UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF VIRGINIA

(Richmond Division)

JEROME SKOCHIN, SUSAN SKOCHIN and LARRY HUBER, 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. 3:19-cv-00049-REP CLASS ACTION

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

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiffs Jerome Skochin, Susan Skochin, and Larry Huber, 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 the claimed harm to the Class allegedly caused by Genworth's lack of adequate disclosures regarding their plans for future rate increases and their dependence on obtaining those rate increases to pay future claims.

As alleged in the very first paragraph of Plaintiffs' initial complaint:

> This case does not challenge Genworth's right to increase these premiums, or the need for premium increases given changes in certain of Genworth's actuarial assumptions. 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 18, 2019, ECF No. 1, ¶ 1; *see also* Third Amended Class Action Complaint ("TAC"), filed November 22, 2019, ECF No. 90, ¶ 1 (same).

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, as amended by the Amendment to Joint Stipulation of Class Action Settlement and Release. ECF Nos. 93-1 and 102-2, attached again as Exhibits B and C 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 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 207,000 members of the Class and historical evidence of policyholder elections following rate increase notices from Genworth, 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, Plaintiffs conservatively project that Class members will receive cash payments approaching or in excess of $100 million in addition to the valuable information and ability to make Special Election Options themselves. *See* 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."), ¶ 8.

This Settlement is also eminently fair to all Class members, as it calibrates the relief (including the financial damages) directly to each Class member's measure of alleged harm. This corresponds directly with Plaintiffs' fraudulent omission claims which averred that the statements Genworth "did make about the likelihood 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* TAC, ECF No. 90, ¶ 31. 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 walk away from their policy having not years earlier, they will receive either cash payments equal to four years of premium payments, or enhanced paid-up benefits that *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 a hard-fought litigation among sophisticated parties and experienced counsel. The Parties and Counsel negotiated the Settlement over several weeks (including weekends) 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 discovery, which overlapped considerably with merits discovery and included the collection and review of hundreds of thousands of pages of documents obtained from Genworth and the completion of depositions of key Genworth representatives, was finished. When the Parties went to mediation, Plaintiffs' motion for class certification was drafted and file-ready.

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. 93-2. These negotiations included three 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.*, ¶¶12-25.

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. 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 state statutory claims should be certified for litigation purposes. At trial, Plaintiffs would have had the burden of proving each of the elements of their fraud and statutory claims – in a case that centers on intricate insurance principles – over Genworth's defenses. Trial would have been expensive. 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. SUMMARY OF THE LITIGATION

This Court is familiar with the facts of this litigation and has already granted conditional approval of the Settlement following a hearing on January 15, 2020. *See* ECF No. 98 and 104. The underlying facts and law have been summarized several times by Plaintiffs in their oppositions to Defendants' motions to dismiss and in their memorandum in support of Plaintiffs' motion to direct notice of proposed settlement to the Class. *See* ECF Nos. 29, 45, and 92. The Court has also summarized the facts of this case in its opinion ruling on Defendants' motion to dismiss. *See, e.g.*, ECF No. 78. Plaintiffs refer the Court to those filings and opinions.

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 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 Nos. 98, ¶¶ 15-19, and 104, pp. 4-5. 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).[2]

As detailed in the accompanying declaration of the Settlement Administrator (the "Administrator"), the Administrator reviewed the Class member mailing list sent to it by Genworth, removed duplicate entries and updated addresses where necessary. On April 14, 2020, the Administrator mailed the Notice Package directly to 207,195 potential Class members. *See* Supplemental Declaration of Cameron R. Azari, Esq. on Implementation of Settlement Notice Plan and Administration ("Azari Decl.") at ¶ 11. For any mailings returned as undeliverable, the Settlement Administrator has "skip-traced" those addresses to update them and re-mailed the Notice Package. *Id.* at ¶12. As of May 22, 2020, the Administrator has re-mailed 10 such Notice Packages. *Id.* at ¶ 12. 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 May 22, 2020, the Settlement Administrator has mailed 397 such additional Notice Packages. *Id*. at ¶ 14. Based on these mailings and remailings to date, the Administrator estimates that Class Notice directly reached (by mail) at least 90% of Class members (and likely higher). *Id.* at ¶8.

On April 14, 2020, the Administrator also established the settlement website (www.longtermcareinsurancesettlement.com), where copies of the operative TAC, Joint Stipulation of Class Action Settlement and Release, Amendment to Joint Stipulation of Class Action Settlement and Release, Plaintiffs' Motion to Direct Notice of Proposed Settlement to the Class, Joint Motion of the Parties for Leave to Amend the Joint Stipulation of Class Action Settlement and Release and to Amend the Order Preliminarily Approving Settlement and Directing

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

Notice to Class, Order Granting Amendment to Preliminary Approval Order of Settlement and Directing Notice to the Class, Class Notice, List of Class Policies, Appendix C – Special Election Options, and Appendix D – Special Election Letter are posted and available for download. *Id.* at ¶16. As of May 19, 2020, a substantial number of individuals have accessed this settlement website and the documents and information on it. According to the Administrator, the settlement website has received 7,402 unique visitors, with 16,348 web pages presented to viewers. *Id.* at ¶ 17. Additionally, the Administrator established a toll-free telephone number through which individuals can receive answers to "FAQs" about the Settlement. As of May 19, 2020, the toll-free number has fielded 4,936 calls totaling 25,268 minutes of use. *Id.* at ¶18.

On May 22, 2020, the Publication Notice was published in *The New York Times*, *The Wall Street Journal* and *USA Today*. *Id.* at ¶15. The combined average weekday circulation of these three publications is approximately 2.82 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 nearly 100% of the Class 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).

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 *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158-60 (4th Cir. 1991)). 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 robust 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." *Jiffy Lube*, 927 F.2d at 159.

1. The Settlement Was Reached After Extensive Litigation

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 Choice 1 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 detailed complaints incorporating this information;
- successfully opposed two motions to dismiss filed by Genworth;
- reviewed and analyzed over 205,000 pages of documents produced by Genworth in this litigation;
- deposed Genworth's Senior Project Leader for In-Force Management 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;
- deposed Genworth's Vice President for LTC Insurance Product Management 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;
- deposed Genworth's expert, Ted Nickel, who was the past President of the National Association of Insurance Commissioners and the Wisconsin Commissioner of Insurance from 2011-2019;
- prepared for and defended the depositions of each Plaintiff;
- researched and drafted a motion for class certification;
- served Genworth with a set of interrogatories and over 200 requests for admission; and
- drafted mediation statements and other documents and conducted three in-person mediation sessions with Genworth and Rodney Max, and participated in several phone sessions mediated by Mr. Max.

See Penny Decl. ¶19.

Plaintiffs and Class Counsel had sufficient information 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 prior to the Settlement strongly supports approval of the Settlement.

2. The Settlement Negotiations Were Conducted over Several Weeks, at Arm's Length, 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.

As set forth in further detail in Plaintiffs' brief in support of their motion to direct notice to the Class (ECF No. 92 at 19) and the Declaration of Rodney Max (ECF No. 93-2)(Penny Decl., Ex A), the Parties engaged in extensive arm's-length negotiations before reaching the Settlement. The first in-person mediation session occurred on Saturday, September 28, 2019, in New York City. In advance of the first mediation, the parties provided Mr. Max with detailed information about their claims or defenses, the status of the litigation, and their views on settlement. Plaintiffs also provided Genworth and Mr. Max with a framework for a proposed settlement. Although the first mediation session was productive, it ended without an agreement. The Parties and Mr. Max met again on October 17, 2019 and continued their mediation efforts the following day. During the second and third sessions, the Parties engaged in extensive discussions and exchanged several rounds of settlement demands and offers. The third session, however, ended with the Parties still at an impasse on various issues.

The Parties continued their good-faith negotiations, with and without Mr. Max, the following week, culminating in the execution of the Memorandum of Understanding, and informed the Court of the Parties' Settlement in the form of a Notice of Settlement filed on October 30, 2019.

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., ¶15. 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 93-6 (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 93-7 (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 93-8 (Phelan Petty Firm Resume). Finally, Berger Montague, where Plaintiffs' counsel Shanon Carson is a Managing Shareholder, is known for its experience in handling class action consumer litigations. *See* ECF No 93-9 (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 *Mills*, 265 F.R.D. at 256). 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.[3]

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 the Court denied some of Genworth's arguments at the motion-to-dismiss stage, 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. The underlying facts also involved complicated issues of insurance regulation and actuarial accounting that may be challenging for most laypersons on a jury to understand.

Further, Genworth would have argued that class certification was unwarranted on either of

[3] 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.

Plaintiffs' claims because, according to Genworth, both fraud and PCPL claims require proof of reliance. Plaintiffs would have countered, in part, 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 Genworth's omissions being material, and that the rate increase notification letters were all uniform and based on template forms. But Genworth would have disputed that, and, in any event, would have argued that any presumption would have been rebutted.

Plaintiffs would have to prevail on all of these issues at class certification and trial, and if they prevailed at both, on the appeals that would likely follow. There were significant risks to the continued prosecution of this action. To be sure, even if Plaintiffs prevailed at trial, they would have faced risk at the Fourth Circuit, including the risk that this Court's rejection of Genworth's filed-rate doctrine arguments, *Skochin v. Genworth Life Ins. Co.*, 413 F. Supp. 3d 473, 484 (E.D. Va. 2019), would have been reversed. As Genworth made clear to the Court during its motion-to-dismiss briefing and argument, nearly all prior cases brought against long-term care insurers were dismissed on the pleadings under the filed-rate doctrine. *See, e.g.*, ECF Nos. 40 at 10-16; 48 at 2-9; *see also* Transcript of Motion Hearing on July 10, 2019, at 4:11-15, ECF No. 60 (Defendant's Counsel: "[T]here's plenty of case law, Your Honor. The filed-rate doctrine takes care of all cases that would -- all claims, including fraud, that would attack -- would violate the underlying principles of the filed-rate doctrine"). This Court (correctly, in Plaintiffs' view) disagreed; but, the risk of reversal was real. Without settlement, the length of time and the expense required to resolve all of these issues, and the risk of no recovery for the Class, would be considerable.

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 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.").[4]

[4] *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

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 at least 207,195 potential Class members. As of May 19, 2020, 84 policyholders have opted-out of the Settlement. *See* Azari Decl. at ¶20. Class Counsel is also aware of fifteen objections to the Settlement. Of those, three have since been withdrawn, which helps underscore their approval of the Settlement. Thus far, the response from the Class has been overwhelmingly positive. Class Counsel have spoken to more than 3,500 Class members, the vast majority of whom expressed their strong approval of the Settlement. *See* Penny Decl. at ¶¶ 11-12. In fact, hundreds of Class members have thanked Class Counsel over the phone and several have even written emails, notes, and letters thanking Class Counsel and the Plaintiffs for their work in this case. *Id.* Class members still have until June 13, 2020 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 June 26, 2020.

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

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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."); *Household*, 787 F.3d 408 (ordering new trial six years after verdict and thirteen years after case was commenced).

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 produced documents, responded to discovery, prepared and sat for depositions, regularly communicated with counsel, and overseen the litigation (including through the mediation process). *See* Penny Decl., ¶¶15-16. Class Counsel has investigated claims, drafted complaints, opposed motions to dismiss and discovery motions, prepared a motion for class certification, analyzed over 205,000 pages of documents produced by Genworth, reviewed scores of rate action applications, financial reports and actuarial tables, taken and defended depositions, and engaged in mediations. *See* §IV.B.1. Plaintiffs and Class Counsel have more than adequately represented the Class, as reflected in their work and by the resulting Settlement. *See also* ECF No. 439 at 23-24.

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, 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.

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.

Again, recognizing Genworth's operational experience and capacity *vis-a-vis* changes in Settlement Class members' LTC policies, Genworth will handle the administration of Settlement Class members' new Special Elections Options. 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. 93-5 at ¶ 16.

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, $25,000 for each of the Named Plaintiffs for the work they performed on behalf of the Class, which included extensive conversations with Class Counsel throughout the litigation, producing all relevant discovery, including sensitive personal medical and financial information, responding to written discovery requests, and preparing for and giving testimony at their depositions. *See* Declaration of Jerome Skochin in Support of Final Approval of Proposed Settlement and Request for Service Payment; Declaration of Susan Skochin in Support of Final Approval of Proposed Settlement and Request for Service Payment; and Declaration of Larry Huber in Support of Final Approval of Proposed Settlement and Request for Service Payment. 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 four of the five Special Election Options is tied directly to the amount of premium and benefit reductions each Class member elects. For Class members that 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 2016 and 2019, or they can *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.

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 207,000 Class members and the financial relief available to those Class members is uncapped. In recent years, approximately 30% of Genworth's policyholders have elected some form of non-forfeiture or reduced benefit options to revise their coverage and premiums when given the opportunity following rate increases. Using a conservative estimate, if only half as many (15%) Class members elect the Special Election Options available under the Settlement, and assuming that Class members elect those Options in equal parts (*i.e.*, 3% chose each of the five Special Election Options), Plaintiffs project that this would result in aggregate cash damage payments approaching or in excess of $100 million. This cash damages payment amount, of

course, does not even include the substantial value to those Class members that elect the *double* Paid-Up Benefit available under that Special Election Option, or the value of obtaining the additional Disclosures. While this is of course just a projection, and Plaintiffs 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. 98, ¶¶ 9-13. Nothing has changed to alter the propriety of certification for settlement purposes and, for all the reasons stated in Plaintiffs' preliminary approval brief (ECF No. 92 at 22-28), 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 Class Counsel's reply papers on or before June 26, 2020.

DATED: May 25, 2020

PHELAN PETTY PLC

/s/ Jonathan M. Petty

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Class Counsel

CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2020, 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

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