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

MARTIN SILVERSTEIN, Plaintiff, v. GENWORTH LIFE INSURANCE COMPANY, Defendant.	Civil No. 3:23-cv-00684 (DJN)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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Plaintiff Martin Silverstein, individually and on behalf of a class of policy owners proposed to be certified for purposes of settlement (the "Settlement Class" or "Class"), has entered into a settlement agreement (the "Settlement" or "Settlement Agreement") with Defendant Genworth Life Insurance Company ("GLIC").[1] Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Plaintiff respectfully moves this Court for an order:

1. Certifying the Settlement Class, appointing Plaintiff as Class Representative, and Susman Godfrey L.L.P. as Class Counsel;

2. Preliminarily approving the proposed Settlement, plan of allocation, and the form and manner of notice to the Settlement Class; and

3. Directing notice to the Class under Rule 23(e)(1).

The Settlement, if approved, will conclude this class litigation in its entirety.

I. INTRODUCTION

Plaintiff and GLIC have agreed to a settlement that provides significant monetary and non-monetary benefits to the Class:

- **CASH**: A $5,100,00 cash payment, reduced for any post-settlement opt outs. This is not a claims-made settlement; checks will be mailed directly to Class members who do not opt-out without requiring them to submit proofs of claim, using GLIC's records. Settlement funds do not revert to GLIC.
- **CLASS COI RATE SCHEDULE INCREASE FREEZE**. A total and complete freeze on any cost of insurance ("COI") increase for Class Policies until October 25, 2029. Thus, even if GLIC has a future change in enumerated factors that would

[1] Unless otherwise noted, all capitalized terms mean the same as in the Settlement Agreement, which is attached as Exhibit 2 to the Declaration of Steven Sklaver.

otherwise permit a COI rate increase under the terms of the Class Policies, GLIC cannot increase COI rates until after October 25, 2029. Policyholders now have the ability to predict, with certainty, what their COI obligations will be for a substantial time period.

- **VALIDITY STIPULATION & STOLI WAIVER**. As part of the Settlement, GLIC has agreed not to challenge the validity and enforceability of any eligible policies owned by participating Class members on the grounds of lack of an insurable interest or misrepresentations in the application for such policies.

The cash portion of the Settlement accounts for 71.5% of the total past COI overcharges alleged in this case. This represents a substantial recovery for the Class and is, at the very least, in line with other settlements in COI class actions to which courts have granted preliminary and final approval. *See, e.g.*, *37 Besen Parkway, LLC v. John Hancock Life Ins. Co.*, Case No. 15-cv-9924 (PGG), Dkt. 164 at 20:08–10 (S.D.N.Y. Mar. 18, 2019) ("*Hancock COI*") (cash fund equal to 42% of COI overcharges with no nonmonetary benefits a "quite extraordinary" result); *Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *10–11 (S.D.N.Y. Sept. 9, 2015) ("*Phoenix COI*") (granting final approval to a class action settlement with a cash award amount equal to 68.5% of past damages, which was "one of the most remunerative settlements this court has ever been asked to approve"). Moreover, the non-cash portion of the Settlement adds meaningful additional value. *See* Declaration of Steven Sklaver ("Sklaver Decl.") ¶¶ 3, 22.

The Court previously approved a settlement with similar monetary and nonmonetary terms in *Brighton Trustees, LLC, et al. v. Genworth Life and Annuity Insurance Company*, Case No. 3:20-cv-00240-DJN, Dkt. 148 ("*GLAIC Action*"). The *GLAIC Action* addressed a COI increase on policies issued by a different insurer, GLAIC. The *GLAIC Action* settlement included a cash portion representing 163% of past overcharges through March 31, 2022, and 70.3% of past

overcharges when projected through June 2024. *See* Sklaver Decl. ¶ 4. GLAIC, however, offered no money to the victims of the GLIC COI increase. The *GLAIC Action* plaintiffs owned only GLAIC-issued policies, *id.*, Dkt. 1 (*GLAIC* Action Compl.) ¶¶ 19–20, and had no privity with nor standing to sue GLIC for breach of contract. GLIC policyholders—*i.e.*, the putative class members in this case—were not included in the *GLAIC Action* Settlement Class and received no relief from the Settlement. *GLAIC Action*, Case No. 3:20-cv-00240-DJN, Dkt. 143-3 (Settlement Agreement) ¶¶ 51, 62, 79. The Settlement here means that GLIC policyholders will finally, for the first time, receive relief for the improper COI overcharges leveled against their policies.

Class Counsel has a strong and well-developed understanding of the merits of Plaintiff's claim and recommends this Settlement to the Court. Class Counsel engaged in discovery and expert work specific to questions of GLIC's liability, including the investigation of liability theories that were not fully explored in the *GLAIC Action* and analysis of GLIC-specific policy-level data in order to develop a comprehensive damages model. Sklaver Decl. ¶¶ 7–9, 14. Plaintiff ultimately issued 43 requests for production, 431 requested for admission, 14 interrogatories, 7 third-party subpoenas, and 5 deposition notices in this case. *Id.* ¶ 7. Plaintiff also responded to GLIC's interrogatories and document requests. *Id.* ¶ 10.

The Parties' use of experienced mediators is further testimony to the fairness of the Settlement. The parties attended in person and video sessions with Rodney Max, a distinguished fellow and past president of the American College of Civil Trial Mediators, and Magistrate Judge Mark Colombell. Sklaver Decl. ¶¶ 15–16 . After long and hard negotiations nearly fell apart, Judge Colombell ultimately made a mediator's proposal of $5.1 million plus the nonmonetary terms described above, which the Parties accepted. *Id.* ¶ 16. The Parties then negotiated the Settlement Agreement that is the basis of this motion. *Id.*

At the final approval hearing, the Court will have before it more extensive submissions in support of the Settlement and will be asked to determine whether the Settlement is fair, reasonable, and adequate in light of all of the relevant factors. At this time, Plaintiff requests only that the Court grant preliminary approval of the Settlement so that Class members can receive notice of the Settlement and the final approval hearing. This Settlement easily warrants preliminary approval because the Court will "likely be able" to approve the Settlement. Fed. R. Civ. P. 23(e)(1)(B).

II. BACKGROUND

A. The COI Increase

The Class consists of owners of approximately 3,000 universal life policies ("Class Policies") insured by GLIC and issued on GE Gold I and GE Gold II policy forms. Sklaver Decl. ¶ 5. Each Class Policy contains a section titled "Changes in Rates, Charges, and Fees," with express limitations on when and how monthly COI rates used to calculate the monthly COI charges can be adjusted. Plaintiff's policy, which is representative of the language in all Class Policies, states in relevant part:

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

Sklaver Decl., Ex. 3 at 14. In September 2019, GLIC announced an increase in COI rates on the Class Policies. Dkt. 1 ¶¶ 4, 37. At the same time, GLAIC also announced an increase on its own policies, which were called First Choice Gold and First Choice Gold II. *Id.*

B. The *GLAIC Action*

In April 2020, Plaintiffs Brighton Trustees, LLC and Bank of Utah filed a putative class action lawsuit against GLAIC, asserting a breach of contract claim in relation to GLAIC's increase

of COI rates on GLAIC-issued policies. *GLAIC Action*, Case No. 3:20-cv-00240-DJN, Dkt. 1. GLIC and GLAIC are separate legal entities. *Id.* ¶ 22. GLIC policyholders were not included in the putative class. In fact, GLAIC *refused* to provide any discovery specific to the GLIC policies or any relief to GLIC policyholders when that case ultimately settled. *See* Sklaver Decl. ¶ 4; *GLAIC Action*, Case No. 3:20-cv-00240-DJN, Dkt. 143-3 (Settlement Agreement) ¶¶ 51, 62, 79. Instead, GLAIC would only agree to make explicit that, because it was not offering any money to owners of GLIC policies nor providing notice of the settlement to those owners, those owners were excluded from the class definition and not subjected to nor bound by the release.

C. The Present Action

Plaintiff owns a GLIC policy. He filed this action for breach of contract on October 20, 2023. Dkt. 1. Plaintiff alleges that GLIC's September 2019 COI rate increase breached the terms of the GLIC policies. *Id.* ¶¶ 1–24. The complaint alleges multiple theories of breach, including that GLIC's mortality expectations had improved; GLIC's investment earnings, persistency, expenses, and tax expectations had not materially changed; the COI increase recouped prior losses; and the increase was not applied to "all insureds with the same combination of the following: attained age; number of years of insurance in force; net amount of risk; and premium class," which the contract required. *Id.*

The Court's March 8, 2024 Scheduling Order set opening expert disclosures for August 13, 2024, the close of fact discovery for September 12, 2024 and trial for January 10, 2025. Dkt. 41. In litigating this case, Plaintiff served 43 requests for production on GLIC and served 6 subpoenas requesting documents from third parties, including MG-ALFA actuarial modeling software from Milliman. Sklaver Decl. ¶¶ 7–8. Plaintiff also served 14 interrogatories, 431 requests for admission, served 5 deposition notices on GLIC, and served a deposition subpoena on Milliman. *Id.* ¶ 7. Plaintiff worked closely with actuarial and damages experts to prepare for

depositions and expert reports. *Id.* ¶¶ 7, 9, 14. Plaintiff's discovery efforts included investigating theories not developed in the *GLAIC Action*. *Id.* ¶ 8. As part of this additional investigation, Plaintiff subpoenaed documents from Genworth Life Insurance Company of New York ("GLICNY"), which had not been done in the *GLAIC Action*. *Id.*. Plaintiff also responded to 13 interrogatories and 14 requests for production served by GLIC, which included the production of documents. *Id.* ¶ 10. The parties met and conferred repeatedly about these issues between April and June 2024. *Id.* ¶ 11.

The parties simultaneously engaged in extensive efforts to settle the case. The parties mediated in person with Mr. Max in Miami, Florida on March 4, 2024. Sklaver Decl. ¶ 15. The parties held a second mediation with Mr. Max via videoconference on April 9, 2024. *Id.* Although these mediations were unsuccessful, the parties continued meeting and conferring regarding settlement. *Id.* On June 26, 2024, the parties mediated in person with Magistrate Judge Colombell in Richmond, Virginia. *Id.* ¶ 16. Plaintiff (and his wife) travelled from Ohio to personally attend that mediation. *Id.* At the conclusion of the mediation, Judge Colombell made a mediator's proposal, which matches the Settlement terms set forth above. *Id.* GLIC requested additional time to consider the mediator's proposal, and on July 8, 2024, Judge Colombell informed the parties that the mediator's proposal had been fully accepted. *Id.* The parties then drafted a long-form settlement agreement, which was executed on August 2, 2024. *Id.*, Ex. 2.

D. The Settlement Agreement

The key terms of the Settlement agreement are set forth below.

1. Settlement Class

The Settlement defines the Settlement Class as:

> "[A]ll Owners of Gold and Gold II universal life insurance policies issued, insured, or assumed by GLIC, or its predecessors or successors, whose COI Rate Scales

> were changed as a result of the 2019 COI Rate Adjustment. Specifically excluded from the class are Class Counsel and their employees, GLIC, its officers and directors and their immediate family members; the Court, the Court's staff, and their immediate family members; and the heirs, successors or assigns of any of the foregoing. Also excluded from the Class are owners of Gold and Gold II policies that have terminated as a result of the death of the insured on or before June 30, 2024, where the 2019 COI Rate Adjustment did not result in an Incremental COI Deduction before the death of the insured.

Sklaver Decl., Ex. 2 at ¶¶ 51, 87.

2. Consideration

The Settlement awards both cash relief and non-cash relief to the Settlement Class. With respect to the cash relief, a $5.1 million Settlement Fund will be funded for the benefit of the Settlement Class. *See* Sklaver Decl., Ex. 2 ¶ 2. This amount will be reduced, on a pro-rata basis by an amount that is calculated by multiplying the amount of the Settlement Fund (*i.e.*, $5,100,000) by a fraction where (i) the numerator is the combined Specified Amount, as of June 30, 2024 (as that term is defined in the Policies) of the Policies that opt out of the Settlement Class and (ii) the denominator is the total Specified Amount, as of June 30, 2024, of all Policies owned by members of the Class. *Id.* ¶ 2. By way of example, if 1% of the total Specified Amount of all Policies owned by members of the Class are attributable to Opt-Outs, the Settlement Fund will be reduced by 1%. *Id.* No portion of the Final Settlement Fund (*i.e.*, the post-reduction amount) will revert to GLIC. *Id.* ¶ 66. Checks will be sent automatically to Class members using GLIC's database of their addresses without requiring Class members to submit claim forms. The Settlement Administrator will also conduct individual address searches, using their own databases and other sources, to confirm the address for owners of terminated policies. Declaration of Gina Intrepido-Bowden ("Intrepido-Bowden Decl.") ¶ 19.

The Settlement Agreement also provides two forms of significant non-cash relief. *First*, "GLIC agrees that COI rates on the Class Policies will not be increased above the COI Rate Scales

adopted under the 2019 COI Rate Adjustment until after October 25, 2029." *See* Sklaver Decl, Ex. 2 ¶ 7. *Second*, "GLIC agrees to not take any legal action (including asserting as an affirmative defense or counterclaim), or cause to take any legal action, that seeks to void, rescind, cancel, have declared void, or seeks to deny coverage under or deny a death claim for any Class Policy based on: (1) an alleged lack of valid insurable interest under any applicable law or equitable principles; or (2) any misrepresentation allegedly made on or related to the application for, or otherwise made in apply for the policy." *Id.* ¶ 9.

3. Release

Once the settlement becomes final, the Settlement Class and certain related parties (referred to as the "Releasing Parties" in the Settlement Agreement) will release GLIC and certain related parties (referred to as the "Released Parties) in the Settlement Agreement) from "all Claims asserted in the Action or arising out of the facts, transactions, events, occurrences, acts, disclosures, statements, omissions, or failures to act that were alleged or could have been alleged in the Action related to the 2019 COI Rate Adjustment." Sklaver Decl., Ex. 2, ¶ 81. The Settlement Class will not release "new claims that could not have been asserted in the Action because they are based upon a future COI Rate Scale increase that occurs after July 8, 2024 ("New COI Increase Claims")." *Id.* ¶ 62.

4. Costs and Fees

The Settlement provides for an incentive award of up to $25,000 for Plaintiff for his services on behalf of the Settlement Class. *See* Sklaver Decl., Ex. 2 ¶ 16. The Settlement Agreement also provides for attorneys' fees in an amount not to exceed 33 1/3% of the Final Settlement Fund as well as reimbursement for all expenses incurred or to be incurred. *Id.* ¶ 17. The amounts as approved by the Court will be paid out of the Final Settlement Fund. *Id.* ¶¶ 16-17.

Class Counsel will file a motion seeking reimbursement of their costs, fees, and incentive awards, which will be proposed to be scheduled to be heard at the same time as the final approval hearing. Class members will be given an opportunity to object to that application prior to the final approval hearing. No such costs, fees, or awards will be distributed without Court order.

5. Notice

Plaintiff requests the appointment of JND Legal Administration LLC ("JND") as the Settlement Administrator. The proposed notice plan is described in paragraphs 23–26 of the Sklaver Declaration and paragraphs 10–26 of the Intrepido-Bowden Declaration. GLIC will provide owner-address information in advance of the Preliminary Approval hearing. Sklaver Decl. ¶ 24. Within 14 days after the motion for preliminary approval is granted, JND will mail the short-form notice attached as Exhibit B to the Intrepido-Bowden Declaration to all addresses on the list from GLIC. *See* Sklaver Decl. ¶ 25; Intrepido-Bowden Decl. ¶¶ 17–20.[2] JND will also post a copy of the long-form notice attached as Exhibit C to the Intrepido-Bowden Declaration to a class action website. *See* Sklaver Decl. ¶ 26; Intrepido-Bowden Decl. ¶¶ 21–22. Class Members who wish to be excluded from the Settlement Class must send a letter to JND requesting exclusion that is postmarked no later than 45 days after the Notice Date. Sklaver Decl., Ex. 2 ¶¶ 74–75.

Within 10 days after the filing of this motion, GLIC shall serve notices of the proposed Settlement upon the appropriate officials in compliance with the requirements of the Class Action Fairness Act, 28 U.S.C. § 1715. *See* Sklaver Decl., Ex. 2 ¶ 15.

[2] Prior to mailing, JND will update the addresses using the National Change of Address database. *See* Intrepido-Bowden Decl. ¶ 19. JND will re-mail any short-form notices returned by the U.S. Postal Service with a forwarding address. *See id.*

6. Distribution Plan

The proposed plan of allocation, as set forth in the notice papers and which is described in Exhibit 4 to the Sklaver Declaration, distributes proceeds directly to Class Members on a *pro rata* basis without the need for a claim form. This ensures that proceeds will be distributed equitably and as many claimants as possible will receive a distribution.

Each Class Member's *pro rata* share is calculated by multiplying (a) the percentage of estimated Incremental COI Deductions (i.e., the estimated additional COI charges imposed as a result of the 2019 COI increase) attributable to that Class Member's policy as of June 30, 2024, by (b) the Final Settlement Fund. *See* Sklaver Decl., Ex. 4. So if the estimated Incremental COI Deductions associated with a Class Member's policy represent .1% of the total estimated Incremental COI Deductions for the Settlement Class as a whole, that Class Member will receive $5,100 before reduction for expenses and fees. There will be a floor of $100 payment for all participating Class Members. All in-force policies will also benefit from the guarantee of policy validity and the COI freeze.

Class members will not need to fill out claim forms. Money will be sent to them automatically in the mail, using the addresses that GLIC maintains on file. Proceeds will be mailed within 30 days after the Final Settlement Date. *See* Sklaver Decl., Ex. 4. Within one year plus 30 days after the date the Settlement Administrator mails the proceeds, to the extent feasible and practical in light of the costs of administering such subsequent payments, any funds remaining in the Settlement Fund shall be re-distributed on a pro rata basis to Class Members who previously cashed their checks, unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair. *Id.*

III. ARGUMENT

A. The Proposed Settlement Warrants Preliminary Approval under Rule 23(e)

1. Legal Standard Governing Preliminary Approval

Federal Rule of Civil Procedure 23(e) requires court approval for a class action settlement. *See* Fed. R. Civ. P. 23(e)(2). "[T]he district court has a fiduciary responsibility to ensure that the settlement is fair and not a product of collusion, and that the class members' interests were represented adequately." *1988 Tr. for Allen Children Dated 8/8/88 v. Banner Life Ins. Co.*, 28 F.4th 513, 521 (4th Cir. 2022) ("*Banner COI*") (quoting *Sharp Farms v. Speaks*, 917 F.3d 276, 293-94 (4th Cir. 2019)). In the Fourth Circuit, "[t]here is a strong judicial policy in favor of settlement to conserve scarce resources that would otherwise be devoted to a protracted litigation." *Robinson v. Carolina First Bank NA*, 2019 WL 719031, at *8 (D.S.C. Feb. 14, 2019) (citing *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158–59 (4th Cir. 1991) and *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 663 (E.D. Va. 2001)); *see also Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989) (the analysis beginning with "the unassailable premise that settlements are to be encouraged"). Settlement is particularly favored "in the class action context." *West v. Cont'l Auto., Inc.*, 2018 WL 1146642, at *3 (W.D.N.C. Feb. 5, 2018).

At the preliminary approval stage, the "parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class" and the Court "must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing 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). Rule 23(e)(2), in turn, states:

> If the proposal would bind class members, the court must 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) the proposal treats class members equitably relative to each other.

These factors, introduced to Rule 23 in December 2018, were designed to supplement, rather than displace, the existing factors used by courts to evaluate settlement proposals. *See* Fed. R. Civ. P. 23, 2018 Advisory Note, Subdivision (e)(2).

In the Fourth Circuit, district judges use four factors for determining a class settlement's "fairness," which are: "(1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area of the class action litigation." *Banner COI*, 28 F.4th at 525. The Fourth Circuit uses five factors to determine a class settlement's "adequacy": "(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." *Id.* at 526.

2. The Settlement is Procedurally Fair

The Fourth Circuit's fairness analysis is intended to confirm that a settlement was fair and

"reached as a result of good-faith bargaining at arm's length, without collusion." *Jiffy Lube*, 927 F.2d at 158–59. This is consistent with the Rule 23(e)(2)(A)–(B) considerations of the adequacy of the representation of the class and whether the settlement was negotiated at arm's length. Each of the fairness factors weighs in favor of a preliminary finding that the Settlement is fair.

a. The Posture of the Proceedings

"Considering the posture of the case at the time of settlement allows the Court to determine whether the case has progressed far enough to dispel any wariness of possible collusion among the settling parties." *Brown v. Transurban USA, Inc.*, 318 F.R.D. 560, 571 (E.D. Va. 2016) (citation and internal quotation marks omitted). "When the parties have 'had adequate time to conduct sufficient discovery to fairly evaluate the liability and financial aspects of the case,' this factor favors settlement approval." *Haney v. Genworth Life Ins. Co.*, 2023 WL 1822384, at *5 (E.D. Va. Feb. 8, 2023) (quoting *Lomascolo v. Parsons Brinckerhoff, Inc.*, 2009 WL 3094955, at *11 (E.D. Va. Sep. 28, 2009)).

The parties were deep in fact and expert discovery at the time of settlement. Plaintiff had served extensive discovery requests, responded to GLIC's discovery requests, and met and conferred repeatedly with GLIC. Sklaver Decl. ¶¶ 7–11. Plaintiff was also working closely with experts to prepare for depositions and expert reports. *Id.* ¶¶ 7–9, 14. As part of settlement discussions, GLIC provided policy-level data for the putative class policies, which allowed Plaintiff and his damages expert to assess the financial aspects of the case. *Id.* ¶ 14. This factor therefore favors settlement.

b. The Extent of Discovery

This factor "enables the Court to ensure that the case is well-enough developed for Class Counsel and . . . Plaintiffs alike to appreciate the full landscape of their case when agreeing to enter into th[e] Settlement." *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 254 (E.D. Va. 2009).

"[S]ignificant discovery, . . . [that] clarifie[s] plaintiffs' previous understanding of the strength and weakness of their claims and afford[s] the ability to confirm the fairness, reasonableness, and adequacy of the proposed . . . settlement" will suffice. *MicroStrategy*, 148 F. Supp. 2d at 664 (footnote omitted). Even substantial fact-finding from investigating plaintiffs' claims may be adequate. *See, e.g.*, *Brown*, 318 F.R.D. at 572 (discovery factor satisfied where class counsel "conducted a rigorous investigation of the claims before filing the Complaint and Amended Complaint."); *In re NeuStar Inc. Sec. Litig.*, 2015 WL 5674798, at *10 (E.D. Va. Sept. 23, 2015) ("Although this case never reached fact or class discovery proceedings, Lead Counsel represents that it has a thorough understanding of the strengths and weaknesses of its claims against Defendants after almost two years of investigation and litigation." (internal quotation marks omitted)).

At the time of settlement, the parties were just over one month away from opening expert disclosures and two months away from the close of fact discovery. Class Counsel served discovery specific to this action. Sklaver Decl. ¶ 7. Class Counsel also had access to the full discovery record from the *GLAIC Action*. *Id.*; *see GLAIC Action*, Case No. 3:20-cv-00240-DJN, Dkt. 148 at ¶ 4 (final approval order referring to the factual investigation as "extensive"). Class Counsel was working with experts to prepare for depositions and expert reports. Sklaver Decl. ¶¶ 7–9, 14. Thus, a full discovery record had been developed and Class Counsel was intimately familiar with all of the key documents in this case and had conducted extensive damages analysis. *Id.* Accordingly, this factor weighs in favor of preliminary approval.

c. The Circumstances Surrounding the Settlement Negotiations

This factor assesses whether the Settlement is the product of adversarial, arm's-length negotiations. *See Microstrategy*, 148 F. Supp. 2d at 665. There was no other pending action involving GLIC policies and under such circumstances, use of experienced mediators—including

a magistrate judge—evidences an arm's-length negotiation and weighs in favor of preliminary approval. *See, e.g.*, *Walkinshaw v. CommonSpirit Health*, 2023 WL 1995281, at *2 (D. Neb. Feb. 14, 2023) (explaining that "[t]he involvement of multiple skilled mediators, including a Magistrate Judge of this Court, in negotiating the Settlement" supported the Court's preliminary approval order); *Etter v. Allstate Ins. Co.*, 2018 WL 5761755, at *3 (N.D. Cal. May 30, 2018) (finding that a "factor weighing in favor of preliminary approval" was that the settlement efforts were overseen by a magistrate judge). Engaging in "numerous meetings and extensive and intensive discussions" with the only lawyers litigating this case on behalf of GLIC owners also supports a finding that a settlement was negotiated at arm's length. *Microstrategy*, 148 F. Supp. 2d at 665.

The parties held two sessions with Mr. Max, including one in-person, in March and April 2024. Sklaver Decl. ¶ 15. The parties then mediated in-person in June 2024 with Magistrate Judge Colombell and this settlement resulted from Judge Colombell's mediator's proposal. *Id.* ¶ 16. The parties produced mediation statements for these mediations and participated in several discussions outside of the mediation process. *Id.* ¶¶ 14–16. These facts make the circumstances surrounding the Settlement negotiations weigh in favor of preliminary approval.

d. The Experience of Class Counsel

This factor looks to the experience of Class Counsel to determine whether they have the experience and ability to effectively represent the Class's interests. *Microstrategy*, 148 F. Supp. 2d at 665. Susman Godfrey L.L.P. has extensive experience in prosecuting cost of insurance class actions, including in the *GLAIC Action*. Sklaver Decl. ¶ 2, Ex. 1. The Court previously held that Susman Godfrey has "significant experience litigation class actions." *GLAIC Action*, Case No. 3:20-cv-00240-DJN, Dkt. 148 at ¶ 4. Accordingly, the experience of Class Counsel weighs in favor of preliminary approval.

3. The Settlement is Substantively Fair, Reasonable, and Adequate

Each of the adequacy factors weighs in favor of a finding that the Settlement if fair, reasonable, and adequate.[3]

a. Relative Strength of Plaintiffs' Case and Strong Defenses

"The first and second factors addressing the adequacy of a settlement require the Court to examine how much the class sacrifices in settling a potentially strong case in light of how much the class gains in avoiding the uncertainty of a potentially difficult case." *Brown*, 318 F.R.D. at 573 (internal quotation marks omitted). Although Plaintiff believes he has a strong case, he will face challenges on the merits of his claims. For example, GLIC disputed that it had increased COI rates "in order to" recoup prior losses and asserted numerous affirmative defenses which, if credited, would have eliminated the Settlement Class' ability to recovery anything. *See* Dkt. 26 (Answer) at 16-19 (asserting affirmative defenses such as compliance with Insurance Regulations, Filed Rate Doctrine, Unclean Hands, Waiver, Accord and Satisfaction, Voluntary Payment, Ratification). GLIC also indicated that it would mount challenges to the plaintiffs' damages model, arguing that, even if the plaintiffs prevailed on liability, only a portion of the Incremental COI Deductions were properly awardable on damages. The challenges that Plaintiff expects to face at summary judgment, trial, and in further appeals creates uncertainty and risks that weigh in favor of preliminary approval.

b. Duration and Expense of Further Litigation

The third adequacy factor asks the Court to "weigh the settlement in consideration of the

[3] One of the adequacy factors, "the degree of opposition to the settlement," 927 F.2d at 159, is premature at this stage because the Settlement Class has not yet received Notice of the Settlement. As Notice will be provided to Settlement Class members, with instructions for the communication of any objections to the Settlement after the Court grants preliminary approval, this factor will be a consideration at the Final Approval Hearing.

substantial time and expense litigation of this sort would entail if a settlement was not reached." *Mills*, 265 F.R.D. at 256. This factor is based on a sound policy of conserving the resources of the Court and the certainty that unnecessary and unwarranted expenditure of resources and time benefit[s] all parties." *Id.* The complexity of this action suggests that further litigation would be lengthy and costly. *See id.* at 256–57; *Brown*, 318 F.R.D. at 573.

The continued litigation of this action would be expensive and resource-intensive for the parties and the Court. At the time the parties settled this case, they were negotiating dates for depositions. *See* Sklaver Decl. ¶ 7. They were also meeting and conferring about discovery issues that may have resulted in motions to compel. *Id.* ¶ 11. If this case were to continue, the parties would need to exchange expert reports, conduct expert depositions, brief class certification, summary judgment, and *Daubert* motions, and prepare for trial. Dkt. 41. After trial, there would be post-verdict and appellate briefing. Each step would be hard fought. Even assuming the Class would clear all these hurdles, it could easily be several years or more before the Class saw a dollar of relief. The Settlement ends future litigation and uncertainty, and eliminates all future costs except for settlement administration. This factor therefore weighs in favor of preliminary approval.

c. Solvency and Recovery on Judgment

GLIC's solvency is not at issue here. However, because GLIC's financial position could change in the future (e.g., its parent's stock price is currently trading at about $6.52 per share as of September 12, 2024) and Settlement puts an end to this risk, this factor favors preliminary approval, or at least is neutral.

d. The Amount of Settlement is Reasonable

Although the Fourth Circuit does not have "enumerated factors for assessing a settlement's reasonableness, we have suggested that assessing whether a class settlement is 'reasonable' involves examining the amount of the settlement." *Banner COI*, 28 F.4th at 527. "To the extent

reasonableness does any work not already performed by one of the other Rule 23(e)(2) requirements, we think it at least ensures that the amount on offer is commensurate with the scale of the litigation and the plaintiffs' chances of success at trial." *Id.* The Settlement Fund of $5.1 million represents 71.5% of total past overcharges at issue in this case, *see* Sklaver Decl. ¶ 3, which when trued-up to today, is consistent with the approved Settlement Funds in the *GLAIC Action* and other COI cases. *See id.* ¶ 4 (*GLAIC Action* Settlement Fund represents an estimate of 70.3% of past overcharges projected through June 2024); *Hancock COI*, Case No. 15-cv-9924 (PGG), Dkt. 164 at 20:08–10 (Settlement Fund equal to 42% of past overcharges); *Phoenix COI*, 2015 WL 10847814, at *10–11 (Settlement Fund representing 68.5% of past overcharges)). The size of the Settlement Fund, coupled with the nonmonetary relief, is appropriate for the size and scale of this litigation.

4. The Rule 23(e)(2) Factors that Do Not Overlap with the Fourth Circuit's Adequacy Factors Support Preliminary Approval of the Settlement[4]

a. Rule 23(e)(2)(A) - Class Representatives and Class Counsel Have Adequately Represented the Settlement Class.

Plaintiff shares the same interest as the Settlement Class in prosecuting this Action to ensure the greatest possible recovery from GLIC. Plaintiff is part of the Settlement Class and suffered the same injuries as other Settlement Class Members: monetary losses associated with COI overcharges. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348-49 (2011) (the "class representative must be part of the class and possess the same interest and suffer the same injury as

[4] The Rule 23(e)(2)(B) factor ("the proposal was negotiated at arm's length") is addressed above in the discussion of the fairness factors. The Rule 23(e)(2)(C)(i) factor ("the costs, risks, and delay of trial and appeal") is addressed above in the discussion of the adequacy factors. The Rule 23(e)(2)(C)(iv) factor (requiring identification of any additional agreements made in connection with the settlement proposal) does not apply as there are no such agreements between the Parties here.

the class members) (citation and internal quotation marks omitted). Further, as noted herein, Class Counsel have demonstrated that they are qualified, experienced, and able to conduct the litigation and supervise the Settlement. The Rule 23(e)(2)(A) factor supports preliminary approval of the Settlement.

b. Rule 23(e)(2)(C)(ii) and 23(e)(2)(C)(iii) - The Relief to be Provided to the Class is Adequate, Taking into Account the Effectiveness of Distributing Relief to the Settlement Class

As part of the adequacy analysis, Rule 23(e)(2)(C)(ii) requires the Court to look to "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." Fed. R. Civ. P. 23(e)(2)(C)(ii). The proposed "claims processing method should deter or defeat unjustified claims," but should not be "unduly demanding" on potential claimants. 2018 Advisory Committee Notes to Fed. R. Civ. P. 23(e)(2).

A proposed plan of allocation, such as here, where funds are automatically distributed to class members on a pro rata basis without a claims process, has frequently been determined to be fair, adequate, and reasonable. *See In re Vitamins Antitrust Litig.*, No. 99-cv-197, 2000 WL 1737867, at *6 (D.D.C. Mar. 31, 2000) ("Settlement distributions, such as this one, that apportion funds according to the relative amount of damages suffered by class members, have repeatedly been deemed fair and reasonable."). Funds will be mailed to Class Members using GLIC's database of Class member addresses. Sklaver Decl. ¶¶ 23–27, Ex. 4. Because GLIC maintains information about each Settlement Class Member, including past COI charges and each insured's contact information, Settlement Class Members need not submit claims or provide supporting documentation to receive a cash award. Sklaver Decl., Ex. 4. The Settlement Administrator will investigate the addresses for any notice that is returned or undeliverable. No funds will revert to GLIC. Sklaver Decl. ¶ 22; Intrepido-Bowden Decl. ¶ 19. Class Counsel, having consulted with the proposed Settlement Administrator, JND, respectfully submits that the proposed plan of

distribution is the most fair, reasonable, and adequate method of equitably allocating the Settlement Fund to the Settlement Class.

c. Rule 23(e)(2)(C)(iii) - The Relief to be Provided to the Class is Adequate, Taking into Account Any Proposed Award of Attorneys' Fees

Rule 23(e)(2)(C)(iii) requires that the Court, as part of its overall analysis of the adequacy of the Settlement, consider the "terms of any proposed award of attorney's fees, including timing of payment." Fed. R. Civ. P. 23(e)(2)(C)(iii). Under the terms of the Settlement Agreement and as described in the proposed Notice to be provided to Settlement Class Members, Class Counsel will apply for an award of attorneys' fees not to exceed 33 1/3 percent of the Settlement Fund, in addition to reimbursement for all expenses incurred or to be incurred. The percentage of the settlement fund is within the range of reasonable awards established by the Court. *See, e.g.*, *GLAIC Action*, Case No. 3:20-cv-00240-DJN, Dkt. 147 at 2 (awarding Class Counsel "33 1/3% of the Final Settlement Fund" plus "a *pro rata* share of the interest earned on the Final Settlement Fund); *Dickman v. Banner Life Ins. Co.*, Case No. 1:16-cv-00192-RDB, 2020 WL 13094954, at *5 (D. Md. May 20, 2020) (approving fee award equal to 39.5% of the common settlement fund after reduction of opt outs and 20.6% of the total value of the relief obtained for the class), *aff'd Banner COI*, 28 F.4th 513 (4th Cir. 2022); *Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, 685 (D. Md. 2013) (describing a range of awards between 15 and 40 percent of the settlement fund that have been deemed fair and reasonable by courts within the Fourth Circuit). As provided in the Settlement Agreement, the amount of attorneys' fees awarded may be paid upon entry of an order approving such fees. *See* Sklaver Decl., Ex. 2 ¶ 17.

d. Rule 23(e)(2)(D) - The Proposal Treats Class Members Equitably Relative to Each Other.

The Rule 23(e)(2)(D) factor seeks to address a potential concern that some class action

settlements may treat some Class members inequitably, including "whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." 2018 Advisory Committee Notes to Fed. R. Civ. P. 23(e)(2). The proposed distribution of the Settlement Fund takes into account differences between Settlement Class members because each Class member will receive a pro rata share of the Settlement Fund depending on the amount that the Class Member was overcharged, with a minimum floor payment assured. Sklaver Decl., Ex. 4. Further, the Releases treat all Settlement Class Members equitably relative to one another. Subject to Court approval, all Settlement Class Members will be giving GLIC identical releases tied to the theory of liability asserted in this Action and no individual who does not receive a Cash Award will be providing any release of individual claims they may have.

B. Certification of the Settlement Class is Appropriate.

Rule 23(e) requires that the Parties demonstrate that this Court "will likely be able to . . . certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B)(ii). The standard for class certification for settlement purposes is less stringent than for litigation purposes. *See* 2018 Advisory Committee Notes to Fed. R. Civ. P. 23(e)(1). As the Fourth Circuit recently observed in the *Banner COI* case:

> Because a district court possesses greater familiarity and expertise than a court of appeals in managing the practical problems of a class action, its certification decision is entitled to substantial deference, especially when the court makes well-supported factual findings supporting its decision. This case, chock-full of the most esoteric principles of life insurance accounting imaginable, could be the poster child for that rule.

28 F.4th at 524 (internal citations omitted). There, the Fourth Circuit affirmed the settlement class certification of a COI breach of contract class, where the district court explained that the class included "policyholders whose standardized form policy included a uniform contractual provision

that was allegedly breached by Defendants' common course of conduct in increasing these COI rates." *Id.* at 522.

Certification of a settlement class requires that the proposed class satisfy the requirements of Federal Rule of Civil Procedure 23. *Id.* at 521. "First, the class must comply with the four prerequisites established in Rule 23(a): (1) numerosity of parties; (2) commonality of factual and legal issues; (2) typicality of claims and defenses of class representatives; and (4) adequacy of representation." *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 423 (4th Cir. 2003) (citing Fed. R. Civ. P. 23(a)). "Second, the class action must fall within one of the three categories enumerated in Rule 23(b)." *Id.* (citing Fed. R. Civ. P. 23(b)).

The requirements of Rules 23(a) and 23(b) are met here, and GLIC does not oppose certification (for settlement purposes only) of the Settlement Class under Rule 23(a) and Rule 23(b)(3), "which requires that common issues predominate over individual ones and that a class action be superior to other available methods of adjudication." *Id.*

1. The Settlement Class Satisfies the Requirements of Rule 23(a).

a. Settlement Class Members Are Too Numerous to be Joined.

Rule 23(a)(1) is satisfied where "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "No specified number is needed to maintain a class action." *Branch v. Gov't Employees Ins. Co.*, 323 F.R.D. 539, 546 (E.D. Va. 2018) (finding a class of 400 to be sufficiently numerous); William B. Rubenstein, 1 *Newberg on Class Actions*, § 3:12 (generally a class of more than 40 satisfies the numerosity requirement) (5th ed. 2018). Here, according to the insured data provided by GLIC, there are approximately 3,000 Settlement Class Members geographically dispersed throughout the country. *See* Sklaver Decl. ¶ 5. Joinder is therefore impracticable and Rule 23(a)(1) is satisfied.

b. There Are Common Questions of Law and Fact.

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "In a Rule 23(b)(3) class action like this one, the 'commonality' requirement of Rule 23(a)(2) is subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class predominate over other questions." *Banner COI*, 28 F.4th at 522 (internal citations omitted).

This Action presents numerous common questions of both law and fact that can be resolved on a classwide basis. As in other certified COI class actions, application of these form contracts—e.g., whether the increase "recoup[ed] prior losses," and was properly based on "expectations as to future investment earnings, mortality, persistency, expenses and taxes"—will resolve common questions central to resolution of the case. *See Hanks v. Lincoln Life & Annuity Co. of N.Y.*, 330 F.R.D. 374, 380 (S.D.N.Y. 2019) ("*Voya COI*") (commonality satisfied where "claims of the proposed class turn on common contentions of what factors VOYA . . . used to calculate the 2016 COI rate increase and whether the insurance contracts allow for a rate increase based on those factors."); *Feller v. Transamerica Life Ins. Co.*, 2017 WL 6496803, at *6 (C.D. Cal. Dec. 11, 2017) ("Given that courts have recognized that the law relating to the elements of a claim for breach of contract do not vary greatly from state to state, the issue of breach . . . is also common to all prospective class members."); *Phoenix COI*, 2013 WL 12224042, at * (S.D.N.Y. 2013) (common questions included whether "the basis for the [COI] increase was unsupported by an enumerated factor in the contract" and whether "the increase was applied discriminatorily rather than, as the contract requires, to all insureds in the same class").

c. Plaintiff's Claim is Typical of the Settlement Class.

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "As to typicality, the commonality

and typicality requirements of Rule 23(a) tend to merge[.]" *Banner COI*, 28 F.4th at 523 (internal citations omitted). Typicality requires that "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Delter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006); *see also Soutter v. Equifax Info. Servs., LLC*, 307 F.R.D. 183, 208 (E.D. Va. 2015) (typicality focuses "on the general similarity of the named representative's legal and remedial theories to those of the proposed class.").

Plaintiff is a member of the Settlement Class, every such member owns a GLIC policy and GLIC is the sole defendant here, and Plaintiff possesses the same interests and suffered the same alleged injury as each Settlement Class Member through GLIC's uniform course of conduct. Plaintiff, like all Settlement Class Members, was subjected to the increase in violation of his policy's terms and shares a common interest in holding GLIC liable for these overcharges and will put forward the same proof to establish GLIC's liability, which is the sole insurer at issue here. Thus, typicality is satisfied.

d. Plaintiff Will Fairly and Adequately Protect the Interests of the Settlement Class.

Rule 23(a)(4) requires that the "representative parties will fairly and adequately protect the interests of the class," and Rule 23(g)(4) requires that "class counsel [will] fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(4). "The adequacy inquiry under Rule 23(a)(4) serves in part to uncover conflicts of interest between named parties and the class they seek to represent." *Banner COI*, 28 F.4th at 523-24 (quoting in part *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997)). As to Class Counsel, the adequacy inquiry assesses whether class counsel is conflicted and whether class counsel has conflicts. *Id.* at 524. A conflict of interest "will not defeat the adequacy requirement if it is 'merely speculative or hypothetical.'" *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 180 (4th Cir. 2010) (quoting *Gunnells*, 348 F.3d at 430).

Here, Plaintiff and the Settlement Class share the same legal claims under the same set of core facts. Proceeds will be distributed equitably, and all Settlement Class Members share an overriding interest in obtaining the largest monetary recovery possible from GLIC. *See In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 453 (S.D.N.Y. 2004) (certifying settlement class and finding that "[t]here is no conflict between the class representatives and the other class members. All share the common goal of maximizing recovery."). Moreover, since filing this action, Plaintiff has taken his role and obligations to the Class seriously, actively participating and monitoring the litigation, including by reviewing documents, collecting requested materials, and travelling to and attending the mediation in person that was held in the courthouse. *See* Sklaver Decl. ¶¶ 10, 16. For these reasons, Plaintiff has claims that are typical and adequate for the Settlement Class, and should be appointed as the representative of the Settlement Class.

Susman Godfrey L.L.P. has vigorously prosecuted this Action on behalf of the Class. Moreover, the lawyers at Susman Godfrey are experienced attorneys with qualifications and resources to administer this settlement, and they have been found adequate class counsel in the *GLAIC* Action, *Reliastar COI*, *NA COI*, *Voya COI, AXA COI, Hancock COI, Phoenix COI, SLD COI,* and numerous other cases.[5] Thus, the Court should find that Susman Godfrey satisfies Rule 23(g).

2. The Settlement Class Meets the Requirements of Rule 23(b)(3).

Certification of a class for settlement purposes requires a showing that "questions of law or fact predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). Manageability is not at issue for a settlement class, *Amchem Prods.*, 521 U.S. at 616, 620, but is in any event satisfied as well.

[5] Sklaver Decl., Ex. 1 (Susman Godfrey Firm Resume).

a. Common Legal and Factual Questions Predominate.

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* at 623. "The predominance inquiry is fundamentally qualitative." *Williams v. Big Picture Loans, LLC*, No. 3:17-cv-461, 2021 WL 3072462, at *9 (E.D. Va. 2021) (citing *Gunnells v. Healthplan Servs.*, 348 F.3d 417, 429 (4th Cir. 2003)). "In other words, Rule 23(b)(3) compares the quality of the common questions to those of the noncommon questions." *Soutter*, 307 F.R.D. at 214. "[It] is not simply a matter of counting common versus noncommon questions and checking the final tally." *Id.* "If the qualitatively overarching issue in the litigation is common, a class may be certified notwithstanding the need to resolve individualized issues." *Id.*

In COI litigation, courts routinely find that common issues predominate when an insurer, like GLIC, uses a common method to raise rates on Class members in breach of the same form contract provisions. The Fourth Circuit recently affirmed the district court's ruling on settlement class certification in *Banner COI,* quoting the district court's observation that "common questions predominate over any questions affecting individual members," given that "the central question to be decided here is whether Banner and William Penn's implementation of the COI rate increases breach the standardized policy language." 28 F.4th at 522. Here, any possible individualized issues are dwarfed by the common questions concerning whether GLIC breached the terms of the uniform, standardized contracts at issue. *See Phoenix COI*, 2013 WL 12224042, at *13 (stating that because the "class alleges [a] breach of contract case arising out of standardized insurance policy forms, the common questions of law and fact predominate over any individual questions.").

b. A Class Action Is Superior to Other Methods of Adjudication.

The Rule 23(b)(3) superiority test requires that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). "In

determining whether the class action mechanism is truly superior, the court should consider the class members' interest in individually controlling the prosecution or defense of separate actions; the extent and nature of any litigation concerning the controversy already begun by or against class members; the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and the likely difficulties in managing the class action." *Thomas v. FTS USA, LLC*, 312 F.R.D. 407, 425 (E.D. Va. 2016) (internal quotation marks omitted) (quoting Fed. R. Civ. P. 23(b)(e)(A)-(D)).

Applying Rule 23(b)(3) superiority factors to this Action makes clear that the class action mechanism is the superior method of adjudication. No individual actions have been filed against GLIC concerning the COI increase. And to the extent any Settlement Class Member wishes to pursue their own individual action, they can do so by opting out of the Settlement. *See Thomas*, 312 F.R.D. at 426. Any interests of Settlement Class Members in individually controlling the prosecution of separate claims are outweighed by the efficiency of the class mechanism. *See Stillmock v. Weis Markets, Inc.*, 385 F. App'x 267, 274–75 (4th Cir. 2010).

Concentrating Settlement Class Members in this forum is desirable because there are approximately 3,000 Settlement Class Members. *See id.* Potentially thousands of individual suits would unquestionably be costly, unwieldy, and pose a risk of inconsistent rulings. A single nationwide class settlement resolving the Settlement Class's claims is far more sensible. In addition, many of the Settlement Class Members are individuals who lack the means or incentive to bring an individual suit claiming potentially small individual damages, particularly where, as here, pursuing that suit involves complex questions of actuarial science, accounting, and economic damage. *See Talbott v. GC Servs. Ltd. P'ship*, 191 F.R.D. 99, 106 (W.D. Va. 2000). Thus, superiority is satisfied, and the Court should preliminarily certify the Settlement Class for

settlement purposes.

C. Notice to the Settlement Class Should Be Approved.

Under Rule 23(e)(1), the Court "must direct notice in a reasonable manner to all class members who would be bound by the propos[ed settlement]." Fed. R. Civ. P. 23(e)(1)(B). Where, as here, notice is to be provided to a settlement class certified under Rule 23(b)(3), the Court is required to "direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The "best notice that is practicable" standard applies to both the form and manner of notice. *See* William R. Rubenstein, 3 Newberg on Class Actions § 8:5 (5th ed.). Here, the proposed form and manner for Notice satisfy these requirements and otherwise conform to the standards of Rule 23(b)(2)(B).

The form of notice here satisfies due process because it informs Settlement Class Members of the terms of the settlement and the options open to them in plain language. *See Newberg* § 11.53 (the form of notice is "adequate if it may be understood by the average class member"). The notice papers, which are attached as Exhibits B and C to the Intrepido-Bowden Declaration, communicate in plain language the essential elements of the Settlement and the options available to Class Members in connection with the Settlement and final approval.

The manner of sending notice, which relies on direct mailing to individual Class members using GLIC's address database, is the best notice practicable here. Intrepido-Bowden Decl. ¶¶ 17–19. Direct notice will be sent by mail to all Class members using their last known address. *Id*. This is a particularly effective method because in-force policyholders are expected to maintain their current addresses with GLIC. In cases where the policy is no-longer in force, the last known address is already on file and the administrator will use its own extensive database of addresses to confirm that address on file, to assist in having notices go directly to Class members. A website

and toll-free phone number will also be maintained so that anyone can read about the settlement and easily find all documents pertinent to the Settlement. *Id.* ¶¶ 21–24. JND will also research and attempt re-delivery of any Notices returned as undeliverable. *Id.* ¶ 19.

Courts routinely recognize that direct mailings to class members, using known addresses maintained by a defendant or other sources, is the best notice practicable under the circumstances. *See McAdams v. Robinson*, 26 F.4th 149, 157–58 (4th Cir. 2022) (approving a notice method where the administrator "mailed notice to class members for whom it had a physical address" and where the mail notice directed class members to a website and telephone number where class members could access a longform notice). This form and manner of notice has also been approved in the *GLAIC Action* and other cost of insurance class actions. *See, e.g.*, *SLD COI*, Case No. 18-cv-01897-DDD-NYW, ECF No. 148; *Voya COI*, Case No. 16-cv-6399, Dkt. 286; *Leonard v. John Hancock Life Ins. Co.*, Case No. 1:18-cv-4994-AKH, Dkt. 203 (S.D.N.Y. Jan. 7, 2022). The notice plan gives Class members 45 days to opt-out, which is particularly appropriate given that notice will be sent directly to Class members using known addresses. Courts regularly approve opt-out periods of similar or even shorter length. *See, e.g.*, *Jones v. Fidelity Resources, Inc.*, 2020 WL 2112141, at *5 (D. Md. May 4, 2020) (affording class members thirty days from the date of notice to opt out if desired).

D. Proposed Schedule

Plaintiff proposes the following dates for deadlines for the notice plan and for the final fairness hearing, subject to the approval of the Court:

Event	Days from Preliminary Approval	Proposed Date/Deadline (if Preliminary Approval Granted October 10, 2024)
Send notice to Class members	14 days	October 24, 2024
Deadline to file motion for award of attorneys' fees, expenses, and service awards	35 days	November 14, 2024
Opt-Out and Objection Deadline	60 days	December 9, 2024
Deadline to file motion for final approval	64 days	December 13, 2024
Final approval hearing	85 days	January 3, 2025

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully request that the Court (i) preliminarily approve the proposed Settlement as within the range of fairness, reasonableness, and adequacy; (ii) certify the Settlement Class, appoint Plaintiff as Class representative and Susman Godfrey L.L.P. as Class Counsel for Settlement purposes; (iii) approve the proposed form and manner of notice to the Settlement Class; and (iv) approve the proposed schedule for notice, the attorneys' fees motion, and the motion for final approval.

Dated: September 13, 2024

Respectfully submitted,

/s/ Kathleen J.L. Holmes

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CERTIFICATE OF SERVICE

I certify that on this 13th day of September 2024, I electronically filed a copy of the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to all counsel of record.

/s/ Kathleen J.L. Holmes

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