IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

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

MEMORANDUM OF LAW IN SUPPORT OF CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND SERVICE AWARDS TO THE NAMED PLAINTIFFS

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Goldman Scarlato & Penny, P.C., Robbins Geller Rudman & Dowd LLP, Berger Montague PC, and Phelan Petty PLC, counsel for the Named Plaintiffs[1] and the Class[2] ("Class Counsel"), respectfully submit this memorandum in support of their application for an award of attorneys' fees and expenses and service awards to the Named Plaintiffs.

I. INTRODUCTION

Class Counsel have again achieved a remarkable Settlement for the benefit of a Class of Genworth[3] long-term care ("LTC") insurance policyholders. The Settlement is very similar to that approved by the Court in *Skochin*[4] and achieves the litigation's main goals, delivering the core relief Plaintiffs could expect to obtain had they prevailed on the merits of their claims – namely, several election options in connection with their LTC insurance policies, including "Paid-up Benefit Options" and "Reduced Benefit Options" with cash damages payments. Stipulation, ¶43 and Appendices C-D. It also provides a more complete and adequate disclosure from Genworth about Future Rate Increases ("Disclosures"). *Id.*, ¶43(a) (b) and Appendix B. While the Settlement structure and relief closely track the *Skochin* settlement, Class Counsel's fee request is significantly lower. As compensation for their efforts, Class Counsel respectfully request an award of attorneys' fees as follows:

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[1] The "Named Plaintiffs" are Judy Halcom, Hugh Penson, Harold Cherry and Richard Landino.

[2] All capitalized terms not defined herein shall have the same meanings as in the Joint Stipulation of Class Action Settlement and Release signed by the Parties on August 22 and August 23, 2021 ("Stipulation") (ECF No. 46-1). Citations are omitted and emphasis is added unless otherwise noted.

[3] Defendants Genworth Life Insurance Company and Genworth Life Insurance Company of New York are collectively referred to herein as "Genworth" or "Defendants."

[4] *Skochin v. Genworth Life Ins. Co.*, No. 3:19-cv-49-REP, 2020 WL 6536140 (E.D. Va. Nov. 5, 2020).

(a) $1,000,000.00 relating to the injunctive relief that is substantially in the form of the Disclosures ("Injunctive Relief Fee") (compared to $2,000,000.00 awarded in *Skochin*); and

(b) an additional contingent payment of 15% of certain amounts related to Special Election Options selected by the Class, which shall be no greater than $18,500,000.00 ("Contingent Fee") (compared to a $24.5 million cap in *Skochin*).

Stipulation, ¶52.

Since fee awards are designed to encourage counsel to get the best possible result for the class, the amount requested in this case is warranted given the outstanding recovery. The monetary relief that Class Counsel expects to be provided to Class members is considerable. Based on the rate of settlement elections made to date in the *Skochin* settlement, Class Counsel anticipate that total cash damages in this Settlement could reach over $200 million. *See* the Declaration of Brian D. Penny ("Penny Decl.") in Support of (1) Plaintiffs' Motion for Final Approval of Class Action Settlement ("Final Approval Brief"), and (2) Class Counsel's Motion for an Award of Attorneys' Fees and Expenses and Service Awards to the Named Plaintiffs, ¶12. That calculation does not account for the benefits for the thousands of Class members who may elect to have their non-forfeiture benefits ***doubled*** in the Settlement. Moreover, none of these amounts will be reduced in any way by Genworth's payment of attorneys' fees, expenses, and the Named Plaintiffs' awards. While the relief provided here is exceptional, the requested Contingent Fee is relatively modest. A 15% fee is far below the fees awarded in this District and Circuit in other recent class actions. *See* below §II.B.6. and Declaration of Brian T. Fitzpatrick ("Fitzpatrick Decl."), ¶18.

In addition, the recovery was achieved in the face of considerable risk. These risks include, for example, the risk that a litigation class could not be certified, the risk that the case would not survive summary judgment on whether the Disclosures were misleading, or the risk that a jury

would not find them misleading. *See* Fitzpatrick Decl., ¶21. While facing these risks, Class Counsel's efforts to date have been without compensation of any kind and the fee has been wholly contingent upon the result achieved. Class Counsel also faced the prospects of an aggressive defense mounted by Defendants through two of the largest and most sought-after defense firms in the country.

The recovery is outstanding and secures what the Named Plaintiffs sought – more complete Disclosures (Stipulation, Appendix B), doubling of paid-up benefits, and large cash damages payment options (including four-times the difference in premiums) (*id.*, Appendix C). This is significantly better than the typical settlement, which "recovers low double digit or even single digit percentages of the relief sought by the class." Fitzpatrick Decl., ¶20. It was achieved despite significant obstacles and risks that Class Counsel faced in bringing and prosecuting this case. Accordingly, the requested fee, which is below that awarded by the Court in *Skochin* and well below others awarded in the Fourth Circuit on a percentage basis, is warranted.

In addition, the Named Plaintiffs – who have participated in and overseen the Action from initial investigation through Settlement – approve of and endorse the requested fee. Class Counsel respectfully request that this Court approve the requested amount of fees and litigation expenses as justified under the particular facts of this case.

Separately, the Named Plaintiffs seek service awards of $15,000.00 each in connection with their representation of the Class. The time, skill and effort the Named Plaintiffs dedicated to this litigation are set forth in the Penny Declaration (¶¶28-35), and they respectfully request that the Court approve the awards.

II. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE AND APPROPRIATE

On August 31, 2021, the Court granted preliminary approval of the Settlement and the Notice of Pendency of Class Action and Proposed Settlement ("Notice") (Stipulation,

Appendix E), which informed Class members that Class Counsel would seek attorneys' fees of $1,000,000.00 relating to the Injunctive Relief Fee and an additional 15% Contingent Fee of no greater than $18,500,000.00. Class Counsel also informed the Class that they would request an award of litigation expenses in an amount not to exceed $50,000.00; and service awards not to exceed $15,000.00 for each Named Plaintiff. *Id.*

Rule 23(h) of the Federal Rules of Civil Procedure permits the Court to "award reasonable attorney's fees . . . that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). Here, as in *Skochin*, the fees are ***both*** authorized by law ***and*** by the Parties' agreement. Paragraph 52 of the Stipulation permits Class Counsel to seek attorneys' fees of $1,000,000.00 relating to the injunctive relief and $18.5 million in the form of a Contingency Fee. The requested fees and expenses were agreed to by the Parties only after they had reached agreement on the substantive terms of the Settlement and following extensive negotiation. Declaration of Rodney A. Max, [ECF No. 46-2], ¶24. Such negotiated fee and expense awards are favored, and courts have endorsed them. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("Ideally, of course, litigants will settle the amount of a fee."). The fact that the Parties were able to avoid a "second major litigation[,]" as to the fees and expenses through extensive negotiations, weighs in favor of the award. *Id.*

Also, like the *Skochin* settlement, the requested fees and expenses sought here "will be paid by Defendants from a separate fund that will not diminish Class members' recovery." *Skochin*, 2020 WL 653614, at *8. Courts recognize that a reduction to a negotiated fee only benefits the defendant. *See, e.g.*, *Foti v. NCO Fin. Sys., Inc.*, No. 04 Civ. 00707 (RJS), 2008 U.S. Dist. LEXIS 16511, at *21 (S.D.N.Y. Feb. 20, 2008) (finding proposed amount of fees to be fair in case where class settlement was not a monetary common fund, and attorneys' fees were not to "come out of the pocket of class members"; the court noted that "were the Court to reduce the agreed-upon amount of attorneys' fees, the only beneficiary would be [defendant] – not the class").

A. A Reasonable Percentage of the Benefit Conferred on the Class Is the Appropriate Method for Awarding Attorneys' Fees

It is well settled that attorneys who achieve a common settlement fund for the benefit of a class are "entitled to a reasonable attorneys' fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). In *Skochin*, the Court treated the cash damages portion of the relief to the Class as a "'constructive' common fund" and agreed that "the percentage method is still appropriate." *Skochin*, 2020 WL 6536140, at *6.

Determining the appropriate percentage fee is case specific, but in *Skochin*, the Court agreed that a 15% fee was reasonable and awarded precisely that. *Id.* at *11. In fact, district courts in the Fourth Circuit have awarded much higher percentages – 25% to 33% of the recovery – as attorneys' fees in recent class actions. *See, e.g.*, *Knurr v. Orbital ATK, Inc.*, No. 1:16-cv-01031-TSE-MSN, 2019 WL 3317976, at *1 (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, at *2 (E.D. Va. Sept. 15, 2016) (Payne J.) (awarding 26.752% fee 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) (awarding 28.67% fee in FCRA case); *see also* Fitzpatrick Decl., ¶18 ("In the 19 settlements in my study from the Fourth Circuit where the percentage method was used, the mean and median were 25.2% and 28%, respectively.").

In addition, because the attorneys' fees that Genworth will pay Class Counsel are capped while the cash damages payments to Class members are not, it is possible (if not probable based on the claims experience to date in *Skochin*) that the contingent portion of the attorneys' fees

ultimately will be well below 15% of the Class' aggregate cash damages payments, further confirming their reasonableness.

To ensure the reasonableness of the percentage fee awarded, district courts in the Fourth Circuit sometimes do a lodestar "cross-check," although as Professor Fitzpatrick explains, the lodestar approach comes with several disadvantages, including that it "[does] not align the interests of class counsel with the interests of the class; class counsel's recovery [does] not depend on how much the class recovered, but, rather, on how many hours [was] spent on the case." Fitzpatrick Decl., ¶10. For this and other acknowledged flaws in the lodestar approach, empirical research show that "the lodestar method is now used to award fees in only a small percentage of class action cases, usually those involving fee-shifting statutes or those where the relief is predominantly injunctive in nature (and the value of the injunction cannot be reliably calculated)." *Id.*

Here, the 15% fee calculated from each Class member's actual cash damages payment is well below the range of percentage fees approved by courts in this District and the reasonableness of the percentage is, if necessary, confirmed by the resulting lodestar multiplier of 8.4x, which is consistent with the Court's conclusion in *Skochin*. 2020 WL 6536140, at *10 ("a potential lodestar multiplier of 9.05 is not unreasonable in this case").

B. Class Counsel's Fee Request Is Fair and Reasonable Under Fourth Circuit Authority

In *Skochin*, the Court used the percentage method and applied a combination of the *Johnson* and *Gunter* factors to determine the reasonableness of Class Counsel's fee request. 2020 WL 6536140, at *6-7; *see also* Fitzpatrick Decl., ¶14 (analyzing Class Counsel's fee request under all *Johnson* and *Gunter* factors).

> The twelve *Johnson* factors are: (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for legal work; (6) the attorney's expectations at the outset of litigation; (7) the time limitations imposed by the client or

> circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation[,] and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

Skochin, 2020 WL 6536140, at *4-5 (citing *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)).

In *Gunter*, "the reasonableness factors are: (1) the results obtained for the class; (2) the quality, skill, and efficiency of the attorneys' involved; (3) the complexity and duration of the case; (4) the risk of nonpayment; (5) awards in similar case; (6) objections; and (7) the amount of time devoted to the case by plaintiffs' counsel." *Id.* at *5 (citing *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000)).

Just as the Court did in *Skochin*, Class Counsel will analyze the fee request by applying both the applicable *Johnson* and *Gunter* factors. Class Counsel's $1,000,000.00[5] and 15% requested fee satisfy each of those factors, are approved and endorsed by the Named Plaintiffs, and are eminently reasonable when compared to the fee award in *Skochin*. Class Counsel's requested fees should be awarded as fair and reasonable in this case.

1. The Amount in Controversy and the Result Obtained for the Class Support the Requested Fee

"The first and most important factor for a court to consider when making a fee award is the result achieved." *Genworth*, 210 F. Supp. 3d at 843; *see also In re MicroStrategy, Inc. Sec. Litig.*,

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[5] While Class Counsel do not assign a value to the Disclosures upon which the $1,000,000.00 portion of the fee request is based, clearly they have value, and this request is half that awarded in *Skochin* for such disclosures.

> In this case, it will be difficult to assign a value to the extensive disclosures the settlement requires Genworth to send to the class members. Nonetheless, there is no doubt that these disclosures have value . . . . Thus, in my opinion, it is appropriate to reward class counsel for these disclosures[.]

Fitzpatrick Decl., ¶15.

172 F. Supp. 2d 778, 787 (E.D. Va. 2001) (stating that a fee should "include a reward or enhancement" for "the degree of success achieved"). Put differently, clients care most about results and would willingly pay, and are financially better off paying, a larger fee for a great result than a lower fee for a poor outcome. *See* Fitzpatrick Decl., ¶11 (noting that "private parties – including sophisticated corporations – that hire lawyers on contingency use the percentage method and not the lodestar method"). Here, not only will the Class receive significant benefits, they can enjoy those benefits without having to pay Class Counsel's fees – that amount is paid entirely by Genworth.

The Settlement is an exceptional result for the Class by any measure. It provides significant injunctive relief in the form of Disclosures that provides Class members visibility about future rate increases and also provides them the option to keep their policies in the face of dramatically increasing premiums or make changes to their policies and also receive cash damages payments depending on their choice. The cash damages payments to Class members for reduced benefit options are calculated as four times the amount in the reduction in premium for each option. For Paid-up Benefit Options, the cash damages payments are equal to 100% of the premiums paid through December 31, 2016, plus premiums paid on or after January 1, 2021, less claims paid over the lifetime of the policy. Eligible Class members can also enhance the paid-up policy benefits by doubling them in lieu of receiving a cash damages payment. There is no aggregate cap or limit to how much Genworth will pay out to Class members, and these payments approximate complete financial relief for the claims asserted. Class members will not benefit from reducing the fees, only Genworth will. *See, e.g.*, *Foti*, 2008 U.S. Dist. LEXIS 16511, at *21.

Based on the claims results from *Skochin* to date, Plaintiffs' calculation of a potential $84 million to $251 million cash damages range here is conservative.

In the end, the Class cares most about getting a great result. This outstanding result obtained for the Class supports Class Counsel's fee request and merits an appropriate fee that encourages counsel to seek excellent results as efficiently as possible.

2. The Reaction of the Class and Endorsement of Named Plaintiffs Support the Requested Fee

The Named Plaintiffs, who most closely observed the work of Class Counsel, approve and endorse the fee request. *See* Penny Decl., ¶34. In addition, Class members were informed in the Notice that Class Counsel would move the Court for attorneys' fees as described above. Class members were also advised of their right to object to the fee request, and that such objections are required to be filed with the Court and served on the Settlement Administrator no later than December 28, 2021. As of the date of this filing, more than 144,821 Notices were sent to Class members, and there have not been any objections to counsel's fee request to date. *See Genworth*, 210 F. Supp. 3d at 844 (the "limited objection to attorneys' fees within the range awarded by the Court demonstrates their reasonableness"). Indeed, as of the date of this filing, Class Counsel have personally spoken with nearly 1,500 Class members regarding the Settlement and none have expressed reservation about Class Counsel's fee request. *See* Penny Decl., ¶15.

3. The Skill and Efficiency of Class Counsel Support the Requested Fee

The skill and efficiency of the attorneys involved is also an important factor. *See Skochin*, 2020 WL 6536140, at *8. Class Counsel, based on knowledge gained in litigating and settling *Skochin*, served targeted discovery, including document requests and interrogatories, and reviewed and analyzed over 350,000 pages of documents. They marshaled evidence on complex factual and legal issues such as contract interpretation, insurance-related financial and actuarial issues (*e.g.*, reserves for future liabilities), and damages. Class Counsel also carefully prepared for and interviewed two of Genworth's representatives. *See* Final Approval Brief, at 3; Penny Decl., ¶24. In doing so, Class Counsel expended significant time, resources, and skill in developing

compelling evidence to establish liability and damages. *See* Final Approval Brief at 3; Penny Decl., ¶¶19-27.

The recovery obtained for the Class is the result of these efforts, and Class Counsel's diligence and skill enabled them to negotiate a very favorable recovery for the Class under difficult and challenging circumstances. *See Genworth*, 210 F. Supp. 3d at 844 (noting the "skill required in complex cases such as this involving massive discovery efforts and complicated issues of fact and law" weighed in favor of awarding 28% fee).

4. The Complexity and Difficulty of the Litigation Support the Requested Fee

The complexity or difficulty of issues is another factor that can support an enhanced fee award. *See Skochin*, 2020 WL 6536140, at *8-9.

While certain of the issues, *e.g.*, pleading issues, were resolved in *Skochin*, a number of other complex and difficult issues lay ahead. For instance, Genworth would have argued that class certification was unwarranted on Named Plaintiffs' claims because, according to Genworth, both fraud and state consumer protection law claims require proof of reliance. Named Plaintiffs would have argued that a presumption of reliance was available under *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153 (1972) (reliance for fraud claim presumed based on materiality of omission), based on Genworth's omissions being material, and that the rate increase notification letters were all uniform based on template forms. Genworth, however, would have disputed that and, in any event, would have argued that any presumption would have been rebutted.

In addition, Named Plaintiffs faced the risk that the Court could have entered summary judgment on whether Genworth's Disclosures were misleading, or whether Genworth was even obligated to make such Disclosures in the first place. Likewise, a jury could have found that Genworth did not have a duty to make these disclosures or that the Disclosures made were not misleading. Also, Genworth would have undoubtedly appealed any decision to certify the class

and any adverse judgment. At the Fourth Circuit, Named Plaintiffs would have faced substantial risk, including the risk that the appellate court would reverse this Court's rejection of Genworth's filed-rate doctrine arguments made in *Skochin v. Genworth Life Ins. Co.*, 413 F. Supp. 3d 473, 484 (E.D. Va. 2019).[6]

5. The Contingent Nature of Class Counsel's Representation and the Risk of Nonpayment, Support the Requested Fee

A determination of a fair fee must include consideration of the contingent nature of the fee and the difficulties which were overcome in obtaining the settlement. *See Skochin*, 2020 WL 6536140, at *9; *Genworth*, 210 F. Supp. 3d at 844. In *Skochin*, the Court recognized that "the risk of non-payment was very real." 2020 WL 6536140, at *9. For the reasons just stated, the same is true here. Class Counsel prosecuted this Action on a wholly contingent basis despite the risks of surviving dispositive motions, obtaining class certification, proving liability and damages, and litigating the case through trial and possible appeals. *See* Final Approval Brief at 4; Penny Decl., ¶23. To date, Class Counsel have not been compensated for their time or expenses in representing the Class. Penny Decl., ¶24.

Litigation of these cases can be extremely protracted and yet law firm salaries, leases, and other expenses must be paid, while counsel wait for several years to be paid, if at all. For example, in another case handled by one of Class Counsel, *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, No. 1:02-cv-05893 (N.D. Ill.), Robbins Geller Rudman & Dowd LLP litigated the case for 14 years through trial and appeal, without compensation and expending over $35 million in actual, out-of-pocket expenses without third-party funding, before reaching a settlement. In Class

[6] *See* Fitzpatrick Decl., ¶21 ("I identified the following risks . . . as especially significant: 1) the risk a litigation class would not be certified; 2) the risk the case would not survive summary judgment on whether Genworth's disclosures were misleading; 3) the risk the jury would not find the disclosures misleading; 4) the risk an appellate court would reverse any victory on whether the disclosures were misleading; and 5) the risk an appellate court would reverse the class's past victory on the filed-rate doctrine.").

Counsel's view, it is their hard-earned reputations and willingness to go all the way to get the best possible result that benefits the Class and makes them highly sought after firms for clients. Nevertheless, in every case the risk of losing and not being paid at all remains, as there are numerous class actions in which plaintiffs' counsel expended thousands of hours and lost, receiving no compensation. *See In re Xcel Energy, Inc. Sec., Deriv. & "ERISA" Litig.*, 364 F. Supp. 2d 980, 994 (D. Minn. 2005) ("Precedent is replete with situations in which attorneys representing a class have devoted substantial resources in terms of time and advanced costs yet have lost the case despite their advocacy.").

Class Counsel bore the risks of litigation and committed significant time to the vigorous and successful prosecution of this Action to achieve the best possible result for the Class. In doing so, Class Counsel diverted resources – and the litigators in this case – away from other potentially meritorious actions. The contingent nature of counsel's representation, and the risk of nonpayment, support approval of the requested fee.

6. Awards in Comparable Cases Support the Requested Fee

In *Genworth*, the court held that the "award of 28% to the Plaintiffs' Counsel is fair and reasonable[,]" and noted that plaintiffs had cited several cases "in which courts grant attorneys' fees varying from 25% to 33.3% of the total Settlement amount." 210 F. Supp. 3d at 845 & n.4 (citing settlements ranging from $165 million to $325 million where attorneys' fees of 25% to 33.3% were awarded). Here, the recovery is better than most cases, providing substantial financial and injunctive relief, yet Class Counsel's requested 15% fee – the same percentage approved in *Skochin*[7] – is well below recent fees for comparable complex litigation settlements:

[7] While the Court noted a "risk of a windfall payment" in *Skochin*, 2020 WL 6536140, at *10 due to the $10 million floor that was initially requested but then withdrawn, here, Class Counsel are not requesting a floor, and hence, there is no risk of windfall.

Cases in the Fourth Circuit	Settlement	Fee %
In re Celebrex (Celecoxib) Antitrust Litig., No. 2:14-cv-00361, 2018 WL 2382091 (E.D. Va. Apr. 18, 2018)	$94,000,000.00	33%
In re Genworth Fin. Sec. Litig., 210 F. Supp. 3d 837 (E.D. Va. 2016)	$219,000,000.00	28%
In re NII Holdings Inc. Sec. Litig., No. 1:14-cv-00227-LMB-JFA, 2016 WL 11660702 (E.D. Va. Sept. 16, 2016)	$41,500,000.00	25%
Ryals v. Strategic Screening Sols., Inc., No. 3:14-cv-00643-REP, 2016 WL 7042947 (E.D. Va. Sept. 15, 2016)	$1,492,869.09	26.752%
Henderson v. Verifications Inc., No. 3:11-cv-514-REP, 2013 WL 12146748 (E.D. Va. Mar. 13, 2013)	$3,750,000.00	28.67%

This is consistent with Professor Fitzpatrick's study and analysis:

> For example, according to my empirical study, the most common percentages awarded by federal courts nationwide using the percentage method were 25%, 30%, and 33%, with a mean award of 25.4% and a median award of 25%. . . . The same is true when looking at fee awards in the Fourth Circuit alone. In the 19 settlements in my study from the Fourth Circuit where the percentage method was used, the mean and median were 25.2% and 28%, respectively.

Fitzpatrick Decl., ¶18. Accordingly, the requested fee percentage is eminently reasonable.

7. The Time and Labor Expended Supports the Requested Fee

Awarding fees based on the percentage method "has the virtue of reducing the incentive for plaintiffs' attorneys to over-litigate or 'churn' cases" and, therefore, the trend has been toward use of the percentage method. *See MicroStrategy*, 172 F. Supp. 2d at 787. Indeed, as courts have observed, through the percentage method, "[a] number of salutary effects can be achieved . . . including removing the inducement to unnecessarily increase hours, prompting early settlement, reducing burdensome paperwork for counsel and court[,] and providing a degree of predictability to fee awards." *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 886 F. Supp. 445, 460 (E.D. Pa. 1995). The lodestar crosscheck, on the other hand, "reintroduces all the bad behaviors of the lodestar method that the percentage method was designed to correct in the first place[.]"

Fitzpatrick Decl., ¶23. Indeed, there is no evidence "that real clients in the marketplace ever use the lodestar crosscheck when they hire lawyers on contingency." *Id.*, ¶24. The legal market in Richmond, Virginia is no different. *See* Declaration of Harris D. Butler, III, Esquire ("Butler Decl."), ¶18 ("For single party or single event cases, the common practice for contingency fee contracts in the Richmond, Virginia legal market is for plaintiffs' attorneys to have a contingency fee contract of 33 to 40% of the gross amount recovered, and in complex federal litigation, a 40% contract is the norm.").

Nevertheless, courts in this District recognize that reviewing counsel's lodestar as a "cross-check" may assist in assessing the reasonableness of a percentage fee. *See Skochin*, 2020 WL 6536140, at *9-10; *Genworth*, 210 F. Supp. 3d at 845; *MicroStrategy*, 172 F. Supp. 2d at 787 (stating that a fee should "adequately compensate lead counsel for the time expended on the case"). Since fee awards are designed to encourage efficient litigation and great results, courts recognize that the fee award should "include a reward or enhancement beyond the lodestar figure to account for the difficulty of the case, the degree of success achieved, and other qualitative factors." *MicroStrategy*, 172 F. Supp. 2d at 787. Overall, the awarding of fees "contemplate[s] the exercise of sound judgment by the trial court in adjusting the lodestar figure after a qualitative assessment of various factors[.]" *Id.* *See* Fitzpatrick Decl., ¶23 ("In my opinion, the better approach is to assess this factor qualitatively rather than quantitatively"). Each of those factors, along with the Court's careful analysis in *Skochin*, supports the requested fee.

a. Class Counsel's Lodestar Multiplier Is Reasonable and Appropriately Rewards and Incentivizes Counsel for Their Efficient Work

Multipliers are appropriate to encourage efficiency and to compensate for the delay in payment and additional risks because, unlike defense firms who are guaranteed payment win or lose and paid immediately, Class Counsel are only paid at the end of the case and only if the case

is successful. *See, e.g.*, *MicroStrategy*, 172 F. Supp. 2d at 788 ("there is no fee unless there is a recovery and the fee awarded must bear a reasonable relation to the size of the recovery").

In this case, Class Counsel and their paraprofessionals have expended to date nearly 4,800 hours in the prosecution of this Action with a resulting lodestar (after writing off time in the exercise of billing judgment) of approximately $2.323 million, resulting in a 8.4x multiplier to Class Counsel's lodestar based on their fee request.[8] *See* Penny Decl. ¶ 20 and *accompanying* Declaration of Brian D. Penny Filed on Behalf of Goldman Scarlato & Penny, P.C. in Support of Application for Award of Attorneys' Fees and Expenses ("Goldman Scarlato Decl."), Exhibit E, ¶4; Declaration of Stuart A. Davidson Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Robbins Geller Decl."), Exhibit F, ¶4; Declaration of Glen L. Abramson Filed on Behalf of Berger Montague PC in Support of Application for Award of Attorneys' Fees and Expenses ("Berger Montague Decl."), Exhibit G, ¶4; Declaration of Jonathan M. Petty Filed on Behalf of Phelan Petty PLC in Support of Application for Award of Attorneys' Fees and Expenses ("Phelan Petty Decl."), Exhibit H, ¶4. This lodestar multiplier confirms the reasonableness of the requested fee award, as it is consistent with the Court's conclusion in *Skochin* that a "potential lodestar multiplier of 9.05 is not unreasonable in this case." 2020 WL 6536140, at *10. The Court in *Skochin* identified two bases supporting this multiplier. First, Class Counsel would only receive the contingency fee ceiling (here, $18.5 million) if enough Class members in fact choose one of the five Special Election Options with a cash damages component. *See id*. In that instance, the Settlement here would be

[8] This multiple is based on the $1 million fee award in connection with the Disclosures obtained, and $18,500,000 for the 15% contingency fee award. If the cash damages paid to the Class members (including value attributed to the non-forfeiture benefit elections) exceeds $123,333,333, then the total attorneys' fees will increase up to (but will not exceed) $19,500,000. Of course, in that event, the requested fees will be no more than 15% of the actual value obtained by the Class, and could be a substantially lower percentage.

valued at over $123,333,333.33 at which point the 15% contingency fee ceiling would be triggered. *See id*. "Second, the lodestar is only used as a cross-check rather than the primary method of assessing the reasonableness of the attorneys' fees in this case." *Id.* If the Court finds, as it did in *Skochin*, that the 15% fee is reasonable in light of the significant value provided to the Class, "the lodestar should not preclude recovery." *Id.*

Awarding Class Counsel a 8.4x multiplier is reasonable under the facts of this case and provides an appropriate "reward or enhancement beyond the lodestar figure to account for the difficulty of the case, the degree of success achieved, and other qualitative factors." *MicroStrategy*, 172 F. Supp. 2d at 787-88.[9]

b. Class Counsel's Hours and Rates Are Reasonable

Although courts need not apply "exhaustive scrutiny" to Class Counsel's lodestar and "may accept the hours estimates provided by Lead Counsel[,]" *Phillips v. Triad Guar. Inc.*, No. 1:09-CV-71, 2016 WL 2636289, at *7 (M.D.N.C. May 9, 2016), courts may "examine [the lodestar's] components and assess their reasonableness," *MicroStrategy*, 172 F. Supp. 2d at 788. Here, both Class Counsel's hours and rates are reasonable for practitioners in this area of the law.

First, the nearly 4,800 hours committed to the prosecution of this case by Class Counsel to date are "reasonable in light of the degree of difficulty involved in prosecuting this complicated

[9] *See also In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587 (E.D. Pa. 2005) (awarding 25% of the settlement fund of $126,800,000 and 6.96 multiplier); *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.*, No. Civ.A. 03-4578, 2005 WL 1213926, at *18 (E.D. Pa. May 19, 2005) (15.6 multiplier awarded, which the court found was "neutralized with respect to the reasonableness of a percentage fee award of 20% by the extraordinary support Plaintiffs have shown for counsel's request for fees"); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 590 (S.D.N.Y. 2008) ("[i]n contingent litigation, lodestar multiples of over 4 are routinely awarded by courts."); *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ 10240 (CM), 2007 WL 2230177, at *17 n.7 (S.D.N.Y. July 27, 2007) ("Lodestar multipliers of nearly 5 have been deemed 'common' by courts in this District.").

case against expert and experienced defense counsel." *Id.*; *see also* Final Approval Brief at 11. In fact, Class Counsel's hours demonstrate that they litigated this Action with exceptional efficiency.

Second, Class Counsel's rates are "within the range of reasonableness." *MicroStrategy*, 172 F. Supp. 2d at 788. Class Counsel's rates are lower than the standard set by national defense firms that defend class actions.[10]

	Genworth LTC II Plaintiff Firm 2021 Rates	Sears Bankr. Defense Firm 2019 Rates	NCAA Antitrust Defense Firm 2018 Rates	Genworth Plaintiff Firm 2016 Rates	NII Holdings Plaintiff Firm 2016 Rates	Comp. Sciences Plaintiff Firm 2013 Rates
Partner	$500-$1100	$1,025-$1,600	$820-$1,445	$700-$995	$775-$985	$750-$975
Associate	$300-450	$560-$1,030	$545-$765	$500	$390-$725	$440-$665
Counsel	$390-970	$1,025-$1,160		$700	$650	$725
Staff Attys[11]	$390-425	$345-$480	$85	$340-390	$335-$435	$325-$390
Paralegals	$350	$240-$480	$170-$340	$285-$310	$150-$325	$200-$295
Investigators	$290			$245-$495	$425-$495	$410-$485
Lit. Support	$220		$275	$285		
Analysts				$325	$300-$550	

[10] The rates for the Sears bankruptcy are for the national law firms of Weil, Gotschal & Manges and Paul, Weiss, Rifkind, Wharton & Garrison. *See* Dan Packel, *Weil Fees in Sears Bankruptcy Shine Light on Big Billers: The Paralegals*, THE AMERICAN LAWYER (Jan. 24, 2019), https://www.law.com/americanlawyer/2019/01/24/weil-fees-in-sears-bankruptcy-shine-light-on-big-billers-the-paralegals/. The rates for the NCAA antitrust case are for the national law firm of Winston & Strawn LLP. *See In re Nat'l Collegiate Athletic Assoc. Athletic Grant-In-Aid Cap Antitrust Litig.*, No. 4:14-md-2541-CW, ECF No. 1169-1 at 12 (N.D. Cal. Mar. 26, 2019). In addition to these examples, it was publicly reported that partners at national firms were "routinely charg[ing] between $1,200 to $1,300 an hour," and Kirkland & Ellis LLP had billing rates as high as $1,445 per hour – four years ago in 2016. *See* Sara Randazzo & Jacqueline Palank, *Legal Fees Cross New Mark: $1,500 an Hour*, WALL ST. J. (Feb. 9, 2016), https://www.wsj.com/articles/legal-fees-reach-new-pinnacle-1-500-an-hour-1454960708?cb=logged0.10928983175737395. The information for the plaintiffs' firm rates are taken from the settlement filings in those cases.

[11] Staff Attorneys includes "project" or "contract" attorneys. Courts in this District have included these attorneys at "market rates" because they "are part of the team brought in to benefit the class" and "[t]heir contributions are of a similar nature to the attorneys who are in the firms retained by plaintiffs." *In re Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 265 (E.D. Va. 2009) ("[T]he Court has absolutely no trouble finding that the contract attorneys should be billed at market versus cost."); *see also In re NII Holdings, Inc. Sec. Litig.*, No. 1:14-cv-00227-LMB-JFA, ECF No. 257-1 at 99 (E.D. Va. Aug. 12, 2016) (including contract attorneys in lodestar).

Notably, only one of the attorneys for Class Counsel who worked on this matter had hourly rates of over $1,000, but he billed less than 0.025% of the total hours in this case. *See* Goldman Scarlato Decl., Ex. A; Robbins Geller Decl., Ex. A; Berger Montague Decl., Ex. A; Phelan Petty Decl., Ex. A. All remaining attorneys' rates are between $300 and $970. *See id*. As demonstrated herein, Class Counsel's rates are in line with comparable cases or even below the rates submitted by nationwide firms. Indeed, "the rates requested by class counsel are fair and reasonable, and within the market rates for the Eastern District of Virginia, Richmond Division." Butler Decl., ¶25. More specifically, Mr. Butler, who has practiced in civil litigation in the Richmond area since 1987, *id.*, ¶4, and is "regularly asked to provide expert testimony in fee application proceedings in matters of complex federal litigation," *id.*, ¶11, opines that:

- "[C]ontingency fee contracts in the Richmond, Virginia legal market is for plaintiffs' attorneys to have a contingency fee contract of 33 to 40% of the gross amount recovered, and in complex federal litigation, a 40% contract is the norm."
- "The market rate for complex federal litigation in the Richmond, Virginia market would certainly be commensurate with the amounts that Class Counsel, [him]self, and defense litigators in this Court regularly charge in such complex federal court litigation."
- Class Counsel's hourly rates match favorably to rates of lawyers practicing in the Richmond Division of the Eastern District of Virginia, including the rates of firms like McGuireWoods and Troutman Pepper.

Id., ¶¶18-25.

III. CLASS COUNSEL'S LITIGATION EXPENSES ARE REASONABLE AND WERE NECESSARILY INCURRED

As with attorneys' fees, Genworth has agreed to pay Class Counsel's litigation expenses up to $50,000 in addition to, and apart from, the relief being provided to the Class. Stipulation, ¶52(a). Class Counsel seek a modest award of $26,701.96 in litigation expenses. Class Counsel's expenses and charges are set forth in the accompanying firm declarations. *See* Goldman Scarlato Decl., ¶5; Robbins Geller Decl., ¶5; Berger Montague Decl., ¶5; Phelan Petty Decl., ¶5. These expenses and charges were reasonable and necessary to the prosecution of the claims and achieving the Settlement. *See* Goldman Scarlato Decl., ¶¶5-6; Robbins Geller Decl., ¶¶5-6; Berger Montague Decl., ¶¶5-6; Phelan Petty Decl., ¶¶5-6.

The "items of costs reported include expenditures for computer legal research, document reproduction, . . . court reporting, . . . consultant fees, and travel, meals, and lodging," which are "reasonable in a case with this level of complexity, and they bear a reasonable relationship to the time and effort expended and the result achieved." *MicroStrategy*, 172 F. Supp. 2d at 791; *accord Genworth*, 210 F. Supp. 3d at 845.

The remaining expenses – such as mediation fees, service fees, and charges for photocopies, telephone services, and delivery services – are all "reasonable in a case with this level of complexity, and they bear a reasonable relationship to the time and effort expended and the result achieved." *MicroStrategy*, 172 F. Supp. 2d at 791. The Notice advised Class members that Class Counsel would seek an award of up to $50,000 in expenses, and there have been no objections to date regarding such an award. Class Counsel respectfully request payment of these reasonable litigation expenses.

IV. THE REQUESTED SERVICE AWARDS ARE REASONABLE AND SHOULD BE APPROVED

Finally, while the Court in *Skochin* found a $25,000 service award to be "reasonable," Class Counsel seek, and Genworth does not oppose, service awards here in the amount of

$15,000.00 for each of the Named Plaintiffs. If approved, Genworth will pay these awards separately. Genworth's agreement to pay them will not diminish the amount of monetary relief provided to Class members. Stipulation, ¶53(b).

Service awards "are commonplace in class actions in this District and elsewhere[.]" *Ryals*, 2016 WL 7042947, at *2, *accord Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009). "Trial courts will typically authorize service awards to class representatives for the time and effort they expended for the benefit of the class." *Skochin*, 2020 WL 6536140, at *10. Such awards are "intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Id.* (quoting *Berry v. Schulman*, 807 F.3d 600, 613 (4th Cir. 2015) and citing *Rodriguez*, 563 F.3d at 958-59). Relevant considerations are the actions the class representative has taken to protect the interests of the class, the degree to which the class has benefited from those actions, and the amount of time and effort the class representative expended. *See Ryals*, 2016 WL 7042947, at *2 ("Plaintiff has earned [the service award] by prosecuting this case, answering discovery, and keeping up-to-date on the case status through conferences with his Counsel."); *Pierce v. Rosetta Stone, Ltd.*, No. C 11-01283 SBA, 2013 WL 5402120, at *6 (N.D. Cal. Sept. 26, 2013).

The requested $15,000.00 awards for each of the Named Plaintiffs here are reasonable and warranted. The Named Plaintiffs actively participated in the prosecution of this case by regularly communicating and working with Class Counsel to produce the Complaint in this case and responding to all written discovery served by Genworth. They produced all relevant documents in their possession, custody, and control to Genworth, which included producing extremely private financial and medical information. The Named Plaintiffs kept abreast of the litigation and

mediation throughout and have consistently demonstrated their commitment to the Class by pursuing this case with passion and diligence. *See* Penny Decl., ¶¶28-35.

In seeking to hold Genworth accountable, the Named Plaintiffs subjected themselves to public attention and exposure of their personal information. Named Plaintiffs pursued these claims notwithstanding the risks that private information would likely be discoverable and perhaps at some point unsealed; in effect, they risked forfeiting their own privacy rights to vindicate the rights of others like them. Under all the circumstances of this case, the requested service awards are justified. *See, e.g.*, *Savani v. URS Prof'l Sols. LLC*, 121 F. Supp. 3d 564, 577 (D.S.C. 2015) ($15,000.00); *Helmick v. Columbia Gas Transmission*, No. 2:07-cv-00743, 2010 WL 2671506, at *3 (S.D. W. Va. July 1, 2010) ($50,000.00); *Jones v. Dominion Res. Servs., Inc.*, 601 F. Supp. 2d 756, 768 (S.D. W. Va. 2009) ($15,000.00 where none of the class representatives produced documents or sat for a deposition); *In re Auto. Refinishing Paint Antitrust Litig.*, No. 1426, 2008 WL 63269, at *7-8 (E.D. Pa. Jan. 3, 2008) ($30,000); *McBean v. City of New York*, 233 F.R.D. 377, 391-92 (S.D.N.Y. 2006) (stating incentive awards of $25,000-$30,000 are "solidly in the middle of the range"); *In re Remeron Direct Purchaser Antitrust Litig.*, No. Civ. 03-0085 FSH, 2005 WL 3008808, at *18 (D.N.J. Nov. 9, 2005) ($60,000); *In re Remeron End-Payor Antitrust Litig.*, No. Civ. 02-2007 FSH, 2005 WL 2230314, at *33 (D.N.J. Sept. 13, 2005) ($30,000); *Brotherton v. Cleveland*, 141 F. Supp. 2d 907 (S.D. Ohio 2001) ($50,000).

V. CONCLUSION

For all the reasons stated herein, and in the accompanying declarations and the Final Approval Brief, Class Counsel respectfully request that the Court: (i) award Class Counsel attorneys' fees as follows: $1,000,000.00 relating to the injunctive relief and an additional contingent payment of 15% of the cash damages payments made pursuant to the Special Election Options selected by the Class, in an amount not to exceed $18,500,000.00, and the payment of

litigation expenses of $26,701.96; and (ii) award the Named Plaintiffs $15,000.00 each in connection with their representation of the Class.

DATED: December 3, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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