KAZEROUNI LAW GROUP, APC
Abbas Kazerounian, Esq. (249203)
ak@kazlg.com
Matthew M. Loker, Esq. (279939)
ml@kazlg.com
245 Fischer Avenue, Unit D1
Costa Mesa, CA 92626
Telephone: (800) 400-6808
Facsimile: (800) 520-5523

HYDE & SWIGART
Joshua B. Swigart, Esq. (225557)
josh@westcoastlitigation.com
2221 Camino Del Rio South, Ste. 101
San Diego, CA 92108
Telephone: (619) 233-7770
Facsimile: (619) 297-1022

CARDOZA LAW CORPORATION
Michael F. Cardoza, Esq. (194065)
mike.cardoza@cardozalawcorp.com
548 Market Street, #80594
San Francisco, CA 94104
Telephone: (415) 488-8041
Facsimile: (415) 651-9700

Attorneys for Plaintiff,

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Kern County Superior Court
Terry McNally
By Gracie Goodson, Deputy

KAZEROUNI LAW GROUP, APC
1303 EAST GRAND AVENUE, SUITE 101
ARROYO GRANDE, CA 93420

SUPERIOR COURT OF CALIFORNIA
COUNTY OF KERN - UNLIMITED

FREDERICK C. ANDERSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff,

v.

PHOENIX FINANCIAL SERVICES, LLC; AND, PENDRICK CAPITAL PARTNERS II, LLC,

Defendants.

Case No.: BCV-16-101385

PLAINTIFF FREDERICK C. ANDERSON'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

DATE: February 20, 2018
TIME: 8:30 a.m.

HON. SIDNEY P. CHAPIN

KAZEROUNI LAW GROUP, APC
1303 EAST GRAND AVENUE, SUITE 101
ARROYO GRANDE, CA 93420

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT Plaintiff FREDRICK C. ANDERSON ("Anderson") hereby files this Notice of Motion and Motion for Preliminary Approval of Class Action Settlement.

Pursuant to Cal. Code Civ. P. 382, Anderson requests that the Court preliminarily approve the Parties' Class Action Settlement Agreement and enter the Preliminary Approval Order submitted with this motion.

By this motion, Anderson requests that the Court:

1. grant preliminary approval of the settlement reached in this action;
2. approve the proposed form of notice;
3. establish a schedule for the dissemination of notice to class members as well as deadlines for class members to object to, or opt out of, the settlement;
4. schedule a hearing for final approval of the settlement during which class members may be heard; and,
5. schedule a hearing for Anderson's counsel's application for an award of fees and litigation costs.

Anderson's Motion is based on the accompanying Memorandum of Points and Authorities, supporting declarations and exhibits thereto, the pleadings and papers on file herein, and other such matter as may be presented to the Court at the time of the hearing.

Date: January 2, 2018

KAZEROUNI LAW GROUP, APC

By: _____

ABBAS KAZEROUNIAN, ESQ.

KAZEROUNI LAW GROUP, APC
1303 EAST GRAND AVENUE, SUITE 101
ARROYO GRANDE, CA 93420

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff FREDERICK C. ANDERSON ("Anderson") submits this Motion for Preliminary Approval of a proposed class action settlement (the "Settlement") of this action (the "Action"), which is unopposed by Defendants PHOENIX FINANCIAL SERVICES, LLC ("Phoenix Financial") and PENDRICK CAPITAL PARTNERS II, LLC ("Pendrick") (collectively referred to as "Defendants").[1] The terms of the Settlement are set forth in the Settlement Agreement and Release (hereinafter the "Agreement" or "Agr.") filed as Exhibit 1 to the Declaration of Abbas Kazerounian In Support of Preliminary Approval of Class Action Settlement Kazerounian Decl.").[2]

The proposed Settlement provides for a financial benefit of $60,000.00 to the 3,682 Class Members. [Agr. § 1.2]. Each of the 3,682 Class Members will be sent a check in the approximate amount of $16.29 as their award from the Settlement Fund, unless they timely and validly request exclusion from the Settlement. [*Id.* at §§ 4; 10.1; and, 11.1]. In return for payment of the Settlement Fund, Anderson, on behalf of the proposed Settlement Class, will dismiss the action and the Settlement Class will unconditionally release and discharge Defendants and other related Released Parties from the Released Claims. [*Id*. at § 15].

While Anderson is confident of a favorable determination on the merits, Anderson has determined that the proposed Settlement provides significant benefits to the Class Members in this action and is in the best interests of the Class Members. [*Id*. at Recitals ¶ G.; Declaration of Abbas Kazerounian ("Kazerounian Decl"), ¶ 37]. Anderson also believes that the Settlement is appropriate because Anderson

[1] Anderson and Defendants are collectively referred to as the "Parties."

[2] Unless otherwise specified, defined terms used in this memorandum are intended to have the meaning ascribed to those terms in the Agreement.

recognizes the expense and amount of time required to continue to pursue the Action, as well as the uncertainty, risk, and difficulties of proof inherent in prosecuting such claims. [Kazerounian Decl., ¶¶ 36-39; Agr. Recitals ¶ G]. Similarly, as evidenced by the Agreement, Defendants have stated that although they have substantial and meritorious defenses to Anderson's claims, they have determined that it is desirable to settle the Action as set forth in the Agreement. [*Id.* at Recitals ¶ F]. "As a general proposition, class actions are favored in California." *Howard Gunty Profit Sharing Plan v. Superior Court*, 88 Cal. App. 4th 572, 578 (2001) (citation omitted). Indeed, "this state has a public policy which encourages the use of the class action device." *Richmond v. Dart Indus., Inc.*, 29 Cal. 3d 462, 473 (1981).

Accordingly, Anderson moves the Court for an order preliminarily approving the proposed Settlement in this action, directing dissemination of class notice and exclusion request form, and scheduling a final approval hearing. The motion is unopposed by Defendants. [*See id*. at Recitals ¶¶ E and F]. A proposed Preliminary Approval Order and Final Approval Order is filed as Exhibit A and B, respectively, to the Agreement (Agreement is Exhibit 1 to the Kazerounian Decl.). The proposed Settlement satisfies all of the criteria for preliminary approval.[3]

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Defendant Phoenix Financial is a third-party debt collector that was retained to collect Anderson's debt. [Compl., ¶ 15]. In the Complaint, Anderson alleged that in its collection efforts, Defendants violated the Rosenthal Fair Debt Consumer Protection Act, Cal. Civ. Code §§ 1788 et seq. ("RFDCPA"), when Phoenix Financial sent an initial written communications to consumers stating that "[the

[3] This proposed settlement is similar to the RFDCPA settlements concerning debt collection letters that were preliminarily approved in *Calloway v. Cash Am. Net of Cal. LLC*, 2011 U.S. Dist. LEXIS 41098, *2 (N.D. Cal. Apr. 12, 2011) and *Gittin v. KCI USA, Inc.*, 2011 U.S. Dist. LEXIS 41099, *6 (N.D. Cal. Apr. 12, 2011).

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balance(s) on the account(s) referenced above…and currently owned by PENDRICK CAPITAL PARTNERS II LLC…have been placed with Phoenix Financial Services, LLC for collection" and that "[o]ur client, PENDRICK CAPITAL PARTNERS II LLC. … has asked us to provide you with the information contained below." [Compl., ¶¶ 26-31]. Anderson contends that such a message is evidence that Defendant Pendrick had knowledge and control over the content of the written language in the written communication Plaintiff received. [*Id*.]. Plaintiff also contends that the initial written communication omitted the consumer collection notice that is required by the RFDCPA. [*Id*.]. As such, Anderson contends that Anderson and the Class Members are entitled to statutory damages pursuant to the RFDCPA. [*Id*. at ¶ 51]. Plaintiff further contends that the letter did not contain a consumer collection notice required by the California Fair Debt Buyer Practices Act ("FDBPA"), Cal. Civ. Code § 1788.52(d)(1), and that Pendrick violated the FDBPA as a result. Defendants have denied and continue to deny that they violated the RFDCPA or FDBPA, and deny all charges of wrongdoing or liability against them in the Action. [Agr., Recitals ¶ F].

On June 17, 2016, Anderson brought this action against Defendants by filing a putative class action complaint. [Agr., Recitals ¶ B].

Following written discovery as well as informal discovery, Parties utilized the services of Arnold Levinson, Esq. of ADR Services, Inc. With Mr. Levinson's assistance, the Parties reached the proposed settlement currently pending before this Court. [Kazerounian Decl., ¶¶ 6-9; Agr., Recitals ¶¶ C-E].

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III. THE SETTLEMENT

A. THE SETTLEMENT CLASS

The "Class" or "Class Members" means:

> All persons with addresses within the State of California who received an initial debt collection letter from Phoenix Financial Services, LLC relating to a Pendrick Capital Partners II, LLC account between June 17, 2015; and, April 13, 2016

[Agr. § 1.1]. The Class consists of 3,682 members. [*Id.* at § 1.2]. Class Members who do not timely and validly request exclusion from the Settlement shall be bound by the Agreement and Final Judgment. [*Id.* at § 10.1].

B. SETTLEMENT PAYMENT

Under the Settlement, Defendants agree to establish a Settlement Fund in the amount of $60,000.00. [Agr. § 3]. All of the 3,682 Class Members who submit a valid claim are entitled to a pro rata distribution from the Settlement Fund. [*Id.*, § 4]. Each Class Member is entitled to only one settlement check. [*Id.*].

The costs of claims administration, and any reasonable attorneys' fees and costs awarded by this Court shall be paid by Defendants outside of the Settlement Fund. [*Id*. at § 3]. Additionally, the Settlement Fund will not be used to pay the incentive awards to Anderson subject to Court approval. [Agr. § 6].

The Class Members have a long time period in which to request exclusion from the Settlement, which is thirty days from the date the Direct Mail Notice is sent (or, in other words, 60 days from the date the Court granting preliminary approval of the class settlement) from the date the direct mail notice is mailed. [*Id.* at § 10.1].

Class Members do not need to do anything to receive a settlement check, as the Class Members are known by Defendants based upon Defendants' business records and will be sent a settlement check unless they have opted out of the Settlement. [*See Id.* at §§ 4 and 9]. Thus, the settlement is structured as an opt-out

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settlement, which is in line with *Hypertouch, Inc. v. Superior Court*, 128 Cal. App. 4th 1527, 1542 (Cal. App. 1st Dist. 2005).

C. CLASS NOTICE

Notice will be given to the 3,682 Class Members by direct mail. [Agr. § 8.1]. The Settlement Agreement provides that the Claims Administrator will mail notice of the proposed Settlement to Class Members by direct mail via first class mail ("Direct Mail Notice") to all of the 3,682 persons in the Class. [Agr. § 8.1; *see* Exhibit 1(A) (Direct Mail Notice)]. This Direct Mail Notice provides a detailed summary of the Settlement and the Release, including instructions on how to opt out or object. [*See* Exhibit 1(A)].

In order to mail the Direct Mail Notice, Defendants will provide the Claims Administrator with relevant records, listing the last known addresses of the 3,682 Class Members. [Agr. § 8.1.1]. Before mailing, the Claims Administrator will check each address against the U.S. Post Office's National Change of Address Database to confirm the address. Further, the Claims Administrator will use its best efforts to update any address for whom the mail is returned as undeliverable and re-mail the Notice. [*Id*. at § 8.1.2].

Moreover, Notice will also be provided electronically on Anderson's counsel's website. [*Id*. at § 8.1.5].

D. SCOPE OF RELEASE

The scope of release by all Class Members, other than those who exclude themselves from the Settlement, relinquishes Anderson's allegations in the Complaint relating to the prohibition against the debt collection letters that are subject of this action. The release also covers known and unknown claims, including California Civil Code Section 1542 claims in connection with the Released Claims. [*Id.* at §§ 15.1-15.3].

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E. OPPORTUNITY TO OPT OUT AND OBJECT

Under the terms of the proposed Settlement, Class Members will have the right to opt out of the Settlement or to object to its terms. [Agr. §§ 10 and 11]. The deadline for doing both is ninety (90) days from the date the Court grants the Motion for Preliminary Approval (i.e., 60 days from the date the Direct Mail Notice is sent out). [*Id*. at §§ 10.1 and 11.1]. Class Members who wish to opt out of the Settlement may do so by completing and mailing an Exclusion Request (or letter) to the Claims Administrator and include: 1) the name and number of this case; 2) the Class Member's name, address, and telephone number; and 3) the Class Member's physical signature. *Id.* at § 10.2. [*Id*. at ¶¶ 10.2; and, 11.2].

Those Class Members who intend to object to the terms of the Settlement may do so by mailing his or her objections to the Court, Class Counsel, and defense counsel and must include: 1) the name and number of this case; 2) the Class Member's name, address, and telephone number; 3) all arguments, citations, and evidence supporting the objection; 4) a statement of whether the objecting Class Member intends to appear at the hearing for final approval of the class action settlement; 5) identify all previous cases in which the Class Members have objected to a proposed class action settlement and provide Class Counsel with copies of such objections; and 6) whether the objecting Class Member intends to appear at the hearing with or without counsel. [*Id.* at § 12]. Class Members will have ninety (90) days from the date the Court grants the Motion for Preliminary Approval (i.e., 60 days from the date the Direct Mail Notice is sent out).

F. TERMINATION OF SETTLEMENT

The Settlement is terminated if: 1) the Court does not preliminarily or finally approve the settlement in substantially the same form as set forth in the Settlement Agreement; or 2) the Settlement is appealed and not approved in substantially the

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same form as set forth in the Settlement Agreement. [Agr. § 16].

G. PAYMENT OF NOTICE AND ADMINISTRATIVE COSTS

The Agreement provides that the costs of Direct Mail Notice and establishing the claims administration procedures are to be paid outside the Settlement Fund. [*Id.* at § 3]. The funds necessary to fund the Settlement, including the Approved Claims and Settlement Costs, will be paid within thirty (30) days after Final Judgment and subject to the terms of the Agreement. [*Id.* at §§ 3; and, 14]. No interest shall accrue on the Settlement Fund. [*Id*.].

H. CLASS REPRESENTATIVE'S APPLICATION FOR INCENTIVE AWARD

The proposed Settlement contemplates that Class Counsel will request an incentive award in an amount not to exceed $1,000.00, subject to Court approval, within thirty (30) days following Preliminary Approval. [*Id.* at § 6]. Defendants have agreed not to oppose a request for such incentive award in this agreed-upon amount. [*Id*.]. As was recently observed in *Cellphone*, 186 Cal. App. 4th at 1393, "[i]ncentive awards are fairly typical in class action cases." Further, such "awards are discretionary, and are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Id.* at 1393-94 (citations omitted).

I. CLASS COUNSEL'S APPLICATION FOR ATTORNEYS' FEES AND COSTS

The proposed Settlement contemplates that Class Counsel shall be entitled to apply to the Court for an award of attorneys' fees, costs, and expenses to be paid from outside the Settlement Fund. [*Id.* at § 5]. Defendants have agreed not to oppose such application by Class Counsel so long as the amounts requested, including claims and litigation costs, are not more than a total of $115,000.00. [Agr. § 5]. No interest shall accrue on any attorneys' fees or costs awarded by the Court to Class

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Counsel. Such attorneys' fees and costs shall be paid within thirty (30) days after Final Judgment and subject to the terms of the Agreement. [*Id*. at § 14.2].

J. CY PRES DISTRIBUTION

The Claims Administrator shall pay any amount remaining in the Settlement Fund Account from un-cashed Settlement checks to a *cy pres* recipient to be agreed upon by the Parties and approved by the Court, if redistribution to the Class Members is not economically feasible. [Agr. § 14.3]. *See also Cundiff v. Verizon California, Inc.*, (2008) 167 Cal. App. 4th 718, 728-729 (requiring payment of any residue to a cy pres recipient if the proposed settlement does not expressly provide that funds not claimed by the class are retained by, or revert to, the defendant).

IV. THE COURT SHOULD CERTIFY THE PROPOSED SETTLEMENT CLASS FOR PURPOSES OF IMPLEMENTING THE SETTLEMENT

Class action suits in California are appropriate "when the question is one of a common or general interest ... or when the parties are numerous, and it is impracticable to bring them all before the court."[4] Two requirements must be met in order to sustain a class action: (1) there must be an ascertainable class; and (2) there must be a "well defined community of interest in the questions of law and fact involved affecting the parties to be represented."[5] In turn, a community of interest is established where (1) there are predominant common questions of law or fact; (2) the representative plaintiffs have "claims or defenses typical of the class"; and, (3) the representative plaintiffs are able to adequately represent the class.[6]

This action should be conditionally certified as a class action solely for the

[4] Cal. Civ. Proc. § 382; *see also Richmond v. Dart Industries, Inc.*, (1981) 29 Cal. 3d 462, 470.

[5] *Daar v. Yellow Cab. Co.,* (1967) 67 Cal. 2d 695, 704.

[6] *See Dunk v. Ford Motor Co.,* (1996)48 Cal. App. 4th 1794, 1806.

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purposes of settlement.[7] The proposed Class definition encompasses all individuals in California who received an initial debt collection letter from Phoenix Financial Services, LLC relating to a Pendrick Capital Partners II, LLC account between June 17, 2015; and, April 13, 2016[Agr. § 2.32]. The Class meets the requirements necessary for class certification because there is a well-defined community of interest in the litigation and the Class, which is numerous, is ascertainable through Defendant's records.

A. NUMEROSITY

The potential members of the Class as defined are so numerous that joinder of all the members of the Class is impracticable.[8] Based upon Defendants' records, the parties agree that there are approximately 3,682 Class Members. "No set number is required as a matter of law for the maintenance of the class action"; it is enough that there is a common question of interests to "many" persons.[9] Joinder of all Class Members would be impractical. The proposed settlement Class of 3,682 individuals therefore satisfies the numerosity requirement.

B. COMMONALITY

The test for predominance of common issues over individual issues does not require that each and every issue in the case be identical for each and every class member (*Collins*, 7 Cal. 3d at 238) but, rather, "that questions of law or fact common to the class predominate over the questions affecting the individual members" (*Washington Mutual Bank v. Superior Court*, 24 Cal. 4th 906, 913 (2001)). A case should be certified for class treatment if it appears that the defendant

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[7] *See Hernandez v. Vitamin Shoppe Industries, Inc.,* (2009) 174 Cal. App. 4th 1441, 1456; *see also Wershba v. Apple Computer, Inc.,* (2001) 91 Cal. App. 4th 224, 240.

[8] Cal. Civ. Proc. § 382.

[9] *Rose v. City of Hayward*, (1981) 126 Cal. App. 3d 926, 934 (1981) (upholding a class of 42); *see also Bowles v. Superior Court*, (1955) 44 Cal. 2d 574 (upholding a class representing 10 individuals).

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engaged in a common course of conduct. *Vasquez v. Superior Court*, 4 Cal. 3d 800 (1971). Where, as here, the central questions surrounding Defendants' liability are common to all Class Members, the fact that some individual issues may exist will not destroy the benefits of proceeding as a class action. *See B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 191 Cal. App. 3d 1341, 1347 (1987) (observing, "[w]e note that it has never been the law in California that the class representative must have identical interests with the class members. The only requirements are that common questions of law and fact predominate and that the class representative be similarly situated." (quoting *Classen v. Weller*, 145 Cal. App. 3d 27 (1983)). Indeed, the *Sav-On* Court noted in upholding the trial court's granting of class certification.

Many of the issues likely to be most vigorously contested in this dispute, as noted, are common ones. Absent class treatment, each individual plaintiff would present in separate, duplicative proceedings the same or essentially the same arguments and evidence, including expert testimony. The result would be a multiplicity of trials conducted at enormous expense to both the judicial system and the litigants. *Sav-On*, 34 Cal. 4th at 340.[10] As stated in Anderson's Complaint, these common questions of law and fact include, without limitation:

i. Whether Defendants' letter violated the RFDCPA as described herein;

ii. Whether Defendants' letter violated the FDBPA as described herein;

iii. Whether members of the Class are entitled to the remedies under the RFDCPA;

iv. Whether members of the Class are entitled to the remedies under the FDBPA;

[10] *Johnson v. Glaxo Smith Kline, Inc.* (2008).166 Cal.App.4th 1497, 1509-10

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v. Whether members of the Class are entitled to an award of reasonable attorneys' fees and costs of suit pursuant to the RFDCPA;

vi. Whether members of the Class are entitled to an award of reasonable attorneys' fees and costs of suit pursuant to the FDBPA;

vii. Whether Defendants can satisfy the bona fide error affirmative defense with regard to Defendants' violation of the RFDPCA; and,

viii. Whether Defendants can satisfy the bona fide error affirmative defense with regard to Defendants' violation of the FDBPA.

The proposed settlement Class of 3,682 individuals therefore satisfies the commonality requirement.

C. TYPICALITY

Typicality requires that class representatives be members of the class they seek to represent.[11] A class representative's claim is typical if it arises from the same event, practice or course of conduct that gives rise to claims of other class members, and if his claims are based on the same legal theory.[12]

Here, Anderson's claims are typical of the claims of the members of the Class in that Anderson is a member of the Class that Anderson seeks to represent. Anderson, like members of the proposed Class, received an initial written communication from the Defendants which is alleged to not comply with the RFDCPA or FDBPA. As such, Anderson is advancing the same claims and legal theories on behalf of himself and all absent members of the Class and Defendants have no defenses unique to Anderson. Anderson's claim is thereby representative of, and co-extensive with, the claims of the Class.

[11] *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal. App. 3d 1341, 1347.
[12] *Classen v. Weller* (1983) 145 Cal. App.3d 27, 46-47.

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D. ADEQUACY OF REPRESENTATION

Adequacy of representation is met when the proposed class representative has interests that are aligned with the class; when he has retained qualified counsel; and, when he can vigorously prosecute class claims.[13] Moreover, adequacy of representation consists of two components: (1) no disabling, irreconcilable conflict of interest between the class representative and the class; and (2) the named representative must be represented by counsel competent and experienced in the kind of litigation to be undertaken. *McGhee v. Bank of Am.*, 60 Cal. App. 3d 442, 450 (1976); *Miller v. Woods*, 148 Cal. App. 3d 862, 874 (1983). With regard to conflicts, "only a conflict that goes to the very subject matter of the litigation" (*Richmond*, 29 Cal. 3d at 470) and which is "irreconcilable" (*Nat'l Solar Equip. Owners' Ass'n v. Grumman Corp.*, 235 Cal. App. 3d 1273, 1286 (1991)) will disqualify a potential class representative. Likewise, the conflict must exist at the time of class certification. *Nat'l Solar Equip. Owners' Ass'n,* 235 Cal. App. 3d at 1285.

Here, counsel and Anderson adequately represent the class. Moreover, the experience and views of Class Counsel warrant a preliminary finding by the Court that the settlement is fair, adequate, and reasonable. Class Counsel are qualified and highly experienced in consumer litigation. [Kazerounian Declaration, ¶¶ 40-50; Swigart Decl., ¶¶ 4-14; Loker Decl.,¶¶ 4-15]. Class Counsel have also extensively litigated this case for approximately two years, having propounded written discovery, informal discovery, and exchanged documents. With the benefit of said litigation, the Parties utilized a third-party neutral to finalize the proposed terms of this settlement. Thus, counsel for each side are fully aware of the potential benefits and risks of settlement compared to proceeding with litigation and have

[13] *Cal Pak Delivery, Inc. v. United Parcel Serv.* (1997) 52 Cal. App.4th 1, 12.

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determined settlement to be the in the best interest of the Class. As such, the Court should defer to the views of counsel and preliminarily approve the Settlement.

E. SUPERIORITY OF CLASS ACTION

Given that Anderson meets each of the elements for class certification, it is clear that a class action settlement is the superior method of resolving the Class Members' claims.[14] In other words, a class-action is superior to all other available means for the fair and efficient adjudication of this controversy.

Individualized litigation would create the danger of inconsistent or contradictory judgments arising from the same set of facts. Individualized litigation would also increase the delay and expense to all Parties' court systems and the issues raised by this action. The damages or other financial detriment suffered by individual Class Members may be relatively small compared to the burden and expense that would be entailed by individual litigation. In other words, the injury suffered by each individual member of the proposed class is relatively small given the statutory damages limitation in comparison to the burden and expense of individual prosecution of the complex and extensive litigation necessitated by Defendants' conduct. Furthermore, individualized litigation increases the delay and expense to all parties and to the court system. By contrast, the class action device presents far fewer management difficulties, and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court. Therefore, a class action is superior.

The proposed Class easily meets the requirements for class certification; however, if the Settlement ultimately fails to be approved, Defendants will maintain its right to oppose the certification of the Class. Thus, conditional certification for settlement purposes is proper and not detrimental to the interests of any Party.

[14] *See Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th at 339-40; *Bell v. Farmers Ins. Exch*. (2004) 115 Cal. App. 4th 715, 745-746.

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V. THE COURT SHOULD GRANT PRELIMINARY APPROVAL OF THE SETTLEMENT

The settlement of a class action requires approval of the Court. Cal. Rules of Court, rule 3.769. In determining whether to approve or reject a proposed settlement, the Court has broad discretion. *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 434, 438. At the preliminary approval stage – which precedes dissemination of notice to class members and a formal fairness hearing – the Court need only decide whether the proposed settlement falls within a range of possible final approval. *Koz v. Kellogg Co.* (S.D. Cal 2013) No. 09-1786, 2013 U.S. Dist. LEXIS 64577, at *13; *In re Tableware Antitrust Litig*. (N.D. Cal. 2007) 484 F.Supp.2d 1078, 1079-1080.[15]

The law favors settlement, particularly in class actions where substantial resources will be conserved by avoiding the cost of litigation: "In reviewing the fairness of a class action settlement, "'[d]ue regard' … 'should be given to what is otherwise a private consensual agreement between the parties. The inquiry "must be limited to the extent necessary to reach a reasoned judgment that the 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.'" *Cellphone*, 186 Cal. App. 4th at 1389 (citation omitted).

A class settlement will be approved if the settlement is found to be fair, adequate, and reasonable. *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1801. In making this determination, courts consider several factors, including "the strength of Anderson's case, the risk, expense, complexity and likely duration of

[15] *See generally*, Judicial Council of California, *Deskbook on the Management of Complex Civil Litigation* § 3.76[2] (2012) (settlement approval is a three-step process, where the court first rules on a preliminary approval motion, making a preliminary finding that the terms and conditions are fair, adequate, and reasonable; notice is then given to the class members; and finally the court holds a final approval hearing).

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1303 EAST GRAND AVENUE, SUITE 101
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1303 EAST GRAND AVENUE, SUITE 101
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further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, and the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement." *Ibid.* The above factors are not exhaustive, and the court "is free to engage in a balancing and weighing of factors depending on the circumstances of each case." *Wershba, supra,* 91 Cal. App. 4th at 245.

A. THE SETTLEMENT AGREEMENT IS ENTITLED TO A PRESUMPTION OF FAIRNESS

The Manual for Complex Litigation (Fourth) (2004) ("Manual"), section 21.632, characterizes preliminary approval as an "initial evaluation" of the fairness of the proposed settlement by the court on the basis of written submissions and informal presentation from the settling parties. Generally, a presumption of fairness exists where: (1) the settlement is reached through arm's length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. *Dunk, supra*, 48 Cal. App. 4th at 1802. The proposed settlement here satisfies the above three requirements, and the number of expected objections is small, if any.

First, this settlement was reached after many months of arm's length negotiations, including mediation with Arnold Levinson. [Kazerounian Declaration ¶¶ 7-9].

Second, the parties have been actively engaged in litigating the action for approximately two years, propounding written discovery, engaging in informal discovery, and exchanging documents. Through this litigation, the Parties are fully aware of the risks and benefits of continued litigation.

Third, Class Counsel is highly experienced in prosecuting consumer class actions, having litigated over 400 such class action lawsuits. [Kazerounian Declaration, ¶¶ 40-50; Swigart Decl., ¶¶ 4-14; Loker Decl., ¶¶ 4-15].

Fourth, given the benefits of this Settlement, Anderson does not anticipate that there will be many legitimate objections to the Agreement from the Class Members since said Class Members will receive a pro rata distribution of the Settlement Fund..

B. THE CURRENT SETTLEMENT IS "FAIR, ADEQUATE AND REASONABLE."

Beyond the presumption of fairness, the Settlement Agreement is clearly "fair, adequate and reasonable" under any standard. In making a fairness determination, courts consider a number of factors, including: (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 through trial; (4) the benefits conferred by settlement; (5) the experience and views of counsel; (6) the extent of discovery completed and the state of the proceedings; and (7) the reaction of class members to the proposed settlement. *See Dunk*, 48 Cal. App. 4th at 1802. As discussed below, all of the foregoing factors are satisfied in the Agreement.

1.*The Strength of Anderson's Case*

Anderson believes Anderson has a very strong case; however, Defendants have and would continue to vigorously contest liability and damages should litigation continue. In addition, Defendants planned on filing their own motion for summary judgment. Thus, the outcome of the case is by no means certain absent a settlement.

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1303 EAST GRAND AVENUE, SUITE 101
ARROYO GRANDE, CA 93420

2. *The Risk, Expense, Complexity and Likely Duration of Further Litigation*

Anderson believes that the claims asserted in the Action are meritorious and Defendants continue to deny that Anderson is entitled to any form of damages or relief based on the conduct alleged. Given the parties' positions on this case and considering the fact that the parties have actively litigated the Action for almost a year, continued litigation would be protracted, unduly burdensome, and expensive. Thus, it is desirable, fair, and beneficial to the Class that the Action now be fully and finally compromised.

3. *The Risks of Maintaining Class Action Status Through Trial*

Defendants have made it clear that they intend to vigorously defend the action should litigation continue. Defendants deny that they committed any wrongful act or violated any law or duty and maintain that they have meritorious defenses to all claims alleged in the action. Given the delicate nature of class actions, the risks of maintaining this Action through trial are high. If Defendants were to prevail on its potential "bona fide error" defense based on Cal Civ. Code § 1788.30(e) the Class Members would receive nothing. Therefore, the benefits of settlement far outweigh the risks of continued litigation and the Class Settlement is an excellent result.

4.*The Benefits Conferred By Settlement*

The benefits conferred by the Settlement for the Class clearly outweigh the potential benefits and risks of proceeding with the class action. Each Class Member who does not exclude themselves will receive an equal award on a pro rata basis from the Settlement Fund in the form of a check, which is estimated to be a minimum of approximately $16.29. Courts have approved class settlements where the settlement distributions were as low as $10 per class member. See *Berther v. TSYS Total Debt Mgmt., Inc.*, 2007 WL 1795472 (E.D. Wis. June 19, 2007); *Gaalswijk-Knetzke v Receivables Mgmt. Servs. Corp.*, 2008 WL 3850657 (M.D.

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1303 EAST GRAND AVENUE, SUITE 101
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Fla. Aug. 14, 2008) (awarding $3.20 per claimant); *Bonnett v. Education Debt Services, Inc.*, 2003 WL 21658267 (E.D. Pa. 2003) (awarding $77.46 per claimant); *Cope v. Duggins*, 203 F. Supp. 2d 650 (E.D. La. 2002) (awarding $11.90 per claimant); *Henderson v. Eaton*, 2002 WL 3145728 (E.D. La. 2002) (awarding $21.00 per claimant); *Oslan v. Law Offices of Mitchell N. Kay*, 232 F. Supp. 2d 436 (E.D. Pa. 2002) (awarding $62 per claimant); *Saunders v. Berks Credit & Collections, Inc.*, 2002 WL 1497374 (E.D. Pa. 2002) (awarding $62.54 per claimant); and, *Burkhammer v. Allied Interstate, LLC*, 2017 Cal. Super. LEXIS 109 (San Luis Obispo Superior Court, May 19, 2017) (final approval granted with consumers to receive $18.66 each).

Moreover, Courts have approved final settlements based solely on injunctive relief when the monetary damages are so *de minimis* that the value of the injunction to the plaintiff outweighs the potential financial gain. *Foti v. NCO Fin. Sys.,* 2008 U.S. Dist. LEXIS 16511, at *12 (S.D.N.Y. Feb. 19, 2008) (approving class action settlement which offered only injunctive relief for a violation of the FDCPA); and, *Moreno-Peralta v. TRS Recovery Services, Inc.*, 2017 Cal. Super. LEXIS 548 (San Luis Obispo Superior Court, Oct. 18, 2017) (order granting preliminary approval of RFDCPA injunctive relief only class). In addition, courts in the Ninth Circuit have previously approved class certification for claims under the FDCPA on an injunctive basis. *See Schwarm v. Craighead*, 233 F.R.D. 655, 662–63 (E.D. Cal. 2006). Such settlements, though small monetarily, effectuate the purpose of class actions and the RFDCPA. *See Jacobson v. Persolve, LLC*, 2015 U.S. Dist. LEXIS 73313, at *22-23 (N.D. Cal. 2015). Therein, *Jacobson* relied upon *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344-45 (7th Cir. 1997) which stated

> [W]e believe that a de minimis recovery (in monetary terms) should not automatically bar a class action. The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for

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1303 EAST GRAND AVENUE, SUITE 101
ARROYO GRANDE, CA 93420

> any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.
>
> 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. These are considerations that cannot be dismissed lightly in assessing whether a class action or a series of individual lawsuits would be appropriate for pursuing the FDCPA's objections.

Id. citing to *Warcholek v. Medical Collection Sys., Inc.*, 241 F.R.D. 291, 295-96 (N.D. Ill. 2006) (certifying 23(b)(3) FDCPA class where defendant claimed negative net worth).

"Ultimately, the 'unfortunate reality…that most of Defendant's…FDCPA violations would probably go unnoticed absent this lawsuit" must be balanced against the possibility that any class recovery may be relatively minimal." *Jacobson*, 2015 U.S. Dist. LEXIS 73313, at *26-27 citing to *Kalish v. Karp & Kalamotousakis, LLP*, 246 F.R.D. 461, 464-65 (S.D.N.Y. 2007). "In light of the probability that most individual plaintiffs are unaware of their claims and because of the small incentives for bringing individual FDCPA claims, the Court finds that class certification would be superior to any alternative, notwithstanding the possibility of a de minimis class recovery." *Id*. As such, injunctive relief is available for a claim under the FDCPA; and, RFDCPA and is particularly appropriate here as it will provide a substantial and tangible immediate recovery without the risks of continued litigation in addition to the cash payment received by consumers that remain in the class.

Additionally, any portion of the Settlement Fund that is not distributed, due to un-cashed checks, will be given to a *cy pres* recipient agreed upon by the Parties

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and approved by the Court, if a redistribution to the Class Members is not economically feasible. [Agr. § 14.3]. Therefore, the Settlement provides a significant benefit without the risks and inherent delays of an adverse jury verdict, trial decision, or potential appeal.

5. *The Experience and Views of Counsel*

Although recommendations of counsel proposing the Settlement are not conclusive, the Court can properly take them under consideration, particularly if they have been involved in litigation for some period of time, appear to be competent, have experience with this type of litigation, and discovery has commenced. *See* 2 H. Newberg, *Newberg on Class Actions* § 11.47 (2d ed. 1985). Indeed, courts do not substitute their judgment for that of the proponents, especially when experienced counsel familiar with the litigation have reached a settlement. *See, e.g., Hammon v. Barry*, 752 F. Supp. 1087 (D.D.C. 1990) (citing *Newberg on Class Actions*, §11.44). Rather, courts presume the absence of fraud or collusion in the negotiation of a settlement unless evidence to the contrary is offered. In short, there is a presumption that negotiations were conducted in good faith. *See Newberg on Class Actions* § 11.51; *In re Chicken Antitrust Litig.*, 560 F. Supp. 957 (N.D. Cal. 1980).

Here, the experience of counsel is addressed above in § IV(D) of this Motion. Moreover, Counsel also believes this to be a strong settlement given Defendants' arguments against certification and the merits of this action.

6.*The Extent of Discovery Completed and the State of the Proceedings*

As discussed above, extensive discovery has been completed in the year since the filing of the Complaint, including sets of written discovery, engaging in informal discovery, as well as the exchange of documents. Class Counsel are fully aware of the potential benefits and risks of this case, and are confident that this Settlement is in the best interests of the Class.

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7. *The Reaction of Class Members to the Proposed Settlement*

Class Counsel believe Class Members will be satisfied with the proposed settlement. The Settlement guarantees that each Class Member will be awarded a pro rata share of the Settlement Fund, which would be approximately $16.29 without the risks and delay of further litigation and trial. Class Members need not take any action in order to receive the settlement payment. [Agr. § 4]. Therefore, Class Counsel are confident that Class Members would react approvingly to the Settlement.

VI. THE PROPOSED NOTICE TO THE CERTIFIED CLASS IS APPROPRIATE

The proposed notice plan is appropriate under California law and is the best notice practicable for this Class. If a class action is to be effective, "members of the class must receive the 'best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Home Sav. & Loan Ass'n v. Sup. Ct.* (1975) 42 Cal. App. 3d 1006, 1012, quoting Federal Rules of Civil Procedure, Rule 23(c). The standard in California for class notice is whether the notice "has a reasonable chance of reaching a substantial percentage of the class members." *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 251, quoting *Cartt v. Super. Ct.*, 50 Cal. App. 3d 960, 974.

Here, the Claims Administrator will mail Direct Mail Notice to all 3,682 Class Members. [Agr. § 8.1; and, Exhibit 1(A)). This mailing of the Direct Mail Notice shall occur within 30 days after entry of the Preliminary Approval Order. [*Id*. at § 8.1.3]. To ensure a high degree of accuracy, the notice procedure also permits searches of the U.S. Post Office National Change of Address Database by the Claims Administrator to obtain current addresses before mailing and for any notices returned by the postal service. [*Id.* at § 8.1.2]. If the Direct Mail Notice sent to any

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1303 EAST GRAND AVENUE, SUITE 101
ARROYO GRANDE, CA 93420

person is returned as undeliverable, and if a new address is obtained for such a person, a second Direct Mail Notice shall be mailed to the new address. [*Id*.].

The Direct Mail Notice, combined with the notice procedure of searching for current addresses before mailing and re-mailing of any notices returned undeliverable if a new address is obtained, is the best notice practicable under the circumstances. Further, Class Counsel's telephone number will be provided to the Class Members and Class Counsel will make themselves available to answer Class Members' inquiries regarding the Settlement.

VI. CLASS REPRESENTATIVES AND CLASS COUNSEL

"[T]wo criteria for determining the adequacy of representation have been recognized. First, the named representatives must appear able to prosecute the action vigorously through qualified counsel, and second, the representatives must not have antagonistic or conflicting interests with the unnamed members of the class." *Lerwill v. Inflight Motion Pictures, Inc*., 582 F.2d 507, 512 (9th Cir. 1978).

In this case, the adequacy of representation requirement is satisfied. Also, for settlement purposes, the Parties jointly request that Anderson be confirmed as the Class Representatives.

The Parties have agreed that Joshua B Swigart of Hyde & Swigart, Abbas Kazerounian and Matthew Loker of the Kazerouni Law Group, A.P.C should be confirmed as Class Counsel for Anderson and for all other purposes of the Settlement. [*See* Agr. § 2.2]. Anderson's counsel all have extensive experience sufficient to be appointed as Class Counsel here. [Swigart Decl., ¶¶ 4-14; Kazerounian Decl., ¶¶ 40-50; Loker Decl, ¶¶ 4-15]. Anderson understands the obligations of serving as class representatives, have adequately represented the interests of the putative class, and have retained experienced counsel. [*Id*.]. Anderson has no antagonistic or conflicting interests with the Class Members. *Id*.

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1303 EAST GRAND AVENUE, SUITE 101
ARROYO GRANDE, CA 93420

Moreover, Anderson and the Class Members seek the same relief, which includes statutory damages for Defendants' alleged unlawful actions as well as injunctive relief.

Considering the overwhelming similarity of claims, there is no potential for conflicting interests.

VII. FIRST CLASS. INC. SHOULD BE APPOINTED CLAIMS ADMINISTRATOR

The Parties have agreed upon and propose that the Court appoint First Class, Inc. ("First Class") to serve as the Claims Administrator. [Agr. § 7.1]. First Class specializes in providing administrative services in class action litigation and has extensive experience in administering consumer protection and privacy class action settlements.[16]

VIII. THE FINAL APPROVAL HEARING SHOULD BE SCHEDULED

The last step in the settlement approval process is the formal Final Approval Hearing. Pursuant to California Rules of Court, rule 3.769(e), should the Court grant preliminary approval, its order must state the time, date, and place of the final approval hearing. This hearing allows the Court to hear all evidence and the arguments necessary to determine whether the settlement is fair, adequate, and reasonable. Anderson requests that the hearing be held not before 150 days after the date of entry of the Preliminary Approval Order to allow sufficient time for Class Members to opt-out or object to the Settlement.

IX. CONCLUSION

For all the foregoing reasons, Anderson respectfully requests that the Court enter an order preliminarily approving the proposed Settlement, and for settlement purposes confirm Anderson as Class Representative, and confirm Abbas Kazerounian, Joshua B. Swigart, and Matthew M. Loker, as Class Counsel.

[16] http://www.firstclassadministration.com/

KAZEROUNI LAW GROUP, APC
1303 EAST GRAND AVENUE, SUITE 101
ARROYO GRANDE, CA 93420

Moreover, Anderson believes that the following schedule shall govern the remainder of this Action:

EVENT	DEADLINE
Defendants to send addresses to Claims Administrator	5 days from date of Preliminary Approval
Notice to be mailed by Claims Administrator	30 days from date of Preliminary Approval
Motion for Attorneys' Fees; Litigation Costs; and, Incentive Award	30 days from date of Preliminary Approval
Deadline to Opt Out/Object	60 days from date of Preliminary Approval
Motion for Final Approval	120 days from date of Preliminary Approval

Dated: January 2, 2018

Respectfully submitted,

KAZEROUNI LAW GROUP, APC

By: _____

ABBAS KAZEROUNIAN, ESQ.

KAZEROUNI LAW GROUP, APC
1303 EAST GRAND AVENUE, SUITE 101
ARROYO GRANDE, CA 93420

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Kazerouni Law Group, APC, 1303 East Grand Avenue, Suite 101, Arroyo Grande, CA 93420. On January 2, 2018, I served the within document(s):

PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL

☒ E-MAIL - by transmitting via e-mail the document(s) listed above to the e-mail address(es) listed below on this date before 11:59 p.m.

☒ MAIL - by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Arroyo Grande, California addressed as set forth below.

☐ PERSONAL SERVICE - by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

☐ OVERNIGHT COURIER - by placing the document(s) listed above in a sealed envelope with shipping prepaid, and depositing in a collection box for next day delivery to the person(s) at the address(es) set forth below via.

☐ CM/ECF - by transmitting electronically the document(s) listed above to the electronic case filing system on this date before 11:59 p.m. The Court's CM/ECF system sends an e-mail notification of the filing to the parties and counsel of record who are registered with the Court's CM/ECF system.

Harijot S. Khalsa, Esq.
SESSIONS, FISHMAN, NATHAN & ISRAEL, L.L.P.
1545 Hotel Circle South, Suite 150
San Diego, CA 92108
e-mail: hskhalsa@sessions.legal

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on January 2, 2018, at Arroyo Grande, California.

Matthew M. Loker

MATTHEW M. LOKER

KAZEROUNI LAW GROUP, APC
245 FISCHER AVENUE, UNIT D1
COSTA MESA, CA 92626