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**UNITED STATES DISTRICT COURT**
**DISTRICT OF HAWAII**

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| STEPHEN G. AQUILINA and LUCINA J. AQUILINA, Individually and on Behalf of All Others Similarly Situated; and DONNA J. CORRIGAN and TODD L. CORRIGAN, Individually and on Behalf of All Others Similarly Situated,<br>Plaintiffs,<br>vs.<br>CERTAIN UNDERWRITERS AT LLOYD'S LONDON; LLOYD'S SYNDICATE #2003; LLOYD'S SYNDICATE #318; LLOYD'S SYNDICATE #4020; LLOYD'S SYNDICATE #2121; LLOYD'S SYNDICATE #2007; LLOYD'S SYNDICATE #1183; LLOYD'S SYNDICATE #1729; LLOYD'S SYNDICATE #510; BORISOFF INSURANCE SERVICES, INC. d/b/a MONARCH E&S INSURANCE SERVICES; SPECIALTY PROGRAM GROUP, LLC d/b/a SPG INSURANCE SOLUTIONS, LLC; ALOHA INSURANCE SERVICES, INC.; ILIKEA LLC d/b/a MOA INSURANCE SERVICES HAWAII; and DOES 1-100,<br>Defendants. | No. 1:18-cv-00496-ACK-KJM<br><br>**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT**<br><br>Trial Judge: Alan C. Kay<br>Hearing Date: July 22, 2021<br>Trial Date: February 1, 2022 |

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Plaintiffs[1] respectfully submit this Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement Agreement to resolve this Litigation alleging violations of Hawaii law relating to the offering, marketing, and sale of surplus lines insurance against Underwriters, Monarch, Aloha, and Moa. Plaintiffs respectfully request that the Court enter an order: (1) preliminarily approving the proposed Settlement, including the Distribution Plan; (2) approving the proposed Notice Program as providing the best notice that is practicable under the circumstances; (3) certifying the proposed Settlement Class; (4) appointing Plaintiffs as class representatives; (5) appointing Joseph P. Guglielmo of Scott+Scott Attorneys at Law LLP, E. Kirk Wood of Wood Law Firm, LLC, and Gregory W. Kugle of Damon Key Leong Kupchak Hastert, a Law Corporation as Class Counsel; (6) appointing RG/2 Claims Administration, LLC ("RG/2") as the Settlement Administrator; (7) staying this Litigation pending Final Approval; and (8) scheduling a Final Approval Hearing.

## I. INTRODUCTION

After extensive, arm's-length negotiations, overseen by and with the assistance of mediator Keith Hunter of Dispute Prevention & Resolution, Inc., the Parties have agreed to the Settlement, which fully resolves the Litigation and settles

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[1] Unless otherwise defined herein, all capitalized terms have the meanings ascribed to them in the Settlement Agreement and Release (the "Settlement Agreement").

the Released Claims. The proposed Settlement provides a significant benefit to the Settlement Class, specifically a full return of premiums Class Members paid to Defendants for surplus lines insurance during the Class Period. In agreeing to resolve the Litigation, Plaintiffs and their counsel were wholly aware of the strengths and weaknesses of the Settlement Class's claims and made a fully-informed evaluation of the risks of continued litigation and the fairness of resolution at this time. While Plaintiffs believe the Settlement Class's claims against Defendants are meritorious and supported by substantial evidence developed during discovery, they also recognize that, in the absence of a settlement, they faced the significant risk that class certification, summary judgment, trial, and any appeals that followed might have resulted in a smaller recovery or no recovery at all.

For the reasons stated herein, Plaintiffs respectfully submit that the Settlement warrants the Court's preliminary approval and request the Court enter the Preliminary Approval Order (Settlement, Ex. C).

## II. SUMMARY OF THE LITIGATION

Following months of investigation by Plaintiffs' counsel, on December 21, 2018, the Aquilina Plaintiffs filed the Class Action Complaint against Moa, Monarch, and Underwriters. Declaration of Joseph P. Guglielmo in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement Agreement ("Guglielmo Decl."), ¶¶9-10. On December 12, 2019, Plaintiffs filed the First

Amended Class Action Complaint adding the Corrigan Plaintiffs, adding Aloha as a Defendant, and revising the allegations in accordance with the Court's order. *Id.*, ¶¶17-19. Following motion practice and oral argument, on June 10, 2020, the Court issued two separate orders ruling on Defendants' motions to dismiss. *Id.*, ¶¶21-26. The Court sustained Plaintiffs' claims for violations of Hawaii Revised Statutes ("HRS") §§480-1, *et seq.*, and breach of the implied covenant of good faith and fair dealing and dismissed without prejudice Plaintiffs' claims for unjust enrichment against Underwriters and Monarch. *Id.*, ¶25. Additionally, the Court denied Moa's and Aloha's motions to dismiss or, in the alternative, stay this action in its entirety, sustaining Plaintiffs' claims for violations of HRS §§480-1, *et seq.*, negligence, and unjust enrichment against Moa and Aloha. *Id.*, ¶26.

With a May 14, 2021 close-of-fact-discovery deadline and July 13, 2021 trial date, Plaintiffs' counsel diligently pursued discovery, serving requests for documents, interrogatories, and requests for admission and engaging in numerous telephonic meet and confers concerning Defendants' responses. *Id.*, ¶¶36-38. Class Counsel also deposed 13 of Defendants' Rule 30(b)(1) and 30(b)(6) witnesses. *Id.*, ¶41. By the time the Settlement was reached, Plaintiffs fully briefed their motion for class certification and three separate opposition briefs to Defendants' motions to deny class certification and joinder motions. *Id.*, ¶¶29, 31, 33. Plaintiffs also had filed three motions for summary judgment against Defendants. *Id.*, ¶34.

Beginning in January 2021, Plaintiffs and certain Defendants began informal settlement negotiations and exchanged proposals and counterproposals to resolve the entire litigation with all Defendants. *Id.*, ¶51. On March 26, 2021, the Parties also engaged in a virtual mediation before Keith Hunter. *Id.*, ¶52. For weeks thereafter, the Parties continued negotiations with Mr. Hunter's assistance. *Id.* On June 1, 2021, the Parties executed a terms sheet memorializing the material terms to achieve global resolution of the Litigation. *Id.*, ¶54.

## III. SUMMARY OF THE SETTLEMENT

The Settlement is attached as Exhibit 1 to the accompanying Guglielmo Declaration. A summary of the material terms of the Settlement follows.

### A. The Settlement Class

Plaintiffs seek certification of the following Settlement Class pursuant to Fed. R. Civ. P. 23(b)(3):

> All persons who purchased a surplus lines insurance policy for a residential property located in Lava Zone 1 on the island of Hawai'i with a Lava Exclusion from January 1, 2012 through and including May 4, 2018 ("Class Period") that was brokered through Monarch and underwritten and/or subscribed to by Underwriters.

Settlement, §3.1.

### B. Benefits to Class Members

The Settlement provides the Settlement Class with significant monetary relief of $1.8 million to be allocated among Class Members following the deduction of

Court-approved fees and expenses, service awards, and costs of notice and settlement administration. Settlement, §4.3. The Settlement amounts agreed to be paid by each Defendant are as follows: (i) Underwriters - $1.4 million; (ii) Monarch - $200,000; (iii) Aloha - $100,000; and (iv) Moa - $100,000. Settlement, §4.3. Defendants also agree to pay up to $50,000 to the Settlement Administrator to defray the actual expenses of notice of the Settlement and all expenses attendant to the administration of the proposed class action settlement. Settlement, §4.4.

### C. **Notice to Settlement Class**

The Settlement's Notice Program is designed to provide the best notice practicable to members of the Settlement Class. As part of the Settlement, Plaintiffs ask that the Court appoint RG/2 as the Settlement Administrator. The Notice Program consists of: (a) a direct mail notice to Class Members; (b) an optional Publication Notice to be published in the event 10-15% of the Mail Notices are undeliverable and cannot be remailed; and (c) notice posted on the Settlement Website. Settlement, §7.2. Both the Mail Notice and the Publication Notice are attached to the Settlement as Exhibits A and B, respectively. Defendants have and will provide Class Counsel with contact information for Class Members that will allow for effective Mail Notice to the Settlement Class. Settlement, §§3.3, 6.3.

The Notice Program will provide Class Members with a description of the material terms of the Settlement, the date by which Class Members may exclude

themselves from, or "opt-out" of, the Settlement Class, the date by which Class Members may object to the Settlement, and the date upon which the Final Approval Hearing will occur. Settlement, §§7.3, 7.11. The Notice Program is reasonably calculated to inform Class Members of the material terms of the Settlement and therefore satisfies the requirements of constitutional due process and the requirements set forth in Fed. R. Civ. P. 23(c)(2).

### D. Claims Process

Class Members that do not elect to opt out of the Settlement will automatically receive a cash payment; no specific documentation is required. Settlement, §4.5. The Net Settlement Fund will be distributed to Class Members by proportion based on the total premium dollar amount paid during the Class Period. Settlement, §4.5. Based on Class Counsel's and their expert's review of the information produced in the Litigation, Class Members will be eligible to receive at least 100% of the premium dollar amounts they paid during the Class Period. Guglielmo Decl., ¶7.

### E. Costs of Settlement Administration, Service Awards, and Attorneys' Fees

Certain Defendants have agreed to pay up to $50,000 to the Settlement Administrator to defray the actual expenses of notice of the Settlement. Settlement, §4.4. To the extent the Costs of Settlement Administration exceed the Settlement Administration Payment, those will be paid by the Settlement Fund. *Id.*

Class Counsel intends to seek Service Awards of up to $2,500 each to the Aquilina Plaintiffs and the Corrigan Plaintiffs, subject to Court approval, in compensation for their involvement in this Litigation and service on behalf of other Class Members. Settlement, §4.5. Plaintiffs provided substantial assistance that allowed Class Counsel to successfully prosecute and resolve this Litigation. Guglielmo Decl., ¶49. Class Counsel will request up to 33.3% of the gross Settlement Fund, including any interest earned thereon, from the Court for their attorneys' fees and will additionally request reimbursement of their reasonable costs and expenses incurred in this litigation from the Settlement Fund. Settlement, §4.5.

### F. **Releases**

In exchange for the benefits conferred by the Settlement, all Class Members will be deemed to have released Releasees from claims relating to the subject matter of the Litigation. Settlement, §9.1.

## IV. ARGUMENT

### A. The Court Is Likely to Grant Final Approval to the Proposed Settlement

The Ninth Circuit has a "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). Further "there is an overriding public interest in settling and quieting litigation," and "[t]his is particularly true in class action suits." *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976).

Rule 23(e) requires the Court's approval of a proposed class action settlement upon finding that the proposal "is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). This approval process "generally proceeds in two phases." *Urena v. Cent. Calif. Almond Growers Ass'n*, No. 1:18-cv-00517, 2021 WL 2588266, at *4 (E.D. Cal. June 24, 2021). During the first phase, which Plaintiffs request that the Court consider at this time, "the court conditionally certifies the class, conducts a preliminary determination of the fairness of the settlement (subject to a more stringent final review), and approves the notice to be provided to the class." *Id.* At this stage, the Court's responsibility "is to ensure that an appropriate class exists and that the agreement is non-collusive, without obvious deficiencies, and within the range of possible approval as to that class." *Id.*

Rule 23(e) also specifies that the crux of the Court's preliminary approval evaluation is whether "giving notice [to the class] 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)[2]. The Rule "focus[es]" the Court's inquiry on "the preliminary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal." Fed. R. Civ. P. 23(e)(2), Advisory Committee's note to 2018 amendment. Furthermore, '"the question whether a

2 Unless otherwise noted, all emphasis is added and citations are omitted.

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.'" *Willcox v. Lloyds TSB Bank, plc*, No. 13-cv-00508 ACK-RLP, 2016 WL 7238799, at *5 (D. Haw. Dec. 14, 2016). In considering preliminary approval, the Court must consider the factors under Rule 23(e)(2). As stated below, the Settlement satisfies each factor.

#### 1. The Court Will Likely Be Able to Approve the Proposed Settlement Under Rules 23(e)(2)(A)-(B)

Rule 23(e)(2)'s first two factors "look[] to the conduct of the litigation and of the negotiations leading up to the proposed settlement." Fed. R. Civ. P. 23(e)(2), Advisory Committee's note to 2018 amendment. Courts may consider "the nature and amount of discovery in this or other cases, or the actual outcomes of other cases, [which] may indicate whether counsel negotiating on behalf of the class had an adequate information base." *Id.*

##### a. The Settlement Is Procedurally Fair Because It Was Achieved Through Extensive Arm's-Length Negotiation with the Assistance of a Respected and Experienced Mediator (Rule 23(e)(2)(B))

To determine whether a settlement is procedurally fair, courts evaluate the process undertaken to achieve it. The Settlement is entitled to a presumption of fairness because it was reached by capable counsel with the assistance of an experienced mediator, Keith Hunter. *See Int'l Longshore & Warehouse Union,*

*Local 142 v. C. Brewer & Co., Ltd.*, No. 06-cv-00260, 2007 WL 4145228, at *2 (D. Haw. Nov. 20, 2007) ("The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive."); *In re Nexus 6P Prods. Liab. Litig.*, No. 17-CV-02185, 2019 WL 6622842, at *8 (N.D. Cal. Nov. 12, 2019) (finding settlement was procedurally fair where it "took place after Defendants produced discovery and was the product of arm's length negotiations between experienced counsel with the aid of a respected mediator"). In addition, "'[g]reat weight' is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation." *Willcox*, 2016 WL 7238799, at *10 ("This is because '[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation.'").

Beginning in January 2021, Plaintiffs and certain Defendants began informal settlement negotiations and exchanged proposals and counterproposals to resolve the entire litigation with all Defendants. Guglielmo Decl., ¶51. On March 26, the Parties engaged in a virtual mediation session before Mr. Hunter, followed by numerous bilateral discussions (with Mr. Hunter's continued assistance), in which negotiations remained arm's-length and counsel on each side zealously advocated for their respective clients. *Id.*, ¶52. On June 1, the Parties executed a terms sheet memorializing the material terms to achieve global resolution of the Litigation. *Id.*,

¶54. These terms are reflected in the Settlement. Thus, an initial presumption of fairness attaches to the Settlement. *See Int'l Longshore*, 2007 WL 4145228, at *2.

In addition, Class Counsel have extensive experience in litigating consumer protection and class actions. *See* Exhibit 2 to Guglielmo Decl. Class Counsel believe that the Settlement is fair and in the best interest of the Settlement Class. Guglielmo Decl., ¶¶6, 55. *See Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980) ("[T]he fact that experienced counsel involved in the case approved the settlement after hard-fought negotiations is entitled to considerable weight."). Therefore, the procedure leading up to the Settlement satisfies Rule 23(e)(2)(B).

**b. Plaintiffs and Class Counsel Have Adequately Represented the Settlement Class (Rule 23(e)(2)(A))**

Rule 23(e)(2)(A) requires the Court to consider whether the "class representative[] and class counsel have adequately represented the class." "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class"? *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998), *overruled on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

Here, Plaintiffs' counsel vigorously prosecuted the Settlement Class's claims and expended significant time and effort. Prior to reaching the Settlement, Plaintiffs'

counsel undertook an extensive investigation before filing the complaint, briefed two rounds of motions to dismiss, engaged in document discovery, took 13 Rule 30(b)(1) and Rule 30(b)(6) depositions, briefed class certification and three briefs in opposition to Defendants' motions to deny class certification, and briefed summary judgment. Guglielmo Decl., ¶¶9, 14-15, 23, 29, 36-50; *see*, *e.g.*, *Spann v. J.C. Penney Corp.*, 314 F.R.D. 312, 324 (C.D. Cal. 2016) (granting preliminary approval where plaintiffs' counsel "engaged in substantial motion practice"). Accordingly, "[i]t is clear that there was ample time to evaluate all of the aspects of the case, the strength of the factual and legal questions at issue, and the likelihood of prevailing." *Vinh Nguyen v. Radient Pharms. Corp.*, No. 11-cv-00406, 2014 WL 1802293, at *3 (C.D. Cal. May 6, 2014) (approving settlement where "both parties had a thorough sense of the options going forward and the likelihood of success at trial").

By the March 26 mediation, Plaintiffs' counsel had also served expert reports and drafted a mediation statement in which they discussed the litigation risks Plaintiffs faced in pursuing their claims against Defendants, as well as potential damages. Guglielmo Decl., ¶32. Thus, Plaintiffs' counsel were well apprised of the strengths and weaknesses of Plaintiffs' and the putative class's claims. *See In re Processed Egg Prods. Antitrust Litig.*, 284 F.R.D. 278, 299 (E.D. Pa. 2012) (finding counsel had adequate knowledge of the litigation where counsel had '"conducted extensive investigations into the case in preparation for filing of the complaint"' and

defendants' motions to dismiss provided counsel "with an additional platform from which to ascertain [settling defendant's] and the other Defendants' positions on the case and thereby to evaluate further the merits of the litigation").

Additionally, Plaintiffs share the same interest as the Settlement Class in obtaining the greatest recovery from Defendants. Plaintiffs are part of the Settlement Class and suffered the same injuries as other Class Members – *i.e.*, monetary losses when they purchased surplus lines homeowners' insurance for their residential property located in Lava Zone 1 that was brokered by Monarch and was underwritten and/or subscribed to by Underwriters. *See Dukes*, 564 U.S. at 348-49. Plaintiffs have played an active role in this case's development, prosecution, and settlement. *See Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 n.25 (2d Cir. 2006). Plaintiffs responded to ten separate discovery requests from Defendants and produced 280 documents during discovery, amounting to over 1,703 pages. Guglielmo Decl., ¶44. Plaintiffs are adequate representatives of the Settlement Class and should be appointed as class representatives for settlement purposes.

**2. The Settlement's Terms Are Adequate Under Rules 23(e)(2)(C)-(D)**

Rules 23(e)(2)(C) and 23(e)(2)(D) direct the Court to evaluate whether "the relief provided for the class is adequate" and "the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(C)-(D). The Settlement represents an excellent result for the Settlement Class. Guglielmo Decl., ¶55.

Plaintiffs' counsel, with the assistance of Plaintiffs' damages expert, have proposed a Distribution Plan for allocating the Settlement proceeds that ensures all Class Members will be treated equally based on the total premium dollar paid for Lloyd's surplus lines insurance policies purchased during the Class Period. *Id.*, ¶7.

#### a. The Settlement Provides Adequate Relief in Light of the Costs, Risks, and Delay of Further Litigation (Rule 23(e)(2)(C)(i))

A key factor to be considered in assessing the approval of a class action settlement is the plaintiff's likelihood of success on the merits, balanced against the relief offered in settlement. '"In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results."' *Willcox*, 2016 WL 7238799, at *7. Here, the Settlement provides for an immediate cash recovery of $1.8 million to be allocated among Class Members following the deduction of Court-approved fees and expenses, service awards, and costs of notice and settlement administration. Settlement, §§4.3, 4.5(a); Guglielmo Decl., ¶3.

If the Litigation had continued, Plaintiffs faced numerous factual and legal risks that could have precluded them from securing any recovery at all on behalf of the Settlement Class. To this day, Defendants deny any wrongdoing. As they previously argued at the motion to dismiss, class certification, and summary judgment stages, Defendants undoubtedly would have continued to argue at trial that

they that they had no obligation under H.R.S. §431:8-301(a) to provide customers with a quote from the Hawaii Property Insurance Association ("HPIA") under the diligent search requirement because HPIA is not an "authorized" insurer within the scope of the statute. *See*, *e.g.*, ECF Nos. 344, 347, 350, 356. In addition to their liability arguments, Defendants would have argued damages were negated because Plaintiffs and other Class Members were paid and did not receive a denial of coverage based on a lava exclusion. *See*, *e.g.*, *id.* At all times, there was a substantial risk that a jury might accept one or more of Defendants' arguments, or award far less than the value of the Settlement, or nothing at all.

While Plaintiffs believe they would have ultimately persuaded the Court to certify a litigation class, Defendants advanced substantial arguments in opposition. *See*, *e.g.*, *id.* Thus, there is a risk that this litigation might not be maintained as a class through trial. *See*, *e.g.*, *Comcast Corp. v. Behrend*, 569 U.S. 27, 29 (2013) (reversing class certification in an antitrust case). Even though the Parties' respective class certification motions and oppositions were set for hearing in June 2021, the losing party would likely seek interlocutory review pursuant to Rule 23(f), which would have caused substantial delay in resolving the Litigation. *See*, *e.g.*, *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1041 (N.D. Cal. 2008) (even if a class is certified, "there is no guarantee the certification would survive through trial, as Defendants might have sought decertification or modification of the class"); *see*

*also In re Payment Card Interchange Fee and Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 212 n.13 (E.D.N.Y. 2013), *reversed and vacated on other grounds*, 827 F.3d 223 (2d Cir. 2016) (noting that "[i]n the *Wal-Mart* case, twenty months elapsed between the order certifying the class and the Second Circuit's divided opinion affirming that decision"). Finally, given the nature of the claims alleged and the number of Defendants, any trial in this Litigation would likely be lengthy and the losing parties would likely appeal any adverse jury verdicts. *See Willcox*, 2016 WL 7238799, at *8 ("The only thing that continued litigation would ensure is the accrual of further costs and attorneys' fees; it is also likely that any judgment would have led to a lengthy, expensive appeal.").

In comparison, the Settlement provides the Settlement Class an immediate and certain recovery. The Settlement of $1.8 million represents a substantial percentage of the potential recoverable damages had the Litigation proceeded to trial. Further, Class Members will be eligible to receive at least 100% of the premium dollar amounts they paid during the Class Period. Guglielmo Decl., ¶7.

Thus, the Settlement benefits each Class Member in that he or she will recover a monetary award immediately, without the risk of an unfavorable outcome at trial. The Settlement also avoids the expense and delay of continuing to prosecute this Litigation through trial and any appeal.

### B. The Proposed Method of Distributing Relief to the Settlement Class Is Fair (Rule 23(e)(2)(C)(ii))

The Distribution Plan is a fair, reasonable, and adequate method of distributing the Settlement monies to the Settlement Class. *See Willcox*, 2016 WL 7238799, at *9 (stating that a plan of distribution '"must be fair, reasonable, and adequate"'). The Net Settlement Fund will be distributed to Class Members by proportion based on the total premium dollar amount paid during the Class Period. Settlement, §4.5(b). To collect from the Settlement, Class Members are not required to submit specific documentation. *Id.* Instead, if Class Members do not opt out of the Settlement, they will automatically be paid their share of the Net Settlement Fund. *Id.*

### C. The Anticipated Request for an Award of Attorneys' Fees Is Reasonable (Rule 23(e)(2)(C)(iii))

The proposed Mail Notice notifies Class Members that Class Counsel will apply for an award of attorneys' fees not to exceed 33.3% of the Settlement Fund, plus reimbursement of reasonable expenses incurred in prosecuting the Litigation. Settlement, Ex. A. A fee of up to 33.3% is eminently reasonable here and is fully supported by Ninth Circuit case law. *See Wise v. Ulta Salon, Cosmetics & Fragrance, Inc.*, No. 1:17-cv-00853, 2020 WL 1492672, at *8 (E.D. Cal. Mar. 27, 2020) (awarding attorneys' fees of one-third of the common fund of $3,400,000); *Lee v. JPMorgan Chase & Co.*, No. 13-cv-511, 2015 WL 12711659, at *9 (C.D. Cal. Apr. 28, 2015) (awarding attorneys' fees of one-third of the common fund of $2,400,000); *Mathein v. Pier 1 Imports (U.S.), Inc.*, No. 1:16-cv-0087, 2018 WL

1993727, at *10 (E.D. Cal. Apr. 27, 2018) (awarding attorneys' fees of one-third of the common fund of $3,500,000).

### D. Any Agreement Required to Be Identified Under Rule 23(e)(3) (Rule 23(e)(2)(C)(iv))

There are no agreements to be identified pursuant to Rule 23(e)(3).

### E. The Proposed Settlement Treats Class Members Equitably Relative to Each Other (Rule 23 (e)(2)(D))

This Rule 23(e)(2) factor "could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." Fed. R. Civ. P. 23(e)(2), Advisory Committee's note to 2018 amendment. Plaintiffs and all Class Members are treated equally under the Settlement – as each will be compensated based on the total premium dollar paid for Lloyd's surplus lines insurance policies purchased during the Class Period. Settlement, §4.5(b). In exchange for payment, all Class Members will be treated equally under the Releases. Settlement, §§9.1-9.10.

### F. Certification of the Settlement Class Is Warranted

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

A court may certify a class for settlement purposes where the proposed settlement class meets the requirements for Rule 23(a) class certification, as well as one of the three subsections of Rule 23(b). *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979-80 (9th Cir. 2011). Rule 23(a) provides that a class may be certified

if the plaintiff demonstrates numerosity, commonality, typicality, and adequacy of the class plaintiffs. Fed. R. Civ. P. 23(a). The Settlement Class meets the requirements of Rule 23(a) for settlement purposes.

**a. Class Members Are So Numerous that Joinder Is Impracticable**

"In general, courts find the numerosity requirement satisfied when a class includes at least 40 members." *Rannis v. Recchia*, 380 Fed. App'x 646, 651 (9th Cir. 2010). Plaintiffs' expert found that 163 properties with policies placed during the Class Period are located in Lava Zone 1. ECF No. 343-1 at 16-17. A class of 163 households is sufficiently numerous that joinder would be impracticable. *See, e.g.*, *Viernes v. DNF Assocs., LLC*, No. 19-cv-00316-JMS-KJM, 2020 WL 6938010, at *6-7 (D. Haw. Nov. 23, 2020), *report and recommendation adopted*, 2021 WL 225327 (D. Haw. Jan. 22, 2021).

**b. Questions of Law and Fact Are Common to All Class Members**

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This threshold is satisfied if the question is "capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores*, 564 U.S. at 350. When assessing commonality, even '"a single

[common] question will do.'" *Id*. at 359. Numerous common and predominant questions exist that do not require individualized inquiries, including:

> Whether Defendants' conduct violated the duty of good faith owed to Plaintiffs and the Class, and thus, was unfair under §480-2, constituted bad faith (as to Underwriters), or was negligent or unjust (as to Moa and Aloha);
>
> Whether Moa's, Aloha's, and Monarch's conduct violated the HSLA's diligent search requirement, and thus, was unfair under §480-2 (as to all Defendants);
>
> Whether Defendants' offering, placement, and sale of the surplus lines insurance policies contravened the public policy behind the enactment of HPIA, and thus, was unfair under §480-2 (as to all Defendants), or negligent or unjust (as to Moa and Aloha); and
>
> Whether Underwriters failed to oversee its agent Monarch, and thus, is vicariously liable for Monarch's misconduct.

ECF No. 343-1 at 17-18. Commonality is readily satisfied for Settlement purposes. *See In re Anthem, Inc. Data Breach Litig*., 327 F.R.D. 299, 309 (N.D. Cal. 2018).

**c. Plaintiffs' Claims Are Typical of Those of the Settlement Class**

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). This standard is satisfied when "the plaintiff endured a course of conduct directed against the class." *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1118 (9th Cir. 2017). Plaintiffs' and the Settlement Class's claims arise out of the same conduct and are based on the same legal theories, and so typicality is satisfied. Plaintiffs' claims are typical of the Settlement Class's claims because Plaintiffs allege the same unlawful course of

conduct harmed all Settlement Class Members. *See Int'l Longshore & Warehouse Union*, 2007 WL 4145228, at *1.

**d. The Settlement Class Is Fairly and Adequately Represented**

As discussed above, Section I.A.2, *supra*, Plaintiffs and Class Counsel have fairly and adequately represented the Settlement Class. Plaintiffs' interests are coextensive with, and not antagonistic to, the interests of Class Members because both have the same interest in the relief afforded by the Settlement. Further, Plaintiffs have actively participated in all phases of the Litigation, warranting their appointment as representatives of the Settlement Class. Guglielmo Decl., ¶49.

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

Rule 23(b)(3) permits a class action if (1) "questions of law or fact common to class members predominate over any questions affecting only individual members," and (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ P. 23(b)(3).

**a. Common Questions of Law and Fact Predominate**

"The predominance inquiry 'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.'" *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016). Predominance is satisfied "'[w]hen common questions present a significant aspect of the case and they can be resolved for all members of

the class in a single adjudication[.]'" *Hanlon*, 150 F.3d at 1022. As discussed in Plaintiffs' class certification briefing, each element of Plaintiffs' claims would be proven through common evidence, including through expert testimony and damages methodology relying on Defendants' transaction data, which is common to all Class Members and requires no individualized inquiries. *See* ECF No. 343-1 at 19-23.

**b. A Class Action Is a Superior Method to Resolve This Case**

Rule 23(b)(3) requires a plaintiff to demonstrate that a class action "is superior to other available methods for fairly and efficiently adjudicating the controversy" and comply with the Rule 23(b)(3)(A)-(D) factors. Fed. R. Civ. P. 23(b)(3). There is no evidence demonstrating that Class Members maintain an interest in individually controlling separate actions. Likewise, there is no existing litigation by Class Members seeking a return of premiums for improperly placed surplus lines homeowner's insurance policies. Because all Class Members' claims relate to property located in Hawaii and are based on Hawaii law, this Court is the appropriate forum, and for the same reasons, Plaintiffs do not foresee difficulties in managing this case as a class action, in particular at this settlement phase. Furthermore, "[i]n light of the small size of the putative class members' potential individual monetary recovery, class certification may be the only feasible means for them to adjudicate their claims." *Leyva v. Medline Indus., Inc.*, 716 F.3d 510, 515 (9th Cir. 2013).

### 3. The Court Should Appoint Class Counsel as Counsel for the Settlement Class

"An order that certifies a class action . . . must appoint class counsel under Rule 23(g)," Fed. R. Civ. P. 23(c)(1)(B), considering the factors identified in Rule 23(g)(1)(A)(i)-(iv). Class Counsel (i) have diligently investigated and pursued the claims in this hard-fought litigation; (ii) have extensive experience managing and litigating complex class actions such as this one, including administering settlements; (iii) are well familiar with the applicable law, as demonstrated by Plaintiffs' success in defeating Defendants' motions to dismiss and in other cases Plaintiffs' counsel have litigated in Hawaii; and (iv) have amply demonstrated they are willing to expend the necessary resources. Accordingly, Plaintiffs request that Joseph P. Guglielmo, E. Kirk Wood, and Gregory W. Kugle be appointed as counsel for the Settlement Class.

### 4. The Court Should Appoint Plaintiffs as Representatives for the Settlement Class

For purposes of the Settlement only, Plaintiffs seek to be appointed as representatives of the Settlement Class. Plaintiffs purchased surplus lines insurance policies for their residential properties located in Lava Zone 1 on the island of Hawai'i with a Lava Exclusion during the Class Period and suffered the same injuries as the rest of the Settlement Class. Their claims are similarly situated to the

Settlement Class and therefore typical of the Settlement Class and will be adequate representatives. *See Int'l Longshore & Warehouse Union*, 2007 WL 4145228, at *2.

### G. The Court Should Approve the Notice Program

Rule 23(c)(2) requires notice to be "the best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). Further, Rule 23(e)(1) requires that notice of a settlement be directed "in a reasonable manner to all class members who would be bound by the propos[ed settlement]." Fed. R. Civ. P. 23(e)(1). Notice "must 'generally describe[] the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'" *Lane v. Facebook, Inc.*, 696 F.3d 811, 826 (9th Cir. 2012). Notice to each member of a class "'who can be identified through reasonable effort'" constitutes reasonable notice. *Willcox*, 2016 WL 7238799, at *5.

Consistent with Rules 23(c)(2)(B) and 23(e)(1), the Settlement Administrator will mail the Mail Notice to all persons on the Class List. Settlement, §3.3, Ex. A. The Mail Notice will provide important information regarding the Settlement and Class Members' rights and will direct recipients to the Settlement Website for more information. Settlement, §7.2. In the event that 10-15% of Mail Notices are undeliverable and cannot be remailed, the Parties further propose to supplement the Mail Notice with the Publication Notice – which provides additional notice of the

proposed Settlement – to be published in the media outlets that are widely read by residents on the Island of Hawaii. Settlement, §7.2(c), Ex. B.

Rule 23(h)(1) also requires that "[n]otice of the motion [for attorneys' fees] must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner." Here, the Mail Notice specifically advises Class Members that Class Counsel will apply to the Court for attorneys' fees not to exceed 33.3% of the Settlement Fund and reimbursement of expenses. *See Willcox*, 2016 WL 7238799 at *6. Settlement, Ex. A.

The robust notice program proposed in connection with the Settlement and the form and content of the Mail Notice and Publication Notice easily satisfy the requirements of the Federal Rules of Civil Procedure. Moreover, courts routinely find that comparable notice procedures meet the requirements of due process and Rule 23. *See Brannon v. Household Int'l Inc.*, 236 F. App'x 285, 287 (9th Cir. 2007); *see also Willcox*, 2016 WL 7238799, at *6. Accordingly, Plaintiffs respectfully request the Court also approve the proposed form and method of giving notice of the Settlement to the Settlement Class.

## V. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court enter the proposed Preliminary Approval Order (Settlement, Ex. C).

Dated: July 13, 2021 **SCOTT+SCOTT ATTORNEYS AT LAW LLP**

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*Counsel for Plaintiffs and Proposed Class Counsel*

**CERTIFICATION OF SERVICE**

I hereby certify that on July 13, 2021, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List.

*s/ Joseph P. Guglielmo*
Joseph P. Guglielmo