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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

THE ESTATE OF KENNETH R.
BROWN, individually and on behalf of
a class of similarly-situated
Washington residents,

Plaintiff,

v.

CONSUMER LAW ASSOCIATES,
LLC, et al.,

Defendants.

NO: 11-CV-0194-TOR

ORDER GRANTING FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT AGREEMENT

BEFORE THE COURT is Plaintiff's Motion for Final Approval of Class Action Settlement (ECF No. 210). This matter was heard with oral argument on May 23, 2013. Matthew J. Zuchetto appeared on behalf of the Plaintiff. Christopher N. Weiss appeared on behalf of Defendants Consumer Law Associates, LLC, Jimmy B. Persels and Neil J. Ruther. Leslie R. Weatherhead and Geana Van Dessel appeared on behalf of Defendants EFA Processing, L.P. and DR

1 Options, LLC. The Court has reviewed the motion, the record and files herein, and
2 is fully informed.

3 DISCUSSION

4 **A. Motion to Substitute**

5 Plaintiff seeks to substitute the Estate of Kenneth R. Brown as a party for
6 named class representative Kenneth R. Brown, who passed away on May 1, 2013.
7 Motions for substitution are governed by Federal Rule of Civil Procedure 25. Rule
8 25(a) provides that a court may substitute a proper party in interest for a deceased
9 party whose death has been noted on the record, provided that the party seeking
10 substitution has served (1) its motion to substitute, and (2) a statement noting the
11 death on the record, upon the existing parties and the non-party to be substituted.
12 Fed. R. Civ. P. 25(a)(3). *See Barlow v. Ground*, 39 F.3d 231, 233 (9th Cir. 1994)
13 (motion to substitute and suggestion of death must be served upon non-party
14 successors or representatives of the deceased party).

15 The Court finds that the requirements of Rule 25(a) have been satisfied. The
16 Court also finds that substitution of Mr. Brown's estate will not prejudice
17 Defendants and does not give rise to a conflict of interest with other members of
18 the class. *See In re Indep. Gasoline Antitrust Litig.*, 79 F.R.D. 552, 557 (D. Md.
19 1978) (allowing administrator of named plaintiff's estate to be substituted as class
20 representative where no conflict of interest existed between administrator and

1 remaining class members). Accordingly, the motion to substitute is granted, and
2 the Estate of Kenneth R. Brown is substituted as the named class representative.

3 **B. Approval of Class Action Settlement**

4 Approval of a proposed class action settlement is governed by Federal Rule
5 of Civil Procedure 23(e). Under Rule 23(e), approval of a proposed settlement
6 “must be accompanied by a finding that the settlement is ‘fair, reasonable, and
7 adequate.’” *Lane v. Facebook, Inc.*, 696 F.3d 811, 818 (9th Cir. 2012) (quoting
8 Fed. R. Civ. P. 23(e)). In determining whether a settlement meets this requirement,
9 a court must “evaluate the fairness of a settlement as a whole, rather than assessing
10 its individual components.” *Id.* at 818-19. “Although Rule 23 imposes strict
11 procedural requirements on the approval of a class settlement, a district court’s
12 only role in reviewing the substance of that settlement is to ensure that it is fair,
13 adequate, and free from collusion.” *Id.* at 819 (quotation and citation omitted).

14 There are several factors relevant to assessing the fairness, adequacy and
15 reasonableness of a class action settlement under Rule 23(e). These factors, which
16 are commonly referred to as the “*Hanlon* factors,” are as follows:

17 [T]he strength of the plaintiffs’ case; the risk, expense, complexity,
18 and likely duration of further litigation; the risk of maintaining class
19 action status throughout the trial; the amount offered in settlement; the
20 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.

1 *Id.* (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)).
2 These factors are not exclusive. *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370,
3 1376 (9th Cir. 1993). The court may also consider, *inter alia*, (1) whether an
4 arbitrator or mediator assisted in facilitating the settlement; (2) a settling party's
5 ability to satisfy its financial obligations under the settlement agreement as
6 compared to its ability to pay a potential judgment; (3) the reasonableness of any
7 provisions for an award of attorney's fees; and (4) the fairness and reasonableness
8 of the procedure used to calculate payment of individual claims. *See Manual for*
9 *Complex Litigation* (Fourth) § 21.62 (2008).

10 1. The Strength of the Plaintiff's Case

11 Plaintiff appears to have a strong case. From the outset of this lawsuit, there
12 has been no dispute that Defendants charged Washington consumers fees in excess
13 of those permitted by the Washington Debt Adjusting Act ("DAA"). For all
14 practical purposes, the only contested issue has been whether Defendants, as
15 licensed attorneys, are subject to the DAA's statutory fee restrictions or whether
16 they qualify for the so-called "attorney exemption." *See RCW 18.28.010(2)(a)*.
17 The Court resolved this issue in Plaintiff's favor on June 15, 2012, ruling that
18 Defendants do not qualify for the attorney exemption because they were not
19 engaged in debt adjusting "solely incidental to" the practice of law. ECF No. 153
20 at 9-18. That ruling effectively established Defendants' liability under the DAA

1 and the Washington Consumer Protection Act (“CPA”), leaving only the issue of
2 damages to be resolved.

3 Plaintiff’s position is further strengthened by this Court’s rulings in several
4 related cases. Most notably, in Parkinson, *et al.* v. Freedom Fidelity Management,
5 Inc., *et al.*, 10-CV-0345-TOR, the Court ruled that the appropriate measure of
6 “actual damages” under the CPA for the type of claims at issue in this case is the
7 amount of *all* fees paid to a debt adjuster rather than the amount of fees paid in
8 excess of the statutory limits. Plaintiffs have reason to believe that the Court might
9 make similar rulings in this case if the case were to proceed. In sum, Plaintiffs
10 have a strong liability case and an equally strong damages position. This factor
11 counsels against acceptance of the proposed settlement.

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

13 Further litigation of this case through trial and a potential appeal carries
14 inherent risks. Plaintiffs run the risk that the Court’s rulings might be reversed on
15 appeal. With respect to the DAA’s attorney exemption, Judge Shea previously
16 observed in related litigation that “there is substantial ground for difference of
17 opinion as to the interpretation of RCW 18.28.010(2)(a) as it applies to attorneys
18 and their agents.” Bronzich v. Persels & Associates, LLC, 10-CV-0364-TOR,
19 ECF No. 154 at 2. Thus, there remains a possibility that an appellate court might
20 construe the statute in Defendants’ favor, thereby absolving them of liability.

1 Similarly, an appellate court might reach a different conclusion with respect to the
2 measure of “actual damages” for based upon a violation of RCW 18.28.080. There
3 are strong arguments to be made on both sides of this issue.

4 Conversely, Defendants face the possibility of an even worse outcome if the
5 case proceeds. In addition to the liability and damages issues addressed above,
6 Defendants must contend with the CPA’s fee-shifting provisions. *See* RCW
7 19.86.090. In the event that the case continues and Plaintiffs prevail on their CPA
8 claims at trial, Defendants would be assessed reasonable attorney’s fees and costs.
9 Based upon the fees and costs reportedly incurred by Plaintiffs to date, any such
10 assessment could easily exceed \$1 million.

11 Finally, litigating this case through trial and a potential appeal would be very
12 expensive. If the case were to proceed to trial, class members would be required to
13 prove—individually—that Defendants charged them fees in excess of the limits
14 imposed by the DAA. They would also be required to draw a distinction between
15 fees paid for debt adjusting services and fees paid for other services. These tasks
16 would likely be very labor-intensive. In view of the foregoing considerations, the
17 Court finds that the risks and costs attendant to continued litigation weigh very
18 strongly in favor of the proposed settlement.

19 3. The Risk of Maintaining Class Action Status

20 Because this case has previously been certified as a class action, the only

1 risk attendant to maintaining class action status is that the Court might de-certify
2 the class after being presented with additional evidence at trial. This possibility,
3 however, is exceedingly remote. Accordingly, this factor weighs against
4 acceptance of the proposed settlement.

5 4. The Amount Offered in Settlement

6 The proposed settlement requires Defendants to pay \$1,155,000 in
7 satisfaction of all claims that could potentially be asserted by the members of the
8 class. Of this sum, an estimated \$776,331.95 will be distributed directly to class
9 members. Counsel indicate that the distribution of these funds will result in each
10 member of the settlement class recovering approximately thirty percent of the total
11 debt adjusting fees he or she paid to Defendants. According to class counsel, more
12 than half of the 712 members of the settlement class will receive a payment in
13 excess of \$1,000. There is little question that the amount of recovery offered to
14 class members under the settlement agreement is substantial. This factor weighs in
15 favor of accepting the proposed settlement.

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

17 The parties engaged in extensive discovery before reaching the proposed
18 settlement. Both parties submitted a voluminous amount of materials in
19 conjunction with Plaintiff's motion for class certification and Defendants' motion
20 for summary judgment). The Court's review of these materials (as well as the

1 materials that have been submitted in Bronzich v. Persels & Associates litigation)
2 indicates that the parties have diligently litigated their respective cases. In sum,
3 there is no indication that the parties have neglected their duties to vigorously
4 prosecute and defend this case. Accordingly, this factor weighs in favor of
5 accepting the proposed settlement.

6 6. The Experience and Views of Counsel

7 This case has been ably prosecuted and defended by experienced litigators.
8 Counsel have collectively indicated that the terms of the proposed settlement are
9 fair, reasonable and adequate and are in the best interests of the settlement class as
10 a whole, and their views are entitled to deference. This factor weighs in favor of
11 the proposed settlement.

12 7. The Presence of a Governmental Participant

13 This factor is not applicable, as no governmental entity has challenged the
14 proposed settlement after receiving notice.

15 8. The Reaction of Settlement Class Members

16 The parties indicated at the final fairness hearing that the reaction of
17 settlement class members to the proposed settlement has been almost uniformly
18 positive. Of the 893 members of the certified class, not one has objected to the
19 proposed settlement. All but five of the class members received actual notice of
20 the proposed settlement, and only one has requested to be excluded. These are

1 strong indicators that the class favors settlement over continued litigation. This
2 factor weighs in favor of the proposed settlement.

3 9. Other Applicable Factors

4 There are three additional factors identified in the *Manual for Complex*
5 *Litigation* which counsel strongly in favor of accepting the proposed settlement.

6 First, the settlement was reached with the assistance of two experienced mediators
7 over the course of two separate mediation sessions. The involvement of these
8 mediators supports a finding that the settlement was reached through informed,
9 arm's-length negotiations. There is no indication whatsoever that the settlement
10 agreement was influenced by improper collusion among counsel.

11 Second, the specified award of \$346,500 to class counsel appears to be
12 reasonable. This award represents 30% of the total settlement payment of
13 \$1,155,00. The Court finds that class counsel's hours and billing rates are
14 reasonable in view of the result achieved for their clients, the risks they faced in
15 taking this case and preparing to litigate it through trial, and the complexity of the
16 legal issues presented. In reaching this conclusion, the Court notes that class
17 counsel's standard hourly rates are commensurate with rates which have
18 previously been approved by this Court and by another judge in this District in four
19 separate CPA class action cases involving violations of the DAA. *See* Parkinson v.
20 Freedom Fidelity Management, Inc., 10-CV-0345-TOR (E.D. Wash.) at ECF No.

1 172; Carlsen v. Freedom Debt Relief, 09-CV-0055-LRS (E.D. Wash.) at ECF No.
2 195; Wheeler v. NoteWorld, 10-CV-0202-LRS (E.D. Wash.) at ECF No. 156;
3 Carlsen v. Global Client Solutions, 09-CV-0246-LRS (E.D. Wash.) at ECF No.
4 219. These rates are also commensurate with those recently approved by the Court
5 in the companion Bronzich v. Persels & Associates litigation. 10-CV-0364 at ECF
6 No. 311. Class counsel's collective expenditure of approximately 1,340 hours on
7 this case is also reasonable in view of the complexity of the issues involved.

8 Third, the proposed settlement guarantees that class members will be paid.
9 As counsel for CLA noted at the hearing, the firm is currently in "wind-down
10 mode" with respect to debt settlements and has not accepted any new clients since
11 2011. As a result, the firm's financial resources have been significantly depleted,
12 and its ability to satisfy a potential judgment in excess of the proposed settlement
13 is rather uncertain. Accepting the proposed settlement will eliminate this
14 uncertainty and ensure that class members receive real recovery. This factor
15 weighs strongly in favor of the proposed settlement.

16 Finally, the Court finds that the procedure used to calculate payment of
17 individual claims is both fair and reasonable. The parties have agreed to reimburse
18 class members according to the formula $(A \div B) \times C$, where "A" represents the
19 total fees paid by the class member pursuant to his or her debt settlement contract
20 with Defendants; "B" represents the aggregate total of all such fees paid by class

1 members; and “C” represents the amount remaining in the “common fund” after
2 attorney’s fees, costs, expenses, and stipends are deducted. Notably, this formula
3 allows each class member to recover a share of the common fund in proportion to
4 the fees which he or she actually paid to Defendants. Because the amount of fees
5 paid by each class member varied widely, this formula for proportionate recovery
6 is eminently reasonable. On balance, the foregoing factors weigh in favor of
7 accepting the proposed settlement. Accordingly, the Court will grant Plaintiffs’
8 motion for final approval.

9 **IT IS HEREBY ORDERED:**¹

10 1. The Court finds that notice to the Settlement Class has been
11 completed in conformity with the Preliminary Approval Order. The Court finds
12 that this notice was the best notice practicable under the circumstances, that it
13 provided due and adequate notice of the proceedings and of the matters set forth
14 therein, and that it fully satisfied all applicable requirements of law and due
15 process.

16 _____
17 ¹ Unless otherwise provided herein, all capitalized terms in this Order shall have
18 the same meaning as set forth in the Settlement Agreement attached as Exhibit 1 to
19 the Declaration of Toby J. Marshall in Support of Preliminary Approval (ECF. No.
20 198) and/or Plaintiffs’ Motion for Preliminary Approval (ECF No. 197).

1 2. The Court finds that notice of the Settlement Agreement has been
2 provided to the United States Attorney General and the Washington State Attorney
3 General in accordance with 28 U.S.C. § 1715.

4 3. The Court finds it has personal and subject matter jurisdiction over all
5 claims asserted in this Litigation with respect to all members of the Settlement
6 Class.

7 4. Pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, the
8 Court certifies for settlement purposes only the following Settlement Class: “All
9 natural persons who entered into retainer agreements with Consumer Law
10 Associates, LLC between April 18, 2007 and January 24, 2013, and who were
11 residents of the State of Washington at the time of entering into such agreements.”

12 5. In connection with this conditional certification, the Court makes the
13 following findings:

14 (a) The Settlement Class is so numerous that joinder of all
15 members is impracticable;

16 (b) There are questions of law or fact common to the Settlement
17 Class for purposes of determining whether this settlement should be approved;

18 (c) Plaintiff’s claims are typical of the claims being resolved
19 through the proposed settlement;

20

1 (d) Plaintiff is capable of fairly and adequately protecting the
2 interests of the Settlement Class members in connection with the proposed
3 settlement;

4 (e) For purposes of determining whether the settlement is fair,
5 reasonable and adequate, common questions of law and fact predominate over
6 questions affecting only individual Settlement Class members. Accordingly, the
7 Settlement Class is sufficiently cohesive to warrant settlement by representation;
8 and

9 (f) For purposes of settlement, certification of the Settlement Class
10 is superior to other available methods for the fair and efficient settlement of the
11 claims of the Settlement Class members.

12 6. The Court has appointed Kenneth R. Brown and now the Estate of
13 Kenneth R. Brown as representative of the Settlement Class. The Estate of
14 Kenneth R. Brown shall act through its designated administrators, Steven James
15 Brown, Scott Covey Brown, and Stacey Lee Camposagrado.

16 7. The Court has appointed Darrell W. Scott and Matthew J. Zuchetto of
17 The Scott Law Group, P.S. and Toby J. Marshall of Terrell Marshall Daudt &
18 Willie PLLC as counsel for the Settlement Class.

1 8. There have been no timely-filed objections to the Settlement. Indeed,
2 even at the final approval hearing for which adequate notice was given to the class,
3 no one lodged any objection.

4 9. The terms set forth in the Settlement are approved as being fair,
5 adequate, and reasonable in light of the degree of recovery obtained in relation to
6 the risks faced by the Settlement Class in litigating the claims. The Settlement
7 Class is properly certified as part of this settlement. The relief provided to the
8 Settlement Class under the Settlement Agreement is appropriate as to the
9 individual members of the Settlement Class and as a whole.

10 10. The Court approves the payment of \$373,668.05 in fees and costs to
11 Class Counsel as fair and reasonable based on the lodestar and percentage-of-the-
12 fund methods, which courts use to determine the reasonableness of fees. The
13 Court reaches this conclusion after analyzing (1) the number of hours Class
14 Counsel reasonably expended on the litigation multiplied by counsel's reasonable
15 hourly rates; (2) the substantial financial recovery for Settlement Class members
16 (3) the diligent and efficient effort utilized by Class Counsel in litigating Plaintiff's
17 claims; (4) Class Counsel's substantial experience in complex litigation and skill
18 utilized to achieve the Settlement; and (5) the hurdles to certifying the Settlement
19 Class and proving liability and damages at trial.

1 11. The Court approves the incentive payment of \$5,000 to Plaintiff
2 Estate of Kenneth R. Brown. This incentive award is reasonable and does not
3 undermine Plaintiff's adequacy as the Class Representative. Rather, this award
4 reasonably compensates Plaintiff for the time and effort that Mr. Brown expended
5 in serving as class representative, assisting in the investigation, participating in and
6 keeping abreast of the litigation, and reviewing and approving the proposed
7 settlement terms after consulting with Class Counsel.

8 12. The Settlement is binding on all Settlement Class members.

9 13. Each member of the Settlement Class shall be entitled to receive a pro
10 rata share of the Net Settlement Proceeds as set forth in the Settlement Agreement.
11 Any Settlement Class Member who fails to cash or deposit a disbursement check
12 issued to that member after a period of 120 calendar days has elapsed from the date
13 on which the disbursement check was issued will not receive a share of relevant
14 Net Settlement Proceeds but will be bound nevertheless by the terms of the
15 relevant Settlement Agreement.

16 14. All Settlement Class Members are bound by the terms of the
17 Settlement Agreement. As of that Settlement Agreement's Effective Date, all
18 Settlement Class Members shall conclusively be deemed to have irrevocably
19 released, relinquished, and forever discharged all claims against all released
20 entities and individuals as set forth in the Settlement Agreement. The Settlement

1 Agreement provides: “Upon the Effective Date of this Agreement and without any
2 further action by the Court or by any Party to this Agreement, Representative
3 Plaintiff and the members of the Class and all of their spouses, former spouses,
4 administrators, executors, personal representatives, heirs, agents, attorneys,
5 assigns, predecessors and successors, for good and sufficient consideration, the
6 receipt and adequacy of which is acknowledged, shall be deemed to, and shall in
7 fact, have fully remised, released and forever discharged any and all Released
8 Claims, which they, or any of them, had or has or may in the future have or claim
9 to have against the Released Persons.” The Settlement Agreement further provides
10 that Release Claims “shall mean and include a full release by Representative
11 Plaintiff and each Class Member as to all Release Persons (as defined further in ¶
12 1) of any and all claims against all Defendants that were or could have been
13 brought in this Action, including a release for theories of breach of fiduciary duty,
14 violation of Washington’s Debt Adjustment Act, RCW 18.28, *et seq.*, negligence,
15 violation of Washington’s Consumer Protection Act, RCW 19.86, *et seq.*,
16 negligence, damage to credit, and any other claim in contract, law, equity or other
17 theory of recovery based on facts known or unknown.”

18 15. As of the Effective Date, all Settlement Class Members agree “not to
19 institute, be represented in, participate in, submit, file, or permit to be filed on their
20 behalf, any lawsuit, arbitration, charge, claim, complaint, or other proceeding in

1 which a Released Claim is asserted. In the event that Representative Plaintiff or
2 any Class Member institutes or is a party to any such action, the claim shall be
3 immediately dismissed with prejudice upon presentation of [the] Settlement
4 Agreement.”

5 16. Neither this Order nor any aspect of the Settlement Agreement is to be
6 construed or deemed an admission of liability, culpability, negligence, or
7 wrongdoing on the part of Defendants, who specifically deny liability. Each of the
8 Parties to the settlement entered into the Settlement Agreement with the intention
9 to avoid further disputes and litigation with the attendant inconvenience and
10 expenses.

11 17. Pursuant to the Settlement Agreement, Plaintiff shall file a Stipulation
12 of Dismissal with Prejudice as to Defendants within thirty (30) days after the
13 Effective Date of the Settlement Agreement. The Court will then dismiss this
14 action with prejudice as to all Settlement Class members except those who have
15 timely and properly excluded themselves from the Settlement Class.

16 18. Individuals who have timely and properly excluded themselves from
17 the Class and are thus not bound by this Judgment are: VERA RYBALKINA only.

18 19. The entry of this order and any subsequent dismissal is without
19 prejudice to the rights of the Parties to enforce the terms of the Settlement
20 Agreement and the rights of Class Counsel to seek the payment of fees and costs as

1 provided for in the Settlement Agreement. The Court intends to retain jurisdiction
2 over this case to resolve future disputes between the parties that may arise from the
3 implementation of the Settlement Agreement. The Court will enter an order to that
4 effect upon receipt of the parties' Stipulation of Dismissal.

5 20. Plaintiff's Motion for Final Approval of Class Action Settlement
6 (ECF No. 210) is **GRANTED**.

7 21. Plaintiff's Motion to Substitute (ECF No. 219) is **GRANTED**. The
8 Estate of Kenneth R. Brown is hereby **SUBSTITUTED** as a party-plaintiff for
9 Plaintiff Kenneth R. Brown. The Clerk of Court shall amend the case caption
10 accordingly.

11 22. Plaintiff's Motion to Expedite Motion to Substitute (ECF No. 218) is
12 **GRANTED**.

13 23. The jury trial set for June 3, 2013, at 1:00 p.m. is **STRICKEN**.

14 The District Court Executive is hereby directed to enter this Order and
15 provide copies to counsel.

16 **DATED** May 23, 2013.



Thomas O. Rice
THOMAS O. RICE
United States District Judge