

THE HONORABLE JASON POYDRAS
Department 18
Noted for Motion: October 12, 2022
Without 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 UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT**

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. RELIEF REQUESTED.....	2
III. STATEMENT OF FACTS.....	2
A. Plaintiff’s Claims	2
B. The parties negotiated this settlement with a solid understanding of the strengths and weaknesses of their positions	2
C. The settlement terms	4
1. Settlement relief.....	4
a. Monetary relief	4
b. Injunctive relief	5
c. Settlement administration expenses	5
d. Service award.....	5
e. Attorneys’ fees and litigation costs	5
2. Release	5
3. Class Members’ rights.....	6
IV. STATEMENT OF ISSUES.....	6
V. EVIDENCE RELIED UPON	6
VI. ARGUMENT AND AUTHORITY	6
A. The class action approval process	6
B. The settlement satisfies the criteria for preliminary approval.....	7

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
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23
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1. The settlement is the product of serious, informed, arms'-length negotiations..... 7

2. The settlement has no obvious deficiencies and does not grant preferential treatment to any Class Members..... 8

3. The settlement falls within the range of possible judicial approval 9

C. The proposed notice plan should be approved 10

D. Proposed schedule for final approval 11

VII. CONCLUSION..... 12

VIII. LCR 7(B)(5)(VI) CERTIFICATION 12

TABLE OF AUTHORITIES

Page

STATE CASES

1
2
3 *Bowles v. Dep’t of Ret. Sys.*,
4 121 Wn.2d 52 (1993)..... 8
5 *City of Seattle v. Blume*,
6 134 Wn.2d 243 (1997)..... 6
7 *Dougherty v. Barrett Business Servs., Inc.*,
8 No. 17-2-05619-1, Clark Cnty. Sup. Ct. Nov. 8, 2019 9
9 *Pickett v. Holland Am. Line Westours, Inc.*,
10 145 Wn.2d 178 (2001)..... 6, 7
11 *Probst v. Wash. Dept. of Ret. Sys.*,
12 150 Wn. App. 1062, 2009 WL 1863993 (Wash. Ct. App. June 30, 2009) 8
13 *Sitton v. State Farm Mut. Auto Ins. Co.*,
14 116 Wn. App. 245, 63 P.3d 198 (2003)..... 9
15 *Strong v. Numerica Credit Union*,
16 No. 17-2-01406-39, Yakima Cnty. Sup. Ct. Feb. 14, 2020 9
17 *Terrell v. Costco Wholesale Corp.*,
18 No. 16-2-19140-1 SEA, King Cnty. Sup. Ct. June 19, 2018..... 9

FEDERAL CASES

19 *Class Plaintiffs v. City of Seattle*,
20 955 F.2d 1268 (9th Cir. 1992) 6
21 *In re Online DVD-Rental Antitrust Litig.*,
22 779 F.3d 934 (9th Cir. 2015) 8
23 *Mullane v. Cent. Hanover Bank & Trust Co.*,
24 339 U.S. 306 (1950) 10
25 *Pelletz v. Weyerhaeuser Co.*,
26 592 F. Supp. 2d 132 (W.D. Wash. 2009) 8
27

RULES & STATUTES

1 CR 23 8
2
3 CR 23(c)(2) 10
4
5 CR 23(e)..... 10
6
7 Federal Rule of Civil Procedure 23 8
8
9 RCW 19.134.010 *et seq* 2
10
11 RCW 19.134.070 2
12

OTHER AUTHORITIES

13
14
15
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17
18
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William B. Rubenstein, *Newberg on Class Actions* § 13:1 (5th ed. Dec. 2021 update) 7

1 I. INTRODUCTION

2 Plaintiff Douglas Proudlove respectfully requests that the Court grant preliminary
3 approval of a Class Settlement between himself and Defendants Seed Consulting, LLC, Erik
4 Gantz, and Kevin Tussy.

5 Plaintiff represents a certified class of Washington consumers who were taken in by
6 companies that claimed consumers could achieve financial security by signing up for expensive
7 training on house flipping, online sales, investment, and other businesses. Plaintiff and the Class
8 Members paid for these training courses primarily with credit cards obtained for them by Seed
9 Capital. Plaintiff and the Class Members each paid Seed thousands of dollars for its services.

10 Seed contracted with consumers to obtain multiple personal credit cards in the
11 consumer's name that together would reach a minimum funding guarantee amount—usually
12 \$50,000 in total credit spread across 6-8 credit cards. Seed simultaneously submitted multiple
13 applications for personal credit cards with introductory 0% interest rates. Plaintiff alleges that
14 the personal credit cards Seed obtained for consumers were available to the general public on
15 substantially the same terms. Seed charged consumers fees, most often \$3,495, for its services.

16 Plaintiff sought to hold Seed's individual owners personally liable for Seed's violations
17 either under the CPA's business owner liability standard or by piercing the corporate veil. In
18 addition to denying Plaintiff and the Class's claims, the individual defendants raised challenges
19 to personal jurisdiction. The parties were on the verge of trial when they reached an agreement
20 to settle.

21 The Settlement is an excellent outcome for the Class. The Settlement Agreement
22 creates a Settlement Fund of \$1,575,000, that will be used to pay awards to Class Members,
23 administration fees, attorneys' fees and costs, and a service award to Plaintiff, as approved by
24 the Court. If the Court approves the Settlement as requested Class Members will receive an
25 estimated average payment of at least \$1,970. The Settlement Fund is 94% of the \$1,669,901 in
26 actual damages Plaintiff and the Class would have asked for at trial. In addition, under the
27

1 Settlement Agreement the individual defendants agree not to operate any business like Seed's
2 in Washington again.

3 Plaintiff moves for preliminary approval of the proposed settlement. The settlement
4 satisfies the requirements for preliminary approval because it was negotiated at arms' length
5 and is fair, adequate, and reasonable.

6 II. RELIEF REQUESTED

7 Plaintiff requests the Court grant preliminary approval of the settlement and confirm
8 the date of the final approval hearing.

9 III. STATEMENT OF FACTS

10 A. Plaintiff's Claims

11 Plaintiff and the Class claim that Seed's business model violated the Consumer
12 Protection Act. *See* Sub. No. 72 (First Amended Complaint). Specifically, Plaintiff claims that
13 Seed operated as a credit services organization and violated multiple provisions of the Credit
14 Services Organization Act, 19.134.010 *et seq.* Violations of the CSOA are per se violations of the
15 CPA under RCW 19.134.070. Seed's practices were also unfair or deceptive under the CPA;
16 charging consumers thousands of dollars to obtain credit they could apply for themselves is
17 unfair.

18 Plaintiff sought to hold Seed's individual owners, Erik Gantz and Kevin Tussy, personally
19 liable for Seed's violations either under the CPA's business owner liability standard or by
20 piercing the corporate veil because Seed was the alter ego of Mr. Gantz and Mr. Tussy. Sub. No.
21 72.

22 Defendants have denied all of Plaintiff's allegations and Mr. Gantz and Mr. Tussy
23 asserted that this Court lacked personal jurisdiction over them.

24 B. The parties negotiated this settlement with a solid understanding of the strengths and 25 weaknesses of their positions.

26 The parties have litigated this case extensively. The Court denied Seed's motion to
27 dismiss based on a forum selection clause two years ago. Sub. No. 36. After Seed failed to fully

1 respond to discovery despite the denial of its motion to dismiss, the Court compelled Seed's
2 complete responses to Plaintiff's First Set of Discovery requests to Seed. Sub. No. 58. Plaintiff
3 then obtained leave to amend his complaint to add the individual defendants in this action.
4 Sub. No. 72.

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

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

13 The individual defendants moved for summary judgment on the grounds that the Court
14 lacked personal jurisdiction over them and that they are not personally liable for Seed's
15 conduct. The Court denied the motion after a hearing on January 7, 2022 (Sub. No. 195),
16 concluding there were genuine issues of material fact related to the individual defendants'
17 minimum contacts with Washington and their control of the Seed business. Sub. No. 245.

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

26 The parties litigated a series of discovery disputes over production of financial records,
27 resulting in a number of Court orders. See Sub. Nos. 208, 249, and 304. Plaintiff deposed Mr.

1 Gantz, Mr. Tussy, and Seed’s former bookkeeper. Chandler Decl. ¶ 9. Defendants deposed
2 Plaintiff and five other absent class members expected to testify at trial. Id. ¶ 10. Plaintiff’s
3 expert also analyzed the financial records produced by defendants and third parties. Id. ¶ 11.
4 Defendants had filed a motion to decertify the Class when the parties settled. Sub. No. 361.

5 The case settled on the eve of trial and all parties were well informed of their respective
6 cases’ strengths and weaknesses.

7 **C. The settlement terms**

8 The parties’ Settlement Agreement and Release, attached as Exhibit 1 to the Declaration
9 of Blythe H. Chandler in support of this motion, contains the full details of the settlement, the
10 Settlement Classes are the Classes certified by the Court:

11 **Umbrella Class:** All Washington residents who signed an
12 agreement with Seed Capital in substantially the form of Exhibit A
13 to the First Amended Complaint, paid any money to Seed Capital,
14 and received only consumer credit cards or lines of credit as a result
15 of Seed Capital's services, at any time starting four years preceding
16 the filing of this action.

17 **Response Marketing Sub-class:** All persons in the Umbrella Class
18 who purchased Seed Capital's services in connection with a
19 program operated by Response Marketing Group or any related
20 entity.

21 1. Settlement relief

22 a. *Monetary relief*

23 Defendants agreed to pay \$1,575,000, which will be used to pay Class Members¹ and to
24 pay attorneys’ fees and costs, service awards, and administrative expenses. Settlement
25 Agreement (“SA”) § III.31. Defendants have already funded half of the Settlement and will fund
26 the second half within the next two months. SA § III.32. The Settlement Fund will be distributed
27 to Settlement Class Members on a pro rata basis based on the amount each Settlement Class

¹ Capitalized terms defined by the Settlement Agreement and have the same meaning hear as in the Agreement.

1 Member paid to Seed in fees. SA § III.31. There is no requirement for Class Members to submit
2 claims; all Settlement Class Members for whom the administrator has a deliverable address will
3 be sent a check. *Id.*

4 Settlement Award checks that are not cashed within 90 days after the check date will be
5 voided. If administratively feasible, the Class Administrator will make a second distribution to
6 Settlement Class Members who cashed their checks. Second distribution checks not cashed
7 within 90 days after the check date will be voided. SA § III.37. Any undistributed amounts
8 remaining in the Settlement Fund will be distributed equally to *cy pres* recipients Legal
9 Foundation of Washington and the Northwest Consumer Law Center. SA § III.38.

10 *b. Injunctive relief*

11 Defendants also agreed to permanent injunctive relief that precludes them from
12 providing or offering to provide Washington consumers any credit card stacking services like
13 those at issue in this case.

14 *c. Settlement administration expenses*

15 The costs of administering the settlement, estimated to be \$10,000, will be paid from
16 the Settlement Fund. SA § VII.41. After obtaining competing bids, Plaintiff selected CPT Group
17 as the Class Administrator. Chandler Decl. ¶ 12.

18 *d. Service award*

19 Plaintiff will request Court approval of a service award of \$10,000, to be paid from the
20 Settlement Fund. SA § IV.37.

21 *e. Attorneys' fees and litigation costs*

22 Class counsel will move for an award of attorneys' fees of 33% of the common fund, or
23 \$519,750, and reimbursement of up to \$37,000 in litigation costs, to be paid from the
24 Settlement Fund. SA § IV.38.

25 **2. Release**

26 In exchange for the benefits provided by the settlement, Settlement Class Members will
27 release Defendants and their present, former and future affiliates, parents, subsidiaries,

1 officers, directors, employees, and attorneys from the claims certified by the Court. SA §§ XI.50-
2 51.

3 3. Class Members' rights.

4 Class Members can exclude themselves from the Settlement by advising the Class
5 Administrator in writing of their desire to opt out by the Opt-Out Deadline. Any opt-out request
6 must include the individual's name and address and be postmarked no later than the Opt-Out
7 Deadline. Individuals who exclude themselves will not be Settlement Class Members and will
8 not be bound by the Settlement Agreement, its release, or the judgments of the Court. SA §
9 VIII.43.

10 Settlement Class Members (defined as Class Member who do not exclude themselves,
11 SA § II.26) may file a written objection and may appear at the Final Approval Hearing after filing
12 a notice of appearance with the Court. SA § IX.

13 **IV. STATEMENT OF ISSUES**

14 Whether the Court should grant preliminary approval of the proposed settlement, direct
15 notice to the Class Members, and confirm the Final Approval Hearing.

16 **V. EVIDENCE RELIED UPON**

17 Plaintiff relies on the pleadings on file in this case and the accompanying declaration of
18 Blythe H. Chandler and the exhibits thereto, including the executed Settlement Agreement
19 ("SA").

20 **VI. ARGUMENT AND AUTHORITY**

21 **A. The class action approval process**

22 As a matter of "express public policy," Washington courts strongly favor and encourage
23 settlements. *City of Seattle v. Blume*, 134 Wn.2d 243, 258 (1997); *see also Pickett v. Holland*
24 *Am. Line Westours, Inc.*, 145 Wn.2d 178, 190 (2001). This is particularly true in class actions
25 where the costs, delays, and risks of continued litigation might otherwise overwhelm any
26 potential benefit the class could hope to obtain. *See Class Plaintiffs v. City of Seattle*, 955 F.2d
27 1268, 1276 (9th Cir. 1992).

1 Courts use a three-step process to approve class action settlements: (1) preliminary
2 approval of the proposed settlement; (2) notice of the settlement to all affected class members;
3 and (3) a final approval hearing at which class members may be heard and evidence and
4 argument concerning the fairness, adequacy, and reasonableness of the settlement may be
5 presented. William B. Rubenstein, *Newberg on Class Actions* § 13:1 (5th ed. Dec. 2021 update).
6 This procedure safeguards class members' due process rights and enables the court to fulfill its
7 role as the guardian of class interests.

8 Plaintiff requests the Court take the first step in the settlement approval process by
9 granting preliminary approval of the proposed Settlement. The approval of a class settlement is
10 within the Court's sound discretion. *Pickett*, 145 Wn.2d at 190.

11 **B. The settlement satisfies the criteria for preliminary approval.**

12 Review of a proposed settlement "is a delicate, albeit largely unintrusive, inquiry by the
13 trial court." *Pickett*, 145 Wn.2d at 189. At the preliminary approval stage, courts typically
14 consider whether the proposed settlement appears to be the product of non-collusive
15 negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to
16 class representatives or segments of the class, and falls within the range of possible judicial
17 approval. *Newberg* § 13.10. The proposed settlement satisfies these requirements.

18 1. The settlement is the product of serious, informed, arms'-length negotiations.

19 This settlement is the result of adversarial litigation and arms'-length negotiations
20 between attorneys experienced in this type of litigation. *Pickett*, 145 Wn.2d at 200 ("When
21 experienced and skilled class counsel support a settlement, their views are given great weight."
22 (citation omitted)). Class Counsel have extensive experience litigating and settling class actions,
23 and consumer class actions in particular. Class Counsel negotiated the settlement with the
24 benefit of many years of prior experience and a solid understanding of the facts and law of this
25 case. Chandler Decl. ¶¶ 2-8. They believe the settlement is fair, reasonable, adequate, and in
26 the best interest of the Class as a whole.

1 The parties participated in an unsuccessful mediation in March 2022 and ultimately
2 resolved the matter through direct, but arm's length, negotiations after Defendants served
3 Plaintiff with an offer of judgment. Chandler Decl. ¶ 21.

4 2. The settlement has no obvious deficiencies and does not grant preferential
5 treatment to any Class Members.

6 The settlement treats all Class Members the same. All Class Members will receive a
7 settlement award based on the amount they paid in fees to Seed. The average payment
8 amount is estimated to be \$1,970.

9 Class Counsel will request a service award of \$10,000 to Plaintiff in recognition of his
10 efforts on behalf of the Class, which included assisting counsel with the investigation,
11 monitoring the litigation over two years, and sitting for a deposition. SA § IV.37; Chandler Decl.
12 ¶ 20. Service awards "are intended to compensate class representatives for work undertaken
13 on behalf of a class" and "are fairly typical in class action cases." *In re Online DVD-Rental*
14 *Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir. 2015) (citation omitted)²; *see also Pelletz v.*
15 *Weyerhaeuser Co.*, 592 F. Supp. 2d 1322, 1329-30 & n.9 (W.D. Wash. 2009) (collecting cases
16 approving awards from \$5,000 to \$40,000); *Probst v. Wash. Dept. of Ret. Sys.*, 150 Wn. App.
17 1062, 2009 WL 1863993, at *5-6 (Wash. Ct. App. June 30, 2009) (unpublished opinion)
18 (affirming service award of \$7,500). Plaintiff's support of the settlement is not conditioned on
19 the service award.

20 The Settlement Fund will also be used to pay attorneys' fees and costs in an amount
21 approved by the Court. Class counsel will ask the Court to approve a reasonable attorneys' fee
22 award of 33% of the Settlement Fund and reimbursement of litigation costs. SA § IV.38. The
23 Washington Supreme Court has approved attorneys' fees awards calculated as a percentage of
24 the common fund recovered in class actions. *Bowles v. Dep't of Ret. Sys.*, 121 Wn.2d 52, 72
25 (1993). Here, Class Counsel seek 33% of the common fund, similar to fees that have been

26 ² Federal cases interpreting provisions of Federal Rule of Civil Procedure 23 that are identical or
27 similar to CR 23 are persuasive. *Pickett*, 145 Wn.2d at 188.

1 approved by Washington Superior Courts in recent years. *See Strong v. Numerica Credit Union*,
2 No. 17-2-01406-39, Order Granting Plaintiff's Unopposed Motion for Final Approval of Class
3 Action Settlement and Award of Attorneys' Fees, Costs and Service Award ¶ 19 (Yakima Cnty.
4 Sup. Ct. Feb. 14, 2020) (attached to Chandler Decl. as Ex. 4); *Dougherty v. Barrett Business*
5 *Servs., Inc.*, No. 17-2-05619-1, Final Approval Order and Entry of Judgment ¶¶ 18-21 (Clark
6 Cnty. Sup. Ct. Nov. 8, 2019) (attached to Chandler Decl. as Ex. 5); *Terrell v. Costco Wholesale*
7 *Corp.*, No. 16-2-19140-1 SEA, Order Approving Award of Attorneys' Fees and Costs (King Cnty.
8 Sup. Ct. June 19, 2018) (awarding one-third of fund) (attached to Chandler Decl. as Ex. 6
9 ("Costco Order")). The requested award of \$519,750 is significantly less than the fees incurred
10 by Class Counsel in litigating this case for over two years. Chandler Decl. ¶ 19. The Settlement
11 Agreement is not contingent on the award of attorneys' fees and costs.

12 3. The settlement falls within the range of possible judicial approval.

13 This is an excellent settlement in light of the obstacles to continued litigation and
14 recovery after trial and appeal. Defendants' agreement to pay \$1,575,000 and provide
15 significant guarantees of payment (SA §§ 34-36), is an excellent outcome for the Class. Plaintiff
16 and the Class's likelihood of success on the merits is among the most important factors in
17 determining whether a proposed settlement is fair, adequate, and reasonable. *Pickett*, 145
18 Wn.2d at 192. The likelihood of success is evaluated as it existed at the time of settlement. *Id.*

19 Here, Plaintiff was very confident in his position at trial. However, Defendants had a
20 pending motion to decertify the class that argued that causation could not be established
21 without testimony from every member of the Class. While Plaintiff strongly disagreed, he and
22 the Class faced risk that the Court might agree and decertify the Class, or that the jury might be
23 find that he had not carried his burden of proof because he did not present testimony on
24 causation from every class member. *See, e.g., Sitton v. State Farm Mut. Auto Ins. Co.*, 116 Wn.
25 App. 245, 206–07, 63 P.3d 198 (2003) (discussing testimony by each class member to
26 demonstrate causation and damages and a mechanism for defendant to challenge each claim).
27

1 Plaintiff also faced challenges establishing personal jurisdiction over Mr. Gantz and Mr.
2 Tussy—the only defendants with assets to pay a judgment in this case. Mr. Gantz and Mr. Tussy
3 have both adamantly maintained that because they were not physically present in Washington
4 and did not directly communicate with Plaintiff or the Class Members, they did not have
5 sufficient minimum contacts with the state of Washington for this Court to exercise personal
6 jurisdiction. The Court is aware of Plaintiff’s extensive evidence of minimum contacts from the
7 summary judgment briefing but this was a hotly contested factual issue. Even if Plaintiff
8 prevailed at trial, lack of personal jurisdiction was an issue the individual defendants may have
9 continued to contest through appeals.

10 Further, because Defendants and their property and assets are located outside of the
11 state of Washington, Defendants could have taken a number of steps to make it extremely
12 difficult to collect on any judgment obtained at trial. Even if Plaintiff and the class prevailed, it
13 could have been years before class members recovered anything. The settlement, by contrast,
14 provides a guaranteed recovery for all Class Members, including through a series of provisions
15 that ensure payment. Specifically, Mr. Gantz and Mr. Tussy have agreed to pre-fund the
16 settlement and have signed a confession of judgment that waives personal jurisdiction defenses
17 and that Plaintiff may file with the Court if Defendants fail to fully fund the settlement in a
18 timely manner. SA § III.34.

19 **C. The proposed notice plan should be approved.**

20 Notice of a class action settlement must “be given to all members of the class in such
21 manner as the court directs.” CR 23(e). To protect class member rights, the Court should ensure
22 that they receive “the best notice practicable under the circumstances.” CR 23(c)(2). The best
23 practicable notice is that which is “reasonably calculated, under all the circumstances, to
24 apprise interested parties of the pendency of the action and afford them an opportunity to
25 present their objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

26 The parties propose that notice be provided in three ways: postcard notice by U.S. mail
27 to the most recent address for each Class Member, as updated by the Class Administrator;

1 email notice to Class Members for whom either party has email addresses; and long form
2 notice posted on the Settlement Website. SA § VII.42; Chandler Decl. Ex. 2 (postcard), Ex. 3
3 (website content). This approach will ensure that notice reaches as many Class Members as
4 possible.

5 The language of the proposed notice is straightforward and easily understood and based
6 on models from the Federal Judicial Center. Each Class Member will receive a personalized
7 notice that provides all information needed to evaluate and respond to the settlement. The
8 notice will inform Class Members of the nature of this litigation, the general terms of the
9 proposed settlement, their rights under the settlement, including how to file object to the
10 settlement or exclude themselves, the identity of Class Counsel and that Class Counsel will
11 move for approval of payment of attorneys' fees and costs and Plaintiff's service award from
12 the Settlement Fund, the Settlement Website and telephone number for additional
13 information, and the date and time of the Final Approval Hearing. Chandler Decl., Exs. A, B; *see*
14 *also* Newberg § 8:17.

15 **D. Proposed schedule for final approval**

16 The last step in the settlement approval process is a fairness hearing at which the Court
17 will make its final evaluation. Plaintiff proposes the following schedule:

Event	Deadline
Class Counsel to establish Settlement Website (SA § VII.42.b)	Within 14 days after issuance of the Preliminary Approval Order
Notice Date (Class Administrator to distribute Class Notice) (SA § VII.42)	Within 30 days after issuance of the Preliminary Approval Order
Deadline for motion for attorneys' fees, costs, and service award (SA § IV.38)	Within 30 days of the Notice Date
Opt-Out and Objection Deadline (SA § II.18-19)	45 days after the Notice Date

Event	Deadline
Deadline for motion for final approval (SA § X.49)	9 judicial days before the Final Approval Hearing
Class Administrator to report on completion of Class Notice (SA § X.47)	12 judicial days before the Final Approval Hearing
Final Approval Hearing (SA § VI.1)	January 13, 2013 at 1 p.m.

VII. CONCLUSION

Plaintiff respectfully requests that the Court: (1) grant preliminary approval of the settlement; (2) approve the proposed notice plan; (3) appoint CPT Group as the Class Administrator; and (4) confirm the final approval hearing.

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

I certify that this memorandum contains 3,671 words in compliance with the Local Civil Rules.

RESPECTFULLY SUBMITTED AND DATED this 10th day of October, 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

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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