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

JAMES BOYLE, SR., on behalf of himself and others similarly situated *Plaintiff*, v. PROGRESSIVE SPECIALTY INSURANCE COMPANY *Defendant.*	:	CIVIL ACTION NO. 09-5515-TJS

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S UNOPPOSED MOTION FOR
NOTICE OF PROPOSED SETTLEMENT AGREEMENT TO THE CLASS

INTRODUCTION

Plaintiff James Boyle, Sr. submits this memorandum in support of his unopposed motion to give notice of a proposed class action settlement with Progressive Specialty Insurance Company ("Progressive") to the class.[1] A copy of the Settlement Agreement is attached as Exhibit A. Because the proposed settlement will likely be approved as fair, reasonable, and adequate following a final approval hearing, the Court should authorize notice to the proposed Settlement Class. The Court should also approve the Notice Plan and schedule a hearing on final approval of the proposed settlement.

[1] The settling parties are Plaintiff James Boyle, Sr. ("Plaintiff") and Defendant Progressive Specialty Insurance Company.

When a proposed class-wide settlement is reached, it must be submitted to the court for approval. 2 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 11.41, at 89 (4th ed. 2002) ("NEWBERG"). Under recently adopted revisions to Federal Rule of Civil Procedure 23(e), the first inquiry in the new class settlement approval process is whether grounds exist to give notice of the proposed settlement to the class. *See* Fed. R. Civ. P. 23(e)(1). The parties must submit sufficient information to allow the Court to determine whether to give notice of the settlement proposal to the class. *See* Fed. R. Civ. P. 23(e)(1)(A). Such grounds exist, and notice is justified, if the parties show the Court that it will likely be able to grant final approval of the proposed settlement as fair, reasonable, and adequate under the factors set forth in Rule 23(e)(2) and to certify a class for the purposes of judgment. *See, e.g.*, *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720, 2019 U.S. Dist. LEXIS 13481, at *119–20 (E.D.N.Y. Jan. 28, 2019) (observing that under the new Rule 23(e), "courts must assess at the preliminary approval stage whether the parties have shown that the court will likely find that the factors weigh in favor of final settlement approval. This standard appears to be more exacting than the prior requirement."); *Du v. Blackford*, No. 17-cv-194, 2018 U.S. Dist. LEXIS 211796, at *21 (D. Del. Dec. 18, 2018).

After directing notice of the proposed settlement to the class members, the Court must hold a final settlement approval or "fairness" hearing. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 2019 U.S. Dist. LEXIS 13481, at *208; Fed. R. Civ. P. 23(e)(2).

The settlement in this case resulted from good faith, extensive arm's-length negotiations between experienced and informed counsel on both sides. The parties' sometimes contentious (but ultimately successful) negotiations spanned several years. Significantly, the parties completed extensive discovery related both to merits and class certification, briefed and argued

numerous motions, including motions for summary judgment and class certification, and retained experts who have submitted opinions. The parties reached the settlement after Plaintiff won partial summary judgment on the issue of liability and certification of a litigation class. During the course of their lengthy settlement negotiations, the parties took advantage of the expert assistance of Judge Restrepo and two former federal judges acting as private mediators, Judge Farnan and Judge Stengel.

Class Counsel has settled a number of similar cases against other insurers on a class basis in this Court on comparable terms. As a result, Class Counsel is in an excellent position to assess the benefits of the proposed settlement and the risks posed by further litigation, including appeals of the Court's summary judgment and class certification decisions. Given the parties' analysis of the extensive information the parties produced to date, and extensive proceedings in the litigation, and the benefits to the class, the proposed settlement is likely to be approved. Therefore, the Court should find that grounds exist warranting notice of the proposed settlement to the class.

PROCEDURAL HISTORY[2]

I. BACKGROUND

A. Commencement of the Litigation, Class-Related Discovery, Summary Judgment in Favor of Plaintiff and Plaintiff's Amended Motion for Class Certification

Plaintiff has litigated this matter against Progressive for nearly ten years. On November 19, 2009, Plaintiff Pamela Lowe-Fenick filed a Complaint (ECF No. 1), alleging that Progressive violated Section 1799.1 of the Pennsylvania Motor Vehicle Financial Responsibility Law ("MVFRL"), 75 Pa.C.S. § 1799.1 and breached standard insurance contracts with insureds in Pennsylvania. The Complaint included additional common law claims and a claim under Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("UTPCPL").[3]

On May 24, 2010, Plaintiff Lowe-Fenick filed an amended complaint, joining James Boyle, Sr. as an additional plaintiff (ECF No. 40). In the amended complaint, Plaintiffs alleged that Progressive charged them and other insureds more for automobile insurance than Pennsylvania law permits. Plaintiffs alleged that section 1799.1 of the MVFRL requires all insurance companies authorized to write private passenger automobile insurance in Pennsylvania to provide a ten percent premium discount on comprehensive coverage for vehicles with "passive antitheft devices" as defined in 75 Pa.C.S. § 1799.1(b). Plaintiffs further alleged that they, and many others in Pennsylvania, insured vehicles with Progressive that have passive antitheft devices, but did not receive a 10 percent antitheft discount from Progressive on their

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[2] The declaration of Ira Neil Richards in Support of Plaintiff's Motion for Notice of Proposed Settlement Agreement to the Class ("Richards Declaration") provides additional background information. The Richards Declaration is attached as Exhibit B.

[3] On February 23, 2010, Plaintiff Lowe-Fenick and Progressive entered into a stipulation (ECF No. 19) that she would voluntarily dismiss her claims in Counts IV, V, and VI without prejudice and Progressive would answer her Complaint, including her MVFRL and breach of contract Counts.

comprehensive coverage, and, thus, were overcharged for their automobile insurance. The amended complaint alleged that Progressive's failure to provide the antitheft discount also breached Progressive's standard insurance contracts. Plaintiffs sought damages and injunctive relief. Progressive answered the amended complaint (ECF No. 41).

On January 26, 2010, following a preliminary pretrial conference, the Court issued a Scheduling Order requiring the parties to complete all fact and expert testimony by May 28, 2010 (ECF No. 17). Under the Court's schedule, the parties exchanged written discovery requests and responses, and met and conferred on numerous occasions to resolve discovery disputes while producing discovery on a rolling basis. Plaintiffs took the depositions of Progressive's Rule 30(b)(6) designees, and Progressive took Plaintiffs' depositions.

On May 12, 2010, the parties filed a Joint Motion for a Scheduling Conference (ECF No. 28). The parties asked the Court to resolve anticipated summary judgment motions before any class certification motion. On May 13, 2010, the Court issued an Amended Scheduling Order (ECF No. 33) requiring the parties to file summary judgment and class certification motions by June 30, 2010. The Court also scheduled argument for August 11, 2010.

On June 30, 2010, the parties filed their respective motions for, and memoranda in support of, summary judgment (ECF Nos. 44, 53, 55). Plaintiffs also filed their motions and brief in support of class certification (ECF Nos. 56–57). The parties filed exhibits in support of their respective motions, and statements identifying facts that they contended were not in dispute (ECF Nos. 45, 47, 48, 49, 54). The same day, Plaintiffs moved in limine to exclude the proffered expert testimony of Robert F. Mangine and Constance B. Foster (ECF Nos. 50, 51). Plaintiffs filed corrected papers in support of their summary judgment and class certification motions on July 8, 2010 (ECF Nos. 64–65). The parties filed responses to each other's filings on July 16,

2010 (ECF Nos. 67–75), and filed reply briefs on July 26, 2010 (ECF Nos. 76–83). On August 11, 2010, the Court held oral argument on the parties' cross-motions for summary judgment and Plaintiffs' class certification motion (ECF No. 86).

On March 29, 2012, the Court granted in part the motions for summary judgment on Plaintiff Boyle's individual section 1799.1 (Count I) and breach of contract (Count II) claims as to liability only (ECF Nos. 94, 95) and granted Progressive's Motion for Summary Judgment as to Plaintiff Lowe-Fenick (ECF Nos. 94, 97). The Court denied as moot each of Plaintiffs' motions in limine (ECF Nos. 98, 99). Finally, the Court denied Plaintiffs' Motion for Class Certification without prejudice, ordering Plaintiff Boyle to file another motion for class certification, consistent with the Court's Memorandum Opinion,[4] no later than May 1, 2012 (ECF No. 96).

On May 1, 2012, Plaintiff filed his Amended Motion for Class Certification (ECF No. 101). On May 22, 2012, Progressive filed its Memorandum in Opposition to Plaintiff's Amended Motion for Class Certification (ECF No. 104). On June 1, 2012, Plaintiff filed a reply brief in support of class certification (ECF No. 105). On June 18, 2012, the Court ordered Plaintiff to submit a trial plan (ECF No. 108). On July 11, 2012, Plaintiff filed that trial plan (ECF No. 109).

On July 18, 2012, the Court held oral argument on Plaintiff's amended class certification motion. In the months following the class certification hearing, the parties resumed settlement discussions, supervised and aided by Judge Farnan. In January 2013, Plaintiff moved to supplement the class certification record (ECF No. 112). The Court granted Plaintiff's motion on January 23, 2013 (ECF No. 117).

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[4] *See Willisch v. Nationwide Ins. Co. of America*, 852 F. Supp. 2d 582 (E.D. Pa. 2012).

At the same time Boyle sought leave to supplement the record, Progressive filed a motion for reconsideration of the Court's March 2012 summary judgment ruling on January 22, 2013. Boyle opposed that motion, and the Court denied Progressive's motion on February 5, 2013. *See* ECF No. 120.

On August 6, 2013, Progressive filed a notice of supplemental authority, to which Plaintiff responded. *See* ECF Nos. 122, 124. On September 3, 2013, Progressive filed a second notice of supplemental authority, to which Plaintiff responded. *See* ECF Nos. 125, 126.

On October 2, 2013, Plaintiff filed a motion to compel Progressive to provide supplemental discovery responses. Progressive had refused to provide updated data even though more than three years had passed since Progressive had provided discovery responses and even though the class Plaintiff sought to certify extended to the then-present day. Progressive opposed the motion to compel, and the Court denied the motion. *See* ECF No. 130.

On September 17, 2013, the *Tomaine* case was filed against Nationwide Mutual Insurance Company, on behalf of a class defined to include policyholders of all of Nationwide Mutual's operating companies in Pennsylvania. The parties in that case exchanged additional discovery relating primarily to Nationwide's changed practice for applying a passive antitheft device discount in Pennsylvania. Plaintiff moved to supplement the class certification record in this case with discovery from *Tomaine* (ECF No. 133). Over Progressive's objections, the Court granted Plaintiff's motion on April 10, 2014 (ECF No. 136).

In June 2014, the Court ordered Plaintiff to file an amended chart of vehicles with qualifying devices, including citations to sources to support the vehicles' inclusion on the chart. (ECF No. 137). Plaintiff completed that task, which required weeks of work and effort, and filed an amended chart and compendium of source information on July 18, 2014 (ECF Nos. 138–39,

141, 142). The Court ordered Progressive to file a response to Plaintiff's submission by August 22, 2014 (ECF No. 143). Progressive sought clarification of the Court's order, and, while denying reconsideration or clarification, the Court entered a further order granting Progressive until September 5, 2014, to file its responsive submission (ECF No. 146). Progressive made its filing on September 5, 2014 (ECF No. 148) and also moved for reconsideration of the Court's summary judgment order (ECF No. 147). The Court denied Progressive's motion for reconsideration on October 2, 2014 (ECF No. 154). Plaintiff filed a reply in further support of his amended vehicle chart and source compendium on September 12, 2014 (ECF No. 152).

Through the course of the case, the parties filed a number of notices of supplemental authority. On November 26, 2014, Progressive filed a notice of supplemental authority, to which Plaintiff responded. *See* ECF Nos. 155, 156. On April 17, 2015, Plaintiff filed a notice of supplemental authority, to which Progressive responded. *See* ECF Nos. 157, 158. On September 4, 2015, Progressive filed a third motion for reconsideration of the Court's summary judgment ruling, which Plaintiff opposed. *See* ECF Nos. 159, 160. The Court denied Progressive's motion on September 10, 2015. *See* ECF No. 162. On August 18, 2016, Progressive filed another notice of supplemental authority, to which Plaintiff responded. *See* ECF Nos. 166, 167. On October 7, 2016, Progressive filed another notice of supplemental authority, to which Plaintiff responded. *See* ECF Nos. 168, 169. On August 22, 2017, Plaintiff filed a notice of supplemental authority, to which Progressive responded. *See* ECF Nos. 170, 171.

The Court granted Plaintiff's class certification motion on June 7, 2018 (ECF Nos. 177, 178). The class certification order directed Plaintiff to further amend the chart of qualifying

vehicles in accordance with the Court's class certification opinion (ECF No. 178).[5] Progressive sought to appeal the class certification order pursuant to Federal Rule of Civil Procedure 23(f), but the Third Circuit denied Progressive's petition on July 20, 2018.

The parties submitted the further amended chart on September 13, 2018 (ECF No. 189), and Progressive simultaneously filed objections to the amended chart and a motion to compel Plaintiff to submit a trial plan (ECF No. 191). The Court denied Progressive's motion to compel and overruled its objections to the amended chart of qualifying vehicles on September 25, 2018 (ECF No. 192).

Plaintiff moved for an order requiring Progressive to pay costs of class notice, and the parties fully briefed that motion by October 23, 2018 (ECF Nos. 194, 198, 201, 205). The parties then engaged in further settlement discussions with the assistance of former Chief Judge Stengel and reached a settlement in principle on January 15, 2019.

II. THE SETTLEMENT AGREEMENT

Reflecting the benefit of the settling parties' analyses of the legal and factual issues, as well as extensive discovery, and the parties' desire to resolve the case without further litigation, the Settlement Agreement provides benefits to be paid to Settlement Class Members from a Net Settlement Fund, which is $2 million (the "Gross Settlement Amount"), less any award of attorneys' fees and expenses, notice costs and costs of claims administration, any incentive award to Class Representative Boyle.[6] *See* Settlement Agreement ¶¶ I(1)(q), I(1)(cc), V(1).

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[5] Plaintiff Lowe-Fenick moved for entry of judgment on her claim pursuant to Federal Rule of Civil Procedure 54(b) on October 19, 2017 (ECF No. 172). The Court denied Plaintiff Lowe-Fenick's motion as moot following its certification of the class and amendment of the case caption (ECF Nos. 177, 178, 179).

[6] Only "Distribution Class Members," *see* Settlement Agreement ¶ VIII(1) ("Determining the Identity of Distribution Class Members"), receive a Class Member Award from the Settlement Fund. *See* Settlement Agreement ¶ VI(1). A "Distribution Class Member" is

Before final approval, Progressive will advance up to $200,000 of the Gross Settlement Amount towards payment of the costs associated with providing notice to the Settlement Class and administering claims, including the fees and expenses of the Settlement Administrator. *See id*. ¶ IX(3). Furthermore, Progressive has agreed to "going-forward relief" for applicants in which, for a minimum of two years after the Effective Date[7] and to the extent consistent with Pennsylvania law, Progressive will conduct a manual review to identify then-current policyholders whose cars are identified on the Chart of Qualifying Vehicles and provide the discount to those individuals. Progressive also concurrently intends to build its own database, which will be populated with the vehicles identified on the Chart of Qualifying Vehicles and may include additional vehicles that Progressive determines have a qualifying passive antitheft device installed as manufacturer's standard equipment. In the event that such database is completed and functional, Progressive will use it to automatically provide the discount to personal automobile insurance policyholders with comprehensive coverage whose vehicles have a qualifying passive antitheft device as manufacturer's standard equipment. *Id*. ¶ V(2).

The monetary amount Class Members receive is based on a formula designed to provide pro rata shares of the Net Settlement Fund based on the damages allegedly incurred by Class Members. The specific procedure by which this calculation will be performed is set forth in Sections V and VI of the Settlement Agreement. In essence, the parties will calculate a Net Settlement Fund which will be the Gross Settlement Amount ($2 million) less: (a) the attorney's fees and expenses awarded to Class Counsel; (b) the payment of costs of administration and

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a "Settlement Class Member," *i.e.*, any person who is included in the definition of the Settlement Class, *see* Settlement Agreement ¶ I(1)(m), who also meets the criteria for receiving a distribution from the Settlement Fund, as set forth in paragraph VIII of the Settlement Agreement. Settlement Agreement ¶ VIII.

7 *See* Settlement Agreement ¶ I(1)(o).

notice; and (c) the incentive payment awarded to the Class Representative. The Net Settlement Fund will be used as the number from which Class Members' pro rata distribution will be determined. All Current Policyholder Class Members automatically will receive a share of the Net Settlement Fund. *See* Settlement Agreement ¶¶ VII(2), VIII(1). Former Policyholder Class Members will receive a share of the Net Settlement Fund if they return an "Address Verification Form" to the Settlement Administrator. *Id*. ¶ VIII(2). Payments will either be in the form of credits (where feasible for current policyholders) or checks. *Id*. ¶¶ VII(1–6).

Upon the Court's final approval of the settlement, Settlement Class Members will release any claims they have against Progressive that have been, or could have been, asserted in this lawsuit relating to vehicle antitheft device premium discounts for personal automobile insurance policies issued in Pennsylvania. *See* Settlement Agreement ¶¶ XV(1–7).

ARGUMENT

Federal courts repeatedly and consistently have recognized a universal and long-standing public policy favoring the settlement of civil actions. *See, e.g.*, *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910) ("[c]ompromises of disputed claims are favored by the courts."). Settlements are particularly favored in complex class actions such as this one. *See, e.g.*, *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004) ("[T]here is an overriding public interest in settling class action litigation, and it should therefore be encouraged."); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995), *cert. denied*, 516 U.S. 824 (1995) (holding that "[t]he law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation"); *Austin v. Pa. Dep't of Corr.*, 876 F. Supp. 1437, 1455 (E.D. Pa. 1995) (explaining that "the

extraordinary amount of judicial and private resources consumed by massive class action litigation elevates the general policy of encouraging settlements to 'an overriding public interest'").

Here, the proposed settlement satisfies the criteria of Rule 23(e), is likely to be finally approved, and provides grounds for directing notice to the Settlement Class.

I. THE SETTLEMENT CLASS REFLECTS THE EXISTING CERTIFIED CLASS AND MAY BE CERTIFIED FOR PURPOSES OF JUDGMENT ON THE PROPOSED SETTLEMENT

Here, as mentioned above, the Court has already certified a class that meets the requirements of Rule 23(a) and Rule 23(b)(3). *See generally Boyle v. Progressive Specialty Ins. Co*., 326 F.R.D. 69 (E.D. Pa. 2018). The Settlement Class reflects the class the Court certified and is defined as follows:

> All Progressive Specialty Insurance Company personal automobile insurance policyholders in Pennsylvania, who at any point during the Class Period: (a) had a policy of automobile insurance that included comprehensive insurance coverage; (b) who insured a make, model and year vehicle that has as standard equipment a Pass-Key or PassLock system, SecuriLock/PATS system, Sentry Key Immobilizer System, Nissan Vehicle Immobilizer System, or Mercedes Immobilizer system as identified on the Chart of Qualifying Vehicles; and (c) did not receive a 10% discount on the comprehensive portion of the paid premium.

Settlement Agreement ¶ III(1). The parties have stipulated that the Class Period is November 19, 2005 (four years prior to the filing of the Complaint) to December 31, 2018. *Id*. ¶ I(1)(h). Accordingly, for the reasons set forth in the Court's memorandum opinion on class certification, the Settlement Class may be certified for judgment, satisfying the requirement of Rule 23(e)(1)(B)(ii).

II. THE PROPOSED SETTLEMENT IS LIKELY TO BE FINALLY APPROVED, AND NOTICE OF THE PROPOSED SETTLEMENT SHOULD BE DIRECTED TO THE CLASS

A. The New Rule 23(e) Standard Required to Give Notice of a Proposed Settlement

Amended effective December 1, 2018, Federal Rule of Civil Procedure 23(e)(1) contains the new procedure for the approval of a proposed class settlement. The rule requires that "[t]he parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class," and that 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) & (2). Rule 23 requires courts deciding whether to direct notice of the proposal to the absent class members to consider specific factors relevant to the fairness, reasonableness, and adequacy of the proposed settlement. *See* Fed. R. Civ. P. 23(e)(2).

When deciding whether to direct notice of the proposal to the class, a court should consider whether:

> (A) the class representatives and class counsel have adequately represented the class;
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> (B) the proposal was negotiated at arm's length;
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> (C) the relief provided for the class is adequate, taking into account:
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> (i) the costs, risks, and delay of trial and appeal;
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> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
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> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and

> (iv) any agreement required to be identified under Rule 23(e)(3); and
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> (D) the proposal treats class members equitably relative to one another.

Fed. R. Civ. P. 23(e)(2)(A)–(D). These factors embody familiar core concerns because they reflect the same general inquiry courts in the Third Circuit have made when determining whether a settlement is fair, reasonable, and adequate. At final approval, courts within the Third Circuit enjoy broad discretion and traditionally have considered the well-known touchstones set forth in *Girsh v. Jepsen*, 521 F.2d 153 (3d Cir. 1975). The *Girsh* factors are:

> (1) The complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best possible recovery; and (9) the range of reasonableness of the settlement in light of all attendant risks of litigation.

521 F.2d at 156–57.[8] There is considerable overlap between Rule 23(e)(2) and the *Girsh* factors, and they address the same core concerns of fairness, reasonableness, and adequacy of the proposed settlement. Finally, the decision to approve a settlement is committed to the sound

[8] As the Committee Note on the 2018 amendments explains, circuit courts developed different factors to consider when determining whether a settlement was fair, reasonable, and adequate. *See* 2018 Committee Note on Subdivision (e)(2). As the Committee Note further explains, the "goal of this amendment is not to displace any factor, but rather to *focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal*." *Id*. (emphasis added). The Rule 23(e)(2) factors therefore embody the same core considerations the *Girsh* factors address to determine whether a proposed settlement is likely to obtain final approval. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig*., 2019 U.S. Dist. LEXIS 13481, at *121–23 (noting the new Rule 23(e)(2) factors do not displace the *Grinnell* factors that courts in the Second Circuit traditionally consider when assessing the fairness, reasonableness, and adequacy of a class settlement).

discretion of the Court. *See In re Insurance Brokerage Antitrust Litig.*, 579 F.3d 241, 256 (3d Cir. 2008); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004).

Here, the Court has already certified a class, so the parties have already satisfied Rule 23(e)(1)(B)(ii)'s requirement that the parties show the Court that it may certify a class for purposes of judgment. As shown below, the proposed settlement is fair, reasonable, and adequate and meets the criteria of Rule 23(e)(2). The Court will likely be able to approve the proposed settlement following class notice and a final fairness hearing. Accordingly, there are grounds to direct notice of the proposed settlement to the class under the revised Rule 23(e).

B. The Proposed Settlement Meets the Standards for Approval and Is Likely to Be Approved Following a Final Fairness Hearing

The Court should direct notice to the class because, considering the relevant factors, the Court will likely grant final approval of the settlement as fair, reasonable, and adequate. To summarize, (1) the class representative and class counsel have adequately represented the class; (2) the settlement is the product of arm's-length, informed negotiations; (3) the settlement falls firmly within the range of reasonableness when compared with other settlements and provides adequate relief for the class, taking into account the costs, risks, and delays of trial and appeal, the effectiveness of the proposed method of distributing relief to the class and processing class-member claims, and the proposed attorney's fee award; (4) the settlement does not grant improper treatment to certain Members of the Settlement Class; and (5) the proceedings are sufficiently advanced to allow for adequate evaluation of a proposed settlement that would account for litigation risks.[9]

[9] Prior to giving the class notice and the receipt of any opt outs or objections, there is not a basis to gauge the reaction of the class to the settlement, so that *Girsh* factor is not yet in play. To the extent other *Girsh* factors overlap with the core concepts set forth in the Rule 23(e)(2) factors, this memorandum analyzes them together.

1. The Class Representative and Class Counsel Have Adequately Represented the Class

As described at pages 3 to 9, *supra*, and in the Richards Declaration, the Class Representative and Class Counsel have more than adequately represented the class through years of complex litigation in this case and related cases against other insurers. This Court has already ruled that Plaintiff and Class Counsel have adequately represented the class in this case:

> There are no conflicts or divergent interests between Boyle and the class members. Nothing will impair his ability to adequately protect the interests of the absent class members. Their interests are the same. Protecting his interest necessarily protects their interests. Therefore, Boyle has satisfied this part of the adequacy requirement.
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> Counsel is qualified to represent the class. They are experienced in handling class actions. We have observed their expertise and comprehensive knowledge of the law and the facts in the handling of this case and the related cases through class certification and settlement. They have already spent a significant amount of time working on this case and the related cases. They have conducted extensive investigation, drafting of pleadings, discovery, litigation of motions for summary judgment and motions for class certification, settlement negotiations, and mediations. They are knowledgeable of the applicable law. Counsel successfully negotiated settlement agreements with ten of the insurance companies in the related cases. They achieved court approval of pre-certification settlements in nine of those cases. Therefore, the adequacy of representation requirement is satisfied.

Boyle, 326 F.R.D. at 80.

Before bringing the case and throughout its pendency, Class Representative and Class Counsel conducted a thorough examination of the relevant law and facts to assess the merits of the claims and potential claims and the likelihood of class certification to determine how best to serve the interest of Plaintiff and the class. *See* Richards Decl. ¶¶ 10, 12.

The Class Representative and Class Counsel engaged in, and participated in, substantial discovery, including considerable third-party discovery and expert discovery, concerning Progressive's practices and anti-theft devices. *See* Richards Decl. ¶¶ 17–24, 26–38, 41–44, 47–59, 62–66. With the information they obtained in discovery, and following extensive and intense motion practice, the Class Representative and Class Counsel obtained partial summary judgment against Progressive on the issue of liability. *See id*. ¶¶ 60, 68–73, 88.

Further, the Class Representative and Class Counsel sought and obtained certification of a litigation class against Progressive. *See* Richards Decl. ¶¶ 69, 89–90, 103, 111. In June 2014, the Court directed Plaintiff to provide an amended chart of vehicles with qualifying anti-theft devices and supporting source information. Through considerable effort over several weeks, Plaintiff compiled a lengthy, detailed chart of vehicles with qualifying anti-theft devices, and filed a compendium of source materials supporting the inclusion of the vehicles on the chart. *See* ECF Nos. 138–42. Progressive filed a response in opposition, challenging the inclusion of nearly every vehicle on the amended chart. *See* ECF No. 148.

When the Court granted class certification, it directed Plaintiff to further amend the chart of qualifying vehicles to conform to the criteria set forth in the Court's memorandum opinion. Richards Decl. ¶ 111. Progressive sought to appeal the Court's class certification ruling to the Third Circuit, but the Third Circuit denied Progressive's Rule 23(f) petition. *Id*.

Plaintiff again went to considerable effort and conformed the vehicle chart to the Court's criteria. Richards Decl. ¶ 111. Progressive again objected to the inclusion of nearly every vehicle on the chart, and the parties submitted the further amended chart and Progressive's objections to it in September 2018. *Id*. ¶ 112. The Court overruled Progressive's objections and

denied Progressive's motion to compel Plaintiff to submit a new trial plan. *Id*. Plaintiff also filed a motion for an order requiring Progressive to pay costs of class notice. *Id*. ¶ 113.

In January 2019, Plaintiff and Progressive engaged in mediation with the assistance of former Chief Judge Stengel and reached a settlement in principle on January 15, 2019.

All of these litigation efforts are consistent with, and grounds for, the Court's finding that Plaintiff and Class Counsel have adequately represented the class.

2. The Settlement Resulted from Serious, Informed, Arm's-Length Negotiations

The Settlement Agreement resulted from the diligent efforts and intensive arm's-length negotiations among the settling parties. *See* Richards Decl. ¶ 114. Through almost ten years of litigation and over the long course of their settlement discussions, the parties worked at various times with Magistrate Judge Restrepo (*see* ECF No. 37), and private mediators, retired Judge Farnan and retired Chief Judge Stengel. *Id*. ¶¶ 91, 113. Progressive strenuously has denied and continues to deny each and all of the claims and contentions alleged in this case, and Progressive would appeal the Court's grant of partial summary judgment and class certification order in favor of Plaintiff if this case is not settled. *Id*. ¶ 2; Settlement Agreement ¶¶ II(4), (8). In this regard, and as the extensive record in this case amply demonstrates, Progressive vigorously and aggressively contested the claims in the case. Nevertheless, Progressive has decided to settle this action in the manner and upon the terms and conditions set forth in the Settlement Agreement in order to avoid the expense, inconvenience, and burden of further legal proceedings, and the uncertainties of trial and appeals. *See* Settlement Agreement ¶ II(6), (8).

As the Court observed in certifying the Class, Class Counsel has demonstrated skill and knowledge of the relevant law and has performed extensive work on behalf of the class in this case and in the related cases. *Boyle*, 326 F.R.D. at 80.

Accordingly, the record shows that the parties negotiated the Proposed Settlement at arm's length following extensive litigation.

3. The Settlement Agreement Provides Substantial Benefits to the Class, Is Comparable to Settlements in Similar Cases, Avoids the Costs, Risks, and Delays of Trial and Appeals, and Embodies an Effective Proposed Method of Distributing Relief to the Class

The proposed $2 million dollar settlement, plus going forward relief, confers substantial benefits on Class Members. The Settlement Agreement is comparable to agreements that this Court has approved in similar cases against other insurers. *See, e.g.*, *Tomaine v. Nationwide Mut. Ins. Co*., No. 2:13-cv-5408-TJS (E.D. Pa.) (*Tomaine* ECF No. 68); *Bucari v. Allstate Prop. & Cas. Ins. Co*., No. 2:09-cv-5512-TJS (E.D. Pa.) (*Bucari* ECF No. 134); *see also* Richards Decl. ¶ 119.

The lengthy history of this complex litigation is described at pages 3 to 9, *supra*, and in the Richards Declaration at paragraphs 13 to 113. Plaintiff and Class Counsel litigated with Progressive for nearly 10 years to obtain partial summary judgment on the issues of liability and to obtain class certification. The litigation involved substantial discovery and motion practice, as well as numerous experts opining on issues relating to insurance law and practice and to anti-theft devices. Class Counsel undertook considerable efforts to identify decades of vehicle makes, models, and trims that have qualifying factory-installed anti-theft devices as standard equipment.

The record in this case amply establishes the case's complexity. The parties argued extensively over the interpretation of the antitheft device discount provision of the MVFRL, as well as the applicability of the MVFRL's provision to standard equipment engine immobilizers. Discovery and summary judgment motions included issues relating to the function and availability of passive antitheft devices, as well as the availability and content of information

sources identifying cars with passive antitheft devices. Progressive argued that it was complying with—and even exceeding—the requirements of Pennsylvania law and did not have the ability to apply an antitheft device discount without confirmation from an insured that a car had a passive antitheft device, for a variety of reasons. Progressive also submitted multiple expert reports contesting whether devices qualify for a passive antitheft device discount, contesting the timing of available information, and contesting Plaintiff's statutory interpretation argument. The parties' competing summary judgment motions and Plaintiffs' motions in limine directed to Progressive's experts reflect the extensive record developed by both sides as they argued the issues in this case. While the Court entered summary judgment for Plaintiff Boyle as to his individual cars, it granted Progressive summary judgment concerning Plaintiff Lowe-Fenick's car. Undoubtedly, additional proceedings, including additional hotly contested motion practice, a trial, and potential appellate practice, would have occurred to resolve Class members' claims, but for the proposed settlement.

Even though Plaintiff prevailed on summary judgment as to the application of the anti-theft device discount provision and class certification, the litigation could have continued for years through trial and appeals. *See, e.g*., *In re Warfarin Sodium Antitrust Litig*., 391 F.3d 516, 536 (3d Cir. 2004) ("Moreover, it was inevitable that post-trial motions and appeals would not only further prolong the litigation but also reduce the value of any recovery to the class."); *In re Rent-Way Sec. Litig*., 305 F. Supp. 2d 491, 501 (W.D. Pa. 2003) ("[R]egardless [of] which party or parties prevail at trial, a direct appeal would be virtually certain to follow, resulting in further expense and protraction of the proceedings."). Progressive made clear its intent to contest the Court's summary judgment ruling and its interpretation and application of the MVFRL, class certification ruling, and amended chart of qualifying vehicles through an appeal to the Third

Circuit. Progressive's numerous motions for reconsideration of the summary judgment ruling and Progressive's Rule 23(f) petition for review of the class certification decision show that Progressive would raise numerous issues on appeal.

Class Counsel recognize the potential expense and length of continuing litigation through a trial and appeals in this action, all of which could take several years. *See generally* Richards Decl. ¶ 118; pages 3–9, *supra*. Taking into account the uncertain outcome of any trial and appeals and other risks of litigation, Class Counsel believe that the Settlement Agreement confers substantial benefits upon the Settlement Class. Based upon their evaluation of the evidence and issues in this litigation, and risks on appeal, Class Counsel determined that the settlement is in the best interest of the Settlement Class. *See* Richards Decl. ¶¶ 7, 113.

Thus, the Settlement avoids the expenditure of substantial time and expense and the risks of further litigation. *See, e.g.*, *In re Prudential Ins. Co. Am. Sales Practice Litig.*, 148 F.3d 283, 318 (3d Cir. 1998) ("[W]e conclude the trial of this class action would be a long, arduous process requiring great expenditures of time and money on behalf of both the parties and the court. The prospect of such a massive undertaking clearly counsels in favor of settlement."); *Lazy Oil Co. v. Witco Corp*., 95 F. Supp. 2d 290, 297 (W.D. Pa. 1997) ("Given the complexity of this case, the large number of fact and expert witnesses and the voluminous documents relied on by both sides, the preparation for trial and the conduct of the trial itself would have been very time consuming and expensive."); *In re Lucent Techs., Inc. Sec. Litig*., 307 F. Supp. 2d 633, 642–43 (D.N.J. 2004) (when a settlement "secures a substantial recovery without further litigation, delay, expense, or uncertainty . . . this factor weighs in favor of the Settlement").

Given the complexity of this case, and the risks on appeal, the $2,000,000 Gross Settlement Amount, which represents approximately 58% of the total amount of possible

damages, grants considerable relief to the Class Members. Richards Decl. ¶ 117. The Settlement Agreement further grants going forward relief that provides Class Members with significant benefits, including providing automatic application of the discount to all the cars identified on the Chart of Qualifying Vehicles, and potentially to other cars that Progressive determines have a qualifying passive antitheft device installed as manufacturer's standard equipment. *Id*. ¶¶ 9, 114, 117.

The fee award requested by Class Counsel and described in the Settlement Agreement falls in line with the awards requested, and granted, in the settlements the Court has approved in the cases against other insurers. *See* Settlement Agreement ¶ XIII(1); Richards Decl. ¶ 118. The proposed method of distributing relief to class members, likewise, is similar to that the Court approved in the other cases, and is calculated to provide the maximum *pro rata* shares of the Net Settlement Fund to the Class Members in the least burdensome manner to the Class Members possible, including by providing credits to Class Members who are existing Progressive customers and checks to former customers. *See* Richards Decl. ¶ 118.

Accordingly, the Settlement Agreement, which is the only agreement between the parties concerning the proposed settlement,[10] is fair, reasonable, and adequate, and likely to be approved in light of the factors enumerated in Rule 23(e)(2)(C).

4. The Settlement Does not Improperly Grant Preferential Treatment to the Class Representative or Segments of the Class

The relief provided in the settlement will benefit all Settlement Class Members equally. *See* Richards Decl. ¶¶ 115–18 The settlement does not grant preferential treatment to segments of the Settlement Class. *Id*. ¶¶ 114–15. Accordingly, the Settlement Agreement satisfies the requirements of Rule 23(e)(2)(D).

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[10] *See* Fed. R. Civ. P. 23(e)(2)(C)(iv) & (e)(3).

5. The Proceedings Are Sufficiently Advanced to Warrant Approval of the Settlement

The stage of the proceedings at which the parties made the Settlement Agreement militates in favor of approval of the proposed settlement. The agreement to settle did not occur until Class Counsel had conducted extensive discovery relating to the merits of the claims, including review of a substantial volume of documents and depositions of witnesses, including Progressive's experts, and work with their own expert. *See* Richards Decl. ¶¶ 28–68. The parties have engaged in significant motion practice, including Plaintiff's summary judgment motion (on which Plaintiff obtained partial judgment on one of his his individual claims as to liability only), motions to certify the class, and motions in limine to preclude expert testimony and reports. *Id*. ¶¶ 69–79. The Court certified a class in this action and appointed Plaintiff class representative (ECF No. 178). Accordingly, the action has progressed far enough that Class Counsel possess sufficient information to make an informed judgment regarding the results that could be obtained through further litigation, including consideration of possible outcomes on appeal. *See id*. ¶ 117; *see also Boyle*, 326 F.R.D. at 80 (noting class counsel's thoroughness in assessing the law and information in obtaining nine pre-certification settlements of the same claims with other insurers).

III. THE COURT SHOULD ORDER NOTICE OF THE PROPOSED SETTLEMENT TO THE CLASS

The Federal Rules of Civil Procedure provide that "[t]he 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)(B). As shown above, the Court has already determined that it may certify a

class in this case. *See Boyle*, 326 F.R.D. at 100–01. And, as demonstrated *supra*, the parties have shown that the Court will likely be able to approve the proposed settlement under Rule 23(e)(2).

The Notice Plan set forth below (i) is the best practicable notice, (ii) is reasonably calculated to apprise Settlement Class Members of the pendency of the Lawsuits and of their right to object to, or exclude themselves, from the proposed settlement; (iii) is reasonable and constitutes due, adequate, and sufficient notice to all persons entitled to receive notice, and (iv) satisfies the requirements of Rule 23 and due process. *See generally* Richards Decl. ¶ 120. In addition, Progressive will comply with the requirements of the Class Action Fairness Act of 2005 to provide notification of the proposed settlement to the appropriate federal and state officials. 28 U.S.C. § 1715; *see* Settlement Agreement ¶ IX(4). Therefore, the Notice Plan should be approved, and the Court should direct notice to the class.

A. The Notice Plan and the Address Verification Form

The proposed Notice Plan has two parts: (1) individual notice sent by email, if feasible, to all Class Members identified in Progressive's records for whom a facially valid email address is available, and by first-class mail in the form of a post card if email is not available ("Mailed Notice")[11]; and (2) notice through a Website maintained by the Settlement Administrator. Richards Decl. ¶ 121. The Website will include copies of the Settlement Agreement (including exhibits), a Long Form Notice,[12] and the Preliminary Approval Order. *Id*. ¶ 120–21. The Website will identify important deadlines and provide answers to frequently asked questions. *Id*.

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[11] The forms of notice to current and former Progressive policyholders are attached as Exhibit C.

[12] The Long Form Notice, which includes the Amended Chart of Qualifying Vehicles, is attached as Exhibit D.

¶ 121. The Website will also contain Spanish translations of the Mailed Notice, Long Form Notice, Website home page, and frequently asked questions. *Id.* In addition, the Website will contain a link to the Address Verification Form for Former Policyholders to verify their addresses in accordance with this Agreement. *Id*. The Mailed Notice will also be made available to all potential Settlement Class Members by request to the Settlement Administrator, who shall send it via first-class U.S. mail to any potential Settlement Class Member who requests it. *Id.*

B. Proposed Timing

Plaintiff proposes the following schedule for class notice and further proceedings, subject to Court approval:

Event	**Proposed Timing**
Entry of Preliminary Approval Order	As entered by the Court
Notice to be transmitted or mailed to potential Settlement Class Members (the "Mailed Notice Date")	The Settlement Administrator shall use their best efforts to complete the transmission and mailing of the Mailed Notice to potential Settlement Class Members within 30 days after entry of the Preliminary Approval Order.
Website Notice	Settlement Administrator shall maintain a Website for this settlement beginning on the Mailed Notice Date and remaining for at least ninety (90) days after the Effective Date.
Class Counsel to file papers in support of final approval and petition for fees, expenses, and incentive award	Thirty (30) days after the Mailed Notice Date.
Filing and service of any objections to settlement, Settlement Agreement,	The objection or motion to intervene must be postmarked and served on the Settlement Administrator, and filed with

Event	**Proposed Timing**
request for fees, expenses, and incentive award, entry of appearance, or motion to intervene	the Court, no later than forty-five (45) days after the Mailed Notice Date.
Requests for Exclusion from Settlement Class	The request for exclusion must be mailed to the Settlement Administrator at the address provided in the Mailed Notice and must be postmarked no later than forty-five (45) days after the Mailed Notice Date.
Filing with Court, by Settlement Administrator, of List of all persons who timely requested exclusion from the Settlement Class ("Opt-Out List") and of Affidavit attesting to accuracy of Opt-Out List	Before Final Approval Hearing.
Class Counsel to file any additional papers in support of the settlement	Five (5) days prior to the hearing on final approval.
Hearing on final approval	As set by the Court, approximately sixty (60) days after the Mailed Notice Date.
Deadline for submitting Address Verification Form	Twenty-one (21) days after Final Approval Hearing.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiff's unopposed motion to direct notice of the proposed settlement with Progressive to the class by entering the Proposed Order submitted herewith.

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