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Of Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

ERIC MACCARTNEY
LUANNE MUELLER
individually and on behalf of all others

Plaintiffs

vs

GORDON, AYLWORTH & TAMI, P.C. and **VISION INVESTIGATIVE SERVICE, LLC**

Defendants

Case No. 3:18-cv-00568-AC

PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT AND CERTIFICATION

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LR 7.1 CERTIFICATION

Defendants Gordon, Aylworth & Tami, P.C. (GAT) and Vision Investigative Service, LLC (Vision) (collectively defendants) do not oppose the relief sought in this motion.

MOTION

Plaintiffs Eric MacCartney (MacCartney) and Luanne Mueller (Mueller) (collectively plaintiffs), as proposed Class Representatives on behalf of themselves and the other proposed Class Members, and defendants have agreed on a proposed class settlement of all claims against defendants, as set forth in the Class Action Settlement Agreement (Settlement Agreement) filed herewith as Exhibit 1, the terms, definitions, provisions, reservations, and conditions of which are incorporated and made part of this motion.

Unopposed by defendants, plaintiffs move the Court, pursuant to FRCP 23, to enter a Preliminary Approval Order, similar in form to the proposed order attached to Exhibit B of the Settlement Agreement:

1. Granting certification of the proposed Class as defined in the proposed Settlement Agreement and herein for settlement purposes only;
2. Granting preliminary approval of the proposed settlement as memorialized in the Settlement Agreement as being fair,

adequate, and reasonable, such that notice to the Class should be provided pursuant to the proposed Settlement Agreement;

3. Approving the summary (postcard) notice be directly mailed to proposed Settlement Class Members in a form similar to the one attached to the proposed Settlement Agreement as Exhibit D;

4. Approving the Long Form Notice in a form similar to the one attached to the proposed Settlement Agreement as Exhibit E;

5. Approving the proposed Settlement Agreement's procedure for persons in the proposed Settlement Class to object, including the right to object to plaintiffs' counsel's attorneys' fees and costs, or opt out from the proposed settlement;

6. Setting of a specified date consistent with the applicable proposed time periods set forth in the Settlement Agreement, by or on which:

- The Settlement Administrator must send the postcard notices to the Class Members;
- Counsel shall file their initial motion for fees, costs, and expenses;
- A Final Fairness Hearing will occur;
- Objections shall be heard and papers in support of such objections must be submitted to the Court; and
- All persons in the Class wishing to exclude themselves from the proposed settlement will have to send their exclusion requests;

7. Appointing plaintiffs as Class Representatives;

8. Appointing plaintiffs' attorneys as Class Counsel;

9. Appointing of JND Legal Administration (JND) as the settlement Class Administrator as jointly agreed to by the parties;

10. Any other relief requested herein, implicated by and necessary for approval of the Settlement Agreement, or that the Court believes is necessary, just, or proper.

INTRODUCTION

1. Factual Background and Procedural History

Within a year of the commencement of this putative class action, GAT filed debt collection lawsuits against plaintiffs MacCartney and Mueller,[1] in an attempt to collect on defaulted consumer debts owed to its clients. Doc. 17-1.

As part of the debt collection lawsuits, Vision then served complaints, drafted by GAT, upon plaintiffs. *Id*. Service of the complaints on each plaintiff was accomplished by restricted delivery certified mail, return receipt requested, along with a follow-up first-class mailing. *Id*. The actual cost of GAT's service by mail was approximately $7. Doc. 67 ¶ 13. The complaints filed against plaintiffs were based on a

[1] One of the original representative plaintiffs, Carlton Chase, was removed as a representative plaintiff in this action via plaintiff's Second Amended Complaint filed on July 7, 2020, but is still a member of the Class. *See* Doc. 67.

common template and stated that GAT was seeking only "actual costs and disbursements" that were "incurred herein" against plaintiffs. Doc. 17-1; Doc. 67 ¶¶ 29, 30.

As part of the motions for default orders it sought against each plaintiff, GAT submitted cost bills to the courts ex parte, based on a common template, stating that its representations were "for use as evidence in court and [were] subject to penalty of perjury," that expedited service took place, that expedited service was necessary, that GAT was entitled to collect service costs of $45 from each plaintiff, that the $45 service cost was a reasonable fee, that the $45 service cost "reflect[s] the actual costs of the service," and that the service costs were "billed directly to the client and are not overhead expenses." *Id*. GAT then obtained default judgments against each plaintiff, and each plaintiff paid the full amount of the default judgments, including the $45 service fees at issue. *Id*.

However, contrary to GAT's misrepresentations to the state courts and to plaintiffs, expedited service was neither necessary nor performed, nor were the service fees reasonable or in an amount actually incurred, given the amounts actually spent on the mailings. Doc. 67 ¶¶ 29-30. After consulting with their attorneys, plaintiffs became aware of defendants' unlawful service fee collection scheme and agreed to join together as proposed Class Representatives, seeking to stop defendants'

unlawful practices and to recover appropriate damages for defendants' unlawful service fee collection scheme.

After plaintiffs filed a First Amended Complaint, defendants moved to dismiss all of plaintiffs' claims under FRCP 12(b)(1) and (b)(6), arguing that the *Rooker-Feldman* doctrine and issue preclusion barred all of plaintiff's' claims, that Oregon's litigation privilege barred plaintiffs' state law UTPA and unjust enrichment claims,[2] and that those claims were subject to Oregon's anti-SLAPP statute. Doc. 19. Following voluminous briefing from the parties on defendants' motion to dismiss, and oral argument, the Magistrate Judge issued findings and recommendations (F&R) granting defendants' motions and recommending that all of plaintiffs' claims be dismissed because they were supposedly barred by the *Rooker-Feldman* and issue preclusion doctrines.[3] Doc. 37.

Plaintiffs filed objections to the F&R and the parties spent substantially more time briefing the issues again for the Court. Docs. 39, 40. After another oral argument, the Court declined to adopt the F&R in its entirety, denying defendants' motions, and returning the case

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[2] Defendants raised the litigation privilege argument for the first time in their reply brief, and plaintiffs were granted leave to file a sur-reply to respond to this argument. *See* Docs. 28-34.

[3] The Magistrate Judge declined to address the anti-SLAPP and litigation privilege grounds for dismissal.

back to the Magistrate Judge for consideration of defendants' anti-SLAPP and litigation privilege arguments. After even more supplemental briefing by the parties, the Magistrate Judge recommended that dismissal based on defendants' anti-SLAPP and litigation privilege arguments be denied. Docs. 47-52. Defendants did not object to those findings.

Absent approval of this settlement, if plaintiffs succeeded in proving each of their three claims at trial, plaintiffs and the Class Members would each be entitled to their actual damages under the FDCPA (or in restitution for unjust enrichment) of no more than $45 (the full amount of the service fee collected from them), $200 in statutory damages under the UTPA (*See* ORS 646.638(1)), and plaintiffs would be entitled to up to $1,000 in statutory damages under their FDCPA claim; however, the other Class Members would be comprehensively limited to statutory damages equal to the lesser of $500,000 or 1% of GAT's net worth for their statutory FDCPA damages.[4] *See* 11 U.S.C. § 1692k(a)(2).

2. The Settlement

The parties engaged in multiple mediation sessions with the Honorable Jean Maurer: the first on May 27, 2020, which was

[4] GAT has declared through discovery that it is "an S Corporation and retains no funds. Consequently, it has a net worth of zero." Declaration of Kelly D. Jones ¶ 6.

unsuccessful, and again on May 17, 2021, where they reached agreement on the material terms of the Settlement Agreement. Declaration of Kelly D. Jones (Jones Decl.) ¶ 3. In the time between the two mediation sessions, the parties engaged in extensive written discovery. *Id*. ¶ 5. Key provisions of the Settlement Agreement, attached in full as Exhibit 1, are summarized below.

2.1. Class Definition

Plaintiffs request preliminary certification for settlement purposes only of a Class defined as:

a. All individual consumers with Oregon addresses;
b. Who defendant GAT filed a lawsuit against to collect a consumer debt on behalf of its clients on or after April 3, 2017;
c. Who were served by defendant Vision prior to January 1, 2018;
d. Who had lawsuits filed against them in which GAT submitted a statement for costs and disbursements claiming Vision's service fees were billed directly to the client and not overhead expenses, the service fees reflected the actual costs of the service, or the expedited service was necessary, and those requested costs for Vision's service fees were awarded by the Court; and
e. Who paid Vision's service fees.

Ex. 1 ¶ 7.

The Class does not include: defendants; any entity that has a controlling interest in either defendant or defendants' current or former directors, officers, counsel, and their immediate families; or any persons who validly and timely request exclusion ("opt out") from the Class. *Id*.

2.2. Class Membership

After reviewing "documentation and information provided by Defendants regarding the Class Members and based upon that review the Parties agree that the **269** individuals listed in Exhibit 1 of the Xu Declaration are the only known Class Members that fit within the Class Definition above." *Id*.; *see also* Declaration of Xin Xu (Xu Decl.), Ex. 1 ¶ 1 (attached as Exhibit 1 is a list of 269 individual Class Members with 273 distinct claims (three Class Members fall under the Class definition more than once) who are releasing their claims in the settlement, along with their case numbers, filing dates, and the Class Members' last known addresses); *id*. ¶ 3 ("The class list attached as Exhibit 1, identifying the class members based on the class definition set forth above, was compiled as a result of defendants' diligent and best efforts, including the search of their records and files regarding the underlying litigation against the individuals encompassed by the class definition, and defendants believe and represent that this class list includes all individuals who fit within this class definition.").

2.3. Class Compensation

If the settlement is approved, each Class Member who does not choose to opt out will each be mailed a check in the amount of **$245,** with no claim process or "opt-in" necessary. Each of the two named plaintiffs will receive a check for $1,245 (an additional $1,000) because they, unlike the absent Class Members, are entitled to (up to) this amount of statutory damages pursuant to 11 U.S.C. § 1692k(a)(2)(B).

The proposed settlement is nonreversionary—meaning that if any proceeds that may be left in the Settlement Fund from checks that do not get cashed by or cannot be delivered (or redelivered) to Class Members will not go back to defendants or their insurer. *Id.* ¶ 34. Instead, any such amounts will be paid to *cy pres*. The parties have agreed that any *cy pres* funds should be split between Oregon Consumer Justice and Oregon Consumer League, because these are two local nonprofit organizations focused on consumer protection issues, and this is a local Oregon-only class action. *Id.*

3. Release

Upon final approval, each Class Member who has not opted out will be releasing all "Released Claims" against the "Released Parties." *Id.* ¶ 36. The terms are defined in ¶¶ 13 and 14 of the Settlement Agreement. No person will be releasing any claims unless they are a Class Member within the Class Definition and any Class Member can

opt out if they so choose. And each Class Member that does not opt out will be sent a $245 check.

4. Class Administration

To ensure that notice and distribution of the Settlement Fund is done properly and effectively, the parties agreed that defendants would retain an experienced and professional class administrator. *Id.* ¶ 8. Defendants have done so. Plaintiffs agree that the entity chosen, JND Legal Administration (JND) is a fine choice and has the experience and professional tools to properly and effectively administer the notice and distribution plan for this settlement. *See generally*, Declaration of Jennifer Keough, filed in support of this motion. Defendants have agreed to pay all costs of class administration with no effect on the amounts to be paid to Class Members.

5. Class Counsel's Fees, Costs, and Expenses

Plaintiffs did not negotiate payment of any amount of their attorneys' fees, costs, or expenses before obtaining a settlement for the Class. In fact, plaintiffs did not attempt to negotiate any amount for these amounts at any time. *Id.* at 24. The only "agreement" is that plaintiffs will apply to the Court for reasonable fees, costs, and expenses at two stages of the settlement process and defendants will then pay an amount that the Court decides plaintiffs' counsel reasonably incurred to prosecute this case and to adequately represent the Class Members. *Id.*

In other words, the Settlement Agreement contains no "clear sailing" agreement or any such similar provision. *Id.*

GENERAL LEGAL STANDARDS

The Ninth Circuit has declared a strong judicial policy for the settlement of class actions. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). Nevertheless, where, as here, "parties reach a settlement agreement prior to class certification, courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003); *see also In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 949 (9th Cir. 2011) (holding that when parties seek approval of a settlement negotiated prior to formal class certification, "there is an even greater potential for a breach of fiduciary duty owed the class during settlement").

In conducting the second part of its inquiry, the "court must carefully consider whether a proposed settlement is fundamentally fair, adequate, and reasonable, recognizing that 'it is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness . . . .'" *Staton*, 327 F.3d at 952 (internal quotation marks and citation omitted). When parties seek class certification only for the purposes of settlement, FRCP 23 "demand[s]

undiluted, even heightened, attention" to the certification requirements. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

The approval of a class action settlement prior to certification takes place in two stages (1) the Court preliminarily approves the settlement pending a fairness hearing, temporarily certifies the Class, then authorizes notice to be given to the Class, then (2) at the fairness hearing, after notice is given to the proposed Class Members, the Court will entertain any of their objections to the treatment of this litigation as a class action or the terms of the Settlement Agreement. *See, e.g.*, *Diaz v. Tr. Territory of Pac. Islands,* 876 F.2d 1401, 1408 (9th Cir. 1989); *see also* Manual for Complex Litigation (4th) § 21.632 (noting that if the parties move for both class certification and preliminary approval, the certification hearing and preliminary fairness evaluation can usually be combined).

ARGUMENTS IN SUPPORT

1. The Class Should Be Preliminarily Certified

Before certifying a class, a court must determine that the proposed class action satisfies four prerequisites: (1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) there are questions of law or fact common to the class (commonality); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality); and (4) the representative

parties will fairly and adequately protect the interests of the class (adequacy). FRCP 23(a); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998).

In addition to meeting the numerosity, commonality, typicality, and adequacy prerequisites under FRCP 23(a), the class action must fall within one of the three types specified in FRCP 23(b). Here, the parties move for certification under FRCP 23(b)(3). To satisfy FRCP 23(b)(3) plaintiffs must show that questions of law or fact common to class members "predominate over any questions affecting only individual members" (predominance) and that the class action must be "superior to other available methods for fairly and efficiently adjudicating the controversy" (superiority). FRCP 23(b)(3); *see also Hanlon*, 150 F.3d at 1019.

As explained below, because the required factors of FRCP 23(a) and (b)(3) have clearly been satisfied here, the Court should enter an order conditionally certifying the proposed Class similar to the proposed order attached as Exhibit B to the Settlement Agreement filed herewith.

1.1. Rule 23(a)

1.1.1. Numerosity

The first requirement for class certification under FRCP 23(a) is that "the class [must be] so numerous that joinder of all members is impracticable." FRCP 23(a)(1). Joinder is impracticable where it would

be difficult or inconvenient for all class members to join in the action. *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964). In this district, there is a "rough rule of thumb" that 40 class members is sufficient to meet the numerosity requirement. *See Giles v. St. Charles Health Sys., Inc.*, 294 F.R.D. 585, 590 (D. Or. 2013); *Or. Laborers-Emp'rs Health & Welfare Tr. Fund v. Philip Morris, Inc.*, 188 F.R.D. 365, 372 (D. Or. 1998).

Attached as Exhibit 1 to the Declaration of Xin Xu filed in support of this motion is a list identifying the Class Members (Class List). Ms. Xu declares that the Class List "was compiled as a result of defendants' diligent and best efforts, including the search of their records and files regarding the underlying litigation against the individuals encompassed by the class definition, and defendants believe and represent that this class list includes all individuals who fit within this class definition." *Id.* ¶ 3. The Class List is composed of "269 individual class members with 273 distinct claims (three class members fall under the class definition more than once) who are releasing their claims in the settlement, along with their case numbers, filing dates, and the class members' last known addresses." *Id.* ¶ 1.

Although 269 individuals may not be an exceptionally large class, this number of potential Class Members more than satisfies the numerosity requirement under FRCP 23(a)(1), because joinder of all

these 269 Class Members would be impracticable because it would be very difficult, if not impossible.

1.1.2. Commonality

The commonality requirement for certification mandates that "there are questions of law or fact common to the class." FRCP 23(a)(2). Commonality is demonstrated when the claims of all class members "depend upon a common contention . . . that is capable of class-wide resolution." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). The common question or contention "must be of such a nature that it 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." *Id*. However, "[e]ven a single common question will do." *Id*. at 359.

Here, there are many common issues of fact, including that the debt collection complaints filed against plaintiffs and the Class Members were based on a common pleading template with common language stating that GAT would only seek "actual costs and disbursements" that were "incurred herein" against plaintiffs and the Class Members. Doc. 17-1. Then, as part of the motions for default orders it sought against each plaintiff, GAT submitted cost bills to the courts, based on a common template, stating that its representations were "for use as evidence in court and [were] subject to penalty of

perjury," that expedited service took place, that expedited service was necessary, that GAT was entitled to collect service costs of $45 from each plaintiff, that the $45 service cost was a reasonable fee, that the $45 service cost "reflect[s] the actual costs of the service," and that the service costs were "billed directly to the client and are not overhead expenses." *Id*.

There are also many common issues of law, including but certainly not limited to: (1) whether GAT's statements in the collection complaints it served on plaintiffs and the other Class Members that it was seeking "actual costs and disbursements" and the statements made to the Court in its false and deceptive cost statements caused the likelihood of confusion or of misunderstanding as to the source of GAT's services or fees in violation of the UTPA and (2) whether GAT's representations in the complaints it served on consumers—that only "actual costs and disbursements" were being requested when GAT knew that it would be requesting and collecting amounts that were not the actual costs paid for service, and were not actually incurred—were false, deceptive, or misleading, or a deceptive or unfair or unconscionable means to collect the debt in violation of the FDCPA.

These common questions of facts and law (among many others) would have been answered using common evidence, run throughout all

claims of the proposed Class Members including plaintiffs, and therefore easily satisfy the commonality requirement of FRCP 23(a)(2).

1.1.3. Typicality

To satisfy the typicality requirement, the Court must find that the named plaintiffs' claims or defenses are typical of the claims or defenses of the other Class Members. FRCP 23(a)(3). Under the "permissive standards" of Rule 23(a)(3), the "representative's claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. "The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Hanon v. Dataproducts Corp*., 976 F.2d 497, 508 (9th Cir. 1992). To assess typicality, courts look to "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Id*. (internal quotation marks omitted).

In this case, there should be no doubt that the claims of the plaintiffs are reasonably co-extensive with those of the absent Class Members. Plaintiffs and the Class Members suffered the same or similar injury from the same alleged conduct by defendants—they paid an inflated $45 service fee as a result of plaintiffs' alleged violations of the

same statutes, a common scheme, using the same common templates, and through GAT's use of the same "dummy" service company, Vision. Because plaintiffs' and the Class Members' claims arise out of the same course of conduct, the same legal theories, and they all seek the same types (and even amounts) of damages, the typicality requirement under FRCP 23(a)(3) is satisfied.

1.1.4. Adequacy of Representation

FRCP 23(a)(4) provides that the Court must find that "the representative parties will fairly and adequately protect the interests of the class." The adequacy requirement involves two questions: (1) whether "the named plaintiffs and their counsel have any conflicts of interest with other class members"; and (2) whether "the named plaintiffs and their counsel [will] prosecute the action vigorously on behalf of the class." *Hanlon*, 150 F.3d at 1020.

Here, plaintiffs share an obvious common interest with the other Class Members and do not have any claims adverse to absent class members or issues that would benefit plaintiffs to the detriment of other absent Class Members.[5] As discussed *supra*, plaintiffs and their counsel

[5] Again, plaintiffs will both receive an additional $1,000 pursuant to the settlement because the FDCPA provides for statutory damages of up to $1,000 to the named plaintiffs in a class action; whereas the other Class Members' statutory damages under the FDCPA are limited to the lesser of $500,000 or 1% of GAT's net worth (here GAT's net worth has been represented as $0). *See* 11 U.S.C. § 1692k(a)(2)(B). Moreover, the

have vigorously prosecuted the case thus far, including: researching the claims and deciding the case should be filed as a class action; working with the plaintiffs to gather evidence; reviewing voluminous amount of documents including public court records; extensively briefing the legal issues underlying defendants' multiple motions to dismiss under FRCP 12(b)(1) and 12(b)(6) (even after the Magistrate Judge recommended that all claims be dismissed); and drafting, obtaining, and reviewing fairly extensive written discovery. Moreover, plaintiffs' counsel have experience in litigating consumer protection cases and two members of plaintiffs' team have been appointed as lead or co-counsel in class actions in this district or in Oregon state court. *See* Jones Decl. ¶ 10; Declaration of Michael Fuller (Fuller Decl.) ¶ 5; Declaration of Matthew Sutton (Sutton Decl.) ¶ 5.

Throughout this case plaintiffs and plaintiffs' counsel have demonstrated their willingness to continue prosecuting this case vigorously and in representing the interests of the proposed Class Members they will continue to do so until the Class Members obtain just relief through this settlement, or otherwise. *See* Jones Decl. ¶ 7; Fuller Decl. ¶ 3; Sutton Decl. ¶ 3.

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plaintiffs are not requesting any service awards related to their time and efforts participating as the named Class Representatives.

Therefore, the Court should find that plaintiffs and their counsel are adequate to represent the Class.

1.1.5. Ascertainability

To the extent that FRCP 23 implicitly requires that the Class Members be objectively ascertainable,[6] here there is no concern. This is not a nationwide class, where most of the class members are unidentifiable and publication and other such methods of notice are required. As set forth *supra*, the 269 Class Members have been clearly identified—including by their names and most recent mailing addresses. *See* Xu Decl. ¶¶ 1-3, Ex. 1.

1.2. Rule 23(b)(3)

In addition to satisfying the requirements FRCP 23(a) factors, plaintiffs must show that "questions of law and fact common to the members of the class predominate over any questions affecting only individual members," (predominance) and that a class action is superior to other available methods of adjudicating the claims (superiority). FRCP 23(b)(3).

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[6] Recent Ninth Circuit caselaw suggests that ascertainability is not a standalone requirement for certification. *See In re Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1133 (9th Cir. 2017) (holding that the plaintiffs in a Rule 23(b)(3) class need not show "an administratively feasible way to identify putative class members").

1.2.1. Predominance

The predominance requirement assesses whether a proposed class is "sufficiently cohesive to warrant adjudication by representation." *Hanlon*, 150 F.3d at 1022. Predominance measures the relative weight of the common questions as against individual ones. *Amchem*, 521 U.S. at 624. Although "there is substantial overlap between" the test for commonality under FRCP 23(a)(2) and the predominance test under FRCP 23(b)(3), the predominance test "is far more demanding, and asks whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1172 (9th Cir. 2010) (internal quotation marks and citation omitted). To determine whether common questions predominate, the Court looks at "the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011). "The relevant question at the [certification stage in assessing predominance] is which category of extrinsic evidence—individualized or common—will be outcome determinative of the fact-finder's analysis. If common evidence dictates the outcome, the Court should grant class certification. If, however, the Court finds that the fact-finder would need to focus primarily on individualized evidence to resolve the ambiguities, the Court should deny class certification."

McKenzie Law Firm, P.A. v. Ruby Receptionists, Inc., No. 3:18-cv-1921-SI, 2020 U.S. Dist. LEXIS 72904, at *21-22 (D. Or. Apr. 24, 2020).

Here plaintiffs bring three claims against defendants relating to their misrepresentations and causing the likelihood of confusion when they collected their service fees from plaintiffs and the putative Class Members under (1) the FDCPA, (2) the UTPA, and (3) for unjust enrichment. It is difficult for plaintiffs to imagine what individualized evidence—other than the perhaps inconsequential differences actual plaintiffs personal identifying information, debt amounts, and the unique case numbers, on the debt collection documents that defendants filed and served—plaintiffs would need to prove their case. For example, there is no need to prove any individual reliance on defendants' misrepresentations for these claims, or any need to assess potentially divergent outcomes under different states' laws, or even any need to conduct individualized damage calculations.

To the contrary, virtually all of the evidence that the fact-finder would need to determine defendants' liability under the three claims at issue are decidedly common—and indeed the issues to be decided regarding defendants' liability require an objective merits assessment, rather than a subjective one. GAT charged each of the plaintiffs and all of the Class Members the same "unreasonable" $45 for supposedly "necessary" "expedited" service, using the same in-house alter-ego entity

service company, and communicated its intent to only seek "reasonable" costs in the same from complaints. The allegedly unlawful methods and practices that GAT and Vision used to collect their improper fees from plaintiffs and the Class Members are common across all three of plaintiffs' claims and to each plaintiff. So too will be the evidence necessary to assess defendants' scienter to prevail on these claims.

Because it is clear that common evidence would dictate the fact-finder's outcome as to defendants' liability and plaintiffs' damages (both actual and statutory) that may be awarded for all three of plaintiffs' claims, the Court should find that the predominance requirement of FRCP 23(b)(3) is satisfied.

1.2.2. Superiority

The superiority requirement under FRCP 23(b)(3) decides whether "classwide litigation of common issues will reduce litigation costs and promote greater efficiency." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). For this, a court looks to "whether the objectives of the particular class action procedure will be achieved in the particular case" and engages in "a comparative evaluation of alternative mechanisms of dispute resolution." *Id*. The "superiority test requires the court to determine whether maintenance of [the] litigation as a class action is efficient and whether it is fair. This analysis is related

to the commonality test. Underlying both tests is a concern for judicial economy." *Wolin*, 617 F.3d at 1175-76.

In order to determine whether a class action is a superior method, a court may consider, *inter alia*: (1) the class members' interests in individually controlling the prosecution of separate actions; (2) the extent of other litigation concerning the controversy; (3) the desirability of concentrating the claims in the particular forum; and (4) the likely difficulties in managing the class action. FRCP 23(b)(3)(A)-(D).

"'Where damages suffered by each putative class member are not large,' the first factor 'weighs in favor of certifying a class action.'" *Agnes v. Papa John's Int'l, Inc.*, 286 F.R.D. 559, 571 (W.D. Wash. 2012) (quoting *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2001)). This is because "[t]he policy 'at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive' for individuals to bring claims." *Id.* (quoting *Amchem*, 521 U.S. at 61); *see also Wolin*, 617 F.3d at 1175 ("Where recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis, this factor weighs in favor of class certification.").

The fact that "the FDCPA specifically authorizes class actions" indicates that class actions are frequently a superior method for adjudicating claims under the FDCPA. *del Campo v. Am. Corrective Counseling Servs., Inc.*, 254 F.R.D. 585, 588 (N.D. Cal. 2008). Indeed,

"[c]lass action certifications to enforce compliance with consumer protection laws are 'desirable and should be encouraged.'" *Capps v. Law Offices of Peter W. Singer*, No. 15-cv-02410-BAS(NLS), 2016 WL 6833937, 2016 U.S. Dist. LEXIS 161137, at *17 (S.D. Cal. Nov. 21, 2016) (internal quotation marks and citation omitted). Moreover, FDCPA claims are particularly suited to class resolution because most consumers are "most likely unaware of their rights under the FDCPA," and "the size of any individual damages claims under the FDCPA are usually so small that there is little incentive to sue individually." *Hunt v. Check Recovery Sys., Inc.,* 241 F.R.D. 505, 514-15 (N.D. Cal. 2007) (agreeing with the plaintiff's assertion that "a class action is the superior vehicle for adjudicating consumer rights relating to Defendants' collection letter because individual recovery is small, and resorting to alternative mechanisms would be unduly inefficient"). All the same is true in regard to the UTPA, Oregon's primary consumer protection statute.

Here there should be no doubt that the amount at stake for putative class members is too small when compared to the cost of litigating individual claims. The UTPA provides a meritorious consumer plaintiff the greater of their actual damages or $200. ORS 646.638(1). The FDCPA provides for actual damages and up to $1,000 in statutory damages in an individual action, but limits class members' total

statutory damages to "the lesser of $500,000 or 1 per centum of the net worth of the debt collector." 11 U.S.C. § 1692k(a)(1)-(2). Although it is true that an individual consumer could conceivably obtain more statutory damages in an individual case than in a class action (because 1% of most debt collector's net worth is de minimus), the reality is that the $245 per Class Member payment is far more than what most or all of the Class Members could and would obtain. *See, e.g., Macarz v. Transworld Sys., Inc.*, 193 F.R.D. 46, 54-55 (D. Conn. 2000) (concluding that "the vast majority, if not all, of those potential plaintiffs would fail to pursue" individual FDCPA claims if the court did not certify a class); *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997) ("True, the FDCPA allows for individual recoveries of up to $ 1000. But this assumes that the plaintiff will be aware of her rights, willing to subject herself to all the burdens of suing and able to find an attorney willing to take her case."); *Jacobson v. Persolve, LLC*, No. 14-CV-00735-LHK, 2015 U.S. Dist. LEXIS 73313, at *25 (N.D. Cal. June 4, 2015) ("FDCPA class actions exist precisely because individual claims are unlikely to be brought and aggregating claims incentivizes suits that produce the deterrent and curative effect of eliminating abusive collection practices intended by Congress." (internal quotation marks and citation omitted)). In any event, "mandatory notice and opt-out provisions under Rule 23(c)(2) will protect the interests of those proposed class members that

may wish to pursue individual claims" in an attempt to better their hand with up to another $1,000 in statutory damages in an individual case. *Jacobson*, 2015 U.S. Dist. LEXIS 73313, at *25.

In regard to the second factor in FRCP 23(b)(3), plaintiffs are aware of no other litigation concerning this same controversy, brought by members of the proposed Class or otherwise. *See* Jones Decl. ¶ 8; Fuller Decl. ¶ 4; Sutton Decl. ¶ 4.

As to the third factor, resolving these claims in a single action in this forum will avoid the potential for inconsistent results, will decrease the expenses of litigation, and will promote judicial economy. *See Valentino*, 97 F.3d at 1234. This is a local Oregon-resident class member case and defendants are Oregon (alter ego) companies. As to the fourth manageability concerns, because certification is being assessed in the context of a class settlement, there are no such concerns. *Amchem*, 521 U.S. at 620.

2. The Proposed Settlement Is Fundamentally Fair, Reasonable, and Adequate, and It Should Be Preliminary Approved

Under FRCP 23(e), the Court must evaluate the parties' proposed settlement for fundamental fairness, adequacy, and reasonableness before approving it. FRCP 23(e)(2). If a proposed settlement "appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment

to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that the notice be given to the class members of a formal fairness hearing." *Monterrubio v. Best Buy Stores, L.P.*, 291 F.R.D. 443, 454 (E.D. Cal. 2013).

Here there certainly is no evidence the settlement involves any fraud or collusion and the settlement proposal has no obvious deficiencies, gives no preferential treatment to any parties, was negotiated at arm's length in multiple mediation sessions with a respected former judge with counsel experienced in consumer and class action litigation, and falls within the range of possible approval. Therefore the settlement should be given a presumption of fairness. *See* 4 *Newberg on Class Actions* ¶ 11.41 (4th ed.).

In the Ninth Circuit, the "factors in a court's fairness assessment will naturally vary from case to case, but courts generally must weigh: (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." *Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 575 (9th Cir. 2004). As explained below, an assessment of each of these

(relevant) factors also supports a finding that the Settlement Agreement is fair and reasonable.

2.1. The Strength of Plaintiffs' Case; the Risks, Expenses, Complexity, and Likely Duration of Ongoing Litigation; and the Risk of Maintaining Class Action Status Throughout the Trial

The first three factors require a comparison of the benefits to the Class and the likelihood of achieving recovery for the Class at trial. However, a court need not "reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." *Officers for Justice v. Civil Serv. Comm'n of the City & Cnty. of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982). Instead, a court should balance these factors with "the benefits afforded to members of the class, and the immediacy and certainty of a substantial recovery." *Maley v. Del Glob. Technologies Corp.*, 186 F. Supp. 2d 358, 364 (S.D.N.Y. 2002).

To be sure, plaintiffs believe that the Class Members would likely prevail at trial on the merits. In plaintiffs' view, defendants have never presented a cogent defense to liability. Nonetheless, defendants clearly believe otherwise and they continue to deny any wrongdoing and continue to zealously defend themselves and mount a host of defenses in their Answer. It is not lost on plaintiffs that at least initially, the

Magistrate Judge also ruled in defendants' favor and recommended dismissal of plaintiffs' claims at the pleading stage. Moreover, plaintiffs cannot, and does not, deny that defendants have viable defenses and the opportunity for defendants to prevail on summary judgment or at trial is not insignificant. For example, under the UTPA, in a class action, in order for the Class to be awarded $200 each in statutory damages, it has a heightened burden to prove that its losses were the "result of a reckless or knowing use or employment" of the conduct violating ORS 646.608(1) by GAT. There are certainly risks in continuing toward trial, especially given that through the settlement the Class Members will already be getting the maximum amount they could be awarded if they did succeed at trial.

In regard to expenses, from plaintiffs' perspective, given the above assessment, this is a much bigger risk for defendants than it is for plaintiffs. However, this case has already been litigated for more than three years, and there can be no doubt that the vast additional resources that it will take to prepare this case for trial—with the potential of not prevailing—present a substantial risk to both parties. In sum, these three factors should weigh in favor of the Court granting approval to the settlement.

2.2. The Amount Offered in Settlement

In considering the potential fairness of the settlement amount, courts usually compare the total amount of the settlement to each Class Members to an estimate of the damages that could be recovered if the case was fully litigated. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000). However, "[i]t is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair." *Id.*

Pursuant to the Settlement Agreement, defendants will provide a Settlement Fund to the Class Administrator in an amount that will cover payments to each Class Member in the amount of $245. Ex. 1 ¶ 33. As already explained *supra*, the maximum that each Class Member could obtain for their damages *if* they were successful at trial would be $200 in statutory damages for their UTPA claim, and $45 representing the amount that they each paid for the service fees at issue in this case in actual damages under the FDCPA or as restitution or disgorgement as damages under their unjust enrichment claim[7]. Thus, through this proposed settlement the Class Members will be getting the maximum

[7] It is true that plaintiffs' operative complaint does allege the right to seek punitive damages, as they are available under the UTPA. However, *inter alia*, plaintiffs are uncertain they would have opted to present these to the jury with the facts here combined with the heightened standard and elements needed to prove punitive damages under the law.

amount they could be awarded if the case went all the way to trial and they prevailed on all three of their claims.

Additionally, as part of the settlement, defendants will pay for all costs related settlement administration and the Settlement Administrator (JND), above and beyond the Settlement Fund. Moreover, any balance of the Settlement Fund remaining after the distributions to the Class Members (from undeliverable or uncashed checks) will be distributed as *cy pres*—no amount will revert back to defendants or their insurer[8].

Moreover, no amount of proposed Class Counsel's attorneys' fees, costs, and expenses will be paid from the Settlement Fund, nor have the parties agreed on any specific amount that defendants would not object to. *See* Ex. 1 ¶ 24. Instead, Class Counsel will seek an award of reasonable fees, costs, and expenses incurred to prosecute this case, to obtain this settlement, and for their continuing duties to represent and protect the interests of plaintiffs, and the other proposed Class Members, until this case concludes. Id. ¶ ¶ 24, 35.

[8] Plaintiffs do not devote a separate section of this motion to discuss the approval of the *ccy pres* recipients that the parties have agreed should equally share in an any remainder of the Settlement Funds, Oregon Consumer Justice and the Oregon Consumer League; however, both of these entities are local Oregon consumer non-profit entities with a clear consumer protection mission and are appropriate and worthy recipients and plaintiffs respectfully request that they be approved by the Court, in its discretion. See Jones Decl. ¶ 9, Ex. 1 and 2.

An assessment of this factor undoubtably and heavily weighs in favor of the Court approving the proposed settlement.

2.3. Extent of Discovery Completed and the Stage of the Proceedings

This factor is concerned with whether "the parties have sufficient information to make an informed decision about settlement." *Mego*, 213 F.3d at 459. Again, this case has been pending for more than three years. The parties have extensively litigated motions to dismiss, and have exchanged and reviewed significant discovery. The parties have "carefully investigated the claims before reaching a resolution"; therefore this factor weighs in favor of approving the settlement. *Ontiveros v. Zamora*, 303 F.R.D. 356, 371 (E.D. Cal. 2014).

2.4. The Experience and Views of Counsel

As set forth *supra*, plaintiffs' counsel have experience litigating consumer and class action cases. Defendants are also represented by experienced counsel. This factor supports approval of the settlement.

2.5. The Reaction of the Class

As there has not yet been notice or any response to this proposed settlement at this stage, this factor is not applicable.

2.6. The Absence of Collusion or Other Conflicts of Interest

As set forth *supra*, the proposed settlement is the product of extensive arm's-length negotiations, with assistance from an

experienced and well-respected mediator, former Oregon Circuit Court Judge Jean Maurer, after multiple mediation sessions. *See* Jones Decl. ¶ 4. There are no indications of collusion or conflicts of interest. The Class Members will receive significant benefits equating to the maximum that could have been obtained after trial, there is no agreement on an amount of fees, and there will be no reversion of any settlement funds to the defendants or their insurer.

3. The Proposed Class Notice and Distribution Plan Should Be Approved

FRCP 23(c)(2)(B), which sets forth the notice requirements for a FRCP 23(b)(3) class, provides that "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Specifically, notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3). FRCP 23(c)(2)(B). Additionally, due process requires notice "reasonably calculated, under all the

circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

Here, the Settlement Agreement proves that, within 30 days after the Court's entry of the preliminary approval order, an experienced Class Administrator (JND) will mail a postcard notice, in substantially the same form as attached to Exhibit D of the Settlement Agreement, with all of the information required by the rule, including a description of the case, the settlement, the class definition, how to opt or object, and the date by which they can do either (at least 90 days from the date that the Court enters the preliminary approval order).

The postcard notice will also contain an internet address where Class Members can go online to a dedicated website maintained by JND to review even more detailed information about the case and the settlement, including the ability to review a Long Form Notice substantially similar to the version attached as Exhibit E to the Settlement Agreement, as well as other case documents. See Declaration of Jennifer Keough (Keough Decl.) ¶ 12. The postcard notice will also contain a toll-free telephone number (1-844-929-4696) that Class Members can call to ask questions—which JND declares will be available 24 hours day, seven (7) days a week." Keough Decl. ¶ 14.

The postcard notices will be sent to the most current addresses of the Class Members as set forth in the Class List complied with by defendants from a diligent search of their records. *See* Xin Decl. ¶ 1-3, Ex. 1. Prior to mailing notices, JND will perform advanced address research on the Class Member records using data from the National Change of Address (NCOA) database. Keough Decl. ¶ 10. If updated address information is located for any of the Class Members, JND will mail the notice to the updated address in the mailing. *Id*. In the event a notice is returned as undeliverable with forwarding address information provided by USPS, the notice will be promptly forwarded to the updated mailing address. If a notice is returned as undeliverable without a forwarding address, JND will conduct a one-time, advanced address search in an effort to obtain an updated address. If an updated address is located after performing the address search, JND will re-mail the notice to the updated mailing address accordingly. *Id*. ¶ 11.

Class Members that do not choose to timely opt out will then be mailed a distribution check, within 45 days after the entry of the Court's final approval order. Also, under the Settlement Agreement, JND must make reasonable efforts to locate new and updated addresses if Class Members' checks are returned as undeliverable or a Class Member gives notice that they did not receive their check. *Id*. ¶ 33(e).

Both notices were designed by plaintiffs' counsel, but have been reviewed, amended, and approved by JND. Ms. Keough the CEO and founder of JND, a company with staff having decades of experience administering class settlements, including large multi-billion-dollar nationwide cases, declares that,

> the program for Class Notice as described herein [and in the Settlement Agreement] will provide the best notice practicable under the circumstances and is consistent with other similar court-approved best notice practicable notice programs. This plan is designed to reach as many Class Members as possible and provide them with the opportunity to review a plain language notice with the ability to easily take the next step and learn more about the Settlement

Keough Decl. ¶ 16.

Because the agreed notice plan more than satisfies all of the criteria set forth in FRCP 23(c)(2)(B) and will provide the best notice that is practicable under the circumstances, the Court should approve the notice and order that a notice in substantially the same form as that attached as Exhibit B to the Settlement Agreement they be sent to the absent Class Members within 30 days of the Court's entry of the preliminary approval order. The Court should also approve and appoint JND as the Class Administrator.

For the convenience of the Court and the parties, a table listing the most relevant events and corresponding proposed timelines is set forth below:

Action	**Date**
Preliminary order granted	Court's discretion
Mailing of notice to the Class Members	Within 30 days of entry of preliminary order
Exclusion/objection deadline	Within 90 days of entry of preliminary order
Class Counsel's initial application for fees, costs, and expenses	Within 30 days of entry of preliminary order
Final Approval Hearing (Settlement Hearing)	Court's discretion; no sooner than 120 days after entry of preliminary order
Distribution date	Within 45 days of Court's entry of Final Approval Order

4. Plaintiffs Should be appointed as Class Representatives and Plaintiffs' Attorneys Should Be Appointed as Class Counsel

Appointment of class counsel turns on whether counsel: (1) has investigated the class claims; (2) is experienced in handing class actions and complex litigation; (3) is knowledgeable regarding the applicable law; and (4) will commit adequate resources to representing the class. FRCP 23(g).

All four of these requirements are satisfied here. As described more fully *supra*, and is apparent from the case docket, plaintiffs' attorneys have engaged in extensive motions practice and discovery in this case. Plaintiffs' attorneys have substantial experience in class action litigation and consumer protection litigation. Jones Decl. ¶ 10;

Fuller Decl. ¶ 5; Sutton Decl. ¶ 5. As explained *supra*, plaintiffs' counsel have prosecuted this case vigorously throughout this litigation, have more than adequately protected the interests of the proposed Class Members, including the commission of substantial time and resources in this case to date, and they will continue to do so until the Class Members obtain just relief through this settlement, or otherwise. *See* Jones Decl. ¶ 7; Fuller Decl. ¶ 3; Sutton Decl. ¶ 3.

Accordingly, plaintiffs are appropriate class representatives and plaintiffs' attorneys are appropriate class counsel. Therefore, plaintiffs respectfully request that this Court appoint Eric MacCartney and Luanne Mueller as the Class Representatives and Kelly D. Jones, of The Law Office of Kelly D. Jones; Michael Fuller, of OlsenDaines, P.C.; and Matthew Sutton, of The Law Office of Matthew Sutton, as Class Counsel.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully ask that the Court (1) certify the proposed Class for settlement purposes only; (2) appoint plaintiffs MacCartney and Mueller as settlement Class Representatives; (3) appoint plaintiffs' attorneys as Class Counsel; (4) grant preliminary approval of the proposed Settlement Agreement; (5) approve the form and manner of notice described *supra* and in the

Settlement Agreement; and (6) grant such further relief the Court deems reasonable and just and as requested herein.

September 13, 2021

RESPECTFULLY FILED,

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CERTIFICATE OF SERVICE

I certify that this document was served on the parties as follows through this Court's ECF system:

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