Judah M. Gersh
Brian M. Joos
VISCOMI, GERSH, SIMPSON & JOOS, PLLP
121 Wisconsin Avenue
Whitefish, MT 59937
(406) 862-7800
gersh@bigskyattorneys.com
joos@bigskyattorneys.com

Alan J. Lerner
LERNER LAW FIRM
P.O. Box 1158
Kalispell, MT 59903-1158
lerner@lernerlawmt.com

Allan M. McGarvey
McGARVEY, HEBERLING, SULLIVAN & LACEY, P.C.
345 1st Avenue E
Kalispell, MT 59901
amcgarvey@mcgarveylaw.com
Attorneys for Plaintiffs

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 all others similarly situated, Plaintiffs, vs. ALLSTATE FIRE & CAS. INS. CO., ALLSTATE INDEM. CO., ALLSTATE PROP. & CAS. INS. CO., ALLSTATE INS. CO., and ALLSTATE INS. CO., Defendants	Case No. CV-17-10-M-DWM **BRIEF IN SUPPORT OF FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

COMES NOW Plaintiff and presents the following authorities and analysis in support of the unopposed motion for final approval of the class action settlement.

I. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL

A. Legal standard

While the question presented on the previous application for ***preliminary*** approval was whether the proposed settlement is "within the range of possible approval," the Court must now answer the ultimate question - whether the proposed settlement is "fair, adequate and reasonable." The Ninth Circuit has addressed the applicable standard for final approval in *Lane v. Facebook, Inc.*, 696 F.3d 811, 818 (9th Cir. 2012):

> A district court's approval of a class-action settlement must be accompanied by a finding that the settlement is "fair, reasonable, and adequate." Fed.R.Civ.P. 23(e). Appellate review of the district court's fairness determination is "extremely limited," and we will set aside that determination only upon a "strong showing that the district court's decision was a clear abuse of discretion." *See Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1026–27 (9th Cir.1998) (holding that district court should have broad discretion because it "is exposed to the litigants, and their strategies, positions and proof") (internal quotations omitted).
>
> Both the district court and this court must evaluate the fairness of a settlement as a whole, rather than assessing its individual components. *See id.* at 1026. As our precedents have made clear, the question whether a settlement is fundamentally fair within the meaning of Rule 23(e) is different from the question whether the settlement is perfect in the estimation of the reviewing court. *See id.* at 1027. Although Rule 23 imposes strict procedural requirements on the approval of a class settlement, a district court's only role in reviewing

the substance of that settlement is to ensure that it is "fair, adequate, and free from collusion." *See id.*

B. This Settlement is "Fair Adequate and Reasonable"

There should be no question that the settlement merits final approval.

The test for whether a settlement is finally approved is not whether the settlement amount is equal to the amount of potential recovery at trial. Rather, "the operative word is 'settlement.'" *7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135, 1150 (2000). "'It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not *per se* render the settlement inadequate or unfair.'" *In re Mego Fin Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (citing *Officers for Justice v. Civil Serv. Comm'n,* 688 F.2d 615, 628 (9th Cir. 1982)).

The instant settlement contemplates a payment of $2,673,500 to class members, less a Court-approved common fund fee, costs and litigation expenses, costs of adjustment and costs of administration. The remainder of the fund will be distributed to class members. The settlement amount constitutes approximately 71.86% of the subrogation taken by the Allstate Defendants over the period of the Class. This settlement is sufficient to pay each class member in excess of his or her 22.5% average loss from not being made whole, plus interest and, attorney fees. Class counsel believes this to be a reasonable settlement amount based on experience with another, similar subrogation action, wherein the amount of subrogation that was

needed to be reimbursed to make similarly situated insureds whole was approximately 22.5% of the total subrogation collected. (The rate of unreimbursed losses in comparison to total subrogation should be statistically similar since there is no reason that unrecovered losses of insureds in Montana automobile accidents should vary from one insurer to the next.) Therefore, it is unlikely that the class would have recovered more than the amount of the proposed settlement, absent an award of extra-contractual, consequential or punitive damages, or a finding that the full amount of subrogation should be returned because the insurers' claim for subrogation was deemed waived or forfeited.

Courts have consistently approved settlements that reflect a mere fraction of the potential recovery. *See In re Four Seasons Sec. Laws Litig.*, 58 F.R.D. 19, 37 (W.D. Okla. 1972) (court approved settlement of less than eight percent of estimated damages); *Newman v. Stein*, 464 F.2d 689, 694-98 (2d Cir. 1972) (court upheld settlement representing only fourteen percent of potential recovery); *In re South Cent. States Bakery Prods. Antitrust Litig.*, 88 F.R.D. 641, 643 (M.D. LA. 1980) (court approved settlement consisting of one-third of potential recovery).

There is no precise formula regarding what constitutes sufficient evidence for the Court to analyze the contested questions of fact in determining whether to approve a class action settlement. *Newberg on Class Actions* § 11.45 (4th Ed. 2002). Even in cases where very little formal discovery was conducted, settlements

have been approved when the plaintiffs have access to the necessary information. *In re Corrugated Container Antitrust Litig.*, 643 F.2d 194, 211 (5th Cir. 1981). "A settlement should stand or fall on the adequacy of its terms." *Id.* A review of the terms provides the court with a means of testing counsel's working knowledge of the case. *Id.* "If the terms are fair, the court may reasonably conclude that counsel did perform adequately." *Id.*

In the case at issue, the settlement represents a substantial recovery of subrogation, attorney fees and interest in a collective amount that should more than approximate the amount necessary to make the insureds "whole" for their unrecovered losses from the auto accident. Further, class members are afforded the right to submit additional documentation to demonstrate their actual made-whole entitlement, if it exceeds the presumptive 30 percent. These claims will be adjusted by a claims adjuster. The settlement is ultimately fair, reasonable and adequate.

Because the proposed stipulation of settlement is "fair, adequate, and reasonable," the Court should grant final approval to the Stipulation of Settlement. Defendants agree that the settlement is fair, reasonable and adequate, and that the certification of a settlement class in this matter is legally appropriate (though Defendants continue to deny that any litigation class would have been appropriate if the case had not settled).

II. THE COURT SHOULD UNCONDITIONALLY CERTIFY THE SETTLEMENT CLASS.

The Court's Preliminary Approval Order certified a settlement class on a conditional basis, and provided class members an opportunity to opt out of the class and the class settlement. The settlement has now satisfied all elements for final implementation. The Court should therefore certify the class on a final basis. Final certification is appropriate because, as described by the Court in its prior class certification ruling, the class is so numerous that joinder of all members is impracticable; there are questions of law or fact common to the class; the claims of the class representatives Seth and Jennifer Konecky are typical of the class claims; the class representatives and their attorneys have fairly and adequately protected and advanced the interests of the class. Questions of law and fact common to members of the class predominate over any questions affecting only individual members, and a class action settlement is superior to other available methods for fair and efficient adjudication and resolution of the controversy.

The final class will include all members of the Settlement Class who elect to participate by not submitting timely and valid requests to be excluded from the Settlement Class pursuant the Stipulation. All such participating class members will be bound by the terms of the class settlement.

III. THE COURT SHOULD FIND THE COURT-ORDERED NOTICE PLAN SATISFIES ALL REQUIREMENTS OF RULE 23 AND DUE PROCESS

Submitted with the Motion for Final Approval of Class Action Settlement and Dismissal are declaration(s) of individuals with JND Class Action Administrators who administered the service of notice under paragraphs 7(d) of this Court's Order preliminary approving the class settlement. Doc. 35, page 5. These declarations describe the steps taken to satisfy the notice requirements of the notice plan and due process.

The Court's role is to assure that the parties and administrator have conformed to high standards of reasonable efforts to contact class members within the limitations of practicality:

> Rule 23(c)(2) requires that individual notice in (b)(3) actions be given to class members "who can be identified through reasonable effort," with others given "the best notice practicable under the circumstances." When the names and addresses of most class members are known, notice by mail (generally first-class mail) is usually required. ... The determination of what efforts to identify and notify are reasonable under the circumstances of the case rests in the discretion of the judge before whom the class action is pending.

Manual for Complex Litigation, Third §30.21, pp. 225-26, *citing Mullane v. Central Hanover Bank & Trust Co.* 339 U.S. 306,313-19 (1950).

The Stipulation of Settlement provides for meeting these standards. Class administrator, JDN Class Action Administration, conducted advanced address searches to track down class members whose notices were returned as undeliverable. Originally,

all 863 class members were mailed notice. As of January 23, 2019 69 of those notices were returned as undeliverable without a forwarding address. Upon further research, JND Class Action Administration was able to find updated address information for 10 of the 69 class members whose original notice was returned and new notices were mailed to these class members. As of January 29, 2019, of these new notices, none were returned as undeliverable. As of January 29, 2019 only 59 class members had all notice attempts returned as undeliverable. Thus, of the 863 class members, approximately 93.2% of the class presumably received notice. Additionally, for the remaining 59 class members who could not be served by regular mail, JND was able to send emails to 39 of those members. No emails were returned, meaning that an additional 39 members who received some notice of the class action through email as opposed to none through regular mail. Consequently, if successful emails and regular mail receipts are considered together, the delivery rate of notice to class members would be approximately 97.7 %.

Finally, the notice by direct mailing efforts are supplemented by creation of a settlement website where class members can obtain the information necessary to exercise their rights.

IV. THE COURT SHOULD EXECUTE THE PROPOSED FINAL APPROVAL ORDER AND JUDGMENT

Pursuant to the terms of the Preliminary Approval Order, class members have been given an opportunity to be excluded or, if not opting out, the right to object to any

terms of the settlement, the attorney fee claim, the class representative incentive award, and/or the methodology for distribution among class members. There have been no objections to any of the terms or procedures of this class settlement, and all parties agree that the Court may and should now enter its final adjudication of the class action.

Submitted herewith is a proposed "Final Approval Order and Judgment." The proposed order is supported by this motion and brief as well as the motion and brief of class counsel in support of assessment of common fund fees. This proposed order will implement the final judicial steps of the class action and direct the distributions of payments to class members in conformance with the Stipulation of Settlement.

Dated this 1st day of February, 2019.

By /s/ Brian M. Joos

Judah M. Gersh
Brian M. Joos
Viscomi, Gersh, Simpson & Joos, PLLP
121 Wisconsin Ave.
Whitefish, MT 59937

Allan M. McGarvey, Esq.
McGarvey, Heberling, Sullivan & Lacey, PC
345 1st Avenue East
Kalispell, MT 59901

Alan J. Lerner
Lerner Law Firm
P.O. Box 1158
Kalispell, MT 59903

Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2), it is hereby certified that the foregoing document, exclusive of index, table of authorities and caption consists of 1784 words.

By:/s/ Brian M. Joos

Judah M. Gersh
Brian M. Joos
Viscomi, Gersh, Simpson & Joos, PLLP
121 Wisconsin Ave.
Whitefish, MT 59937