

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION

SETH KONECKY and JENNIFER  
KONECKY, husband and wife,  
FLATHEAD VALLEY DIST., INC., a  
Montana Corporation, individually, and  
on behalf of all others similarly  
situated,

Plaintiffs,

vs.

ALLSTATE FIRE & CAS. INS. CO.,  
ALLSTATE INDEM. CO.,  
ALLSTATE PROP. & CAS. INS. CO.,  
ALLSTATE INS. CO.,

Defendants.

CV 17-10-M-DWM

ORDER

**INTRODUCTION**

The parties have reached a settlement. Through an unopposed motion for preliminary approval of the class settlement, they ask the Court to, among other things, certify the proposed class for settlement, grant preliminary approval of the Stipulation of Settlement, direct notice to the class, and set a final fairness hearing. (Doc. 54.) Through another unopposed motion, they ask the Court to approve the appointment of a class administrator and claims adjuster. (Doc. 58.) A hearing was held on September 27, 2018. The motions are granted.

## BACKGROUND

Plaintiffs Seth Konecky, Jennifer Konecky, and Flathead Dist., Inc. (“Koneckys”) filed this suit on behalf of themselves and a putative class in the Montana Eleventh Judicial District Court, Flathead County. The Koneckys allege that they suffered bodily injury and property damage in an automobile accident and that their insurer, Allstate Insurance Company aided and abetted by other defendant Allstate companies (“Allstate”) illegally sought subrogation from the at-fault driver before they were made whole. They allege that Allstate is part of a common scheme to deny Montanans appropriate benefits through the wrongful collection of subrogated funds and they seek to represent a class of individuals who have suffered similar injuries.

Allstate removed the case to federal court. After three denied motions to dismiss, (Docs. 9, 20, 37), a stay pending settlement discussions, (Doc. 16), and an amended complaint, (Doc. 34), the Koneckys moved to certify the class, (Doc. 41). Before the class was certified, the parties notified the Court that they had settled the class claims. (Doc. 50.) The parties filed the motion for preliminary approval of the class settlement on May 29, 2018, and the motion to approve the appointment of a class administrator and claims adjuster on June 21, 2018.

The Stipulation of Settlement, (Doc. 56), begins with a statement of recitals, a list of defined terms, and the definition of the class. (*Id.* at 2–10.) Allstate will

conduct an electronic search of its business records to identify class members and determine the amount of subrogation collected on each class member's claim. (*Id.*) Each class member will automatically receive a pro rata share of the net settlement fund, which is the remainder of Allstate's \$2.5 million lump sum payment less costs, attorneys' fees, and class representative awards. (*Id.* at 9, 14–15.) A class member's automatic share will be based on .30 of the amount Allstate subrogated as to that individual's claim, but class members who believe they are entitled to more may submit a claim to an independent claims adjuster. (*Id.* at 14–17.)

The Stipulation provides that no compensation for class counsel has been negotiated as part of the settlement, but counsel intend to seek 25% of the settlement fund, or \$625,000, in attorneys' fees. (*Id.* at 19.) Further, class counsel will request a \$5,000 class representative award each for Seth and Jennifer Konecky. (*Id.*) The Stipulation then sets out the conditions of settlement and effect of disapproval, cancellation or termination of the agreement. (*Id.* at 20–22). It goes on to address the final approval of the settlement, class members' objections and requests for exclusion, and conditions on confidentiality and proprietary information. (*Id.* at 22–31.) Further, the Stipulation provides that entry of the final judgment results in the release of all released claims, which are defined as all claims "arising from or related to allegations regarding any purported improper subrogation activity whatsoever by Allstate." (*Id.* at 8, 31.) The

Stipulation also includes a provision for ongoing jurisdiction for purposes of enforcing and interpreting the agreement. (*Id.* at 32.) Finally, the Stipulation includes a denial of all liability by Allstate, addresses claims involving class members who are deceased, minors, or incapacitated, and lists miscellaneous standard contract provisions. (*Id.* at 32–38.)

### LEGAL STANDARD

Federal Rule of Civil Procedure 23(e) requires court approval before a class action can be settled. Fed. R. Civ. P. 23(e). “The purpose of Rule 23(e) is to protect the unnamed members of the class from unjust or unfair settlements affecting their rights.” *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2010). The standard for final approval is that the settlement is “fair reasonable, and adequate.” Fed. R. Civ. P. 23(e). However, litigants may ask courts to preliminarily approve a settlement. Where, as here, settlement is reached prior to class certification, courts apply “a higher standard of fairness and a more probing inquiry than may normally be required under Rule 23(e).” *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012) (internal quotation marks omitted).

### ANALYSIS

#### **I. Class certification**

Like any other class, a settlement class must meet Rule 23(a)’s prerequisites for class certification and must be maintainable under Rule 23(b). *Amchem Prods.*

*v. Windsor*, 521 U.S. 591, 621 (1997). Rule 23(a) requires that “(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a). This class is proposed under Rule 23(b)(3), which requires “that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b). When certifying a settlement class, a court must pay “undiluted, even heightened, attention” to Rule 23’s protections for absent class members. *Amchem Prods*, 521 U.S. at 620.

Here, the class is defined as all individuals who were insured under an auto insurance policy issued by Allstate in Montana and with respect to whom Allstate recovered subrogation on a Montana automobile insurance claim after October 21, 2008, *i.e.*, in the eight years before the action was filed in state court. (Doc. 56 at 10.) The parties have stipulated that the proposed class meets Rule 23’s requirements. (*Id.* at 11.) However, the Court must conduct its own review. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011).

The proposed class meets the threshold requirements of Rule 23(a). First,

the numerosity requirement is satisfied because at the September 27 hearing, class counsel informed the Court that there are at least 1,000 class members, rendering joinder of all class members impracticable. Second, the commonality requirement is satisfied because the crux of this case is whether Allstate's subrogation practices violate state law and each class member will need to answer that question to obtain relief. (*See* Doc. 34.) Third, the typicality requirement is satisfied because the named plaintiffs hold substantially similar insurance policies as the absent class members, all the policies were issued in Montana, and all the claims are to be decided under Montana law. (*See* Doc. 56 at 10.) Finally, the adequacy of representation requirement is satisfied because there is nothing in the record to suggest that the named plaintiffs and their counsel have any conflicts of interest with other class members, or that the named plaintiffs and their counsel will prosecute the action vigorously on behalf of the class. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998).

The proposed class also meets the predominance and superiority requirements of Rule 23(b)(3). Regarding predominance, whether Allstate's subrogation practices violate state law is a common question of law that will outweigh any questions affecting individual class members. Regarding superiority, there is nothing in the record indicating that the class members would have an interest in individually controlling separate actions, and there are no concerns

about difficulties in managing a class action. Indeed, with over 1,000 class members, a class action is an efficient procedure for resolution.

## **II. Preliminary approval of the settlement**

The standard for preliminary approval is that the settlement “(1) appears to be the product of serious, informed, non-collusive negotiations; (2) has no obvious deficiencies; (3) does not improperly grant preferential treatment to class representatives or segments of the class; and (4) falls within the range of possible approval.” *Nen Thio v. Genji, LLC*, 14 F. Supp. 3d 1324, 1333 (N.D. Cal. 2014) (citations omitted).

### **A. The settlement process**

The record does not raise concerns about the settlement process. That the Koneckys were deposed and that the parties have completed discovery of “thousands of pages of Manuals and computer system records,” (Doc. 55 at 8.), suggest the settlement was the product of informed decision-making. Further, that litigation went on for nearly a year and a half before the parties reached a settlement and included three fully-briefed motions to dismiss supports that the settlement is non-collusive.

### **B. The presence of obvious deficiencies**

A review of the filings and the arguments at the hearing shows there are no obvious deficiencies in the Stipulation.

### **C. Preferential treatment**

The Stipulation does not improperly grant preferential treatment to the class representatives or other class members. As explained above, the measure of damages for each class member will be based on individualized records from Allstate, and class members can appeal to an independent insurance adjuster. (Doc. 56 at 14–15.) All class members, then, are treated equally. Further, the Koneckys’ incentive fee is just \$5,000 each, or \$10,000 total. That amounts to just 0.4% of the settlement fund, which is in line with Ninth Circuit precedent upholding incentive fees of \$5,000 for each of 9 class representatives when those fees amounted to 0.17% of the settlement fund. *In re Online DVD*, 779 F.3d at 947–48, and upholding \$5,000 for each of 2 class representatives from a settlement fund of \$1.725 million, *Staton*, 327 F.3d at 976 (discussing *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000)). Thus, the Koneckys are not receiving preferential treatment by serving as named plaintiffs.

### **D. Range of possible approval**

In considering whether a proposed settlement falls within the range of possible approval, “courts primarily consider plaintiff’s expected recovery balanced against the value of the settlement offer.” *Nen Thio*, 14 F. Supp. 3d at 1335. Courts may also “preview the factors that ultimately inform final approval.” *Id.* Those factors include

(1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement.

*Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004).

Here, the record does not establish the expected recovery at trial. However, the Stipulation of Settlement does explain that class members will automatically receive .30 of the amount that Allstate subrogated as to their individual claims. (Doc. 56 at 15–17.) That the settlement is only a fraction of the potential recovery is not inherently unfair and does not take the settlement out of the realm of possible approval. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d at 459 (citations omitted). Further, that class counsel is experienced and competent to assess the fairness of the settlement, that formal discovery has already progressed to a great extent, and that the litigation, which has already seen three motions to dismiss, (Docs. 9, 20, 37), is likely to proceed slowly all weigh in favor of approving the settlement.

### **III. Class notice**

There are two notice requirements in Federal Rule of Civil Procedure 23 that are relevant here. First, Rule 23(c)(2)(B) requires notice to class members that a class has been certified under Rule 23(b)(3). Specifically, Rule 23(c)(2)(B)

provides that

the court must 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. The notice must clearly and concisely state in plain, easily understood language:

- (i) the nature of the action;
- (ii) the definition of the class certified;
- (iii) the class claims, issues, or defenses;
- (iv) that a class member may enter an appearance through an attorney if the member so desires;
- (v) that the court will exclude from the class any member who requests exclusion;
- (vi) the time and manner for requesting exclusion; and
- (vii) the binding effect of a class judgment on members under Rule 23(c)(3).<sup>1</sup>

Fed. R. Civ. P. 23(c)(2)(B). Second, Rule 23(e) requires notice to class members that a settlement has been reached. Specifically, Rule 23(e) provides that “[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal.” Fed. R. Civ. P. 23(e)(1). “Notice is satisfactory if it ‘generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.’”

*Rodriguez v. West Publ’n Co.*, 563 F.3d 948 (9th Cir. 2009) (quoting *Churchill*

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<sup>1</sup> The proposed 2018 amendments to the Federal Rules of Civil Procedure revise Rule 23(c)(2)(B) to explicitly address settlement-only classes and to specify that “notice may be by one or more of the following: United States mail, electronic means, or other appropriate means.” Absent congressional action, the proposed amendments will be effective December 1, 2018. *See Proposed Amendments to the Federal Rules of Civil Procedure* (available at [https://www.supremecourt.gov/orders/courtorders/frcv18\\_5924.pdf](https://www.supremecourt.gov/orders/courtorders/frcv18_5924.pdf)).

*Vill., LLC*, 361 F.3d at 575).

Here, the notice comports with both Rule 23(c)(2)(B) and Rule 23(e). Within 60 days of the settlement's preliminary approval, class counsel will send notice of the settlement by first class mail to the last known address of each class member according to Allstate's records. (Doc. 56 at 13.) This satisfies Rule 23(c)(B)(2)'s instructions to send "the best notice that is practicable under the circumstances" and to send "individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(B)(2). The proposed notice form includes all the components required by Rule 23(c)(B)(2), including a description of the action. (*See generally* Doc. 56-1.) The notice also instructs class members how to obtain additional information, and how to register objections to the settlement, consistent with Rule 23(e)'s requirements. (*Id.* at 6–8.) Finally, the notice informs class members that class counsel plan to request attorneys' fees that amount to 25% of the settlement fund and that the Koneckys plan to request \$5,000 each in incentive awards, totaling \$10,000. (*Id.* at 5.) The notice, then, is adequate.

#### **IV. Class administrator**

Class counsel have moved unopposed to have JND approved as the class administrator and Pete Yonge as the independent adjuster, as provided for in the Stipulation. (Doc. 58.) The record establishes JND and Pete Yonge's

qualifications to serve in this role. (*See* Doc. 58-1.)

\* \* \*

Accordingly, IT IS ORDERED that the motion for preliminary approval of class settlement, (Doc. 54), and the motion for approval of class administrator and adjuster, (Doc. 58), are GRANTED AS FOLLOWS:

1. This Preliminary Approval Order incorporates by reference the definitions in the Agreement, (Doc. 56).
2. The Court has jurisdiction over the subject matter of this Action and over all Parties to this Action, including the Named Plaintiff, all Settlement Class Members, and Allstate.
3. The Court preliminarily approves the Agreement, and preliminarily finds the Settlement to be fair, reasonable, and adequate to the Settlement Class, but such finding is not to be deemed an admission of liability or fault by Allstate or by any other Person, or a finding of the validity of any claims asserted in the Action or of any wrongdoing or of any violation of law by Allstate. Neither the Agreement, nor any of its terms or provisions, nor any of the negotiations or proceedings connected with it, shall be construed as an admission or concession by the Released Persons of the truth of any of the allegations made in the Action, or of any liability, fault, or wrongdoing of any kind whatsoever on the part of the Released Persons, except that Allstate may file this Order in any action that may be

brought against it in order to support a defense or counterclaim based on principles of res judicata, collateral estoppel, release, good faith settlement, judgment bar or reduction, or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim.

4. The Court approves, as to form and content, the Class Notice.

5. All dates that are set forth in or that otherwise flow from the Preliminary Approval Order shall be added to the Class Notice before it is mailed to Class Members.

6. The Court finds the Class Notice constitutes the best notice practicable under the circumstances, by providing individual notice to all Class Members who can be identified through reasonable effort, and constitutes valid and sufficient notice to all Persons entitled thereto, complying fully with the requirements of Fed. R. Civ. P. 23 and due process.

7. The Class Notice procedure shall be as set forth below and in the Agreement.

- a) Notice of the pendency of the Action and of the Settlement shall be made by the Class Notice, which will be sent via first class mailing by Class Counsel or, if applicable, the Class Administrator.
- b) Within sixty (60) days of this Order, Class Counsel or, if applicable, the Class Administrator, shall cause copies of the Class Notice and

Claim Form to be mailed to all Settlement Class Members in accordance with Part IV of the Agreement. The Class Notice shall be sent only to Settlement Class Members, not to any of their attorneys, whether known or unknown, in connection with their original claim to Allstate or otherwise.

- c) Class Counsel or, if applicable, the Class Administrator, shall provide further copies of the Class Notice and the Claim Form to Class Members upon request.
  - d) All costs and expenses incurred in providing notice to Settlement Class Members and in administering the Settlement shall be paid from the Settlement Fund as set forth in the Agreement. Prior to the Final Settlement Hearing, Class Counsel shall file with the Court and serve on counsel for Allstate proof by declaration or affidavit that it has complied with the Class Notice requirements described above and in the Agreement.
  - e) Allstate will have absolutely no responsibility for any act or failure to act by Class Counsel or, if applicable, the Class Administrator, in their role as sole administrator of the Settlement.
8. The Claim Form sets forth six categories of damages for which class members may be eligible to recover under the terms of the Agreement. Recovery

under these categories is for settlement purposes only, and nothing in the Agreement or the Claim Form imposes any obligation on Allstate to compensate past or future claimants for these categories of damage outside of the Agreement, or is otherwise an admission by Allstate that these categories are either compensable under Allstate insurance policies or properly part of any made whole analysis.

9. Consistent with the Agreement, the Court conditionally approves the following Settlement Class: All Persons (and their heirs, executors, administrators, successors and assigns), as of September 28, 2018, (a) who were insured under an auto insurance policy issued by Allstate in Montana; (b) with respect to whom Allstate recovered subrogation on a Montana automobile insurance claim after October 21, 2008, *i.e.*, 8 years before the filing of the Action. Excluded from the Class are: all present or former officers and/or directors of Allstate, Class Counsel and their resident relatives, the Judge in this case and his resident relatives, and Allstate's counsel of record and their resident relatives. Also excluded are persons who properly executed and filed a timely request for exclusion from the Class.

10. If final approval of the Proposed Settlement is not obtained, this certification order, including the above description of the Settlement Class, shall be vacated and of no further force or effect.

11. The Court appoints Seth Konecky, Jennifer Konecky, and Flathead

Valley Dist., Inc. as Class Representatives, and Allan M. McGarvey, Judah M. Gersh, Brian M. Joos, and Alan J. Lerner as Class Counsel.

12. The Court approves JMD to serve as the Class Administrator, and Pete Yonge to serve as the adjuster, in accordance with the Agreement's terms.

13. Settlement Class Members who wish to comment on, object to or exclude themselves from the Settlement must do so in accordance with the instructions contained in the Agreement and Class Notice. Exclusion requests must be postmarked not later than 30 days prior to the date set for the final settlement hearing. All persons who properly submit requests for exclusion shall not be members of the Settlement Class and shall have no rights with respect to the Settlement. All Settlement Class Members who do not validly request exclusion shall be bound by any final judgment and order of dismissal entered pursuant to the Settlement, shall be barred and enjoined, now and in the future, from asserting any and all of the Released Claims against any and all of the Released Persons, and any such Settlement Class Member shall be conclusively deemed to have released any and all such Released Claims.

14. A hearing shall be held on February 13, 2019, at 1:30 p.m., before the Honorable Donald W. Molloy, Russell Smith Federal Courthouse, 201 E. Broadway, Missoula, MT 59802, for the purpose of determining (a) whether the proposed Settlement as set forth in the Agreement is fair, reasonable and adequate

and should be finally approved by the Court; (b) whether a Final Judgment, granting final approval of the Agreement and dismissing the Action with prejudice should be entered; (c) whether the Class Representative should receive an incentive award and in what amount; (d) whether Class Counsel should receive a fees and costs award and in what amount; and (e) such other matters as the Agreement contemplates and as the Court may deem just and proper.

15. Any application by Class Counsel for Attorneys' Fees and Costs, and all papers in support thereof, and any application for a Class Representative Award, shall be filed with the Court at least ten (10) days prior to the final settlement hearing.

16. All other papers in support of the Settlement or responding to objections or motions to intervene shall be filed at least ten (10) days prior to the final settlement hearing.

17. Any Class Member who has not requested to be excluded from the Class may appear and endeavor to show cause, if any, why the Court should or should not: (a) approve the proposed Settlement as set forth in the Agreement as fair, reasonable and adequate; (b) provide for a Class Representative Award; (c) provide for a fee and expense award to Class Counsel; and (d) enter the Final Judgment finally approving the Settlement. Provided, however, that no person shall be heard with respect to, or shall be entitled to contest the foregoing matters

unless, no later than thirty (30) days prior to the final settlement hearing, that person has properly filed with the Clerk of Court, and served upon the following

The Court:

Clerk of the Court  
United States District  
Court for the District  
of Montana  
201 E. Broadway  
Missoula, MT 59802

For the Class:

Allan M. McGarvey  
MCGARVEY,  
HEBERLING,  
SULLIVAN &  
LACEY, P.C.  
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Judah M. Gersh  
Brian M. Joos  
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PLLP  
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Alan J. Lerner  
LERNER LAW FIRM  
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For Allstate:

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CROWLEY FLECK  
PLLP  
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Billings, MT 59103-  
2529

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Chicago, IL 60606

in writing the following information: (a) a heading which refers to the Action; (b) the name, address, telephone number and signature of the Settlement Class Member filing the objection; (c) a statement whether the objector intends to appear at the final settlement hearing, either in person or through counsel, and, if through counsel, identifying counsel by name, address and phone number; (d) a detailed statement of the specific legal and factual bases for each and every objection, and

if through counsel, a legal memorandum in support of the objection; (e) a list of any witnesses, along with the expected testimony of each such witness, and photocopies of exhibits which the objector intends to introduce at the final settlement hearing; (f) a detailed description of any and all evidence the objector may offer at the final settlement hearing, if the objector intends to speak at the hearing; and (g) documentary proof of membership in the Settlement Class. If the Settlement Class Member is represented by an attorney, he/she or it must comply with all applicable laws and rules for filing pleadings and documents. The notice of intent to object, to be effective, also must be submitted by the objector or a legally authorized representative on an individual basis and not as part of a group, class or subclass.

18. Unless otherwise ordered by the Court, any Settlement Class Member who does not make his, her, or its objection in the manner provided for herein, shall be deemed to have waived such objection and shall forever be foreclosed from making any objection to the foregoing matters.

19. The Court may adjourn the final settlement hearing from time to time and without further notice to the Settlement Class Members. The Court reserves the right to approve the Settlement at or after the final settlement hearing with such modifications as may be consented to by the Parties and without further notice to the Settlement Class Members. The Court further reserves the right to enter a Final

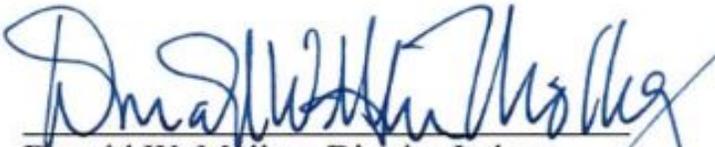
Judgment, dismissing the Action with prejudice as to Allstate and against the Named Plaintiff and the Settlement Class Members at or after the final settlement hearing and without further notice to the Settlement Class Members.

20. This Action shall be stayed pending further proceedings in connection with the effectuation of the Proposed Settlement.

21. Pending final determination as to whether the Settlement, as set forth in the Agreement, should be approved, no Settlement Class Member shall commence, prosecute, pursue, or litigate any Released Claims against any Released Person, whether directly, representatively, or in any capacity, and regardless of whether or not any such Settlement Class Member has appeared in the action.

IT IS FURTHER ORDERED that a final fairness hearing is set for February 13, 2019, at 1:30 p.m., at the Russell Smith Federal Courthouse, Missoula, Montana. The final pretrial conference set for January 17, 2019, and all associated deadlines are VACATED. The jury trial set for January 28, 2019, is VACATED.

DATED this 28th day of September, 2018.

  
Donald W. Molloy, District Judge  
United States District Court