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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

ROBERT D. BYRNE, individually and on behalf of all others similarly situated,

Plaintiff,

v.

OREGON ONE, INC, an Oregon Corporation,

Defendant.

Case No. 3:16-cv-01910-SB

PLAINTIFF'S UNOPPOSED MOTION FOR ORDER PRELIMINARILY APPROVING CLASS ACTION SETTLEMENT, CONDITIONALLY CERTIFYING PROPOSED SETTLEMENT CLASS, DIRECTING NOTICE, AND SETTING HEARING ON FINAL APPROVAL OF SETTLEMENT

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LOCAL RULE 7.1 CERTIFICATION

Plaintiff's counsel hereby certifies that the parties have conferred regarding the matters raised in this Motion. Defendant Oregon One, Inc. ("OOI" or "Oregon One") does not oppose this Motion and agrees to preliminary approval of the class settlement and conditional certification of a class for settlement purposes. The parties also stipulate to, and consent to, the authority of Magistrate Judge Beckerman for the limited purpose of considering this Motion and entering Final Judgment if this Motion is granted.

MOTION

Plaintiff Robert D. Byrne ("Plaintiff" or "Byrne"), unopposed by OOI, moves the Court, pursuant to Rule 23 of the Federal Rules of Civil Procedure ("FRCP"), to:

(1) Conditionally certify, for the purposes of settlement only, a class of individuals ("the Class") as set forth in the parties' proposed class action settlement agreement ("Settlement Agreement"), attached as Exhibit 1;

(2) Preliminarily approve the Settlement Agreement;

(3) Appoint Plaintiff as the named representative of the Class;

(4) Appoint Kelly D. Jones and Bret A. Knewtson as Class Counsel;

(5) Order notice to Class Members regarding the certification of the Class, the terms of the Settlement Agreement, and the rights of Class Members, as set forth in the Notice attached as Exhibit C to the Settlement Agreement, within 30 days of entry of an Order on this Motion; and

(6) Set a date for a hearing on a Motion for Final Approval of the

Settlement Agreement and to consider Class Counsel's request for an award of fees and costs, and for a class representative service award to Plaintiff, on a date that is after the close of the "opt out period," as described in more detail herein.

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

The Settlement Agreement meets the standards for preliminary approval. The parties arm's-length negotiations with an experienced mediator resulted in a settlement that provides substantial benefits to the proposed Class—including actual checks that will be sent to Class Members as well as other significant additional benefits. Given OOI's low net worth, lack of insurance coverage, and the risks and uncertainty associated with continued litigation, the Settlement Agreement, taken as a whole, is fair, reasonable, and adequate to all concerned parties—and represents the putative Class Members' best chance to obtain relief for OOI's alleged unlawful conduct.

The proposed class definition meets the criteria under FRCP 23 for preliminary class certification. All of the 158 members of the Class were sent a materially identical collection letter, based upon a common template, within the class period, that Plaintiff contends violates the same federal statute in the same manner. The proposed Class should be conditionally certified for settlement purposes, because the Class satisfies each requirement of FRCP 23(a): (1) the Class is so numerous that joinder of all members is impracticable, (2) issues of law or fact are common to the Class, (3) Plaintiff's claims are typical of the claims of the Class, (4) Plaintiff has no interests antagonistic to the other members of the Class, and

Plaintiff's counsel is qualified, is experienced, and will vigorously represent the Class. The proposed Class also satisfies FRCP 23(b)(3) because (1) common questions of law or fact predominate and (2) a class resolution is superior to other methods available for the fair and efficient adjudication of this controversy. Therefore, the proposed Class should be conditionally certified for settlement purposes, Plaintiff should be appointed Class Representative, and Plaintiff's counsel should be appointed as Class Counsel.

II. FACTUAL AND PROCEDURAL BACKGROUND

In this putative class action, Plaintiff asserts claims on behalf of himself and a class of individuals with Oregon addresses to whom OOI sent letters in an attempt to collect on an alleged debt that violated numerous provisions of the Fair Debt Collection Practices Act ("FDCPA"), including 15 U.S.C. § 1692g ("§ 1692g"), 15 U.S.C. § 1692e ("§ 1692e"), and 15 U.S.C. § 1692f ("§ 1692f"). *See generally* Plaintiff's Class Action Allegation Complaint, Dkt. 1 ("Complaint"). The Complaint was filed on September 29, 2016.

Specifically, in his Complaint, Byrne alleges that the initial collection letter that was sent to him by OOI, dated April 6, 2016 (Dkt. 1-1 or "initial collection letter"), which was the initial communication attempt to collect a consumer debt that allegedly originated with Citibank Goodyear ("debt"), failed to adequately provide him with substantive information about the debt as mandated by § 1692g(a)(1)-(2), because the initial collection letter did not state the amount of the debt that included an amount for interest, although that interest was accruing on the debt, and the initial collection letter did not state the name of the current creditor to whom the debt

was owed. Dkt. 1, ¶¶ 31, 33; Dkt. 1-1. Byrne also alleges that OOI also failed to provide him with adequate notice of his right to dispute the debt and request verification of the debt, or the name and address of the original creditor as mandated by § 1692g(a)(4)-(5), because the initial collection letter did not state that his dispute or request for verification of the debt needed to be in writing. Dkt. 1, ¶¶ 35-36; Dkt. 1-1.

Plaintiff's individual allegations were asserted as class allegations, because "the collection letter sent to Plaintiff, is a template and is identical or materially similar to other initial collection letters sent to other individuals in Oregon within the class period, as the initial communication in an attempt to collect debts incurred for personal, family or household purposes, with exception to the actual alleged amount of the debt that Oregon One was attempting to collect and, in some instances, the name of the alleged original creditor." Dkt. 1, ¶ 19.

The proposed class definition was defined in Plaintiff's Complaint as follows:

> (1) All individuals with Oregon addresses; (2) from whom Defendant attempted to collect debts incurred for personal, family or household purposes; (3) by sending a collection letter that was the only written notice sent within five days of the initial communication:
>
> (a) that was substantially or materially similar to the initial collection letter sent to Plaintiff and attached as Exhibit 1 to this Complaint, in that the letter
>
> (b) did not state the name of the current creditor to whom the debt was owed; or
>
> (c) contained bolded double-spaced text listing the consumer's available options in response to the collection letter, but listing the notices required by 15 U.S.C. §1692g(a) in single spaced, non-bolded language at the bottom of the page; or
>
> (d) stated "[w]e would like to confirm the status of your account and decide as to our future course of action. Our decision will largely depend on you. Your response to this letter will determine the measures

> we take to collect the principal balance, all accrued and unpaid interest"; or
>
> (e) did not contain language that if the consumer notifies Oregon One *in writing* within the thirty-day period that the debt, or any portion thereof, is disputed, that Oregon One will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; or
>
> (f) that did not contain language stating that that, upon the consumer's written request within the thirty-day period, that Oregon One will provide the consumer with the name and address of the original creditor, if different from the current creditor; or
>
> (4) by sending any collection letter that stated an amount owed for the debt that did not include interest, or an interest rate, but stated that interest was accruing on the debt;
>
> (5) at any time on or after September 29, 2015.

Dkt. 1, ¶ 20.

OOI filed a Motion to Dismiss pursuant to FRCP 12(b)(1) on November 28, 2016, arguing that this Court lacked subject-matter jurisdiction to provide relief to Byrne because he failed to plead a concrete injury-on-fact that would permit this Court to provide relief pursuant to federal court constitutional standing requirements. Dkt. 8. On July 18, 2017, Magistrate Judge Beckerman found that Byrne satisfied the minimum constitutional requirements for Article III standing, and therefore the Court recommended that the district judge deny OOI's Motion to Dismiss. Dkt. 22. On August 16, 2017, Judge Brown adopted Magistrate Judge Beckerman's Findings and Recommendation and denied OOI's Motion to Dismiss. Dkt. 27.

On February 5, 2018, OOI then filed a Motion to Compel Arbitration, Stay Case and Strike Class Allegations ("Motion to Compel Arbitration") (Dkt. 47), and its Memorandum in Support of that Motion (Dkt. 48). Plaintiff filed its response to OOI's

Motion to Compel Arbitration on March 10, 2018, and an amended response (to correct caption only) on March 13, 2018. Dkt. 58, 62. OOI filed its reply on March 22, 2018. Dkt. 65. Oral argument on OOI's Motion to Compel Arbitration, and all other case management deadlines, has been stayed pending settlement negotiations and Final Approval of a class action settlement, by request of the parties. Dkt. 73. No previous motion for class certification has yet been filed in this case.

III. SUMMARY OF THE SETTLEMENT PROCESS

The parties consummated the Settlement Agreement only after an all-day in-person mediation, multiple emails, and a phone conference with Susan Hammer, and several months of arm's-length contested negotiations and extensive discovery. Declaration of Kelly D. Jones In Support of Plaintiff's Unopposed Motion For Order Preliminarily Approving Class Action Settlement, Conditionally Certifying Proposed Settlement Class, Directing Notice, And Setting Hearing on Final Approval of Settlement ("Jones Decl."), ¶¶ 3-8. Susan Hammer is a very accomplished and experienced mediator, a former partner of Stoel Rives, LLP, a Distinguished Fellow in the International Academy of Mediators, and a member of the National Academy of Distinguished Neutrals. Jones Decl., ¶ 4.

Prior to reaching the Settlement Agreement, counsel for Plaintiff conducted extensive discovery, including a lengthy deposition of OOI's President, Shyrlene Mason. Jones Decl., ¶ 7. In review of this discovery, Plaintiff is confident, and OOI's counsel has confirmed, that there are 158 Class Members (including Plaintiff) who received an applicable letter violating the FDCPA as defined in the class definition

within the class period. Jones Decl., ¶ 7.[1] As part of the discovery process, prior to reaching the Settlement Agreement, Plaintiff conducted significant discovery into OOI's net worth. Jones Decl., ¶¶ 7, 9. OOI's net worth is an important factor to assess whether the Settlement Agreement is fair, reasonable, and adequate, because under the FDCPA statutory damages awarded to the Class are limited to "the lesser of $500,000 or 1 per centum of the net worth of" OOI. 15 U.S.C. § 1692k(a)(2)(B)(ii). Plaintiff's counsel also requested, and reviewed, discovery regarding any insurance policies that would provide coverage to OOI, and is confident that based upon those productions, as confirmed by OOI and its counsel, that any insurance policy that OOI has will not provide coverage for any relief requested for Plaintiff or the Class Members. Jones Decl., ¶ 10.

After agreeing to an amount for statutory class damages at the mediation, the mediation Plaintiff's counsel then also negotiated, and OOI ultimately agreed, to discontinue collecting on all Class Members accounts for which any balance remains, and to file satisfactions of judgments for all judgments obtained against Class Members, for which any balance remains and for which a satisfaction of judgment has not previously been filed. *See* Settlement Agreement, Section 4.07. Only after an amount of class damages were agreed to, the parties then agreed that OOI would not object to Plaintiff requesting a class representative service award, not to exceed $3,500. Jones Decl., ¶ 8. The parties have not agreed on any amount of attorney fees,

[1] The list of Class Members names is attached as Exhibit A to the Settlement Agreement, but the names are redacted in the version filed in support of this Motion because it is required to be filed under seal. Plaintiff will file Exhibit A to the Settlement Agreement in unredacted form if the Court requests that Plaintiff do so.

costs, and expenses of Plaintiff's counsel that would not be objected to by OOI. Jones Decl., ¶ 8. Therefore, any fees or costs awarded by this Court would be collected from OOI and not paid out of the funds available to the Class Members.

IV. THE COURT SHOULD GRANT THE MOTION TO PRELIMINARILY APPROVE THE SETTLEMENT AGRREEMENT, NOTICE, AND SET FURTHER PROCEEDINGS

Through this unopposed Motion, Plaintiff respectfully requests that this Court preliminarily approve the Settlement Agreement and give permission to send notice to Class Members. The district court has discretion in approving the proposed settlement of a class action. *See Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 963-64 (9th Cir. 2009). The Ninth Circuit has a judicial policy favoring settlements, "particularly where complex class action litigation is concerned." *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992).

A. Legal Standards for Preliminary Approval.

Approval of a proposed class action settlement under FRCP 23(e) is a two-step process. First, counsel submits the proposed terms of settlement and the Court makes a preliminary determination of fairness. Upon preliminary approval, the Court directs that notice of the settlement be given to the Class Members and then sets a formal fairness hearing for consideration of whether the proposed settlement is fair, reasonable, and adequate. *See Manual for Complex Litigation* 4th §§ 21.632-21.633 (2004). This Motion for preliminary approval of the settlement is the first step in the Court's two-step approval process.

The purpose of the Court's preliminary evaluation of the proposed settlement is to determine only whether the proposed settlement is within the range of possible

approval. Following notice to Class Members and the opportunity to comment or opt out, the Court will fully evaluate whether the parties negotiated a settlement that is fair, reasonable, and adequate to the Class Members. At the preliminary approval stage, the Court evaluates whether the settlement falls "within the range of possible approval, such that there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing." *In re M.L. Stern Overtime Litig*., No. 07-CV-0118-BTM (JMA), 2009 U.S. Dist. LEXIS 31650, at *10 (S.D. Cal. Apr. 13, 2009) (internal quotation marks and citation omitted); *see also Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 386 (C.D. Cal. 2007) ("To determine whether preliminary approval is appropriate, the settlement need only be potentially fair, as the Court will make a final determination of its adequacy at the hearing on Final Approval, after such time as any party has had a chance to object and/or opt out." (citations omitted)).

As set forth in the *Manual for Complex Litigation*:

> If the preliminary evaluation of the proposed Settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval, the court should direct that notice under Rule 23(e) be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement.

Manual for Complex Litigation 3d § 30.41 (1995). As clarified by the Ninth Circuit:

> Both the district court and this court must evaluate the fairness of a settlement as a whole, rather than assessing its individual components. As our precedents have made clear, the question whether a settlement is fundamentally fair within the meaning of Rule 23(e) is different from the question whether the settlement is perfect in the estimation of the reviewing court. Although Rule 23 imposes strict procedural requirements on the approval of a class settlement, a district court's only

> role in reviewing the substance of that settlement is to ensure that it is fair, adequate, and free from collusion.

Lane v. Facebook, Inc., 696 F.3d 811, 818-19 (9th Cir. 2012). A settlement negotiated at arm's-length by counsel well-versed in class litigation is preliminarily entitled to "a presumption of fairness." *Gribble v. Cool Transp., Inc.*, No. CV 06-04863 GAF (SHx), 2008 U.S. Dist. LEXIS 115560, at *26 (C.D. Cal. Dec. 15, 2008).

B. The Proposed Settlement Falls Within the Range of Possible Approval.

In approving a class action settlement, this Court must determine that the settlement is "fair, reasonable, and adequate." FRCP 23(e)(2). Prior to approving a class action settlement "the district court must reach a reasoned judgment that the proposed Settlement Agreement is not the product of fraud or overreaching by, or collusion among, the negotiating parties and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned parties." *Medearis v. Or. Teamster Emp'rs Tr.*, CV.07-723-PK, 2009 U.S. Dist. LEXIS 53453, at *2 (D. Or. June 19, 2009) (quoting *Ficalora v. Lockheed Cal. Co.*, 751 F.2d 995, 997 (9th Cir. 1985)). If the 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).

In the Ninth Circuit "voluntary conciliation and settlement are the preferred means of dispute resolution." *Officers for Justice v. Civil Serv. Comm'n of the City & Cty. of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983). It is beyond question that "[t]here is an overriding public interest in settling and quieting litigation," and this is "particularly true in class action suits." *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976) (footnote omitted); *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995).

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). Each of these factors supports a finding that the Settlement Agreement is fair and reasonable.

The first three factors require a comparison of the benefits to the Class and the likelihood of achieving recovery for the Class at trial. This Court must show that it has evaluated each of the factors, but need not reach a conclusion as to the merits of the dispute. *Officers for Justice*, 688 F.2d at 625 (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"). Instead, the 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); *see also Elkins v. Equitable Life Ins. Co.*, Civil Action No. 96-296-CIV-T-17B, 1998 U.S. Dist. LEXIS 1557, at *76-77 (M.D. Fla. Jan. 27, 1998) (finding that the correct inquiry is accomplished by "'balancing the probabilities, not assuring that the plaintiff class receives every benefit that might have been won after a full trial'" (quoting *In re Chicken Antitrust Litig.*, 560 F. Supp. 957, 960 (N.D. Ga. 1980))). In this case, all seven of the factors support preliminary approval.

1. The Strength of Plaintiff's Case.

The Class would prevail at trial on the merits. OOI has never presented a cogent defense to liability, but it denies any wrongdoing and continued to zealously defend itself, inter alia, by seeking to arbitrate the claim in private arbitration. The FDCPA is a strict liability statute,[2] and, *inter alia*, § 1692g(a) clearly states that the initial communication with the consumer must include the amount of the debt,[3] the name of the current creditor, and that a *written* request is required from the consumer disputing the debt or requesting either verification or the name of the

2 *See Clark v. Capital Credit & Collection Servs.*, 460 F.3d 1162, 1176 n.11 (9th Cir. 2006).

3 Compliance with § 1692g(a)(1) also includes that the debt collector state amounts owed for any accrued interest and other charges, as well as principal, as of the date the initial collection letter is sent. *See Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C.*, 214 F.3d 872, 875 (7th Cir. 2000).

original creditor. The notices required by § 1692g(a) must not be overshadowed or contradicted by other language in the initial collection letter. *See Swanson v. S. Or. Credit Serv.*, 869 F.2d 1222 (9th Cir. 1988).

However, Plaintiff and the Class Members face a significant obstacle in establishing the amount of statutory damages available in this case, as FDCPA class statutory damages are limited to "the lesser of $500,000 or 1 per centum of the net worth of" OOI. 15 U.S.C. § 1692k(a)(2)(B)(ii). Plaintiff, on behalf of himself and the Class Members, only seeks statutory damages in this case. Through discovery, Plaintiff has requested, and reviewed, discovery indicating that OOI's net worth is approximately $350,000. Jones Decl., ¶ 9; Knewtson Decl., ¶ 3. Based upon this valuation, 1 percent of OOI's net worth would be no more than $3,500. Although it is conceivable that OOI's net worth may increase by the time a judgment is obtained after trial, it is also just as likely that it may decrease even further through payment of attorney fees to its counsel for continued litigation in this case, or as a result of other factors.[4]

Plaintiff's counsel has also requested, and reviewed, discovery regarding any insurance policies that would provide coverage to OOI, and is confident that based upon those productions, as confirmed by OOI and its counsel, that any insurance

[4] Although the FDCPA does not specify at what point the defendant's net worth is to be assessed (*e.g.*, at the time of the violation, when the complaint is filed, or at the time there is a finding of liability) limited case law dealing with the issue indicates the assessment may take place at the time liability is established. *See Seawell v. Universal Fid. Corp.*, Civil Action No. 05-479, 2007 U.S. Dist. LEXIS 25163, at *7 (E.D. Pa. Apr. 2, 2007).

policy that OOI has will not provide coverage for any relief requested for Plaintiff or the Class Members. Jones Decl., ¶ 10.

Plaintiff also recognizes that, even had the Class prevailed at trial, Plaintiff and the Class would have likely faced significant investment of resources in collection actions. Therefore, while the merits of Plaintiff and the putative Class Members' FDCPA case are strong, ultimate monetary recovery outside of settlement is questionable. For that reason, the Settlement Agreement, which guarantees each Class Member a cash payment for their statutory damages, with no claims process, is a fair result that warrants Court approval.

2. The Risks, Expenses, Complexity, and Likely Duration of Ongoing Litigation.

The risks, expenses, complexity, and duration of ongoing litigation are significant. In addition to the 1 percent class statutory damages cap and collectability issues described above, OOI has filed a Motion to Compel Arbitration, which has been stayed, pending this proposed settlement. Dkt. 73. Although Plaintiff is confident that he would succeed in his opposition to OOI's Motion to Compel Arbitration, it is certainly not a given. Moreover, if this Court found that Plaintiff's claim against OOI was not subject to any enforceable arbitration agreement, OOI has the right of an immediate appeal of that decision, pursuant to 9 U.S.C. § 16, which would cloud and delay further proceedings and relief to Plaintiff and the Class Members. In short, given the 1 percent class statutory damages cap combined with OOI's low net worth, lack of insurance coverage, the significant possibility that the Class could recover less for their damages after trial as a result of OOI's legal expenses or other economic

strategies or factors, the potential post-judgment collection difficulties, and potential appeals, even if the Class were to prevail at trial, it could realistically be years before the Class would be able to recover any relief outside of the Settlement Agreement. Thus, Plaintiff and Class Members will benefit from ending this litigation, eliminating all risks of continuing the lawsuit, and receiving guaranteed payments from OOI through the Settlement Agreement.

3. The Risk of Maintaining Class Action Status Throughout the Trial.

Plaintiff has not moved for certification of the Class prior to this Motion. Although Plaintiff is confident that a motion for class certification would be granted outside of settlement, Plaintiff is also confident that absent the Settlement Agreement, OOI would have vigorously opposed the certification motion. In addition to an appeal of the Court's favorable decision to certify the Class, there would be a risk that the Court could have decertified the Class before or after trial.

4. The Amount Offered in Settlement.

The total monetary amount of the Settlement Fund provided by the Settlement Agreement is $13,000 (not including class administration costs which will be paid by OOI outside of the Settlement Fund). Under the terms of the Settlement Agreement, Class Members will receive substantial benefits. First, each Class Member will receive an actual check in the amount of $54.14—without a "claims made" process—for their statutory damages. This amount of monetary recovery alone is notable, because in class cases the FDCPA caps the total amount of statutory damages recoverable by the class to the *lesser of* $500,000 or 1 percent of the net worth of the

debt collector. 15 U.S.C. § 1692k(a)(2)(B)(ii). Here, OOI has represented, and Plaintiff has verified, that OOI has a net worth of approximately $350,000, thus the total that might have been awarded for the Class Members' damages at trial is $3,500. *See* Jones Decl., ¶ 9. As the named Plaintiff, Plaintiff would be able to recover $1,000 for his statutory damages, independent of the class statutory damages cap, and he has done so pursuant to the Settlement Agreement. *See* 15 U.S.C. § 1692k(a)(2)(B)(i). Thus, even assuming that at the time of trial OOI's net worth was $350,000, the maximum that could be awarded to Plaintiff and the Class Members for the damages they are seeking in this case would be $4,500: $3,500 for class statutory damages and $1,000 for Plaintiff's statutory damages. But through the Settlement Agreement, Plaintiff has secured at least $8,500 of the Settlement Fund for the Class Members' statutory damages payments.

Further, the Settlement Agreement provides for additional significant benefits to the Class Members who have a balance owing on their account, for which OOI has agreed to cease collection of, and the balances remaining on any judgments obtained against any Class Members that have not previously been satisfied, for which OOI has agreed to file satisfactions of judgments in state court. Settlement Agreement, Section 4.07. Although it may not be possible to calculate these additional benefits to the Class with certainty, this surely will provide a significant real-life benefit to Class Members.

Moreover, OOI will pay for all costs of the settlement administrator, above and beyond the Settlement Fund and pursuant to the Settlement Agreement, and any

balance of the Settlement Fund remaining after the distributions to Plaintiff and the Class Members will be distributed to a *cy pres*—no amount will revert back to OOI. Lastly, no attorney fees, costs, and expenses will be paid from the Settlement Fund, nor have the parties agreed on an any specific amount that OOI would not object to. Instead, Plaintiff's counsel (as Class Counsel) will seek reasonable fees, costs, and expenses to be awarded by this Court.

Therefore, the Settlement Agreement, which (1) guarantees *all* Class Members a cash payment, (2) with no "claims made" process, (3) provides the significant additional benefit of the satisfaction of any judgments that have yet to be satisfied and the cessation of the collection of any remaining balances owed (relief that could not have been obtained at trial), (4) avoids the risk of continued litigation, (5) provides that OOI pays administration costs beyond the Settlement Fund, (6) does not include attorney fees, costs, or expenses, (7) provides that no amount will revert back to OOI, and (8) almost certainly provides more relief to the Class Members than could ever be awarded at trial, represents an amount that is fair, reasonable, and adequate.

5. The Extent of Discovery Completed and the Stage of the Proceedings.

This lawsuit was originally filed on September 29, 2016. Since that time, the parties have conducted significant discovery. Hundreds of files were produced, including a myriad of spreadsheets containing a large volume of relevant data. OOI also served subpoenas on and conducted depositions of third parties, which Plaintiff participated in and defended. Plaintiff conducted a lengthy all-day FRCP 30(b)(6) deposition of OOI's President, Shyrlene Mason. Jones Decl., ¶ 7. OOI served, and

Plaintiff responded to, significant discovery requests as well. The parties engaged in significant motions practice on complex issues, litigating an FRCP 12(b)(1) Motion to Dismiss (through objections to this Court's Findings and Recommendations and subsequent objections), and fully briefed a (pending) Motion to Compel Arbitration. Both parties were represented by experienced counsel who thoroughly and zealously argued their clients' respective positions.

The parties have gained a clear view of the strengths and weaknesses of their respective arguments, which has enabled them to engage in meaningful settlement negotiations, including mediation with a very experienced and well-respected mediator, and the essential terms of the Settlement Agreement were facilitated by an intensive all-day mediation, several emails, and a phone conference with the mediator, crafted by the mediator after protracted mediation sessions. Where, as here, the parties have conducted significant discovery and are well-versed in the strengths and weaknesses of their claims, settlement is favored. *See Holden v. Burlington N., Inc.*, 665 F. Supp. 1398, 1423 (D. Minn. 1987) ("[i]t is clear that by the time the proposed settlement was reached, each party was keenly aware of the strengths and weaknesses of its case and was well able to accurately assess the benefits of the proposed settlement in light of the risk, expense, and delay associated with continued litigation"); *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) (where settlement was reached after significant discovery and summary judgment motions were decided, the fact that the parties "had exhaustively examined the factual and legal bases of the disputed claims"

weighed in favor of the settlement); *City P'ship Co. v. Atl. Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996) ("When sufficient discovery has been provided and the parties have bargained at arms-length, there is a presumption in favor of the settlement." (citations omitted)). This factor also weighs in favor of finding that the proposed settlement falls within the range of possible approval.

6. The Experience and Views of Counsel.

Plaintiff is represented by Kelly D. Jones and Bret A. Knewtson, both solo practitioners with significant experience in class action litigation and extensive experience in consumer litigation, especially FDCPA litigation. *See* Jones Decl., ¶ 16; Knewtson Decl., ¶ 7. Counsel for OOI, Jeffrey Hasson, also has experience in class litigation and extensive experience in FDCPA litigation. Counsel's support of the Settlement Agreement weighs in favor of finding the settlement fair, adequate, and reasonable. *Monterrubio*, 291 F.R.D. at 454; *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 528 ("Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation." (citation omitted)). Based upon examination of the evidence, especially regarding OOI's net worth, the viability of adding any additional defendants, and the risks associated with protracted litigation, Plaintiff's counsel recommends this settlement and believes that it represents a fair, reasonable, and adequate settlement for Plaintiff and the Class Members. Jones Decl., ¶ 13; Knewtson Decl., ¶ 5.

7. No Government Participant Is Present in This Litigation.

Because there is no government participant in this litigation, this factor is inapplicable to the preliminary approval analysis.

8. The Settlement Class Members Have Not Yet Been Given Notice of the Settlement.

Notice has not yet been given to Class Members. Accordingly, this factor is not relevant at this preliminary approval stage. The Court will be in a better position to evaluate this factor at the Final Approval hearing in light of any objections or comments from Class Members.

C. Procedural Fairness: The Proposed Settlement Is the Product of Arm's-Length Negotiation.

The Ninth Circuit "put[s] a good deal of stock in the product of an arms-length [sic], non-collusive, negotiated resolution." *Rodriguez*, 563 F.3d at 965; *see also Officers for Justice*, 688 F.2d at 625 ("[T]he court's intrusion upon what is otherwise a private consensual Settlement Agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the Settlement Agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned."); *Monterrubio*, 291 F.R.D. at 454; *Newberg on Class Actions* 3d § 11.42 ("[a]n initial presumption of fairness is usually involved if the settlement is recommended by class counsel after arm's-length bargaining").

Here, the Settlement Agreement was negotiated at arm's-length, during an all-day mediation with Susan Hammer, follow-up emails and a telephone conference with Susan Hammer, and months of subsequent negotiations between the parties to finalize the remaining terms. The parties were represented by experienced counsel, and the settlement discussions facilitated by a skilled, experienced, and well-respected mediator. The process leading to the Settlement Agreement was fair to both

sides, with neither party wielding undue influence over the other. The Settlement Agreement suggests no bias, collusion, or coercion in favor of any party or Class Member.

D. This Court Should Permit the Parties to Send Notice to Absent Class Members.

Notice to absent class members should issue "[i]f the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies[.]" *Manual for Complex Litigation* 3d, *supra*, § 30.41. As shown above, the Settlement Agreement is fair and reasonable. Once preliminary approval is granted, the next step of the process involves notice of a hearing to settlement Class Members. FRCP 23(c) requires that notice to class members "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); *see also* FRCP 23(e) (requiring court to direct notice to all class members who would be bound by settlement proposal).

The class members must be sent the "best notice that is practicable under the circumstances," and individual notice must be sent to class members who "can be identified through reasonable effort." FRCP 23(c)(2)(B). Moreover, due process requires that the notice "provide affected parties with the opportunity to be heard."

Torrisi v. Tucson Elec. Power Co., 8 F.3d 1370, 1373 (9th Cir. 1993) (citing *In re Cement & Concrete Antitrust Litig.*, 817 F.2d 1435, 1440 (9th Cir. 1987)). The Ninth Circuit has recognized that a notice is sufficient where it "generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *In re Cement & Concrete*, 817 F.2d at 1440.

The Notice the parties propose to send to the Class Members is attached as Exhibit C and Exhibit D to the Settlement Agreement. The Notice was designed by counsel and has been approved by Garden City Group ("GCG")—a national class action settlement administrator with an excellent reputation and a wealth of experience that has been approved by this Court in at least one other class case. The Declaration of Brandon Schwartz filed in support of this Motion describes the experience and expertise of GCG. As set forth in the Settlement Agreement, the Notice will be sent to 158 Class Members, all of whom have been identified from data produced by OOI in this case. The Notice in Exhibit C of the Settlement Agreement will be mailed by U.S. mail, within 30 days of this Court granting preliminary approval. Pursuant to the Settlement Agreement, OOI has retained GCG to mail the Notices and handle settlement administration.

The Settlement Agreement also affirms the process through which the parties have identified the Class Members, as described above. Further, the Settlement Agreement requires OOI to confirm contact information for all Class Members; GCG to verify that contact information before sending the Notices; and GCG to take

reasonable steps to locate any Class Member whose Notice is returned as undeliverable, and to resend the Notice if a better address is found. Further, a website and toll-free telephone center will also be established to answer settlement Class Members' questions and to provide copies of the pertinent settlement documents and the Notice. As the Declaration of Brandon Schwartz confirms, the Notice and Notice Plan will effectively reach Class Members, is well-suited to the Class, and is more than adequate to satisfy due process. Brandon Schwartz's Declaration also confirms that the Notice and Notice Plan will provide the best notice practicable under the circumstances. The proposed notice procedures will enable Class Members to exercise their rights and make an informed decision regarding their views of the fairness, adequacy, and reasonableness of the proposed settlement, fulfilling the requirements of adequate notice. *See*, *e.g.*, *Torrisi*, 8 F.3d at 1374; *Manual for Complex Litigation* 3d, *supra*, § 30.21.

Finally, the proposed notice period, which will give settlement Class Members 90 days from the date the Court enters an Order on this Motion to file objections or requests for exclusion, is appropriate and sufficient prior to the final settlement approval hearing. *See Torrisi*, 8 F.3d at 1374-75 (finding 31 days more than sufficient because "class as a whole had notice adequate to flush out whatever objections might reasonably be raised to the settlement").

E. Oregon Consumer Justice Is an Appropriate Recipient of the *Cy Pres* Award.

The parties have agreed that no amount of the Settlement Fund remaining after distribution to Class Members should revert to OOI. Rather, the parties agree

that any remaining funds should be paid to a *cy pres* recipient, as approved by the Court. The *cy pres* "must account for the nature of the plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class members." *Nachshin v. AOL, Ltd. Liab. Co.*, 663 F.3d 1034, 1036 (9th Cir. 2011). Plaintiff and the Class recommend (and OOI has agreed to and does not oppose) that Oregon Consumer Justice ("OCJ") be named as recipient of the *cy pres* award, if there is any. Because the putative Class is composed of only individuals with Oregon addresses, and the claims are for alleged violations of a consumer protection statute, an Oregon nonprofit public benefit entity like OCJ, with a sole mission to advance consumer protection for Oregonians, is a particularly well-suited choice for a *cy pres* award in this action. *See* Jones Decl., ¶ 14. Niether Plaintiff nor Plaintiff's counsel has any affiliation with OCJ. *See* Jones Decl., ¶ 15; Knewtson Decl., ¶ 6. Plaintiff and the Class will ask the Court to approve the Settlement Agreement, which names OCJ as the *cy pres* recipient, in the Final Approval Motion.

V. THE SETTLEMENT CLASS SHOULD BE CONDITIONALLY CERTIFIED

In addition to finding that a class settlement is fair, reasonable, and adequate under FRCP 23(e), in order to certify a settlement class, the Court must also find that the settlement class meets the certification requirements of FRCP 23(a) and (b). *Resnick v. Frank* (*In re Online DVD-Rental Antitrust Litig.*), 779 F.3d 934, 942 (9th Cir. 2015) (citing *Amchem Prods., Inc.*, 521 U.S. 591, 620-21 (1997)). In order for a court to certify a class, a plaintiff must satisfy the prerequisites of FRCP 23(a) and

must also "satisfy at least one of the three requirements listed in Rule 23(b)." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2548 (2011).

The requirements of FRCP 23(a) are: (1) a class so numerous that joinder is impractical; (2) common questions of law or fact; (3) typicality of the class representative; and (4) that the representatives will adequately represent the class. However, in the context of a proposed settlement class, manageability of the case for trial is not considered. Each of these requirements is satisfied as to the settlement class that Plaintiff proposes here.

A. The Proposed Class Definition.

Section 1.08 of the Settlement Agreement defines the Class as follows:

> **1** All individuals with Oregon addresses;
> **2** From whom OOI attempted to collect debts incurred for personal, family or household purposes;
> **3** With respect to the individuals that meet the criteria set forth in sections 1 and 2, on or after September 29, 2015, one of the following is true:
> **3.1** OOI sent to that consumer an initial collection letter that
> **3.1.1** Did not state the name of the current creditor to whom the debt was owed; or
> **3.1.2** Contained bolded double-spaced text listing the consumer's available options in response to the collection letter, but listing the notices required by *15 U.S.C. § 1692g (a)* in single spaced, non-bolded language at the bottom of the page; or
> **3.1.3** Stated "[w]e would like to confirm the status of your account and decide as to our future course of action. Our decision will largely depend on you. Your response to this letter will determine the measures we take to collect the principal balance, all accrued and unpaid interest"; or
> **3.1.4** Did not contain language that if the consumer notifies Oregon One *in writing* within the thirty-day period that the debt, or any portion thereof, is disputed, that OOI would obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment would be mailed to the consumer by OOI; or

> **3.1.5** Did not contain language stating that upon the consumer's *written* request within the thirty-day period that OOI would provide the consumer with the name and address of the original creditor, if different from the current creditor.
>
> **3.2** OOI sent to that consumer a collection letter that stated interest was accruing on the debt but did not include the amount owed that included the interest that had accrued, or did not include the rate of interest that was accruing on the debt.

Section 1.08.4 of the Settlement Agreement provides that the Class "does not include OOI, any entity that has a controlling interest in OOI, and OOI's current or former directors, officers, members, managers, employees, counsel, and their immediate families. The Plaintiff Class also does not include any persons who validly request exclusion from the Plaintiff Class pursuant to the Opt Out Procedures described in this Agreement."

B. The Elements of Rule 23(a) Are Satisfied.

1. The Members of Each Class Are So Numerous that Joinder Is Impracticable.

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). While the size of a proposed class is not dispositive, it is significant because, "where a class is large in numbers, joinder will usually be impracticable." *Jordan v. Los Angeles County*, 669 F.2d 1311, 1319 (9th Cir.), *vacated on other grounds*, 459 U.S. 810 (1982). A putative class of at least 40 members usually is sufficient to satisfy the numerosity requirement. *Or. Laborers-Emp'rs Health & Welfare Tr. Fund v. Philip Morris, Inc.*, 188 F.R.D. 365, 372 (D. Or. 1998). Here,

Plaintiff anticipates that the proposed Class includes 158 members. The joinder of 158 Class Members is impractical. Therefore, the numerosity requirement is satisfied.

2. Numerous Questions of Law and Fact Are Common to the Class.

The second requirement for class certification under FRCP 23(a) is that there must be "questions of law or fact common to the class." FRCP 23(a)(2). As the Ninth Circuit has observed:

> Rule 23(a)(2) has been construed permissively. All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with the disparate legal remedies within the class.

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998).

"[E]ven a single common question will do." *Dukes*, 131 S. Ct. at 2556 (internal quotation marks omitted). As a result, "when the party opposing the class has engaged in some course of conduct that affects a group of persons and gives rise to a cause of action, one or more elements of that cause of action will be common to all persons affected." *Or. Laborers-Emp'rs*, 188 F.R.D. at 373 (internal quotation marks omitted).

Plaintiff and the proposed Class Members' FDCPA claims arise out of a common core of facts. Common facts include, among other things, that:

(1) The initial collection letters that OOI sent to Plaintiff and the proposed Class Members were based upon a common template;

(2) The initial collection letters that OOI sent to Plaintiff and the proposed Class Members did identify the current creditor to whom the debt was owed;

(3) The initial collection letters that OOI sent to Plaintiff and the proposed Class Members omitted that the consumers had a right to dispute the debt and to request verification of the debt and the current name and address of the original creditor *in writing*;

(4) The initial collection letters that OOI sent to Plaintiff and the proposed Class Members did not specify the amount of the debt including interest, or any interest rate whatsoever, although it stated that interest was accruing on the account; and

(5) The debts incurred by Plaintiff and the proposed Class Members were incurred for personal, family, or household purposes.

In addition to these common issues of facts, which are sufficient to establish commonality standing alone, there also are a number of legal issues common to Plaintiff and the prosed Class Members' FDCPA claims. The resolution of Plaintiff and the prosed Class Members' FDCPA claims will involve at least the following common legal issues:

(1) Whether OOI violated the FDCPA because its initial collection letters do not identify the name of the current creditor;

(2) Whether OOI violated the FDCPA because the language, type, font, formatting, and/or structure of its initial collection letters overshadow the required notice of a consumer's right to dispute the debt and to request verification of the debt;

(3) Whether OOI violated the FDCPA because its initial collection letters omit the required notice of the consumers' right to dispute the debt and to request verification of the debt and the current name and address of the original creditor in writing; and

(4) Whether OOI violated the FDCPA because it did not specify the amount of the debt including interest, or any interest rate whatsoever, although it stated that interest was accruing on the account.

Given the many common questions of both law and fact, the commonality requirement of FRCP 23(a)(2) is satisfied.

3. Plaintiff's Claims Are Typical of Those of Absent Class Members.

The third requirement for class certification under FRCP 23(a) is that "the claims . . . of the representative parties [must be] typical of the claims . . . of the class." FRCP 23(a)(3). A class 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. If a defendant's challenged conduct involves a policy or practice that affects all class members, a court should find that typicality exists if proposed class members have injuries "similar" to those of the named plaintiff and that "result from the same, injurious course of conduct." *Armstrong v. Davis*, 275 F.3d 849, 868-69 (9th Cir. 2001), *abrogated in part on other grounds by Johnson v. California*, 543 U.S. 499, 504-05 (2005).

Here, Plaintiff's FDCPA claim and the claims of the proposed Class Members arise out of OOI's common practice of sending initial collection letters to collect on

consumer debts, based on the same common template, that failed to list the current creditor of the debt, and failed to state that Plaintiff and the proposed Class Members had the right to dispute and request verification of the debt, and request the name and address of the original creditor, in *writing*, as required by § 1692g(a). Additionally, Plaintiff's FDCPA claim and the claims of the proposed Class Members arise out of OOI's common practice of sending initial collection letters that contained double-spaced, bold-face text in the center of the page setting forth the consumer's options and stating that "[w]e would like to confirm the status of your account and decide as to our future course of action. Our decision will largely depend on you. Your response to this letter will determine the measures we take to collect the principal balance, all accrued and unpaid interest," which overshadowed or contradicted the notice(s) mandated by § 1692g(a)—which were (defectively) stated in single-spaced, non-bold-face text at the bottom of the page, and thus would not be easily read or sufficiently prominent enough to be noticed by the least sophisticated debtor. Moreover, Plaintiff's FDCPA claim and the claims of the proposed Class Members arise out of OOI's common practice of sending collection letters that did not contain the current amount of the debt owed by Plaintiff, including interest, as of the date of the letter, or even an interest rate, in violation of §§ 1692g, 1692e, and 1692f.

For these reasons, the typicality requirement is satisfied here.

4. Plaintiff Is an Adequate Representative.

The fourth requirement for class certification under FRCP 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." FRCP 23(a)(4). To satisfy this requirement, a proposed class representative must: (1)

not have conflicts of interest with the proposed class, and (2) be represented by qualified and competent counsel. *Capps v. U.S. Bank Nat'l Ass'n*, No. CV 09-752-PK, 2009 U.S. Dist. LEXIS 120476, at *18 (D. Or. Dec. 28, 2009). "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem*, 521 U.S. at 613. Here, Plaintiff's interests are identical to the interests of each member of the proposed Class he seeks to represent—the recovery of statutory damages for OOI's violations of the FDCPA. Plaintiff has assisted in many aspects of the case, including preparation the case and Complaint, responding to extensive discovery requests, and attendance at an all-day mediation. Plaintiff is an adequate class representative.[5]

C. The Elements of FRCP 23(b) Are Satisfied.

In addition to satisfying the prerequisites of FRCP 23(a), a plaintiff also must "satisfy at least one of the three requirements listed in Rule 23(b)." *Dukes*, 131 S. Ct. at 2548. Here, Plaintiff seeks certification of the proposed Class under FRCP 23(b)(3), which requires that: (1) common questions of law or fact predominate; and (2) a class action is superior to other methods available for the fair and efficient adjudication of the controversy. FRCP 23(b)(3). Plaintiff's FDCPA claim satisfies both of these requirements.

[5] See Paragraph VI, *infra*, for discussion regarding the adequacy of proposed Class Counsel and why Plaintiff's counsel Kelly D. Jones and Bret A. Knewtson should be appointed Class Counsel in this case.

1. Common Questions of Law or Fact Predominate.

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem,* 521 U.S. at 623. "Rule 23(b)(3) focuses on the relationship between the common and individual issues. When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than an individual basis." *Hanlon*, 150 F.3d at 1022 (internal quotation marks omitted); *see also Local Joint Exec. Bd. of Culinary/Bartender Tr. Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001). "Plaintiffs need not establish that there are no individual issues, only that class issues predominate and that a class action is superior." *Phelps v. 3PD, Inc.*, 261 F.R.D. 548, 559 (D. Or. 2009) (citing *Local Joint*, 244 F.3d at 1163).

As discussed above, the collection letters sent by OOI to the putative Class Members are based on a common template, with the same or similar language alleged to violate the FDCPA for the same reasons, and all proposed Class Members were subject to OOI's common practice of attempting to collect debts from them using the same, or a materially same, letter. Plaintiff asserts that OOI's collection letters violated the FDCPA in various ways because the notices and information mandated by § 1692g(a) were nonexistent, noncompliant, overshadowed, and/or ineffectively conveyed. Plaintiff and proposed Class Members are entitled to statutory damages, although the FDCPA limits class members' statutory damages to the lesser of $500,000 or 1 per centum of the OOI's net worth and provides that the class plaintiff is entitled to $1,000. 15 U.S.C. § 1692k(a)(2)(B).

Many courts within the Ninth Circuit have certified class actions based on alleged violations of the FDCPA under the FRCP 23(b)(3) predominance standard. *See, e.g.*, *Schwarm v. Craighead*, 233 F.R.D. 655, 663-64 (E.D. Cal. 2006) (holding that "common questions concerning whether the defendants' standardized conduct violates the FDCPA and whether the defendants' conduct amounts to actionable misrepresentations predominate the action" (citing *Amchem,* 521 U.S. at 625 ("[P]redominance is a test readily met in certain cases alleging consumer . . . fraud . . . .")); *see also Wyatt v. Creditcare, Inc.*, No. 04-03681-JF, 2005 U.S. Dist. LEXIS 25787, at *18 (N.D. Cal. Oct. 21, 2005) (finding that the plaintiff had "sufficiently established that the questions of law or fact common to all members of the class predominate, given the standardized nature of Defendants' alleged unlawful conduct and the identical statutory violations alleged by Wyatt on behalf of herself and the prospective class" (citing *Amchem*, 521 U.S. at 625)); *Abels v. JBC Legal Grp., P.C.*, 227 F.R.D. 541, 547 (N.D. Cal. 2005) (finding that "the issues common to the class-namely, whether the Defendants' systematic policy of sending collection letters, and whether those letters violate FDCPA-are predominant").

In fact, there are no material individualized issues that exist here, and even if there were any such issues they would pale in comparison to the fundamental common issue of whether OOI violated the FDCPA by sending materially identical collection letters that did not state the name of the current creditor, did not state an amount owed on the debt that included interest (but stated interest was accruing), did not state that the consumer must dispute, and request verification of, the debt in

writing, and contained language and were formatted in a way that overshadowed and ineffectively contained the required notices.

Plaintiff's proposed Class meets the predominance requirement.

2. A Class Resolution Is Superior to Other Methods.

In order to determine whether "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy," FRCP 23(b)(3), a court may consider: (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).

As a preliminary matter, the fact that "the FDCPA specifically authorizes class actions" plainly indicates that class actions frequently are 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). Additionally, "[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 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) (citing *Amchem*, 521 U.S. at 615); *see also Gold v. Midland Credit Mgmt.*, 306 F.R.D. 623, 626 (N.D.

Cal. 2014) (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").

Class resolution is especially true with FDCPA claims based upon the sending of collection letters. *See Abels*, 227 F.R.D at 541 (finding that "[c]ase law affirms that class actions are a more efficient and consistent means of trying the legality of collection letters"); *Jones v. Advanced Bureau of Collections LLP*, 317 F.R.D. 284, 294 (M.D. Ga. 2016) (holding that a class action was superior method of adjudicating allegations that collection letters failed to comply with the FDCPA's "in-writing" requirement because "separate actions by each of the class members would be repetitive, wasteful, and an extraordinary burden on the courts" (internal quotation marks omitted)); *accord Irwin v. Mascott*, 112 F. Supp. 2d 937 (N.D. Cal. 2000); *Brink v. First Credit Res.,* 185 F.R.D. 567 (D. Ariz. 1999); *Piper v. Portnoff Law Assocs.*, 262 F. Supp. 2d 520 (E.D. Pa. 2003); *Sledge v. Sands*, 182 F.R.D. 255, 259 (N.D. Ill. 1998); *Herrera v. LCS Fin. Servs. Corp*., 274 F.R.D. 666, 682 (N.D. Cal. 2011).

The relatively small amount of the statutory damages that Class Members might recover in an individual action ($1,000 maximum) makes it economically unviable for members of the proposed Class to pursue their claims through individual cases, given the substantial expense of litigation. *See Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 960 (9th Cir. 2005) ("[T]he district court did not abuse its discretion in finding that, absent a class action, Class Plaintiffs would have no meaningful redress

against [defendant].”). Indeed, “[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 any individual to bring a solo action prosecuting his or her rights.” *Amchem*, 521 U.S. at 617 (internal quotation marks omitted). Litigating these claims through a class action is superior to leaving the Class Members without a viable means of pursuing their claims—which is the virtually certain scenario if a class is not certified in this action.

Although it is true that in an individual action a given class member could be awarded up to $1,000 for their statutory damages, the reality is that the proposed $54.14 per Class Member payment provided by the Settlement Agreement, if it is approved, is likely $54.14 more than what the Class Members would otherwise obtain; thus it does not render a class-wide resolution less superior than individual actions. *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)).

Moreover, even de minimis recoveries (which the proposed settlement at bar is not) do not defeat the superiority element of a proposed class action. *See del Campo*, 254 F.R.D. at 595-96 n.9 ($0.00000111 per class member); *Abels*, 227 F.R.D. at 546-47 ($0.25 per class member); *Kalish v. Karp & Kalamotousakis, LLP*, 246 F.R.D. 461, 464 (S.D.N.Y. 2007) ($2.50 per class member); *Warcholek v. Med. Collections Sys., Inc.*, 241 F.R.D. 291, 295-96 (N.D. Ill. 2006) (certifying a FRCP 23(b)(3) FDCPA class where defendant claimed negative net worth). Further, "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." *Jacobson*, 2015 U.S. Dist. LEXIS 73313, at *25. The fact that attorney fees awarded may end up being more than the monetary value of the class recovery is also "not necessarily at odds with the underlying goals of the FDCPA . . . [because] the FDCPA provides for attorney's fees because attorneys would otherwise have little incentive to take such cases, and the fees provision 'makes the class action more likely to proceed, thereby helping to deter future violations'" *Id.* at *26 (quoting *Mace*, 109 F.3d at 344-45).

Additionally, it is desirable to concentrate this litigation in a single forum. Resolving these claims in a single action will avoid the potential for inconsistent results, will decrease the expenses of litigation, and will promote judicial economy. *See Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). Plaintiff is unaware of any other litigation concerning this controversy brought by members of

the proposed Class. Jones Decl., ¶ 12. The "manageability" analysis is not applicable in the context of a settlement class. *See, e.g., Wright v. Linkus Enters., Inc.*, 259 F.R.D. 468, 474 (E.D. Cal. 2009) (citing *Amchem*, 521 U.S. at 620) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial.").

VI. PLAINTIFF'S COUNSEL SHOULD BE APPOINTED CLASS COUNSEL

Plaintiff requests, and OOI does not oppose, that the Court appoint Kelly D. Jones and Bret A. Knewtson as Class Counsel in this case. 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. Plaintiff's attorneys have engaged in extensive motions practice and discovery in this case, including: defeating OOI's FRCP 12(b)(1) Motion to Dismiss; obtaining and reviewing extensive documents and data related to OOI's sending of allegedly unlawful collection letters to the putative class, OOI's net worth, class size, class membership; taking the full-day FRCP 30(b)(6) deposition of OOI; defending two third-party depositions; and responding to OOI's Motion to Compel Arbitration. Plaintiff's counsel has substantial experience in class action litigation, as well as extensive consumer protection litigation—specifically litigating complex FDCPA claims. Jones Decl., ¶ 16; Knewtson Decl., ¶ 7.

Plaintiff's counsel has previously demonstrated an ability to represent a class throughout long-term class litigation, including being appointed Class Counsel in a national FDCPA case. Jones Decl., ¶ 16; Knewtson Decl., ¶ 7. Finally, Plaintiff's counsel has already committed substantial resources to representing Plaintiff and the putative Class and will continue to commit adequate resources to protect the Class. *See* Jones Decl., ¶ 17.

Accordingly, the appointment of Kelly D. Jones and Bret A. Knewtson as Class Counsel is appropriate.

VII. CONCLUSION

For all of the reasons stated in this Motion, Plaintiff, on behalf of the certified class, respectfully asks that the Court grant this Motion.

Dated: July 13, 2018.

Respectfully Submitted By,

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CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under LR 7-2(b) because it contains (10,744) 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

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