% of 50% of $5 million) when a particular insured dies, it would not be "damaged" by that amount any more than it would be "damaged" by a full $2.5 million recovery. It is merely the amount that is attributable to Pillar's interest under the settlement. And, it is computed by means of an objective standard that is not dependent on the intangible, subjective differences of each class member's circumstances. *Id.* at 415.[6]

No party other than Pillar has alleged that its claim to ownership is one for damages. Indeed, Pillar itself did not characterize the relief it requested as "damages" in its adversary proceeding. And there is good reason why it did not do so: any such claim is tenuous at best.

For these reasons, I recommend that Your Honor deny Pillar's objection to certification of the ownership class on the ground that those claims are for individualized monetary relief.

The Rescission Class Was Not Contrived To Create a Common Fund Claim for Class Counsel

Pillar and the Arbitration Objectors contend that rescission claims are predominantly monetary and, as such, cannot be certified as a class. Like Pillar, the Arbitration Objectors have never asserted rescission claims and do not intend to do so now. But, some of the Arbitration Objectors may opt to pool their fractional interests as part of plan confirmation. If so, their concern is that the existence of a rescission subclass permits class counsel to claim responsibility for the creation of a common fund and thereby seek attorneys' fees of $33 million. Those fees, in turn, would be payable from the pool that some of the Arbitration Objectors would look to for recovery. In contrast to Pillar, the Arbitration Objectors do not oppose certification of an ownership class and the options afforded that class under the settlement; they merely oppose certification of the rescission class.

[6] This is true of the pooling and rescission options as well.

Before addressing the question of whether rescission is predominantly monetary relief, I first address the Arbitration Objectors' claim that class counsel seeks certification of a rescission class primarily for the purpose of creating a common fund that will support its request for $33 million in fees. First, the settlement is not conditioned upon class counsel's receipt of $33 million in fees. Ultimately, Your Honor will determine whether class counsel is entitled to any fee and, if so, how much. Class counsel has agreed to seek no more than $33 million and the parties to the settlement have agreed not to oppose that request. That does not preclude the Arbitration Objectors or any other party from objecting to class counsel's fees in whole or in part.

But, the Arbitration Objectors' fee argument cannot be casually dismissed for at least one important reason. The Arbitration Objectors argue that the rescission subclass has no purpose except to establish a common fund for class counsel. In essence, the Arbitration Objectors contend that the rescission class is contrived and is merely a pretext for an award of fees. I construe this argument as a claim that the rescission class was created in bad faith. Even so construed, I do not agree with it.

The Arnold plaintiffs have been pursuing the remedy of rescission since 2011. And, they have been pursuing it against great odds. Indeed, at one point, a Texas civil court found these claims to be sanctionable. The Arnold plaintiffs persevered, however, and the Dallas Court of Appeals and Texas Supreme Court ultimately ruled that LPI's fractional interests were in fact securities. So, not only are the Arnold Plaintiff's rescission claims not of recent vintage, but they have been pursued at great risk and cost. This procedural history belies any allegation of contrivance for settlement purposes.

Next, the settlement of the rescission claims was the result of "fully informed, arms-length negotiations." Schmidt Dec. ¶ 5. Former bankruptcy Judge Richard Schmidt conducted the mediation that led to settlement and he has declared that in his opinion "the settlement was negotiated in good faith and is in the best interests of the Debtors, their creditors and the estate." *Id.*

Finally, at the August 3 hearing, in response to my questions on this issue, class counsel confirmed that many investors not only want the option to rescind, but will in fact elect that option. For the foregoing reasons, I recommend that Your Honor find that the rescission class was created in good faith.

Rescission Damages Are Incidental to Declaratory Relief

The most serious argument advanced by the Arbitration Objectors and Pillar is that rescission claims are claims for monetary relief and, as such, cannot be certified under Rule 23(b)(2). The Arbitration Objectors quote *Wal-Mart* for the proposition that Rule 23(b)(2) "does not 'authorize the class certification of monetary claims at all.'" That statement, however, is taken out of context. *Wal-Mart* says, "*One possible reading* of [Rule 23(b)(2)] is that it applies *only* to requests for such injunctive and declaratory relief and does not authorize the class certification of monetary claims at all." *Wal-Mart*, 564 U.S. at 360 (emphasis supplied). It then followed that statement by saying, "We need not reach that broader question in this case, because we think, at a minimum, claims for *individualized* relief (like the back pay at issue here) do not satisfy the Rule." *Id.* This statement reiterated its earlier holding that monetary relief may not be certified under Rule 23(b)(2), "at least where . . . the monetary relief is not incidental to the injunctive or declaratory relief." *Id.* If these statements were not enough, the Court said it one more time. Referring specifically to the Fifth Circuit's ruling in *Allison*, which permits

certification of monetary relief that is incidental to injunctive or declaratory relief, the Court refused to decide whether there are forms of incidental monetary relief that are consistent with Rule 23(b)(2). *Id.* at 365-66. In light of the fact that the Court repeatedly refused to hold that monetary relief could never be certified under Rule 23(b)(2), it is folly to suggest that the Court so ruled.

Because the Supreme Court went so far as to quote *Allison*, but refused to overrule it, it is the law of this circuit. As such, the guiding principle in this circuit is that "monetary relief may be obtained in a (b)(2) class action as long as the predominant relief sought is injunctive or declaratory." *Allison*, 151 F.3d at 411. And, "monetary relief predominates in class (b)(2) actions unless it is incidental to requested injunctive or declaratory relief." *Id.* at 415. "Incidental" means that the "damages . . . flow directly from liability to the class *as a whole* on the claim forming the basis of the injunctive or declaratory relief." *Id.*

The cases relied upon by the Arbitration Objectors and Pillar provide examples of claims for individualized monetary relief that cannot be certified under (b)(2). In *Wal-Mart*, the plaintiff sought back-pay due to discrimination. As the Court noted, if Wal-Mart could show that it took an adverse action against an employee for any reason other than discrimination, back-pay was not appropriate. 564 U.S. at 364. So, Wal-Mart was entitled to an individualized determination of each employee's eligibility for back-pay. *Id.*

In *Allison*, the plaintiffs sought compensatory damages for discrimination. Because compensatory damages require proof of actual injury, often in the form of psychological or medical evidence, or other corroborating testimony, the very nature of those damages implicate "the subjective differences of each plaintiff's circumstances." 151 F.3d at 417. These subjective differences belied (b)(2) certification.

In *Wilborn v. Wells Fargo*, the plaintiffs alleged that Wells Fargo charged unreasonable fees to mortgagors who were in bankruptcy. *Wilborn v. Wells Fargo Bank, N.A. (In re Wilborn)*, 609 F.3d 748, 750 (5th Cir. 2010). There, "[t]he differing circumstances of the debtors render[ed] the reasonableness of the individual charges a fact-specific inquiry rather than a class-oriented decision." *Id*. at 756.

And, in *Kahler v. Firstplus Financial*, the plaintiffs alleged that the debtor charged excessive loan fees and interest and hid effective interest rates, loan costs, and fees. *Kahler v. Firstplus Financial, Inc. (In re Firstplus Financial, Inc.)*, 248 B.R. 60, 65-66 (Bankr. N.D. Tex. 2000). The plaintiffs sought, among other things, restitution for all improper charges, damages, and punitive damages. *Id.* at 66. Clearly, once a plaintiff alleges that a particular loan fee is "excessive," that his particular interest rate is "excessive," and asks for restitution of all "improper" charges, he is seeking an individualized monetary recovery based on fact-specific circumstances. And, as the court noted in *Allison*, punitive damages alone introduce new and substantial legal and factual issues that are not capable of computation by reference to objective standards. 151 F.3d at 418.

While each of these cases gives insight into the circumstances where class certification under (b)(2) is not permitted, they also give guidance as to when it would be. Indeed, *Allison* is explicit in its guidance. First, (b)(2) certification is proper where the requested relief is injunctive or declaratory. 151 F.3d at 415. Here, the request for relief is declaratory, that is: investors who purchased fractional interests from LPI are entitled to rescission. The settlement so provides and it enjoins LPI from further sales of unauthorized securities.

Next, *Allison* instructs us that any monetary relief must be incidental to the declaratory relief. *Id.* "Incidental" means that the damages flow directly from the liability of the defendant

to the class as a whole on the claims forming the basis of the declaratory relief. *Id.* Here, the declaration of entitlement to rescission forms the basis for LPI's liability to the class as a whole. And, those damages are damages that all class members are *automatically* entitled to once the liability to the class is established. *Id.* Indeed, such damages are statutorily mandated. *Id.*

The damages here are capable of computation by means of objective standards and are not dependent on intangible, subjective differences of each class member's circumstances. *Id.* Class members' claims are determined by their basis in the fractional interests. While one member's basis will differ from that of another, these are not "intangible, subjective differences." As such, LPI's liability for rescission "should not require additional hearings to resolve the disparate merits of each individual's case." *Id.* Nor should it require the introduction of "new and substantial legal or factual issues, nor entail complex individualized determinations." *Id.* In short, the relief sought and awarded here is nothing like that sought in *Wal-Mart, Allison, Wilborn, or Firstplus.* Instead, it comports fully with the criteria established in *Allison*.

But, the Arbitration Objectors argue that in my preliminary report and recommendation I erred by focusing on the nature of the relief provided in the settlement without consideration of the relief requested in the complaint. Arbitration Objectors Br. at p. 4. According to the Arbitration Objectors, in their complaint the Arnold plaintiffs sought substantial monetary relief under the Texas Securities Act, a fact that I allegedly ignored. Now, (as I understand the argument) the class plaintiffs have attempted to hide this request for monetary relief by a superficial declaration of rescission and a meaningless injunction. The Arbitration Objectors seem to suggest that the settlement was contrived to obscure the substantial monetary relief sought. Again, I disagree.

The *Allison* criteria I discussed above are what they are. They serve as our guide to whether damages are incidental or not. If the damages sought meet that criteria, they are incidental even if they are "substantial" in amount.

Moreover, declaring that an investor is entitled to rescission is not meaningless. In order to be entitled to rescission damages under the Texas Securities Act, the purchaser must surrender the security he received. In the absence of declaring a right to rescission, the process of tender and payment does not occur. The plan implements that procedure and provides that the surrendered interest be contributed to the Position Holder Trust.

Finally, the Arbitration Objectors argue that rescission claimants do not really receive rescission damages because any recovery they receive will come from a creditors' trust under the plan**.** So, (again, as I understand it) the Arbitration Objectors argue that rescission claimants will not be paid in full upon tender, which is relief to which they are entitled under the Texas Securities Act.

This argument is not persuasive for several reasons. First, LPI is insolvent. It has no ability to pay unsecured creditors in full. And, rescission claimants are nothing more than unsecured creditors because rescission claims have no administrative priority under Title 11. So, as a matter of bankruptcy law rescission claimants cannot be paid in full upon tender. Second, it assumes that the relief given a particular class must align exactly with the relief requested or authorized by law. But, of course, one reason why parties "settle" is that one of the parties may not have the ability to meet its obligations. Finally, the Arbitration Objectors seem to ignore the fact that rescission claimants are not locked into an unsatisfactory rescission remedy if they choose not to be. They can continue to own their interests (subject to moderate forfeiture) or pool them with other investors with no continuing obligation to pay premiums. The Arbitration

Objectors imply that because rescission claimants (which they are not) have more and perhaps better options than rescission alone, they are being treated unfairly. I know of no legal basis for that objection, and I recommend that Your Honor deny it.

The Settlement Provision That Allows the Class Representatives To Vote on Behalf of Non-Voting Class Members Is Not an Effort To Skirt the Provisions of Section 1129(a)(10)

Pillar devotes a substantial portion of its brief to its argument that the class settlement is an effort to skirt the provisions of section 1129(a)(10). That section conditions cramdown on acceptance of the plan by at least one accepting impaired class of creditors. 11 U.S.C. § 1129(a)(10). Although its argument is lengthy, it boils down to one point: permitting the class representatives to cast votes for those who do not vote on the plan "is designed for the sole purpose of ensuring that the Trustee Plan may proceed to confirmation due to an impaired accepting class." Pillar Br. ¶ 40. As such, this "gerrymandering" of an impaired accepting class "punishes" creditors who reject the plan by allowing the class representative to out-vote them. Pillar Br. ¶ 53. Also, it is not permissible because class proofs of claim are not allowed, and it is inconsistent with cases holding that non-voting creditors may not be "deemed" to have accepted a plan. *Id.* ¶ 54.

Pillar's argument again starts with a self-serving premise: that no other class of impaired creditors will accept the plan except for the "gerrymandered" investor class. And because of this premise, it argues that Your Honor not only should deny class certification and decline to approve the settlement, but you should preclude the plan from even being voted on, much less confirmed. So, once again employing circular logic, Pillar argues that no voting should take place because it knows how that vote will turn out.

But Pillar is not omniscient. It is possible that investors who do vote will satisfy the requirements of section 1126(c) and approve the plan even without regard to the vote of the plan representatives. If all classes of investors and creditors approve the plan, then section 1129(a)(10) is irrelevant. Moreover, Class B4 consists solely of unsecured creditors who are not investors. This class is impaired and the class representatives cannot vote in this class. If class B4 votes to accept the plan, section 1129(a)(10) is satisfied.

Next, it is true that the Fifth Circuit has not decided whether class proofs of claim are permissible. *Teta v. Chow (In re TWL Corp.)*, 712 F.3d 886, 892 (5th Cir. 2013). Pillar takes this as a signal that they are not. But, if the issue were as clear cut as Pillar suggests, the Fifth Circuit could have used *TWL* and other cases to lay the issue to rest. It has not done so, and by declining to do so it has left the issue open.

The question before Your Honor is not just the broad question of whether someone purporting to represent an ad hoc class of creditors (consenting or otherwise) may cast a vote on behalf of those creditors. One might reasonably question whether any authority for such action exists. But here, the question is whether a person who has been designated a class representative pursuant to Rule 23 may cast votes on behalf of the class members he was appointed to represent.

It is beyond question that a class of creditors may be certified pursuant to Rule 7023 in a bankruptcy case. *See, e.g., TWL*, 712 F.3d 886; *Wilborn*, 609 F.3d 748. Given that Pillar relies upon these authorities itself, surely it does not take issue with that proposition. But, Pillar‘s position is that class certification of creditors’ claims in a bankruptcy case leads nowhere. According to Pillar, even though class certification of creditors’ claims might be permissible in bankruptcy, its utility ends when it comes to confirmation.

To borrow a phrase from the Fifth Circuit, Pillar's position would virtually read Rule 7023 out of the rules. *Wilborn*, 609 F.3d at 754. If a class representative cannot even vote for a plan that incorporates a class action settlement that has been approved by a federal judge, then what good is Rule 7023? Are not the qualifications of the class representative to act in the best interests of the class subsumed in the class certification itself? I respectfully submit to Your Honor that Rule 7023 is of very limited use in bankruptcy if it cannot resolve claims of the nature and size in this case, and implement them in a plan of reorganization.

Notwithstanding Pillar's Argument to the Contrary, the Class Action Will Substantially Aid in the Administration of the Estate

Pillar disputes the assertion that the class action here in any way "aid[s] in the administration of the bankruptcy case." Pillar Br. ¶ 48. To the contrary, says Pillar, it adds "vast complexity." *Id.* ¶ 49.

Tellingly, Pillar itself does not propose an alternative to this complexity. One thing is certain: whatever that solution is, Pillar contends it cannot be found in bankruptcy court. Given Pillar's new position on bankruptcy jurisdiction, the bankruptcy court not only has no authority to decide the ownership issue in an adversary proceeding, but no authority to resolve it in a plan. So, while Pillar complains that the solution before Your Honor violates its rights under Title 11, it obfuscates the fact that it denies the existence of any jurisdiction at all. And, in making this argument, Pillar denies not just my jurisdiction, but Yours as well.

Notwithstanding its defense of the rights of non-voting investors and investors who vote to reject the plan, the fact is that Pillar is no fan of democracy. Its position is that no plan can affect its rights or the rights of other investors. Pillar is a fan of litigation. And, because it has both the desire and wherewithal to litigate, so should all 21,000 investors (so long, of course, as

they do not do so in bankruptcy court). Thousands of lawsuits all across the country: that is Pillar's solution.

I recommend that Your Honor deny this objection.

Miscellaneous Objections to Class Counsel's Fees Should Be Considered In Connection With His Fee Application

Several investors have filed objections to the $33 million fee requested by class counsel. As I noted previously, the settlement itself is not conditioned upon award of $33 million in fees to class counsel, it merely limits fees to the amount. Your Honor will decide the issue of fees pursuant to a separate motion. You have referred that motion to me for a report and recommendation and I will conduct a hearing on that motion on August 25. I will consider all objections to counsel's fee application at that time.

To the extent that these objections could be construed to complain that the settlement provides a basis for class counsel to seek fees that he is not otherwise entitled to, I addressed that argument in response to the Arbitration Objectors' objection. As I stated there, I do not find that objection to be well-founded.

For these reasons, I recommend that Your Honor deny the objections of Janet Davis, Joseph Zuech, Charlene and Richard Sevcik, Eric Mattingly, Kamlesh Shingari, Elyse Bailey, and Howard Carr as they relate to the settlement, but consider them in relation to class counsel's application for fees.

Your Honor Should Grant Transparency's Motion To Withdraw Its Objection

Transparency Alliance has moved to withdraw its objection to the joint motion. I recommend that Your Honor grant that motion. Transparency has filed a plan that embraces the settlement. I have approved Transparency's disclosure statement. Its plan as well as the

Trustee's plan will proceed to confirmation on August 29. It is worth noting that the settlement before Your Honor has not, as alleged, tied LPI's creditors to a single plan. Instead, it has created a spirited competition where the merits of each plan will be vetted at confirmation.

The Objections of Inge and Principal Protection Plus Should Be Denied for Lack of Standing

Peyton Inge filed a lengthy objection to the settlement. At the August 3 hearing, Inge confirmed that he is not an investor in LPI fractional interests. Instead, he is a shareholder of LPHI, the parent of LPI. Because Inge is not a class member and has no pecuniary interest in distributions from the LPI estate, I recommend that You deny his objections due to lack of standing.

Principal Protection Plus LLC is a limited liability company owned by Cecilia Hufstetler. At the August 3 hearing, Ms. Hufstetler confirmed that Principal Protection Plus is not an investor in fractional shares or a creditor of LPI. Instead, her husband, Steven Hufstetler, is an IRA investor in fractional shares. At the August 3 hearing, I informed Ms. Hufstetler that she and Principal Protection Plus had no standing in LPI's bankruptcy, but that her husband did. I instructed Mr. Hufstetler that he could file the same objection as Principal Protection Plus as long as he did so on his own behalf. He has done so and I address his objection below. However, I recommend that Your Honor deny the objection of Principal Protection Plus for lack of standing.

The Settlement Is Not the Product of Fraud or Collusion

In his objection Mr. Hufstetler seems to argue that the class settlement is the product of fraud and collusion between the settlement proponents. I do not agree. The settlement is the product of arms-length negotiations. The settlement was negotiated at a mediation conducted by

former Bankruptcy Judge Richard Schmidt, who I personally know, respect, and highly regard. He fully supports the settlement as an arms-length bargain.

More importantly, any suggestion that the joint movants had collusive motives is belied by the facts of this case. The class plaintiffs were highly adversarial to the Trustee and the Committee during the first ten months of this case. Early on, the class plaintiffs resisted the motion of the Trustee to access cash values of the policies in order to keep the case alive. That objection, which I sustained, nearly brought the case to a screeching halt. This is but one example of the complete absence of collusion between the settling parties.

Mr. Hufstetler's real argument is one that his wife has voiced repeatedly at hearings in the bankruptcy case: that is, everything worked fine at LPI before its parent filed bankruptcy and the Trustee placed LPI in bankruptcy. According to the Hufstetlers, the Trustee and estate professionals have run the case with the sole purpose of generating fees at the expense of fractional interest holders and creditors. They suggest that fractional interest holders should be paid in full first, and then the estate professionals can seek their compensation.

The sweeping allegation of professional malfeasance is wrong as a matter of fact, and the proposed solution is wrong as a matter of law. Addressing the latter point first, it goes without saying that I cannot rewrite the priorities of the Bankruptcy Code out of a sense of fairness.

As to the first point, time will tell whether professionals are entitled to all the compensation they seek. That is the point of the fee application process. But, to characterize the entire bankruptcy process thus far as an unabashed grab for fees by estate professionals is to disregard the complexity and litigiousness of this case. Estate professionals have sacrificed their personal lives for the past twenty months in order to come to a resolution of this case.

Weekends, holidays, vacations and – yes – sleep have been sacrificed. The efforts of estate professionals have been not just compensable, but laudable. This objection should be overruled.

LeCompte's Objection Is Misguided

Finally, there is the objection of Levis J. LeCompte. As I understand it, LeCompte is angry because the settlement lets Brian Pardo, LPI's former president, and other officers off the hook. While LeCompte's anger is understandable, it is misguided when it comes to the settlement. Neither the settlement nor the plan can effect the punishment that LeCompte wants to mete out. But, it is worth noting that in a separate adversary proceeding pending in Your Court, the Trustee is pursuing Pardo and others for their role in placing investors in the positions they find themselves today. But, the settlement should not be denied simply because it fails to send Pardo to jail. I recommend that Your Honor deny this objection.

Conclusion

One year ago today it would have been unthinkable that we would find ourselves where we are today. On August 29, I will commence confirmation hearings on two competing plans of reorganization, each of which offers many options for LPI's fractional interest holders. Indeed, one of the criticisms of the plans is that they offer too many options, making it difficult for investors to make meaningful comparisons. But options, confusing though they may be, are preferable to endless litigation, which is what at least one objector wants.

A year ago today LPI was anchored in uncertainty. LPI was administratively insolvent and I had agreed with the class plaintiffs and others that the Trustee could not use policy cash values to sustain LPI's servicing operations, advance premiums for defaulted policy premiums, and pay bankruptcy administrative expenses, including professionals. That ruling led to a recognition by all parties that only their collaborative efforts could avoid a complete collapse of

LPI. Like the settling parties before Your Honor, most parties came to the conclusion that litigating the ownership issue was a zero-sum game. If LPI was determined to own the policies, fractional interest holders were nothing more than creditors holding unsecured claims against a pool of assets. If the fractional interest holders prevailed, then in the absence of a servicing platform, how would those interests be preserved? It was clear that litigation brinksmanship would lead nowhere.

Faced with this dilemma, the parties first came together with a compromise that permitted LPI to borrow from policy maturities in order to sustain its operations. That, in turn, led to the settlement now before Your Honor, which led to the Trustee's plan. That plan has been revised twice, and has been bolstered by the joinder of Vida Capital, which originally opposed the plan. The Trustee's plan has been improved due in no small part to objections by parties like the Arbitration Objectors. The Trustee's plan has in turn led to the Transparency plan, which, as I noted, now embraces the settlement.

For many investors, even those who vote for them, the plans are bitter pills to swallow. Many investors, if not most, will not receive the benefit of the bargain they thought they struck with LPI. The reasons for this are manifold. In large part it is due to mismanagement, if not fraud, by some in LPI's prepetition management. But, it is also due in part to the risks inherent in life settlements, risks that may not have been fully explained to purchasers of those securities. Those risks are now on full display in this case.

But, it serves no useful purpose for investors to judge what they will get under the plans by reference to what they thought they would get from LPI under Pardo. They must choose between two plans and elect the treatment they deem best for themselves based upon the facts we know today. The fact that they have the opportunity to make those elections is due to the

settlement now before Your Honor. It is a good settlement. It is a fair settlement. I respectfully recommend that Your Honor approve it.

END OF REPORT AND RECOMMENDATION # #