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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

DECLARATION OF MICHAEL FULLER

DECLARATION

I, Michael Fuller, declare the following under penalty of perjury:

1. I write this declaration solely to address a few incorrect claims made by defendants in their objections to Class Counsel's fee motion.

2. On page 1, defendants claim that they settled this action "to buy peace and finality". This is incorrect. If the case settled solely to buy peace, defendants would not have agreed to pay maximum damages to each class member. Defendants did not buy peace – defendants agreed to a full surrender, on terms comparable to a full plaintiffs' verdict at trial. Further, if the case settled solely to buy finality, defendants would have made their offer before spending considerable attorney time and resources over the course of two years filing various unsuccessful motions to dismiss the case on legal technicalities. To the contrary, defendants' insurance claims adjuster settled this action because discovery revealed that defendants had in fact engaged in the exact unlawful trade and collection practices alleged in the complaint, and because plaintiffs would accept nothing less than maximum damages for each class member, which plaintiffs were first offered near the end of the second mediation with Judge Maurer.

3. On page 2, defendants claim that the parties' first mediation with Judge Maurer failed "because plaintiffs' counsel would not disclose their hours to date or hourly rate." This is incorrect. The first mediation failed because defendants failed to offer to pay maximum damages for each class member. Plaintiffs provided estimates of their attorneys' hours and rates to Judge Maurer, and also to defendants, but plaintiffs would not negotiate fees until relief for the class was secured. Because defendants would not agree to pay maximum damages for each class member at the first mediation, plaintiffs would not agree to negotiate fees, and so the mediation failed. I have experience negotiating well over a dozen consumer class action cases in mediations in various jurisdictions across the Country. I have never experienced a defendant so stubbornly insist on negotiating fees before substantive relief for the class as the defendants did in the first mediation in this case. It did not appear to me that insurance company's claims adjuster had any actual experience negotiating class action cases, ever. If they had, they would have known that negotiating fees before securing relief for the class, while not illegal, certainly creates an appearance of impropriety, and of possible collusion (both to the Court, to the class members, and to any professional objectors who may be monitoring the case), and

has, in some circumstances, created ethical issues and conflicts for the lawyers involved. I can certainly understand the desire of a claims adjuster to know with certainty what amount of fees will be paid by the insurance company, prior to agreeing to substantive relief for the class. So too would plaintiff lawyers desire to know with certainty what amount of fees will be paid, prior to agreeing to prosecute and fund a consumer protection class action on pure contingency. Regardless, as fully explained in plaintiffs' reply. ethical class action lawyers do not negotiate fees before obtaining fair relief for the class they purport to represent. This ethical principle was taught to me by my attorney mentor, David Sugerman, and is an ethical principle I teach as a supervising attorney and adjunct professor, and it is an ethical principle I adhere to in my practice as a class action lawyer. It would certainly be more profitable to begin negotiating my own fees before relief for the class is secured – but consumer protection work is not done for profits. Consumer protection work is done to protect consumers, and as soon as the defendants in this case agreed to provide full and fair relief for the class at the second mediation, the case settled, with only the issue of fees remaining to be negotiated. Though defendants agreed to pay reasonable attorney fees to class counsel, defendants did not once ever make

even a single offer to settle attorney fees after the second mediation. Instead, defendants opted to allow the Court to decide, subject to their objections, which was their right, and is mandatory in a class action settlement in any event.

4. On page 3, defendants attack the reasonableness of time plaintiffs' attorneys reasonably expended prosecuting the case in litigation. Defendants' attack on the reasonableness of plaintiffs' time incurred resumes on page 10. In all fairness, and only because defendants opened the door to the issue, the Court should not find defendants' estimations and augments persuasive as to the time necessary to reasonably expend in litigation and in preparation for motions practice. The choice of defendants' claims adjuster to limit the amount of time defense counsel could invest in this case resulted in unfortunate consequences and setbacks for defendants, both at oral argument, and later when the Court ultimately rejected all defendants' various legal attempts to have the case dismissed. As shown below, defendants' claims adjuster saved time by failing to compensate defendants' counsel the time needed to read or brief the most relevant controlling Ninth Circuit opinion that was key in disposing of defendants' entire *Rooker-Feldman* argument. A true and correct copy of the entire hearing transcript is attached for the record.

THE COURT: Only if there is anything more you wanted to say about Bell. I appreciate you say you haven't read it, so so be it.

MS. XU: There were a lot of cases cited. I certainly can't --

THE COURT: I just don't understand why people didn't cite the most current and relevant Rooker-Feldman case from the Ninth Circuit. They cited it, and you didn't respond to it.

THE COURT: The Bell v. City of Boise case, isn't that the most recent decision from the Ninth Circuit in explaining what those terms mean?

MS. XU: Your Honor, if you wish, I'm certainly happy to go back and review that case and submit supplemental briefing to either apply or distinguish it.

Preparation takes time, litigation takes time. In light of the results achieved in this case, not only substantively, but in motions practice, the Court should not find persuasive defendants' attacks on the amount of time plaintiffs' counsel decided to spend to prepare for and otherwise prosecute this case. The use of three lawyers with different specialties and skill sets, to represent a class over 200 low-income consumers is not unreasonable, and is consistent with the consumer class cases I've worked on throughout the Country, including the CenturyLink and Sonic Drive-In class action cases listed in my CV, where I was

selected by the Court as one of several dozen lawyers appointed to represent the interests of a large class of consumers.

5. On page 9, defendants question why the income level derived from the practice of law is relevant to a lawyer's skill, experience, and reputation. As explained in detail in my prior declaration, the level of income an attorney derives from the practice of law is not a novel factor – it is one of the first factors assessed in the OSB economic survey of attorney fees and billable rates. Because it's still possible that a lawyer of average skill, experience, and reputation may nonetheless derive income from the practice of law near the 95% percentile, I also included a recent professional services agreement showing that my market rate – the rate I am actually hired and paid for consumer litigation, is also near the 95% percentile.

6. On page 13, defendants conclude with the unsupported allegation that the litigation was "unnecessarily prolonged" by plaintiffs' "unreasonable refusal to provide basic information". This is incorrect. Plaintiffs provided good faith estimates on multiple occasions, both to defendants, and to the mediator, and the case settled as soon as defendants agreed to provide maximum relief to the class, prior to the negotiation of fees. Notwithstanding defendants' unsupported recollection of events in their objections,

defendants simply never agreed to provide maximum relief to the class *prior* to the negotiation of fees and not conditioned on an agreement on fees, not before the first mediation, not during the first mediation, or after that mediation It simply never happened, until near the end of the second mediation.

7. I know the facts I am testifying about based on my personal knowledge. Under 28 U.S.C. § 1746, I declare under penalty of perjury that this declaration is true and correct.

February 15, 2022

RESPECTFULLY SUBMITTED,

s/ Michael Fuller
Michael Fuller, OSB No. 09357
Of Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on the date below, plaintiffs' counsel caused this document and all attachments to be served on the parties to this action via ECF.

February 15, 2022

s/ Michael Fuller
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