

**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

**DECLARATION OF BRIAN D. PENNY IN SUPPORT OF PLAINTIFFS' MOTION TO
DIRECT NOTICE OF PROPOSED SETTLEMENT TO THE CLASS**

I, BRIAN D. PENNY, declare pursuant to 28 U.S.C. §1746 as follows:

1. My name is Brian D. Penny. I am over the age of 18, and I am competent to give testimony. The statements contained herein are based upon my own personal knowledge and are true and correct.

2. I am one of Plaintiffs' counsel in the above-captioned action. I submit this Declaration in support of Plaintiffs' Motion to Direct Notice of Proposed Settlement to the Class.

3. 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. With that notice, Plaintiff's counsel also provided a draft complaint specifying their allegations. 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.

4. 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.

5. 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. 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. 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. 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.

6. 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. 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.

7. 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.

8. 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].

9. 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.*

10. In the meantime, the Parties engaged in written confirmatory discovery, including serving requests for production of documents and interrogatories. The Parties timely responded and objected to each, and their counsel met and conferred regarding the scope of the discovery requests. 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. 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.

11. 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.

12. Attached hereto are true and correct copies of the following documents:

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| Exhibit 1 | Settlement Agreement |
| Exhibit 2 | Declaration of Rodney A. Max |
| Exhibit 3 | Staff Report, <i>Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns</i> (F.T.C. Sept. 2019) |
| Exhibit 4 | Brian T. Fitzpatrick, et al., <i>An Empirical Look at Compensation in Consumer Class Actions</i> , 11 N.Y.U. J. L. & BUS. 767 (2015) |

- Exhibit 5** Declaration of Cameron R. Azari, Esq. on Settlement Notice Plan and Administration
- Exhibit 6** Goldman, Scarlato & Penny, P.C. Firm Resume
- Exhibit 7** Robbins Geller Rudman & Dowd LLP Firm Resume
- Exhibit 8** Phelan Petty, LLC Firm Resume
- Exhibit 9** Berger Montague Firm Resume

I declare under penalty of perjury under the laws of the United States that the foregoing facts are true and correct, and that this declaration was executed this 1st day of April, 2022.

/s/ Brian D. Penny

BRIAN D. PENNY