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

BRIGHTON TRUSTEES, LLC, AS TRUSTEE, *et al.*, Plaintiffs, v. GENWORTH LIFE AND ANNUITY INSURANCE COMPANY, Defendant.	Civil No. 3:20cv240 (DJN)

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

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I. INTRODUCTION

The Settlement—achieved after more than two years of vigorous litigation and following arm's-length negotiations conducted with the assistance of a highly experienced mediator—is an outstanding result for the Settlement Class.[1] The monetary and nonmonetary benefits combined result in a Settlement value of over $44.8 million for the Settlement Class. This includes a cash fund of $24,997,961.25. The cash fund on its own is equal to 163% of all COI overcharges that Defendant Genworth Life and Annuity Insurance Company ("GLAIC") imposed on the Settlement Class through March 31, 2022. *See* Declaration of Steven Sklaver in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement ("Sklaver Final Approval Decl."), ¶ 37. The Settlement also provides over $19.9 million in nonmonetary benefits to the Settlement Class, as valued by an experienced expert in life insurance, including (1) a guarantee by GLAIC not to impose a new COI increase for seven years even in the face of a worldwide pandemic, which some carriers claim justify an additional COI increase and even if otherwise permitted by the language of the policies, and (2) a guarantee that GLAIC will not challenge the validity and enforceability of any eligible policies owned by participating Settlement Class members on the grounds of lack of an insurable interest or misrepresentation in the application for such policies, thereby ensuring that the death benefits will be paid when a policy matures and a proper claim for the policy proceeds is submitted. *Id.* ¶ 38. The terms of the Settlement are set forth in a Stipulation, finalized on May 6, 2022. *Id.*, Ex. 2.

Preliminary approval of the Settlement was granted on June 3, 2022, and Notice to the Settlement Class was mailed on June 17, 2022. ECF Nos. 136, 138. Although there are 13,429 policies in the Settlement Class, not a single objection was filed. Declaration of Gina Intrepido-

[1] Unless otherwise noted, all Capitalized Terms mean the same as in the Settlement Agreement.

Bowden ("Intrepido-Bowden Decl."), ¶ 12. Only two exclusion requests were received, accounting for less than 0.008115% of the total face value of the policies in the Settlement Class. *Id.* ¶ 11; Sklaver Final Approval Decl. ¶ 32.

The Settlement resulted from the tenacious prosecution of this case. All told, Class Counsel invested more than 3,650 hours of work, which included reviewing over 435,800 pages of documents and actuarial data sets, assisting in the preparation of eight detailed expert reports, taking and defending more than fourteen highly technical fact and expert depositions, and preparing forty-eight pages of class certification briefing supposed by forty-five exhibits. Sklaver Final Approval Decl. ¶¶ 11-19. This hard work paid off—despite vigorous opposition from GLAIC and its counsel—Plaintiffs turned this case in their favor by defeating two *Daubert* motions and achieving favorable indications from the Court on how it might rule on class certification and summary judgment. The strengths and weaknesses of the case were well-known by the time the parties achieved the Settlement.

The Settlement is an even better result when considering that this case had substantial trial risks, whereby the Settlement Class could have recovered nothing. The Court is well aware of the challenges that Plaintiffs would face at trial. *See, e.g.*, Sklaver Final Approval Decl., Ex. 5 at 10:3-6 ("I also, I think, made clear that this is a 50/50 case, so there were significant risks that were at issue here for the plaintiffs as to both the breach and the damages that would have been heavily contested."). Among other issues, the complex, expert-driven nature of proving Plaintiffs' case made it uncertain how the jury would respond. *See, e.g., id.* at 5:18-6:4 ("[F]or the plaintiffs, nobody is going to have a clue on the jury as to what's going on in this case. It took me double readings, with large degrees of caffeine, to figure this out, and I have a feeling the jury is going to be glazed over."). At the time the parties reached a negotiated settlement, GLAIC filed a motion

for summary judgment disputing that it had increased COI rates "in order to" recoup prior losses and argued that Plaintiffs' theories of breach "rely on alleged actuarial meanings or attempts to enforce constraints that are not in the subject policies." ECF No. 119. Although Plaintiffs strongly disagreed with this position, the result was far from certain, including at trial. Even if Plaintiffs overcame these arguments, the risk would have continued with the inevitable filing of decertification motions, motions *in limine*, post-verdict motions, and appeals. *See Fleisher v. Phoenix Life Ins. Co.*, No. 11-cv-8405 (CM), 2015 WL 10847814, at *6 (S.D.N.Y. Sept. 9, 2015) ("Even if the Class could recover a judgment at trial and survive any decertification challenges, post-verdict and appellate litigation would likely have lasted for years."); ECF No. 132-2 (Declaration of Mediator Rodney Max ("Max Decl.")) ¶ 20 ("The settlement obtained is particularly fair, adequate, and reasonable under the circumstances of this case because it provides a very substantial recovery for the Class, especially when measured against the obstacles standing in the way of achieving a successful resolution of the claims.").

In light of the recovery for the Settlement Class and the risks to continued litigation, Class Representatives respectfully submit that the Settlement is fair, reasonable, and adequate, and warrants final approval by the Court.

II. BACKGROUND

A. The COI Increase

The Settlement Class consists of owners of 13,429 universal life policies ("Class Policies") issued by First Colony Life Insurance Company, now GLAIC, between 1999 and 2007.[2] Each

[2] The number of Settlement Class Members identified here is lower than the 14,900 Class Members previously identified in Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement. ECF No. 132 at 5. The difference is attributable to policies that terminated before December 1, 2019, the effective date of the COI Increase, and policies that terminated after December 1, 2019, as a result of death of the insured. The original Class Member count reflected the policies in force as of September 30, 2017. The parties have met

Class Policy contains a section titled "Changes in Rates, Charges, and Fees," with limitations on when and how monthly risk rates used to calculate the monthly COI charges can be adjusted. Plaintiffs' policies, which are representative of the language included in all Class Policies, state in relevant part:

> The Company will base any change on its expectations as to future investment earnings, mortality, persistency, expenses and taxes. The Company will not make any change in order to recoup prior losses. Any change in the monthly risk rates will apply to all insured with the same combination of the following: attained age; number of years of insurance in force; net amount at risk; and premium class.

See Sklaver Final Approval Decl., Ex. 3 at 14. In 2019 and 2020, GLAIC adjusted COI rates on the Class Policies.

B. The Litigation

In April 2020, Plaintiffs filed a putative class action lawsuit, asserting a breach of contract claim against GLAIC. ECF No. 1. In consultation with industry experts, Class Counsel studied the language of the GLAIC policy forms, the trends in actuarial assumptions from the time the policies were issued as detailed in GLAIC's filings with insurance regulators, and the information GLAIC provided about the COI rate changes to its policyholders to assess whether the COI changes were permitted by the policies and other applicable laws. *See* Sklaver Final Approval Decl. ¶ 8. As a result of this investigation, Class Counsel drafted and filed the highly detailed Complaint. ECF No. 1. GLAIC did not move to dismiss the well-pleaded complaint. The Court appointed Class Counsel as Interim Class Counsel on June 30, 2020. ECF No. 21 at 2.

The parties engaged in extensive fact discovery, which included the production and review of more than 435,800 pages of documents and datasets, including detailed policy-level data for the Class Policies. *See* Sklaver Final Approval Decl. ¶ 11. Class Counsel took the depositions of

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and conferred about this issue and agree on the number of Settlement Class Members as set forth herein.

GLAIC's corporate representative and six individual witnesses for GLAIC, including GLAIC's vice president and actuary for life projections and valuations, illustration actuary, senior project manager, and the COI actuary responsible for day-to-day operations of the COI project. *See id.* ¶ 12. Class Counsel also prepared for and defended the depositions of Plaintiffs Brighton Trustees, LLC, as trustee, and Ronald Daubenmier. *See id.*

Class Counsel also conducted extensive third-party discovery. Plaintiffs served subpoenas on entities that worked with GLAIC, including Milliman, Willis Towers Watson, Oliver Wyman, and KPMG, as well as thirteen of GLAIC's reinsurers. *Id.* ¶ 14. Plaintiffs also submitted numerous freedom of information law requests to state regulators. *Id.* ¶ 15. This third-party discovery resulted in the production of important documents relating to GLAIC's work on and analysis of the 2019 COI rate changes. *See id.* For example, Plaintiffs' subpoena to Milliman secured Plaintiffs' access to Milliman's proprietary actuarial software, MG-ALFA. Plaintiffs' experts have been trained to use MG-ALFA, and so used, Plaintiffs were able to analyze GLAIC's actuarial models in the same software used by GLAIC's own actuaries. Plaintiffs also obtained internal emails from GLAIC's consultants at Willis Towers Watson who questioned GLAIC's COI methodology, including GLAIC's treatment of statutory reserves. One of the core issues in this case was the way GLAIC accounted for its statutory reserves. Plaintiffs argued GLAIC's handling of its statutory reserves rendered the COI increase improper because it recouped prior losses. Plaintiffs also deposed corporate representatives from Milliman and Willis Towers Watson. *Id.* ¶ 14.

After the close of fact discovery on December 17, 2021, the parties conducted expert discovery on the merits. *Id.* ¶ 17. Discovery necessitated significant work with top-notch actuarial, financial modeling, regulatory, and damages experts that were identified and retained by Class Counsel. Class Counsel worked with two experts—actuarial expert Howard Zail and damages

expert Robert Mills. *See id.* GLAIC also designated two experts: Lisa Kuklinski and Professor Craig Merrill, both for actuarial issues. *See id.* Class Counsel deposed Ms. Kuklinski in connection with the declaration that she filed in support of GLAIC's opposition to class certification, and GLAIC deposed Messrs. Zail and Mills in connection with their class certification declarations. The parties collectively produced eleven expert reports, including more than 500 pages of actuarial and damages analysis, and nearly 20,000 pages of exhibits. *Id.* ¶¶ 17-18.

Plaintiffs moved for class certification on August 1, 2021. ECF No. 49. Plaintiffs' certification motion included three declarations from Class Representatives, two expert reports, forty-five exhibits, and forty-eight pages of briefing. Sklaver Final Approval Decl. ¶ 18. GLAIC opposed certification, and Plaintiffs filed a reply. *See id.*; ECF No. 68, 100. At the same time, GLAIC moved to exclude Plaintiffs' experts in support of class certification, and the parties fully briefed those motions as well. Sklaver Final Approval Decl. ¶ 19.

The Court denied GLAIC's motions to exclude Plaintiffs' experts. ECF No. 109. It also convened a conference call with the parties on February 14, 2022, to discuss class certification. *See* Sklaver Final Approval Decl. ¶ 21, Ex. 5. On the call, the Court indicated it had reviewed the extensive briefing and was inclined to certify the class, "unless something completely unusual happens" at the forthcoming certification hearing. *Id.*, Ex. 5 at 4:17-21. Without prohibiting the parties from filing dispositive motions or pre-judging the issues, the Court further stated that summary judgment would be "a waste of time in this case," given the genuine disputes of material fact made plain in the expert declarations related to class certification. *Id.* The Court encouraged the parties to engage in settlement discussions.

C. Settlement Negotiations, Preliminary Approval, and Class Notice

The Settlement is the result of extensive, arms-length negotiations between the parties with the assistance of an experienced mediator, Rodney Max Esq. of Upchurch Watson White & Max.

Sklaver Final Approval Decl. ¶ 24; Max. Decl. ¶¶ 12-21. The parties first conducted an in-person mediation session with Mr. Max in Miami on October 17, 2021. Sklaver Final Approval Decl. ¶ 24. Although that in-person session did not result in settlement, the parties continued to negotiate informally. Following the February 14, 2022, telephone conference with the Court, the parties reopened the settlement dialogue and scheduled additional mediation sessions with Mr. Max. Those mediation sessions took place on March 12 and March 25, 2022, and were held remotely. The parties reached an agreement in principle after the last mediation session. The parties informed the Court about the development, and the Court convened a telephone conference to discuss the schedule for preliminary approval. *See* ECF No. 126.

After the parties agreed to a settlement in principle, GLAIC produced updated COI data and actuarial modeling from its administrative systems. Plaintiffs reviewed the updated data and complex modeling with their experts and confirmed their intent to proceed with the Settlement. A long-form settlement agreement was heavily negotiated and agreed to on May 6, 2022.

Throughout the process, the Settlement negotiations were conducted by highly qualified and experienced counsel on both sides at arm's length. Sklaver Final Approval Decl. ¶ 23; Max Decl. ¶¶ 12-21. The mediator, Mr. Max, believes that the proposed Settlement is fair and reasonable, and is "an excellent result" for members of the Settlement Class. *See* Max. Decl. ¶ 21. Class Counsel analyzed all the contested legal and factual issues to thoroughly evaluate GLAIC's contentions, advocated in the settlement negotiation process for a fair and reasonable settlement that serves the best interests of the Settlement Class, and made fair and reasonable settlement demands of GLAIC. *Id.*

On June 3, 2022, the Court issued the Order Preliminarily Approving Class Action Settlement. ECF No. 136. The Order stated that Class Counsel "had provided the Court with

information sufficient to enable it to determine whether to give notice of the proposed settlement to the Class pursuant to Rule 23(e)(1)(A)." *Id.* ¶ 2. Using this information, the Court determined that it "will likely be able to approve the Settlement under Rule 23(e)(2)." *Id.* ¶ 4. The Court also preliminarily approved the proposed plan of allocation and distribution "because the Court will likely be able to find that the Settlement is fair, reasonable, and adequate considering the Rule 23(e)(2)(A)-(D) factors and the factors identified in *1988 Trust for Allen Children Dated 8/8/88 v. Banner Life Insurance Co.*, 28 F.4th 513, 525 (4th Cir. 2022)." *Id.* ¶ 5. In the hearing on preliminary approval, the Court further noted, "I previously appointed plaintiffs and found lead counsel to adequately lead this case and their litigation conduct has confirmed the wisdom of my decision." ECF No. 140-6 (Tr. of May 26, 2022 Preliminary Approval Hrg.) at 8:3-10. The Court set a final fairness hearing for October 17, 2022. ECF No. 136 ¶ 20.

The Court also approved the proposed class notice plan and the form of the short- and long-form notices, holding that the notices and manner of dissemination "meet the requirements of Rule 23 and due process, constitute the best notice practicable under the circumstances, and shall constitute due and sufficient notice to all persons and entities entitled thereto." *Id.* ¶¶ 9-10. The Court appointed JND Legal Administration, LLC ("JND") as the Settlement Administrator and provided deadlines for mailing, the website, and the toll-free number. *Id.* ¶¶ 8-14.

The Notice Program proceeded consistently with the Preliminary Approval Order and therefore met the requirements of Rule 23 and due process. JND mailed the approved short-form notice to potential Settlement Class members on June 17, 2022, using mailing addresses provided by GLAIC. *See* ECF No. 138 (Proof of Mailing and Supporting Declaration). Only 690 notices were returned as undeliverable without a forwarding address, and JND conducted skip tracing for those returned notices to forward 315 notices to updated addresses, of which only 11 were returned

as undeliverable. *See* Intrepido-Bowden Decl. ¶ 5. Through these methods, the direct mailing notice effort successfully reached an outstanding 98.1% of potential Settlement Class Member addresses. *See id.* ¶ 5. The long-form Settlement notice was posted on the class website (www.genworthcoisettlement.com) and a call-in line was established on June 17, 2022. ECF No. 138. As of September 1, 2022, the website has more than 1,500 page views. *See* Intrepido-Bowden Decl. ¶ 7. JND and Class Counsel have promptly responded to all questions and inquiries received from potential Settlement Class Members. *See* Sklaver Final Approval Decl. ¶ 29; Intrepido-Bowden Decl. ¶¶ 9.

On June 6, 2022, GLAIC sent Class Action Fairness Act ("CAFA") notices to the Attorney General of the United States and the State Attorneys General as required by 28 U.S.C. § 1715(b). *See* Sklaver Final Approval Decl. ¶ 30. GLAIC received questions from Delaware and Indiana regarding the lists of insureds in their states. GLAIC did not receive any objections to the Settlement from any Attorney General. *See id.*

On July 8, 2022, Class Counsel filed its Motion for Attorneys' Fees, Reimbursement of Litigation Expenses, and Incentive Awards. ECF Nos. 139-140. Pursuant to Federal Rule of Civil Procedure 23(e)(4) and the Court's Preliminary Approval Order (ECF No. 136), potential Settlement Class Members could opt out of the Settlement or object to the Settlement by August 1, 2022. No potential Settlement Class Member objected by that deadline (or since), and JND received only two opt-out requests. *See* Sklaver Final Approval Decl. ¶ 32; Intrepido-Bowden Decl. ¶¶ 11-12.

D. The Settlement Agreement

1. Settlement Class

The Settlement defines the Settlement Class as:

> All owners of Gold and Gold II universal life insurance policies issued, insured, or assumed by GLAIC, or its predecessors or successors, whose COI Rate Scales were changed as a result of the 2019 COI Rate Adjustment. Specifically excluded from the class are Class Counsel and their employees, GLAIC, its officers and directors and their immediate family members; the Court, the Court's staff, and their immediate family members; and the heirs, successors or assigns of any of the foregoing. Also excluded from the Class are owners of Gold and Gold II policies that have terminated as a result of the death of the insured on or before March 31, 2022, where the 2019 COI Rate Adjustment did not result in an Incremental COI Deduction before the death of the insured. For purposes of clarification only, the Class also does not include any policies issued by or insured by Genworth Life Insurance Company or its predecessors or successors.

2. Monetary and Nonmonetary Relief for Settlement Class Members

The Settlement awards both cash relief and non-cash relief worth over $44.8 million to the Settlement Class. The Settlement Agreement includes a cash Settlement Fund of up to $25 million, which has been reduced by a trivial amount to $24,997,078.25 for the two policies that opted out during the Rule 23(e)(4) opt-out period (resulting in the Final Settlement Fund). *See* Sklaver Final Approval Decl., Ex. 2 ¶ 2. The two policies that opted out during the Rule 23(e)(4) period accounted for only $175,000 of the over $2.1 billion in total face value for the Settlement Class through March 31, 2022 (~0.008155%). *See* Sklaver Final Approval Decl. ¶ 32. The Final Settlement Fund is equal to 163 percent of all COI overcharges collected by GLAIC from the Settlement Class Policies through March 31, 2022. *See id.* ¶ 37. No portion of the Final Settlement Fund will revert to GLAIC. *See id.*

The Settlement Agreement also provides two forms of significant non-cash relief. *First*, for a period of seven years after the date on which the Court approves the Settlement, "GLAIC agrees that COI rates on the Class Policies will not be increased above the COI Rate Scales adopted under the 2019 Adjustment." *See id.* ¶ 38. Thus, even if GLAIC has a future change in cost factors (including any alleged increase in mortality from COVID-19) that GLAIC contends supports a new COI rate schedule increase, the COI rate scale will not increase for 7 years. An expert with

extensive experience in the life insurance industry has opined that this nonmonetary relief is worth $19,506,664 to the Settlement Class. *See* ECF No. 140-12 (Declaration of Keith McNally ("McNally Decl.")) ¶ 11, Ex. A (Report). *Second*, "GLAIC agrees to not take any legal action (including asserting as an affirmative defense or counterclaim), or cause to take any legal action, that seeks to void, rescind, cancel, have declared void, or seeks to deny coverage under or deny a death claim for any Class Policy based on: (1) an alleged lack of valid insurable interest under any applicable law or equitable principles; or (2) any misrepresentation allegedly made on or related to the application for, or otherwise made in apply for the policy." Sklaver Final Approval Decl. ¶¶ 36, 38. Mr. McNally calculated that this nonmonetary relief adds an additional $382,453 of value for the Settlement Class, resulting in a total value of $19,889,117 in nonmonetary relief from the Settlement. *See* McNally Decl. ¶ 11.

3. Release

Once the settlement becomes final, the Settlement Class and certain related parties (referred to as the "Releasing Parties" in the Settlement Agreement) will release GLAIC and certain related parties (referred to as the "Released Parties" in the Settlement Agreement) from "all Claims asserted in the Action or arising out of the facts, transactions, events, occurrences, acts, disclosures, statements, omissions, or failures to act that were alleged or could have been alleged in the Action related to the 2019 COI Rate Adjustment." Sklaver Final Approval Decl., Ex. 2 ¶ 80. The Settlement Class will not release "(i) new claims that could not have been asserted in the Action because they are based upon a future COI Rate Scale increase that occurs after March 25, 2022 ("New COI Increase Claims"), (ii) claims relating to the COI Rate Scale increases imposed by GLAIC's affiliate Genworth Life Insurance Company, on Gold and Gold II policies issued, insured, and/or assumed by it, and (iii) claims at issue" in a case involving different policies in *TVPX ARS Inc. v. Genworth Life & Annuity Insurance Co.*, Case No. 3:18-cv-636-JAG (E.D.V.A.)

and Case No. 00-CV-217 (CDL) (M.D. Ga.), appeal filed, 22-11185-A (11th Cir.). *Id.* ¶¶ 28, 62.

4. Awards, Costs, and Fees

Class Counsel filed its motion for fees, expenses, and incentive awards on July 8, 2022. ECF Nos. 139-140. Class Counsel sought 33 1/3% of the Final Settlement Fund, incurred litigation expenses, and a $25,000 incentive award for each Class Representative, consistent with the Preliminary Approval Order. *Id.*; Sklaver Final Approval Decl. ¶ 31. Settlement Class Members were given the opportunity to object to the fee, expense, and incentive awards motion. No potential Settlement Class Member filed an objection or otherwise objected to the fee, expense, and incentive awards motion, either by the objection deadline or since. *See* Intrepido-Bowden Decl. ¶¶ 11-12.

Because the Final Settlement Fund was reduced by one additional opt-out received after the fee motion was filed, and Class Counsel committed to seeking 33 1/3% of the Final Settlement Fund after accounting for all opt-outs, Class Counsel will amend its requested attorneys' fees to $8,332,653.75, which is slightly lower than what was requested in the initial motion ($8,333,139.08). *See* Sklaver Final Approval Decl. ¶ 41; *compare* Dkt. 140 at 1. Class Counsel will concurrently file an updated Proposed Order for fees and expenses with this Motion.

5. Distribution Plan

The proposed plan of allocation, as set forth in the notice papers and which is described in ECF No. 132-9 and Exhibit 5 to the Sklaver Final Approval Declaration, distributes proceeds directly to Settlement Class Members on a *pro rata* basis after a minimum settlement payment is made to all Settlement Class Members, without the need for a claim form. The Court already preliminarily approved the proposed plan of allocation. ECF No. 136, ¶ 5. The allocation plan ensures that the proceeds will be distributed equitably and as many claimants as possible will receive a distribution. A Settlement Class Member's *pro rata* share of the Net Settlement Fund

after deducting all minimum relief payments shall be calculated by multiplying (a) the percentage of Incremental COI Deductions attributable to that Class Member's policy as of March 31, 2022, by (b) the Net Settlement Fund after deducting all minimum relief payments. Those damages will be determined in accordance with the methodology set forth in the Expert Report of Robert Mills (ECF No. 49-5), which determines the COI overcharges for a Policy as the difference between the COI charges actually assessed on the Policy since December 1, 2019, and the COI charges that would have been deducted from the Policy but-for the 2019 COI Increase. Mr. Mills has updated these calculations through March 31, 2022, using recently produced data.

Proceeds will be mailed within 30 days after the Final Settlement Date using the addresses that GLAIC maintains on file. *See* ECF No. 136, ¶ 17. Within one year plus 30 days after the date the Settlement Administrator mails the proceeds, any funds remaining in the Settlement Fund shall be re-distributed on a *pro rata* basis to Settlement Class Members who previously cashed their checks, unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair. *Id.* ¶ 18.

III. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL

A. Legal Standard

Federal Rule of Civil Procedure 23(e) provides that a class-action settlement must be presented to the Court for approval, and should be approved if the Court finds it "fair, reasonable, and adequate." *See* Fed. R. Civ. P. 23(e)(2). "[T]he district court has a fiduciary responsibility to ensure that the settlement is fair and not a product of collusion, and that the class members' interests were represented adequately." *1988 Trust for Allen Children Dated 8/8/88 v. Banner Life Ins. Co.* ("*Banner COI*"), 28 F.4th 513, 521 (4th Cir. 2022) (quoting *Sharp Farms v. Speaks*, 917 F.3d 276, 293-94 (4th Cir. 2019)).

In the Fourth Circuit, "[t]here is a strong judicial policy in favor of settlement to conserve scarce resources that would otherwise be devoted to protracted litigation." *Robinson v. Carolina First Bank NA*, No. 7:18-cv-02927-JDA, 2019 WL 719031, at *8 (D.S.C. Feb. 14, 2019) (citing *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158-59 (4th Cir. 1991) and *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 663 (E.D. Va. 2001)). Settlement is particularly favored "in the class action context." *West v. Cont'l Auto., Inc.*, No. 3:16-cv-00502-FDW-DSC, 2018 WL 1146642, at *3 (W.D.N.C. Feb. 5, 2018); *see also Lomascolo v. Parsons Brinckerhoff, Inc.*, No. 08-1310, 2009 WL 3094955, at *10 (E.D. Va. Sept. 28, 2009) ("There is an overriding public interest in favor of settlement, particularly in class action suits.").

Pursuant to the amendments to Rule 23(e)(2), a court may approve a settlement as "fair, reasonable, and adequate" after considering the following four factors:

> (A) class representatives and 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). The Rule 23 amendments, which became effective in December 2018, have not changed the overall standard for approving a class action settlement, *i.e.*, whether or not the settlement is fundamentally fair, adequate, and reasonable.

Historically, the Fourth Circuit has held that district courts should consider the factors set

forth in *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 159 (4th Cir. 1991) when evaluating a class action settlement. *See, e.g.*, *In re Genworth Fin. Securities Litig.*, 210 F. Supp. 3d 837, 839-41 (E.D. Va. 2016); *In re Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 254 (E.D. Va. 2009). The *Jiffy Lube* factors are consistent with the Rule 23(e)(2) factors. Under *Jiffy Lube*, to assess the threshold factor of the fairness of a settlement, courts consider, "(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 the class action litigation." *Banner COI*, 28 F.4th at 525. Analyzing these factors enables the Court to determine that "the settlement was reached as a result of good-faith bargaining at arm's length, without collusion . . . ." *Jiffy Lube*, 927 F.2d at 159.

Under the second *Jiffy Lube* threshold factor of the adequacy of the proposed settlement, courts consider, "(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." *Banner COI*, 28 F.4th at 529.

The Advisory Committee Notes to the 2018 amendments to the Federal Rules of Civil Procedure indicate that the factors set forth in Rule 23(e)(2) are not intended to "displace" any factor previously adopted by the court of appeals, but "rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Fed. R. Civ. P. 23(e)(2) Advisory Committee Notes to 2018 Amendments. And the Fourth Circuit has itself observed that the Rule 23(e)(2) factors largely overlap with the *Jiffy Lube* factors. *See In re Lumber Liquidators Chinese-Manufactured Flooring Prod. Mktg. Sales*

Practices & Prod. Liab. Litig., 952 F.3d 471, 484 n.8 (4th Cir. 2020) (noting that the *Jiffy Lube* "factors for assessing class-action settlements almost completely overlap with the new Rule 23(e)(2) factors"); *see also In re Peanut Farmers Antitrust Litig.*, No. 19-cv-1963, 2021 WL 3174247, at *2 (E.D. Va. July 27, 2021) ("Taking this substantial overlap into consideration, the Court will examine Plaintiffs' Motion for Settlement based upon the Rule 23(e)(2) factors."). In any event, each Rule 23(e)(2) and *Jiffy Lube* factor readily supports approval of the proposed Settlement.

In granting preliminary approval under Rule 23(e)(1), the Court already held that the Settlement likely meets the fair, reasonable, and adequate standard required by the Federal Rules and the Fourth Circuit. *See* ECF No. 136, ¶¶ 4-5 ("the Court will likely be able to find that the Settlement is fair, reasonable, and adequate considering the Rule 23(e)(2)(A)-(D) factors and the factors identified in *1988 Trust for Allen Children Dated 8/8/88 v. Banner Life Insurance Co.*, 28 F.4th 513, 525 (4th Cir. 2022)").[3]

B. Application of Rule 23(e)(2) and *Jiffy Lube* Factors

1. Class Representatives and Class Counsel Have Zealously Represented the Settlement Class.

In deciding whether to approve a class-action settlement, the Court should consider whether "the class representatives and class counsel have adequately represented the class." Fed. R. Civ. P. 23(e)(2)(A). This requirement is "met when (1) the named plaintiff[s] do[] not have interests antagonistic to those of the class; and (2) plaintiff's attorneys are qualified, experienced, and generally able to conduct the litigation." *Solomon v. Am. Web Loan, Inc.*, No. 4:17cv145, 2020

[3] Because the Court previously certified the Settlement Class, the Court does not need to recertify a class. *See* ECF No. 136, ¶ 3; *accord* William B. Rubenstein, 4 Newberg on Class Action § 13:16 (6th ed., June 2022 Update).

WL 3490606, at *2 (E.D. Va. June 26, 2020) (quoting *In re Neustar Inc. Sec. Litig.*, No. 1:14cv884, 2015 WL 5674798, at *4 (E.D. Va. Sept. 23, 2015)).

Consistent with their obligations, Class Representatives have remained active and informed participants in this litigation effort and were consulted on, and approved, the terms of the Settlement. Further, Class Representatives' interests continue to be aligned with other Settlement Class Members. Settlement Class Members and Class Representatives share an overriding, common interest in obtaining the largest monetary and nonmonetary recovery possible. *See* William B. Rubenstein, 1 Newberg on Class Actions § 3:58 (6th Ed., June 2022 Update) ("All that is required—as the phrase 'absence of conflict' suggests—is such sufficient similarity of interest such that there is no affirmative antagonism between the representative and the class." (citations omitted)). Class Representatives are part of the Settlement Class and suffered similar injuries as other Settlement Class Members: monetary losses associated with COI overcharges. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348-49 (2011) (the "class representative must be part of the class and possess the same interest and suffer the same injury as the class members) (citation and internal quotation marks omitted). There are no antagonistic interests here.

In preliminarily approving the class-action settlement, the Court has already found that Susman Godfrey was fit to serve as class counsel. *See also* ECF No. 21 at 2 (appointing Susman Godfrey as interim lead counsel). Class Counsel developed a deep understanding of the facts of the case and merits of the claims through: (i) a comprehensive investigation that involved, among other things, a review of publicly available information regarding the Company and input from industry experts regarding the contract language; (ii) engaging in extensive discovery efforts that included obtaining and reviewing more than 435,800 pages of documents and datasets, issuing subpoenas to thirteen reinsurers, three actuarial consultants, and one auditor, serving FOIA

requests on state regulators, and deposing ten highly technical witnesses, including six current and former Genworth employees, two third-party actuarial consultants, Genworth's actuarial expert, and Genworth's 30(b)(6) corporate representative; (iii) briefing on class certification, and (iv) opposing motions to exclude the opinions and testimony of Plaintiffs' expert witnesses. Since their appointment as Interim Lead Counsel, Class Counsel has continued to adequately represent the Class in both their vigorous prosecution of the Action and in their negotiation and achievement of the Settlement. The Court previously recognized Counsel's efforts, at the preliminary approval hearing, observing that, "I previously appointed plaintiffs and found lead counsel to adequately lead this case and their litigation conduct has confirmed the wisdom of my decision." *See* ECF No. 140-6 at 8:3-10. Class Counsel have been assisted by able and experienced Liaison Counsel, Holmes Costin & Marcus PLLC, and co-counsel for one of the Class Representatives, Bonnett Fairbourn Friedman & Balint, PC. Accordingly, as previously found in preliminarily approving the Settlement, Class Representatives and Class Counsel have adequately represented the Settlement Class.

2. The Settlement is the Product of Good Faith, Informed, and Arm's Length Negotiations by Experienced Counsel.

In weighing a class-action settlement at final approval, the Court must consider whether the settlement "was negotiated at arm's length." Fed. R. Civ. P. 23(e)(2)(B). Similarly, under the *Jiffy Lube* "fairness factors," the Court's analysis of whether the settlement was reached through good faith bargaining at arm's length includes considering the following four factors: "(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 relevant subject matter]." *In re Neustar Inc. Sec. Litig.*, No. 1:14-cv-885, 2015 WL 5674798, at *10 (E.D. Va. Sept. 23, 2015) (quoting *Jiffy Lube*, 927 F.2d at 159). Consideration of

all these factors demonstrates that the Settlement here was reached through arm's-length negotiations after vigorous litigation and with no hint of collusion.

In particular, the advanced posture of this case and the significant amount of discovery that was conducted before the Parties' agreement in principle dispel any concerns of possible collusion. *See Jiffy Lube*, 927 F.2d at 159 (acknowledging that a settlement reached "at a very early stage in the litigation and prior to any formal discovery, rais[es] questions of possible collusion"). Here, fact discovery had already been closed for more than five months before the parties reached the negotiated Settlement. Plaintiffs had already filed a motion for class certification that GLAIC vigorously contested, including by filing motions to exclude Plaintiffs' expert reports and testimony. *See* ECF Nos. 46-52, 57, 64, 67-68, 79-82, 95-96, 100-101.

Notably, the Parties completed both fact and expert discovery, which involved taking or defending 14 depositions (both fact and expert) and the production of more than 435,800 pages of documents and data sets. *See Winingear v. City of Norfolk, Va.*, No. 12-cv-560, 2014 WL 3500996, at *2 (E.D. Va. July 14, 2014) ("When discovery has been largely completed, this factor weighs in favor of approving the settlement."). The parties exchanged eleven expert reports. Class Representatives submitted expert reports from an actuarial expert, Howard Zail, and a damages expert, Robert Mills. GLAIC responded to the reports of these experts with two experts of their own.

At the time of settlement, the Parties had already litigated Plaintiffs' motion for class certification and Defendant's motions to exclude Plaintiffs' experts, and Defendant had filed a motion for summary judgment. When "several briefs have been filed and argued, courts should be inclined to favor the legitimacy of a settlement." *In re Mills Corp. Sec. Litig.*, 265 F.R.D. at 254. The extensive discovery and motion practice in this case provided each side with further insight to

evaluate the merits and, as discussed below, laid the groundwork for the arm's-length negotiations that ultimately resulted in the Settlement.

The settlement negotiations were conducted at arm's length by experienced class-action litigators with the assistance of an experienced mediator. In November 2021, Class Counsel and GLAIC's counsel participated in a full-day mediation session in Miami before the mediator, Rodney Max. *See* Max Decl. ¶¶ 10-11. In advance of the mediation, the parties filed mediation statements, along with exhibits, and prepared for the mediation through several phone calls with the mediator. Although the initial session did not result in settlement, two additional mediation sessions took place after the completion of discovery and after the February 14, 2022, telephone conference with the Court, where the Court indicated it was inclined to certify the class and deny any motion for summary judgment. An agreement to resolve the Action was not formally reached until after GLAIC provided confirmatory data that Class Counsel reviewed to confirm the adequacy of the Settlement amount.

Regarding the experience of counsel, Class Counsel is among the most highly qualified firms in the country in prosecuting cost of insurance class actions. "The final *Jiffy Lube* 'fairness' factor looks to the experience of Class Counsel in this particular field of law." *Mills*, 265 F.R.D. at 255-56. Counsel's experience was previously recognized by the Court when it was appointed Class Counsel. *See* ECF No. 21 at 3. Indeed, Class Counsel have a wealth of experience litigating and resolving COI class actions across the country and have been appointed to represent plaintiffs in numerous COI class actions. *See* Sklaver Final Approval Decl., Ex. 1; *see also, e.g.*, *TVPX ARS Inc. v. Lincoln Nat'l Life Ins. Co.*, No. 18-cv-2989, Dkt. 37 (E.D. Pa. Oct. 31, 2018); *Iwanski v. First Penn-Pac. Life Ins. Co.*, No. 18-cv-1573, Dkt. 37 (E.D. Pa. Oct. 31, 2018); *Brach Family Fund, Inc. v. AXA Equitable Life Ins. Co.*, No. 16-cv-740-JMF, Dkt. 145 (S.D.N.Y. Nov. 13, 2017);

Phoenix COI, 2013 WL 12224042, at *12 (in appointing Susman Godfrey as class counsel in *Phoenix COI*, noting that "[c]ounsel for plaintiffs is more than capable of representing the interest of the proposed Classes in this case, and defendant does not contend otherwise"). Courts recognize that the opinion of experienced and informed counsel favoring a settlement should be afforded substantial consideration in determining whether a class settlement is fair and adequate. *See In re Microstrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 665 (E.D. Va. 2001).

3. The Relief Provided by the Settlement is Adequate.

The proposed Settlement readily satisfies Rule 23(e)(2)(C) (and the *Jiffy Lube* adequacy factors).[4] Under Rule 23(e)(2)(C), the Court must consider whether "the relief provided for the class is adequate, taking into account . . . the costs, risks, and delay of trial and appeal," as well as other relevant factors. Fed. R. Civ. P. 23(e)(2)(C).

To determine whether a proposed settlement is fair, reasonable, and adequate, courts balance the continuing risks of litigation against the benefits afforded to class members through settlement. *See, e.g.*, *Neustar*, 2015 WL 5674798, at *11 (the *Jiffy Lube* adequacy analysis "weighs the likelihood of the plaintiff's recovery on the merits against the amount offered in settlement"). The Settlement provides more than $44.8 million in total relief to the Settlement Class, including $24,997,961.25 in cash relief that, on its own, is equal to 163% of COI overcharges for Settlement Class Members through March 31, 2022. This monetary relief compares favorably to other approved COI class action settlements. *See, e.g.*, *Phoenix COI*, 2015 WL 1087814, at *10-11, 13 (cash fund equal to 68.5% of overcharges); *37 Besen Parkway, LLC v. John Hancock Life Ins. Co.*,

[4] This factor under Rule 23(e)(2)(C) encompasses four of the five factors of the traditional *Jiffy Lube* adequacy analysis: "(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, [and] (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment." *Jiffy Lube*, 927 F.2d at 159.

No. 15-cv-9924 (S.D.N.Y. Jan. 18, 2019), ECF No. 145 at 19 (cash fund equal to 42% of COI overcharges). This is an excellent recovery for the Settlement Class, particularly in light of the risks of litigation and potential outcomes at trial. As discussed below, assuming that this Action were to continue to be litigated, Class Representatives would continue to face significant legal challenges. Although Class Representatives believe that the claims asserted against Defendant were strong and that substantial evidence supports their allegations, they recognize that the Action presented several risks to establishing both liability and damages.

a. Risks of Establishing Liability and Damages Support Approval of the Settlement.

Class Representatives would have faced challenges in proving to the ultimate finder of fact that their interpretation of the contract should prevail and that GLAIC breached the contract. Defendant argued in its motion for summary judgment that that there was no evidence supporting Plaintiffs' claim that it had increased COI rates "in order to" recoup prior losses and argued that Plaintiffs' theories of breach "rely on alleged actuarial meanings or attempts to enforce constraints that are not in the subject policies." ECF No. 119.

GLAIC also mounted challenges to Plaintiffs' damages model, arguing that, even if Plaintiffs prevail on liability, only a portion of the Incremental COI Deductions are properly awardable on damages. *See* ECF No. 67 at 26-28. Indeed, GLAIC even moved to strike Plaintiffs' expert reports in support of class certification on the grounds that Plaintiffs had not quantified the portion of the overcharges that were directly attributable to each alleged breach. *See* ECF No. 58 at 8-10. Although the Court denied those motions to strike, it concluded that GLAIC had raised this challenge "prematurely" and opined that "whether any decrease should offset the damages constitutes a merits question for the Court to address at a later stage." ECF No. 109 at 7.

Although Plaintiffs prevailed thus far in the face of challenges to class certification and

motions to exclude, the Court has not yet evaluated the merits of Plaintiffs' case. The challenges that Plaintiffs expect to face at summary judgment, trial, and in further appeals creates uncertainty and risks that weigh in favor of final approval.

b. Costs and Delay of Continued Litigation Support Approval of the Settlement.

In addition to the substantial risks and uncertainty inherent in continued litigation, the Parties face the certainty that further litigation would be expensive, complex, and time consuming. The fact that the Settlement eliminates the substantial delay and expense of summary judgment motions, *in limine* motions, trial, and likely appeals, a process that could possibly extend for years and might lead to a smaller recovery, or no recovery at all, strongly weighs in favor of approval. *See Winingear*, 2014 WL 3500996, at *2. In sum, the proposed Settlement would satisfy Rule 23(e)(2)(C)(i).

c. There is an Effective Process for Distributing Relief to the Settlement Class.

Rule 23(e)(2)(C) also instructs courts to consider whether the relief provided for the class is adequate in light of "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." The proposed "claims processing method should deter or defeat unjustified claims," but should not be "unduly demanding" on potential claimants. 2018 Advisory Committee Notes to Fed. R. Civ. P. 23(e)(2).

Here, the Court already preliminarily approved the proposed plan of allocation and distribution. ECF No. 136. Funds will be mailed to Settlement Class Members using GLAIC's database of Settlement Class member addresses. Sklaver Final Approval Decl., ¶ 45, Ex. 6. This plan of allocation and distribution, where funds are automatically distributed to class members on a *pro-rata* basis without a claims process, has frequently been determined to be fair, adequate, and reasonable. *See, e.g., In re Peanut Farmers Antitrust Litig.*, 2021 WL 3174247, at *4 ("This type

of distribution plan is commonly referred to as a *pro rata* distribution plan which has been previously approved by the Court in similar class action litigation."). The Court-appointed Claims Administrator, JND Settlement Administration, has successfully reached an outstanding 98.1% of potential Settlement Class Member addresses through the direct mailing notice effort. *See id.* Given the success of this Notice campaign, Class Counsel respectfully submits that the checks that will be provided to the Settlement Class through the same delivery method, without the need for a claim form, is adequate, accounting for the effectiveness of distributing the relief. Accordingly, the proposed Settlement satisfies Rule 23(e)(2)(C)(ii).

d. The Settlement Does Not Excessively Compensate Class Counsel.

As discussed in the previously filed Memorandum of Law in Support of Class Counsel's Motion for Attorneys' Fees, Reimbursement of Litigation Expenses, and Incentive Awards, the requested fee award of 33 1/3 percent of the Final Settlement Fund (i.e., the cash fund, exclusive of and not including the estimated $19,889,117 in nonmonetary relief), is well-within the percentages that courts in the Fourth Circuit have approved in class actions with comparable recoveries. ECF No. 140. No Settlement Class Member objected to the fee request. Class Counsel is also seeking payment of litigation expenses incurred during the prosecution of the Action and incentive awards for class representatives, routinely approved in the Fourth Circuit. *See, e.g.*, *Berry v. Schulman*, 807 F.3d 600, 613 (4th Cir. 2015) (observing that incentive awards are "fairly typical in class action cases"). Accordingly, the proposed Settlement satisfies Rule 23(e)(2)(C)(iii).

e. The Relief Provided in the Settlement is Adequate Taking Into Account All Agreements Related to the Settlement.

Rule 23(e)(2)(C)(iv) also requires the disclosure of any agreement between the Parties in connection with the proposed Settlement. The Settlement Agreement, signed by the Parties on May 6, 2022, identifies all agreements made in connection with the proposed settlement. Pursuant

to the Settlement Agreement, the Parties agreed to conditions under which GLAIC had the option to terminate the Settlement in the event that requests for exclusion from the Settlement Class exceeded a certain agreed-upon threshold, which was not triggered given the positive reaction to the Settlement by all eligible policy owners. Pursuant to the agreement, these (now mooted) terms may be submitted to the Court *in camera* or under seal.

4. Settlement Class Members Are Treated Equitably Relative to One Another.

Rule 23(e)(2)(D) addresses whether "the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2). The proposed distribution of the Settlement Fund treats Settlement Class members equitably because each Settlement Class member will receive a *pro-rata* share of the Settlement Fund depending on the amount that the Settlement Class Member was overcharged, with a minimum floor payment assured. Sklaver Decl., Ex. 6 ¶ 2. Similarly, the Releases treat all Settlement Class Members equitably relative to one another because, subject to Court approval, all Settlement Class Members will be giving GLAIC identical releases tied to the theory of liability asserted in this Action and no individual who does not receive a Cash Award will be providing any release of individual claims.

5. Reaction of the Settlement Class Supports Approval of the Settlement.

"The degree of opposition to the settlement" should also be considered on final approval of a settlement. *See Genworth*, 210 F. Supp. 3d at 842; *Mills*, 265 F.R.D. at 257 (explaining that the fifth *Jiffy Lube* factor "looks to the reaction of the Class to the proposed settlement and '[t]he attitude of the members of the Class, as expressed directly or by failure to object, after notice to the settlement . . . ."). "A lack of objections to settlement by class members and opt-outs from the class demonstrates low opposition and weighs in favor of approving a settlement." *Genworth*, 210 F. Supp. 3d at 842. Pursuant to the Preliminary Approval Order, the Court-appointed Settlement

Administrator, JND, mailed copies of the short-form notice to potential Settlement Class Members. Intrepido-Bowden Decl. ¶ 5. The short-form notice described the terms of the Settlement in plain language. JND's records show that 98.1 percent of potential Settlement Class Member addresses being successfully reached by direct mail. *See id.* As of the August 1, 2022 opt-out deadline and since, only two policies (out of 13,429 total Settlement Class Members) had opted out of the Settlement and no Settlement Class member had objected. *Id.* ¶¶ 11-12. This Class Member reaction supports final approval. *See, e.g., In re: Lumber Liquidators*, 952 F.3d at 485-86 (affirming approval of class-action settlement where 94 of the 178,859 class members who responded to the class-action settlement notice opted out of the settlement (about 0.05%), and 12 class members objected (about 0.06%)) (citing *Does 1-2 v. Déjà Vu Servs., Inc.*, 925 F.3d 886, 899 (6th Cir. 2019) (explaining that opt-out rate of about 0.2% and objection rate of about 0.02% supported ruling that the settlement is adequate), and *Flinn v. FMC Corp.*, 528 F.2d 1169, 1174 (4th Cir. 1975) (affirming approval of class-action settlement where 5 of 253 class members objected thereto)).

IV. PLAN OF ALLOCATION IS FAIR AND REASONABLE

In addition to seeking final approval of the Settlement, Class Representatives seek final approval of the proposed Plan of Allocation for the Settlement Proceeds. Approval of a plan of allocation for settlement proceeds is governed by the same standards of fairness and reasonableness applicable to the settlement as a whole. *See, e.g.*, *Microstrategy*, 148 F. Supp. 2d at 668 ("To warrant approval, the plan of allocation must also meet the standards by which the . . . settlement was scrutinized—namely, it must be fair and adequate."). "The proposed allocation need not meet standards of scientific precision, and given that qualified counsel endorses the

proposed allocation, the allocation need only have a reasonable and rational basis." *Mills*, 265 F.R.D. at 28.

The proposed Plan of Allocation for the proceeds of the Settlement is set forth in Exhibit 6 to the Declaration of Steven Sklaver, filed at ECF No. 132-9, and is re-submitted to the Court as Exhibit 5 to the Sklaver Final Approval Declaration. There were no objections to the proposed Plan of Allocation. The Court has already preliminarily approved the Plan. ECF No. 136, ¶ 5. The proposed Plan of Allocation was developed by Class Counsel in consultation with Class Representatives' damages expert. The Plan provides that each Settlement Class Member who is the current or most recent owner of a policy according to GLAIC's records will be issued a check for that policy equal to the minimum settlement relief payment of $100.00, plus that Recipient's *pro-rata* share of the Net Settlement Fund. No claim forms or claim processes shall be used; the cash funds will be directly mailed to all Settlement Class Members.

V. NOTICE SATISFIED RULE 23 AND DUE PROCESS

The Notice to the Settlement Class satisfied the requirements of Rule 23, which requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The Notice also satisfied Rule 23(e)(1), which requires that notice of a settlement be "reasonable"—*i.e.*, it must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Wal-Mart Stores, Inc. v. Visa U.S.A.*, 396 F.3d 96, 114 (2d Cir. 2005).

Both the substance of the Notice and the method of its dissemination to potential members of the Settlement Class satisfied these standards. The Notice included all the information required by Federal Rule of Civil Procedure 23(c)(2)(B). In accordance with the Preliminary Approval

Order, JND began mailing copies of the Short-Form Notice to potential Settlement Class Members on June 17, 2021. Intrepido-Bowden Decl. ¶ 4. In addition, JND caused the Long-Form Notice to be published on the class action website (www.genworthcoilitigation.com) and set up a toll-free telephone number. *Id.* ¶¶ 6-9. This combination of individual mail to all Settlement Class Members who could be identified with reasonable effort, supplemented by a website and phone number, was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B).

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant final approval of the Settlement, approve the Notice Program as compliant with Rule 23 and due process, and approve the plan of distribution as fair, reasonable, and adequate.

Dated: September 2, 2022

Respectfully submitted,

/s/ Kathleen J.L. Holmes

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CERTIFICATE OF SERVICE

I certify that on this 2nd day of September 2022, I electronically filed a copy of the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to all counsel of record.

/s/ Kathleen J.L. Holmes

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