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

FRED HANEY, MARSHA MERRILL, SYLVIA RAUSCH, STEPHEN SWENSON, and ALAN WOOTEN, individually, and on behalf of all others similarly,

Plaintiffs,

v.

GENWORTH LIFE INSURANCE COMPANY and GENWORTH LIFE INSURANCE COMPANY OF NEW YORK,

Defendants.

Civil Action No.: 3:22-cv-00055-REP

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DIRECT NOTICE OF PROPOSED SETTLEMENT TO THE CLASS

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. PROCEDURAL HISTORY OF THE LITIGATION 5

III. THE SETTLEMENT TERMS 8

IV. ARM'S-LENGTH SETTLEMENT NEGOTIATIONS 15

V. THE SETTLEMENT WARRANTS PROVIDING NOTICE TO THE CLASS 16

A. The Proposed Settlement Is Procedurally Fair 17

B. The Settlement Is Substantively Adequate 19

C. The Remaining Amended Rule 23(e)(2) Factors Are Also Met 21

1. Plaintiffs and Their Counsel Have Adequately Represented the Class 21

2. The Proposed Method for Distributing Relief Is Effective 21

3. Attorneys' Fees 23

4. The Parties Have No Other Agreements 25

5. Class Members Are Treated Equitably 25

VI. CERTIFICATION OF A CLASS IS APPROPRIATE 25

A. The Class Satisfies the Requirements of Rule 23(a) 26

1. Numerosity and Identifiability of the Class 26

2. Commonality 26

3. Typicality 27

4. Adequate Representation 28

B. Rule 23(b)(3) Is Satisfied 30

VII. NOTICE TO THE CLASS SHOULD BE APPROVED 32

VIII. PROPOSED SCHEDULE OF SETTLEMENT EVENTS 33

IX. CONCLUSION 34

TABLE OF AUTHORITIES

Cases **Page**

Affiliated Ute Citizens v. United States,
406 U.S. 128 (1972) 20, 30, 31

Allen v. Lloyd's of London,
975 F. Supp. 802 (E.D. Va. 1997) 24

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997) 25, 30, 32

Amgen Inc. v. Conn. Ret. Plans & Tr. Funds,
568 U.S. 455 (2013) 31

Ansin v. River Oaks Furniture, Inc.,
105 F.3d 745 (1st Cir. 1997) 31

Boeing Co. v. Van Gemert,
444 U.S. 472 (1980) 24

Castle v. Capital One, N.A.,
No. WMN-13-1830, 2014 WL 176790 (D. Md. Jan. 15, 2014),
aff'd, 593 F. App'x 223 (4th Cir. 2015) 31

Commonwealth v. Ortho-McNeil-Janssen Pharms., Inc.,
52 A.3d 498 (Pa. Commw. Ct. 2012) 31

Deiter v. Microsoft Corp.,
436 F.3d 461 (4th Cir. 2006) 28

Edens v. Goodyear Tire & Rubber Co.,
858 F.2d 198 (4th Cir. 1988) 31

EQT Prod. Co. v. Adair,
764 F.3d 347 (4th Cir. 2014) 26

Henderson v. Verifications Inc.,
No. 3:11cv514-REP, 2013 WL 12146748 (E.D. Va. Mar. 13, 2013) 13

In re BearingPoint, Inc. Sec. Litig.,
232 F.R.D. 534 (E.D. Va. 2006) 32

In re Celebrex (Celecoxib) Antitrust Litig.,
No. 2:14-cv-00361, 2018 WL 2382091 (E.D. Va. Apr. 18, 2018) 13

In re Comput. Scis. Corp. Sec. Litig.,
288 F.R.D. 112 (E.D. Va. 2012) 27, 28

Page

In re Facebook Biometric Info. Priv. Litig.,
No. 15-CV-03747-JD, 2021 WL 757025 (N.D. Cal. Feb. 26, 2021), 522 F. Supp. 3d 617, 622 (N.D. Cal. 2021), *aff'd*, No. 21-15555, slip op. (9th Cir. Mar. 17, 2022).....3

In re Genworth Fin. Sec. Litig.,
210 F. Supp. 3d 837 (E.D. Va. 2016) 13

In re Genworth Fin. Sec. Litig.,
No. 3:14-cv-682-JAG, 2016 WL 7187290 (E.D. Va. Sept. 26, 2016).....24

In re Jiffy Lube Sec. Litig.,
927 F.2d 155 (4th Cir. 1991) ..... *passim*

In re MicroStrategy Inc. Sec. Litig.,
110 F. Supp. 2d 427 (E.D. Va. 2000) 28

In re Mills Corp. Sec. Litig.,
257 F.R.D. 101 (E.D. Va. 2009) 26

In re Mills Corp. Sec. Litig.,
265 F.R.D. 246 (E.D. Va. 2009) 17, 19

In re NeuStar, Inc. Sec. Litig.,
No. 1:14CV885, 2015 WL 5674798 (E.D. Va. Sept. 23, 2015) ..... *passim*

In re NII Holdings, Inc. Sec. Litig.,
311 F.R.D. 401 (E.D. Va. 2015) 29

In re Tyco Int'l, Ltd. Multidistrict Litig.,
MDL No. 02-1335-PB, 2006 U.S. Dist. LEXIS 58278 (D.N.H. Aug. 15, 2006) 31

In re U.S. Foodservice Inc. Pricing Litig.,
729 F.3d 108 (2d Cir. 2013).....31

Knurr v. Orbital ATK, Inc.,
No. 1:16-cv-01031-TSE-MSN, 2019 WL 3317976 (E.D. Va. June 7, 2019).....13, 24

Mills v. Elec. Auto-Lite Co.,
396 U.S. 375 (1970).....24

Page

Moore v. PaineWebber, Inc.,
306 F.3d 1247 (2d Cir. 2002).....31

Ryals v. Strategic Screening Sols., Inc.,
No. 3:14-cv-00643-REP, 2016 WL 7042947 (E.D. Va. Sept. 15, 2016) 13

Skochin v. Genworth Fin., Inc.,
No. 3:19-cv-49, 2020 WL 6532833 (E.D. Va. Nov. 5, 2020) 27

Skochin v. Genworth Fin., Inc.,
No. 3:19-cv-49, 2020 WL 6697418 (E.D. Va. Nov. 12, 2020) ..... *passim*

Soutter v. Equifax Info. Servs., LLC,
307 F.R.D. 183 (E.D. Va. 2015) 26

Stanich v. Travelers Indem. Co.,
249 F.R.D. 506 (N.D. Ohio 2008) 30

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011).....27

STATUTES, RULES AND REGULATIONS

28 U.S.C. §2201.....7

Federal Rules of Civil Procedure
Rule 23.....27, 30, 33
Rule 23(a) 26
Rule 23(a)(1).....25, 26
Rule 23(a)(2)..... 25
Rule 23(a)(3).....25, 27
Rule 23(a)(4).....25, 28
Rule 23(b)(3).....30, 32
Rule 23(e) 16, 23
Rule 23(e)(1).....5, 16
Rule 23(e)(1)(A) 5
Rule 23(e)(1)(B) 16
Rule 23(e)(1)(B)(ii).....4
Rule 23(e)(2).....16, 17

Page

Rule 23(e)(2)(A) 21
Rule 23(e)(2)(B).....16, 17
Rule 23(e)(2)(C)(i).....16
Rule 23(e)(2)(C)(ii).....21
Rule 23(e)(2)(C)(iii).....23
Rule 23(e)(2)(C)(iv).....25
Rule 23(e)(2)(D) 25
Rule 23(e)(3).....16

SECONDARY AUTHORITIES

Brian T. Fitzpatrick, *et al*., *An Empirical Look at Compensation in Consumer Class Actions*, 11 N.Y.U. J. L. & BUS. 767, 770 (2015) 2

Staff Report, *Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns* (F.T.C. Sept. 2019) 1, 3

William B. Rubenstein, *Newberg on Class Actions* §3:11 (5th ed. 2013).....26

Plaintiffs Fred Haney, Marsha Merrill, Sylvia Rausch, Stephen Swenson, and Alan Wooten (collectively, "Named Plaintiffs"), pursuant to Rule 23(a), (b)(3), and (e)(1) of the Federal Rules of Civil Procedure, and the Court's February 1, 2022 Order (ECF No. 12), respectfully move for entry of an Order: (1) directing notice of the pendency and proposed Settlement of this class action ("Settlement"); and (2) scheduling a hearing for final approval of the Settlement. The Settlement is set forth in the Settlement Agreement,[1] attached as Exhibit 1 to the Declaration of Brian D. Penny in Support of Plaintiffs' Motion to Direct Notice of Proposed Settlement to the Class ("Penny Declaration" or "Penny Decl."), filed herewith.

I. INTRODUCTION

The Settlement is an excellent result for the Class because it provides Class Members with material and comprehensive information about Genworth's future plans to seek additional rate increases (the "Disclosures"), as well as the opportunity to choose from a menu of special election options that could reduce policyholders' premiums, provide substantial monetary damages payments, or enhance the value of their paid-up policy options ("Special Election Options"). Depending on the election made by a Class Member, Cash Damages payments for each individual Class Member who makes an election will range from $1,000 to $10,000.

In terms of monetary damages, the available financial benefits for Class Members are significant and far outweigh those of other consumer class action settlements. *See, e.g.*, Staff Report, *Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns*, at 11 (F.T.C. Sept. 2019) ("Half of the settlements in our sample provided median compensation of $69 or more,

[1] Unless otherwise stated or defined, all capitalized terms used herein shall have the meanings provided in the Settlement Agreement. All citations, internal quotations, and footnotes are omitted and emphasis is added, unless otherwise indicated.

and a quarter provided median compensation of $200 or more."), Penny Decl., Exhibit 3; Brian T. Fitzpatrick, *et al*., *An Empirical Look at Compensation in Consumer Class Actions*, 11 N.Y.U. J. L. & BUS. 767, 770 (2015) ("the average payout [in 15 studied consumer class action settlements (13 of which were MDLs)] ranged from $13 to $90, representing between 6% and 69% of average class member damages (even after deducting attorneys' fees)."), Penny Decl., Exhibit 4.

The monetary damages provided by the Settlement are made all the more significant when combined with the opportunity for Class Members to reevaluate their coverage and premiums in light of the Disclosures and then make a new election regarding benefits going forward if they so choose. And as a result of the Settlement, Class Members' elections will be based on enhanced Disclosures relating to Genworth's plan(s) for future rate increases, which Plaintiffs contend allow them to make more informed decisions. These Settlement benefits constitute not only a fair recovery, but a substantial recovery for the Class that matches the relief sought in the Complaint and ranks among the highest echelon of possible outcomes.

This Settlement is similar in structure and magnitude to another settlement between Genworth and some of its other long-term care ("LTC") policyholders, which this Court found to be fair and adequate. *See Skochin v. Genworth Fin., Inc*., No. 3:19-cv-49, 2020 WL 6697418 (E.D. Va. Nov. 12, 2020). It is also similar in structure and magnitude to the pending settlement in *Halcom v. Genworth Life Ins. Co.*, No. 3:21-cv-19, which is under consideration for final approval by this Court. While the Policyholders that make up the Class in this case are not the same as those in *Skochin* or in *Halcom*, the instant action alleges a course of conduct by Genworth that is substantially similar to that alleged in those two cases, and the terms of the Settlement are very much comparable. Notably, with approximately 345,000 affected policyholders, this Class is essentially as large as the *Skochin* (approximately 207,000 members) and *Halcom* (approximately 144,000 members) classes *combined*.

Moreover, the Parties are able to provide the Court with current data concerning the *Skochin*

settlement administration that may serve as a useful tool when evaluating this similar settlement. At this point, approximately 95% of the *Skochin* settlement has been fully implemented (meaning that 95% of *Skochin* settlement class members have received a Special Election Letter and their time to make an election has fully run). Of that portion of the *Skochin* settlement class, approximately 28% of *Skochin* class members in premium-paying status have made an election. This is an impressive "claims rate" and indicates the *Skochin* class members' very favorable response to the options afforded them. *Compare, e.g.*, *In re Facebook Biometric Info. Priv. Litig.*, 522 F. Supp. 3d 617, 622 (N.D. Cal. 2021), *aff'd*, No. 21-15555, slip op. (9th Cir. Mar. 17, 2022) (approving consumer class settlement and lauding the "claims rate of approximately 22%, a result that vastly exceeds the rate of 4-9% that is typical for consumer class actions") (citing F.T.C., *Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns*, at 11 ("Across all cases in our sample requiring a claims process, the median calculated claims rate was 9%, and the weighted mean (i.e., cases weighted by the number of notice recipients) was 4%.")); *see also id.* at 629 ("a claims rate of around 22%" is "an unprecedentedly positive reaction by the class."). Plaintiffs reasonably expect that the proposed Settlement in this case could prompt a similarly favorable reaction from this Class.

Moreover, and as in *Skochin* and *Halcom*, this impressive recovery for the Class was obtained after complex settlement negotiations including two separate mediation sessions, spanning three full days, before an experienced mediator, interspersed, and followed by significant and meaningful information sharing, investigation, and confirmatory discovery. Based on Plaintiffs' counsel's substantial experience as class action counsel and specifically with the knowledge and insight gained as counsel in *Skochin* and *Halcom*, they were able to prudently evaluate the merits of Plaintiffs' claims, including the risks to recovery. To reach the Settlement, the Parties engaged in extensive, arm's-length negotiations overseen by Rodney A. Max of Upchurch, Watson, White & Max Mediation Group, who previously mediated the *Skochin* and *Halcom* settlements. See Declaration of

Rodney A. Max ("Max Decl."); Penny Decl., Exhibit 2. These negotiations included two separate, in-person mediation sessions with Mr. Max lasting three days total and numerous informational exchanges and discussions. The result is a Settlement, unhesitatingly approved by Mr. Max, which represents significant recovery for the Class. Max Decl., ¶ 23.

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

Plaintiffs respectfully request the Court take the first steps in the approval process, to which Genworth has stipulated and agreed, to: (1) evaluate for likelihood of approval the terms of the Settlement under Rule 23(e)(2) and the Fourth Circuit's standards for procedural fairness and substantive adequacy; (2) certify the Class[2] under Rule 23(e)(1)(B)(ii); and (3) direct that notice

[2] The "Class" means "all Policyholders (defined below) of GLIC and GLICNY long-term care insurance Choice 2, Choice 2.1, California CADE, California Reprice, and California Unbundled policies and state variations of those Class Policies (defined below) in force at any time during the Class Period (defined below)

of the proposed Settlement be sent to the Class under Rule 23(e)(1)(A). *See generally* Fed. R. Civ. P. 23(e)(1); *In re Jiffy Lube Sec. Litig*., 927 F.2d 155 (4th Cir. 1991). As set forth below, the proposed Settlement satisfies each of these standards.[3] If the Court directs notice of the proposed Settlement to the Class, the Class will be fully informed of their right to object or opt out of the Class and of the date set for a final Settlement Hearing.

II. PROCEDURAL HISTORY OF THE LITIGATION

On August 11, 2021, counsel for Plaintiffs provided pre-suit notice of this class action lawsuit to Genworth, alleging a course of conduct similar to that alleged in *Skochin* and *Halcom* on behalf of policyholders with policies not included in those lawsuits. Penny Decl., ¶ 3. With that notice,

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and issued in any of the States (defined below) excluding: (1) those Policyholders whose policies entered Non-Forfeiture Status (defined below) or entered a Fully Paid-Up Status (defined below) prior to January 1, 2014; (2) those Policyholders whose Class Policy is Lapsed (defined below) and is outside any period Genworth allows for the Class Policy to be automatically reinstated with payment of past due premium, or whose Class Policy has otherwise Terminated (defined below), as of the date of the Class Notice; and those Policyholders whose Class Policy is Lapsed and is outside any period Genworth allows for the Class Policy to be automatically reinstated with payment of past due premium or has otherwise Terminated, as of the date the Special Election Letter (defined below) would otherwise be mailed to the Policyholder; (3) those Policyholders who are deceased at any time before their signed Special Election Option (defined below) is post-marked for mailing to Genworth, or is faxed or emailed to Genworth; (4) Genworth's current officers, directors, and employees as of the date Class Notice is mailed; and (5) Judge Robert E. Payne and his immediate family and staff.

"Policyholder(s)" means the policy owner, except: (1) where a single policy or certificate insures both a policy owner and another insured person, "Policyholder(s)" means both the policy owner and the other insured person jointly; (2) where the Class Policy at issue is certificate 7042CRT, 7044CRT, or any other Class Policy that is a certificate issued under a group long-term care insurance policy, "Policyholder(s)" means the certificate holder.

The "Class Period" means any time on or between January 1, 2013 and the date the Class Notice is mailed.

"Class Policies" means Genworth long-term care insurance policies on the policy forms identified in Appendix A to the Settlement Agreement in force at any time during the Class Period and issued in any of the fifty (50) states of the United States or the District of Columbia.

The "Special Election Letter" means the letter that Genworth will send, as part of consideration to the Class under this Settlement that provides disclosures and settlement options available to the Class Member.

[3] The proposed order is attached as an exhibit to Plaintiffs' Motion to Direct Notice of Proposed Settlement to the Class. The proposed order has been approved by both Plaintiffs and Defendants Genworth Life Insurance Company ("GLIC") and Genworth Life Insurance Company of New York ("GLICNY") (collectively, "Genworth").

Plaintiff's counsel also provided a draft complaint specifying their allegations. *Id.* Thereafter, counsel for the Parties engaged in extensive discussions regarding the potential claims and defenses as well as whether there was mutual interest in exploring pre-suit settlement negotiations. *Id.*

The Parties jointly contacted mediator Rodney Max inquiring of his availability to serve as a neutral mediator. Mr. Max was already substantially familiar with Genworth and the Parties' counsel, having mediated both the *Skochin* and *Halcom* settlement negotiations. Mr. Max agreed, and on November 8, 2022, convened a mediation session with the Parties at the law offices of Dentons US LLP ("Dentons") (counsel for Genworth) in New York City. *Id.*, ¶ 4.

Prior to this mediation session, Plaintiffs propounded a number of written questions and requests for documents and information relevant to their claims, Defendants' defenses, and the composition of the purported Class. *Id.*, ¶ 5. During the full-day mediation session, the Parties worked with Mr. Max productively exchanging information and competing views about the merits of the Class's claims and Genworth's defenses. *Id.* At the conclusion of that session, the Parties agreed to exchange additional information and documents and, in light of the progress made, to reconvene for an additional mediation session, which they scheduled for January 2022. *Id.* Thereafter, Genworth provided further responses to Plaintiffs' requests for information and documents, and Plaintiffs reviewed those responses and documents prior to the next mediation session. *Id.*

On January 14 and 15, 2022, the Parties and Mr. Max re-convened at Mr. Max's offices in Miami, Florida, and spent two full days negotiating the material terms of a proposed Settlement. *Id.*, ¶ 6. The Parties concluded the second day of mediation by executing a Memorandum of Understanding ("MOU") setting forth the material terms of an agreement-in-principle to be incorporated into a formal Settlement Agreement for the Court's approval. *Id.*

On January 28, 2022, Plaintiffs filed their Class Action Complaint ("Complaint") on behalf of themselves, and on behalf of the proposed class of Genworth policyholders who have Choice 2, Choice

2.1, California CADE, California Reprice, or California Unbundled policies, and State variations of those policies. ECF No. 1, ¶ 170. The Complaint asserts two claims against Genworth. Count One alleges fraudulent inducement by omission, based upon alleged misrepresentations and failure to disclose material information in the premium rate increase letters sent for certain long-term care insurance policies issued. *Id.*, ¶¶ 186-203. Count Two seeks declaratory relief pursuant to 28 U.S.C. §2201 regarding whether Genworth had a duty to disclose certain information. *Id.*, ¶¶ 204-207.

Contemporaneously, the Parties filed a Joint Motion for Entry of Scheduling Order, in which they notified the Court of their agreement and of the MOU and proposed a schedule for seeking Court approval of the Settlement. [ECF No. 9]. The Court granted the motion and ordered Plaintiffs to file a Motion to Notice the Class pursuant to Rule 23(e)(1), and to provide an executed Settlement Agreement to the Court by April 1, 2022. [ECF No. 12].

Genworth filed an Answer on February 28, 2022. ECF No. 24. In its Answer, Genworth denied that Plaintiffs were entitled to any of the relief sought in the Complaint and asserted numerous affirmative defenses. *Id.*

In the meantime, the Parties engaged in written confirmatory discovery, including serving requests for production of documents and interrogatories. Penny Decl., ¶ 10. The Parties timely responded and objected to each, and their counsel met and conferred regarding the scope of the discovery requests. *Id.* With respect to Genworth's document production, counsel for the Parties negotiated stipulations concerning the collection and production of electronically stored information and confidentiality, as well as agreements regarding the use of discovery originally produced in *Skochin* and *Halcom*. In total, the Parties have exchanged more than 54,000 documents, consisting of well over 300,000 pages. *Id.* Additionally, on March 22-23, 2022, Plaintiffs' counsel conducted detailed interviews of Genworth employees involved in Genworth's rate increase decisions and communications with Policyholders. *Id.*

Contemporaneously with this discovery, the Parties negotiated the Settlement Agreement. After confirmatory discovery was complete and both Parties had confirmed that in light of the facts and law relevant to this case the Settlement Agreement provided fair, adequate and appropriate relief, the Parties signed the Settlement Agreement. The instant Motion to Notice the Class and Memorandum of Law in Support follows. *Id.*, ¶ 11.

III. THE SETTLEMENT TERMS

Under the terms of the Settlement Agreement, and following the effective date of the same, Genworth will send a special election letter ("Special Election Letter"), the template of which is attached to the Settlement Agreement at Appendix D, to all Class Members who have not timely opted out of the Class. The Special Election Letter will do two things:

First, the Special Election Letter will make the following Disclosures, as applicable to the individual Class Member:

DISCLOSURES

> **[Genworth Life Insurance Company's ("GLIC's")] [Genworth Life Insurance Company of New York's ("GLICNY's")] Plans for Significant Additional Future Rate Increases**
>
> As part of the *Haney* class action settlement, we are providing additional information on our current plans to seek future rate increases on your policy and policies like yours to assist you in evaluating which of the elections best meets your needs going forward. **We plan to seek rate increases in most States over the next few years, and [we plan to seek cumulative rate increases of: (1) approximately [%] on policies with lifetime benefits and an Inflation Benefit (other than 1% compound), (2) approximately [%] on policies with lifetime benefits and 1% compound or no Inflation Benefit, (3) approximately [%] on policies with limited benefits and an Inflation Benefit (other than 1% compound), and (4) approximately [%] on policies with limited benefits and 1% compound or no Inflation Benefit in the State where your policy was issued.] <Policies in a category for which no increases are planned but are planned in other categories> [We do not have immediate plans to seek premium rate increases on Your policy, though future increases are possible.]** *or* [While we do not have immediate plans to seek rate increases on your policy and policies like yours [that previously elected a [Stable Premium Option] [Flexible Benefit Option]] in the State where your policy was issued, future premium increases are possible [after the expiration of your premium rate guarantee period.] Future rate increases are important to our ability to pay future claims. The inability to obtain future rate increases may impair our ability to do so.

As explained further below, it is possible the actual rate increases we seek will be larger or more numerous than currently planned. As you review your election options, you should know that [A.M. Best, a global credit rating agency focused on evaluating the claims paying ability of insurance companies currently rates [GLIC's] [GLICNY's] financial strength as C++, indicating A.M. Best's view that [GLIC] [GLICNY] has a "marginal ability to meet [its] ongoing insurance obligations."]

These planned rate increases will only take effect as permitted by applicable State insurance regulators. Based on our experience, we expect that most States will continue to grant some portion or all of the requested rate increases. However, some States may not grant all or a portion of a requested rate increase and some cap the allowable annual increase on policies issued in their States. In States that do not grant the full increases requested, our current plan is to continue to file for rate increases up to the full amount of our original request. [Again, these rate increases will not affect your policy as your policy is fully paid-up and no more premiums are due.]

<if future rate increases planned>[Importantly, if either the performance of these policies and/or economic conditions differ from our projections, our requested rate increases may be higher or lower than our current plans or we may also seek additional future rate increases which are not contemplated in our current plans.]

Second, the Special Election Letter will offer each Class Member several special election options ("Special Election Options") for their long-term care policy (subject to the Class Member's current policy terms), to be made with the benefit of the Disclosures. These Special Election Options include:

I. Special Election Options For Class Members With Policies That Are Not In Non-Forfeiture Status

Class Members who have policies that are **not** in Non-Forfeiture Status, excluding Class Members whose level of benefits are below the level of benefits available in the defined option, will receive the following Special Election Options:

A. Paid-Up Benefit Options

1. A settlement option consisting of two components: **(a)** a paid-up benefit equivalent to 100% of the Class Member's paid in premiums less $10,000 and less claims paid over the lifetime of the policy, and **(b)** a damages payment of $10,000. The total paid-up benefit amount available under this option shall not exceed the Class Member's current, actual lifetime maximum at the time his or her election is processed, less the Class Member's damages payment under this option.

2. A settlement option consisting of a paid-up benefit option equivalent to **1.5 times** the difference between the Class Member's paid-in premiums to date less claims paid to the Class Member to date. The total paid-up benefit amount available under this option is capped at the actual lifetime maximum provided for under the electing Class Member's policy. This option will **not** include any damages payment.

B. Reduced Benefit Options ("RBOs")[4]

1. RBOs For Class Members Who Currently Do Not Have Stable Premium Option ("SPO"), Or Flexible Benefit Option ("FBO") Policies

Class Members who currently have in force policies, ***excluding*** (1) Class Members who previously elected a SPO, or FBO, and/or (2) Class Members whose level of benefits are below the level of benefits available in the defined option, will have the following options:

a. For Class Members with a Benefit Inflation Option ("BIO"), a settlement option consisting of two components: **(a)** a change in the Class Member's policy benefits that removes BIO with a reduction of their Daily/Monthly Benefit Amount ("D/M BA") to their original D/M BA (*i.e.*, the D/M BA that he or she had prior to any BIO increases)[5] for a reduced annual premium, and **(b)** a damages payment of $6,000.

b. For Class Members with BIO, a settlement option consisting of two components: **(a)** a change in the Class Member's policy benefits that reduces his/her BIO benefit to 1% compound inflation and recalculates his/her D/M BA by applying 1% compound inflation to his/her original benefit amount,[6] and **(b)** a damages payment of $6,000.

c. A settlement option consisting of two components: **(a)** a change in the Class Member's policy benefits that removes BIO (for those Class Members who have BIO), retains the Class Member's D/M BA, and for Class Members with

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[4] RBOs may be available to Class Members with Partnership Plans, subject to all other requirements, even if those options may result in the loss of Partnership Status. However, Reduced Benefit Options may not be available to Partnership Plans issued in California, Connecticut, Indiana, or New York ("Restrictive Partnership States") if those options may result in the loss of Partnership Status.

[5] In some cases, Class Members may have made changes to their policies resulting in a recalculated original D/M BA, in which case, the recalculated original D/M BA will be used in connection with this Special Election Option.

[6] In some cases, Class Members may have made changes to their policies resulting in a recalculated original D/M BA, in which case, the recalculated D/M BA will be used in connection with this Special Election Option.

a benefit period that is greater than three (3) years (four (4) years for shared policies), reduces the existing benefit period to three (3) years (four (4) years for Class Members with shared policies), and **(b)** a damages payment of $6,000.

2. RBOs For Class Members Who Currently Are Not Eligible For The RBOs In Section I.B.1 Above (Except For Class Members With FBO Policies)

Class Members who currently are not eligible for the RBOs in Section I.B.1 above (except for Class Members with FBO Policies) will have an option that maintains their SPO status (if any) and consists of two additional components: **(a)** a reduction of the Class Member's D/M BA by 25%, and **(b)** a damages payment of $1,000.

II. Special Election Options For Class Members In Fully Paid-Up Status

1. A settlement option consisting of two components: **(a)** a paid-up benefit equivalent to 100% of the Class Member's paid in premiums less $10,000 and less claims paid over the lifetime of the policy, and **(b)** a damages payment of $10,000. The total paid-up benefit amount available under this option shall not exceed the Class Member's current, actual lifetime maximum at the time his or her election is processed less the Class Member's damages payment under this option.

2. A settlement option consisting of two components: **(a)** a reduction of the Class Member's existing benefit period to the next lowest benefit option available (in the case for Class Members in a Fully Paid-Up Status that have unlimited benefit period policies, a six (6) year benefit period) and a reduction to his or her current D/M BA (after benefit inflation) by 25%, and **(b)** a damages payment equal to $6,000.[7]

III. Special Election Option For Class Members In Non-Forfeiture Status

1. Class Members who were on Non-Forfeiture Status after January 1, 2014 but prior to making an election in this settlement will be provided with an option to elect a damages payment of $1,000 and retain their current paid-up benefit.

IV. Special Election Options For Class Members In States That Do Not Allow The Disclosures Or Any Applicable Special Election Options To Be Provided

To the extent that any State refuses to allow any form of the Disclosures and the Special Election Options agreed to in the underlying Agreement, the Class Members in that State will be offered:

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[7] This RBO may be available to Class Members with Partnership Plans, subject to all other requirements, even if those options may result in the loss of Partnership Status. However, RBOs may not be available to Partnership Plans issued in Restrictive Partnership States if those options may result in the loss of Partnership Status.

1. For Class Members whose policies are still in force, an option to elect a $100 credit against future Class Policy premiums.

2. For Class Members whose Class Policies are in Non-Forfeiture Status only, an option to elect a $100 one-time credit to the Class Members' current benefit pool.

For each Special Election Option, the Cash Damages are a fixed dollar amount by Option that is the same for all Class Members eligible for that Option. Accordingly, Class Members will know the value of each of the Special Election Options in the Settlement when they receive the Notice. This differs from the Settlements in *Halcom and Skochin* where the Cash Damages were calculated on an individualized basis at the time each Class Member's Special Election Letter was created according to the Class Member's policy status at that time.

Class Notice and administration costs will be funded by Genworth. Settlement Agreement, ¶ 56.[8] The Parties propose a nationally recognized class action settlement administrator, Epiq Class Action & Claims Solutions, Inc. ("Epiq"), to be retained subject to the Court's approval. The proposed Class Notice and plan for auditing of Special Election Letter responses is discussed below in § VII and in the Declaration of Cameron R. Azari, Esq. on Settlement Notice Plan and Administration ("Azari Decl."), attached to the Penny Declaration as Exhibit 5. Epiq also was proposed by the Parties and appointed by the Court as the notice administrator in both *Skochin and Halcom*.

In recognition of the work Named Plaintiffs did to represent the Class, including consulting with Class Counsel, reviewing pleadings, responding to interrogatories, and gathering and producing documents, Named Plaintiffs intend to request Service Awards of $15,000 each.[9] Any such amounts

[8] "Class Notice" means Court directed appropriate notice pursuant to Rule 23(e), the forms of which are in Appendices E and F to the Settlement Agreement and attached to the [Proposed] Notice Order as Exhibits A-B.

[9] These requested service awards are less than the service awards approved for the named plaintiffs in *Skochin* ($25,000 per named plaintiff) and equal to the service awards approved for the named plaintiffs in *Halcom*.

the Court awards shall be paid by Genworth separate and apart from the financial benefits made available to the Class under the Settlement.

Plaintiffs' counsel will also submit an application for attorneys' fees and costs with its motion for final approval of the Settlement. In it, Plaintiffs' counsel will seek approval of: (a) attorneys' fees of 15% of the "Cash Damages" paid to Class Members, subject to a cap of $13,000,000.00; and (b) payment of expenses resulting from the prosecution of this action in an amount not to exceed $50,000.00.

All fees and expenses the Court awards shall be paid by Genworth *in addition to* the Cash Damages Genworth will pay to Class Members who make Special Election Options in the Settlement. That is, Class Members' benefits from this Settlement will not be reduced at all to compensate Class Counsel for their representation, which is a significant additional benefit to the Class.

The actual fee, of course, will be subject to approval by this Court at final approval, but Plaintiffs note that the requested 15% fee, which will be paid on top of each Class Member's Cash Damages payment, would be lower than awards to class counsel by this Court and in this District in other cases. *See, e.g.*, *Knurr v. Orbital ATK, Inc.*, No. 1:16-cv-01031-TSE-MSN, 2019 WL 3317976 (E.D. Va. June 7, 2019) (awarding 28% fee); *In re Celebrex (Celecoxib) Antitrust Litig.*, No. 2:14-cv-00361, 2018 WL 2382091, at *5 (E.D. Va. Apr. 18, 2018) (awarding 33% fee in antitrust class action settlement); *In re Genworth Fin. Sec. Litig.*, 210 F. Supp. 3d 837, 845 (E.D. Va. 2016) (awarding 28% fee in securities class action settlement); *Ryals v. Strategic Screening Sols., Inc.*, No. 3:14- cv-00643-REP, 2016 WL 7042947 (E.D. Va. Sept. 15, 2016) (Payne, J.) (awarding 26.752% fee in in Fair Credit Reporting Act ("FCRA") class settlement); *Henderson v. Verifications Inc.*, No. 3:11cv514-REP, 2013 WL 12146748, at *5 (E.D. Va. Mar. 13, 2013) (Payne, J.) (awarding 28.67% fee in FCRA case).

In addition, that percentage would be in line with the amount the Court approved in *Skochin* and the amount requested in *Halcom* (15% in both cases). Moreover, the requested fee cap is

substantially lower than the fee this Court approved in *Skochin* ($24,500,000) and requested in *Halcom* ($18,500,000)—even though the Class in this case is the same size as those of *Skochin* and *Halcom combined*. Not only is the cap (with no floor) of $13,000,000 lower than that in the prior two cases, but there is no fee request, at all, in this case payable for the valuable and crucial non-monetary Disclosures (as opposed to $2,000,000 approved in *Skochin* and $1,000,000 requested in *Halcom* for the similar Disclosures in those cases). In the end, *all* of the fees Class Counsel requests in this case will be contingent upon the Cash Damages elected and recovered by Class Members in this Settlement.

The Parties have agreed that if more than 10% of the Class request exclusion and/or the number of state regulators who object to the Disclosures and/or the Special Election Options represents 10% or more of the Class Members, then Genworth shall have the right, but not the obligation, to terminate the Settlement Agreement. Settlement Agreement, ¶ 60.

With regard to input of state regulators on the Special Election Letter, Genworth will provide the Settlement Agreement, including the form of the Special Election Letter, to each State's insurance regulator for review prior to a Special Election Letter being sent to any Class Member whose Class Policy was issued in that State. *Id*., ¶ 46(a). Genworth will report to the Court any concerns or proposed changes to the Disclosures, the Special Election Options, or the Special Election Letter received from State regulators prior to the Final Approval Hearing. *Id*., ¶ 46(b).

In exchange for the benefits provided under the Settlement, each Class Member and the Named Plaintiffs will release the Genworth Released Parties from any and all Released Claims. *Id.* ¶ 47.[10] Genworth has also agreed to release Named Plaintiffs, the Class, and Plaintiffs' counsel from any claims that arise out of or relate in any way to the institution, prosecution, or settlement of the

[10] The proposed Release in this action is identical to the release modified at the Court's instruction in *Halcom*.

claims against Genworth, except for claims relating to the enforcement of the Settlement. *Id.* ¶ 49.

IV. ARM'S-LENGTH SETTLEMENT NEGOTIATIONS

The Parties engaged in hard-fought, arm's-length negotiations facilitated by mediator Rodney Max. Prior to agreeing to mediate, the Parties exchanged information about their prospective claims or defenses involving this potential class and the distinguishing characteristics between this case and the *Skochin* and *Halcom* cases. In advance of the first mediation session, the Parties shared this information with Mr. Max in separate conference calls. Max Decl., ¶ 15.

The first in-person mediation session occurred on November 8, 2021, in New York City. Max Decl., ¶16. Over the course of the first day of mediation, the Parties and Mr. Max engaged primarily in question-and-answer discussions regarding the policies involved and how, if at all, the claims on behalf of the prospective class would be distinguishable from the claims in *Skochin* and *Halcom*. Before and again during the first day of mediation, Plaintiffs' counsel propounded a number of fact questions to and requested certain documents and data points from Genworth. Genworth provided, or agreed to provide in the future, much of the information and materials requested. Max Decl., ¶16.

Following the first mediation session, and before reconvening for the second mediation session in January, the Parties exchanged additional information and documents regarding the merits of their claims and defenses. Penny Decl., ¶ 5. On Friday, January 14, 2022, the Parties met in person again in Miami, Florida, with Mr. Max, and continued their mediation. During the second session, the Parties engaged in extensive discussions and exchanged several rounds of settlement demands and offers over the course of two full days of negotiations, culminating in the execution of the MOU in the early evening of Saturday, January 15, 2022. Max Decl., ¶¶ 17-19.

Mr. Max attests that he never witnessed or sensed any collusion between the parties, and that at all times the settlement process was conducted in an arms-length and adversarial manner. *Id.*, ¶ 20. Indeed, it was only after finally agreeing upon the substantive terms of the settlement and Class

member relief that the issues of the named Plaintiffs' service awards and attorneys' fees and costs were broached. *Id.*, ¶ 21.

V. THE SETTLEMENT WARRANTS PROVIDING NOTICE TO THE CLASS

Rule 23(e) requires judicial approval for the settlement of claims brought as a class action. Pursuant to Rule 23(e)(1), the issue at this stage is whether the Court should direct notice of the proposed Settlement to the Class. Notice should be provided after first determining that the Court "will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B). Next, Rule 23(e)(2) provides:

> ***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 class 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.

Overlapping with Rule 23(e)(2)(B) (arm's-length negotiation) and Rule 23(e)(2)(C)(i) (adequacy of the settlement based on the costs, risks, and delay of trial and appeal) is the two-level analysis in the Fourth Circuit, *Jiffy Lube*, 927 F.2d at 158-60, which "includes an assessment of both the procedural fairness of the settlement negotiations and the substantive adequacy of the settlement

itself." *In re NeuStar, Inc. Sec. Litig.*, No. 1:14CV885 (JCC/TRJ), 2015 WL 5674798, at *9 (E.D. Va. Sept. 23, 2015). The procedural fairness factor 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. The substantive adequacy analysis, on the other hand, "weigh[s] the likelihood of the plaintiff's recovery on the merits against the amount offered in settlement." *NeuStar*, 2015 WL 5674798, at *11.

The proposed Settlement provides a fair and substantial recovery for the Class and satisfies each of the factors identified under Rule 23(e)(2) as well as the Fourth Circuit's "fairness" and "adequacy" analysis. The standard for certification of a Class is also met, such that notice of the proposed Settlement should be sent in advance of a final Settlement Hearing.

A. The Proposed Settlement Is Procedurally Fair

The first inquiry under the Fourth Circuit's analysis is a procedural one – "whether the settlement was reached through good-faith bargaining at arm's length." *NeuStar*, 2015 WL 5674798, at *10; *see* Fed. R. Civ. P. 23(e)(2)(B) ("the proposal was negotiated at arm's length"). In making this determination, courts in the Fourth Circuit generally consider 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 area of . . . class actions litigation.'" *NeuStar*, 2015 WL 5674798, at *10 (quoting *Jiffy Lube*, 927 F.2d at 159).

Looking to the first *Jiffy Lube* factor, the Court considers whether the case has progressed far enough to dispel any wariness of "'possible collusion among the settling parties.'" *Id.* (quoting *In re Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 254 (E.D. Va. 2009)). Here, there is no hint of collusion. *See* Max Decl., ¶¶ 17-24. Plaintiffs served a detailed Complaint pre-filing, and then engaged in significant fact-finding prior to and during settlement negotiations. Class Counsel and Defense counsel were also very familiar with the factual predicates for their claims and defenses, as well as the legal framework surrounding this case based upon their extensive work in the *Skochin* and *Halcom* cases.

After the Memorandum of Understanding was signed, but before the Settlement Agreement was fully negotiated or executed, the Parties engaged in mutual confirmatory discovery that included formal document requests and interrogatories, as well as interviews of key Genworth employees with knowledge of (i) the Class Policy rate increases; (ii) the actuarial basis for rate increase requests; (iii) Genworth's internal plans to seek additional future rate increases; and (iv) notification letters to and communications with the Class regarding rate increases. Class Counsel reviewed tens of thousands of pages of documents before the Settlement Agreement was formalized. "These adversarial encounters dispel any apprehension of collusion between the parties." *NeuStar*, 2015 WL 5674798, at *10.

The second *Jiffy Lube* factor is the extent of discovery. "This factor permits the Court to ensure that all parties appreciate the full landscape of their case when agreeing to enter into the Settlement." *Id.* As noted above, Plaintiffs had more than a sufficient factual record on which to base their conclusion that the proposed Settlement is fair, reasonable, and adequate.

The third *Jiffy Lube* factor (the circumstances surrounding the negotiations) is also readily met here, as detailed above in § IV. The multi-day settlement negotiations overseen by the mediator Mr. Max were vigorous and adversarial throughout.

The fourth factor (the experience of counsel in the area of complex class action litigation) is also satisfied. This Court is already familiar with Plaintiffs' counsel from *Skochin* and *Halcom*. 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* Penny Decl., Exhibit 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. *Id.*, Exhibit 7. Mr. Davidson himself has spent the last 19 years of his

26-year career representing consumers, insureds, and shareholders in class action suits around the country. Jonathan M. Petty and Brielle M. Hunt of Phelan Petty, PLC ("Phelan Petty") are well-known to this Court as providing excellent representation of their clients. Penny Decl., Exhibit 8 (Phelan Petty Firm Resume). Finally, Berger Montague PC, where Plaintiffs' counsel Shanon Carson and Glen Abramson are shareholders, is known for its experience in handling class action consumer litigations. *Id.*; Exhibit 9 (Berger Montague Firm Resume).

"'[W]hen Class 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). The Court so held in *Skochin* as well, where the class members were represented by the same counsel. *See* 2020 WL 6697418, at *3

B. The Settlement Is Substantively Adequate

The second factor in the Fourth Circuit is the substantive adequacy of the settlement. Here, courts generally consider the following:

> (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.

NeuStar, 2015 WL 5674798, at *11 (quoting *Jiffy Lube*, 927 F.2d at 159). These factors too weigh heavily in favor of finding the proposed Settlement adequate.

In regard to the merits of the case, the Parties recognized that litigation through trial – and likely appeals – posed significant risks that made any result uncertain. For example, Genworth would argue at trial that the evidence demonstrates they did not make any material misstatements or omissions, and the difficulties of proof can be substantial for such claims. It also would renew its argument, including on appeal, that Plaintiffs' claims were barred by the filed rate doctrine. The

underlying facts involved the overlap of complicated issues of insurance regulation and actuarial accounting that may be challenging for most laypersons to understand.

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

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

The remaining factor – the degree of opposition to the Settlement – will be addressed at the final approval stage, after Class Members have been given notice of the proposed Settlement and an opportunity to object. To date, Plaintiffs are unaware of any potential objections to the Settlement by any Class Member. While there were objectors to the settlement in *Skochin*, this Court overruled each of those objections, and none of those objectors filed an appeal after the Court approved the settlement in that case. And out of nearly 145,000 class members in *Halcom*, there were only 11 objections filed

by 19 class members, the vast majority of which were the same types of objections that the Court overruled in *Skochin*. Also, prior to final approval in *Halcom*, all 50 state insurance regulators were given an opportunity to object to or provide input concerning the proposed special election letter and options. State regulators voiced no objections, and all of their questions and comments were addressed in a satisfactory manner prior to seeking final approval.

Additionally, the response of the *Skochin* class to that settlement has been impressive. As noted above, the *Skochin* settlement has, to date, yielded a 28% election rate by Class Members in premium paying status—a rate many times higher than the claims rate in many if not all consumer class action settlements. Plaintiffs' counsel also routinely receive emails and phone calls expressing sincere appreciation for the *Skochin* settlement. Similarly, though not yet approved, Plaintiffs' counsel received extensive and overwhelmingly positive feedback from class members in *Halcom* after notice of the potential settlement was provided.

C. The Remaining Amended Rule 23(e)(2) Factors Are Also Met

1. Plaintiffs and Their Counsel Have Adequately Represented the Class

As explained above, Plaintiffs and their counsel have adequately represented the Class as required by Rule 23(e)(2)(A) by diligently prosecuting this action, including, among other things, researching and drafting the Complaint; conducting significant pre-suit and confirmatory discovery; interviewing key Genworth personnel; and engaging in three full-day mediation sessions. Moreover, Plaintiffs and their counsel have achieved an excellent result, particularly when comparing the injunctive and monetary relief obtained in the Settlement to that sought in the Complaint.

2. The Proposed Method for Distributing Relief Is Effective

As demonstrated below in § VII, the proposed Class Notice and administration process (Rule 23(e)(2)(C)(ii)) will be effective. Under the Class Notice plan, within sixty (60) calendar days after

the Court grants approval to provide the Class Notice, Genworth shall provide to the Settlement Administrator a list of all known Class Members with each Class Member's last known mailing address from Genworth's records ("Class List"). Settlement Agreement ¶ 57(a). Within thirty (30) calendar days of receiving the Class List from Genworth, the Settlement Administrator shall send out the Class Notice by direct mail, and those mailings are expected to reach more than 95% of the Class. Settlement Agreement ¶ 57(a).

In addition, the contents of the Class Notice shall be reproduced on a website maintained by the Settlement Administrator, with the input and oversight of Genworth's counsel and Class Counsel. Azari Decl., ¶22. The website shall include all the relevant documents in this case, including information regarding the nature of the lawsuit, a summary of the substance of the Settlement, the Class definition, the procedure and time period to request exclusion from and/or object to the Settlement, and the date set for the Final Approval Hearing. *Id.*

Finally, subject to the Court's approval, the Settlement Administrator shall also publish notice of the Settlement in the national edition of *The New York Times*, *The Wall Street Journal*, and *USA Today*, at least 15 days before the Deadline for requesting exclusion from the Class or filing objections. Azari Decl., ¶ 15.

The Parties and Epiq are confident that the Class Notice plan will reach at least 95% of Class Members. *Id.*, ¶ 11. To wit, in *Skochin*, the same Class Notice plan reached 99.8% of the Class. Similarly, in *Halcom*, this same Class Notice plan reached 99% of the Class. *Id.*, ¶ 5(a) and (b).

The process for obtaining the benefits under the Settlement is also effective. Rather than having the third-party administrator send the Special Election Letter to Class Members, Genworth will be sending the Special Election Letter directly to them. As the Class Members' LTC insurer, Genworth has the requisite operational experience and capacity to handle creation and mailing of the Special Election Letter to Class Members, as it is doing in the current *Skochin* settlement. Since letters

from one's insurance carrier are ordinarily considered extremely important, this will further ensure that Class Members will read the letter and afford it the attention it deserves.

Similarly, recognizing Genworth's operational experience and capacity vis-a-vis changes in Class Members' LTC policies and its experience in the *Skochin* settlement, Genworth will also handle the administration of Class Members' new Special Elections Options. To ensure accuracy of Genworth's election-handling process, Epiq will conduct audits every ninety (90) days and will report the results of such audits to Plaintiffs' counsel and Genworth, as explained in the Azari Declaration. *Id.* ¶¶ 16-21. This is in substance the same notice and claims program that was approved by the Court in *Skochin*, and which now has a proven track record of success.

3. Attorneys' Fees

Rule 23(e)(2)(C)(iii) addresses "the terms of any proposed award of attorney's fees, including timing of payment[.]" As discussed above (at § III), Plaintiffs' counsel intend to seek Court approval of Genworth's payment, separate from Class damages, of attorneys' fees in the amount of 15% of the "Cash Damages" paid to the Class Members, with a cap of $13,000,000.00. As referenced, *supra*, if approved, this fee request will be lower than fee awards in other settlements approved in recent cases in this District, including in this Court, and lower than either of the fee amounts approved in *Skochin* ($26,500,000) and requested in *Halcom* ($19,500,000), despite each of those Class sizes being substantially smaller than this case's proposed Class. Notably, the requested fee here does not include any amount for the vital non-monetary disclosure benefits achieved for the Class, whereas these same benefits for the classes in *Skochin* and *Halcom* included corresponding fees of $2,000,000 (approved) and $1,000,000 (requested), respectively.

It is also important to emphasize that Plaintiffs' counsel will not be paid *any* of the fee until the Settlement becomes effective *and* Class Members' elections are made, processed, and corresponding Cash Damages paid, even though courts in this District have ordered fee awards to be

paid upon entry of a final approval order. *See, e.g.*, *Knurr*, 2019 WL 3317976, at *1 (ordering "[t]he awarded attorneys' fees and expenses and interest earned thereon shall be paid to Lead Counsel immediately after the date this Order is executed"); *In re Genworth Fin. Sec. Litig.*, No. 3:14-cv- 682-JAG, 2016 WL 7187290, at *2 (E.D. Va. Sept. 26, 2016) (ordering that "attorneys' fees and Litigation Expenses awarded above may be paid to Lead Counsel immediately upon entry of this Order"). Moreover, all attorneys' fees will be paid on a rolling basis in concert with Class Member elections that trigger the payment of Cash Damages to the Class Member. 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. This procedure eliminates any concern that attorneys will be compensated before the Class and further ensures that the amount of fees are tied directly to the monetary compensation to the Class.

Importantly, the Class's damages payments will not be reduced by Plaintiffs' counsel's fee or expense awards. Genworth has agreed to pay the Court-approved fees and expenses on top of the Class's damages payments, even though it is hornbook law that the entire purpose of the "common benefit" fee is to ensure that class members are not unjustly enriched by the work of class counsel in obtaining benefits they are able to enjoy. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("The [common benefit] doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense.") (citing *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392 (1970)); *Allen v. Lloyd's of London*, 975 F. Supp. 802, 806 (E.D. Va. 1997) ("The rationale which underpins the common benefit doctrine is the prevention of unjust enrichment[.]").

Finally, as explained in the Class Notice, Named Plaintiffs intend to request an amount not to exceed $15,000 each in connection with their representation of the Class, which included extensive conversations with Class Counsel throughout the litigation, producing all relevant discovery, and responding to written discovery requests.

4. The Parties Have No Other Agreements

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. Class Members Are Treated Equitably

The final factor, Rule 23(e)(2)(D), looks at whether Class Members are treated equitably. As reflected in the Settlement Agreement (Appendix C), the Settlement treats Class Members equitably relative to each other, based on the specific terms of their Class Policy. Class Members will be entitled to voluntarily choose what new election is best for them (if any), while maintaining the right to continue their policies under their current terms if they so choose after receiving the Disclosures. The choices available to Class Members will be comparable to each other in that the same options will be provided to Class Members in the same states with policies comparable to theirs, and each Special Election Option will carry its own flat Cash Damages payment in that amount to any Class Member who elects that Option. In that sense, each and every Class Member is treated the same.

VI. CERTIFICATION OF A CLASS IS APPROPRIATE

In granting preliminary settlement approval, the Court is also respectfully requested to certify the proposed Class for purposes of the Settlement under Fed. R. Civ. P. 23(a)(1)-(4), (b), and (e). As set forth above and in ¶ 41 of the Settlement Agreement, the Parties have stipulated to the certification of the Class.

Courts have long acknowledged the propriety of certifying a class for settlement purposes. *See, e.g.*, *NeuStar*, 2015 WL 5674798, at *2; *Mills*, 265 F.R.D. at 255. Although a settlement class, like other classes, must satisfy all the requirements of Rule 23(a)-(b), the manageability concerns of Rule 23(b)(3) are not at issue. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (explaining that when determining whether to certify a Class, courts need not consider the last factor, "whether the case, if tried, would present intractable management problems, for the proposal is that there be no

trial"); *NeuStar*, 2015 WL 5674798, at *8.

- **The Class Satisfies the Requirements of Rule 23(a)**

Certification is appropriate under Rule 23(a) if: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class."

- **Numerosity and Identifiability of the Class**

Rule 23(a)(1) requires that the proposed class be "so numerous that joinder of all members is impracticable[.]" This Court has previously cited William B. Rubenstein, *Newberg on Class Actions* §3:11 (5th ed. 2013), for the proposition that "[j]oinder is generally deemed practicable in classes with fewer than 20 members and impracticable in classes with more than 40 members." *Soutter v. Equifax Info. Servs., LLC*, 307 F.R.D. 183, 199 (E.D. Va. 2015). In addition, "[t]he Fourth Circuit . . . has repeatedly recognized that Rule 23 contains an implicit threshold requirement that the members of a proposed class be 'readily identifiable.'" *Id.* at 196 (quoting *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014)).

Here, there are presently approximately 345,000 members of the Class in all 50 states and the District of Columbia. Numerosity is easily satisfied. In terms of identifiability, Genworth is able to determine the members of the Class from its own internal data, easily demonstrating that members of the Class are identifiable.

- **Commonality**

Rule 23(a)(2) requires that "questions of law or fact [be] common to the class[.]" Commonality "does not mean that members of the class must have identical factual and legal claims in all respects." *In re Mills Corp. Sec. Litig.*, 257 F.R.D. 101, 105 (E.D. Va. 2009). Rather, "there need be only a single issue common to the class." *Soutter*, 307 F.R.D. at 199.

Here, the common issues include:

- whether Genworth's alleged partial disclosures created a duty to all Class members to make a full and adequate disclosure of Genworth's plans for future rate increases, its reliance on obtaining those increases to remain solvent, and its current financial rating;
- whether Genworth breached that duty to all Class members at times during the Class Period; and
- whether the Class is entitled to damages, injunctive, and/or declaratory relief to remedy that breach.

These are the central issues in the case, and they are capable of being proven (or disproven) by common evidence. Accordingly, they each depend upon a common contention—for example, Genworth's duty to disclose that it knew it needed significant rate increases. That common contention is of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Just as the Court found in its November 5, 2020 Order overruling the objections in *Skochin*, the commonality requirement is met here as well. *See Skochin v. Genworth Fin., Inc.*, No. 3:19-cv-49, 2020 WL 6532833, at *24 (E.D. Va. Nov. 5, 2020) ("This case falls within the circumstances envisioned by Rule 23's Advisory Committee Notes. Common questions regarding Genworth's liability to class members for its allegedly material omissions and the elements of materiality and reliance are uniform questions across the policyholders.").

- **Typicality**

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class[.]" Typicality is satisfied where "the class representative is part of the class and possess[es] the same interest and suffer[s] the same injury as the class members." *In re Comput. Scis. Corp. Sec. Litig.*, 288 F.R.D. 112, 122 (E.D. Va. 2012).

> The typicality requirement goes to the heart of a representative parties' ability to represent a class, particularly as it tends to merge with the commonality and

> adequacy-of-representation requirements. The representative party's interest in prosecuting his own case must simultaneously tend to advance the interests of the absent class members. For that essential reason, plaintiff's claim cannot be so different from the claims of absent class members that their claims will not be advanced by plaintiff's proof of his own individual claim. That is not to say that typicality requires that the plaintiff's claim and the claims of class members be perfectly identical or perfectly aligned.

Deiter v. Microsoft Corp., 436 F.3d 461, 466-67 (4th Cir. 2006). Simply stated, "[t]he essence of the typicality requirement is captured by the notion that as goes the claim of the named plaintiff, so go the claims of the class." *Id.* at 466.

Here, Named Plaintiffs and the Class are all Class Policy policyholders. All of them have received correspondence, including annual premium statement and rate action letters, from Genworth regarding their rates and rate increases. For most of the Class Period, none of them were afforded the specific disclosures that Named Plaintiffs sought here regarding Genworth's plans for future rate increase requests on the Class Policies and the importance of such rate increases to Genworth's ability to pay future claims. This is the information Plaintiffs allege was material and would have caused many Class Members to make different elections or to stop paying premiums altogether. Although Genworth's plans and need for future increases were known to Genworth, Named Plaintiffs allege that it withheld that information from each Named Plaintiff and Class Member alike. Thus, Named Plaintiffs and Class Members share the same claims for declaratory relief, injunctive relief, and compensatory damages.

- **Adequate Representation**

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." The primary purpose of the adequacy requirement "is to detect and avoid potential conflicts between lead plaintiffs and other class members." *Computer Scis.*, 288 F.R.D. at 118. It is generally satisfied where the representative "(i) does not have interests that are adverse to the interests of the class, (ii) has retained competent counsel, and (iii) is otherwise competent to serve as class representative." *In re MicroStrategy Inc. Sec. Litig.*, 110 F. Supp. 2d 427, 435-36 (E.D. Va.

2000).

Here, Named Plaintiffs' interests are aligned with – and not antagonistic to – those of the Class. Named Plaintiffs are Class Policy policyholders who, like all Class Members, allegedly were not provided with material information about Genworth's plans for and reliance upon future rate increases, and who made decisions regarding their policies without that material information. Thus, Named Plaintiffs and the Class have the same interest in achieving the maximum recovery possible.

Named Plaintiffs also understand the role and obligations of class representatives and have protected, and will continue to protect, the Class's interest. For example, Named Plaintiffs have demonstrated their ability to serve as Class representatives by, inter alia, overseeing the litigation through the pleadings, discovery, and now settlement phases, and participating in discussions with Class Counsel concerning case developments, strategies, discovery, and settlement. Further, Named Plaintiffs have searched for and produced documents in discovery, and responded to written discovery. Named Plaintiffs are competent, and their interests are aligned with the Class.

Named Plaintiffs have also engaged GSP, Robbins Geller, Phelan Petty, and Berger Montague as their counsel. As referenced previously, these firms have extensive experience litigating complex class actions both before courts in this Circuit and throughout the country. *See* Penny Decl., Exhibits 6-9 (Firm Resumes). Prior to filing this case, Class Counsel engaged in an extensive investigation, which is reflected in the detailed complaint filed in this action. Class Counsel, armed with the critical experience, knowledge, and insight gained through their handling of the *Skochin* and *Halcom* cases involving Genworth, engaged in hard-fought settlement negotiations, and pursued thorough, confirmatory discovery at considerable speed. Class Counsel are qualified, experienced, and able to prosecute this action. *See In re NII Holdings, Inc. Sec. Litig.*, 311 F.R.D. 401, 408 (E.D. Va. 2015) ("highly- experienced" counsel with "a proven track record" in litigating class actions who had "already undertaken substantial work" established adequacy).

- **Rule 23(b)(3) Is Satisfied**

Rule 23(b)(3) authorizes class certification if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Rule 23(b)(3) is "designed to secure judgments binding all class members save those who affirmatively elect[] to be excluded," where a class action will "achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem*, 521 U.S. at 614-15. Certification of the Class for settlement serves these purposes.

Although reliance is generally an element of a fraud claim, and Rule 23's Advisory Committee's Notes to the 1966 Amendment caution reliance may not be well-suited for class status where "material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed" are present, the Notes also find it appropriate to use a class device to resolve cases involving "fraud perpetrated on numerous persons by the use of similar misrepresentations[,]" as is alleged here. The case of *Stanich v. Travelers Indem. Co.*, 249 F.R.D. 506, 521 (N.D. Ohio 2008), is on point. There, the plaintiffs alleged the defendant had a duty to disclose in its form insurance policies that identical policies were available from the defendant at lower prices. Certifying the policyholder class, the Court found "[w]here there are uniform presentations of allegedly misleading information, or common omissions throughout the entire class, especially through form documents, courts have found that the element of reliance may be presumed class-wide, thereby obviating the need for an individualized inquiry[.]" *Id.* at 518.

Like *Stanich*, numerous other courts have found that fraud claims (even those not alleged under the federal securities laws) that are based on material omissions in form contracts may be certified in light of the Supreme Court's seminal decision in *Affiliated Ute*, 406 U.S. at 153; *see, e.g.*,

In re U.S. Foodservice Inc. Pricing Litig., 729 F.3d 108, 118 (2d Cir. 2013) ("[F]raud claims based on uniform misrepresentations to all members of a class 'are appropriate subjects for class certification' because, unlike fraud claims in which there are material variations in the misrepresentations made to each class member, uniform misrepresentations create 'no need for a series of mini-trials.'") (quoting *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1253 (2d Cir. 2002)); *In re Tyco Int'l, Ltd. Multidistrict Litig.*, MDL No. 02-1335-PB, 2006 U.S. Dist. LEXIS 58278, at *26-27 (D.N.H. Aug. 15, 2006) (certifying misrepresentation claim, holding that because it is "practically impossible" for plaintiffs to prove that they relied on information that was never provided to them[,]" under *Affiliated Ute*, "it is appropriate to infer reliance if . . . defendants failed to disclose material information") (citing *Edens v. Goodyear Tire & Rubber Co.*, 858 F.2d 198, 206 (4th Cir. 1988) (Fourth Circuit applying *Affiliated Ute* to actions for fraudulent breach of contract); *Ansin v. River Oaks Furniture, Inc.*, 105 F.3d 745, 754 (1st Cir. 1997) ("Because of the logical impossibility of proving that plaintiffs relied on information that they did not have, [p]ositive proof of reliance on omissions is not necessary where materiality has been established.")); *Commonwealth v. Ortho-McNeil-Janssen Pharms., Inc.*, 52 A.3d 498, 510 (Pa. Commw. Ct. 2012) ("reliance may be presumed from the materiality of the misrepresentation").

Whether Genworth's alleged failure to disclose its need for substantial rate increases was "material" to insureds is also a question of fact for a jury that is well suited for class treatment. *See Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 468 (2013) ("the failure of proof on the element of materiality would end the case for one and for all; no claim would remain in which individual reliance issues could potentially predominate"); *Castle v. Capital One, N.A.*, No. WMN-13-1830, 2014 WL 176790, at *6 (D. Md. Jan. 15, 2014) ("A fact is material if a reasonable person would rely on it in making a decision, or if the maker of the misrepresentation knows the recipient is likely to regard [it] as important."), *aff'd*, 593 F. App'x 223 (4th Cir. 2015).

Finally, proceeding as a class action is superior to other available methods for resolution of Class Members' claims. *See, e.g.*, *In re BearingPoint, Inc. Sec. Litig.*, 232 F.R.D. 534, 545 (E.D. Va. 2006). The remaining manageability concerns of Rule 23(b)(3) are not at issue in the context of a class settlement. *See Amchem*, 521 U.S. at 620 (explaining that when determining whether to certify a Class, courts need not consider the last factor, "whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial"); *NeuStar*, 2015 WL 5674798, at *8.

VII. NOTICE TO THE CLASS SHOULD BE APPROVED

Upon entry of the [Proposed] Order Granting Preliminary Approval of the Settlement and Directing Notice of Proposed Settlement to the Class ("Notice Order"), the Parties will notify Class Members of the Settlement by mailing the Class Notice (Exhibit A to the Notice Order) to all Class Members identified from Genworth's records. Specifically, the Administrator will utilize Genworth's own data to identify and send the Class Notice to Class Members. Azari Decl., ¶ 12.[11] The Class Notice advises Class Members of the terms of the Settlement, the plan to send the Special Election Letter following the effective date of the Settlement, and Plaintiffs' counsel's forthcoming motion for attorneys' fees, expenses, and service awards. The Notice further details: (a) the procedures for objecting to the Settlement or the request for approval of attorneys' fees, expenses, or service awards; (b) how Class Members can exclude themselves from (opt out of) the Class; and (c) the date, time, and location of the Final Settlement Hearing.

In short, the Class Notice fairly apprises the Class of the Settlement's terms and of the options that are open to them in connection with the proceedings. The manner of providing notice, which is individual notice by mail to all Class Members and publication notice, represents the best notice

[11] The Parties request that the Court approve retention of Epiq as the administrator for this case. Epiq has successfully administered numerous complex class action settlements to date, including the settlement in *Skochin*. Azari Decl., ¶¶ 4-7.

practicable and satisfies the requirements of due process and Rule 23.

VIII. PROPOSED SCHEDULE OF SETTLEMENT EVENTS

Plaintiffs request that this Court enter the Parties' agreed-upon form of Notice Order, submitted herewith, which among other things, will:

(a) enter the Notice Order preliminarily approving the Settlement on the terms set forth in the Settlement Agreement and finding that the Court is likely to grant final approval;

(b) certify the proposed Class for purposes of the Settlement;

(c) approve the Class Notice and Publication Notice attached as Exhibits A and B to the [Proposed] Notice Order;

(d) find that the distribution procedures for the Class Notice in the manner and form set forth in the Notice Order constitute the best notice practicable under the circumstances, and comply with the notice requirements of due process and Fed. R. Civ. P. 23; and

(e) set a schedule and procedure for: disseminating the Notice; requesting exclusion from the Class; objecting to the Settlement or Class Counsel's application for attorneys' fees, expenses, and service awards; submitting papers in support of final approval of the Settlement; and the final Settlement Hearing.

Event	Calculation of Due Date	Proposed Date[12]
Date for commencing the mailing of the Class Notice to the Class	At least 90 calendar days after entry of Notice Order	August 1, 2022
Deadline for filing of papers in support of final approval of Settlement and Plaintiffs' counsel's application for attorneys' fees, expenses, and service awards	At least 60 calendar days prior to Final Approval Hearing	September 23, 2022
Publication of Publication Notice	At least 15 calendar days before the Deadline for requesting exclusion from the Class or filing objections	By September 15, 2022
Deadline for requesting exclusion from the Class or filing objections	60 calendar days after the mailing of Class Notice	September 30, 2022
Deadline for filing reply brief(s) in support of final approval of Settlement and Class Counsel's application for an award of attorneys' fees, expenses, and Named Plaintiffs' service payments, and	14 calendar days prior to Final Approval Hearing	November 7, 2022
Deadline for Genworth to report to the Court concerning any state regulatory input on the Settlement	14 calendar days prior to Final Approval Hearing	November 7, 2022
Final Approval Hearing	At least 120 calendar days after entry of the Notice Order	November 21, 2022

IX. CONCLUSION

Plaintiffs respectfully request that the Court: (a) certify the proposed Class for the purposes of the Settlement; (b) approve the proposed form and manner of notice to Class Members; and (c) schedule a hearing on Plaintiffs' motion for final approval of the Settlement and Plaintiffs' counsel's motion for an award of attorneys' fees, expenses, and service awards. The Parties' agreed-upon form of proposed Notice Order is submitted herewith.

[12] These dates are triggered by two events, the date the Court grants this Motion to Direct Notice of the Proposed Settlement to the Class and the date of the Final Approval Hearing. This proposed schedule is based upon the Court granting the Motion on May 2, 2022 and setting the Final Approval Hearing for November 21, 2022.

DATED: April 1, 2022

PHELAN PETTY PLC

/s/ Jonathan M. Petty

JONATHAN M. PETTY (VSB No. 43100)
BRIELLE M. HUNT (VSB No. 87652)
3315 West Broad Street
Richmond, VA 23230
Telephone: 804/980-7100
804/767-4601 (fax)
mphelan@phelanpetty.com
jpetty@phelanpetty.com

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

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

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

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2022, I filed the foregoing pleading or paper through the Court's CM/ECF system, which sent a notice of electronic filing to all registered users.

/s/ Jonathan M. Petty

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

Counsel for Plaintiffs