

**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)

**DECLARATION OF STEVEN SKLAVER IN SUPPORT OF PLAINTIFFS' MOTION
FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

I, Steven G. Sklaver, hereby declare as follows:

1. I submit this declaration in support of final approval of the proposed class-action settlement between Plaintiffs Brighton Trustees, LLC, on behalf of and as trustee for Diamond LS Trust; Bank of Utah, solely as securities intermediary for Diamond LS Trust; and Ronald L. Daubenmier, individually and on behalf of the Class, and Defendant Genworth Life and Annuity Insurance Company ("GLAIC").

2. I am admitted *pro hac vice* before this Court. I am also member in good standing of the State Bars of California, Colorado, and Illinois. I am a partner in the law firm of Susman Godfrey L.L.P. and counsel of record for Plaintiffs and court-appointed Class Counsel in the above-captioned case. I have personal knowledge of the facts set forth herein or they are readily discernible, and if called to testify as a witness, could and would testify competently thereto.

3. Susman Godfrey has significant experience with class action litigation, including cost of insurance ("COI") class actions and settlements thereof. A copy of the firm's class action profile and the profiles of myself and my fellow class counsel at Susman Godfrey are attached hereto as **Exhibit 1**.

4. I was among the principal negotiators of the proposed class-action settlement. Following extensive negotiations, the parties entered a Joint Stipulation and Settlement Agreement on May 6, 2022. Attached hereto as **Exhibit 2** is a true and correct copy of the Settlement Agreement. It is the opinion of Class Counsel that this settlement is fair, adequate, and reasonable.

THE LITIGATION

5. Plaintiff Brighton Trustees, LLC, as trustee, owns a life insurance policy issued by First Colony Life Insurance Company, now GLAIC, in 1999 (“Pinsof Policy”). Plaintiff Bank of Utah is the custodian and securities intermediary for Diamond LS Trust, the trust managed by Brighton Trustees, LLC. Bank of Utah is responsible for collecting maturity proceeds and paying premiums for the policy. Attached as **Exhibit 3** hereto is a true and correct copy of the Pinsof Policy.

6. Plaintiff Ronald Daubenmier owns a life insurance policy issued by First Colony Life Insurance Company, now GLAIC, in 2002. Attached as **Exhibit 4** is a true and correct copy of the Daubenmier Policy.

7. In December 2019, GLAIC changed COI rates for Gold and Gold II universal life insurance policies (“Class Policies”), issued by First Colony between 1999 and 2007 (the “2019 COI Increase”).

8. Class Counsel immediately investigated whether the 2019 COI Increase was made in compliance with the terms of the Class Policies. Class Counsel worked with industry experts to do a comprehensive review of publicly available information about the Class Policies and the 2019 COI Rate Increase, including studying the GLAIC policy forms, analyzing trends in actuarial assumptions—detailed in GLAIC’s public filings with insurance regulators—from the

time the policies were issued, and reviewing the information GLAIC provided to policyowners about the 2019 COI Increase.

9. Plaintiffs Brighton Trustees LLC, as trustee, and Bank of Utah filed the first case against GLAIC on April 6, 2020. ECF No. 1. The complaint included a claim for breach of contract. *Id.* Plaintiff Ronald Daubenmier filed a second complaint against GLAIC on May 13, 2020. Case No. 3:20-cv-0240, ECF No. 1. On June 30, 2022, the Court granted the Parties' Consent Motion to Consolidate Related Cases and Plaintiffs' Unopposed Motion to Appoint Susman Godfrey LLP Interim Lead Counsel. ECF No. 21.

10. Plaintiffs filed a Consolidated Complaint on July 17, 2020. ECF No. 26. GLAIC filed an answer on to the Consolidated Complaint on August 31, 2020. ECF No. 35.

11. Fact discovery lasted until December 17, 2021, with supplemental discovery obligations under Federal Rule of Civil Procedure 26(e) continuing thereafter. During this time, Plaintiffs served twenty-three interrogatories, twenty requests for production of documents, and sixty-nine requests for admission. GLAIC produced more than 435,800 pages of documents and spreadsheets, including actuarial tables, policy-level data, and thousands of data sets, many with dozens of separate individual worksheets. Plaintiffs, in turn, responded to GLAIC's thirty-six interrogatories and forty-two requests for production.

12. Plaintiffs took a corporate representative deposition and six depositions of individual witnesses from GLAIC. Class Counsel's depositions included GLAIC's vice president and actuary for life projections and valuations, illustration actuary, and senior project manager, as well as the COI actuary responsible for day-to-day operations on the COI project. Plaintiffs' 30(b)(6) deposition notice included thirty-six topics on multiple subparts, including topics on technical data issues. The parties met and conferred for two months on the Rule 30(b)(6) topics

and filed a joint discovery brief to seek the Court's guidance on matters where the parties could not reach resolution. GLAIC also deposed Plaintiffs Brighton Trustees, LLC, as trustee, and Ronald Daubenmier.

13. GLAIC's productions included detailed policy-level data, providing information on historical payments, deductions, and credit history for each universal life insurance policy in the putative class. Class Counsel, working with Plaintiffs' damages expert Robert Mills, spent significant time processing and analyzing this data. With the assistance of Mr. Mills, Class Counsel drafted detailed topics about policy data for Plaintiffs' Federal Rule of Civil Procedure 30(b)(6) notices.

14. Plaintiffs also issued subpoenas to thirteen reinsurers, three actuarial consultants, and one auditor that worked with GLAIC, including Milliman, Willis Towers Watson, Oliver Wyman, and KPMG. These subpoenas resulted in the production of relevant documents related to the 2019 COI Increase. 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 it 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.

15. Plaintiff has also made Freedom of Information requests to state insurance departments throughout the United States relating to GLAIC's 2019 COI increase.

16. Expert discovery related to class certification took place in the fall of 2021. On August 16, 2021, Plaintiffs filed expert reports in support of class certification from two experts: actuarial expert Howard Zail and damages expert Robert Mills. These reports totaled 78 pages and were supported by 9,984 pages of exhibits, attachments, and appendices. On November 1, 2021, GLAIC filed an expert report in opposition to class certification from actuarial expert Lisa Kuklinski. This report totaled 52 pages with 18 pages of appendices. On December 20, 2021, Plaintiffs produced reply reports for their experts. The reply reports totaled 45 pages with 43 pages of appendices. All three experts were subsequently deposed.

17. Expert merits discovery commenced in 2022. On January 24, 2022, Plaintiffs served opening merits reports from Mr. Zail and Mr. Mills. These reports totaled 151 pages and were supported by 9,953 pages of exhibits, attachments, and appendices. On February 24, 2022, GLAIC produced merits reports from Ms. Kuklinski and actuarial expert Craig Merrill, totaling 120 pages with 27 pages of exhibits. On March 8, 2022, Plaintiffs produced reply reports for both their experts. The reply reports totaled 84 pages.

18. Plaintiffs' opening motion for class certification was filed on August 16, 2021; GLAIC's opposition was filed on November 1, 2021; and Plaintiffs' reply was filed on December 20, 2021. ECF Nos. 49, 67-68, 100-101. Collectively, Plaintiffs filed 48 pages of briefing supported by 45 exhibits, totaling hundreds of additional pages in addition to Plaintiffs' expert reports in support of class certification. GLAIC filed a 30-page opposition brief, supported by the declaration of GLAIC actuary Carrie Jaso and 18 exhibits.

19. GLAIC also moved to exclude Plaintiffs' expert testimony and reports in support of class certification. GLAIC filed motions to exclude Messrs. Zail and Mills on November 1, 2021; Plaintiffs filed oppositions on December 6, 2021; and GLAIC filed replies on December

20, 2021. ECF No. 58, 64, 80, 82, 95, 96. GLAIC filed 54 pages of briefing in support of its motions, and Plaintiffs filed 37 pages of briefing in opposition.

20. On February 9, 2022, the Court denied GLAIC's motions to exclude. ECF No. 109. The Court concluded that it could rely on Mr. Zail's testimony at the class certification stage "for his demonstration that common evidence can identify the class members and that Genworth used common methods in redetermining the COI Rate." *Id.* at 7. The Court also found Mr. Mills' methods reliable "[w]ith respect to comparing the original COI Rate with the redetermined COI Rate to determine the amount of damages." *Id.* at 7. It also concluded that "at the class certification stage," it could "rely on Mills' testimony and report in determining whether Plaintiffs can present a damages model that will prevent individual damages issues from predominating over common issues." *Id.* at 8.

21. On February 14, 2022, the Court convened a telephone conference with all parties. A transcript of the telephone conference is attached as **Exhibit 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. Hearing Tr. at 4:17-21. Without prohibiting the parties from filing dispositive motions or pre-judging the issues, the Court, by this point very familiar with the expert reports, explained that Genworth would not likely prevail on summary judgment because of the genuine dispute of facts identified by the experts. *Id.* at 4:24-5:2 ("[I]t's also clear to me that summary judgment is a waste of time in this case. There's going to be a genuine dispute as to material fact. Just your experts alone is going to create that."). The Court exhorted the parties to settle. *Id.* at 6:8-10 ("So to me, this is a case that needs to settle, and I'd like to see if you can get something done over the next couple weeks."); *id.* at 5:13-15 ("And you all had engaged in private mediation last year, and I understand it

wasn't fruitful. I think this is a case that needs to settle."); *id.* at 9:12-16 ("I really want you to put every effort that you can into settling this case.").

22. GLAIC filed a motion for summary judgment on March 16, 2022. ECF No. 119. The Parties reached a Settlement Agreement before Plaintiffs' deadline to oppose the motion.

MEDIATION, PRELIMINARY APPROVAL, AND CLASS NOTICE

23. As stated above, I was one of the principal negotiators of the proposed class-action settlement. Following extensive, arms-length, adversarial negotiations over multiple months between experienced and knowledgeable counsel on all sides, the parties entered into the Settlement Agreement (Exhibit 2) on May 6, 2022. It is the opinion of Class Counsel that this settlement is fair, adequate, and reasonable.

24. The parties have mediated and exchanged numerous offers and counter-offers throughout the life of the case. The parties first conducted an in-person mediation with experienced mediator Rodney Max in Miami on October 17, 2021. With the encouragement of the Court, the parties reopened the settlement dialogue and scheduled additional mediations with Mr. Max after the February 14, 2022, telephone conference. Those remote mediation sessions took place on March 12 and March 25, 2022, by Zoom. The parties reached an agreement in principle after the last remote 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.

25. 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.

26. After the mediation, in April 2022, GLAIC supplemented its damages data production through March 31, 2022. Using the methodology described in the August 16, 2021 Expert Report of Robert Mills (ECF Nos. 49-5, and in advance of the mediation, Mr. Mills calculated overcharges for the Class Policies through March 31, 2022. The overcharges through that date totaled \$15,319,14.00.

27. Class Counsel has actively litigated this case for years—through fact and expert discovery, and class certification—and is well versed in all the factual and legal issues posed by this litigation. Before mediation, Class Counsel took steps to ensure that it had all the necessary information to advocate for a fair, adequate, and reasonable settlement that serves the best interests of the Settlement Class. During mediation and in the settlement discussions that followed, Class Counsel aggressively advocated for the class, while accounting for the strengths and weaknesses of the claims asserted, the risks of continued litigation and trial, and the likelihood of recovery. By the time the Settlement was reached, Class Counsel were well informed of material facts, and the negotiations were hard-fought and non-collusive.

28. The Court granted preliminary approval of the proposed Settlement on June 3, 2022. ECF No. 136. The Court approved Plaintiffs' proposed notice procedures, appointed JND Legal Administration, LLC, as the Settlement Administrator, and set deadlines for final approval briefing. *Id.* ¶¶ 8-10, 17-20.

29. The approved short-form Settlement was mailed to potential Settlement Class Members on June 17, 2022. ECF No. 138. That same day, the long-form Settlement Notice was posted on the class website (www.genworthcoilitigation.com) and a call-in line was established. Plaintiffs worked with JND to continuously and timely update the website with documents filed

during the class notice and approval process, and to promptly respond to all questions and inquiries received from potential Settlement Class Members.

30. The required Class Action Fairness Act Notice was sent by GLAIC to the applicable Attorneys General on June 6, 2022. GLAIC received questions from Delaware and Indiana regarding the list of insureds in each state. GLAIC did not receive any objections to the Settlement from any Attorney General.

31. On July 8, 2022, Class Counsel filed its Motion for Attorneys' Fees, Reimbursement of Litigation Expenses, and Incentive Awards. ECF Nos. 139-140. In its motion, Class Counsel requested attorneys' fees in the amount of \$8,333,139.08, reimbursement of litigation expenses in the amount of \$800,981.03, and a \$25,000 incentive award for each named Plaintiff. The motion and supporting documents were posted to the Class Website the next business day (July 11).

32. The Court's Preliminary Approval Order included an opt-out period pursuant to Federal Rule of Civil Procedure 26(e)(4). ECF No. 136, ¶ 15. This opt-out period ended August 1, 2022. Two policies timely and validly opted out: 2967990 and 5689800. These two policies accounted for \$175,000 (~0.008155%) of the \$2,145,926,009 total Specified Amount, as of March 31, 2022, of all Policies owned by members of the Class.

33. The Court's Preliminary Approval Order also stated that potential Settlement Class Members could object to the Settlement by filing a written objection with the Court and serving any such written objection on counsel for the respective parties no later than 45 calendar days after the Notice Date. ECF No. 136, ¶ 19. The deadline to file objections was August 1, 2022. No potential Settlement Class Member filed an objection by this date. There have been no untimely objections filed as of September 1, 2022.

34. The Final Fairness Hearing is set for October 17, 2022 at 3:00 p.m. before the Honorable David J. Novak of the United States District Court for the Eastern District of Virginia, Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse, 701 East Broad Street, Richmond, VA 23219.

35. As of July 8, 2022, the total number of hours expended on this litigation by Class Counsel is 3650.6 hours. *See* ECF Nos. 140-1, ¶¶ 32, 40, 41; 140-7, ¶¶ 9, 11; 140-9, ¶¶ 9, 12.

THE SETTLEMENT AGREEMENT

36. The specific terms and conditions of the Settlement are set forth in the Settlement Agreement (Exhibit 2). The monetary and non-monetary benefits for the Settlement Class are the following:

- **CASH:** A cash Settlement Fund of up to \$25,000,000. The Settlement Fund is decreased on a *pro rata* basis measured by multiplying the amount of the Settlement Fund (i.e., \$25,000,000) by a fraction where (i) the numerator is the combined Specified Amount as of March 31, 2022 (as that term is defined in the Policies) of the Policies that opt-out of the Settlement Class and (ii) the denominator is the total Specified Amount, as of March 31, 2022, of all Policies owned by members of the Class. This results in a Final Settlement Fund of \$24,997,961, which is calculated using the following formula: $((\$175,000 / \$2,145,926,009) \times \$25,000,000)$.¹
- **COI RATE FREEZE:** A total and complete freeze on any cost of insurance increase for Class Policies for seven years. Thus, even if GLAIC has a future change in enumerated factors that would otherwise permit a COI rate increase under the terms of the Class Policies—including any cost factors that may have increased due to any surge in mortality due to the COVID-19 pandemic—GLAIC will not increase COI rates for seven years. Policyholders now can predict, with certainty, what their COI obligations will be for a substantial period of time.

¹ In this formula, \$2,145,926,009 is the total Specified Amount, as of March 31, 2022, of all Policies owned by members of the Class, \$175,000 is the combined Specified Amount as of March 31, 2022 (as that term is defined in the Policies) of the Policies that opt-out of the Settlement Class, and \$25,000,000 is the Settlement Fund. Note that \$24,997,961.25 is slightly lower than the Final Settlement amount listed in the Fee Motion (\$24,999,417.50) because the second opt out was received after the filing of that motion.

- **VALIDITY STIPULATION & STOLI WAIVER:** As part of the Settlement, GLAIC has agreed not to challenge the validity and enforceability of any eligible policies owned by participating Class members on the grounds of lack of an insurable interest or misrepresentations in the application for such policies. Class members now have the assurance that a death benefit will be paid if an otherwise valid claim for the policy proceeds is submitted.

37. In my opinion, the cash payment alone adequately compensates the members of the Settlement Class for their damages in view of the risks of litigation. The Final Settlement Fund of \$24,997,961.25 represents 163% of the total COI overcharges through March 31, 2022, for the Settlement Class Policies. The Settlement Class will further benefit because checks will be mailed automatically to eligible Class Members, with no need to fill out claim forms, and none of the cash in the Final Settlement Fund will be returned to GLAIC. Furthermore, any cash proceeds remaining after the initial distribution will be redistributed to Settlement Class Members (if feasible).

38. In addition to the cash payment to the Class, the Settlement Agreement states GLAIC will provide two non-monetary benefits to the Class: (i) a promise not to raise COI rates for the next 7 years (the “COI Rate Freeze”), and (ii) a promise not to contest a death claim on the grounds that the policy lacks an insurable interest or that the application policy contained misrepresentations (the “Validity Stipulation”). As described in the Declaration of Keith McNally and the “Report on the Value of the Non-Monetary Benefits Achieved in the Class Action Settlement with GLAIC,”² a reasonable estimate of the value of the COI Rate Freeze is \$19,506,664 and a reasonable estimate of the value of the Validity Stipulation is \$382,453. These non-monetary guarantees, totaling \$19,899,117 provide substantial benefits to the Class that would not have been obtained even if the litigation had been successful.

² Filed concurrently with the “Motion for Attorneys’ Fees, Reimbursement of Litigation Expenses, and Incentive Awards” on July 8, 2022, as ECF Nos. 140-12 and 140-13.

39. In exchange for the monetary and nonmonetary benefits, the Settlement Class and certain related parties will release GLAIC and certain related entities 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 Change Adjustment. Released Claims do not include Excluded Claims.” Ex. 2 ¶ 80.

40. The Settlement Class will not release “Excluded Claims,” which include “(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 Genworth Life Insurance Company, on Gold and Gold II policies issued, insured, and/or assumed by it, and (iii) claims at issue in the TVPX Action. New COI Increase Claims are limited to claims and damages that could not have been included in the Action because a future COI Rate Scale increase has not yet taken place, but do not include any claims challenge the COI Rates and/or COI Rate Scales adopted under the 2019 COI Rate Adjustment. To the extent that a Settlement Class Member is an owner of both a GLAIC Policy and a Genworth Life Insurance Company policy (or any other policy that is not a Class Policy), this release will only be applicable for the GLAIC policy and not any other policy.” *Id.* ¶¶ 62, 80.

41. Class Counsel stated in the Motion for Preliminary Approval that it would seek attorneys’ fees in an amount not to exceed 33 1/3% of the gross monetary benefits only, viewed in isolation from the non-monetary benefits. *See* ECF No. 140 at 1, 14. Class Counsel is therefore seeking an award of \$8,332,653.75 (33 1/3% of \$24,997,961.25 Final Settlement Fund). Note that this amount is slightly lower than the amount listed in the Attorneys’ Fee

motion due to the timely opt out received after that motion was filed (\$8,333,139.08, which was 33 1/3% of \$24,999,417.50).

42. Class Counsel has actively litigated this case for years—through fact and expert discovery, *Daubert* motions, and class certification—and is well versed in all the factual and legal issues posed by this litigation. Before mediation, Class Counsel took steps to ensure that it had all the necessary information to advocate for a settlement that serves the best interests of the Settlement Class. During mediation and in the settlement discussions that followed, Class Counsel aggressively advocated for the class, while accounting for the strengths and weaknesses of the claims asserted, the risks of continued litigation and trial, and the likelihood of recovery.

43. It is the opinion of Class Counsel that the \$24,997,961.25 Final Settlement Fund represents an excellent monetary recovery for the Settlement Class. The non-monetary relief adds substantial value for the Settlement Class in the amount of \$19,889,117, for a total Settlement value of \$44,887,078.25. This Settlement represents an especially great result because no part of the Final Settlement Fund will be returned to GLAIC.

PLAN OF DISTRIBUTION

44. The proposed Plan of Distribution is attached as **Exhibit 6**.

45. Funds will be mailed to Class Members using GLAIC's database of Class Member addresses. Because GLAIC maintains information about each Settlement Class Member, including historical COI charges, and each insured's contact information, Settlement Class Members need not submit claims or provide supporting documentation to receive a cash award.

46. The method of distribution will ensure that all Settlement Class Members are equitably compensated and is designed to maximize the number of Settlement Class Members to

receive proceeds from the Settlement. It is Class Counsel's opinion that this distribution plan is fair, reasonable, and equitable.

47. No potential Settlement Class Member objected to the Plan of Distribution.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 2nd day of September, 2022, in Los Angeles, CA.

/s/ Steven G. Sklaver
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Class Counsel

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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