Joseph P. Guglielmo (*pro hac vice*)
SCOTT+SCOTT ATTORNEYS AT LAW LLP
The Helmsley Building
230 Park Avenue, 17th Floor
New York, NY 10169
Telephone: (212) 223-6444
Facsimile: (212) 223-6334
jguglielmo@scott-scott.com

Counsel for Plaintiffs

[Additional Counsel on Signature Page.]

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

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,

Plaintiffs,

vs.

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,

Defendants.

No. 1:18-cv-00496-JMS-KJM

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF SETTLEMENT AGREEMENT

Trial Judge: J. Michael Seabright
Hearing Date: August 15, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes, Rules, and Regulations

Federal Rules of Civil Procedure

Plaintiffs[1] respectfully submit this Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Final Approval of Settlement Agreement to resolve this Litigation alleging violations of Hawaii law relating to the offering, marketing, and sale of surplus lines insurance filed against Underwriters, Monarch, Aloha, and Moa. Plaintiffs respectfully request that the Court enter an order: (1) finally approving the proposed Settlement and the Distribution Plan; (2) finally approving the proposed Notice Program as satisfying Fed. R. Civ. P. 23(c)(2); (3) finally certifying the proposed Settlement Class; (4) excluding those Class Members that have opted out of the Settlement Class; and (5) releasing the Releasees from the Released Claims.

I. INTRODUCTION

Following preliminary approval of the Settlement, the Court-approved Settlement Administrator, RG/2 Claims Administration LLC ("RG/2"), implemented the Notice Program as required by the Settlement Agreement and Preliminary Approval Order. *See Aquilina v. Certain Underwriters at Lloyd's London*, No. 1:18-CV-00496-ACK-KJM, 2021 WL 3611027, at *19, ¶9 (D. Haw. Aug. 13, 2021) ("PAO"); *see also* Declaration of Dana Boub of RG/2 Claims Administration LLC Regarding Notice to the Class ("September Boub Decl."), ECF

[1] Unless otherwise defined herein, all capitalized terms have the meanings ascribed to them in the Settlement Agreement and Release (the "Settlement Agreement") (ECF No. 408).

No. 415-1, ¶6. The Mail Notice advised Class Members of all relevant aspects of the Litigation and the Settlement, including an overview of the Settlement, the methodology for calculating the payments, the scope of the Release, and other pertinent dates for opting out or objecting to the Settlement, as well as directing Class Members to the settlement website to obtain more information. To date, no objections to the Settlement have been received, and the reaction of the Settlement Class has been overwhelmingly positive.

As discussed further below, several Class Members who have pending individual state court cases for property damage sought to opt out from the Settlement. Some of the Class Members' cases were identified in the Settlement as Enumerated State Court Lawsuits. The Settlement provided that if such Class Members sought to exclude themselves from the Settlement, Defendants could seek to terminate the Settlement. Defendants have chosen not to exercise their right to terminate the Settlement, rather, Defendants agree to proceed with the Settlement and allow all Class Members to obtain a full return of their premiums. Thus, as previously represented, Class Members stand to receive a full return of the premiums, taxes, and fees they paid to Defendants for surplus lines insurance during the Class Period, if not more. Declaration of Joseph P. Guglielmo in Support of Plaintiffs' Unopposed Motion for Final Approval of Settlement Agreement ("Guglielmo Final Approval Decl."), ¶9. The Settlement is an excellent result and

provides immediate and material recovery for members of the Settlement Class – with Class Members obtaining thousands of dollars without having to file a Claim. The terms of the Settlement – which were negotiated with the involvement of a respected neutral mediator and at arm's-length by lawyers experienced in complex litigation – fully satisfy the requirements of fairness, reasonableness, and adequacy, and therefore should be approved by this Court under applicable case law.

As set forth herein, Plaintiffs respectfully request that the Court grant Plaintiffs' motion as the Settlement is fair, reasonable, and adequate and warrants final approval.

II. SUMMARY OF THE LITIGATION

Plaintiffs respectfully refer the Court to the Declaration of Joseph P. Guglielmo (ECF No. 418-4), filed with Plaintiffs' Motion for Attorneys' Fees, Litigation Expenses, and Service Awards, for an additional detailed description of the factual and procedural history of the Litigation, the claims asserted, the extensive investigation and discovery undertaken, and the settlement negotiations. An abbreviated description of this Litigation follows.

A. Pleadings and Motions to Dismiss

Following months of investigation by Class Counsel, on December 21, 2018, the Aquilina Plaintiffs filed the Class Action Complaint against Moa, Monarch, and the Underwriters. Guglielmo Decl., ECF No. 418-4, ¶¶7-8. 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 motion to dismiss orders. *Id.*, ¶16. Following motion practice and oral argument, on June 10, 2020, the Court issued two separate orders ruling on Defendants' motions to dismiss. *Id.*, ¶23. 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.* 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.*, ¶24.

B. Discovery Efforts

With a May 14, 2021 close-of-fact-discovery deadline and July 13, 2021 trial date, Class 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.*, ¶¶34, 36. Class Counsel deposed 13 of Defendants' Rule 30(b)(1) and 30(b)(6) witnesses. *Id.*, ¶39. Plaintiffs also subpoenaed numerous entities to obtain information relevant to the underlying claims. *Id.*, ¶48. At the time the Settlement was reached, Plaintiffs had fully briefed

their motion for class certification and filed three separate opposition memoranda to Defendants' motions to deny class certification and joinder motions. *Id.*, ¶¶29, 31. Plaintiffs also had filed three motions for summary judgment against Defendants and submitted two experts' reports. *Id.*, ¶32.

C. The Mediation

Beginning in January 2021, Plaintiffs and certain Defendants began informal settlement discussions and exchanged proposals and counterproposals to resolve the litigation. *Id.*, ¶49. On March 26, 2021, the Parties engaged in a virtual mediation before respected mediator Keith Hunter. *Id.*, ¶50. 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.*, ¶52. Thereafter, the Parties continued to work on finalizing the remaining Settlement terms and notice documents and executed the Settlement Agreement on July 13, 2021. ECF No. 405-3. Following oral argument on Plaintiffs' motion for Preliminary Approval of the Settlement, the Parties revised the Settlement to address the Court's concerns regarding various provisions of the Settlement. *Id.*, ¶¶55-56. On July 30, 2021, Plaintiffs filed a revised Settlement Agreement, which the Court preliminarily approved on August 13, 2021. *Id.*, ¶56.

D. Requests for Exclusion from the Settlement

Starting on September 24, 2021, Class Counsel began receiving identical form requests for exclusion from Class Members. To date, Class Counsel have received timely valid requests for exclusion from the Settlement from Class Members representing 32 properties. Guglielmo Final Approval Decl., ¶7; Supplemental Declaration of Dana Boub of RG/2 Claims Administration LLC Regarding Notice to the Class ("Supplemental Boub Decl."), ¶5. Despite the Parties' efforts, those Class Members have not sought to revoke their opt outs and remain in the Class. Rather than Defendants electing to terminate the Settlement pursuant to Section 7 of the Settlement Agreement, Defendants have elected to proceed with the Settlement. Accordingly, Class Members will receive a full refund of the premiums, taxes, and fees paid during the Class Period or an even greater recovery from the Settlement with the opt outs removed from the Settlement Class. Guglielmo Final Approval Decl., ¶9.

Class Counsel have also received two requests for exclusion that the Claims Administrator and Class Counsel have determined are not from Class Members ("Invalid Opt Outs"). Guglielmo Final Approval Decl., ¶10; Supplemental Boub Decl., ¶6; and Ex. B. The individuals and their identified properties do not appear in the classwide damages data, and the identified properties are not located in Lava Zone 1, Guglielmo Final Approval Decl., ¶10, which is required for membership in

the Settlement Class. The Settlement Class definition requires that Class Members "purchased a surplus lines insurance policy for a residential property located in Lava Zone 1 on the island of Hawai'i." Settlement Agreement, §3.1. Therefore, Plaintiffs request that the Court rule that the Invalid Opt Outs be denied, as they are not members of the Settlement Class.

III. SUMMARY OF THE SETTLEMENT AGREEMENT

In accordance with the Settlement, the Court preliminarily certified 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 at any time during the period of 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 Agreement, §3.1; PAO, 2021 WL 3611027, at *3.

A summary of the material terms of the preliminarily approved Settlement Agreement (ECF No. 408) follows.

A. Benefits to Class Members

The Settlement Agreement provides the Settlement Class with significant monetary relief of $1,800,000 to be allocated among Class Members following the deduction of Court-approved fees and expenses, service awards, and costs of notice and settlement administration. Defendants also agreed 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 Settlement. Settlement Agreement, §4.4.

With the opt outs removed from the Settlement Class, the remaining Class Members stand to receive a full return of the premiums, taxes, and fees they paid to Defendants for surplus lines insurance during the Class Period, if not more. Guglielmo Final Approval Decl., ¶9.

B. Notice to Settlement Class

The Settlement's Notice Program satisfies Rule 23(c)(2) and is the best notice practicable to members of the Settlement Class. The Notice Program consisted of: (a) a direct mail notice to Class Members using address information for Class Members provided by Defendants; (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 Agreement, §7.2.

The Notice Program provided 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 Agreement, §§7.3, 7.11. The Notice Program informed 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).

RG/2 implemented the Notice Program as outlined in the PAO. *See* Boub Decl., ECF No. 415-1, ¶6; *see also* Supplemental Boub Decl., ¶4. After mailing the Mail Notice, 27 notices were returned by the United States Postal Service ("USPS") as undeliverable. *Id.* RG/2 performed multiple skip traces to search for updated addresses for the Class Members, re-mailed these Mail Notices, and only one Mail Notice remains undeliverable. *Id*. As such, the threshold for Publication Notice was not triggered.

C. Claims Process

Class Members that did not elect to opt out of the Settlement will automatically receive a cash payment; no specific documentation is required. Settlement Agreement, §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. *Id*. 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 premiums, taxes, and fees they paid during the Class Period. Guglielmo Final Approval Decl., ¶9.

D. 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 Agreement, §9.1.

IV. ARGUMENT

A. Final Certification of the Settlement Class Is Warranted

In the PAO, the Court preliminarily certified the Settlement Class. PAO, 2021 WL 3611027, at *5-*9. Final Certification of the Settlement Class remains appropriate because, as discussed in Plaintiffs' Preliminary Approval Brief (ECF No. 405-1, at 18-22) and class certification briefs (ECF Nos. 327, 343-1, 381), the Settlement Class meets all the requirements of Rule 23(a) and Rule 23(b)(3). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Accordingly, Plaintiffs request that the Court grant final certification of the Settlement Class under Rules 23(a) and 23(b)(3).

B. The Settlement Should Be Finally Approved

The Ninth Circuit has a "strong judicial policy that favors settlements," PAO, 2021 WL 3611027, at *4 (citing *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." PAO, 2021 WL 3611027, at *10 (citing *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 second phase, which Plaintiffs request that the Court consider at this time, "the court holds a full fairness hearing where class members may present objections to class certification, or the fairness of the settlement agreement." *Id.* "Following the fairness hearing, the court is to consider all of the information before it and confirm that class certification is appropriate, and that the settlement is fair, reasonable, and adequate." *Id.*

As the Court analyzed in the PAO, courts balance several factors to determine whether a settlement agreement is fair: (1) the strength of the plaintiff's 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 of the proposed settlement.[2]

[2] In the PAO, the Court considered the *Bluetooth* factors, which largely overlap with the Rule 23(e)(2) factors. *Kimbo v. MXD Grp., Inc.*, No. 2:19-CV-00166, 2021 WL 492493, at *3 (E.D. Cal. Feb. 10, 2021). Because of the overlap, Plaintiffs analyze the *Bluetooth* factors herein. One factor, Rule 23(e)(2)(iv), which requires

PAO, 2021 WL 3611027, at *9. Each of the applicable factors support final approval of the Settlement.

1. Plaintiffs Allege a Strong Case in the Litigation

'"This factor considers both the likelihood of success on the merits and the range of possible recovery."' PAO, 2021 WL 3611027, at *10 (citing *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Pracs., & Prods. Liab. Litig.*, No. 8:10 ML 02151, 2013 WL 3224585, at *7 (C.D. Cal. June 17, 2013)). However, '"the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits."' PAO, 2021 WL 3611027, at *10.[3]

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., ECF No. 418-4, ¶¶7-8, 12-13, 27, 29, 31-32, 34-48. Accordingly, "[i]t is clear that there was ample time to evaluate all of the aspects of

---

the parties to disclose any agreement required to be identified under Rule 23(e)(3), is not addressed in the *Bluetooth* factors. There are no additional agreements required to be disclosed under Rule 23(e)(3).

3 Unless otherwise noted, citations are omitted.

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, 2021 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., ECF No. 418-4, ¶33. 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").

By the time of the mediation, Plaintiffs were confident that the Court would certify a class action and grant Plaintiffs' motions for summary judgment, in whole or in part. However, Class Counsel are not aware of any other similar class action

litigation asserting comparable claims against insurers and retail brokers for improper sales of surplus lines insurance (Guglielmo Decl., ECF No. 418-4, ¶75); therefore, recovery was far from guaranteed. As the Court noted at preliminary approval, "[t]he contested facts and competing statutory interpretations together increase the likelihood of risk and expense of further litigation." PAO, 2021 WL 3611027, at *10. The Settlement ensures a tangible benefit to the Settlement Class and represents an outstanding recovery of at least 100% of the premiums, taxes, and fees Class Members paid during the Class Period, if not more. As such, this factor weighs in favor of final approval.

2. The Risk, Expense, Complexity, and Likely Duration of Further Litigation and the Risk of Maintaining Class Action Status Throughout Trial Warrant Final Approval

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."' PAO, 2021 WL 3611027, at *10. Here, the Settlement provides for an immediate cash recovery of $1,800,000 to be allocated among Class Members following the deduction of Court-approved fees and expenses, service awards, and costs of notice and settlement administration.

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"). As the Court previously recognized, "Plaintiffs faced the risk that the Class either would not be certified or that it could face decertification later in the litigation." PAO, 2021 WL 3611027, at *11.

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 v. Lloyds TSB Bank, plc*, No. 13-00508-ACK-RLP, 2016 WL 7238799, at *8 (D. Haw. Dec. 14, 2016) ("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 represents a substantial percentage of the potential recoverable damages had the Litigation proceeded to trial. Further, Class Members will receive at least 100% of the premiums, taxes, and fees they paid during the Class Period, if not more. Guglielmo Final Approval Decl., ¶9.

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. This factor weighs in favor of final approval.

3. The Amount Offered in Settlement Justifies Final Approval

The Settlement represents an excellent result for the Settlement Class and is fair, adequate, and reasonable. Guglielmo Decl., ECF No. 418-4, ¶57. The Settlement provides $1,800,000 in cash payments to Class Members, in addition to a valuable payment of 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 Settlement. *Id.*, ¶3. Class Counsel, with the assistance of Plaintiffs' damages expert, devised a Distribution Plan for allocating the Settlement proceeds, which the Court has preliminarily approved, 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.*, ¶6. Thus,

the ample recovery and fair method of distributing the Settlement support granting final approval.

4. The Extent of Discovery Completed and the Stage of the Proceedings Support Final Approval

'"Consideration of the extent of discovery and the current stage of the litigation allows the Court to evaluate whether the parties are able to make decisions about their claims based on information received during the discovery process."' PAO, 2021 WL 3611027, at *12.

As discussed at §IV.B.1., *supra*, Class Counsel had a full opportunity to evaluate the strengths and weaknesses of the Litigation prior to reaching the Settlement. By the time the Settlement was reached, Plaintiffs had fully briefed their motion for class certification and three separate opposition briefs to Defendants' motions to deny class certification and joinder motions, Plaintiffs had filed three motions for summary judgment against Defendants, served requests for documents, interrogatories, and requests for admission, engaged in numerous telephonic meet and confers concerning Defendants' responses, and deposed 13 of Defendants' Rule 30(b)(1) and 30(b)(6) witnesses. Guglielmo Decl., ECF No. 418-4, ¶¶7-8, 12-13, 27, 29, 31-32, 34-48; *see also Lane v. Facebook, Inc.*, No. C 08-3845, 2010 WL 9013059, at *5 (N.D. Cal. Mar. 17, 2010) ("Class Counsel established that they acquired sufficient information to make an informed decision with respect to settlement, even though formal discovery is not complete."), *aff'd*, 696 F.3d 811 (9th

Cir. 2012). Class Counsel also undertook an extensive, months-long investigation before filing the original complaint. Guglielmo Decl., ECF No. 418-4, ¶7. Thus, Class Counsel were fully apprised of the strengths and weaknesses of the Litigation from conducting extensive discovery and briefing, and able make an informed and meaningful decision regarding the Settlement.

5. Class Counsel, Based on Their Extensive Experience in Complex Litigation, Recommend Final Approval of the Settlement

"'Great 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., ECF No. 418-4, ¶49. On March 26, the Parties engaged in a virtual mediation session before Keith 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.*, ¶50. On June 1, the Parties

executed a terms sheet memorializing the material terms to achieve global resolution of the Litigation. *Id.*, ¶52. These terms are reflected in the Settlement.

Class Counsel have extensive experience in litigating consumer protection and class actions. *See* ECF No. 405-4. Class Counsel believe that the Settlement is fair and in the best interest of the Settlement Class. Guglielmo Decl., ECF No. 418-4, ¶57. *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, Class Counsel recommend that the Court finally approve the Settlement.

6. There Is No Government Participant Present in the Litigation

As the Court previously found at preliminary approval, this factor is not relevant to the Court's analysis because there is no government actor participating in the Litigation. PAO, 2021 WL 3611027, at *13.

7. The Reaction of the Class Members to the Settlement Warrants Final Approval

The Mail Notice advised Class Members of the December 6, 2021 deadline to request exclusion from the Settlement. RG/2 received requests for exclusion from the Settlement from Class Members representing 32 properties. *See* Supplemental Boub Decl., ¶5. Because Class Members are not required to file claims to collect from the Settlement, this means that the level of participation, excluding Class

Members who have requested exclusion, is 80.4%. In addition, the Mail Notice advised Class Members that the deadline to object to the Settlement and request for attorneys' fees was December 6, 2021. The Court extended the deadline to object to the Settlement to January 28, 2022 (ECF No. 417), and as of the date that the Court vacated all deadlines, January 21, 2022 (ECF No. 432), no objections to the Settlement had been received. Plaintiffs will address any objections in their reply brief, but as of now, the high participation rate and lack of objectors supports final approval of the Settlement. *See Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 624 (N.D. Cal. 1979) (finding that the fact that only 16% of the class objected was deemed "persuasive" of the adequacy of the settlement); *Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 852 (N.D. Cal. 2010) (4.86% opt-out rate strongly supported approval); *Barcia v. Contain-A-Way, Inc.*, No. 07-cv-938, 2009 WL 587844, at *4 (S.D. Cal. Mar. 6, 2009) ("The absence of any objector strongly supports the fairness, reasonableness, and adequacy of the settlement."); *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, at 320 (N.D. Cal. 2018) (approving settlement with 1.8% claims rate and finding that low rates of objections and opt outs are "indicia of the approval the class").[4]

[4] *See also Theodore Broomfield v. Craft Brew All., Inc.*, No. 17-01027, 2020 WL 1972505, at *7 (N.D. Cal. Feb. 5, 2020) (approving 2% claims rate); *Shin v. Plantronics, Inc.*, No. 18-cv-05626, 2020 WL 1934893, at *4 (N.D. Cal. Jan. 31, 2020) (approving approximately 3.8% claims rate); *Schneider v. Chipotle Mexican Grill, Inc.*, 336 F.R.D. 588, 599 (N.D. Cal. 2020) (approving 0.83% claims rate).

C. The Court Should Finally 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 mailed the Mail Notice to all persons on the Class List. Boub Decl., ECF No. 415-1, ¶6; Supplemental Boub Decl., ¶4. The Mail Notice provided Class Members with important information regarding the Settlement and Class Members' rights and directed recipients to the Settlement Website for more information. Boub Decl., ECF No. 415-1, ¶¶8-9; Supplemental Boub Decl., ¶¶5-6. 99.4% of Mail Notices were delivered. *Id.*, ¶4. Therefore, the Publication Notice portion of the Notice Program was not triggered. Class Members also could access information regarding the Settlement on the dedicated Settlement Website, including updates to deadlines. *Id.*, ¶6.

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 advised Class Members that Class Counsel would 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 Agreement, Ex. A. In accordance with the Mail Notice and PAO, Class Counsel moved for attorneys' fees on November 22, 2021. ECF No. 418. The motion and supporting documentation were promptly posted on the Settlement Website for Class Members to review.

Therefore, the robust Notice Program easily satisfies 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 finally approve the Notice Program.

D. The Court Should Finally Approve the Distribution Plan

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 Agreement, §4.5(b). To collect from the Settlement, Class Members are not required to submit specific documentation. *Id.* Instead, Class Members that did not opt out of the Settlement by the deadline of December 6, 2021 will automatically be paid their share of the Net Settlement Fund. *Id.* With the opt outs removed from the Settlement Class, the remaining Class Members will receive a full return of the premiums, taxes, and fees they paid to Defendants for surplus lines insurance during the Class Period, if not more. Guglielmo Final Approval Decl., ¶9. Therefore, Plaintiffs request that the Court grant final approval of the Distribution Plan.

V. CONCLUSION

For the reasons set forth herein and in the supporting declarations, Plaintiffs respectfully request that the Court grant final approval of the Settlement Agreement.

Dated: June 10, 2022

SCOTT+SCOTT ATTORNEYS AT LAW LLP

s/ Joseph P. Guglielmo

Joseph P. Guglielmo (*pro hac vice*)
Michelle E. Conston (*pro hac vice*)
Alex M. Outwater (*pro hac vice*)
The Helmsley Building
230 Park Avenue, 17th Floor
New York, NY 10169
Telephone: (212) 223-6444
Facsimile: (212) 223-6334
jguglielmo@scott-scott.com
mconston@scott-scott.com
aoutwater@scott-scott.com

SCOTT+SCOTT ATTORNEYS AT LAW LLP
Erin Green Comite (*pro hac vice*)
156 South Main Street
P.O. Box 192
Colchester, CT 06415
Telephone: (860) 537-5537
Facsimile: (860) 537-4432
ecomite@scott-scott.com

E. Kirk Wood (*pro hac vice*)
WOOD LAW FIRM, LLC
P. O. Box 382434
Birmingham, AL 35238-2434
Telephone: (205) 908-4906
Facsimile: (866) 747-3905
ekirkwood1@bellsouth.net

Gregory W. Kugle
DAMON KEY LEONG KUPCHAK HASTERT, LLC
1003 Bishop Street, Suite 1600
Honolulu, Hawai‘i 96813
Telephone: (808) 531-8031
Facsimile: (808) 533-2242
gwk@hawaiilawyer.com

Counsel for Plaintiffs and Proposed Class Counsel

CERTIFICATION OF SERVICE

I hereby certify that on June 10, 2022, 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