

THE HONORABLE JASON POYDRAS
Department 18
Noted for Hearing: January 13, 2023 at 1:00 p.m.
With Oral Argument

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

DOUGLAS PROUDLOVE, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

SEED CONSULTING, LLC, doing business as,
SEED CAPITAL, CORP., ERIK GANTZ, KEVIN
TUSSY, and DOES 1-10,

Defendants.

NO. 20-2-09220-7 SEA

**PLAINTIFF'S MOTION FOR FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT**

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

	Page
I. INTRODUCTION	1
II. STATEMENT OF FACTS.....	1
III. STATEMENT OF ISSUES.....	2
III. EVIDENCE RELIED UPON.....	2
IV. ARGUMENT AND AUTHORITY	2
A. The Settlement is fair, adequate, and reasonable.....	3
1. The Settlement provides substantial relief to Settlement Class Members.....	3
2. The Settlement is an excellent result given the risks of continued litigation.....	4
3. The substantial discovery completed supports final approval of the Settlement.....	5
4. The Settlement is the result of arm’s length negotiation and supported by experienced counsel.....	6
5. The reaction of the Class supports final approval of the Settlement. ...	6
B. Class Members received the best notice practicable.....	6
C. The requested attorney’s fees and service award should be approved.	7
V. CONCLUSION.....	7

TABLE OF AUTHORITIES

Page

State Cases

Pickett v. Holland Am. Line-Westours, Inc.,
145 Wn.2d 178, 35 P.3d 351 (2001) passim

Sitton v. State Farm Mut. Auto Ins. Co.,
116 Wn. App. 245, 63 P.3d 198 (2003)..... 4

Federal Cases

Class Plaintiffs v. City of Seattle,
955 F.2d 1268 (9th Cir. 1992)..... 6

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

Marshall v. Holiday Magic, Inc.,
550 F.2d 1173 (9th Cir. 1977) 6

Nat’l Rural Telecomms. Co-op. v. Directv, Inc.,
221 F.R.D. 523 (C.D. Cal. 2004)..... 6

Officers for Justice v. Civil Serv. Comm’n,
688 F.2d 615 (9th Cir. 1982)..... 3

Pelletz v. Weyerhaeuser Co.,
255 F.R.D. 537 (W.D. Wash. 2009) 3

Torrisi v. Tucson Elec. Power Co.,
8 F.3d 1370 (9th Cir. 1993)..... 2

Rules and Statutes

Credit Services Organization Act, RCW 19.134..... 1

Fed. R. Civ. P. 23..... 3

Washington Civil Rule 23..... 2

Other Authorities

1
2
3
4
5
6
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8
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10
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12
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Newberg, Herbert B. & Conte, Alba, *Newberg on Class Actions* § 11.43 “General Criteria for Settlement Approval” (3d ed. 1992) 2

1 **II. INTRODUCTION**

2 Plaintiff requests that the Court grant final approval of the \$1,575,000 Settlement and
3 approve payment of attorneys' fees, costs and a service award from the Settlement Fund. The
4 Settlement is an excellent result for the Class Members, it provides significant and immediate
5 payments without the need to file claims. The average payment amount to Class Members if
6 the Court approves the Settlement as requested is estimated to be \$1,960. Each Settlement
7 Class Member will receive approximately 60% of the amount they paid in fees to Seed Capital.
8 This is an excellent result given the challenges and delays Class Members would have faced in
9 obtaining a judgment in their favor at trial, protecting such a judgment on appeal, and
10 collecting on any judgment.

11 **III. STATEMENT OF FACTS**

12 The Court is familiar with the extensive history of this litigation challenging Defendants'
13 operation of Seed Capital as a credit services organization in alleged violation of multiple
14 provisions of the Credit Services Organization Act, RCW 19.134.010 *et seq.* Plaintiff claims that
15 Seed's practices were unfair or deceptive under the CPA because charging consumers
16 thousands of dollars to obtain credit they could apply for themselves is unfair. *See* Sub. No. 72.
17 The parties produced and reviewed tens of thousands of pages of documents, took nine
18 depositions, and litigated class certification, multiple motions to dismiss, two motions for
19 summary judgment, and multiple discovery motions before the case settled on the eve of trial.
20 *See* Sub. No. 408 at 2-4.

21 Since the Court granted preliminary approval of the settlement, the Class Administrator
22 CPT Group has fully executed the notice plan approved by the Court. Talavera Decl., ¶¶ 2-7. CPT
23 Group mailed postcard notices to all 505 Class Members and sent email notices to the 432 Class
24 Members for whom the parties had email addresses. Talavera Decl., ¶ 7. Of the 37 postcard
25 notices returned, CPT Group was able to update addresses for Class Members and re-mail 21,
26 leaving only 16 Class Members whose postcard notices were undeliverable. Talavera Decl.,
27 ¶¶ 8-9. Ninety-seven percent of Class Members received postcard notices.

1 No Class Members objected to the Settlement or requested exclusion from the
2 Settlement. Talavera Decl., ¶¶ 11-13.

3 **IV. STATEMENT OF ISSUES**

4 Whether the Court should grant final approval of the Settlement, find that Settlement Class
5 Members received adequate notice; approve payment of a service award to the Class
6 Representative, and award attorneys' fees and costs to Class Counsel.

7 **V. EVIDENCE RELIED UPON**

8 Plaintiff relies upon the Declaration of Jeremy Talavera describing the notice and
9 settlement administration, the papers filed in support of preliminary approval of the Settlement
10 (Sub. Nos. 408-410), the papers filed in support of Plaintiff's motion for attorneys' fees, costs,
11 and service award (Sub. Nos. 413-416), and the balance of pleadings filed in this action.

12 **VI. ARGUMENT AND AUTHORITY**

13 When considering a motion for final approval of a class action settlement under
14 Washington Civil Rule 23, the Court's inquiry is whether the settlement is "fair, adequate, and
15 reasonable." *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 188, 35 P.3d 351
16 (2001) ("it is universally stated that a proposed class settlement may be approved by the trial
17 court if it is determined to be 'fair, adequate, and reasonable'" (citing *Torrisi v. Tucson Elec.*
18 *Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993))).

19 In evaluating whether a class settlement is fair, adequate, and reasonable, courts
20 generally refer to eight criteria, with differing degrees of emphasis: the likelihood of success by
21 plaintiff; the amount of discovery or evidence; the settlement terms and conditions;
22 recommendation and experience of counsel; future expense and likely duration of litigation;
23 recommendation of neutral parties, if any; number of objectors and nature of objections; and
24 the presence of good faith and the absence of collusion. *Pickett*, 145 Wn.2d at 192 (citing 2
25 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 11.43 "General Criteria for
26 Settlement Approval" (3d ed. 1992)). This list is "not exhaustive, nor will each factor be relevant
27 in every case The relative degree of importance to be attached to any particular factor will

1 depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief
2 sought, and the unique facts and circumstances presented by each individual case.” *Pickett*,
3 145 Wn.2d at 189 (citing *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir.
4 1982)).¹

5 The approval of a settlement agreement “is a delicate, albeit largely unintrusive inquiry
6 by the trial court.” *Pickett*, 145 Wn.2d at 189. Although the Court has discretion to determine
7 whether a proposed class action settlement should be approved,

8 the court’s intrusion upon what is otherwise a private consensual
9 agreement negotiated between the parties to a lawsuit must be
10 limited to the extent necessary to reach a reasoned judgment that
11 the agreement is not the product of fraud or overreaching by, or
12 collusion between, the negotiating parties, and that the
settlement, taken as a whole, is fair, reasonable and adequate to
all concerned.

13 *Id.* (quoting *Officers for Justice*, 688 F.2d at 625). Moreover, as the court in *Pickett* observed, “it
14 must not be overlooked that voluntary conciliation and settlement are the preferred means of
15 dispute resolution.” *Id.* at 190 (quoting *Officers for Justice*, 688 F.2d at 625). In the end,
16 “[s]ettlement is the offspring of compromise; the question we address is not whether the final
17 product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from
18 collusion.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998); *see also Pelletz v.*
19 *Weyerhaeuser Co.*, 255 F.R.D. 537, 544 (W.D. Wash. 2009).

20 **A. The Settlement is fair, adequate, and reasonable.**

21 1. The Settlement provides substantial relief to Settlement Class Members.

22 The Settlement provides comprehensive relief for the Class. Defendants have fully
23 funded a \$1,575,000 common fund. Settlement Agreement § III. 31-32. After deducting Court-

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27 ¹ CR 23 is similar to its federal counterpart, Fed. R. Civ. P. 23; thus, federal cases interpreting
the analogous federal provision are persuasive. *Pickett*, 145 Wn. 2d at 188.

1 approved settlement administration expenses, attorney's fees and costs, and service awards to
2 the Class Representatives, the Settlement Proceeds will be distributed to Settlement Class
3 Members for whom the Class Administrator has a deliverable address based on the amount
4 each Settlement Class Member paid to Seed Capital in fees. Settlement Agreement § III.36. No
5 part of the Settlement Proceeds will revert to Defendants and Settlement Class Members will
6 be paid automatically with no requirement to file claims. *Id.* § III.

7 The Settlement also prohibits Defendants Erik Gantz and Kevin Tussy from operating a
8 credit services organization in the state of Washington.

9 2. The Settlement is an excellent result given the risks of continued litigation.

10 Plaintiff and the Class's likelihood of success on the merits is among the most important
11 factors in determining whether a proposed settlement is fair, adequate, and reasonable.
12 *Pickett*, 145 Wn.2d at 192. The existence of risk and uncertainty to the plaintiff at the time of
13 resolution "weighs heavily in favor of finding that the settlement was fair, adequate, and
14 reasonable." *Id.*

15 Here, Plaintiff was very confident in his position at trial. However, Defendants had a
16 pending motion to decertify the class that argued that causation could not be established
17 without testimony from every member of the Class. While Plaintiff strongly disagreed, he and
18 the Class faced risk that the Court might agree and decertify the Class, or that the jury might be
19 find that he had not carried his burden of proof because he did not present testimony on
20 causation from every class member. *See, e.g., Sitton v. State Farm Mut. Auto Ins. Co.*, 116 Wn.
21 App. 245, 206–07, 63 P.3d 198 (2003) (discussing testimony by each class member to
22 demonstrate causation and damages and a mechanism for defendant to challenge each claim).

23 Plaintiff also faced challenges establishing personal jurisdiction over Mr. Gantz and Mr.
24 Tussy—the only defendants with assets to pay a judgment in this case. Mr. Gantz and Mr. Tussy
25 both adamantly maintained that because they were not physically present in Washington and
26 did not directly communicate with Plaintiff or the Class Members, they did not have sufficient
27

1 minimum contacts with the state of Washington for this Court to exercise personal jurisdiction.
2 The Court is aware of Plaintiff's extensive evidence of minimum contacts from the summary
3 judgment briefing, but this was a hotly contested factual issue. Even if Plaintiff prevailed at trial,
4 lack of personal jurisdiction was an issue Mr. Gantz or Mr. Tussy may have continued to contest
5 through appeal.

6 Further, because Defendants and their property and assets are located outside of
7 Washington, Defendants could have taken a number of steps to make it difficult to collect on
8 any judgment obtained at trial. Even if Plaintiff and the class prevailed, it could have been years
9 before class members recovered anything. The Settlement, by contrast, provides a guaranteed
10 recovery for all Class Members from a Settlement Fund that is now fully funded. SA § III.34.

11 3. The substantial discovery completed supports final approval of the Settlement.

12 Courts consider the amount and nature of discovery and evidence developed at the
13 time of settlement in determining whether the settlement is fair, adequate, and reasonable.
14 *Pickett*, 145 Wn.2d at 199. This case was heavily litigated. Defendants and third parties
15 produced tens of thousands of pages of documents in this action. The parties litigated a series
16 of discovery disputes over production of financial records, resulting in a number of Court
17 orders. *See* Sub. Nos. 208, 249, and 304. Plaintiff deposed Mr. Gantz, Mr. Tussy, and Seed's
18 former bookkeeper. Sub. No. 414 ¶ 9. Defendants deposed Plaintiff and five other absent class
19 members expected to testify at trial. *Id.* ¶ 10. Plaintiff's expert also analyzed the financial
20 records produced by defendants and third parties. *Id.* ¶ 11. The parties also litigated class
21 certification (Sub. No. 166), multiple dispositive motions (Sub. Nos. 36, 58, 134, 195, 245), and
22 discovery disputes (Sub. Nos. 58, 208, 249, 304). Defendants had filed a motion to decertify the
23 Class (Sub. No. 361) and the parties had filed trial briefs and motions in limine (Sub. Nos. 340,
24 344, 347, 375, 379, 387), when the parties settled. In short, both parties were well informed of
25 the strengths and weaknesses of the Class's claims when they negotiated the Settlement.

1 requirements of due process and applicable law, provides the best notice practicable under the
2 circumstances, and constitutes due and sufficient notice to all individuals entitled to notice.

3 Sub. No. 412 ¶ 4. The approved Notice Plan was fully implemented by independent Class
4 Administrator, CPT Group.

5 CPT Group provided both postcard and email notice as approved by this Court. Talavera
6 Decl. ¶¶ 2-7. Postcard notice was delivered to 489 of the 505 Class Members, a success rate of
7 97%. *Id.* ¶¶ 5-9. Email notice was also delivered to 421 of the 432 Class Members for whom the
8 parties had an email address. Talavera Decl. ¶ 7.

9 **C. The requested attorneys' fees and service award should be approved.**

10 Plaintiffs filed their fully documented motion for approval of attorneys' fees and class
11 representative service awards on November 17, 2022. Sub. Nos. 413–416. The motion and
12 supporting declarations were posted to the Settlement Website the following business day. No
13 Settlement Class Member has made any objection to Class Counsel's request for an attorneys'
14 fee award of 33% of the common fund plus costs, or to Plaintiff's request for a service award of
15 \$10,000 in recognition of his efforts on behalf of the Class. These amounts should be approved.

16 **VII. CONCLUSION**

17 Plaintiff and Class Counsel request that the Court grant final approval of the settlement
18 and approve the requested attorneys' fees, costs, and service award.

19 **VIII. LCR 7(b)(5)(B)(iv) CERTIFICATION**

20 I hereby certify that this memorandum contains 2,290 words in compliance with Local
21 Civil Rules.

1 RESPECTFULLY SUBMITTED AND DATED this 30th day of December, 2022.

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