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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
ENCOMPASS INDEM. CO.,

Defendants

Case No. CV-17-10-M-DWM

**DECLARATION OF ALAN J.
LERNER IN SUPPORT OF
UNOPPOSED MOTION FOR
ASSESSMENT OF FEES, COSTS,
AND CLASS REPRESENTATIVE
AWARD**

Alan J. Lerner, being first duly sworn, declares and states:

1. I, Alan J. Lerner, hereby make the following declaration in Support of the Motion for Assessment of Fees and Costs against the Common Fund and Approval of Class Representative Incentive Award.
2. I have been admitted to the practice of law in the State of Montana since November of 1974 and have been continually practicing law in Montana since my admission. I was admitted to the United States District Court for the District of Montana in December of 1974. I was admitted to the United States District Court for the Northern District of California in June of 1991. I was admitted to the United States Court of Appeals for the Ninth Circuit in August of 1975. I was admitted to the United States Supreme Court in May of 1984. I have remained an active attorney in good standing in the State of Montana before the Montana Supreme Courts and the lower state Courts of Montana and the above described federal courts since my admission to each bar.
3. I have practiced law in Western Montana for more than 37 years and am familiar with the standard and customary rates charged by attorneys, especially in contingent fee cases. For at least the past 20 years, 95% of my cases have been on a contingent fee basis. I represent mostly Plaintiffs.
4. It is common and customary for attorneys representing clients before a verdict to charge a contingent fee of between 25% and 50% of the recovery, depending on

the stage the case is settled, the difficulty of the case, the novelty of the case, the attorney's professional standing and skill, the effort devoted to the case, the potential of non-recovery, and other factors.

5. In this case, the individual plaintiffs and class representatives have agreed to a contingent fee rate of 40% after the case was filed and before verdict and appeal. Also, the individual plaintiffs and class representatives and their attorneys have agreed to reduce the individual plaintiffs and class representative share of the fees owed on their share of the class claims to equal the fee paid by the class as a whole from the common fund.
6. Co-counsel Allan M. McGarvey, Judah M. Gersh and Brian M. Joos, are all admitted to practice in the state and federal courts of the State of Montana and are all in good standing. Co-counsel have excellent reputations as attorneys.
7. Neither I, nor Co-counsel, kept a comprehensive record of the time we expended in this case. However, a summary of some of the initial work accomplished in this case includes preparation and filing of the Complaint for filing in State Court; Service of Process on the Defendants; Preparation of an Amended Complaint in this Court.
8. A key event in the litigation was plaintiffs' counsel's successful litigation of multiple versions of Defendants' Motions to Dismiss through which litigation plaintiffs' counsel obtained an OPINION and ORDER (Doc 44) on the applicable

legal duties and rights, including that “the insureds are “entitled to be made whole for [their] entire loss and any costs of recovery, including attorney fees, before the insurer can assert its right of legal subrogation against the insured or the tort-feasor.””.

9. Plaintiff’s counsel retained two insurance experts for the purposes of trial in this case, attended Court hearings and conferences, represented the class representatives at the depositions conducted by Defendants, prepared pretrial disclosure statements, and propounded written discovery.

10. Much of the work by Class Counsel was expended in analyzing thousands of pages of documents produced by Allstate in response to discovery and correlating memoranda and procedures in Allstate’s manuals to the fact issues in the case. Based on this work, plaintiffs’ counsel drafted a Motion for Partial Summary Judgment and a Supporting Brief (this case settled before that Motion and Brief were filed); and prepared extensively to depose Allstate witnesses and Allstate itself, using the documents identified through this review. The case settled a day or two before the first in our series of deposition of Allstate personnel had been scheduled to start in Dallas, TX.

11. Plaintiffs’ counsel also filed a motion and brief seeking class certification and responded to Defendants’ opposition. This Motion was pending when this case settled.

12. Plaintiff's counsel negotiated a very favorable settlement for the class in this case, and renegotiated an increase in the settlement amount when it was discovered that the total subrogation involved in the class period exceed the \$3,400,000 that was the original basis for the original settlement amount. Plaintiff's counsel also represented the class representatives and the class in the approval process in this Court; worked with the class administrator (JND) to assure that this Court's Order of preliminary approval and notice was carried out in best practical means and with protection of due process rights of all class members as per this Court's directions, and numerous other tasks that are involved in complex litigation such as this case. If this Court grants final approval for this settlement, Co-counsel and I will be required to work with JND and adjuster Pete Younge for purposes of the assuring the adjustment of claims that were filed and for other matters in striving to assure that as many class members receive their money from the settlement as possible.

13. Additionally, Co-counsel and I have extensive experience in developing the case that is now before this Court. Allan M. McGarvey and I were counsel of record in *Steinke v. Safeco Corporation, et al.*, Cause No. CV-02-042-M-DWM, (D. Mont. 2002) (settled without class certification), which was a subrogation case against the Safeco Companies for return of medical expense subrogation that this Court did not certify for class action treatment. Allan M. McGarvey, Judah Gersh and I

were Co-counsel in *Ferguson v. Safeco, et al.*, that was filed in the Montana Eleventh Judicial District Court, Flathead County, and, after appeal to the Montana Supreme Court and a decade of litigation, resulted in certification of a class and eventual settlement in 2015. The Ferguson class recovered for all subrogation collected by Safeco and was not limited to return of medical expenses that were collected by subrogation. Allan M. McGarvey, Judah Gersh, Brian M. Joos, and I were Co-counsel in *Burton v. Trinity Universal Insurance Company*, Cause No. CV-14-242-M-DWM (D. Mont. 2014), which involved the same issues as are present in this case. And, Allan M. McGarvey, Judah Gersh, Brian M. Joos, and I were Co-counsel in *Tkachyk v. Traveler's Home Marine Insurance, et al.*, Case No. 16-CV-M-00028-DLC (D. Mont. 2016), which involved the same issues as are presented in this case. Through these five cases (including this one), Co-counsel and I have formulated a successful litigation plan that has resulted in four successful recoveries for class members who had been deprived of their made whole rights under Montana law.

14. In this case, Class Counsel bore the risk of time expended and costs advanced, that there could be no-recovery or extended litigation, which might have resulted in inadequate compensation for Class Counsel even if a generous fee had been awarded from a final Class common fund following extended litigation.

15. The result achieved by Class Counsel in this case pays the class's attorney fees

and expenses and, further pays each class member substantially in excess of the average projected 22.5%¹ of subrogation taken, together with interest.

16. While time records are not available in this case, Declarant estimates that the hours spent by Class Counsel in the 5 cases discussed paras. 6 and 7 of this Declaration, are between 4,000 and 5,000 hours of work. This extensive work developed strong legal theories, and, developed litigation procedures and strategies, developed statistical experience with average “unrecovered losses,” all of which has enabled Class Counsel to provide a highly developed case strategy to advance the claims of the class in this case.

17. The individual Class Representatives, Seth and Jennifer Konecky have been involved in all Class decisions, have expended extensive effort on Class matters and, have been deposed by the Defendants. The individual Class Representatives have contributed to achieving the result for the Class that was achieved. It is Declarant’s opinion that a \$5,000.00 incentive fee to each of the two individual Class Representative (\$10,000.00 total) is extremely reasonable for their contribution, and is in proportion to the work, inconvenience and delay that they have endured on the Class’ behalf.


18. Co-counsel and I have incurred total costs in the amount of \$8,545.69 as per the

¹ Previous experience in the *Ferguson* case has shown that this is the average amount of subrogation due after an appropriate investigation and application of the Montana made whole rule.

true and correct copies of the three law firm's cost bills attached to this Declaration and filed herewith.

I declare under penalty of perjury under the laws of the United States of America and the State of Montana that the foregoing is true to the best of my knowledge and belief.

DATED THIS 17th day of January, 2019

By: 
Alan J. Lerner