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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

REPLY TO DEFENDANTS' OBJECTIONS TO CLASS COUNSEL'S MOTION TO ALLOW ATTORNEYS' FEES

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INTRODUCTION

On October 12, 2021, the Court issued its Findings and Recommendation (F&R), *inter alia*, preliminarily certifying the proposed Settlement Class under FRCP 23, appointing plaintiffs' counsel as Class Counsel, appointing plaintiffs as Class Representatives, and preliminarily approving this settlement. Doc. 92. Under Article III review, the Court approved the F&R on October 27, 2021. Doc. 94. A Fairness Hearing to weigh any objections to the settlement and finally approving the settlement and this motion is set for April 19, 2022, before this Court.

Pursuant to the parties' class action settlement agreement and this Court's order, Class Counsel filed a motion to allow attorneys' fees (fee motion) on December 24, 2021. Doc. 95. The fee motion was supported by the declarations of Class Counsel, Michael Fuller (Fuller), Kelly Jones (Jones), and Matthew Sutton (Sutton); various exhibits attached to those declarations, including each attorney's detailed time records; and a declaration from a prominent Oregon-licensed class action attorney Bonner C. Walsh. Docs. 96-99. After an approved extension, defendants filed a response in opposition to the fee motion (response) on February 8, 2022. Doc. 104. Class Counsel files this reply to defendants' response.

CLASS COUNSEL'S LODESTAR REQUEST

FRCP 23(h) provides that "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are [1] authorized by law or [2] by the parties' agreement." The parties' agreement provides that Class Counsel will request fees under the lodestar method incurred up to the filing of the fee motion in advance of final approval and again after final approval for fees incurred after submission of the fee motion,[1] and that defendants will pay the amount of fees awarded by the Court. Doc. 83-1 ¶ 24; *see also* 15 U.S.C. § 1692k(a)(3); ORS 646.638(3); ORS 646.641(4); *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 978 (9th Cir. 2008) (as a fee-shifting statute, an award of attorneys' fees under the FDCPA is mandatory); *St. Bernard v. State Collection Serv., Inc.*, 782 F. Supp. 2d 823, 826 (D. Ariz. 2010) (courts should calculate damages using the lodestar method in FDCPA cases because "for Congress's private attorney general approach to succeed in the context of FDCPA cases, attorney fees must not hinge on a percentage of actual damages awarded").

"Plaintiffs do not request a percentage of recovery from the common fund, but instead seek attorneys' fees and expenses separate

[1] In their response, defendants state that Class Counsel "intend to later file a motion for supplemental fees," implying that this is somehow improper, but that is exactly what the parties agreed to in the settlement agreement. Doc. 104 at 1; Doc. 83-1 ¶ 24.

from the Class Members' recovery. Therefore, the lodestar method is the appropriate means of determining whether Class Counsel's fee request is reasonable." *Schuchardt v. Law Office of Rory W. Clark*, 314 F.R.D. 673, 688 (N.D. Cal. 2016) (citing *Camacho*, 523 F.3d at 978). The "lodestar figure is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011) (citing *Staton v. Boeing Co.*, 327 F.3d 938, 965 (9th Cir. 2003)).

For ease of reference, Class Counsel's requested lodestar is as follows:

Fuller: 94.10 hours x $525 (market rate) = $49,402.50
19.70 hours x $325 (discounted rate) = $6,402.50; Total = $55,805

Jones: 171.70 hours x $475 per hour = $81,557.50

Sutton: 51.60 hours x $350 per hour = $18,060

Total Lodestar: (337.10 hours) $155,422.50

Class Counsel do not seek an award of costs or expenses.

ARGUMENTS IN REPLY

In assessing a lodestar request, the Court "should take into consideration various factors of reasonableness, including the quality of an attorney's performance, the results obtained, the novelty and complexity of a case, and the special skill and experience of counsel." *Updike v. Multnomah County*, No. 3:13-cv-1619-SI, 2020 WL 4736461, 2020 U.S. Dist. LEXIS 146960, at *3 (D. Or. Aug. 14, 2020). In the context of a class action settlement, "[f]oremost among these considerations, however, is the benefit obtained for the class." *Bluetooth*, 654 F.3d at 942; *see also Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1033 (9th Cir. 2012) (in reversing fee award for plaintiffs in FDCPA case against debt collection law firm the court acknowledged the value of the litigation in stopping the defendant's use of the unlawful collection practices and recovery of maximum statutory damages). As set forth in detail in various filings in this case and confirmed by defendants, due to the efforts of Class Counsel, the practices giving rise to the class action have ceased, and each class member is set to receive the maximum damages available under the applicable consumer protection statutes.

Despite these exceptional results, defendants now attack as "exorbitant" and "excessive" Class Counsel's requested hourly rates and the reasonable time spent on litigating this case in order to secure this

class-wide relief. Defendants request that the Court dramatically reduce Class Counsel's overall lodestar request of $155,422.50 to $72,382.10: a reduction of $83,040.40, and more than 53% of the requested lodestar.

Once a fee applicant satisfies the initial burden of establishing entitlement to an award and documenting the hours expended and hourly rates, "[t]he party opposing the fee application has a burden of rebuttal that requires submission of evidence to the district court challenging the accuracy and reasonableness of the hours charged or the facts asserted by the prevailing party and submitted affidavits." *Gates v. Gomez*, 60 F.3d 525, 534-35 (9th Cir. 1995) (holding that defendants did not meet their rebuttal burden of providing specific evidence that the requested hours were duplicative or inefficient).

As set forth in detail below, defendants' arguments in support of this drastic reduction of Class Counsel's lodestar request misrepresent and distort the history and underlying facts of this litigation, misapply or ignore relevant and controlling case law, fail to meet their rebuttal burden, and should therefore be rejected.

1. Defendants' objections to Class Counsel's reasonable hours incurred should be rejected

A review of the case docket and Class Counsel's detailed time records should indicate that the time incurred to obtain maximum relief for the class and the cessation of these illegal practices is more than reasonable and that Class Counsel litigated this case not just vigorously

and effectively, but also efficiently. Nonetheless, defendants argue that this Court should severely cut Class Counsel's reasonable time spent by 109.5 hours, from 337.10 hours to 227.60 hours—a reduction of more than 32%.

1.1. Time incurred between the mediations

Defendants first argue that Class Counsel should not be compensated for any work done in the entire year period between the date of the first unsuccessful mediation in May 2020 and the date of the second ultimately successful mediation in May 2021. Doc. 104 at 11. This would result in denying Class Counsel compensation for 57.7 hours (more than 17%) of the time spent litigating this case up to the date of the fee motion.

According to defendants, all of this time should be denied because the case would have settled for the same maximum relief to the class but for Class Counsel's failure to provide defendants their hours to date and hourly rates at the time of the first May 2020 mediation and corresponding refusal to accept defendants' post-mediation lump-sum counteroffer conditioned on an acceptance of an amount for fees. *See id.* ("It would be unreasonable to require defendants to pay for fees that should never have been expended in the first place and did not provide any benefit to the class members."); *id*. at 2 ("The parties mediated with Judge Jean Kerr Maurer on May 27, 2020, which failed because

plaintiffs' counsel would not disclose their hours to date or hourly rate."); *id*. at 3 ("Class Counsel's refusal to disclose their hours and rates prevented the case from settling in May 2020.").

This argument misrepresents the actual facts, defies common sense, and is unsupported by the law. First, even *if* it were relevant, it is not true that counsel did not disclose their estimated lodestar during the 2020 mediation, or that defendants made an offer of maximum relief during the 2020 mediation. *See* Fuller Decl. ¶¶ 3, 6. Plaintiffs have always been willing to discuss and attempt to negotiate fees, but only *after* reaching an agreement on relief for the class members and that was not conditioned on an agreement on fees. *Id.*; Jones Decl. ¶ 1, Ex. 1 (showing that defendants were well aware of this position well before the 2020 mediation).

Second, defendants' refusal to understand that in a class action settlement, unlike an individual case, a court must always decide the reasonableness of Class Counsel's fees and costs—regardless of whether the parties agree to an amount of fees. Thus, defendants' argument that it needed to know the amount of fees incurred in order to settle the case within its desired range, before agreeing on class damages, makes no sense. *See* Doc. 105-1 ("Ms. Houston, the PLF claims attorney, cannot write a blank check and cannot agree to a settlement that might exceed her authority. As a result, we are making the lump sum settlement offer

of $152,150.00, to settle this class action, inclusive of all attorney fees and class administration costs.").

Plaintiffs explained this reality many times and stated that they would also be content to simply let the Court decide a reasonable amount of fees incurred at that time, *after* reaching a settlement on class damages, because that is what is required in class action. *See, e.g.*, Jones Decl. ¶ 2, Ex. 2. The actual facts indicate that defendants' resolution strategy—or more accurately their liability insurer the Professional Liability Fund's (PLF) strategy—was to settle the case for as little as possible and to create a conflict and pit Class Counsel against the absent class members by conditioning any offer of class relief to plaintiffs' acceptance of a significantly reduced amount of fees. despite plaintiffs' insistence that they would negotiate in this fashion and repeated explanations of why that was so. This typical PLF strategy failed because this is a class case not an individual case. Now they want Class Counsel to absorb the costs of their failed negotiated strategy.

Defendants argue it is a *per se* rule that if class plaintiffs do not agree to negotiate their attorneys' fees simultaneously and comprehensively with class members' damages they should be denied fees for the pendency of the litigation if no settlement is reached. Adoption of this flawed reasoning would create a mandatory conflict-of-interest quagmire for consumer class action attorneys in many cases,

and would eviscerate the fee-shifting provisions enacted to encourage private enforce these statutes. Such a ruling would mean that consumer class counsel either (1) agree simultaneously to negotiate fees in potential conflict with the interests of the absent class members, (2) take on consumer class action cases on a pure pro bono basis with little or no hope of ever recovering enough fees and eventually going out of business, or (3) stop taking on these cases all together—leaving Oregon consumers without representation.

Unfortunately, Class Counsel's many detailed explanations regarding this very real conflict fell on deaf ears. Class Counsel have never before encountered such stubbornness regarding this commonly understood and well-recognized ethical position. Fuller Decl. ¶ 3. This obstinance is particularly shortsighted, frustrating, and unfortunate given that the PLF is the mandatory liability insurer for Oregon attorneys, including Class Counsel, and would have to cover claims asserted against Class Counsel and other Oregon attorneys facing similar ethical scenarios by aggrieved clients and class members.

Defendants point to only one case (among many) provided to them during this litigation supporting plaintiffs' refusal to negotiate fees before first securing just relief for the class, *Prandini v. Nat'l Tea Co.*, 557 F.2d 1015 (3d Cir. 1977). According to defendants, *Prandini* was subsequently overruled and the principles announced by the Third

Circuit in that case are irrelevant. That is incorrect. For this argument, defendants point to *Evans v. Jeff D.*, 475 U.S. 717, 733-35 (1986), and *Ashley v. Atlantic Richfield Co.*, 794 F.2d 128 (3d Cir. 1986).

Evans was a class action lawsuit brought by a class of children with emotional and mental disabilities seeking injunctive relief for deficiencies in healthcare and educational services. 475 U.S. at 720-21. The issue was whether a court may approve a class settlement that conditioned substantial injunctive relief on a complete waiver of attorneys' fees as allowed under the Civil Rights Attorney's Fees Awards Act of 1976 (Fees Act) (42 U.S.C. § 1988). *Id.* at 720. The Ninth Circuit held that a court could not do so. *Id.* at 724-25. The Supreme Court reversed, holding that (1) the simultaneous negotiation of merits and statutory fees is permissible in civil rights cases under the Fees Act applicable to federal civil rights claims, (2) there is no *per se* prohibition against a defendant's making a settlement offer that conditions favorable merits relief on the waiver of statutory attorneys' fees, and (3) the issue of whether a particular agreement is acceptable is determined on a case-by-case basis, considering the relevant circumstances, to evaluate whether the merits relief is an adequate quid pro quo for the waiver of fees. *Id.* at 727-43. The *Evans* Court did not discuss or mention *Prandini*.

Ashley was another civil rights case dealing with a potential fee waiver under the Fee Act. In discussing *Evans*, the Third Circuit explained that "the Court was unanimous in concluding 'that the Fees Act [§ 1988] should not be interpreted *to prohibit all simultaneous negotiations* of a defendant's liability on the merits and his liability for his opponent's attorney's fees.'" *Ashley*, 794 F.2d at 138 (emphasis added) (quoting *Evans,* 475 U.S. at 738 n.30). In discussing the ramifications of the Supreme Court's *Evans* holding as to its *Prandini* decision, the Third Circuit found that "to the extent that *Prandini* constitutes an *absolute ban* on simultaneous fee negotiation, then, it has been overruled." *Id.* (emphasis added).

Long after *Evans* (and *Ashley*), the Third Circuit continues to favorably cite to and promote the guidepost set forth in *Prandini* and many other sources—although not *per se* improper in all cases, negotiating attorneys' fees concurrently with class damages, rather than after just relief is obtained for the class, is disfavored, often creates ethical conflicts, and is examined as a possible indicia of collusion by courts:

> In *Prandini*, this court recognized the potential for attorney-class conflicts where the fees, while ostensibly stemming from a separate agreement, were *negotiated* simultaneously. We characterized simultaneity of fee and settlement negotiations as a "situation . . . having, in practical effect, one fund divided between the attorney and client." *Id.* To respond to this danger of collusion between the class counsel and defendant, *Prandini* and the Third

Circuit Task Force Report on court-awarded attorneys' fees disapproved fee discussions until after the achievement and approval of settlement. *See Prandini*, 557 F.2d at 1021; *Court Awarded Attorney's Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 238, 266 (1985) [hereinafter *Task Force*].

In this case, there were strong indications that such simultaneous negotiations in fact transpired. Indeed, there was evidence in a letter from class counsel that at least some portion of the fees and expenses had to have been negotiated simultaneously with the settlement. The court justified its dismissal of the allegation of simultaneous negotiation by citing (1) a statement in the letter that the "attorneys' fees were negotiated separately, after we agreed on everything else," and (2) GM's reservation of the right to contest any award of fees that it deemed unreasonable. Even though we assume that these are factual findings, thus ordinarily deserving deference, we think these findings were made by reference to an erroneous legal standard. Indeed, neither of these bases is persuasive, especially in view of GM's acquiescence in a patently baseless ground for augmenting the counsel fee, *see* Part VII *infra*.

In considering the adequacy of representation, we are loath to place such dispositive weight on the parties' self-serving remarks. And even if counsel did not discuss fees until after they reached a settlement agreement, the statement would not allay our concern since the *Task Force* recommended that fee negotiations be postponed until the settlement was judicially approved, not merely until the date the parties allege to have reached an agreement. **We recognize that *Evans* . . . overruled *Prandini*'s strict rule prohibiting simultaneous negotiations. However, many of the concerns that motivated the *Prandini* rule remain, and we see no reason why *Jeff D.* [*Evans*] or its underlying policy of avoiding rules that impede settlement preclude us from considering the timing of fee negotiations as a factor in our review of the adequacy of the class's representation. Consequently, the likelihood that the parties did negotiate the fees concurrently with**

> **the settlement in this case increases our concern about the adequacy of representation.**

In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 803-04 (3d Cir. 1995) (emphasis added); *see also In re Cmty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortg. Loan Litig.*, 418 F.3d 277, 308 (3d Cir. 2005) ("As we recognized in *Prandini* . . . there exists a special danger of collusiveness when the attorney fees, ostensibly stemming from a separate agreement, were negotiated simultaneously with the settlement."); *id.* at 308 n.25 ("We recognize that *Evans* . . . overruled *Prandini*'s strict rule prohibiting simultaneous negotiations, but as stated in *G.M. Trucks*, 'many of the concerns that motivated the *Prandini* rule remain, and we see no reason why [*Evans*] or its underlying policy of avoiding rules that impede settlement preclude us from considering the timing of fee negotiations as a factor in our review of the adequacy of the class's representation.'" (quoting *GMC Pick-Up Truck,* 55 F.3d at 804)).

It is not just the Third Circuit that continues to promote this ethically responsible class action settlement negotiation process and recognizes the potential conflict of interest in not doing so—it is widely adhered to by class action attorneys, commentators, and the courts. *See* Federal Judicial Center, *Manual for Complex Litigation Fourth* § 21.7 (2004) ("[T]he simultaneous negotiation of class relief and attorney fees creates a potential conflict. Separate negotiation of the class settlement

before an agreement on fees is generally preferable."); *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991) ("The problem has two aspects: extortion (that is, the prosecution of strike suits) and collusion (that is, the tension which necessarily arises between class members and class counsel when settlements and attorneys' fees are negotiated simultaneously[.]")); *In re Hager*, 812 A.2d 904, 912-13 (D.C. 2002) ("Respondent faced a classic conflict of interest – his interest in maximizing his fee versus his clients' interest in maximizing the amount paid to them. That it occurred in the midst of secret settlement negotiations meant the conflict was even more pronounced . . . [a]ny settlement represents a total value figure that one party is willing to pay to end the controversy. Attorneys' fees, even though they may not be technically deducted from the amount paid to the litigants, represent an integral part of the overall amount that the settling party is willing to pay, and as such, they have a direct effect on the net amount that will ultimately be paid to the litigants."); *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 398 (C.D. Cal. 2007) ("While the merits of the substantive revisions to the economic relief provisions of the prior settlement are themselves questionable, the process through which Plaintiffs' counsel negotiated its own attorneys fees simultaneously with the negotiation of class relief is highly suspicious . . . [t]he simultaneous negotiation of attorneys fees and class relief is

thus an additional and damning indictment of Plaintiffs' counsel's commitment to pursuing a fair, arms-length settlement on behalf of the plaintiff class."). Indeed, the Ninth Circuit held long ago that it "strongly discourage[s] the simultaneous negotiation of attorneys' fees and substantive issues in class action settlement negotiations." *Mendoza v. United States*, 623 F.2d 1338, 1353 (9th Cir. 1980) (citing *Prandini*, 557 F.2d at 1021).

Beyond defendants' (and the PLF's) failure or unwillingness to understand the potential ethical conflicts and adequacy of counsel issues fostered by their demands that fees be negotiated simultaneously with, and as a condition of, class relief, they appear to be unaware of or ambivalent to the reality that "[c]lass action settlements involve unique due process concerns for absent class members who are bound by the court's judgments," that "[w]hen the settlement agreement is negotiated before formal class certification, as in this case, the court should engage in 'an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required under Rule 23(e)," and that such "subtle signs of collusion" and potential conflicts of interest a court should look for include "when counsel receive a disproportionate distribution of the settlement," or "when the parties negotiate a 'clear sailing' arrangement providing for the payment of attorneys' fees separate and apart from class funds." *Brinkmann v. ABM Onsite Servs.-*

W., Inc., No. 3:17-cv-275-SI, 2021 U.S. Dist. LEXIS 167025, at *32-41 (D. Or. Sept. 2, 2021) (internal quotation marks and citations omitted).

A "clear sailing" agreement on fees is what defendants and the PLF were ultimately seeking with their demands to simultaneously negotiate fees along with class damages and their lump-sum offer conditioned on acceptance of an amount of fees—whether they know it or not. On their own, although not *per se* rejectable, such agreements when entered into *after* an agreement for the class are met with suspicion and trigger heightened scrutiny. *See Roes v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1050-51 (9th Cir. 2019) (reiterating that "[a]lthough clear sailing provisions are not prohibited, they by their nature deprive the court of the advantages of the adversary process' in resolving fee determinations and are therefore disfavored," and that "clear sailing agreements on attorneys' fees are important warning signs of collusion, because the very existence of a clear sailing provision increases the likelihood that class counsel will have bargained away something of value to the class." (cleaned up)).

Given that the "clear sailing" agreement defendants were seeking was combined with the ethical issues and disfavored process of negotiating fees simultaneously and conditionally with class relief, plaintiffs—as advised by Class Counsel—had the right, if not a duty, to reject defendants' insistence to negotiate a class-wide settlement in this

manner. If plaintiffs had not so resisted, and had accepted defendants' conditional damages fees offer, in addition to questioning the adequacy of Class Counsel's representation, this Court (and the class members and any objectors) would have rightfully viewed the settlement with heightened scrutiny—contrary to the many courts,[2] including the Ninth Circuit, that have cited the parties' separate and subsequent fee resolution (or lack thereof as in this case) as a positive factor warranting approval of the class settlement. *See, e.g., Acosta*, 243 F.R.D. at 398 ("[T]he process through which Plaintiffs' counsel negotiated its own attorneys fees simultaneously with the negotiation of class relief is highly suspicious . . . [t]he simultaneous negotiation of attorneys fees and class relief is thus an additional and damning indictment of Plaintiffs' counsel's commitment to pursuing a fair, arms-length settlement on behalf of the plaintiff class."); *McKenna v. Sears, Roebuck, & Co.*, CA No. 92-17038, 1997 WL 349024, 1997 U.S. App. LEXIS 15528, at *4-5 (9th Cir. June 25, 1997) ("Here, the fee agreement was negotiated after the class settlement, a fact that reduces the danger of an improper *quid pro quo* detrimental to the class. Because the Supreme Court in *Evans* held that even contemporaneously-negotiated fee agreements do not violate public policy *per se*, it follows *a fortiorari* that a fee agreement

[2] Indeed, there are far too many cases citing this factor in support of settlement approval, and adequacy of class counsel to cite here.

negotiated after the class settlement likewise does not."); *Lane v. Page*, 862 F. Supp. 2d 1182, 1258 (D.N.M. 2012) ("While the individual objectors criticize these separate negotiations . . . that the fees were negotiated after the Settlement reduces the risk of any improper bargaining, such as reducing the class award so that the attorney can be paid quickly." (citing *McKenna*, 1997 U.S. App. LEXIS 15528, at *4-5)).

Class Counsel should not be financially penalized for being ethical, choosing to avoid potential conflicts, and following a sensible and well-established and controlling legal class action negotiation principle. That the case did not settle in 2020 and that plaintiffs were compelled to continue to diligently litigate the case—and should now be compensated for that work—was a product of defendants' and their insurance provider's choices. They could have simply accepted or made the same class damages settlement that *they* agreed to a year later without demanding simultaneous negotiation of fees and not conditioning their offers on an agreement on fees, and then separately negotiating a significantly lower agreement as to fees. And if unsuccessful in reaching an agreement as to fees, the parties would have simply been here a year earlier without defendants attempting to roll back the clock and improperly passing the buck to Class Counsel to recoup the cost of their mistake.

1.2. Allegedly redundant and unnecessary time

Defendants also argue that Class Counsel's time should be cut by 39.7 hours because it is redundant or duplicative. A court should award fees based on "the number of hours reasonably expended on the litigation" and should exclude "hours that are excessive, redundant, or otherwise unnecessary," but "[t]here is no precise rule or formula for making these determinations[,]" and a court "necessarily has discretion in making this equitable judgment." *Hensley v. Eckerhart*, 461 U.S. 424, 433-37 (1983).

According to defendants, because their insurance provider only provided them with one attorney to defend this class action case and do all of the work, plaintiffs also should have employed only one attorney to prosecute this case. That is incorrect. There is nothing unusual or improper about having three lawyers litigate a consumer class action case, and plaintiffs should not be punished because of defendants' insurer's choice to employ a single attorney to defend a class action case. *See* Fuller Decl. ¶ 4; *see also Camacho*, 523 F.3d at 978 (FDCPA consumer statewide class action case finding that plaintiffs' "three attorneys spent a reasonable number of hours on [the] case, specifically noting that they spent their time on motions brought by the defendant and successfully defending against an interlocutory appeal" and "recognizing that the attorneys were exceedingly well-versed on the

narrow legal question presented"); *Or. Nat'l Desert Ass'n v. BLM*, 223 F. Supp. 3d 1147, 1154 (D. Or. 2016) ("I am not concerned about any 'excessive staffing.' ONDA's attorneys were judicious in the tasks on which they collaborated and efficiently used each other in strategic discussions and on editing submissions.").

Defendants mark up Class Counsel's time sheets with a hatchet, rather than a scalpel—asserting that counsel should not be reimbursed for any time that hints at any collaboration on any task no matter how complex the task, or any conferencing together. However, the Ninth Circuit has held that "the participation of more than one attorney does not necessarily constitute an unnecessary duplication of effort." *Kim v. Fujikawa*, 871 F.2d 1427, 1435 n.9 (9th Cir. 1989). "Duplication" is warranted by the complexity of the matter or by each attorney's distinct contributions to the case. *Id.* ("Here, the participation of more than one attorney constituted a reasonable necessity, given the complexity of legal issues and the breadth of factual evidence involved in this case."); *Johnson v. Univ. Coll. of Univ. of Ala.,* 706 F.2d 1205, 1208 (11th Cir. 1983) ("An award for time spent by two or more attorneys is proper as long as it reflects the distinct contribution of each lawyer to the case and the customary practice of multiple-lawyer litigation."). As explained in the fee motion, and as reflected in Class Counsel's supporting declarations and time records, Sutton has unique experiences and skills

as a former creditor's attorney, he originally identified these illegal collection practices, and his review of the underlying debt collection documents and attending legal theories and strategy was crucial to litigating this case. As the Court is well-aware, and as supported by the record of this case, Fuller and Jones work together on substantial litigation in this Court, with Fuller generally taking on the role of lead trial attorney overseeing and directing the litigation and Jones handling the legal briefing and argument. Collaboration on important tasks, including discovery, document review, researching, drafting, and responding to defendants' many motions and legal arguments, and occasionally conferencing together to coordinate and discuss these tasks and the legal issues, was warranted by "the complexity of [this] matter [and] by each attorney's distinct contributions to [this] case," Class Counsel employed sound billing judgment and were "judicious in the tasks on which they collaborated and efficiently used each other in strategic discussions and on editing submissions." *Kim*, 871 F.2d at 1435 n.9; *Nat'l Desert Ass'n*, 223 F. Supp. 3d at 1154.

In specific regard to conferring and conferencing together, defendants cite the in-district proposition that "[w]hen attorneys hold a telephone or personal conference, good 'billing judgment' mandates that only one attorney should bill that conference to the client, not both attorneys," and "[t]o correct for this duplication by two attorneys, the

higher billing rate of the two attorneys should be allowed." *Nat'l Warranty Ins. Co. v. Greenfield*, CV-97-1654-ST, 2001 WL 34045734, 2001 U.S. Dist. LEXIS 7763, at *14 (D. Or. Feb. 8, 2001); *Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-ST, 2015 WL 5093752, 2015 U.S. Dist. LEXIS 114290, at *22 (D. Or. Aug. 28, 2015). But even if this Court does decide to apply this rule to some of Class Counsel's time entries, it is apparent from defendants' opposition that they do not apply the higher billing rate of the multiple attorneys to any of this "duplicative" time, but instead just improperly request that it all be cut and not recovered by any member of plaintiffs' team.

In the beginning of its opposition, defendants vaguely and misleadingly attack various tasks performed by Class Counsel to prepare the case for class certification and trial, after the first May 2020 mediation was unsuccessful. For example, defendants state that plaintiffs "attempted to inundate defense counsel with form discovery requests" and "sent 16 deposition notices, exceeding the maximum number allowed under FRCP 30(a)(2)(A) and seeking to depose a deceased attorney," and "[d]espite issuing 16 deposition notices, plaintiffs' counsel never took any depositions."[3] Doc. 104 at 4. As to the

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[3] Defendants also misleadingly state that after the 2020 mediation plaintiffs relayed their intent to "immediately amend the complaint to expand the class statutory period to six years." In truth, defendants knew of this intention before the 2020 mediation. *See* Jones Decl. ¶ 1, Ex. 1.

deposition notices, plaintiffs sent the notices in an attempt to confer and would have filed for leave to expand the number of depositions if necessary as allowed by FRCP 30(a)(2). The "deceased" attorney was the founder and named partner of the defendant debt collection law firm, who plaintiffs did not realize at the time was deceased. In any event, after conducting and reviewing additional documentary discovery, plaintiffs narrowed their depositions down to three fact witnesses and the two FRCP 30(b)(6) depositions. Jones Decl. ¶ 3, Ex. 3. As to defendants' assertion that plaintiffs did not proceed with any depositions, that is correct but irrelevant. Plaintiffs retained a court reporter and prepared for the depositions, but the parties agreed to reconvene mediation just before the scheduled depositions. *Id.*

As to "inundating" counsel with "form" discovery requests—this is also not true. Plaintiffs took great care and time to draft specific and targeted discovery requests. Defendants note that they "on the other hand, did not engage in any discovery because the relevant facts are simple [and] did not require discovery." As the plaintiffs in a putative class action lawsuit alleging defendants' violation of multiple federal and state consumer protection statutes, plaintiffs have a duty to prove all elements of each of their claims as well as the FRCP 23 class certification factors. Class Counsel take their duty and their job to adequately represent the interests of and to zealously represent their

clients seriously, as they should. That defendants chose to employ a single attorney to defend them and chose to engage in a curious defense strategy of forgoing any discovery in order to conserve their insurer's resources is their prerogative. But these choices have consequences. *See* Fuller Decl. ¶ 4. Plaintiffs should not be penalized through false equivalence by the economic decisions defendants made. Moreover, defendants' attempt to paint a picture of an easy case that required little effort or discovery is contradicted by even a cursory review of the docket in this case—which was largely driven by defendants' failed efforts to dismiss plaintiffs' claims. After losing those motions it is apparent that defendants took a hands-off approach to the litigation because it always intended to settle the case, but failed to do so for several years because it stubbornly refused to settle the class damages separately from fees. Because there was no settlement, plaintiffs were required to continue this litigation with the assumption that they needed to prove class certification as well as the merits of their claim—which they did, as efficiently as possible. The Ninth Circuit has held:

> It must also be kept in mind that lawyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee. It would therefore be the highly atypical civil rights case where plaintiff's lawyer engages in churning. By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker.

Moreno v. City of Sacramento, 534 F.3d 1106, 1112 (9th Cir. 2008). Defendants' framing of Class Counsel's litigation time as redundant, duplicative, and overlitigation in order to save themselves costs resulting from their own illegal conduct and litigation choices at the expense of compensating Class Counsel for the more than reasonable time spent to obtain maximum allowed damages for the class members and Class Counsel should be denied.

2. Defendants' objections to Class Counsel's requested hourly rates should be rejected

"Generally, when determining a reasonable hourly rate, the relevant community is the forum in which the district court sits."[4] *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1205 (9th Cir. 2013). "Within this geographic community, the district court should consider the experience, skill, and reputation of the attorneys or paralegals involved." *Id.* Although courts in this district rely on the most recent Oregon State Bar (OSB) Economic Survey as the "initial benchmark," "[a]ttorneys may argue for higher rates based on inflation, specialty, or any number of other factors." *See* U.S. Dist. Ct., Dist. of Or.,

[4] Defendants argue that Sutton's rate should be pegged to the median rate for southern Oregon attorneys. Because this case was litigated in this Portland forum and Sutton's declaration indicates his practice is statewide, Portland should be the applicable market.

Message from the Court Regarding Fee Petitions.[5] Courts may also consider factors such as the quality of an attorney's performance, the results obtained, the complexity of a case, and the special skill and experience of counsel. *See League of Wilderness Defs. v. Turner*, 305 F. Supp. 3d 1156, 1165 (D. Or. 2018). "Typically, 'affidavits of the plaintiffs' attorney and other attorneys regarding prevailing fees in the community and rate determinations in other cases . . . are satisfactory evidence of the prevailing market rate.'" *Schuchardt*, 314 F.R.D. at 688 (quoting *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990)).

Through their fee motion, supporting declarations, and exhibits, as well as the procedural history of this case, plaintiffs have met their burden to show that Class Counsel's requested hourly rates are reasonable considering the quality of Class Counsel performance, the results obtained, the complexity of this case, and the special skill and experience of counsel—even if these rates are beyond the "initial benchmark" of the applicable matrix in the 2017 OSB survey. Defendants argue that Class Counsel's requested rates should simply be capped at the respective "median" rates in the 2017 OSB survey, because this was just a "simple" FDCPA case, the lower rates awarded to Fuller

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[5] Available at: https://ord.uscourts.gov/index.php/rules-orders-and-notices/notices/fee-petitions.

and Jones in an unrelated individual Fair Credit Reporting Act (FCRA) case are determinative, plaintiffs provided lower rates that they would "likely" seek in this case for mediation, and plaintiffs have not established any of the other factors to depart from a presumptive and arbitrary "median" OSB survey rate.

These arguments against Class Counsel's requested rates should be rejected. Defendants fail to understand that the Court needs to assess the facts and circumstances of each in order to determine the reasonable rates in the case before it. Unlike *Sponer*, this is a class action case and Fuller and Jones took a lead role as Class Counsel, rather than as co-counsel in support of an experienced FCRA lead trial attorney in *Sponer*. As indicated by their declarations and other submissions, and this Court's experiences, Fuller and Jones have extensive and specialized experience litigating not just FDCPA and UTPA cases, but class action litigation under these statutes, akin to this case. As discussed *supra* and in the fee motion papers, Sutton has unique and specialized experience as a debt collection attorney in line with the debt collection law firm in this case, and was the one who uncovered these unlawful practices. This class action undoubtably "benefitted from [and] required [the] specialized experience" of Class Counsel to justify rates beyond the respective median OSB survey rates. *Sturgis v. Asset Acceptance, Ltd.*

Liab. Co., No. 3:15-cv-00122-AC, 2016 WL 3769750, 2016 U.S. Dist. LEXIS 91479, at *13 (D. Or. July 14, 2016).

As to current market rates for Class Counsel, the OSB survey is of little assistance in assessing these hourly rates. As plaintiffs point out in their motion, in *Strawn v. Farmers Insurance Co.*, it was noted that billing rates of Portland class action plaintiff attorneys "can range from $450 to $590 per hour" in 2010 dollars. 233 Or. App. 401, 416 (2010). The Walsh declaration[6] filed in support of the motion in support of Fuller's and Jones' requested rates declares that the rates "are reasonable and are within the range of rates charged by consumer class action attorneys of comparable skill and experience in Portland," and are "relatively modest in comparison." Doc. 99 ¶ 4; *see also Lott v. Vial Fotheringham, LLP*, No. 3:16-cv-00419-HZ, 2021 WL 3287580, 2021 U.S. Dist. LEXIS 143928, at *7-19 (D. Or. July 30, 2021) (although the court "expressed concerns regarding their ability to manage a complex class action," the court awarded the three attorneys rates at the 75% level of the applicable OSB survey matrix for work performed on a putative class action case which was not certified).

[6] Defendants unfairly attack Mr. Walsh as "biased" and assert that he is not qualified to testify as to reasonable Portland market rates because he is an outsider, although he has been licensed as an Oregon attorney since 2013 and has litigated "around 100 consumer cases in Oregon courts." Doc. 99 ¶ 2.

As to defendants' argument that this was a just "simple" FDCPA case, the case docket, review of the voluminous filings, and this Court's experience with the case dictate otherwise. *See also* Fuller Decl. ¶ 4. This case involved the intersection of federal and state procedural rules, issues of first impression, attacks on the Court's jurisdiction, underlying state court collection litigation, preclusion principles, and attorney litigation privilege, and resulted in conflicting decisions by the two judges assigned to this case on many of these issues. Defendants' argument that the case was easier because the FDCPA is a "strict liability" statute is also contradicted by the fact there is "bona fide error defense" to that strict liability, and there are other state law statutes at issue which, *inter alia*, require a plaintiff to prove a heightened reckless or knowing scienter to obtain statutory damages in a class action. 15 U.S.C. § 1692k(c); ORS 646.638(8); *see also Lott*, 2021 U.S. Dist. LEXIS 143928, at *12-13 ("The FDCPA is a 'comprehensive and complex federal statute.'" (quoting *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 587 (2010))); *Holman v. Experian Info. Sols., Inc.*, No. 11-cv-0180, 2014 WL 7186207, 2014 U.S. Dist. LEXIS 173698, at *10 (N.D. Cal. Dec. 12, 2014) ("By providing competitive rates we assure that attorneys will take such cases, and hence increase the likelihood that the congressional policy of redressing public interest claims will be vindicated.").

As to defendants' argument that Class Counsel's fees should be limited to the estimated rates that they provided to defendants before the second mediation—in the event the parties settled class damages and would attempt to separately negotiate fees—defendants provide no support why Class Counsel or this Court should be bound by those potential rates. Counsel stated that these rates were what they would "likely" seek, not what they would definitely seek. More important, after reaching agreement on the amount for class damages, defendants made no attempt to settle the fees. Fuller Decl. ¶ 3. If they had done so it is possible plaintiffs would have negotiated with those initially proposed rates. Instead, defendants chose to forgo such negotiation and waited to oppose this fee motion to convince the Court it should award significantly lower rates. That was their right. In the meantime, Class Counsel investigated reasonable hourly rates for their fees in this case and determined that the rates requested were appropriate and justified. That was Class Counsel's right. It is now up to the Court to decide.

Of course, plaintiffs understand that this Court has broad discretion to assess hourly rates that it believes are reasonable in this case based on the record. However, plaintiffs respectfully request that the Court take into consideration, *inter alia*, the specialized experience of Class Counsel that was necessary in this case, the complexity of this litigation and its status as a class action, plaintiffs' evidence of actual

market rates relevant to this litigation, and the exceptional results that Class Counsel and plaintiffs achieved in this case for the class members. The Court should reject the deflated rates suggested by defendants, which would not reflect an appropriate assessment of the relevant factors, evidence, and realities of this litigation.

CONCLUSION

The purpose of fee-shifting statutes is to encourage attorneys in private practice to enforce the laws that protect the public in areas like civil rights, consumer protection, and the environment. *City of Riverside v. Rivera*, 477 U.S. 561, 574-75 (1986); *Evon*, 688 F.3d at 1033; *Holman*, 2014 U.S. Dist. LEXIS 173698, at *10 ("By providing competitive rates we assure that attorneys will take such cases, and hence increase the likelihood that the congressional policy of redressing public interest claims will be vindicated."). Class Counsel prosecuted this case not only vigorously and effectively, but also efficiently. Due to the efforts of Class Counsel, the practices giving rise to the class action have ceased, and each class member is set to receive the maximum damages available under the applicable consumer protection statutes. Contrary to defendants' misguided arguments, Class Counsel should be rewarded—not penalized—for refusing to negotiate their attorneys' fees before substantive relief for the class was secured. Considering the actual facts of this case, Class Counsel respectfully request that the Court allow

reasonable attorneys' fees in the amounts sought in the fee motion, or in an amount that is otherwise fair and reasonable.

February 15, 2022

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CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under LR 7-2(b), 26-3(b), 54-1(c), or 54-3(e) because it contains 7,344 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

CERTIFICATE OF SERVICE

I certify that on the date below, counsel caused this document and all attachments to be served on the parties to this action via ECF, and have forwarded this document to the Class Administrator to be posted on the Settlement Website at www.visionclasssettlement.com.

February 15, 2022

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