IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

JUDY HALCOM, HUGH PENSON, HAROLD CHERRY, and RICHARD LANDINO, Individually and on Behalf of All Others Similarly Situated, Plaintiffs, vs. GENWORTH LIFE INSURANCE COMPANY and GENWORTH LIFE INSURANCE COMPANY OF NEW YORK, Defendants.	Civil Action No. 3:21-cv-00019-REP CLASS ACTION

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiffs Judy Halcom, Hugh Penson, Harold Cherry, and Richard Landino, on behalf of themselves and the Class, respectfully submit this memorandum in support of their motion for final approval of this class action settlement.

I. INTRODUCTION

The Settlement[1] is an excellent result for the Class and represents considerable financial and injunctive relief for the claims asserted. As the Court is well aware, this case did not (and could not) challenge Genworth's long-term care ("LTC") rate increases themselves. Rather, this case sought to address claimed harm to the Class allegedly caused by Genworth's lack of adequate disclosures regarding its plans for future rate increases and its dependence on obtaining those rate increases to pay future claims.

As alleged in Plaintiffs' Class Action Complaint:

> Since 2008, Genworth has steadily and substantially increased the premiums on these policies. To be clear, this case does not challenge Genworth's contractual right to increase these premiums, or its need for premium increases given changes in certain of Genworth's actuarial assumptions and the historical experience of these policy blocks. Nor does this case ask the Court to reconstitute any of the premium rates or otherwise substitute its judgment for that of any insurance regulator in approving the increased rates. Rather, this case seeks to remedy the harm caused to Plaintiffs and the Class[] from Genworth's partial disclosures of material information when communicating the premium increases, and the omission of material information necessary to make those partial disclosures adequate.

See Class Action Complaint, filed January 11, 2021, ECF No. 1, ¶ 3 (hereinafter "Complaint").

This Settlement directly addresses that alleged harm by providing Class members with additional Disclosures about future rate increases, and then allowing them options to restructure

[1] The Settlement is reflected in the Joint Stipulation of Class Action Settlement and Release. ECF No. 46-1, attached again as Exhibit B to the Declaration of Brian D. Penny in Support of in support of (1) Plaintiffs' Motion for Final Approval of Class Action Settlement and (2) Class Counsel's Motion for an Award of Attorneys' Fees and Expenses and Service Awards to the Named Plaintiffs ("Penny Decl."). All capitalized terms used herein are defined in the Settlement, unless otherwise stated.

their benefits and premiums in light of those Disclosures, if they so wish. Every Class member, regardless of what election they make, will receive the additional Disclosures including information about Genworth's current financial condition and details about its plans to request future premium rate increases. In addition, every Class member that elects one of the offered and available options to restructure their policy in the Settlement will either be paid considerable cash damages or will obtain valuable enhanced paid-up benefits, depending on the options they each elect.

Based on the over 144,000 members of the Class and historical evidence of policyholder elections following rate increase notices from Genworth, including the to-date experience of the election of Special Election Options in the similar *Skochin v. Genworth* Class Action Settlement,[2] Plaintiffs anticipate that the Class will receive substantial financial payments. While Plaintiffs do not (and cannot) know exactly what Special Election Options the Class members may or may not elect given the novelty of the Options fashioned by this Settlement, if Class members make elections at a rate similar to the current rate in the *Skochin* settlement – or even at a rate one-third (1/3) of the current rate in *Skochin*, Class Counsel conservatively estimates that Class members in this case would receive cash payments totaling between $84 million (at the lower rate) and $251 million (at the current *Skochin* rate)—in addition to the valuable information and ability to make Special Election Options themselves. *See* Declaration of Brian D. Penny in Support of (1) Plaintiffs' Motion for Final Approval of Class Action Settlement and (2) Class Counsel's Motion for an Award of Attorneys' Fees and Expenses and Service Awards to the Named Plaintiffs ("Penny Decl."), ¶ 12.

This Settlement is also eminently fair to all Class members, as it calibrates the relief

[2] *Skochin v. Genworth Life Ins. Co.*, No. 19-cv-00049 (REP), 2020 WL 6697418 (E.D.Va. Nov. 12, 2020) ("*Skochin*").

(including the financial damages) directly to each Class member's measure of alleged harm pled in the Complaint. This relief tracks Plaintiffs' fraudulent omission claims which averred that the statements Genworth "did make about the likelihood or possibility of future rate increases were not adequate, omitted material information necessary to make the partial disclosures adequate, and resulted in the Class members making policy renewal elections they never would have made." *See* Complaint, ECF No. 1, ¶ 21. Moreover, since the cash damages are calculated as up to ***four times*** the amount of the reduction in premium for reduced benefit/reduced premium options elected in the Settlement, those payments will be larger for Class members who choose to select an option with more substantial changes to their policy in light of the additional Disclosures, and who thus allegedly suffered more financial harm from the lack of disclosures. For those that decide to select a paid-up policy having not done so years earlier, they will receive either cash payments equal to four years of premium payments, or enhanced paid-up benefits that potentially *double* the value of those paid-up policies. The opportunity to make these Special Elections, the additional Disclosures, and the enhanced paid-up benefits and available financial damages obtained here thus represent a substantial recovery for the alleged lack of disclosures Plaintiffs claimed in this Action.

This impressive recovery was obtained only after extensive discovery conducted by sophisticated parties and experienced counsel. The Parties and Counsel negotiated the Settlement over two in-person mediation sessions and only after several months of focused and expedited litigation efforts. With a quickly developing factual record, Class Counsel were able to evaluate the merits of Plaintiffs' claims, including the risks to recovery. Class Counsel conducted extensive discovery, including the collection and review of hundreds of thousands of pages of documents obtained from Genworth and the completion of interviews of key Genworth representatives.

To reach the Settlement, the parties engaged in extensive, arm's-length negotiations overseen by experienced mediator Rodney A. Max of Upchurch, Watson, White & Max Mediation

Group, Inc. *See* Declaration of Rodney A. Max ("Max Decl."), ECF No. 46-2. These negotiations included two in-person mediation sessions and substantial informational exchanges and discussions. The result is the Settlement, unhesitatingly approved by Mr. Max and conditionally approved by the Court, which represents a significant recovery for the Settlement Class. *Id.*, ¶¶11-24.

Plaintiffs and Class Counsel also fully approve of the Settlement. Plaintiffs' Counsel have extensive experience in complex insurance and consumer class actions and are recognized as leading lawyers in the field. *See Skochin*, 2020 WL 6697418, at *3. Plaintiffs retained these attorneys specifically because of their class action expertise and track record of consumer protection. In accepting the Settlement, Plaintiffs and their counsel understood that there were serious risks to continued litigation. At class certification, Plaintiffs would have had the burden of demonstrating that their fraud-by-omission and declaratory relief claims satisfied the rigorous requirements of Rule 23 and should be certified for litigation purposes. At trial, Plaintiffs would have had the burden of proving each of the elements of their fraud claims – in a case that centers on intricate insurance principles – over Genworth's defenses. Genworth would have raised, and potentially appealed, the filed rate doctrine as a defense. Trial and appeal would have been expensive and time-consuming (a particularly critical factor considering the nature of the Class, the relief sought, and the benefits obtained in the Settlement). While both sides strongly believe that they could have prevailed at trial, there was considerable risk to each of them.

The Settlement is fair, reasonable, and adequate, and is in the best interests of the Settlement Class. Plaintiffs respectfully request the Court grant final approval of the Settlement.

II. PROCEDURAL HISTORY OF THE LITIGATION

On January 11, 2021, Plaintiffs filed their Complaint on behalf of themselves, and on behalf of two proposed classes of Genworth policyholders: (1) those who have Genworth PCS I long-term care insurance policies ("PCS I Class"); and (2) those who have Genworth PCS II long-term

care insurance policies ("PCS II Class"). ECF No. 1, ¶ 202.

The Complaint asserted two claims against Genworth. Count 1 alleged fraudulent inducement by omission, based upon alleged misrepresentations and failure to disclose material information in the premium rate increase letters sent for certain long-term care insurance policies issued. Id., ¶¶ 219-235. Count 2 sought declaratory relief pursuant to 28 U.S.C. §2201 regarding whether Genworth had a duty to disclose certain information. Id., ¶¶ 236-239.

Genworth filed an Answer on March 15, 2021.[3] ECF No. 13. In its Answer, Genworth denied that Plaintiffs were entitled to any of the relief sought in the Complaint and asserted numerous affirmative defenses. Id.

The Parties then engaged in written discovery, including serving requests for production of documents and interrogatories. The Parties timely responded and objected to each, and their counsel engaged in numerous meet and confer conferences regarding the scope of the discovery requests. With respect to Genworth's document production, counsel for the Parties negotiated stipulations concerning the collection and production of electronically stored information and confidentiality, as well as agreements regarding the use of discovery originally produced in *Skochin*. In total, the Parties exchanged 53,406 documents, consisting of more than 350,000 pages, which Plaintiffs' counsel reviewed promptly in order to prepare for mediation and later conducted interviews with Genworth employees involved in Genworth's rate increase decisions and notifications to Policyholders.

With this discovery underway, the Parties jointly contacted mediator Rodney Max inquiring of his availability to serve as a neutral mediator, as he was already substantially familiar

[3] While Genworth did not file a motion to dismiss Plaintiffs' Complaint, the Parties were aware of this Court's prior rulings in *Skochin* on a vigorously contested motion to dismiss involving similar claims and issues. *See generally Skochin v. Genworth Life Ins. Co.*, 413 F. Supp. 3d 473 (E.D. Va. 2019) (Payne, J.) (ruling on a motion to dismiss following full briefing and two days of oral argument on the issue).

with Genworth and the Parties' counsel. Mr. Max agreed and scheduled two mediation sessions with the Parties on June 17, 2021 and June 18, 2021. ECF No. 46-2, ¶ 12.

On June 17, 2021, Mr. Max convened the first mediation session with the Parties at the law offices of Dentons US LLP ("Dentons") (counsel for Genworth) in New York City. *Id.*, ¶ 15. The Parties worked all day with Mr. Max and made substantial progress on a general framework for a negotiated resolution.

The following day, the Parties and Mr. Max re-convened at Dentons and spent the day negotiating the material terms of a proposed Settlement. The Parties concluded the second day of mediation by executing a Memorandum of Understanding ("MOU"), setting forth the material terms of an agreement-in-principle to be incorporated into a formal Settlement Agreement for the Court's approval. *Id.* ¶ 21. On June 23, 2021, the Parties notified the Court of their agreement and of the MOU. The Court subsequently held a hearing on June 30, 2021 to discuss the proposed Settlement and the schedule for seeking Court approval of the Settlement. ECF No. 41.

The Court ordered Plaintiffs to file a Motion to Notice the Class pursuant to Rule 23(e)(1), and to provide an executed Settlement Agreement to the Court by August 20, 2021. *Id.* The Court then granted the Parties' joint request to provide that Agreement and this Motion to the Court by August 23, 2021, 12:00 P.M. EST. ECF No. 43. The Parties' Settlement Agreement was drafted and revised in the intervening weeks and executed on August 23, 2021. The Court granted conditional approval of the Settlement following a hearing on August 30, 2021. See ECF No. 51 and 52.

III. PLAINTIFFS HAVE PROVIDED NOTICE TO THE CLASS IN COMPLIANCE WITH RULE 23 AND DUE PROCESS

In granting conditional approval of the Settlement, the Court appointed Epiq Class Action & Claims Solutions, Inc. as the Settlement Administrator (the "Administrator") to fulfill the duties set forth in the Settlement Agreement and approved Plaintiffs' proposed forms of Notice as well

as their plan for mailing and publicizing the Notice, which includes all the information required by Rule 23. *See* ECF No. 52, ¶¶ 14-19. Pursuant to the Court's order, and in compliance with Rule 23, the Class was provided "the best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B).[4]

As detailed in the accompanying declaration of the Administrator, the Administrator reviewed the Class member mailing list sent to it by Genworth, removed duplicate entries and updated addresses where necessary. Commencing on October 22, 2021, the Administrator mailed the Notice Package directly to 144,821 potential Class members. *See* Declaration of Cameron R. Azari, Esq. on Implementation of Settlement Notice Plan ("Azari Decl.") at ¶ 13. For any mailings returned as undeliverable, the Administrator has "skip-traced" those addresses to update them and re-mailed the Notice Package. The Administrator has re-mailed 27 such Notice Packages. *Id.* at ¶15. The Administrator has also mailed a Notice Package to anyone that has requested one via the toll-free telephone number, mail, or email. As of November 30, 2021, the Administrator has mailed 122 such additional Notice Packages. *Id*. at ¶16. Based on these mailings and remailings to date, the Administrator estimates that Class Notice directly reached (by mail) at least 95% of Class members (and likely higher). *Id.* at ¶24.

On October 27, 2021, the Administrator also established the settlement website (www.pcslongtermcareinsurancesettlement.com), where copies of the Class Notice, operative Complaint, Joint Stipulation of Class Action Settlement and Release (i.e., the Settlement Agreement) and exhibits, and the Court's Order Granting Preliminary Approval of Settlement and Directing Notice to the Class are posted and available for download. *Id.* at ¶18. As of November 30, 2021, a substantial number of individuals have accessed this settlement website and the

[4] Citations, internal quotations, and footnotes omitted and emphasis added unless otherwise noted.

documents and information on it. According to the Administrator, the settlement website has received 8,447 unique visitors, with 18,690 web pages presented to viewers. *Id.* at ¶19. Additionally, the Administrator established a toll-free telephone number through which individuals can receive answers to "FAQs" about the Settlement. As of November 30, 2021, the toll-free number has fielded 9,355 calls totaling 124,216 minutes of use. *Id.* at ¶20. Class Counsel also established their own call center and toll-free number. That information was posted on the Settlement website and included in the Notice. The call center is staffed by Class Counsel. As of December 2, 2021, this call center has fielded nearly 1,500 calls and responded directly to questions those Class members had about the Notice, the Settlement terms, or both. *See* Penny Decl. at ¶ 15.

During the week of December 6, 2021, the Publication Notice will be published in *The New York Times*, *The Wall Street Journal* and *USA Today*. Azari Decl. at ¶17. The combined average weekday circulation of these three publications is approximately 1.38 million. *Id.* This combination of individual, first-class mail to all Class members, supplemented by notice in appropriate, widely circulated publications, and set forth on the website, is calculated to reach more than 95% of the Class, *see* Azari Decl. at ¶24, and constitutes "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B).

IV. THE SETTLEMENT WARRANTS FINAL APPROVAL

A. Standards for Final Approval of Class Action Settlements

A "district court should approve a class action settlement it finds to be 'fair, reasonable, and adequate.'" *In re Genworth Fin. Sec. Litig.*, 210 F. Supp. 3d 837, 839 (E.D. Va. 2016) (Gibney, J.) (granting final approval). Rule 23(e)(2), amended as of December 1, 2018, provides several factors for district courts to consider in making this assessment:

> (2) ***Approval of the Proposal.*** If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

> (A) the class representatives and Lead Counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>
> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

In the Fourth Circuit, the Rule 23(e)(2) analysis has been condensed into the two-step *Jiffy-Lube* test which examines the fairness and adequacy of the settlement. *Skochin*, 2020 WL 6697418, at *2 (citing *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158-59 (4th Cir. 1991)). Amended Rule 23(e)(2)(B) (arm's-length negotiation) and amended Rule 23(e)(2)(C)(i) (adequacy of the settlement) are similar to the two-level analysis previously adopted by the Fourth Circuit, which "includes an assessment of both the procedural fairness of the settlement negotiations and the substantive adequacy of the agreement itself." *In re Neustar, Inc. Sec. Litig.*, No. 1:14cv885 (JCC/TRJ), 2015 WL 8484438, at *2 (E.D. Va. Dec. 8, 2015) (Cacheris, J.) (citing *Jiffy Lube.*, 927 F.2d 158-60). Like Rule 23(e)(2)(B), this procedural fairness analysis ensures "that the settlement was reached as a result of good-faith bargaining at arm's length, without collusion." *Jiffy Lube*, 927 F.2d at 158-59. And, like Rule 23(e)(2)(C)(i), the adequacy analysis "'weigh[s] the likelihood of the plaintiff's recovery on the merits against the amount offered in settlement.'" *Neustar*, 2015 WL 8484438, at *2.

As discussed below, given the recovery obtained (including the Disclosures, the opportunity for each Class member to make novel Special Election Options, and those Options' enhanced paid-up benefits or substantial cash damages payments), the risks faced, and the procedural posture of the Action when an agreement was reached, the Settlement satisfies each of the Rule 23(e)(2) factors, as well as the Fourth Circuit's "fairness" and "adequacy" tests.

B. The Settlement Is Fair and Was Negotiated at Arm's Length

The Rule 23(e)(2)(B) factor (arm's-length negotiation) and the first part of the Fourth Circuit's *Jiffy Lube* analysis consider a procedural issue – "whether the parties settled the case through good-faith, arm's-length bargaining." *Genworth*, 210 F. Supp. 3d at 839. In making this determination, courts in the Fourth Circuit look to: "(1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area of [consumer] class action litigation." *Skochin*, 2020 WL 6697418, at *2; *Jiffy Lube*, 927 F.2d at 159.

1. The Settlement Was Reached After Extensive Litigation And Discovery

The first and second *Jiffy Lube* factors focus on whether the case has progressed far enough to dispel any wariness of "possible collusion among the settling parties" and to ensure "all parties appreciate the full landscape of their case when agreeing to enter into the Settlement." *Neustar*, 2015 WL 8484438, at *3. There is no bright-line amount of litigation or discovery that must be undertaken to satisfy these factors. *See Jiffy Lube*, 927 F.2d at 159 (affirming settlement at a "very early stage in the litigation and prior to any formal discovery"); *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 664-65 (E.D. Va. 2001) (approving settlement "early on" because it was "clear that plaintiffs 'ha[d] conducted sufficient informal discovery and investigation to . . . evaluate [fairly] the merits of Defendants' positions during settlement negotiations'").

Here, the Settlement was reached after the case had proceeded to a stage where a careful evaluation of the action and the propriety of Settlement could be (and was) made. For example, Plaintiffs and Class Counsel had already:

- researched Genworth rate action filings with insurance commissioners over a ten-year period in at least 20 states;
- surveyed and charted PCS I and PCS II rate action approvals in all 50 states;
- reviewed the past ten years of Genworth's SEC filings, public statements, and financial statements filed with the Delaware Department of Insurance;
- reviewed all correspondence between Genworth and the Plaintiffs, including their policies and all rate action letters the Plaintiffs received;
- drafted a detailed Complaint incorporating this information;
- reviewed and analyzed over 350,000 pages of documents produced by Genworth in this litigation;
- interviewed Genworth's Senior Project Manager for In-Force Placement, who was responsible for developing rate increase notification letters sent to the Settlement Class, as well as for providing support for the customer service team following state regulatory decisions on Genworth's rate increase requests;
- interviewed Genworth's Senior Vice President for LTC Inforce, who was responsible for development of rate increase action plans, new LTC products, and helping to oversee the state regulatory approval process of LTC rate increase requests;
- served Genworth with interrogatories and received and reviewed detailed responses;
- produced documents and answered interrogatories in response to discovery served by Genworth;
- drafted mediation statements and other documents and conducted two in-person mediation sessions with Genworth and Rodney Max; and
- reviewed data from the *Skochin* class action settlement and the response of the *Skochin* Class to that settlement.

See Penny Decl. ¶24.

Plaintiffs and Class Counsel had sufficient information to "appreciate the full landscape of their case when agreeing to enter into this Settlement," *Skochin*, 2020 WL 6697418, at *3, and to

"evaluate [fairly] the merits of Defendants' positions during settlement negotiations." *MicroStrategy*, 148 F. Supp. 2d at 665; *see also Genworth*, 210 F. Supp. 3d at 840 (approving settlement following "extensive and hard-fought" process); *Neustar*, 2015 WL 8484438, at *3 (approving settlement where counsel's investigation provided sufficient information to evaluate defendants' positions). The extent of the proceedings and discovery prior to the Settlement strongly supports approval of the Settlement.

2. The Settlement Negotiations Were Conducted at Arm's with an Experienced Mediator

The third *Jiffy Lube* factor considers "the negotiation process by which the settlement was reached in order to ensure that the compromise [is] the result of arm's-length negotiations . . . necessary to effective representation of the class's interests." *Neustar*, 2015 WL 8484438, at *4; *see also Skochin*, 2020 WL 6697418, at *3 (examination of the circumstances surrounding the negotiation allows court to ensure settlement was reached through arms-length negotiations).

As set forth in further detail in Plaintiffs' brief in support of their motion to direct notice to the Class (ECF No. 46 at 19) and the Declaration of Rodney Max (ECF No. 46-2) (Penny Decl., Ex A), the Parties engaged in extensive arm's-length negotiations before reaching the Settlement. The Parties held initial discussions over several months during the course of discovery, including discussions regarding a possible framework for any potential settlement. The Parties then conducted two in-person mediation sessions on June 17, 2021 and June 18, 2021, in New York City. In advance of the mediation, the parties provided Mr. Max with information about their claims or defenses, the status of the litigation, and their views on settlement.

On June 17, 2021, Mr. Max convened the first mediation session with the Parties at the law offices of Dentons US LLP ("Dentons") (counsel for Genworth) in New York City. *Id.*, ¶ 15. The Parties worked all day with Mr. Max and made substantial progress on a general framework for a negotiated resolution. During this session, the Parties engaged in extensive discussions and exchanged several rounds of settlement demands and offers.

The following day, the Parties and Mr. Max re-convened at Dentons and spent the day negotiating the material terms of a proposed Settlement. The Parties concluded the second day of mediation by executing a Memorandum of Understanding ("MOU"), setting forth the material terms of an agreement-in-principle to be incorporated into a formal Settlement Agreement for the Court's approval. *Id.* ¶ 21. On June 23, 2021, the Parties notified the Court of their agreement and of the MOU. The Court subsequently held a hearing on June 30, 2021 to discuss the proposed Settlement and the schedule for seeking Court approval of the Settlement. [ECF No. 41].

As observed by Mr. Max, although the Parties had previously negotiated the *Skochin* settlement, the mediation in this case dealt with several new issues. Each side possessed strong, non-frivolous arguments on the merits, and the negotiations involved were complex and highly adversarial. Max Declaration, ECF 46-2, at ¶¶ 17-21. This arm's-length negotiation process, facilitated by a respected and experienced mediator, supports final approval. *See Genworth*, 210 F. Supp. 3d at 840-41 (approving settlement reached following two mediation sessions); *Wong v. Accretive Health, Inc.*, 773 F.3d 859, 864 (7th Cir. 2014) (affirming settlement "proposed by an experienced third-party mediator after an arm's-length negotiation").

3. The Action Was Litigated and Settled by Counsel with Significant Experience in Class Action Litigation

The final *Jiffy Lube* fairness factor "'looks to the experience of Lead Counsel in this particular field of law.'" *Genworth*, 210 F. Supp. 3d at 841. Where counsel is experienced, "it is 'appropriate for the court to give significant weight to the judgment of Class Counsel that the proposed settlement is in the interest of their clients and the class as a whole.'" *MicroStrategy*, 148 F. Supp. 2d at 665.

Class Counsel has many years of experience in complex class action litigation, and Class Counsel staffed their team with highly experienced attorneys who dedicated thousands of hours to the litigation. *See* Penny Decl., ¶20. Mr. Penny and his firm, Goldman Scarlato & Penny, P.C.

("GSP"), have successfully represented aggrieved individuals and entities in class action litigation for decades. *See* ECF No 46-6 (GSP Firm Resume). Likewise, Robbins Geller Rudman & Dowd LLP ("Robbins Geller"), where Plaintiffs' counsel Stuart Davidson is a partner, is considered one of the most successful and experienced class action litigation firms in the country, achieving numerous record-breaking recoveries for class members. *See* ECF No 46-7 (Robbins Geller Firm Resume). Mr. Davidson himself has spent the last 17 years of his 24-year career representing consumers, insureds, and shareholders in class action suits around the country. Michael Phelan and Jonathan Petty of Phelan Petty, LLC ("Phelan Petty") are well-known to this Court as providing excellent representation of their clients. *See* ECF No 46-8 (Phelan Petty Firm Resume). Finally, Berger Montague, where Plaintiffs' counsel Glen Abramson is a Shareholder, is known for its experience in handling class action consumer litigations and has been recognized by courts throughout the country for its ability and results. *See* ECF No 46-9 (Berger Montague Firm Resume). "[W]hen Lead Counsel are nationally recognized members of the . . . litigation bar, it is entirely warranted for this Court to pay heed to their judgment in approving, negotiating, and entering into a putative settlement." *NeuStar*, 2015 WL 5674798, at *11 (citing *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 256 (E.D. Va. 2009)). These facts further support the fairness of the Settlement. *See Genworth*, 210 F. Supp. 3d at 841 (holding that counsel's "many years of experience in complex class actions . . . demonstrat[ed] the fairness of the Settlement"); *Neustar*, 2015 WL 8484438, at *4 (finding opinions of counsel and institutional plaintiff further supported that the settlement was fair).

C. The Settlement Is Adequate Considering the Costs, Risks, and Delay of Trial and Appeal

Rule 23(e)(2)(C)(i) and the second part of the Fourth Circuit's *Jiffy Lube* analysis address the substantive adequacy of the settlement. Rule 23(e)(2)(C)(i) advises district courts to consider

"the costs, risks, and delay of trial and appeal." Fed. R. Civ. P. 23(e)(2)(C)(i). These adequacy factors weigh in favor of finding the proposed Settlement adequate.[5]

1. Plaintiffs Faced Risks in Continuing the Litigation

The Parties recognized that continued litigation through trial – and likely appeals – posed significant risks that made *any* result uncertain. For example, although Genworth did not file a motion to dismiss in light of this Court's prior rulings in *Skochin*, Genworth would argue at trial that the evidence demonstrates they did not make any material misstatements or omissions. Indeed, the difficulties of proof were significant. Genworth also would renew its argument, including on appeal, that Plaintiffs' claims were barred by the filed rate doctrine. The underlying facts involved the overlap of complicated issues of insurance regulation and actuarial accounting that may be challenging for most laypersons to understand.

Further, Genworth would have argued that class certification was unwarranted on either of Plaintiffs' claims because, according to Genworth, fraud claims require proof of reliance. Plaintiffs would have argued that a presumption of reliance was available under *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153 (1972) (reliance for fraud claim presumed based on materiality of omission), based on arguments that Genworth's omissions were material, and that the rate increase notification letters were all uniform based on template forms, but Genworth would have disputed that and, in any event, would have argued that any presumption would have been rebutted. Genworth also would have argued that the substantial involvement of state insurance regulators in the long-term care insurance rate increase gave rise to numerous defenses, factual and legal.

Plaintiffs would have to prevail on all of these issues at class certification and trial, and if

[5] In *Jiffy Lube*, the Fourth Circuit provided five adequacy factors that overlap with Rule 23(e)(2)(C): (1) the relative strength of the plaintiffs' case on the merits; (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial; (3) the anticipated duration and expense of additional litigation; (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment; and (5) the degree of opposition to the settlement. 927 F.2d at 159. The fourth factor is irrelevant to this Action, and the other factors are addressed within the Rule 23(e)(2)(C)(i) analysis.

they prevailed at both, on the appeals that would likely follow. Thus, there were significant risks to the continued prosecution of this action. Moreover, without settlement, the length of time and the expense required to resolve all of these issues would be considerable. Considering the age of the Members of the proposed Class, any delay in resolving these claims would likely prevent some Class Members from being able to participate at all, even were the case to be successful.

At bottom, although Plaintiffs believe their claims are meritorious, further litigation posed a significant threat to any class-wide recovery, let alone the significant recovery achieved by Plaintiffs here. *See Genworth*, 210 F. Supp. 3d at 841-42 ("Even with a strong case, the plaintiffs nonetheless face a large risk before a jury.").

2. The Settlement Eliminates the Additional Costs and Delay of Continued Litigation

Rule 23(e)(2)(C)(i) advises district courts to consider the costs and delay of continued litigation absent a settlement. The foregoing risks demonstrate that several complex and nuanced issues would be the subject of ongoing litigation, and it is well-established that class action litigation is costly and time consuming. *See, e.g.*, *Genworth*, 210 F. Supp. 3d at 842 ("Taking this case through trial and any appeals would involve a great deal of effort and expense, especially in light of the unknown outcome of such actions."); *MicroStrategy*, 148 F. Supp. 2d at 667 (noting continued litigation "would likely have been protracted and costly, requiring extensive expert testimony concerning the company's accounting practices").

If not for this Settlement, the case would have continued to be fiercely contested. The Parties would have continued extensive discovery efforts (including depositions and expert work) and then completed briefing and a hearing on Plaintiffs' class certification motion. If that motion were granted, the Parties would then have briefed and argued motions to exclude experts, motions for summary judgment, motions *in limine* and other pretrial motions, as well as prepared exhibits and witnesses for trial, and completed a trial likely to last several weeks. Once all that was done, even if Plaintiffs could recover a judgment larger than the Settlement after trial, the additional

delay, through trial, post-trial motions, and the appellate process, could last for years, with costs compounding throughout that time. *See MicroStrategy*, 148 F. Supp. 2d at 667 ("[T]here is little doubt that a jury verdict for either side would only have ushered in a new round of litigation in the Fourth Circuit and beyond, thus extending the duration of the case and significantly delaying any relief for plaintiffs.").[6]

A prolonged period of pretrial proceedings and lengthy and uncertain trial and appeals would not serve the interest of the Class in light of the monetary and injunctive benefits provided by the Settlement. As in *MicroStrategy*, "the old adage, 'a bird in the hand is worth two in the bush,' applies with particular force here." *In re MicroStrategy, Inc. Sec. Litig.*, 150 F. Supp. 2d 896, 904 (E.D. Va. 2001).

3. The Degree of Opposition to the Settlement

The Notice has been mailed to 144,821 potential Class members. *See* Azari Decl. at ¶13. As of November 30, 2021, only 40 policyholders have requested to opt-out of the Settlement. *See* Azari Decl. at ¶22. Class Counsel is also aware of one (1) objection to the Settlement. Thus far, the response from the Class has been overwhelmingly positive. Indeed, Class Counsel have spoken to nearly 1,500 Class members, the vast majority of whom expressed their strong approval of the Settlement. *See* Penny Decl. at ¶ 15.[7]

[6] *See also In re Merck & Co., Inc. Vytorin Erisa Litig.*, No. 08-CV-285 (DMC), 2010 WL 547613, at *11 (D.N.J. Feb. 9, 2010) ("[E]ven a victory at trial is not a guarantee of ultimate success. If plaintiffs were successful at trial and obtained a judgment for substantially more than the amount of the proposed settlement, the defendants would appeal such judgment. An appeal could seriously and adversely affect the scope of an ultimate recovery, if not the recovery itself."); *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408 (7th Cir. 2015) (ordering new trial six years after verdict and thirteen years after case was commenced).

[7] Class members still have until December 28, 2021 to opt-out of or object to the Settlement. Plaintiffs will update these numbers and address all objections to the Settlement in their reply brief to be filed on or before January 27, 2022.

D. The Proposed Settlement Is Fair and Adequate Under the Additional Amended Rule 23(e)(2) Factors

In addition to the costs, risks, and delay of continued litigation, Rule 23(e)(2)(A) advises district courts to consider whether "the class representatives and Lead Counsel have adequately represented the class," and Rules 23(e)(2)(C)-(D) advise district courts to consider "the effectiveness of any proposed method of distributing relief to the class," the "terms of any proposed award of attorney's fees, including the timing of payment," and "any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2). These factors also confirm the fairness and adequacy of the Settlement.

1. Plaintiffs and Their Counsel Have Adequately Represented the Class

In prosecuting this case, Plaintiffs have participated in the drafting of the Complaint, produced documents, responded to discovery, regularly communicated with counsel, and overseen the litigation (including through the mediation process). *See* Penny Decl., ¶¶20-27. Class Counsel has investigated claims, researched and drafted the Complaint, obtained, reviewed, and analyzed over 350,000 pages of documents; interviewed key Genworth personnel; and engaged in two full-day mediation sessions. Moreover, Plaintiffs and their counsel have achieved an excellent result, particularly when comparing the injunctive and monetary relief obtained in the Settlement to that sought in the Complaint.

2. The Proposed Method for Distributing Relief Is Effective

The Settlement provides two primary sources of relief: (1) additional Disclosures about Genworth's current financial condition, its plans to seek additional rate increases in the future, and its reliance on obtaining future rate increases to pay future claims; and (2) an opportunity for each Class Member to, if they so choose, select options to restructure their coverage, benefits, and premiums in light of those additional Disclosures while also either enhancing their benefits or obtaining cash damages payments from Genworth. This Settlement not only affords Class

members additional information and an opportunity to restructure their current policy terms in light of the additional Disclosures but also the ability to obtain financial relief if those Class members choose.

The process for obtaining these benefits under the Settlement is also simple and effective. Rather than having the third-party administrator send the Special Election Letter with the additional Disclosures and the Special Election Options to Class members, Genworth will be sending the Special Election Letter to Settlement Class members directly. As the Class members' LTC insurer and having successfully administered the Special Election Letters and processing of elections in the *Skochin* Settlement thus far, Genworth has the requisite operational experience and capacity to handle creating individual Special Election Letters for each Class member based on his or her specific policy and mailing those letters to Class members. Because letters from one's insurance carrier are ordinarily considered extremely important, this will ensure that Class members will view the letter and afford it the attention it deserves, as the high engagement of the *Skochin* Settlement Class to date has demonstrated.

The format of the Special Election Letter will also be familiar to Class members, as it is similar to the table formatting of prior rate action letters sent by Genworth. And to select among the Special Election Options, a Class Member merely needs to check a box, sign, and return the form.[8]

Again, recognizing Genworth's operational experience and capacity *vis-a-vis* changes in Settlement Class members' LTC policies and administration of the *Skochin* Settlement, Genworth will handle the administration of Settlement Class members' new Special Elections Options. And

[8] Plaintiffs and Genworth anticipate submitting an updated Special Election Letter at the time of Plaintiffs' Reply in Support of Final Approval that incorporates any refinements to further improve that Letter (which again has been very well-received in *Skochin*) following the expiration of the period for objections and requested input from state insurance regulators.

to ensure accuracy of Genworth's election-handling process, the Court-appointed Settlement Administrator, Epiq, will be conducting audits every ninety (90) days and will report the results of such audits to Plaintiffs' counsel and Genworth, as explained in the Azari Declaration, ECF No. 46-5 at ¶ 16.[9]

3. Class Counsel's Fees and The Timing of Payment Are Reasonable

Class Counsel's request for an award of attorneys' fees was fully disclosed in the Notice and is reasonable and appropriate, as detailed in Class Counsel's accompanying Memorandum of Law in Support of Motion for an Award of Attorneys' Fees and Expenses and an Award to Plaintiffs (the "Fee Brief"). It is important to emphasize that Plaintiffs' counsel will not be paid ***any*** of the fee approved for the "Cash Damages" portion until the Settlement becomes effective ***and*** Class members begin to send in their new election forms. Attorneys' fees attributable to the cash damages awards to the Class will be paid on a rolling basis in concert with Class member elections that trigger the payment of those fees. As such, both the timing and amount of attorneys' fees will be tied directly to the timing and amount of cash benefits paid to the Class. Importantly, the Class' damages payments ***will not be reduced*** by Class Counsel's fee or expense awards. Genworth has agreed to pay the Court-approved fees and expenses ***on top of*** the Class' damages payments, providing additional benefits to the Class. *See* Manual for Complex Litig. § 21.75 (4th ed. 2008) ("If an agreement is reached on the amount of a settlement fund and a separate amount for attorney fees . . . the sum of the two amounts ordinarily should be treated as a settlement fund for the benefit of the class."). Finally, Class Counsel has requested, and Genworth has agreed to pay, $15,000 for each of the Named Plaintiffs for the work they performed on behalf of the Class, which included extensive conversations with Class Counsel in advance of and throughout the

[9] To date, the similar audits of the *Skochin* Settlement administration have revealed no errors, let alone of any significance.

litigation, producing all relevant discovery, including sensitive personal medical and financial information, responding to written discovery requests, and discussing the terms of the proposed Settlement. *See* Penny Decl ¶¶28-34. The request for attorneys' fees, expenses and service awards should be granted.

4. The Parties Have No Side Agreements Other than Opt-Outs

Rule 23(e)(2)(C)(iv) requires the disclosure of any other agreement. The parties have not entered into ***any*** other or supplemental agreement in connection with this Settlement.

5. The Settlement Treats Class Members Equitably

The final factor, Rule 23(e)(2)(D), looks at whether the class members are treated equitably. The Settlement treats Class members equitably relative to each other based on the specific terms of their policy. Subject to review and instruction by state insurance regulators, Class members will all be given the same Disclosures about Genworth's current financial condition, plans for future rate increase requests, and its reliance on those requests to pay future claims. Then, in light of that information (again, subject to review and instruction by state insurance regulators), Class members will be entitled to ***voluntarily choose*** what new Special Election Option (if any) is best for them. In that way, each and every Class member is treated the same.

Moreover, the amount of the cash damages payments associated with Special Election Options involving a benefit reduction (not including the Non-Forfeiture Option) is tied directly to the amount of premium and benefit reductions each Class member elects. For Class members that are not currently in Fully Paid-Up or Non-Forfeiture Status and chose either of the Paid-Up Benefit Special Election Options, they will either receive cash damages payments equal to the amount of premiums they paid between 2017 and 2020, or they can potentially *double* the value of their paid-up benefit. All of these options have significant benefits and the Class members each get to decide which ones they prefer. It is also important to note that there is no cap on the amount of financial damages Genworth will pay to the Class members, which means that each Class member's

decision to elect options that pay financial damages will not affect any other Class member's ability to select such options nor will it impact the amount of financial damages each can recover in the Settlement. This also makes the allocation of the Settlement benefits entirely equitable to all Class members.

In all, the component of the Settlement providing for cash damages payments to Class members who make certain Special Election Options will likely be substantial. As noted, there are more than 144,000 Class members and the aggregate relief available to those Class members is uncapped. Additionally, the Parties are able to provide the Court with data concerning the *Skochin* settlement administration to date that may serve as a useful reference for the Court to evaluate this similar settlement. At this point, approximately 56% of the *Skochin* Settlement has been fully implemented (meaning that 56% of *Skochin* settlement class members have received a Special Election Letter and their time to make an election has fully run). Of that population of the *Skochin* settlement class, approximately 30% of *Skochin* class members in premium-paying status have made an election. This is a very impressive "claims rate" and indicates the *Skochin* class members' very favorable response to the options afforded them. *Compare, e.g., In re Facebook Biometric Info. Priv. Litig.*, No. 15-CV-03747-JD, 2021 WL 757025, at *2 (N.D. Cal. Feb. 26, 2021), *appeal dismissed*, No. 21-15555, 2021 WL 2660668 (9th Cir. June 22, 2021) (approving consumer class settlement and lauding the "claims rate of approximately 22%, a result that vastly exceeds the rate of 4-9% that is typical for consumer class actions") (citing F.T.C., *Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns*, at 11 ("Across all cases in our sample requiring a claims process, the median calculated claims rate was 9%, and the weighted mean (i.e., cases weighted by the number of notice recipients) was 4%.")); *see also id.* at *8 ("a claims rate of around 22%" is "an unprecedentedly positive reaction by the class."). As such, it is

entirely possible that the proposed Settlement in this case will prompt a similarly favorable reaction from this Class.

Using the to-date data from the Skochin settlement, Genworth has calculated that if this Settlement were to achieve a comparatively (to Skochin) modest take rate of 10% (which would still exceed the median claims rates for class actions, as noted directly above), the total Cash Damages payments to Class Members in this case could be approximately $84 million in total. Declaration of Nicholas Sheahon ("Sheahon Declaration") at ¶¶4-5 (attached as Exhibit D to Penny Decl.). If this Settlement were to achieve a take rate similar to that of Skochin to date (again, an extraordinary result), the total Cash Damages payment to Class Members in this case could be approximately $251 million in total. *Id.* Any Cash Damages payment amount would not even include the substantial value to those eligible Class members who elect the double Paid-Up Benefit available under that Special Election Option, or the value of obtaining the additional Disclosures. While these of course are just hypothetical calculations at this point, and Plaintiffs and Genworth simply do not (and cannot) know what Special Election Option any Class Member may or may not elect given the novelty of the Special Election Options, there is no question that the Settlement includes substantial relief, and each Class member gets to choose what relief they prefer.

Thus, each factor identified under Rule 23(e)(2) is satisfied. Plaintiffs respectfully submit that the Settlement is fair, reasonable, and adequate, and request that the Court grant final approval.

V. CERTIFICATION OF THE CLASS REMAINS WARRANTED

The Court previously, for settlement purposes only, preliminarily (1) approved this action as a class action pursuant Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure, and (2) appointed Plaintiffs as Class Representatives and Plaintiffs' counsel as Class Counsel. ECF No. 52, ¶¶ 9-13. Nothing has changed to alter the propriety of certification for settlement purposes. Again, the Court previously certified a nearly identical settlement class in the prior *Skochin* litigation. *See Skochin v. Genworth Life Ins. Co.*, No. 19-cv-00049 (REP), (E.D.Va. Nov. 12,

2020), ECF No. 220. For these reasons, and all the reasons stated in Plaintiffs' preliminary approval brief (ECF No. 46 at 21-27), Plaintiffs request that the Court grant final certification of the Class and appointment of Plaintiffs as Class Representatives and Plaintiffs' counsel as Class Counsel, for settlement purposes only, pursuant to Rules 23(a) and (b)(3).

VI. CONCLUSION

The Settlement is a highly favorable, fair, and adequate result, particularly given the substantial, certain, and immediate benefit of the Settlement to the Class, the arm's-length settlement negotiations, the stage of litigation and discovery at the time of settlement, the advocacy of experienced counsel for all parties, and the considerable risk, expense, and delay if the case were to continue. Therefore, and for all the reasons stated above and in the accompanying declarations and Fee Brief, Plaintiffs respectfully request that this Court approve the Settlement as fair, reasonable, and adequate, and certify the Class for settlement purposes only.

Proposed orders certifying the Class, approving an award of attorneys' fees, costs and service awards, and granting final approval of the Settlement will be filed with Plaintiffs' and Class Counsel's reply papers on or before January 27, 2022.

DATED: December 3, 2021

PHELAN PETTY PLC

/s/ Jonathan M. Petty

MICHAEL G. PHELAN (VSB No. 29725)
JONATHAN M. PETTY (VSB No. 43100)
6641 West Broad Street, Suite 406
Richmond, VA 23230
Telephone: 804/980-7100
804/767-4601 (fax)
mphelan@phelanpetty.com
jpetty@phelanpetty.com

GOLDMAN SCARLATO & PENNY, P.C.
BRIAN DOUGLAS PENNY
Eight Tower Bridge, Suite 1025
161 Washington Street
Conshohocken, PA 19428
Telephone: 484/342-0700
484/342-0701 (fax)
penny@lawgsp.com

ROBBINS GELLER RUDMAN
& DOWD LLP
STUART A. DAVIDSON (*pro hac vice*)
BRADLEY BEALL (*pro hac vice*)
120 East Palmetto Park Road, Suite 500
Boca Raton, FL 33432
Telephone: 561/750-3000
561/750-3364 (fax)
sdavidson@rgrdlaw.com
bbeall@rgrdlaw.com

BERGER MONTAGUE PC
SHANON J. CARSON
GLEN L. ABRAMSON
1818 Market Street, Suite 3600
Philadelphia, PA 19103
Telephone: 215/875-3000
215/875-4604 (fax)
scarson@bm.net
gabramson@bm.net

Class Counsel

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2021, I filed the foregoing pleading or paper through the Court's CM/ECF system, which sent a notice of electronic filing to all registered users.

/s/ Jonathan M. Petty

Jonathan M. Petty (VSB No. 43100)
PHELAN PETTY, LLC
3315 West Broad Street
Richmond, VA 23230
Telephone: 804/980-7100
804/767-4601 (fax)
jpetty@phelanpetty.com

Counsel for Plaintiffs