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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

FOLWEILER CHIROPRACTIC, PS, a
Washington professional services corporation,

Plaintiff,

No. 15-2-17846-6 SEA

vs.

STIPULATION OF SETTLEMENT

PROGRESSIVE MAX INSURANCE
COMPANY; PROGRESSIVE NORTHWEST
INSURANCE COMPANY; PROGRESSIVE
DIRECT INSURANCE COMPANY;
PROGRESSIVE CLASSIC INSURANCE
COMPANY and PROGRESSIVE
CASUALTY INSURANCE COMPANY,
foreign insurance companies ,

Defendant.

This Stipulation of Settlement (“Agreement” or “Stipulation”) is made by and between the Named Plaintiff, Folweiler Chiropractic, PS, on behalf of itself and on behalf of all others similarly situated (“Plaintiff”), and Defendant “Progressive” (as defined below), by and through their respective counsel.

RECITALS

WHEREAS, on July 23, 2015 Plaintiff filed a purported class action in the Superior Court for the State of Washington in the County of King (the “Court”) in Case No. 15-2-17846-6 SEA (the “Action”), which through this Settlement, will be accepted as a certified class action, but for settlement purposes only, on behalf of the Settlement Class; and

1 WHEREAS, the Action alleges, among other things, that from June 1, 2011 to
2 December 31, 2013 Progressive failed to pay all reasonable and necessary medical expenses
3 incurred by a covered person under the Personal Injury Protection (“PIP”) provisions of
4 automobile insurance policies issued by Progressive in Washington; and

5 WHEREAS, the Action further alleges that from June 1, 2011 to December 31, 2013
6 Progressive improperly applied Code 41 Reductions to pay benefits under the PIP provisions
7 of automobile insurance policies issued by Progressive in Washington; and

8 WHEREAS, based on these and other allegations Plaintiff asserts claims for
9 declaratory judgment, violations of the Washington Consumer Protection Act, RCW chapter
10 19.86 (“CPA”), unjust enrichment and breach of contract; and

11 WHEREAS, Plaintiff, through counsel, while believing that the claims asserted in the
12 Action have substantial merit, examined the benefits to be obtained under the terms of the
13 Proposed Settlement, considered the risks associated with the continued prosecution and
14 possible appeal of this complex and time-consuming litigation and the likelihood of success
15 on the merits of the Action, and believes that, in consideration of all the circumstances, the
16 Proposed Settlement embodied in this Agreement is fair, reasonable, adequate and in the best
17 interests of the Potential Class Members; and

18 WHEREAS, Progressive, while denying wrongdoing of any kind whatsoever, and
19 without admitting liability, nevertheless agreed to enter into this Stipulation to avoid further
20 expense, inconvenience and the distraction of burdensome and protracted litigation, and to be
21 completely free of any further controversy with respect to the claims which were asserted or
22 could have been asserted against Progressive in the Action;

23 NOW, THEREFORE, IT IS HEREBY AGREED by and between the Parties, through
24 their respective counsel, that the Action be settled and compromised as between the Plaintiff,
25 the Settlement Class, and Progressive, upon approval of the Court after hearing as provided
26 for in this Stipulation, on the following terms and conditions:

I. DEFINITIONS

In addition to the foregoing, the following terms shall have the meanings set forth below:

1 1. “Agreement” or “Stipulation” means this Stipulation of Settlement, including
2 all exhibits thereto.

3 2. “Claim Form” means the document, which will be appended to the Class
4 Notice that Settlement Class Members must submit, as set forth in and subject to the
5 provisions of this Agreement, to potentially obtain benefits from the Proposed Settlement. A
6 copy of the Claim Form is attached hereto as Exhibit B.

7 3. “Claim Period” means the period commencing on the Initial Notice Date and
8 continuing until 30 days after the Final Approval Hearing.

9 4. “Class Administrator” or “Claims Administrator” means the company hired
10 by Progressive to administer the class claims. The Class/Claims Administrator shall be
11 approved by the Court in the Preliminary Approval Order.

12 5. “Class Counsel” means Breskin Johnson & Townsend, PLLC.

13 6. “Class Notice” means the notice of the preliminarily approved settlement,
14 which includes a Claim Form, to be sent to all Settlement Class Members. A copy of the
15 Class Notice is attached hereto as Exhibit A.

16 7. “Class Period” means June 1, 2011 to December 31, 2013.

17 8. “Code 41 Reduction” means the difference between the amount a Settlement
18 Class Member billed on a Subject Claim and the amount paid by Progressive, where the
19 billing line includes code “41” or “x41” on the Explanation of Benefits form.

20 9. “Effective Date” means that date defined in Section XII of this Agreement.

21 10. “Final Approval Hearing” or “Fairness Hearing” means the settlement
22 approval hearing to be conducted by the Court in connection with the determination of the
23 fairness, adequacy, and reasonableness of this Agreement in accordance with CR 23(e).

24 11. “Final Judgment” means the Court’s Final Approval Order and Final
25 Judgment that finally approves the Settlement and dismisses the Action with prejudice.

26 12. “Initial Notice Date” means the date upon which the Class Notice is first
mailed to Class Members pursuant to this Agreement, as further described below.

 13. “Named Plaintiff” means Folweiler Chiropractic, PS.

1 14. “Parties” means the Settlement Class Members, including the Named
2 Plaintiff, and Progressive.

3 15. “Person” means any natural person, individual, corporation, association,
4 partnership, trust, or any other type of legal entity.

5 16. “Preliminary Approval Order” means the order that preliminarily approves the
6 Settlement.

7 17. “Progressive” means The Progressive Corporation, Progressive Casualty
8 Insurance Company, Progressive American Insurance Company, Progressive Northwestern
9 Insurance Company, Progressive Classic Insurance Company, United Financial Casualty
10 Company, Progressive Max Insurance Company, and Progressive Direct Insurance
11 Company. Where “Progressive” is obligated to act by the Settlement, “Progressive” includes
12 any third-party administrator or other designee for the purpose of fulfilling Progressive’s
13 obligations under this Agreement, including the Claims Administrator as appropriate.

14 18. “Proposed Settlement” means the terms agreed to by the Parties as set forth in
15 this Agreement.

16 19. “Release” means those Releases set forth in Section XV.

17 20. “Released Claims” means and includes any and all claims, rights, demands,
18 actions, choses in action, causes of action, suits, debts, liens, contracts, liabilities,
19 agreements, interest, costs, expenses, or losses arising from or in any way related to any acts
20 which have been alleged or which could have been alleged in the Action against Progressive
21 concerning any Subject Claim, whether at law, in equity, or under any statute or regulation,
22 relating to Progressive’s use of Code 41 Reductions including without limitation:

- 23 a. any and all claims, demands, actions, causes of action, and/or suits for
24 declaratory judgment, breach of contract, fraud, misrepresentation,
25 consumer fraud, unfair trade practices, unfair insurance practices, unjust
26 enrichment, statutory violations, administrative-regulation violations,
 and/or bad faith arising from or in any way relating to any Subject Claim
 against Progressive,

- 1 b. any and all claims, demands, actions, causes of action, and/or suits for
2 direct damages, indirect damages, actual damages, consequential damages,
3 treble damages, punitive damages, and/or exemplary damages,
4 prejudgment interest, post-judgment interest, costs, expenses, and/or
5 attorneys' fees, whether statutory or non-statutory, arising from or in any
6 way relating to any Subject Claim against Progressive, and
7 c. any and all Unknown Claims arising from any Subject Claim against
8 Progressive; provided, however, that the Released Claims do not include
9 any claim for enforcement of this Agreement and/or the Final Judgment.

10 21. “Released Persons” means:

- 11 a. all of the companies defined as “Progressive” in paragraph 17, above;
12 b. all of the past and present officers, directors, agents, attorneys,
13 employees, stockholders, divisions, affiliates, subsidiaries, and parents of any of the insurers
14 listed in subparagraph a; and
15 c. all of the successors, assigns, and legal representatives of any of the
16 entities listed in subparagraph(s) a and/or b.
17 d. “Released Persons” does not mean FAIR Health, Inc., or any other
18 database supplier; or Mitchell International, Inc., or any other medical bill reviewer
19 and/or auditor.

20 “Settlement” means the terms and conditions of the agreement reached by the
21 Parties.

22 22. “Settlement Class” means the class defined in Section II below.

23 23. “Settlement Class Members” means those Persons as defined in Section II
24 below.

25 24. “Settlement Class Payment” means the payments to Settlement Class
26 Members described in Section VI below.

1 25. “Subject Claim” means any claim submitted to Progressive within the Class
2 Period for payment or reimbursement of charges for medical treatment, medical service,
3 medication, or prosthesis under the PIP coverage provided by a Subject Policy.

4 26. “Subject Policy” means any personal automobile policy (a) issued by any of
5 the companies defined as “Progressive” in paragraph 17 above, (b) delivered by Progressive
6 or one of its agents to a policyholder in Washington, and (c) providing PIP coverage.

7 27. “Unknown Claims” means claims against Progressive arising out of facts
8 found hereafter to be other than or different from the facts now believed to be true, relating to
9 any matter covered by this Agreement, as to any of the Released Claims against Progressive,
10 as specifically defined above, so that each Settlement Class Member shall be deemed to have
11 expressly waived any and all Unknown Claims against Progressive relating to any matter
12 covered by this Agreement to the full extent permitted by law, and to the full extent of claim
13 preclusion and res judicata protections.

14 **II. THE SETTLEMENT CLASS**

15 29. The “Settlement Class” means all Washington health care providers who
16 billed Progressive from June 1, 2011 to December 31, 2013 for medical expenses incurred
17 under a Subject Policy and were paid less than the amount billed due to Code 41 Reductions.
18 Excluded from the Class are: all present or former officers and/or directors of Progressive,
19 Class Counsel and their resident relatives, the Judge in this case and any resident relatives,
20 and Progressive’s counsel of record and their resident relatives.

21 30. Through a search of its business records, Progressive certifies it will to the
22 best of its ability, identify all potential Settlement Class Members and subject to the release
23 of claims referred to in paragraph 20 above, and will promptly share that list of persons and
24 the search parameters that went into the creation of that list with Class Counsel upon the
25 execution of this Agreement. The Parties agree that the list will remain confidential in
26 accordance with paragraph 65, and is only to be used for purposes of effectuating this
Settlement. A Person not on the class list prepared by Progressive shall not be a Settlement
Class Member unless that Person submits a claim under this Settlement.

1 **III. PRELIMINARY CLASS CERTIFICATION**

2 31. Upon execution of this Agreement, the Parties shall submit this Agreement to
3 the Court and request the Court to enter a Preliminary Approval Order

4 32. For purposes of this Settlement only, the Parties stipulate and agree to the
5 certification of the Settlement Class defined in this Agreement and that: (i) the proposed
6 Class meets the requirements of CR 23(a) and (b)(3); (ii) the proposed notice is the best and
7 most practicable under the circumstances, and satisfies the requirements of CR 23 and Due
8 Process; and (iii) the terms of the Settlement are fair and reasonable. For purposes of the
9 Settlement, the Named Plaintiff is agreed upon as a suitable Class Representative.

10 33. Preliminary certification of the Settlement Class and appointment of the
11 Settlement Class Representative and Class Counsel by the Court shall be binding only with
12 respect to the Settlement of the Action. In the event this Agreement is terminated pursuant to
13 its terms, or a Final Judgment for any reason does not occur, the certification of the
14 Settlement Class shall be nullified, and the Action shall proceed as though the Settlement
15 Class had never been certified, without prejudice to the Court's consideration, on the merits,
16 of any properly submitted Motion for Class Certification. The Named Plaintiff and Class
17 Counsel agree that neither this Agreement, nor any pleading or other paper related in any
18 way to this Agreement, nor any act or communication in the course of negotiating,
19 implementing or seeking approval of this Agreement, shall be deemed an admission by the
20 Named Plaintiff or Class Counsel of any matter related in any manner thereto, or by
21 Progressive, that certification of any class is appropriate in this litigation or any other
22 litigation, or otherwise shall preclude Progressive from opposing or asserting any argument it
23 may have with respect to certification of a class in this or any other matter.

24 34. Upon the Preliminary Approval of this Proposed Settlement by the Court, as
25 evidenced by entry of the Preliminary Approval Order, all proceedings in the Action shall be
26 stayed until further order of the Court, except such proceedings as may be necessary either to
implement the Proposed Settlement or to comply with or effectuate the terms of this
Agreement. Additionally, any other litigation against Progressive brought by this Class

1 against Progressive shall be stayed or enjoined by the Court. The stay contemplated herein
2 does not apply to the pending litigation, *Folweiler v. FAIR Health, Inc.*, King County Cause
3 No. 15-2-13107-9, or to any other litigation except an action that was brought by this Class
4 against Progressive.

5 **IV. NOTICE, COSTS OF NOTICE, AND ADMINISTRATION OF SETTLEMENT**

6 35. Notice of the pendency of the Action and of the Settlement shall be made by
7 the Class Notice, which will be sent by the Class Administrator.

8 36. Within thirty (30) days of the entry of the Preliminary Approval Order, the
9 Class Notice, substantially in the form attached hereto as Exhibit A, shall be sent by first
10 class mail, postage prepaid, to the last known address of each Person Progressive has
11 determined, from a review of its business records, to be a Settlement Class Member. This
12 shall constitute the Initial Notice Date. A copy of the Claim Forms, substantially in the
13 forms attached to the Class Notice, will be included with the Class Notice. The last known
14 address shall be determined from the latest information available in the Progressive's files,
15 which will be updated through the National Change of Address (NCOA) Database.

16 37. In the event any Class Notice is returned as undeliverable, the Class
17 Administrator shall make one additional update search (i.e., one level beyond the NCOA
18 database) for a correct address and re-mail to that address if one is located.

19 38. Progressive shall also mail the Notice and Claim Forms to all such persons
20 who request them. In addition, the Notice and Claim Forms shall be sent to each Class
21 Member whose identity becomes known as a result of the Class Notice, and other subsequent
22 mailings will be made during the Claim Period as the identities or addresses of additional
23 Class Members become known.

24 39. Progressive shall pay all costs of notice and claims administration, including
25 costs associated with identifying Settlement Class Members and providing notice of the
26 pendency of the Action and of the Settlement embodied herein to the Settlement Class
Members in accordance with the terms of the Court's Preliminary Approval Order. Costs of
administration (including, but not limited to, printing and mailing the Class Notice, address

1 updating costs and costs to re-mail the Class Notice, printing and distributing Payments to
2 Settlement Class Members and all postage relating to the foregoing) will be paid by
3 Progressive from its own funds.

4 **V. CLAIMS PROCEDURE**

5 40. Settlement Class Members will be deemed Settlement Class Members unless
6 they timely submit a written request for exclusion from the Settlement Class postmarked not
7 later than 30 days before the Final Approval Hearing, in the manner set forth below in
8 Paragraph 62.

9 41. Additionally, in order to potentially qualify for payment as a member of the
10 Settlement Class, Settlement Class Members must submit a completed and signed Claim
11 Form, postmarked not later than the end of the Claim Period as listed in the Class Notice.
12 The Class Administrator shall establish, as of the date of the initial mailing of the Class
13 Notice, a dedicated P. O. Box to be used for submission of Claim Forms.

14 42. The Claims Administrator will promptly notify a Settlement Class Member if
15 it deems that Person's Claim Form materially incomplete or deficient, and specify any
16 additional information that must be submitted. Notification shall be by first class mail unless
17 the Settlement Class Member specifies another mode of notification. The Claims
18 Administrator will contemporaneously provide Class Counsel with copies of the
19 notifications. Such Persons shall have 21 days from the date the notification is mailed, or
20 until the expiration of the Claim Period, whichever is longer, to submit the requested
21 information.
22

23 43. Settlement Payments shall be made no later than 60 days after the Effective
24 Date or 60 days after submission of the Claim Form, with any amendments pursuant to the
25 preceding paragraph as necessary, whichever is later.

26 44. Settlement Payment checks shall, unless otherwise directed in writing, be
made payable to the Settlement Class Member. In connection therewith, Progressive is

1 entitled to receive the applicable Tax Identification Number (TIN) or the Settlement Class
2 Social Security Number prior to payment. However, in the event it is determined a
3 Settlement Class Member is deceased or incapacitated or otherwise unavailable, the check
4 shall, unless otherwise mutually directed, be made, in relevant part, payable to the duly
5 authorized legal representative of that party, or if no such party exists, only to the remaining
6 Settlement Class Member or attorney for that Settlement Class Member.
7

8 **VI. CALCULATION OF PAYMENT**

9 45. The Settlement Class Payments set forth in this Section shall be the only
10 payments to which any Settlement Class Member will be entitled.

11 46. Settlement Class Members shall receive as payment: (i) according to
12 Progressive's calculations of the amount of Code 41 reductions at issue and which have been
13 confirmed by Class Counsel's CR 30(b)(6) deposition of Progressive, one hundred and sixty
14 five percent (165%) of the dollar amount of a Code 41 Reduction on a billing line, arising
15 from a Subject Claim, provided that; (a) PIP benefits remain on the Subject Claim; and (b)
16 the Settlement Class Member provider has not already been paid by Progressive the amount
17 reduced by the Code 41 Reduction; and (ii) \$25.

18 **VII. CLAIM CHALLENGE PROCEDURE**

19 47. If Progressive possesses evidence that leads it to reasonably believe that a
20 completed Claim Form was not correctly or honestly completed or that the Claimant has
21 already received payment for the claim by Progressive, it will promptly notify Class Counsel
22 of this fact and the evidence on which it relies, and the following procedure shall be
23 followed:
24

25 a. If Class Counsel agree with Progressive that there is credible prima
26 facie evidence that the Claim should not be paid, a notice shall be sent to the Claimant by
Progressive (with a copy to Class Counsel) advising that the Claim will not be paid,
supplying the evidence and reason(s) for that decision, and advising the Claimant of his or

1 her right to apply to the Court for relief. A Claimant may challenge that decision by filing
2 and serving an application for payment within 30 days of receipt of such notice. On such an
3 application, the burden of proving that the Claim should be paid shall be on the Claimant.
4 The Claim shall be paid or disallowed as provided by the Court.
5

6 b. If Class Counsel does not agree with Progressive that there is credible
7 prima facie evidence that the Claim should be disallowed, then the claim shall be paid unless,
8 within 15 days of receipt of Class Counsel's position, Progressive files with the Court and
9 serves upon the Claimant and Class Counsel an application with the Court to disallow the
10 Claim. On such an application, the burden of proving that the Claim Form was correctly and
11 honestly filled out shall be on the Claimant; the burden of proving that the Claim should not
12 be allowed based on previous payment or other reason will be on Progressive. The Claim
13 shall be paid or disallowed as provided by the Court.

14 **VIII. COMMUNICATIONS WITH THE CLASS**

15 48. The Class Notice shall list Class Counsel's address and telephone number.
16 Communications relating to the Action or this Settlement with Persons receiving Class
17 Notices and Settlement Class Members shall be handled through Class Counsel, and/or the
18 Class Administrator, as necessary. Nothing in this Agreement shall be construed to prevent
19 Progressive, its employees, attorneys, agents, or representatives from communicating with
20 Settlement Class Members in the normal course of business operations.

21 49. Neither Progressive nor Class Counsel shall be responsible in any way for any
22 attorneys' lien submitted by any prior counsel for any of the Settlement Class Members, nor
23 shall any attorneys' lien be created by any of the efforts by the Parties to effectuate any of the
24 terms of this Agreement, and this provision shall be incorporated into the Final Approval
25 Order of this Agreement.
26

IX. CLASS COUNSEL'S FEES AND COSTS AND CLASS REPRESENTATIVE FEES

1 50. The Parties recognize that Class Counsel are entitled to an award of
2 attorneys' fees and expenses for the work performed and the results obtained in the Action.
3 Class Counsel intend to seek Court approval for a fee and expense award of \$135,000. For
4 purposes of determining an award of reasonable attorneys' fees and expenses, the Parties
5 agree that the total value of the settlement to the class is approximately \$710,174, plus \$25
6 per Settlement Class Members that make a Subject Claim, plus administrative costs.
7 Progressive shall not oppose, either directly or indirectly, the amount of fee and expense
8 request listed above that Class Counsel intend to seek. Under no circumstances will
9 Progressive be obligated to pay any award of greater than this amount.
10

11 51. Additionally, the Parties agree that Class Counsel will request a Class
12 Representative award to the Named Plaintiff in the amount up to \$5,000 in recognition of the
13 risk and effort undertaken in prosecuting this case. Progressive agrees to pay such Class
14 Representative award, unless otherwise ordered by the Court.

15 52. The Class Representative award, and the attorneys' fees and costs awarded by
16 the Court, shall be in addition to the amounts paid to Settlement Class Members pursuant to
17 this Agreement, and shall be paid by Progressive within 30 days of the Effective Date, as
18 defined in Section XII below.

19 **X. CONDITIONS OF SETTLEMENT AND EFFECT OF DISAPPROVAL,**
20 **CANCELLATION OR TERMINATION OF AGREEMENT**

21 53. The Named Plaintiff, Settlement Class Members and Progressive consent to
22 the entry of a Final Judgment.

23 54. If the Court disapproves this Agreement or fails to rule, or if the Court enters
24 the Final Judgment but it is reversed or vacated on appeal, this Agreement shall be null and
25 void and of no force and effect. If the Court materially modifies any provision of the
26 Agreement or proposed Final Judgment, or if either is materially modified on appeal or
remanded to the Court for modification, or if any of the terms of this Agreement is impaired

1 in any material way, then either party shall have the option of terminating this Agreement
2 and withdrawing its consent to the entry of the Final Judgment, in which case this Agreement
3 shall be null and void and of no force and effect. Either party shall have the right to
4 determine, in its discretion, materiality in connection with any court's disapproval, reversal,
5 vacation, or modification of the Agreement or proposed Final Judgment, except that such
6 determination shall be made in good faith and in compliance with prevailing law regarding
7 the standards for determining materiality. Either party shall have 15 days from the event
8 triggering its option to inform Class Counsel that it is exercising its option of terminating this
9 Agreement.
10

11 55. If the Court does not finally approve the Settlement as described herein, all
12 obligations of Progressive under this Agreement terminate, including but not limited to any
13 obligation to pay attorneys' fees. Additionally, the Parties agree that neither this Agreement,
14 nor any pleading or other paper related in any way to this Agreement, nor any act or
15 communication in the course of negotiating, implementing or seeking approval of this
16 Agreement, shall be deemed an admission by Progressive that certification as a class is
17 appropriate in any other litigation, or otherwise shall preclude Progressive from opposing or
18 asserting any argument it may have with respect to certification of a class in this Action.
19

20 56. In the event the number of Settlement Class Members who elect to opt out
21 exceeds 10%, Progressive in its sole discretion may elect to terminate this Agreement on the
22 ground that the exclusion of Class Members at that level threatens to frustrate Progressive's
23 essential purpose in entering into this Agreement. Progressive's election to terminate under
24 this paragraph shall be made not later than 10 days after the end of the opt-out period set
25 forth in paragraph 39 above by notifying Class Counsel in writing of its election.
26

XI. FINAL APPROVAL OF SETTLEMENT

57. Class Counsel will file a motion seeking the Court's final approval of the
Proposed Settlement at a Final Approval Hearing to be held at a time, date, and location that

1 will be stated in the Preliminary Approval Order, and listed in the Class Notice. The Parties
2 will request that the Final Approval Hearing be held at the earliest date that is at least 90 days
3 after the Preliminary Approval Order that the Court is available to hear the matter. Class
4 Counsel shall request the Court to enter a Final Judgment approving the Proposed Settlement
5 without material alteration, and directing the Parties and their counsel to comply with and
6 consummate the terms of this Agreement.
7

8 **XII. EFFECTIVE DATE**

9 58. The “Effective Date” of this Agreement shall be the first date after which all
10 the following events and conditions have been met or occurred:

- 11 a. All Parties have executed this Agreement; and
12 b. The Court has, by entry of the Preliminary Approval Order,
13 preliminarily approved this Agreement, the Proposed Settlement set forth herein and the
14 method for providing notice to the Settlement Class; and
15 c. The Court has entered the Final Judgment, finally approving this
16 Agreement and releasing the Released Persons from the Released Claims and dismissing with
17 prejudice, and without leave to amend, the Action and all claims asserted therein, except
18 reserving claims as to those Settlement Class Members who timely request exclusion; and
19 d. In the event there is an objection to entry of the Final Judgment, or
20 intervention to contest same, the expiration (without the filing or noticing of an appeal) of the
21 time to appeal from the Final Judgment; or (ii) the entry of a final dismissal order of any and
22 all appeals from the Final Judgment; or (iii) affirmance on appeal of the Final Judgment
23 without material alteration; or (iv) if a ruling or decision is entered by an appellate court with
24 respect to affirmance of the Final Judgment, the time to petition for reconsideration with
25 respect to such ruling or decision has expired; or (v) if a petition for reconsideration with
26 respect to an appellate decision as to the Final Judgment is filed, the petition has been denied
or dismissed or, if granted, has resulted in affirmance of the Final Judgment without material

1 alteration.

2 59. In the event that any of the events or conditions described above are not met
3 or do not occur, this entire Agreement shall become null and void, except Progressive shall
4 have the option to agree in writing to waive the event or condition and proceed with this
5 Settlement, in which case the Effective Date shall be deemed to have occurred on the date of
6 said written agreement, or a date otherwise specified in said written agreement.
7

8 60. Notwithstanding the foregoing, an appeal or motion for discretionary review
9 pertaining solely to the Class Representative award, or the award of attorneys' fees and costs
10 to Class Counsel, shall not in any way delay the Effective Date, except with respect to those
11 appealed items.

12 **XIII. OBJECTIONS AND REQUESTS FOR EXCLUSION**

13 61. Settlement Class Members who wish to exclude themselves from the
14 Settlement Class must prepare a written request for exclusion, postmarked not later than 30
15 days before the Final Approval Hearing, which shall be sent to the Class Administrator at the
16 address provided in the Class Notice. Written requests for exclusion must be signed and
17 include the Settlement Class Member's name, address, and telephone number, and expressly
18 state the desire to be excluded from the Settlement Class. No Settlement Class Member may
19 effect an exclusion of a class of individuals or represent such a class.

20 62. The Class Administrator shall promptly log each request for exclusion that it
21 receives and provide copies of the log and all such requests for exclusion to Progressive and
22 Class Counsel.

23 63. Settlement Class Members who do not file a timely request for exclusion may
24 file a notice of intent to object to the Proposed Settlement, or intervene in the Action for the
25 purpose of contesting the Proposed Settlement. The written notice of intent to object and/or
26 intervene must be: (a) filed with the Clerk of the Court not later than 30 days before the date
set for the Final Approval Hearing as listed in the Class Notice; and (b) sent by first-class

1 mail, postmarked not later than 30 days before the date set for the Final Approval Hearing, to
2

3 For the Class:

For Progressive:

4 David E. Breskin
5 Breskin, Johnson & Townsend
6 PLLC
7 1000 Second Avenue, Suite 3670
8 Seattle, WA 98104

J. Matthew Donohue
Markowitz Herbold PC
1211 SW Fifth Avenue, Suite 3000
Portland, OR 97204-3730

9 64. Any Settlement Class Member who does not so request to object or intervene
10 waives the right to do so in the future, and shall be forever barred from intervening or making
11 any objection to the Proposed Settlement or Final Judgment. Any Notice of Intent to Object
12 or Intervene must contain the information set forth in the Preliminary Approval Order and
13 Class Notice.

14 65. Prior to the Final Approval Hearing, Class Counsel and Progressive's Counsel
15 shall exchange a complete list of all timely and valid requests for exclusion received by the
16 Class Administrator as of that date.

17 **XIV. CONFIDENTIALITY OF INFORMATION**

18 66. Progressive asserts that the following constitutes highly confidential
19 information of Progressive (the "Confidential Information"): (a) the policy numbers, and
20 claims-related data concerning insureds and Settlement Class Members compiled by
21 Progressive and/or the Class Administrator in effectuating the Proposed Settlement; and (b)
22 the electronic data processing and other record keeping procedures and materials to be
23 utilized by Progressive and/or the Class Administrator in identifying the Settlement Class
24 Members and effectuating Progressive's other obligations under this Agreement and/or the
25 Proposed Settlement. The confidentiality of all Confidential Information provided to Class
26 Counsel by Progressive shall be protected from disclosure by Class Counsel and/or other
attorneys for the Named Plaintiff in this Action to any persons other than those described in

1 Paragraph 67 below.

2 67. No persons other than Progressive, Progressive's counsel, and
3 clerical/administrative personnel employed by Progressive or Progressive's Counsel, Class
4 Counsel and clerical/administrative personnel employed by Class Counsel, Class Members,
5 the Class Administrator, and such other persons as the Court may order, or Progressive may
6 agree, shall be allowed access to any Confidential Information.
7

8 68. Within 90 days after the Effective Date, Class Counsel and/or other attorneys
9 for Plaintiff in this Action shall upon request return to Progressive or destroy all Confidential
10 Information (as identified by Progressive), other than the Class list, provided by Progressive
11 to Class Counsel or anyone they employed or retained in this Action, either in discovery or in
12 connection with this Agreement. Upon request, Class Counsel shall deliver a letter to
13 Progressive certifying their compliance with this Paragraph.

14 69. Class Counsel and the Named Plaintiff shall not make any statements to the
15 media, orally or in writing, about the Action, or this Agreement, other than statements which
16 are fully consistent with this Settlement and the Class Notice, except in a bona fide court
17 proceeding relating to the subject matter of the Action.

18 **XV. DISMISSAL OF ACTION AND RELEASES**

19 70. Upon the Court's Final Approval of this Agreement and the Proposed
20 Settlement set forth herein, the Final Judgment shall be entered providing for the dismissal,
21 with prejudice and without leave to amend, of the Action, and the Release by the Settlement
22 Class Members, including the Named Plaintiff, and including their past, present or future
23 agents, legal representatives, trustees, parents, estates, heirs, executors and administrators, of
24 all Released Claims against the Released Persons.
25

26 71. Upon the Effective Date, by operation of the entry of the Final Judgment, each
Settlement Class Member, including the Named Plaintiff, and including their past, present or
future agents, legal representatives, trustees, parents, estates, heirs, executors and

1 administrators, shall be held to have fully released, waived, relinquished and discharged, to
2 the fullest extent possible by law, the Released Persons from the Released Claims.

3
4 72. Upon the Effective Date, the Settlement Class Members, including the Named
5 Plaintiff, and including their past, present or future agents, legal representatives, trustees,
6 parents, estates, heirs, executors and administrators, expressly agree that they, acting
7 individually or together, shall not and shall not seek to institute, maintain, prosecute, sue,
8 assert or cooperate in any action or proceedings against any of the Released Parties for any of
9 the Released Claims.

10 73. Notwithstanding the Court's entry of the Final Judgment, the Court shall
11 retain ongoing jurisdiction over this Action for purposes of enforcing and interpreting this
12 Agreement, including entering such orders and injunctions to prevent any collateral litigation
13 that may be filed by Settlement Class Members, if necessary.

14 **XVI. DENIAL OF LIABILITY**

15 74. Were it not for this Settlement, Progressive would have vigorously contested
16 each and every claim in the Action. Progressive maintains that it has consistently acted in
17 accordance with governing laws at all times. Progressive vigorously denies all the material
18 allegations set forth in the Action. Progressive nonetheless has concluded that it is in its best
19 interest that the Action be settled on the terms and conditions set forth in this Agreement.
20 Progressive reached this conclusion after considering the factual and legal issues in the
21 Action, the substantial benefits of a final resolution of the Action, the expense that would be
22 necessary to defend the Action through trial and any appeals that might be taken, the benefits
23 of disposing of protracted and complex litigation, and the desire of Progressive to conduct its
24 business unhampered by the distractions of continued litigation, and the Settlement of this
25 matter by Progressive, and any steps taken in accordance therewith, shall not be used in any
26 way as precedent in any pending or future actions including any actions against any of the
Released Parties.

1 75. As a result of the foregoing, the Released Parties enter into this Agreement
2 without in any way acknowledging any fault, liability, or wrongdoing of any kind. Neither
3 this Agreement, nor any of its terms or provisions, nor any of the negotiations or proceedings
4 connected with it, shall be construed as an admission or concession by the Released Parties
5 of the truth of any of the allegations made in the Action, or of any liability, fault, or
6 wrongdoing of any kind whatsoever on the part of the Released Parties.
7

8 76. To the extent permitted by law, neither this Agreement, nor any of its terms or
9 provisions, nor any of the negotiations shall be utilized or offered as evidence or received in
10 evidence in any pending or future civil, criminal, or administrative action or proceeding, for
11 any purpose of establishing any liability or admission by the Released Parties, except in any
12 proceedings brought to enforce the Agreement or otherwise with the written consent of
13 Progressive.

14 77. Neither this Agreement, nor any pleading or other paper related in any way to
15 this Agreement, nor any act or communication in the course of negotiating, implementing or
16 seeking approval of this Agreement, shall be deemed an admission by Progressive that
17 certification of a class or subclass is appropriate in any other litigation, or otherwise shall
18 preclude Progressive from opposing or asserting any argument it may have with respect to
19 certification of any class(es) or subclass(es) in any proceeding.
20

21 **XVII. DECEASED CLASS MEMBERS**

22 78. Claims may be submitted by any attorney or interested person on behalf of a
23 deceased Settlement Class Member's estate. Before distributing any funds, Progressive may
24 request that the Court approve the party submitting such a claim as the proper party to
25 receive distribution of funds. In addition, if and when necessary, Progressive may request
26 that estates deemed entitled to benefits under this Agreement be reopened before such
benefits will be paid.

XVIII. INCAPACITATED CLASS MEMBERS

1 79. Claims may be submitted by any attorney or interested person on behalf of an
2 incapacitated Settlement Class Member. Before distributing any funds, Progressive may
3 request that the Court approve the party submitting such a claim as the proper party to
4 receive distribution of funds.
5

6 **XIX. TAX OBLIGATIONS**

7 80. Tax obligations which may arise by virtue of the Settlement Class Payments
8 made pursuant to this Agreement, if any, are solely the responsibility of the Persons who
9 receive such Settlement Class Payments, and are not the responsibility of Progressive. The
10 Parties to this Agreement do not in any way express any belief or opinion regarding the
11 existence of such tax obligations and do not undertake to provide any advice to any
12 Settlement Class Member regarding any tax obligations which may arise by virtue of any
13 Settlement Class Payments made pursuant to this Agreement.

14 **XX. MISCELLANEOUS PROVISIONS**

15 81. This Agreement shall not be construed to affect or limit the rights of Class
16 Members against third parties unrelated to Progressive, including, but not limited to, Mitchell
17 Medical or FAIR Health, Inc. In particular, nothing in this Agreement shall be construed to
18 affect in any way, or require the forfeiture or compromise of, any personal injury claims
19 against third parties. Nothing in this Agreement shall be construed to affect in any way the
20 other existing policy rights of Class Members or Progressive concerning any other aspect of
21 their insurance agreements.
22

23 82. The Parties hereto and their undersigned counsel agree to undertake their best
24 efforts and mutually cooperate to effectuate this Agreement and the terms of the Proposed
25 Settlement set forth herein, including taking all steps and efforts contemplated by this
26 Agreement, and any other steps and efforts which may become necessary by order of the
Court or otherwise. The Parties hereto and their undersigned counsel further agree to defend
this Agreement against objections made to final approval of the Settlement or in any appeal

1 of the Final Judgment or collateral attack on the Agreement or Final Judgment.

2 83. The undersigned counsel represent that they are fully authorized to execute
3 and enter into the terms and conditions of this Agreement on behalf of their respective
4 clients.

5 84. Except as otherwise provided by written agreement, this Agreement and its
6 Exhibits contains the entire agreement between the Parties hereto, and supersedes any prior
7 agreements or understandings between them. All terms of this Agreement are contractual
8 and not mere recitals. The terms of this Agreement are and shall be binding upon each of the
9 Parties hereto, their agents, attorneys, employees, successors and assigns, and upon all other
10 Persons claiming any interest in the subject matter hereof through any of the Parties hereto,
11 including any Settlement Class Member.

12 85. This Agreement may be amended or modified only by a written instrument
13 signed by counsel for all Parties hereto. Amendments and modifications may be made
14 without additional notice to the Settlement Class Members unless such notice is required by
15 the Court.

16 86. The exhibits to this Agreement are an integral part of the Settlement and are
17 hereby incorporated and made a part of this Agreement.

18 87. None of the Parties shall be considered to be the drafter of this Agreement or
19 any provision hereof for the purpose of any statute, case law or rule of interpretation or
20 construction that would or might cause any provision to be construed against the drafter.

21 88. To the extent permitted by law, this Agreement may be pleaded as a full and
22 complete defense to, and may be used as the basis for an injunction against, any action, suit
23 or other proceeding which may be instituted, prosecuted or attempted in breach of this
24 Agreement.

25 89. Progressive, the Named Plaintiff, and each Settlement Class Member
26 irrevocably submit to the exclusive jurisdiction of the Court for any suit, action, proceeding

1 or dispute arising out of or relating to this Agreement or the applicability of this Agreement
2 and exhibits, but for no other purpose.

3
4 90. This Agreement shall be deemed to have been executed upon the last date of
5 execution by all the undersigned counsel.

6 91. This Agreement may be executed in counterparts, each of which shall
7 constitute an original.

8 Dated this 1st day of August, 2016.

9
10 BRESKIN, JOHNSON & TOWNSEND PLLC

MARKOWITZ HERBOLD PC

11 s/ David E. Breskin

s/ Matthew Donohue

12 David E. Breskin

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