UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CATHERINE MONROE, individually and on behalf of all others similarly situated, Plaintiff, *vs.* ASSETCARE LLC; CF MEDICAL LLC; and JOHN DOES, Defendants.	§ § § § § § § § § § §	Civil Action No. 4:19-cv-05039

PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF THE PARTIES' CLASS SETTLEMENT AGREEMENT

Plaintiff, Catherine Monroe, individually and on behalf of all others similarly situated, on consent of Defendants, AssetCare LLC ("AssetCare") and CF Medical LLC, ("CF Medical") respectfully submits this Motion for Preliminary Approval of the Parties' Class Settlement Agreement pursuant to Fed. R. Civ. P. 23(b)(2) and (b)(3).

Specifically, Plaintiff requests the Court enter an order which (i) preliminarily approves the Parties' Class Settlement Agreement ("Agreement") attached at ***Appendix A***, (ii) certifies for settlement purposes the Settlement Class defined in Paragraph 8 of the Agreement; (iii) appoints STERN•THOMASSON LLP and CIMENT LAW FIRM, PLLC as Class Counsel, (iv) appoints Plaintiff as representative of the Settlement Class, (v) sets dates for Class Members to seek exclusion from, or to object to, the Settlement, (vi) schedules a hearing for final approval of the Agreement, (vii) approves mailing of notice to Class Members and Subclass Members in the form of Exhibits 1, 2, and 3 to ***Appendix A***, and (viii) finds that mailing of such notice satisfies the requirements of due process. The Parties' proposed preliminary approval order is attached as Exhibit 4 to ***Appendix A***.

The grounds supporting class certification and preliminary approval are explained and supported by points and authorities set forth *infra*, the accompanying Appendix and Declarations of Andrew T. Thomasson and Daniel J. Ciment, the documents and pleadings on file with the Court, and any oral argument the Court entertains by the Parties' counsel regarding this motion.

I. FACTUAL AND PROCEDURAL HISTORY

On December 31, 2019, Plaintiff, individually and on behalf of a class, filed this lawsuit (the "Litigation"). [Doc. 1.] Plaintiff is a Texas consumer, employed as a first-grade teacher in Katy, Texas, who allegedly incurred a debt for personal medical services ("Debt") rendered to her minor child on April 22, 2014 by U.S. Anesthesia Partners of Texas P.A. ("Anesthesia Partners"). *Id.* AssetCare is a Texas based debt collector who collects defaulted medical debts on behalf of CF Medical. *Id.* CF Medical is a purchaser of defaulted medical debts. *Id.*

Sometime after April 2014, Anesthesia Partners sold the Debt to CF Medical who, in turn, placed the Debt with AssetCare to collect. *Id.* AssetCare mailed Ms. Monroe a collection letter ("Letter") dated January 16, 2019 to collect the Debt by making a deceptive limited time "settlement offer" to resolve it; however, the Debt was allegedly no longer judicially enforceable when the Letter was mailed because the statute of limitations had already run. *Id.*

The Litigation alleges Defendants violated the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692, *et seq.* and Texas Debt Collection Act (TDCA), Tex. Fin. Code § 392, *et seq*., by making deceptive limited time settlement offers to Plaintiff and other putative Texas consumers without disclosing their medical debts, now owned by CF Medical, were no longer judicially enforceable because the statute of limitations to file a lawsuit had passed. *Id.*

On February 25, 2020, Defendants each filed an Answer with Affirmative Defenses to the Complaint denying they violated the FDCPA and TDCA, as well as denying all liability to Plaintiff and the Settlement Class. [Docs. 10 and 12.] The Parties began engaging in extensive arms-length settlement discussions since the outset, which intensified as discovery progressed.

On March 17, 2020, the Parties conducted their Rule 26(f) Planning Conference, and on March 20, 2020, they filed their Joint Discovery/Case Management Plan. [Doc. 17.] On March 23, 2020, Plaintiff served her Mandatory Initial Discovery Responses [Doc. 19] and, on March 27, 2020, the Defendants served their Mandatory Initial Discovery Responses [Docs. 20 and 21].

On April 7, 2020, the Parties each served initial sets of written discovery which included Interrogatories, Requests for Production, and Requests for Admission and, on May 12, 2020, Plaintiff served each Defendant with a second set of written discovery requests. The Parties each responded to written discovery and began scheduling party and non-party witness depositions.

On May 21, 2020, the Court conducted its Rule 16 Conference and entered a Scheduling Order which set deadlines for completing discovery, Defendants' dispositive motions, and Plaintiff's motion for class certification. [Docs. 25 and 26.]

On June 23, 2020, the Parties personally appeared for, and engaged in, private mediation (via Zoom conferencing) which lasted approximately 10 hours. The Parties did not settle at mediation, but they did make good progress and, therefore, continued engaging in further extensive settlement discussions for several weeks thereafter. In furtherance of those ongoing discussions, on July 9, 2020, the Parties filed a Joint Motion to Extend the Discovery and Dispositive Motion Deadlines [Doc. 30], which the Court granted on July 10, 2020 [Doc. 31].

Thereafter, the Parties' settlement negotiations continued while they also pursued remaining discovery, prepared for dispositive motions and Plaintiff's motion for class certification; on August 14, 2020, they each raised discovery disputes [Doc. 32] for which the Court scheduled a hearing for August 27, 2020 [Doc. 33].

The Parties subsequently resolved their discovery issues and reached an agreement on all material terms of a class settlement, which ultimately culminated with this Agreement.

II. THE SETTLEMENT TERMS

The Parties desire to settle and compromise the Litigation on the terms and conditions embodied in the Agreement and, to that end, have agreed as follows:

A. Settlement Class Certification.

The Parties stipulated to certification of the following Class for settlement purposes only:

> All natural persons to whom AssetCare LLC mailed a letter between December 31, 2017 and January 21, 2020, which sought to collect a debt on behalf of CF Medical LLC, and offered a settlement of a debt on which the last payment or activity had occurred more than four years prior to the date of the letter without disclosing the debt was no longer legally enforceable.

And on behalf of a Subclass, defined as:

> All persons who meet the foregoing Class definition, but whose letter was mailed between December 31, 2018 and January 21, 2020.

[***Appendix A***, ¶8]. The ***Class Claims*** are only comprised of claims arising under the TDCA which, unlike the FDCPA: (i) allows for equitable relief; but (ii) *not* recovery of statutory damages for the specific TDCA violations alleged in the Litigation. *See,* Tex. Fin. Code § 392.403(a). By contrast, the ***Subclass Claims*** include claims arising under the FDCPA, which permits recovery of statutory damages (but not equitable relief). *See,* 15 U.S.C. § 1692k(a)(2).

Defendants' business records indicate there are approximately 28,572 people who fit within the Class definition and 19,027 persons who fit within the Subclass definition and, therefore, are all in the Settlement Class. [*Id.* at ¶9.]

B. Settlement Class Recovery.

Defendants will provide the following relief to the Class ("Class Recovery") and Subclass ("Subclass Recovery"):

(i) ***Class Recovery*—Deletion of Credit Reporting Tradelines**. Defendants represent that, as of August 28, 2020, they requested deletion of all tradelines concerning Class Members' CF Medical accounts that are the

subject of this Lawsuit from any credit reporting agency to whom they were reporting one or more of Class Members' CF Medical accounts which AssetCare was collecting. [*Id.* at ¶ 11(a).]

(ii) ***Class Recovery*—Waiver of Debts**. Within seven (7) days of the Court's entry of an Order granting final approval of the Settlement, CF Medical will: (i) consider each Class Members' account(s) that are the subject of this Lawsuit as disputed; (ii) permanently waive the entire balance owed for each Class Members' account(s) that are the subject of this Lawsuit; (iii) suppress the filing/reporting of a 1099-C form for all Class Members' account(s) that are the subject of this Lawsuit; and (iv) never sell, assign, or subject to further collection activity any Class Members' account(s) that are the subject of this Lawsuit. The total value of the Class Members' debt waiver is $41.2 million. [*Id.* at ¶11(b).]

(iii) ***Class Recovery*—Injunctive Relief**. As a non-monetary part of the settlement, Defendants will submit to the Court's entry of a mandatory injunction providing that, on a going-forward basis, they shall provide the following notices in written communications seeking payment on a time-barred debt owed to CF Medical from consumers who have Texas addresses:

(1) If the reporting period for including the consumer debt in a consumer report prepared by a consumer reporting agency has not expired under Section 605 of the Fair Credit Reporting Act (15 U.S.C. § 1681c), and CF Medical furnishes to a consumer reporting agency information regarding the consumer debt:

"THE LAW LIMITS HOW LONG YOU CAN BE SUED ON A DEBT. BECAUSE OF THE AGE OF YOUR DEBT, WE WILL NOT SUE YOU FOR IT. IF YOU DO NOT PAY THE DEBT, CF MEDICAL LLC MAY CONTINUE TO REPORT IT TO CREDIT REPORTING AGENCIES AS UNPAID FOR AS LONG AS THE LAW PERMITS THIS REPORTING. THIS NOTICE IS REQUIRED BY LAW."

(2) If the reporting period for including the consumer debt in a consumer report prepared by a consumer reporting agency has not expired under Section 605 of the Fair Credit Reporting Act (15 U.S.C. § 1681c), but CF Medical does not furnish to a consumer reporting agency information regarding the consumer debt,

"THE LAW LIMITS HOW LONG YOU CAN BE SUED ON A DEBT. BECAUSE OF THE AGE OF YOUR DEBT, WE WILL NOT SUE YOU FOR IT. THIS NOTICE IS REQUIRED BY LAW."

(3) If the reporting period for including the consumer debt in a consumer report prepared by a consumer reporting agency has

> expired under Section 605 of the Fair Credit Reporting Act (15 U.S.C. §1681c),
>
> "THE LAW LIMITS HOW LONG YOU CAN BE SUED ON A DEBT. BECAUSE OF THE AGE OF YOUR DEBT, WE WILL NOT SUE YOU FOR IT, AND WE WILL NOT REPORT IT TO ANY CREDIT REPORTING AGENCY. THIS NOTICE IS REQUIRED BY LAW."

[*Id.* at ¶ 11(c)(i)-(iii).]

A notice required under the foregoing provisions must be in at least 12-point type that is boldfaced, capitalized, or underlined or otherwise conspicuously set out from the surrounding written material. Such disclosure shall be made until and unless the TDCA provision Tex. Fin. Code § 392.307 providing for said language is amended, struck, or revised, or overruled or preempted by case law, statute or regulatory guidance.

(iv) ***Subclass Recovery*.** Defendants will create a class settlement fund of $100,000.00 ("Class Recovery"), which a Third-Party Settlement Administrator ("Administrator") will distribute *pro rata* (up to $30.00) to each Subclass Member who timely returns a claim form and does not exclude him/herself from the Settlement. Subclass Members will receive their share of the Class Recovery by check which will be void 120 days from the date of issuance. [*Id.* at ¶ 11(d).]

(v) ***Subclass Recovery*—Residual**. Any Subclass Recovery checks not cashed by the void date, along with any unclaimed funds remaining in the Subclass Recovery, will be disbursed in the following order: (i) to pay the costs associated with providing Notice to Class Members and administering the Subclass Recovery; and (ii) any remainder donated as a *cy pres* award to the Texas Access to Justice Foundation, who provides *pro bono* legal services to low-income Texans who would otherwise be denied access to justice. *Id.*

C. Relief to Plaintiff.

Subject to Court approval, Defendants agreed to pay Plaintiff $1,000.00 for her statutory damages pursuant to 15 U.S.C. § 1692k(a)(2)(B), plus an additional $5,000.00 as consideration for her services on behalf of the Settlement Class. [*Id.* at ¶11(e)].

D. Attorneys' Fees and Costs.

Subject to Court approval, Defendants also agreed to pay Plaintiff's reasonable attorneys' fees and costs incurred in the prosecution of a "successful action" under 15 U.S.C. § 1692k and Tex. Fin. Code § 392.403(b) notwithstanding that Defendants deny liability as set forth above

and in ¶ 3 of the Class Settlement Agreement. [*Id.* at ¶ 12]. As such, and subject to court approval, Defendants agree Class Counsel shall be entitled to receive $100,000.00, which covers all fees and expenses arising out of the Litigation, and does not in any way reduce, the Settlement benefits or amounts provided to the Settlement Class. *Id*.

E. Notice to Class Members—Direct Mail Notice, Website, & Toll-Free Number.

Defendants shall provide Class Counsel with a spreadsheet containing Class Members' names and last known mailing addresses according to Defendants business records. [*Id.* at ¶20]. Within 21 days of entry of the Preliminary Approval Order, Administrator shall cause actual notice in the form of Exhibits 1 and 2 to ***Appendix A***, to be respectively sent to Class Members and Subclass Members using Defendants foregoing spreadsheet. *Id.* The Administrator shall distribute the Notices via any form of U.S. Mail providing address forwarding. *Id.* The Notices shall be sent with a request for forwarding addresses, and the Administrator shall forward all Notices returned as undeliverable with a forwarding address within 4 days of receipt. *Id.*

Additionally, prior to mailing the Notices the Administrator shall also establish a settlement website and toll-free telephone number by which Class Members may obtain a copy of the longform settlement Notice in the form of Exhibit 3 to ***Appendix A***, other pertinent case documents, and information regarding the Settlement, and Subclass Members may obtain the Subclass claim form along with detailed instructions for completing and returning it. *Id.*

F. Class Members' Exclusion & Objection Rights.

Any Class Member may choose to be excluded from the Settlement by opting out within the time set by this Court. [*Id.* at ¶¶13 and 14.] Class Members who opt out of the Settlement shall not be bound by any prior Court order or the Agreement's terms. *Id*. Class Members may also object to the Settlement and, if they choose to do so, they may also appear and be heard at the fairness hearing. [*Id.* at ¶¶13 and 15.]

III. THE COURT SHOULD GRANT PRELIMINARY APPROVAL

The Defendants produced information in discovery relevant to the requirements of Fed. R. Civ. P. 23. The Parties' Agreement provides Class Members with a combination of legal and equitable benefits, injunctive relief, and direct notice by mail which explains their exclusion and objection rights, and how Subclass Members can submit a claim for a cash payment. The Parties believe the benefits afforded by the Agreement are fair, reasonable, and in Class Members' best interest. Consequently, the Parties ask the Court to preliminary approve their Settlement and certify a hybrid class pursuant to Rule 23(b)(2) and (3).

A. The Nature of Class Members' Claims & Relief Obtained.

The *Class* Claims only arise under the TDCA which permits recovery of equitable relief and actual damages but *not* recovery of statutory damages for the specific types of TDCA violations alleged in the Litigation. Tex. Fin. Code § 392.403(a). By contrast, the *Subclass* Claims arise under the FDCPA which permits recovery statutory (or "additional") in the absence of actual damages but, unlike the TDCA, does *not* permit recovery of equitable relief. The FDCPA caps the recovery of statutory damages for individual plaintiffs at $1,000.00, and the Class recovery here at 1% of a debt collector's net worth. 15 U.S.C. § 1692k(a)(2)(B)(ii).

All Class Members will receive direct mail notice and substantial equitable relief. First, as of August 28, 2020, Defendants requested deletion of all tradelines from all credit reporting agencies to whom they were reporting concerning Class Members' CF Medical accounts that are the subject of this Lawsuit. Second, if the Settlement receives final approval, CF Medical will, for *each* Class Members' account(s) that are the subject of this Lawsuit: (i) consider the account disputed; (ii) permanently waive the entire account balance owed (valued at $41.2 million); (iii) suppress the filing/reporting of a 1099-C form; and (iv) never sell, assign, or subject to further collection activity the account(s). Third, Defendants agreed to the Court's entry of a mandatory injunction requiring them to provide disclosures in future written communications to Texas

consumers when collecting time-barred debts owed to CF Medical.

Importantly, it is undisputed that Class Members' debts are legitimately owed to CF Medical; thus, non-litigation collection efforts and credit reporting remain possible. As such, deletion of Class Members' negative credit reporting tradelines and permanent debt waiver of the entire outstanding balances of Class Members' accounts without 1099-C reporting is relief that has significant value to consumers, but is *not* an available remedy under the TDCA or FDCPA.

In addition to the foregoing benefits, Subclass Members can receive a direct $30.00 cash payment from the $100,000.00 Subclass Recovery Fund. [*Id.* at ¶ 11(d)].

B. The Rule 23(a) Requirements are Satisfied.

The Defendants produced information in discovery relevant to the requirements of Fed. R. Civ. P. 23(a) which, as discussed *infra*, are satisfied.

1. Numerosity.

Fed. R. Civ. P. 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." The Fifth Circuit's analysis of numerosity is, as Rule 23(a)(1) provides, focused on the impracticability of joining would-be class members as plaintiffs in one action. *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1038 (5th Cir. 1981). The analysis starts with a "reasonable estimate of the number of purported class members" but "the actual number of class members" is not alone dispositive because the issue is "whether joinder of all members is practicable." The Fifth Circuit has recognized that forty class members can raise a presumption of impracticability. *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (citing *See* 1 Newberg on Class Actions § 3.05, at 3–25 (3d ed.1992))

Here, the Settlement Class consists of 28,572 persons geographically dispersed throughout Texas who fit within the Class definition, of which 19,027 persons fit within the Subclass definition. Thus, Rule 23(a)(1)'s numerosity requirement is satisfied.

2. Commonality.

To satisfy the commonality requirement under Rule 23(a)(2) plaintiffs must demonstrate their claims "depend upon a common contention," the resolution of which "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal–Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011). The element aims to determine "whether there is a need for combined treatment and a benefit to be derived therefrom." *Jenkins v. Raymark Indus., Inc*., 782 F.2d 468, 472 (5th Cir. 1986). In the Fifth Circuit, the threshold of commonality is not a high one. *Applewhite v. Reichhold Chems., Inc*., 67 F.3d 571, 573 (5th Cir. 1995); and *Moore Video Distribs., Inc. v. Quest Entertainment, Inc*., 823 F. Supp. 1332, 1339 (S.D. Miss. 1993) ("The rule requires only that resolution of the common questions affect all or a substantial number of the class members.").

In the Fifth Circuit, "[t]he most widely accepted tests for determining whether a collection letter contains false, deceptive, or misleading representatives are objective standards based on the concepts of the 'least sophisticated consumer' or the 'unsophisticated consumer.'" *Taylor*, 103 F.3d at 1236 (5th Cir. 1997). Because that test is objective, the same analysis applies to each putative class member and no subjective inquiries are required. Consequently, common questions arise in the context of FDCPA cases where, like here, "defendants have engaged in standardized conduct towards members of the proposed class by mailing to them allegedly illegal form letters or documents." *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998) (citations omitted); *accord. Lewis v. Riddle*, C.A. No. 97-0542, 1998 U.S. Dist. LEXIS 20465, at *6 (W.D. La. Nov. 18, 1998).

Here, the common question of fact is whether Defendants mailed Plaintiff and each Class member the same *standardized* form collection Letter to collect defaulted medical debts owed to CF Medical which allegedly made false limited time "settlement offers" to resolve their debts without disclosing the debts were no longer judicially enforceable because the statute of limitations to file a lawsuit had passed. The common questions of law are whether the content of

those letters violate the TDCA and FDCPA by using false, deceptive, and misleading representations and/or means to collect or attempt to collect any debt.

Thus, the commonality requirement of Rule 23(a)(2) is satisfied.

3. Typicality.

The class representative's claims must also be "typical" of the class claims. Fed. R. Civ. P. 23(a)(3). The test for typicality, like commonality, is not demanding. *Forbush v. J.C. Penney Co. Inc*., 994 F.2d 1101, 1106 (5th Cir. 1993). "It focuses on the similarity between the named plaintiffs' legal and remedial theories and the theories of those whom they purport to represent." *Lightbourn v. Cty of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997)). A named plaintiff's claims are typical of the class if they "arise out of the same event or course of conduct as the class members' claims and are based on the same legal theory." *Durrett v. John Deere Co*., 150 F.R.D. 555, 558 (N.D. Tex. 1993) (typicality exists where the named plaintiff and class members' claims are "all arising out of the same form contract).

Here, typicality is inherent in Plaintiff's proposed Class definition which requires provides that Defendants mailed Plaintiff and each Class member the same *standardized* form collection Letter which allegedly violated the TDCA and FDCPA in the same manner. Further, Defendants' form collection letter is judged using an objective standard and, thus, a single analysis will be dispositive of all class members' claims—*i.e.*, if the Letter is found to be misleading for Plaintiff, then it is misleading for everyone.

Accordingly, Rule 23(a)(3)'s typicality requirement is satisfied.

4. Adequacy of Representation.

Fed. R. Civ. P. 23(a)(4) requires that a named plaintiff provide fair and adequate protection for the interests of the class. Adequacy "encompasses three separate but related inquiries (1) 'the zeal and competence of the representative[s'] counsel'; (2) 'the willingness and ability of the representative[s] to take an active role in and control the litigation and to protect the

interests of absentees'; and (3) the risk of 'conflicts of interest between the named plaintiffs and the class they seek to represent.'" *Slade v. Progressive Sec. Ins. Co.*, 856 F.3d 408, 412 (5th Cir. 2017) (citations omitted). These requirements are met here.

As to the first inquiry, Plaintiff's counsel is experienced in class action and complex consumer litigation. [*See,* Declarations of Andrew T. Thomasson and Daniel J. Ciment which outlines their firm's qualifications to serve as Class Counsel]. Additionally, the Settlement relief—comprised of equitable benefits not available under the TDCA or FDCPA, along with damages, and injunctive relief—speaks to the "the zeal and competence" of Plaintiff's counsel.

Regarding the second inquiry, Plaintiff has for nearly a year demonstrated her "willingness and ability…to take an active role in and control the litigation and to protect the interests of absentees." She has been actively involved at every stage of this litigation to advance the putative class members' claims, protect their interests. [*Thomasson Decl.*, ¶11.] By way of limited example, she fully and timely responded to all of Defendants' written discovery requests and promptly agreed to appear on all dates Defendants requested for her deposition. Additionally, on June 23, 2020, she actively participated in a full day of mediation with Defendants and she met her attorneys prior to the mediation, immediately afterwards, and several times since then in connection with the Parties' ongoing class settlement negotiations. [*Id.* at ¶12.] Prior to mediation, Ms. Monroe was offered an opportunity to resolve her claims on an individual basis for a substantial sum, but she declined the offer because of her desire to protect the putative class members by pursuing their claims and obtaining redress for them. *Id.*

Regarding the third inquiry, Plaintiff's counsel is unaware of any conflicting interests she has with putative class members and she has no familial relationship to any of her attorneys or any other person employed by, or know to, them. [*Id.* at ¶11.] Ms. Monroe has been actively involved at every stage of this litigation to advance the putative class members' claims, protect their interests, and to seek appropriate redress for them from the Defendants—a fact confirmed

the quality of the Settlement benefits she negotiated for Class Members. *Id.*

B. The Court Should Certify a "Hybrid" Class Under Rule 23(b)(2) and (b)(3) and Permit All Class Members Notice, Exclusion & Objection Rights.

In addition to the Rule 23(a) requirements, the party seeking to obtain class certification must demonstrate the action may be maintained under within one or more of three categories established by Rule 23(b). The first two categories, established by Rules 23(b)(1) and 23(b)(2), mainly concern actions for equitable relief, while the third category, established by Rule 23(b)(3), usually involves actions for money damages. *See* Fed. R. Civ. P. 23(b).

The Court should certify this case as a "hybrid" class action because the Settlement provides the *entire* Class non-monetary relief (injunctive and equitable), which is characteristic of Rule 23(b)(2), and monetary relief to the Subclass which is characteristic of Rule 23(b)(3).

However, the combination of injunctive, equitable, *and* monetary relief may implicate Class Members' Due Process right to notice, and opt-out, of the pending action because "[s]uch a class action, at least in the relief stage, begins to resemble a 23(b)(3) action, and there has been more concern with protecting the due process rights of the individual class members to ensure they are aware of the opportunity to receive the monetary relief to which they are entitled." *Penson v. Terminal Transp. Co*., 634 F.2d 989, 994 (5th Cir. 1981). Accordingly, in most cases "where monetary relief is sought and is made available in a Rule 23(b)(2) class action, notice is no longer discretionary but is required at some stage in the proceedings." *Id.* citing *Johnson v. General Motors Corp*., 598 F.2d 432 (5th Cir. 1979).

The Parties request the Court direct that *all* Class Members—including Subclass Members—receive direct mail notice of this action and the right to seek exclusion from, or object to, the Settlement.

1. Rule 23(b)(2)—Injunctive & Equitable Relief is Appropriate to the Entire Class.

Certification is appropriate under Rule 23(b)(2) when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." *Id.* at 437. A member of a class certified under Rule 23(b)(2) has no right to opt out of the class, though a district court may mandate such a right pursuant to its discretionary powers under Rule 23. *Penson v. Terminal Transport Co.*, 634 F.2d 989, 993 (5th Cir. 1981).

In this case, Defendants acted on grounds that apply generally to the *entire* Class by mailing Plaintiff and each Class Member standardized for letters which sought to collect defaulted medical debts owed to CF Medical; those letters uniformly made allegedly false, deceptive, and misleading limited time "settlement offers" without disclosing the debts were no longer judicially enforceable because the statute of limitations to file a lawsuit had passed.

Plaintiff alleges Defendants' foregoing collection letters violate the TDCA which permits injunctive relief and actual damages but, unlike the Subclass Claims—which only arise under the FDCPA—does not provide for recovery of statutory damages. The TDCA provides for a two-year statute of limitations, as opposed to the FDCPA's one-year statute of limitation. Although the FDCPA and TDCA both permit recovery of actual damages those damages (if they exist) would be difficult to quantify without individual questions of fact and, therefore, may prove difficult to certify under the predominance prong of Rule 23(b)(3) (*see, infra*).

The Parties' Agreement provides for injunctive relief under the TDCA—specifically, the Court's entry of a mandatory injunction requiring Defendants to provide disclosures in future written communications to Texas consumers which disclose whether the debts being collected are time-barred and/or credit reported, and whether Defendants will sue or credit report the debts. [*See supra,* § II.B(iii).] Injunctive relief is better suited for class treatment under Rule 23(b)(2).

The Agreement also provides *all* Class Members' with valuable equitable relief which is unavailable under the TDCA and FDCPA and, therefore, also better suited for class treatment under Rule 23(b)(2). Specifically, as of August 28, 2020, Defendants requested deletion of reporting tradelines from each credit reporting agencies to whom they were reporting Class Members' CF Medical account(s) that are the subject of this Lawsuit. Additionally, if the Court grants final approval of the Settlement, CF Medical will, for each of those Class Members' account(s) that are the subject of this Lawsuit: (i) consider the account disputed; (ii) permanently waive the entire account balance owed; (iii) suppress the filing/reporting of a 1099-C form; and (iv) never sell, assign, or subject to further collection activity the account(s). The total value of Class Members' debt waiver is $41.2 million.

It is undisputed that Class Members' debts are legitimately owed to CF Medical and, thus, Defendants' non-litigation collection efforts including credit reporting remain possible. As such, Defendants' deletion of Class Members' negative credit reporting tradelines coupled with permanent debt waiver of Class Members' entire outstanding account balances—and suppressing the filing of a 1099-C form—is relief which has significant value to ordinary consumers in today's current economic environment where many creditors have tightened lending standards due to high unemployment rates.

2. Rule 23(b)(3)—Subclass Claims

Class certification is also appropriate under Rule 23(b)(3) where: (1) there exist questions common to the class which predominate in favor of the class, *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S.Ct. 1184, 1191 (2013); and, (2) resolution by class action will "achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated without sacrificing procedural fairness or bringing about other undesirable results." *Amchem Prods. v. Windsor*, 521 U.S. 591, 615 (1997). Both requirements are satisfied.

First, "Rule 23(b)(3) requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Amgen*, 133 S.Ct. at 1191 (emphasis in original). Individual questions need not be absent, so long as common questions predominate. *Id*. at 1196. Here, common questions predominate over the Subclass because, by definition, it is only comprised of a subset of Texas residents to whom AssetCare mailed its *standardized* form Letter [Doc. 1 (Exh. A)] to collect time-barred CF Medical debts; those letters contained the *same* allegedly false, deceptive, and misleading language that allegedly violates the FDCPA in the *same* manner. Therefore, the predominance inquiry of Rule 23(b)(3) is satisfied.

Second, to establish superiority, a plaintiff must demonstrate that resolution by class action will "achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated without sacrificing procedural fairness or bringing about other undesirable results." *Amchem*, 521 U.S. at 615. Class actions are a superior method when each class members' damages are modest because:

> 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 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

Amchem, 521 U.S. at 617 (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)). "Most importantly, the superiority of FDCPA class action claims is apparent in the language of the statute [because] '[t]he language of the FDCPA governing the recovery in class actions is an indication that Congress views the availability of the class action procedure as an integral part of the enforcement regime.'" *Hackler v. Tolteca Enters.*, Civil Action No. SA-18-CV-911-XR, 2019 U.S. Dist. LEXIS 226145, *17 (W.D. Tex. Sep. 9, 2019) quoting *Barnett v. Experian Info. Sols.*, No. Civ.A.2:00CV175, 2004 WL 4032909, at *5 (E.D. Tex. Sept. 30, 2004)

and 15 U.S.C. § 1692k(a)(2)(B).

The damages caused by a violation the FDCPA are typically modest. *Barnett*, 2004 WL 4032909, at *5 ("[T]he typical recovery in an FDCPA case by an individual is often very small due to the plaintiff's inability to demonstrate precisely the amount of reasonable compensation necessary to remedy an unfair collection practice. The absence of the class action vehicle would leave many consumers with no practical alternative to enforce their rights under the statute.") Thus, a class action is a superior method of adjudicating FDCPA claims when class members are likely unaware their rights were violated which seems apparent here as none of the 28,572 *Class* Members have sued Defendants regarding their Letter at issue in this case.

Given the very specific common thread (*i.e.*, Defendants' standardized collection letter) tying members of the Subclass Claims together, the judicial economy of class adjudication is plainly superior to 19,027 individual cases challenging the exact same, standardized, conduct. Moreover, many Subclass Members are likely unaware of their statutory rights, or that a violation of those rights even occurred. Therefore, class adjudication will allow Subclass Members to receive "valuable consideration for what, for most individuals, is likely to be a technical violation that they did not know occurred." *See, e.g., Harlan v. Transworld Sys., Inc.*, 302 F.R.D. 319, 326 (E.D. Pa. 2014).

IV. THE PARTIES' NOTICE PLAN

As set forth in their Agreement, the Parties jointly request the Court approve the Class Notices (Exhibits 1 and 2 to ***Appendix A***) and set the following schedule:

(a) Notice to Class Members and Subclass Members (Exhibits 1 and 2 to ***Appendix A***) shall be mailed within 21 days of entry of the Preliminary Approval Order [***Appendix A***, ¶20].

(b) Prior to mailing the Notices, the Administrator shall establish a settlement website and toll-free telephone number by which Class Members may obtain a copy of the longform settlement Notice (Exhibit 3 to ***Appendix A***), other pertinent case documents, and information regarding the Settlement,

and Subclass Members may obtain the Subclass claim form along with detailed instructions for completing and returning it.

(c) Class Members shall have forty-five (45) days after the initial mailing of the Notice to exclude themselves from, or object to, the Settlement; and Subclass Members shall return a claim form by that date. Any Class Member desiring to exclude themselves from the Settlement must serve copies of their request on the Administrator by the same date. Any Class Member who wishes to object to the Settlement must submit an objection in writing to the Clerk of the United States District Court for the Southern District Texas, and serve copies of the objection on the Administrator by the same date [*Id.*, ¶¶13-15].

(d) A final hearing on the fairness and reasonableness of the Settlement and whether the final approval shall be given to it and the requests for fees and expenses by Class Counsel will be held before this Court on a date at least ninety (90) days from the entry of a preliminary approval order.

If there is any conflict between any provision of this Motion and the Agreement, the Parties intend for the Agreement to control, subject to Court approval.

V. CONCLUSION

WHEREFORE, the Plaintiff, on Defendants' consent, respectfully requests the Court enter an order in the form of Exhibit 4 to the Agreement, which: (i) preliminarily approves the Agreement attached as ***Appendix A***; (ii) certifies for settlement purposes the Settlement Class as defined in Paragraph 8 of the Agreement; (iii) appoints STERN•THOMASSON LLP and the CIMENT LAW FIRM PLLC as Class Counsel; (iv) appoints Plaintiff as representative of the Settlement Class; (v) sets dates for Class Members and Subclass Members to return a claim form, seek exclusion, or object to, the Settlement; (vi) schedules a hearing for final approval of the Settlement; (vii) approves the mailing of notice to Class Members and Subclass Members in the form of Exhibits 1 and 2 to ***Appendix A***, and (viii) finds the mailing of such notice satisfies the requirements of due process.

Respectfully submitted,

s/ Andrew T. Thomasson

Dated: October 16, 2020

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CERTIFICATE OF CONFERENCE

I, Andrew T. Thomasson, certify that on October 16, 2020, I conferred with Defendants' counsel, Whitney L. White, who confirmed Defendants do not oppose Plaintiff's Motion for Preliminary Approval of the Parties' Class Settlement Agreement.

s/ Andrew T. Thomasson
Andrew T. Thomasson