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Class Counsel

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

AIMEE MORRISON, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED, Plaintiff, v. **EXPRESS RECOVERY SERVICES, INC. D/B/A/ CLEAR MANAGEMENT SOLUTIONS,** Defendant.	**JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT** **Case No.:** 1:17-cv-0051- CW-EJF Hon. Clark Waddoups

I. INTRODUCTION

This Court recently granted preliminary approval to the parties' class action settlement in which a cy pres award in the amount of $18,000 was preliminarily approved to be awarded to Utah Legal Services. See ECF #66. When Defendant prepared the class list to mail notice to the class, it was discovered there is a change in the class size. Furthermore, there is an issue with compliance with the Class Action Fairness Act that the parties wished to also bring to the Court's attention. Therefore, the parties file this joint motion to fully explain to the Court these issues and to seek further approval of the settlement prior to incurring the cost of notice, and to request new deadlines to send notice to the class.

II. CLASS SIZE

In discovery, Class counsel propounded written discovery to determine the class size in this case. Specifically, Plaintiff asked, "The number of consumers that Clear Management Solutions has collected upon on behalf of UIA since April 11, 2016."

The response received from the original creditor, UIA, and defense counsel after stating some objections was as follows, "Defendant Clear Management Solutions is a billing service and UIA has assigned 40,887 accounts between April 11, 2016 and April 11, 2017." See Answer to Plaintiff's Subpoena For Requests for Production of Documents, attached as Exhibit "A" to the Declaration of Attorney David J. McGlothlin.

This figure was later confirmed during the deposition of Defendant's person most knowledgeable, Michelle Camp. See excerpt of deposition transcript attached as Exhibit "B" to the Declaration of Attorney David J. McGlothlin. Therefore, the parties believed that the class size was 40,887 people. Class counsel then subsequently relied on this number in their Motion for Class Certification (ECF # 32) as well as the Motion for Summary Judgment (ECF #36) and finally in the Motion for Preliminary Approval of the Class Action Settlement (ECF# 62).

Subsequent to receiving preliminary approval to the class action settlement, Defendant then finalized the class list to send to the claims administrator so that notice could be completed. See Declaration of Michelle Camp ("Camp Decl.") ¶ 6, During this process Defendant

discovered that they had responded to the questions regarding class size based on how many letters were sent and not the number of separate individual Utah consumers. *Id*. at ¶¶ 4-7. During this process it was concluded many of the letters were sent multiple times to the same people due to multiple accounts. *Id*. at ¶¶ 6-7 Therefore, after removing these duplicates, the total number of letters sent to a consumer with a Utah address is 24,057. *Id*. at ¶ 6.

With a class size of 24,057, if the settlement fund was to be distributed to the individual class members each class member would still receive a negligible amount. Splitting the proposed settlement of $18,000 equally among class members would result in each person receiving approximately 75 cents. Even a pro-rata split of the Settlement Fund from those that opt-in to the settlement would still not yield much better results. Traditional opt-in percentage rates are typically 3-5% of the class members. See *Forcellati v. Hyland's Inc*., 2014 WL 1410264, at *6 (C.D. Cal. Apr. 9, 2014). See also *Ferrington v. McAfee, Inc.*, 2012 WL 1156399, at *4 (N.D. Cal. Apr. 6, 2012) "[T]he prevailing rule of thumb with respect to consumer class actions is [a claims rate of] 3-5 percent."

In this case, five percent of the Class would be 1,202 individuals. If they were to split the Settlement Fund amount on a pro rata basis, each class member would receive approximately $14.98. It is important to note with a direct mail notice plan claims rates can be much higher, as class counsel has seen a 20% claims rate in the past. *See* the supporting declaration to the Motion for Preliminary Approval of Class Settlement by attorney David McGlothlin , ECF 62-1, ¶ 8. If that were to occur here each class member would receive approximately $3.74.

Therefore, due to the still negligible amount that would be received by individual consumers if forced to split the settlement fund, the parties still believe that a settlement awarding the settlement fund to Utah Legal Services in the form of a cy pres award is fair, reasonable, and adequate, and the best method to resolve this lawsuit.

III. CAFA NOTICE

The parties wish to inform the court that Defendant has now complied with the notice provisions of the Class Action Fairness Act ("CAFA"). CAFA provides for federal jurisdiction for nationwide class actions so long as there is minimum diversity and the amount in controversy exceeds $5 million. See 28 U.S.C. § 1332(d)(2). CAFA also requires defendants to notify state and federal regulators of any proposed settlement and to provide the regulators with at least 90 days to review the proposed settlement before a federal judge can grant final approval. See 28 U.S.C. § 1715(d).

According to the Senate Judiciary Committee, CAFA's notification requirement "is designed to ensure that a responsible state and/or federal official receives information about proposed class action settlements and is in a position to react if the settlement appears unfair to some or all class members or inconsistent with applicable regulatory policies." See S. Rep. No. 109-14, at 32 (2005); see also *Garner v. State Farm Mut. Auto. Ins. Co.*, No. CV-08-1365 CW (EMC), 2010 WL 1687832, at *14 (N.D. Cal. Apr. 22, 2010) ("CAFA presumes that, once put on notice, state or federal officials will raise any concerns that they may have during the normal course of the class action settlement procedures.").

CAFA requires that within 10 days after filing a proposed settlement with the court, every defendant involved must provide notice to the "appropriate federal official" and to the "appropriate state official" in every state where a class member resides. See 28 U.S.C. § 1715(b).

Caselaw is unclear whether the CAFA notice provisions only apply to cases in federal court under CAFA's jurisdictional provisions or if the CAFA notice provisions apply to all class actions in federal court. In this case, jurisdiction of this Court arises pursuant to "federal question", 28 U.S.C. § 1331, the Fair Debt Collection Practices Act, 15 U.S.C. § 1692(k), and 28 U.S.C. § 1367 for the supplemental state claim. Due to this uncertainty, notice was not sent out within 10 days after filing a proposed settlement with the court pursuant to 28 U.S.C. § 1715(b). However, based on advice of the claims administrator, Defendant complied with the notice

provisions of CAFA and notified the appropriate federal and State of Utah officials of the proposed settlement on January 10, 2020. Based on this, federal and state officials will still have the 90 days to review the settlement prior to the final approval hearing as required by 28 U.S.C. § 1715(d).

In conclusion the parties wished to update the Court that compliance with CAFA has now been completed and to make the Court aware of the timeline of such notices. The parties do not believe any further action on this issue is necessary.

IV. CONCLUSION

For the foregoing reasons, the parties respectfully request that the Court (1) again grant preliminary approval of the proposed Settlement, (2) approve the proposed Notice procedure an the form, manner and content of the Notice to begin on a timeline corresponding with the Court's order on this motion, (3) stay all proceedings until the Court renders a final decision regarding the approval of the Settlement, and (4) schedule a new hearing for Final Approval.

Dated: January 21, 2020

KAZEROUNI LAW GROUP, APC

By: /s/ David J. McGlothlin
David J. McGlothlin, Esq.
Attorneys for Plaintiff

Dated: January 21, 2020

PATRICIA JO STONE, P.C.

By: /s/ Joseph Lico
Joseph Lico, Esq.
Attorneys for Defendant

CERTIFICATE OF SERVICE

A copy of the foregoing *Motion for Preliminary Approval of Class Action Settlement* has been filed this 21st day of January 2020, through the Court's electronic filing system. All parties may access the foregoing via the Court's electronic filing system.

By: /s/ David J. McGlothlin
David J. McGlothlin, Esq.

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Class Counsel

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

AIMEE MORRISON, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED, Plaintiff, v. **CLEAR MANAGEMENT SOLUTIONS,** Defendant.	**DECLARATION OF DAVID J. MCGLOTHLIN IN SUPPORT OF PLAINTIFF'S SUPPLEMENTAL FILING FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT** **Case No.:** 1:17-cv-0051- CW-EJF Hon. Clark Waddoups

1. I, David J. McGlothlin, hereby declare under penalty of perjury, and pursuant to the laws of the State of Utah and the United States of America, that the foregoing is true and correct. If called as a witness, I would competently testify to the matters herein from my own personal knowledge.

2. I am a partner of the law firm of Kazerouni Law Group and have been appointed as class counsel in this matter. I am a member in good standing of the bars in California, Arizona and Oregon. I am also admitted in every federal district in California and have handled federal litigation in Arizona, Colorado, Oregon, Nevada and Utah. Except as otherwise noted, I have personal knowledge of the facts set forth in this declaration, and could testify competently to them if called upon to do so.

3. I am writing this declaration in support of Plaintiff's Motion for Preliminary Approval of the Class Action Settlement.

4. I believe the settlement fund should be awarded in a Cy Pres to Utah Legal Services due to the de minimus amount that would be distributed to the class through a burdensome and costly distribution should the settlement fund be distributed pro rata to Class Members.

5. I recently served as class counsel in *Pastor et al v. Bank of America, N.A*. in the United States District Court, Northern District of California, case number 15cv03831-VC. In that case a settlement was reached where the parties anticipated the usual 3-5% claims rate. In *Pastor* the claims administrator was given addresses of the class members, and the direct mail notice postcard resulted in an almost 20% claims rate. *See Id*. Docket # 81.

6. Taking into account the burdens, uncertainty and risks inherent in this litigation, Class counsel have concluded that further prosecution of this action through trial would be protracted, burdensome, and expensive, and that it is desireable, fair, and beneficial to the settlement class that the action now be fully and finally compromised, settled and terminated in the manner and upon the terms and conditions set forth in the Settlement Agreement.

7. Attached hereto as **Exhibit A** is a true and correct copy of the Answer to Plaintiff's Subpoena For Requests for Production of Documents by UIA.

8. Attached hereto as **Exhibit B** is a true and correct copy of an excerpt from the deposition transcript of Defendant's designated representative.

Dated: January 21, 2020

KAZEROUNI LAW GROUP, APC

By: /s/ David J. McGlothlin
DAVID J. MCGLOTHLIN, ESQ.
ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

A copy of the foregoing *Motion for Preliminary Approval of Class Action Settlement* has been filed this 21st day of January 2020, through the Court's electronic filing system. All parties may access the foregoing via the Court's electronic filing system.

/s/ David J. McGlothlin
David J. McGlothlin

Exhibit A

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Attorneys for Utah Imaging Associates

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

Aimee Morrison, on behalf of Herself and Others Similarly Situated, Plaintiff, v. Clear Management Solutions, Defendant.	**ANSWER TO PLAINTIFF'S SUBPOENA FOR REQUESTS FOR PRODUCTION OF DOCUMENTS** Case No.: 1:17-cv-00051-DBP

Utah Imaging Associates ("UIA") by and through its counsel, Patricia Jo Stone, P.C., hereby submits the following Responses to Plaintiff's Subpoena for Requests for Production of Documents ("RFP"):

I. PRELIMINARY STATEMENT AND GENERAL OBJECTIONS

1. UIA objects to Plaintiff's RFPs to the extent that it seeks information and documents that are confidential or proprietary or that are subject to the attorney-client privilege and/or that constitute trial preparation or other work product and/or that are otherwise not discoverable under Fed. R. Civ. P.

2. To the extent that any discovery request can be interpreted as requiring UIA to identify or produce documents that are in the possession, custody or control of others and have not been made available to or are otherwise not in the possession of UIA or are equally accessible to Plaintiff, UIA objects thereto.

3. UIA objects to Plaintiff's RFPs to the extent it is irrelevant and beyond the scope of the subject matter involved in this action.

4. UIA objects to the definitions and instructions included with Plaintiff's RFPs to the extent they are vague, confusing, and generally unintelligible.

5. The term "responsive documents" means existing documents within the possession, custody or control of UIA. Any response to any discovery request below identifying responsive documents does not constitute a representation by UIA that documents exist as to all portions of the discovery request.

6. A partial response by UIA to any discovery request as set forth below is not deemed to be a waiver by UIA of UIA's objections thereto (if any) or to the right of UIA to object to additional, supplemental or further discovery requests or parts thereof.

7. UIA will respond to Plaintiff's RFPs pursuant to the applicable provisions of Fed. R. Civ. P. and, therefore, objects to any definition or instruction inconsistent with those rules.

8. All responses by UIA to Plaintiff's RFPs represent the information acquired to date. UIA reserves the right to amend, supplement or change in any way UIA's responses should

information be acquired through further investigation that would so warrant an amendment, supplementation or change.

By this reference, UIA incorporates the Preliminary Statement and General Objections into each of the specific responses below as if set forth in its entirety. Subject to and without waiving the foregoing Preliminary Statement and General Objections, UIA responds as follows:

REQUEST FOR PRODUCTION OF DOCUMENTS

1. A copy of the original contract between Plaintiff Aimee Morrison and Utah Imaging Associates, Inc. ("UIA").

   RESPONSE: None.

2. A copy of the UIA financial responsibility document or similar documents signed by Aimee Morrison.

   RESPONSE: None.

3. Any and all documents regarding Plaintiff Aimee Morrison in UIA's possession.

   RESPONSE:

   See Documents, attached hereto and identified as Bates Stamp UIA001-UIA006.

4. Any and all correspondence between UIA and Defendant Clear Management Solutions regarding Plaintiff Aimee Morrison.

   RESPONSE: None.

5. Any and all correspondence between UIA and Express Recovery Services regarding Plaintiff Aimee Morrison.

6. Any and all records of debts that were collected on behalf of UIA by Defendant Clear Management Solutions since April 11, 2016.

RESPONSE: UIA objects to Request for Production No. 6 as vague and overbroad and also objects as some of the information requested therein is irrelevant and is not reasonably calculated to lead to the discovery of admissible evidence.

7. The number of consumers that Clear Management Solutions has collected upon on behalf of UIA since April 11, 2016.

RESPONSE: UIA objects to Request for Production No. 7 as vague and overbroad and also objects as some of the information requested therein is irrelevant and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections, UIA states as follows:

Defendant Clear Management Solutions is a billing service and UIA has assigned 40,887 accounts between April 11, 2016, and April 11, 2017.

Dated: January 5, 2018

Respectfully submitted,

PATRICIA JO STONE, P.C.

By: /s/ Joseph J. Lico

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Attorneys for UIA

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2018, I served the foregoing **UIA'S RESPONSES TO PLAINTIFF'S SUBPOENA FOR REQUESTS FOR PRODUCTION OF DOCUMENTS** via electronic mail to the following address:

Ryan McBride (16218)
ryan@kazlg.com

By: /s/ Joseph J. Lico _____
Joseph J. Lico, Esq.

Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

AIMEE MORRISON, on behalf of herself and others similarly situated,

Plaintiffs,

vs.

CLEAR MANAGEMENT SOLUTIONS,

Defendant.

Case No. 1:17-cv-0051-DBP

30(b)(6) Deposition of
Clear Management Solutions
By: MICHELLE CAMP
January 17, 2018 * 8:52 a.m.
Location: CitiCourt Reporting
236 South 300 East
Salt Lake City, Utah

Reporter: Dawn M. Perry, CSR
Notary Public in and for the State of Utah
Job No. 2790253A

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Q. Okay. Between April 11th, 2016, and April 11th, 2017, do you know approximately how many accounts that CMS billed for on behalf of Utah Imaging?

A. I don't know.

I don't know if you recall if I've even pulled that. I couldn't say off the top of my head.

MR. LICO: I think we gave it to you in some sort of document. North of 40,000, if I remember correctly.

Q. (BY MR. MCGLOTHLIN) Right. So in a document that actually came from Utah Imaging they identify just over 40,000 accounts. Does that sound accurate to you?

A. Yeah, I wouldn't argue with that.

Q. Okay. And all of these accounts would have received the EB1 notice?

A. As long as we had an address.

Q. Okay. And does Clear Management Solutions maintain records of who it's contacted on behalf of Utah Imaging?

A. Yes.

Q. Okay. And how long are these records maintained?

A. At least seven years.