

ROBBINS GELLER RUDMAN
& DOWD LLP
RACHEL L. JENSEN
ALEXANDRA S. BERNAY
CARMEN A. MEDICI
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

Attorneys for Plaintiffs

[Additional counsel appear on signature page.]

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

LINCOLN ADVENTURES, LLC, a
Delaware Limited Liability Company,
and MICHIGAN MULTI-KING, INC.,
a Michigan Corporation, on Behalf of
Themselves and All Those Similarly
Situated,

Plaintiffs,

vs.

THOSE CERTAIN UNDERWRITERS
AT LLOYD’S, LONDON MEMBERS
OF SYNDICATES, et al.

Defendants.

No. 2:08-cv-00235-CCC-JAD

CLASS ACTION

PLAINTIFFS’ OMNIBUS REPLY IN
FURTHER SUPPORT OF MOTION
FOR FINAL APPROVAL OF
PARTIAL CLASS ACTION
SETTLEMENT AND MOTION FOR
AN AWARD OF ATTORNEYS’ FEES
AND EXPENSES/CHARGES AND
SERVICE AWARDS

Motion Return Date: September 18, 2019

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. THE REMAINING FACTORS ALSO FAVOR APPROVAL	2
A. The Settlement Class Has Reacted Positively.....	3
B. No Government Entity Has Objected	4
C. No One Objects to the Fee Motion	5
D. No One Objects to the Substance of the Partial Settlement.....	5
E. The Hawaii Plaintiffs’ Claims Do Not Fall Within the Definition of Released Claims in the Partial Settlement.....	6
1. Coverage Claims Are Expressly Excluded.....	6
2. The Hawaii Plaintiffs’ Claims Could Not Have Been Advanced in This Action	7
III. CONCLUSION.....	9

TABLE OF AUTHORITIES

	Page
CASES	
<i>Bilotti v. Accurate Forming Corp.</i> , 39 N.J. 184, 188 A.2d 24 (1963)	8
<i>Filtrator Apparatus Co., Inc. v. Food Enters., Inc.</i> , 491 F. Supp. 566 (D.N.J. 1980).....	8
<i>In re Ins. Brokerage Antitrust Litig.</i> , 297 F.R.D. 136 (D.N.J. 2013).....	5
<i>In re Liquid Aluminum Sulfate Antitrust Litig.</i> , No. 16-md-2687 (JLL) (JAD), 2018 WL 7108059 (D.N.J. Dec. 3, 2018).....	5
<i>In re Prudential Ins. Co. of Am. Sales Practice Litig.</i> , 261 F.3d 355 (3d Cir. 2001)	8
<i>Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.</i> , 221 F.R.D. 523 (C.D. Cal. 2004).....	4
<i>Varacallo v. Mass. Mut. Life Ins. Co.</i> , 226 F.R.D. 207 (D.N.J. 2005).....	8
<i>Wal-Mart Stores, Inc. v. Visa U.S.A, Inc.</i> , 396 F.3d 96 (2d Cir. 2005)	8
STATUTES, RULES AND REGULATIONS	
28 U.S.C. §1711.....	4
Federal Rules of Civil Procedure Rule 23	9

Plaintiffs and their counsel respectfully submit this omnibus reply in further support of their Motion for Final Approval of Partial Class Action Settlement (“Final Approval Motion”) (ECF 105) and Motion for an Award of Attorneys’ Fees and Expenses/Charges and Service Awards (“Fee Motion”) (ECF 106).

I. INTRODUCTION

Since Plaintiffs filed their opening papers, Class Counsel has worked diligently, along with the Claims Administrator, to field hundreds of inquiries and to assist Settlement Class Members with filing claims. The Settlement Class’s reaction continues to be overwhelmingly positive, with nearly 75,000 visits to the website and nearly 2,800 claims filed with the deadline still six weeks out. There is good reason for this buzz: this Partial Settlement scores nearly \$22 million in cash payments and five years of business reforms.¹ And the Partial Settlement releases only 13 of 23 Syndicate Defendants, so future recoveries may well be on their way.

Further, the deadline to opt out or file objections to the Partial Settlement, including attorneys’ fees and expenses and service awards, has come and gone without substantive objection and just 14 opt outs. Likewise, no governmental entity has objected. The one “conditional objection” filed by the Aquilinas and Lanes (the

¹ The terms of the Partial Settlement are reflected in the Agreement, which is attached as Exhibit A to the Declaration of Rachel L. Jensen in Support of Plaintiffs’ Motion for Preliminary Approval of Partial Class Action Settlement. *See* ECF 89-2 at 8-69. (Page number citations to docket entries (“ECF”) refer to the page numbers generated by the electronic case filing (CM/ECF) system.) The Settling Defendants are Defendant Lloyd’s Syndicates 0033, 0102, 0382, 0435, 0570, 0609, 0623, 0958, 1183, 1886, 2001, 2623, and 2987.

“Hawaii Plaintiffs”) does not take issue with the Partial Settlement itself but seeks assurance from Settling Defendant Syndicate 1183 (“Syndicate 1183”) or this Court that their coverage claims arising out of the 2018 Kilauea Volcano eruption and pending in state and federal actions in Hawaii are not released. *See* ECF 108-2 to 108-4. We understand that the Hawaii Plaintiffs’ discussions with Syndicate 1183 are ongoing and should be resolved before the Fairness Hearing. If not, Plaintiffs reserve the right to join in any request by the Hawaii Plaintiffs for declaratory relief that their claims are not barred by the Partial Settlement in this Action.²

The upshot is that no one objects to the substance of the proposed Partial Settlement. And this Court has already preliminarily found that it is fair, adequate, and reasonable. Plaintiffs respectfully request that the Court now finalize its findings and grant their Final Approval Motion and Fee Motion.

II. THE REMAINING FACTORS ALSO FAVOR APPROVAL

The opening papers filed in support of Plaintiffs’ Final Approval Motion and Fee Motion explain why, based on the relevant factors, the Partial Settlement should

² The Agreement stipulates in Paragraph XX.2: “The Court retains exclusive jurisdiction over this Agreement, the Settlement, the Settling Parties, Settlement Class Members and opt-outs for the purpose of adjudicating issues relating to this Agreement. The Settling Parties agree that any lawsuit to enforce the Agreement shall be brought only in this Court.” ECF 89-2 at 66. Accordingly, this Court retains exclusive jurisdiction to decide whether the definition of the Released Claims in the Partial Settlement bars the Hawaii Plaintiffs’ claims.

be approved and fees awarded. We are now in a position to provide complete information about the Settlement Class's reaction and government participation.

A. The Settlement Class Has Reacted Positively

In the Court's order preliminarily approving the Partial Settlement, the Court approved a comprehensive Notice Plan for dissemination to the Settlement Class. *See* ECF 93 at 8-11; *see also* ECF 89-4 (Affidavit of Linda V. Young). In accordance with the Court's Preliminary Approval Order, the Court-appointed Claims Administrator, A.B. Data, Ltd., implemented the Notice Plan, which included direct notice to all known Settlement Class Members and a robust print publication and online media campaign. *See generally* ECF 105-3 (Aug. 13, 2019 Declaration of Eric J. Miller Regarding Notice Administration). To date, the Claims Administrator has mailed 197,059 copies of the Summary Notice to potential Settlement Class Members. *See* Sept. 10, 2019 Supplemental Declaration of Eric J. Miller Regarding Notice Administration ("Miller Reply Decl."), ¶3, submitted concurrently herewith.

With the benefit of this extensive notice program, the Settlement Class has been engaged and reacted positively. As of September 9, 2019, there were 32,281 unique visitors to the website and 74,782 webpages served to visitors; at least 1,673 calls; and 282 emails to the Claims Administrator, not including the many inquiries fielded by Class Counsel. *See* Miller Reply Decl., ¶¶6, 8-9. Although the deadline for submitting claims does not expire until October 25, 2019, potential Settlement Class

Members have already filed 2,796 claims. *See id.*, ¶12. Only 14 exclusion requests have been received, and no substantive objection has been filed. *Id.*, ¶11. One “conditional” objection was filed pending reassurance from Syndicate 1183 that their claims are not barred, as discussed further below.

The positive reaction of the Settlement Class further supports the granting of the Final Approval Motion and Fee Motion. *See Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004) (“[T]he absence of a large number of objections . . . raises a strong presumption that the terms of a proposed class settlement action are favorable.”).

B. No Government Entity Has Objected

In the same vein, after the issuance of preliminary approval, the Settling Defendants timely complied with the notice requirements of the Class Action Fairness Act of 2005, 28 U.S.C. §1711, *et seq.* (“CAFA”) in providing notice of this Partial Settlement to the Attorneys General of all 50 states, the District of Columbia, and the United States. *See* Declarations of Matthew Burke and Duvol Thompson, both dated May 2, 2019 (ECFs 91-92). In response to the CAFA notice, not one government entity has inquired, much less objected. This factor, too, supports the granting of the Final Approval Motion and Fee Motion.

C. No One Objects to the Fee Motion

In addition, no one objects to Plaintiffs' requests for attorneys' fees, expenses, and service awards, which are all in line with past settlements in MDL 1663 and this District. *See, e.g., In re Ins. Brokerage Antitrust Litig.*, 297 F.R.D. 136, 155 (D.N.J. 2013) (awarding 33% of \$10.5 million partial settlement fund in attorneys' fees and \$1,023,188.76 in expenses); *In re Liquid Aluminum Sulfate Antitrust Litig.*, No. 16-md-2687 (JLL) (JAD), 2018 WL 7108059, at *1 (D.N.J. Dec. 3, 2018) (awarding 33.3% of \$10,796,800 settlement fund). Accordingly, Plaintiffs ask the Court to award the full amount requested for attorneys' fees, expenses/charges, and Class Representative service awards, respectively.

D. No One Objects to the Substance of the Partial Settlement

As this Court found in its preliminary approval order, "the Settlement is sufficiently fair, reasonable and adequate to warrant sending [out Class Notice]." ECF 93 at 4-5. Nothing has changed to alter that conclusion. Indeed, no one objects to the Settlement Amount being paid by the Settling Defendants; the five years of business reforms that they are undertaking; the Plan of Allocation being proposed; the certification of the Settlement Class; the appointment of Plaintiffs as Class Representatives or their counsel as Class Counsel; or the terms of the fee request. These facts weigh strongly in favor of granting the Final Approval and Fee Motions.

E. The Hawaii Plaintiffs' Claims Do Not Fall Within the Definition of Released Claims in the Partial Settlement

The Hawaii Plaintiffs do not object to the substance of the Partial Settlement but simply seek reassurance that their pending actions are not barred by it. Syndicate 1183 should have already provided it. The Partial Settlement does not release the Hawaii Plaintiffs' claims, which arose after the 2018 Kilauea Volcano destroyed their homes in Lava Zones 1 and 2 and, yet, the underwriters and brokers denied coverage due to lava-related exclusions. *See, e.g.*, ECF 108-3 at 25-31. If Syndicate 1183 fails to confirm that the Hawaii Plaintiffs' claims are not released by this Partial Settlement, Plaintiffs reserve the right to join in any request by the Hawaii Plaintiffs for declaratory relief confirming this. *See supra* n.2.

1. Coverage Claims Are Expressly Excluded

First, the Hawaii Plaintiffs' claims are expressly excluded from the scope of the release in the Partial Settlement. It is beyond dispute that the release negotiated by the Settling Defendants cover only those claims that fall within its scope. *See* ECF 89-2 at 10. And according to the express terms of the Partial Settlement, the definition of Released Claims expressly carves out coverage claims: "Provided, however, that (a) "Released Claims" *shall not* include Releasing Plaintiffs' Claims or Unknown Claims for, or Released Defendants' defenses to, coverage under Contracts of Insurance issued to a Settlement Class Member (including either Plaintiff) or Releasing Plaintiff by a Released Defendant" ECF 89-2 at 22-23.

Coverage is what the Hawaii Plaintiffs' claims appear to concern. In May 2018, the Kilauea Volcano on the Big Island of Hawaii erupted, destroying hundreds of homes in its wake. Homeowners in Lava Zones 1 and 2 who lost everything in the volcano then suffered the compounding injury of having coverage denied due to lava-related exclusions of which they were allegedly unaware. *See, e.g.*, 108-3 at 27-32. These homeowners have now filed suit against certain syndicates, brokers, and adjusters for denial of benefits and unlawful placement in surplus lines insurance. *See, e.g.*, ECF 108-3; 108-4. The gravamen of the Hawaii Plaintiffs' claims is, thus, a coverage dispute that the Settling Parties specifically excluded from the definition of "Released Claims" in the Partial Settlement. ECF 89-2 at 22-23. And unlike the Hawaii Plaintiffs, the Settling Defendants knew exactly what was excluded when they negotiated the release. These claims are not barred.

2. The Hawaii Plaintiffs' Claims Could Not Have Been Advanced in This Action

To our knowledge, there is no dispute that the Hawaii state court actions are coverage disputes and thus expressly carved out from the definition of Released Claims in the proposed Partial Settlement. To the extent that the federal *Aquilina* case also contains allegations about the failure to conduct due diligence before placing surplus lines insurance, improper inflation of coverage amounts, and broker misconduct motivated by greed, those claims also do not appear to be barred as they could not have been brought in this Action.

As this District has previously held, “[t]he scope of a release is determined by the intent of the parties as expressed in the terms of the instrument, considered in the light of all the surrounding facts and circumstances.” *Filtrator Apparatus Co., Inc. v. Food Enters., Inc.*, 491 F. Supp. 566, 568 (D.N.J. 1980) (quoting *Bilotti v. Accurate Forming Corp.*, 39 N.J. 184, 204, 188 A.2d 24 (1963)).

A settlement can release claims not specifically alleged in the complaint only insofar as they are based on the same *factual predicate* as those claims litigated and contemplated by the settlement. *See In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 366 (3d Cir. 2001) (“[A] judgment pursuant to a class settlement can bar later claims based on the allegations underlying the claims in the settled class action. This is true even though the precluded claim was not presented, and could not have been presented, in the class action itself.”); *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 244 (D.N.J. 2005) (“in class action settlements, releases may include all claims that arise out of the same course of conduct alleged in the Complaint” and “[t]he law allows a release to bar future claims for conduct that occurred in the past that are based on the same factual predicate as those claims in this action”); *see also Wal-Mart Stores, Inc. v. Visa U.S.A, Inc.*, 396 F.3d 96, 107 (2d Cir. 2005) (“The law is well-established in this Circuit and others that class action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the ‘identical factual predicate’ as the settled conduct.”).

Here, as the Court is aware, the factual predicate of this Action is the Lloyd's Syndicates' alleged scheme to conceal the lack of competition in the Lloyd's Market, and the remedy sought is the allegedly supra-competitive charges paid by Plaintiffs. In contrast, *Aquilinas* arises out of denial of coverage for Hawaii homeowners in Lava Zones 1 and 2, who allege wrongful placement into surplus lines insurance, failure to perform the necessary due diligence required under Hawaiian law, and inflated coverage amounts. *See, e.g.*, ECF 108-2 at 3-4. It appears the plaintiffs there are seeking the entire premium amounts that they paid. *See, e.g.*, ECF 108-2 at 42-52.

Given that the Hawaiian Actions are primarily coverage disputes that do not appear to arise from the same factual predicate of this Action, the Hawaiian Actions are not barred by the scope of the release in this Partial Settlement.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Final Approval and Fee Motions and, therefore: (1) find the Notice Plan complies with Rule 23 and due process and was the best notice practicable under the circumstances; (2) grant final approval of the Partial Settlement; (3) confirm final certification of the Settlement Class for purposes of effectuating the Partial Settlement and the appointment of Plaintiffs as Class Representatives and Co-Lead Counsel as Class Counsel; (4) approve the Plan of Allocation; and (5) award attorneys' fees in the

amount of \$7,317,000; litigation expenses of \$1,850,000; and service awards in the amount of \$15,000 each to Plaintiffs Lincoln Adventures and Michigan Multi-King.

DATED: September 11, 2019

Respectfully submitted,

ROBBINS GELLER RUDMAN
& DOWD LLP
RACHEL L. JENSEN
ALEXANDRA S. BERNAY
CARMEN A. MEDICI

s/Rachel L. Jensen
RACHEL L. JENSEN

655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

ROBBINS GELLER RUDMAN
& DOWD LLP
PAUL J. GELLER
120 East Palmetto Park Road, Suite 500
Boca Raton, FL 33432
Telephone: 561/750-3000
561/750-3364 (fax)

ZWERLING, SCHACHTER
& ZWERLING, LLP
ROBERT S. SCHACHTER
DAN DRACHLER
ANA M. CABASSA
41 Madison Avenue
New York, NY 10010
Telephone: 212/223-3900
212/371-5969 (fax)

Class Counsel

COHN LIFLAND PEARLMAN
HERRMANN & KNOPF LLP
PETER S. PEARLMAN
Park 80 West – Plaza One
250 Pehle Avenue, Suite 401
Saddle Brook, NJ 07663
Telephone: 201/845-9600
201/845-9423 (fax)

BONNETT, FAIRBOURN, FRIEDMAN
& BALINT, P.C.
ANDREW S. FRIEDMAN
H. SULLIVAN BUNCH
2325 E. Camelback Road, Suite 300
Phoenix, AZ 85016
Telephone: 602/274-1100
602/274-1199 (fax)

FOOTE, MIELKE, CHAVEZ
& O'NEIL, LLC
ROBERT M. FOOTE
KATHLEEN C. CHAVEZ
10 West State Street, Suite 200
Geneva, IL 60134
Telephone: 630/232-7450
630/232-7452 (fax)

CAFFERTY CLOBES MERIWETHER
& SPRENGEL LLP
ELLEN MERIWETHER
1101 Market Street, Suite 2650
Philadelphia, PA 19107
Telephone: (215) 864-2800
215/864-2810 (fax)

DAVID M. FOSTER, P.C.
DAVID M. FOSTER
30833 Northwestern Hwy., Suite 209
Farmington, MI 48334
Telephone: 248/855-0940
248/855-0987 (fax)

Additional Attorneys for Plaintiffs