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

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 ATTORNEYS' FEES, COSTS AND SERVICE AWARD

TERRELL MARSHALL LAW GROUP PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
TEL. 206.816.6603 • FAX 206.319.5450
www.terrellmarshall.com

TABLE OF CONTENTS

TERRELL MARSHALL LAW GROUP PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
TEL. 206.816.6603 • FAX 206.319.5450
www.terrellmarshall.com

TABLE OF AUTHORITIES

Page

STATE CASES

TERRELL MARSHALL LAW GROUP PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
TEL. 206.816.6603 • FAX 206.319.5450
www.terrellmarshall.com

FEDERAL CASES

RULES

OTHER AUTHORITIES

TERRELL MARSHALL LAW GROUP PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
TEL. 206.816.6603 • FAX 206.319.5450
www.terrellmarshall.com

I. INTRODUCTION

Plaintiff Douglas Proudlove and his counsel took on significant risks to vindicate the rights of 505 Washington consumers who paid thousands of dollars to Seed to fill out free credit card applications. Mr. Proudlove and Class Counsel developed powerful evidence that Seed worked hand in glove with a series of fraudulent companies that charged tens of thousands of dollars for useless training. Seed and its owners Gantz and Tussy made millions for themselves while leaving consumers with crushing debt. The proposed settlement recovers more than 94% of the fees Seed collected from Washington consumers. Mr. Proudlove seeks a service award and Class Counsel seek reasonable attorneys' fees for they work they did in obtaining that benefit for the Class.

Mr. Proudlove requests that the Court award Class Counsel $519,750 in attorneys' fees and $45,427 in litigation costs, and grant Mr. Proudlove a $10,000 service award. Class Counsel's requested attorneys' fee award is 33% of the common fund established for the benefit of the class. The requested award is just over half of Class Counsel's lodestar in this heavily litigated matter. The requested awards are warranted given the time invested by both Class Counsel and Mr. Proudlove in order to obtain the $1,575,000 settlement for the Class.

The case settled on the eve of trial. The settlement was reached only after extensive litigation that included briefing and argument on multiple dispositive motions, briefing on many non-dispositive motions, including class certification, nine depositions, expert work, and trial preparation. Mr. Proudlove prevailed on nearly every contested motion in this case. Class Counsel's requested fee and cost award is reasonable in light of the time they invested in the case in order to obtain an excellent outcome for the Class.

The $10,000 service award Mr. Proudlove requests is warranted by his extensive efforts on behalf of the Class, which included assisting counsel with the investigation of the claims and preparing extensively for and sitting for a deposition. In addition, Mr. Proudlove rejected substantial individual settlement offers so that he could continue to pursue claims for the Class.

TERRELL MARSHALL LAW GROUP PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
TEL. 206.816.6603 • FAX 206.319.5450
www.terrellmarshall.com

II. STATEMENT OF FACTS

A. Class Counsel dedicated thousands of hours to this case over more than two years.

Mr. Proudlove filed this action in May 2020. Over the course of more than two years, the litigation required extensive briefing, voluminous document production, numerous depositions, expert work, and trial preparation. The Court denied Seed's motion to dismiss based on a forum selection clause two years ago. Sub. No. 36. After Seed failed to fully respond to discovery despite the denial of its motion to dismiss, the Court compelled Seed's complete responses to Plaintiff's First Set of Discovery requests to Seed. Sub. No. 58. Plaintiff then obtained leave to amend his complaint to add the individual defendants in this action. Sub. No. 72.

The Court then denied the individual defendants' motion to dismiss for lack of personal jurisdiction (Sub. No. 134). In the same order the Court compelled the individual defendants to fully respond to Plaintiff's first set of discovery requests propounded to each of them (Sub. No. 134 ¶ 3) and entered a default against Seed (Sub. No. 134 ¶ 5).

The Court entered an order certifying a class of Washington consumers who contracted with Seed and paid its fees. The Court appointed Mr. Proudlove and his counsel to represent the certified Class. Sub. No. 166. Class Counsel provided and paid for the Class notice approved by the Court. Sub. No. 183 (Order approving class notice).

Gantz and Tussy moved for summary judgment on the grounds that the Court lacked personal jurisdiction over them and that they are not personally liable for Seed's conduct. The Court denied the motion after a hearing on January 7, 2022 (Sub. No. 195), concluding there were genuine issues of material fact related to the individual defendants' minimum contacts with Washington and their control of the Seed business. Sub. No. 245. Mr. Proudlove's response to this motion relied heavily on emails that Class Counsel obtained by paying the ESI consultant Seed and Gantz had earlier used to gather and produce documents responsive to a civil investigative demand from the Federal Trade Commission. Chandler Decl. ¶ 13.

TERRELL MARSHALL LAW GROUP PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
TEL. 206.816.6603 • FAX 206.319.5450
www.terrellmarshall.com

Mr. Proudlove moved for summary judgment on his and the Class's CPA claims. Mr. Proudlove also sought entry of a default judgment against Seed. The Court found there were genuine issues of material fact regarding personal liability and denied Mr. Proudlove's motion as to the individual defendants. Sub. No. 216. The Court found that as to Seed, the allegations of Mr. Proudlove's complaint would be taken as true at trial and established the first four elements of Mr. Proudlove's and the Class's CPA claim. Sub. Nos. 216 and 303. The Court further entered an order clarifying that the first four elements of Mr. Proudlove's and the Class's CPA claims against Seed were satisfied and did not have to be proven at trial. Sub. No. 303.

The parties litigated a series of discovery disputes over production of financial records, resulting in a number of Court orders. See Sub. Nos. 208, 249, and 304. Class Counsel deposed Mr. Gantz, Mr. Tussy, and Seed's former bookkeeper. Chandler Decl. ¶ 14. Gantz and Tussy deposed Plaintiff and five other absent class members expected to testify at trial. *Id.* ¶ 15. Mr. Proudlove's expert also analyzed the financial records produced by defendants and third parties. *Id.* ¶ 16. Gantz and Tussy had filed a motion to decertify the Class when the parties settled. Sub. No. 361. The parties had also completed ER 904 designations, witness and exhibit lists, proposed jury instructions, motions in limine, and trial briefs when the case settled. *See* Sub. Nos. 340-404.

As reflected in Class Counsel's contemporaneous time records submitted in support of this motion, they spent more than 2,400 hours litigating this case. Chandler Decl. ¶ 19, Ex. 1; Arons Decl. ¶ 3, Ex. 1, Leonard Decl. ¶¶ 2-3, Ex. 1.

B. Mr. Proudlove was actively involved in the litigation.

Mr. Proudlove committed significant time to this litigation. Early in the case he met with his counsel numerous times to discuss his claims and the factual allegations in the complaint. Arons Decl. ¶ 8. Mr. Proudlove submitted declarations in support of motions. Sub. Nos. 28, 155. He spent more than seven hours preparing for his deposition with counsel and sat for a half day deposition. Arons Decl. ¶ 8. This process was arduous for Mr. Proudlove because of his health

TERRELL MARSHALL LAW GROUP PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
TEL. 206.816.6603 • FAX 206.319.5450
www.terrellmarshall.com

issues. Arons Decl. ¶ 8. Mr. Proudlove rejected individual offers of settlement as high as $55,000 so that he could continue to pursue claims on behalf of the class members. Arons Decl. ¶ 8. Without Mr. Proudlove's efforts, absent class members would not have recovered any of the fees they paid to Seed Capital.

III. STATEMENT OF ISSUES

Should the Court approve the requested attorneys' fees, litigation costs, and service awards?

IV. EVIDENCE RELIED UPON

Mr. Proudlove relies on the Declarations of Blythe H. Chandler, Paul Arons, and Sam Leonard in support of this motion, and the exhibits attached thereto. Mr. Proudlove also relies on the documents filed with his Motion for Preliminary Approval.

V. ARGUMENT AND AUTHORITY

Class Counsel requests that the Court approve payments from the settlement fund of $519,750 in attorneys' fees and $45,427 for their documented out-of-pocket expenses.[1] Class Counsel's request warrants approval. Class Counsel fully disclosed to the Class their intent to request fees and costs to be paid from the settlement fund in the Court-approved notice and will post this motion and the supporting documentation on the settlement website within one-business day of filing it with the Court. Settlement Agreement § IV.1.

Where, as here, counsel in a class action seek fees from the common fund, courts have discretion to employ either the lodestar method or percentage-of-recovery method to calculate a reasonable fee. *Bowles v. Washington Dep't of Ret. Sys.*, 121 Wn.2d 52, 72, 847 P.2d 440 (1993). When determining the appropriate fee from a common fund, the percentage-of-the-fund method is preferred. *Id.* As a matter of public policy, awarding fees from the common fund promotes "greater access to the judicial system" by making it easier for class action plaintiffs to

[1] The $37,000 in costs that Class Counsel described in Mr. Proudlove's motion for preliminary approval of the settlement did not include a final bill from Plaintiff's forensic accounting experts.

TERRELL MARSHALL LAW GROUP PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
TEL. 206.816.6603 • FAX 206.319.5450
www.terrellmarshall.com

obtain counsel. *Id.* Class Counsel's request is reasonable under either percentage-of-recovery or lodestar analysis.

A. Percentage-of-recovery analysis supports Class Counsel's fee request.

Under the "percentage of recovery" method attorneys are awarded a reasonable percentage of the total recovery, "often in the range of 20 to 30 percent." *Bowles*, 121 Wn.2d at 72; *see also City of Seattle v. Okeson*, 137 Wn. App. 1051, 2007 WL 884827 at *7 (2007) (unpublished) ("Twenty to thirty percent of the recovery is a typical benchmark used in awarding attorney fees under the common fund doctrine, but that figure can be adjusted based on the circumstances of the case."). However, courts in this state can and do award more than 30 percent. *See A.M. v. Moda Health Plan, Inc.*, C 14-1191 TSZ, 2015 WL 9839771, at *3 (W.D. Wash. Nov. 3, 2015) (awarding fee of 35% of settlement fund). Here, Class Counsel seek 33% of the common fund, similar to fees that have been approved by Washington Superior Courts over recent years. *See Long v. First Resolution Investment Corp.,* No. 19-2-11281-6 SEA, Final Approval Order and Judgment ¶ 21 (King Cnty. Sup. Ct. Aug. 28, 2020) (attached to Chandler Decl. as Ex. 2); *Strong v. Numerica Credit Union*, No. 17-2-01406-39, Order Granting Plaintiff's Unopposed Motion for Final Approval of Class Action Settlement and Award of Attorneys' Fees, Costs and Service Award ¶ 19 (Yakima Cnty. Sup. Ct. Feb. 14, 2020) (attached to Chandler Decl. as Ex. 3); *Dougherty v. Barrett Business Servs., Inc*., No. 17-2-05619-1, Final Approval Order and Entry of Judgment ¶¶ 18-21 (Clark Cnty. Sup. Ct. Nov. 8, 2019) (attached to Chandler Decl. as Ex. 4) ("BBSI Order); *Terrell v. Costco Wholesale Corp.*, No. 16-2-19140-1 SEA, Order Approving Award of Attorneys' Fees and Costs (King Cnty. Sup. Ct. June 19, 2018) (attached to Chandler Decl. as Ex. 5) ("Costco Order").

Class Counsel's request is warranted given the significant value to the Class provided by the Settlement. Class members will receive approximately 60% of the allegedly unlawful fees they paid to Seed. The settlement also prohibits Seed, Gantz, and Tussy from operating a credit services business in Washington ever again.

TERRELL MARSHALL LAW GROUP PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
TEL. 206.816.6603 • FAX 206.319.5450
www.terrellmarshall.com

The recovery is particularly impressive given that the claims in this case were far from risk-free. Mr. Proudlove was confident in the strength of his case but also aware of the risk created by Gantz and Tussy's personal jurisdiction defenses. Mr. Gantz and Mr. Tussy—the only defendants with assets to pay a judgment in this case—maintained that because they were not physically present in Washington and did not directly communicate with Mr. Proudlove or the Class Members, they did not have sufficient minimum contacts with the state of Washington for this Court to exercise personal jurisdiction. The Court is aware of Mr. Proudlove's extensive evidence of minimum contacts from the summary judgment briefing but this was a hotly contested factual issue. Even if Mr. Proudlove and the Class prevailed at trial, lack of personal jurisdiction was an issue the individual defendants may have continued to contest through appeals.

Further, because Gantz and Tussy and their property and assets are located outside of the state of Washington, they could have taken a number of steps to make it extremely difficult to collect on any judgment obtained at trial. If Mr. Proudlove and the Class prevailed, it could have been years before class members recovered anything. The settlement, by contrast, provides a guaranteed recovery for all Class Members, including through a series of provisions that ensure payment. Specifically, Mr. Gantz and Mr. Tussy have agreed to pre-fund the settlement and have signed a confession of judgment that waives personal jurisdiction defenses and that Mr. Proudlove may file with the Court if Defendants fail to fully fund the settlement in a timely manner.

The $1,575,000 settlement would not have been achieved without Class Counsel's zealous pursuit of discovery in this matter, including documents and information in the possession of Seed's former bookkeeper and documents produced by Seed and Gantz to the FTC. Class Counsel's willingness to bring discovery disputes to the Court and their successful responses to two motions to dismiss and a motion for summary judgment, as well as their partial success on an affirmative motion for summary judgment, made this outcome possible for the Class.

TERRELL MARSHALL LAW GROUP PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
TEL. 206.816.6603 • FAX 206.319.5450
www.terrellmarshall.com

B. Class Counsel's fee request is far less than their lodestar in the case and consistent with the ethics guidance on reasonableness of fees.

While the percentage approach provides an independent ground for granting the fee request, a "cross-check" under the lodestar method also demonstrates that counsel's request is reasonable. *See Manual for Complex Litigation* (Fourth) ("*MCL 4th*") § 14.121 (noting "[a] number of courts favor the lodestar as a backup or cross-check on the percentage method when the fees might be excessive"). "Under the lodestar/multiplier method, the district court first calculates the 'lodestar' by multiplying the reasonable hours expended by a reasonable hourly rate. *See generally Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597–99, 675 P.2d 193, 203–04 (1983). The court may then enhance the lodestar with a 'multiplier,' if necessary, to arrive at a reasonable fee." *Id*.

Here, Class Counsel have devoted over 2,400 hours to the investigation, development, litigation, and resolution of this case, incurring over $954,000 in fees. Chandler Decl. ¶ 19, Ex. 1; Arons Decl., Ex. 1; Leonard Decl., Ex. 1. This total does not include more than 149 hours of professional staff time written off by the Terrell Marshall Law Group through exercise of billing judgment, or time spent working on a motion for sanctions for which Class Counsel was previously awarded fees. Chandler Decl. ¶ 19, Ex. 1 (time entries in red are not included in lodestar calculation). Class Counsel spent considerable time investigating the claims of the Class members, researching and analyzing legal issues, briefing numerous motions, taking written discovery, third party discovery, and depositions, and working with experts. Class Counsel's work was essential to ensure the successful prosecution and settlement of this complex action.

Class Counsel's lodestar calculations also are based on reasonable hourly rates. In assessing the reasonableness of an attorney's hourly rate, courts consider "the usual billing rate, the court may consider the level of skill required by the litigation, time limitations imposed on the litigation, the amount of the potential recovery, the attorney's reputation, and the undesirability of the case." *Bowers*, 100 Wn.2d at 587. Class Counsel are experienced, highly regarded members of the bar with extensive expertise in the area of class actions and complex

TERRELL MARSHALL LAW GROUP PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
TEL. 206.816.6603 • FAX 206.319.5450
www.terrellmarshall.com

litigation involving claims like those at issue here, and the Court approved Class Counsel's hourly rates ranging from $325-$550 when the Court awarded Class Counsel their fees as a sanction for Defendants' discovery misconduct. Sub. No. 305. Similar or higher rates have been approved numerous times in class action cases. *See*, *e.g.*, *Costco Order* (approving similar rates for Terrell Marshall); *Barnett v. Wal-Mart Stores, Inc.*, No. 01-2-24553-8 (King Cnty. Sup. Ct. July 20, 2009) (Judge Spector approving fee request based on rates ranging from $100 to $760); *Splater v. Thermal Ease Hydronic Systems, Inc.*, No. 03-2-33553-3 (King Cnty. Sup. Ct. July 31, 2009) (Judge Washington approving fee request based on rates ranging from $100 to $760); *Bowen v. CSO Financial, Inc., et al.*, No. 17-cv-00677, ECF No. 38, at 3 (W.D. Wash. July, 10, 2018) (approving Plaintiff's counsel's fee request based on rates similar as those requested here); *Carideo v. Dell, Inc.*, No. 06-cv-01772, ECF No. 162 (W.D. Wash. Dec. 17, 2010) (approving as reasonable a fee petition which included rates ranging from $175 to $600); *Hartman v. Comcast Business Communications, LLC*, No. 10-0413, ECF No. 106 (W.D. Wash. Dec. 8, 2011) (approving fee request based on rates ranging from $180 to $650).

Class Counsel's requested fee of $519,750 is $434,000 less than their lodestar in the case, even after counsel made reductions to reflect billing judgment. The lodestar cross-check thus confirms that the requested are reasonable.

Finally, the Washington Supreme Court has said that the factors set out in Rule of Professional Conduct 1.5(a) may also guide a court's analysis of the reasonableness of a fee request. *See Mahler v. Szucs*, 135 Wn.2d 398, 433 n.20, 957 P.2d 632 (1998) (overruled on other grounds). Those factors include the novelty and difficulty of the question involved and the skill requisite to perform the legal services properly, whether the representation precludes other employment by the lawyer, the fee customarily charged in the locality for similar legal services, and the amount involved and the results obtained. Here, the case raised novel and difficult questions of law, which demanded litigators with the skill and experience of Class Counsel, Class Counsel's work on this matter precluded work on other matters, a one-third fee

TERRELL MARSHALL LAW GROUP PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
TEL. 206.816.6603 • FAX 206.319.5450
www.terrellmarshall.com

in contingency cases is customary in this State, and Class Counsel obtained excellent results for the Class. *See BBSI Order; Costco Order* at ¶ 6.

C. Class Counsel seeks litigation costs that would be charged to a paying client.

Class Counsel have expended $45,427 in litigation expenses related to the prosecution of this action, including filing and service expenses, expert fees, document production costs, investigator fees, postage, travel, court reporting and transcript production costs, and mediation expenses. Chandler Decl. ¶ 23; Arons Decl., Ex. 2. The costs incurred were reasonable, necessary to the successful conclusion of this litigation and are the types of costs normally charged to a paying client. *See Newberg on Class Actions* § 16.10 (explaining that class counsel can typically recover from a common fund costs that would "normally be charged to a paying client"); *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (counsel should recover "those out-of-pocket expenses that would normally be charged to a fee paying client"); *see also Absher Const. Co. v. Kent Sch. Dist. No. 415*, 79 Wash. App. 841, 848, 917 P.2d 1086, 1090 (1995) (online legal research fees recoverable as costs); *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1177-1178 (S.D. Cal. 2007) (finding that costs such as filing fees, photocopy costs, travel expenses, postage, telephone and fax costs, computerized legal research fees, and mediation expenses are relevant and necessary expenses in a class action litigation).

D. The Class Representatives' requested service awards should be approved.

"At the conclusion of a class action, the class representatives are eligible for a special payment in recognition of their service to the class." Rubenstein, William B., *Newberg on Class Actions* § 17:1 (5th ed. Dec. 2019). Courts approve service awards in most class suits and the awards average between ten and fifteen thousand dollars per class representative. *Id.* Service payments "are intended to compensate class representatives for work undertaken on behalf of a class" and "'are fairly typical in class action cases.'" *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir. 2015) (citation omitted); *see Probst v. State of Washington Dep't of Ret. Sys.*, 150 Wn. App. 1062, 2009 WL 1863993, at *6 (2009) (unpublished) (affirming payment of $7,500 to named plaintiff). Such awards are intended to compensate class representatives

TERRELL MARSHALL LAW GROUP PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
TEL. 206.816.6603 • FAX 206.319.5450
www.terrellmarshall.com

for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and to recognize their willingness to act as private attorneys general.

Mr. Proudlove requests a service award of $10,000 in recognition of his efforts on behalf of the Class, which include assisting counsel with the investigation, litigation, and settlement of the case. Mr. Proudlove expended significant time and effort in this matter, consistently putting the Class members' interests first. He provided information to their counsel during counsel's investigation of the case, sat for deposition, and evaluated the settlement terms. Mr. Proudlove did these things despite significant health challenges that make speaking for long periods of time difficult. Arons Decl. ¶ 8. He also rejected large individual settlement offers in favor or pursing the class members' claims. Mr. Proudlove's efforts and willingness to pursue this action resulted in substantial benefits to the Class. He requests a reasonable award in line with service awards approved in other cases. *See, e.g.,* Burnett v. Wal-Mart Stores, No. 01-2-24553-8 SEA, 2009 WL 2194864 (King Cnty. Sup. Ct. July 20, 2009) (approve service awards of $10,000 each to three class representatives); *Probst*, 150 Wn. App. at *6 (affirming $7,500 incentive award).

VI. CONCLUSION

Mr. Proudlove and Class Counsel respectfully request that the Court approve the requested attorneys' fees, costs, and service awards, because they are reasonable in light of the work required to achieve the settlement obtained for the Class.

VII. LCR 7(B)(5)(B)(VI) CERTIFICATION

I certify that the foregoing memorandum contains 3,474 words in compliance with the Local Civil Rules.

//

//

//

//

//

//

TERRELL MARSHALL LAW GROUP PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
TEL. 206.816.6603 • FAX 206.319.5450
www.terrellmarshall.com

RESPECTFULLY SUBMITTED AND DATED this 17th day of November, 2022.

TERRELL MARSHALL LAW GROUP PLLC

By: /s/ Blythe H. Chandler, WSBA #43387
Beth E. Terrell, WSBA #26759
Email: bterrell@terrellmarshall.com
Blythe H. Chandler, WSBA #43387
Email: bchandler@terrellmarshall.com
Eden B. Nordby, WSBA #58654
Email: enordby@terrellmarshall.com
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
Telephone: (206) 816-6603
Facsimile: (206) 319-5450

Sam Leonard, WSBA #46498
Email: sam@seattledebtdefense.com
LEONARD LAW
6040 California Avenue, Suite C
Seattle, Washington 98136
Telephone: (206) 486-1176
Facsimile: (206) 458-6028

Paul Arons, WSBA #47599
Email: lopa@rockisland.com
LAW OFFICE OF PAUL ARONS
175 Gretchen Way
Friday Harbor, Washington 98250
Telephone: (360) 378-6496
Facsimile: (360) 359-7170

Attorneys for Plaintiff