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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

GREAT NORTHERN RESOURCES, INC., DYNAMIC SERVICE FIRE AND SECURITY, LLC, and WALTER VAN LEJA, on behalf of themselves and others similarly situated,

Plaintiffs,

vs.

KATY COBA, in her Official Capacity as State Chief Operating Officer and Director of the Oregon Department of Administrative Services; OREGON DEPARTMENT OF ADMINISTRATIVE SERVICES; THE CONTINGENT; BLACK UNITED FUND OF OREGON; and DOES 1-10,

Defendants.

Case No. 3:20-cv-01866-IM (L)

JOINT MOTION OF PLAINTIFF GREAT NORTHERN RESOURCES, INC., STATE DEFENDANTS, THE CONTINGENT AND BLACK UNITED FUND FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

JOINT MOTION

Pursuant to Fed. R. Civ. P. 23(e), plaintiff Great Northern Resources, Inc.; defendants State of Oregon, Department of Administrative Services, and Katy Coba, in her Official Capacity as State Chief Operating Officer and Director of the Oregon Department of Administrative Services (the "State Defendants"); The Contingent and Black United Fund of Oregon ("BUF") (together, the "Settling Defendants"), respectfully move for preliminary approval of settlement, which will resolve those claims brought by named Plaintiff Great Northern Resources, Inc. as well as the proposed class members' claims in this action. The motion is based on the below Memorandum, the Proposed Settlement, the Declarations of Clifford S. Davidson and Jonathan Mitchell, the concurrently filed Notice of Settlement, matters subject to judicial notice, and the Court's file in this matter.

MEMORANDUM

This Memorandum explains the factual background relevant to this motion, in Section I, then summarizes the proposed settlement terms in Section II. Section III explains why the proposed settlement is justified and appropriate: why a class should be certified for applicants, and why the settlement for those class members is fair, reasonable, and adequate.

I. RELEVANT FACTUAL BACKGROUND

A. The Oregon Emergency Board Allocates $62 Million to Create the Fund, and Great Northern, Dynamic, and Van Leja Sue to Enjoin the Fund's Operation.

This lawsuit concerns the Oregon Emergency Board's allocation of $62 million of federal CARES Act money to Defendant Oregon Department of Administrative Services ("DAS") for the purpose of creating a fund available to Oregon-based businesses majority-owned by persons self-identifying as Black; Oregon-based community organizations primarily serving the Black community; and Oregon-based individuals who self-identify as Black. That Fund is known as the Oregon Cares Fund for Black Relief and Resiliency (the "Fund"). (ECF No. 65 at 4.) DAS entered

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into a contract with defendant The Contingent, an Oregon-based non-profit with existing programs that serve Oregon's Black community, to administer the Fund. (*Id.*) The Fund was set to expire on December 30, 2020 based on the federal CARES Act deadline for expenditures and according to the terms of the agreement between DAS and The Contingent.

On October 29, 2020, plaintiff Great Northern Resources, Inc. ("Great Northern") sued on its own behalf and moved for a temporary restraining order on November 7, 2020. (ECF Nos. 1, 12.) On November 20, 2020, the Court denied Great Northern's TRO motion for lack of irreparable injury, in part because The Contingent offered to deposit into the Court registry the maximum amount any business applicant could obtain ($200,000), and the Court agreed to that deposit. (ECF No. 28.)

On December 6, 2020, Plaintiffs filed their "First Amended Class-Action Complaint." (ECF No. 32.) The Amended Complaint added named Plaintiffs Dynamic Service Fire and Security, LLC ("Dynamic") and Walter Van Leja, who purported to bring suit on behalf of themselves as well as a class defined as "all current and future individuals, families, and businesses who: (1) live or are based in Oregon; (2) have experienced or are experiencing hardship due to COVID-19; and (3) do not self-identify as [B]lack, and who therefore have been or are currently being disqualified from the relief from the Fund on account of race." (*Id*. at 68.) The Amended Complaint also named Black United Fund as a defendant.

On December 8, 2020, The Contingent announced it would no longer accept applications because The Contingent had received more applications than could be funded through the remaining Fund balance. (ECF No. 65 at 4; *see also* ECF No. 45 at 6–7.)

On December 11, 2020, Plaintiffs moved for a temporary restraining order. (ECF No. 39.) After briefing, The Contingent informed the Court it would deposit the remaining balance of the Fund into the Court's registry ($8,814,120.00); thus, the Court denied Plaintiffs' request as moot and accepted The Contingent's deposit. (ECF No. 59.)

In all, there is a total of $9,014,120.00 in Fund monies on deposit with the Court in

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connection with Case, No. 3:20-cv-01866-IM (the "GNR Deposit"). There is also $46,853.65 in Fund monies on deposit with the Court in trailing Case No. 20-cv-02022-IM, filed by plaintiff Cocina Cultura LLC. The deposit in the Cocina matter is not the subject of the proposed settlement or this motion.

B. Defendants Address Whether Persons Who Did not Apply to the Fund prior to December 8, 2020 Have Any Claim for Relief.

On December 29, 2020, Defendants submitted briefs to the Court addressing the standing of non-applicants—*i.e.*, whether those individuals, businesses, and nonprofits, who did not apply before the Fund closed, hold *any* claim for relief. (ECF No. 65.) This includes Dynamic and Mr. Van Leja. (*Id.*; *see also* ECF No. 32. ¶¶ 42, 47.) The Court deferred ruling on this briefing.

C. The Settling Parties Negotiate Two Different Settlements – One, a Proposed Settlement Class of Applicants to the Fund, Including Great Northern – the Other, Not at Issue Here, a Settlement of the Individual Claims of Dynamic and Mr. Van Leja, Who Did Not Apply to the Fund.

On December 18, 2020, the Court ordered the parties to attend a settlement conference within 60 days. (ECF No. 59.) On January 12, 2021, the parties attended a settlement conference with Judge Mosman, which did not result in immediate settlement. (ECF No. 78.) However, the conference did precipitate settlement communications between the parties. The Settling Parties have negotiated extensively over the course of the past two months. (Davidson Decl. ¶ 2.)

Through these settlement negotiations, Defendants separately agreed with Dynamic and Mr. Van Leja to settle their individual claims. Unlike the proposed settlement class as to which Great Northern would be a class representative, the Settling Defendants' settlement with Dynamic and Mr. Van Leja is simply a settlement of their individual claims and is not proposed as a class settlement. Dynamic and Van Leja, on one hand, and Defendants, on the other, have agreed on settlement terms. The settlement resolves Dynamic's and Mr. Van Leja's claims, and also involves immediate release, before preliminary or final approval of the class settlement, $5.3 million of the GNR Deposit so that it may be disbursed immediately to Fund applicants (the "Non-Applicant

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Settlement").[1] Please see the Notice of Settlement filed concurrently with this motion, which describes the Non-Applicant Settlement.

Meanwhile, Settling Defendants agreed to settle with Great Northern. That proposed settlement would involve—and is contingent upon—the certification by this Court of a settlement class pursuant to Fed. R. Civ. P. 23(e). (*See* Proposed Settlement, attached hereto as Exhibit 1.) Following the Court's preliminary approval, and the Settlement Administrator's dissemination of reasonable notice, the Settling Parties will submit their agreement for final approval by this Court (the "Settlement Agreement").

The summary of the settlement terms for this Court's preliminary approval of settlement follows.

II. SUMMARY OF PROPOSED SETTLEMENT TERMS

A. The Proposed Settlement Class

The Proposed Settlement contemplates a settlement class consisting of all individuals, businesses, and nonprofits that applied to the Fund prior to December 8, 2020, whose applications do not indicate that the applicant identifies as Black, or as a Black-owned business or Black-focused organization. (Proposed Settlement ¶ 42.) The settlement class will total approximately 1,252 applicants (individually, "Class Members"). (Davidson Decl. ¶ 3.) As explained in full below, the Proposed Settlement Class does not consist of those individuals, business, and nonprofits who did not apply to the Fund prior to December 8, 2020. (See below, Section III.)

B. The Proposed Class Notice

1. Form of Class Notice

The proposed Class Notice is reasonably calculated to apprise Class Members of the Proposed Settlement and, specifically, a Class Member's rights to exclude themselves from the Settlement Agreement or object to the Proposed Settlement's terms. (Proposed Settlement, Section VII.) The Class Notice proposes three methods of notice: (i) direct mail notice, via

[1] Please see Appendix A for a summary of deposit amounts.

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electronic mail or U.S. Postal Service; (ii) a Class Member website; and (iii) a longform notice with more detail than the direct mail notices, available on the Settlement Website, and/or upon written request. (Proposed Settlement ¶¶ 62, 65)

Direct mail/email is the most targeted—and thus, likely the most effective—method. Based on their applications and because applications were submitted online, The Contingent is in possession of every Class Member's e-mail address and mailing address. (Davidson Decl. ¶ 4.) The Settling Parties will attempt to provide direct mail notice via e-mail to all class members. (Proposed Settlement ¶ 62.) Class Members whose e-mail is returned as undeliverable will receive direct mail notice to their mailing address, via U.S. Postal Service. (*Id.* ¶ 63.)

The Settling Parties also intend to establish a website to allow Class Members to obtain notice of, and information about, the Settlement Agreement (the "Settlement Website"). (*Id*. ¶¶ 39, 54, 65.) The Settlement Website will include an electronic and printable copy of the longform notice, information about the litigation and the settlement, and important Court documents and deadlines. Class Members will be able to opt out of the Settlement Class through the Settlement Website, via an easy-to-use web interface, or by written request. (*Id*. ¶¶ 54, 65.)

2. Content of Class Notice

All forms of Notice will include: (i) a description of the nature of the action; (ii) the definition of the Proposed Settlement Class; (iii) the class claims and issues; (iv) a statement that a Class Member may enter an appearance through an attorney if the member so desires; (v) a statement that the Court will exclude from the class any member who requests exclusion; (vi) identification of the time and manner for requesting exclusion; and (vii) an explanation of the binding effect of a class judgment to members under Fed. R. Civ. P. 23(c)(3). *See* Fed. R. Civ. P. (c)(2)(b). (Proposed Settlement ¶ 57.)

To assist in this process, the Settling Parties have agreed to appoint a class action administrator at the State Defendant's expense (the "Administrator"). The Administrator will provide notice to Class Members, process applications and opt-outs, disburse funds where

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appropriate, create and maintain the Settlement Website and perform all other required administrative tasks and reports. (Proposed Settlement ¶¶ 34, 39, 47, 50-55.)

Separately, and immediately upon the Effective Date as defined in the Settlement, the Court will release to The Contingent the Remainder of the GNR Deposit, $3,714,120.00 (keeping the funds set aside in the *Cocina Cultura* litigation), which will be disbursed to the remaining applicants satisfying the Fund's original criteria and eligible for disbursements based on COVID-19 losses. (*Id.* ¶ 69(f).) The Contingent has already identified those eligible for such disbursements.

C. Relief for the Settlement Class

Class Members who do not opt out of the Settlement Class will be eligible to have their Fund applications processed and receive funding as appropriate based on the Class Members' applications to the Fund. (Proposed Settlement ¶¶ 58-59.) The Administrator will process these applications in order of receipt by The Contingent. (*Id.* ¶ 52.) In accordance with the Proposed Settlement Class (*see supra* Section A), the Administrator will *not process* applications submitted after 11:59:59 p.m. Pacific on December 8, 2020. (Proposed Settlement ¶ 53.) In consultation with the Administrator, Settling Parties agree to create a mutually agreeable schedule for accomplishment of various tasks related to this processing and disbursement, to be provided in the Settlement Agreement for the Court's final approval. (*Id.* ¶ 55.) The Settling Parties have already agreed that the timeline will be as short as practicable. (*Id.*)

Payment to Class Members will not be allocated from the Fund. Rather, the State Defendants will deposit roughly $3.5 million (the exact amount to be determined based on the Administrator's award determinations) with the Administrator for all class payments (the "Settlement Class Fund"). (Proposed Settlement ¶¶ 36, 44, 77.) After the Administrator processes all eligible applications, any unused amount of the Settlement Class Fund will be returned to DAS and no *cy pres* recipients will be permitted. (Proposed Settlement ¶ 74.)

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D. Class Release

In exchange for a Class Member's agreement to allow the Administrator to process their application (by virtue of not opting out of the class), Class Members would agree to a general release of all claims related to their application and waive their right to sue any Defendant in this action, whether or not that Defendant is a Settling Party, or making other claims in relation to the Fund, its creation, or administration. (Proposed Settlement ¶¶ 81-85.)

E. Remaining Fund Moneys

Upon the Effective Date as defined in the Settlement, the remainder of the GNR Deposit will be returned to The Contingent. (Proposed Settlement ¶ 69(f).) After the GNR Deposit was made with the Court, the State Defendants and The Contingent agreed that The Contingent would continue its work to earmark grant dollars for recipients qualified under the original criteria, and the total GNR Deposit balance was in fact earmarked for specific applicants. Upon release of the GNR Deposit, The Contingent will immediately work to disburse those moneys in accordance with its earmarks. Any monies left over from the Fund will be handled pursuant to the then-current amended Grant Agreement between The Contingent and DAS. (*Id.*)

F. Class Representatives' Awards and Attorneys' Fees and Costs

The State Defendants agree to provide $45,000 to Great Northern from moneys other than those comprising the Fund. (Proposed Settlement ¶ 45.) Great Northern will dismiss with prejudice its claims against all Defendants. (*Id.* ¶ 69(d).)

Lastly, the State Defendants will pay Great Northern's attorneys' fees, which Settling Defendants agree not to oppose if less than or equal to a total of $185,945, for work performed in this matter through final approval. (*Id.* ¶ 86.) State Defendants' will pay the attorneys' fees from moneys other than those comprising the Settlement Class Fund. (*Id.* ¶ 88.)

III. NOTICE OF THE PROPOSED SETTLEMENT IS JUSTIFIED

Rule 23(e) of the Federal Rules of Civil Procedure provides for judicial approval of class action settlements. To obtain such approval, the Settling Parties must provide the Court with

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information "sufficient to enable it to determine whether to give notice of the proposal to the class." Fed. R. Civ. P. 23(e)(1)(A). Notice is "justified" when the parties demonstrate the Court will likely be able to: (1) certify the class for purposes of judgment; and (2) demonstrate that the settlement is fair, reasonable, and adequate. *See* Fed. R. Civ. P. 23(e)(1)(B)(i–ii); *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003) (noting that when a settlement agreement is reached prior to class certification, "courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement."); *In re Google Plus Profile Litig.*, No. 5:18-cv-06164 (VKD), 2021 U.S. Dist. LEXIS 13571, at *5 (N.D. Cal. Jan. 25, 2021) ("First, the district court must assess whether a class exists under Federal Rule of Civil Procedure 23(a) and (b). . . . Second, the district court must carefully consider whether a proposed settlement is fundamentally fair, adequate, and reasonable pursuant to Federal Rule of Civil Procedure 23(e)[.]" (citations omitted) (emphases added).

Notice is justified here because the State Defendants and Great Northern can demonstrate both conditions: (1) the Proposed Settlement Class fulfills the prerequisites of Rule 23(a), and is certifiable under Rule 23(b)(3); and (2) the Proposed Settlement is fundamentally fair, adequate, and reasonable. Accordingly, the Court should approve the Proposed Settlement and direct notice of this proposal to the class pursuant to Rule 23(e)(1)(B).

A. Class Certification, for Purposes of Settlement, is Proper.

Prior to approval of a proposed settlement, the Court must assess whether a class exists under Federal Rule of Civil Procedure 23(a) and (b). *See* Fed. R. Civ. P. 23(e)(1)(B)(ii). For purposes of settlement only, Settling Defendants do not dispute either qualification, and notice of the Proposed Settlement is justified.

1. This Action Satisfies Rule 23(a)'s Prerequisites.

Rule 23(a) sets forth four (4) prerequisites for class actions: numerosity, commonality, typicality, and adequacy. For purposes of settlement, this action meets all four.

First, the Settlement Class is so numerous (approximately 1,252 applicants) that joinder of

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each Class Member is impracticable. (Davidson Decl. ¶ 3.) Litigation of this scale is precisely what Rule 23 was designed to address.

Second, the Settlement Class presents common facts: each Class Member applied to the Fund prior to 11:59:59 p.m. on December 8, 2020, but did not indicate that the applicant identifies as Black, or as a Black-owned business or Black-focused organization. (Proposed Settlement ¶ 42.) The Settlement Class also presents common questions of law: whether the Fund used a permissible race-conscious approach to ameliorate the effects of a public health and economic emergency. (*Cf.* ECF No. 39 *with* ECF No. 54 at 2.)

Third, Great Northern's claims are typical of the claims or defenses of the Proposed Settlement Class: Great Northern applied to the Fund, did not receive any funding, and claims the Fund's race-conscious approach was *not* permissible. (ECF No. 32.) Although The Contingent later rejected Great Northern's application on grounds *other* than race, Great Northern disputes whether that rejection was proper based on the non-race contents of its application, and Great Northern's "typicality" stands because it applied to the Fund and ultimately would be subject to the Fund's race criteria. (ECF No. 32 ¶ 27.) This contrasts with Dynamic and Mr. Van Leja, who did not apply to the Fund at any point. (*Id.* ¶¶ 42, 47.)[2] Great Northern's claims are therefore "reasonably coextensive" with those of the Proposed Settlement Class. *See Staton*, 327 F.3d at 957 (noting representative claims are "typical" if they are "reasonably coextensive with those of absent class members; they need not be substantially identical") (citations omitted).

Fourth, Great Northern has fairly and adequately protected the interests of the Proposed Settlement Class—a fact demonstrated by counsel's vigorous prosecution of this action, including amendment of the complaint and repeated injunction practice. The commonality between Great Northern and the Class Members furthers this conclusion; because Great Northern's interests are reasonably, if not entirely, coextensive with that of the Proposed Settlement Class, it cannot be

[2] Although Settling Defendants dispute whether Dynamic or Mr. Leja have standing or viable claims (*see* ECF No. 65), they do *not* dispute the Proposed Settlement Class' representation by Great Northern and its counsel.

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said that counsel failed one over the other. *See id.* at 959 (finding class counsel met their burden of "adequacy" with evidence of coextensive interests between named plaintiffs and class). Lastly, especially because State Defendants have agreed to fund the Settlement Class Fund in its entirety, neither Great Northern nor its counsel present any conflicts of interest between themselves and other Class Members. *Id.* at 958 (analyzing Rule 23(a)(4)'s adequacy requirement based on the representative's vigorous prosecution and absence of conflicts of interest).

Having established all four prerequisites (numerosity, commonality, typicality, and adequacy), the Proposed Settlement Class qualifies as a class under Federal Rule of Civil Procedure 23(a).

2. Class Certification Is Proper under Rule 23(b)(3).

Once Rule 23(a) is satisfied, a class action may be maintained if common questions of law or fact "predominate" over questions affecting individual members, and if a class action is "superior" to other methods regarding a fair and efficient adjudication. Fed. R. Civ. P. 23(b)(3). While the "predominance" inquiry focuses on whether the proposed class is "sufficiently cohesive to warrant adjudication by representation" (*Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)), the "superiority" inquiry ensures a class action is the most efficient and effective means of resolution, and considers whether individual recovery "would be dwarfed by the cost of litigating on an individual basis." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010). For purposes of settlement, the Proposed Settlement Class meets both conditions.

Questions of law or fact, common to the Proposed Settlement Class, dominate any question affecting individual Class Members. The Proposed Settlement Class is discrete, consisting only of those individuals, businesses, and nonprofits that applied to the Fund prior to 11:59:59 p.m. on December 8, 2020, whose applications do not indicate that the applicant identifies as Black, or is a Black-owned business or Black-focused organization. (Proposed Settlement ¶ 42.) The resulting class is cohesive: every Class Member applied to the Fund prior to its closure, does not satisfy the Fund's race-conscious criteria, and seeks the same remedy (the processing of their applications

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using race-neutral criteria). In other words, the issues posed by the Proposed Settlement Class are the same for every member: whether the Fund used a permissible race-conscious approach to ameliorate the effects of a public health and economic emergency with a disparate impact upon Oregon's Black community. Where, as here, common questions present a "significant aspect of the case," "clear justification" exists for handling the dispute on a representative rather than on an individual basis.") (emphasis added). *Hanlon*, 150 F.3d at 1026.

This is unlike the situation posed by non-applicants, who present varying questions of law and fact. For example, it is unclear how many non-applicants could have, in fact, qualified for the Fund under its race-conscious criteria. It also is unclear how many non-applicants wished to apply to the Fund—as Dynamic and Mr. Van Leja allege as to themselves—or were able and ready to apply to the Fund, such that the proposed non-applicant class could assert anything more than an impermissible generalized grievance. (*See, e.g.*, ECF No. 65.) To the extent non-applicants have any non-moot claim now that the Fund has stopped accepting applications and expired on December 30, 2020, determination of whether a given non-applicant was able and ready to apply would require a case-by-case determination unsuited to class treatment. In contrast to the lack of commonality that Dynamic and Van Leja might have with a class of non-applicants, the Proposed Settlement Class represented by Great Northern promises a narrow and unified class by virtue of the predominate questions of fact and law. *Hillman v. Lexicon Consulting*, No. EDCV 16-01186 (SPx), 2017 U.S. Dist. LEXIS 231075, at *13 (C.D. Cal. Apr. 27, 2017) (finding common issues predominated over individuals' concerns when every member sought compensation for time spent on base when they were not allowed to leave the base 24 hours per day).

In light of the predominance of those issues shared by the Proposed Settlement Class, representative adjudication is a superior option here. Individual Class Members likely hold little interest in prosecuting separate actions, particularly considering that Class Members applying as natural persons are eligible for relatively small awards ($1,000 or $3,000), and the cost of litigation alone would dwarf any individual recovery (including the maximum business award of $200,000).

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Principles of judicial economy support the superiority of a class action as the Proposed Settlement would eliminate many potential individual suits, preserve the Court's time and resources, and economically resolve approximately 1,252 claims. (Davidson Decl. ¶ 3.) Because no other avenue exists for such a fair and effective adjudication, the Proposed Settlement Class satisfies the "superiority" test, and class certification is proper under Rule 23(b). *See Wolin*, 617 F.3d at 1176 (holding that "although alternative means of recovery are available, *e.g.*, small claims court" class-wide adjudication would "reduce litigation costs and promote greater efficiency").

B. The Settlement Is Fair, Reasonable, and Adequate.

Following its determination that a class exists, the Court must carefully consider "whether a proposed settlement is fundamentally fair, adequate, and reasonable" pursuant to Federal Rule of Civil Procedure 23(e)(2), recognizing that "[i]t is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Hanlon*, 150 F.3d at 1026 (citations omitted). Under the revised Federal Rules of Civil Procedure, the court must consider four factors in evaluating the proposal: (1) the class representatives and class counsel have adequately represented the class; (2) the proposal was negotiated at arm's length; (3) the relief provided for the class is adequate, taking into account a variety of factors, as set forth under Fed. R. Civ. P. 23(e)((2)(C); and (4) the proposal treats class members equitably relative to each other. Because the Proposed Settlement qualifies under each factor, notice of the Proposed Settlement is justified.

1. Great Northern and its Counsel Have Adequately Represented the Proposed Settlement Class.

As previously noted, Great Northern and its counsel have vigorously prosecuted this suit. *See supra*, pg. 8. Considering the overlapping nature of Great Northern's interests with those of the Proposed Class Members, and Great Northern's obvious means and incentives to effectively litigate its claims, there is little doubt these efforts adequately represented the Proposed Settlement Class. *See, e.g.*, *In re Cooper Cos. Sec. Litig.*, 254 F.R.D. 628, 632 (C.D. Cal. 2009) (finding adequate representation when the representatives' s interest aligned with the rest of the class and

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held the "means and incentives to effectively prosecute this suit"). As such, this factor weighs in favor of preliminary approval of the Proposed Settlement.

2. The Proposed Settlement was Negotiated at Arm's Length.

Courts within the Ninth Circuit "put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution." *Azar v. Blount Int'l., Inc.*, No. 3:16-cv-0483-SI, 2019 U.S. Dist. LEXIS 223032, at *4 (D. Or. Dec. 31, 2019) (quoting *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009)). Still, when settlement is negotiated prior to class certification, courts must look beyond the parties' negotiations to determine whether the settlement is the product of "good-faith, arm's length negotiations" or "fraud and collusion." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946–47 (9th Cir. 2011). In determining whether the settlement is the result of collusion, the Ninth Circuit looks to three "warning signs": (1) a disproportionate distribution of the settlement to counsel; (2) payment of attorneys' fees separate and apart from class funds; and (3) a reversion of fees to defendants rather than a class fund. *Id.* at 947. The Proposed Settlement withstands such scrutiny.

The Settlement Proposal is the result of thorough and arm's length negotiations. (Davidson Decl. ¶ 2.) At all times, the Settling Parties and their counsel held informed views of the strengths and weaknesses of their respective positions, the risks of continued litigation, and an appreciation for the substantial value this settlement delivers to the Settlement Class and Black-identifying applicants to the Fund who also will receive money from the Fund. (*Id.*) Counsel for both sides are qualified and competent litigators, individuals well-positioned to evaluate the strengths and weaknesses of continued litigation against the reasonableness of the Settlement. Great Northern's counsel has handled multiple class actions involving civil rights issues, as well as other complex mass or multi-party actions throughout the United States in both federal and state courts—all factors weighing in favor of preliminary approval of the Settlement Proposal. (*See* Mitchell Decl.) *See, e.g.*, *Azar*, 2019 U.S. Dist. LEXIS 223032, at *22 (noting courts "can and should" rely upon the judgment of experienced counsel when assessing settlement, as "parties represented by

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competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation").

The Settling Parties' arm's length negotiations also lack evidence of collusion. Counsel will *not* obtain a disproportionate distribution of the settlement, but a likely maximum of $185,945—approximately 5% of all funds anticipated to be paid to Class Members under the Proposed Settlement.[3] (Davidson Decl. ¶ 5.) *See Bluetooth*, 654 F.3d at 947; *id.* at 942 (noting when courts award attorneys as a percentage of the class recovery, a reasonable award is typically calculated at 25% of the fund). Despite payment of these fees apart from the Settlement Fund, the relatively small amount ameliorates any concern that the State Defendants are paying counsel "excessive fees" in exchange for an unfair settlement. *Id.* at 947; *see also, e.g.*, *Philips v. Munchery Inc*., No. 19-cv-00469, 2021 U.S. Dist. LEXIS 18711, at *21 (N.D. Cal. Feb. 1, 2021) (noting that the existence of a class-action defendant's agreement not to oppose fees, without more, did not trigger the court's concerns of collusion). Likewise, the presence of a revision clause does not render the Settlement Proposal unfair because it provides for the processing of every Class Member's application. (Proposed Settlement ¶ 53) (providing the Administrator will not process applications submitted after 11:59:59 p.m. on December 8, 2020). Thus, the return of *any* amount of the Settlement Class Fund denotes the satisfaction of the class claims. While unconventional, this class-friendly term does not alone suggest self-interest or collusion.

Because the Proposed Settlement is not the result of collusion and instead the product of arms'-length negotiations between experienced and professional counsel, this factor weighs in favor of preliminary approval of the Proposed Settlement

3. The Proposed Relief for the Settlement Class is Adequate.

Rule 23(e)(2)(C) sets forth four subfactors when considering whether the proposed relief is adequate, all of which weigh in favor of preliminary approval of the Proposed Settlement.

[3] As detailed in the concurrently filed Notice of Settlement, State Defendants, as a means of settling Dynamic and Van Leja's claims against all defendants, are paying Class Counsel $75,962 in fees and costs related to prosecuting those non-applicant plaintiffs' claims.

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a. The Proposed Settlement outweighs the costs, risks, and delay of trial and appeal.

"In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *Nat'l Rural Telecommc'ns Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) (citations omitted). This case is no exception. Continued litigation of this action would be lengthy, complex, costly, and likely would not result in a better outcome. For one, the parties have not yet engaged in fact discovery, which would involve extensive written discovery, document productions, several depositions, followed by class certification briefing (a process likely involving expert disclosures and depositions), before finally submitting briefs in support of summary judgment. Lacking resolution, the parties would eventually proceed to trial, which may result in an appeal. All of these matters would require significant time and expense and offer no guarantee of success.

Furthermore, all Class Members will be paid in the full amount that their applications support. Full payment of Class Members' applications—a rare result in class actions—weighs strongly in favor of the proposed settlement. *Cf. Ferrell v. Buckingham Prop. Mgmt.*, No. 1:19-cv-00332-LJO, 2020 U.S. Dist. LEXIS 9919, *57–58 (E.D. Cal. January 17, 2020) (noting that cash settlement payments amounting to only a fraction of the potential recovery are not *per* se inadequate or unfair). That result may even be more favorable than the likely result if this action does not settle. The parties dispute what remedies would be available were Plaintiffs to prevail. But assuming for the sake of argument that the Court were to order as a remedy the race-neutral processing of applications submitted prior to the Fund's closing, that could result in fewer applicants receiving payment than through the proposed settlement.

The Proposed Settlement's substantial and immediate benefits are not outweighed by the potential costs, risks, and delay of trial and appeal.

b. The proposed method of distributing relief is highly effective.

"The goal of any distribution method is to get as much of the available damages remedy to class members as possible and in as simple and expedient a manner as possible." *Moreno v. Beacon*

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Roofing Supply, Inc., No. 19cv185 (LL), 2020 U.S. Dist. LEXIS 122642, at *14 (S.D. Cal. July 13, 2020) (citation omitted). Here, the claim process provides Class Members a clear, efficient route to obtain relief because it does not require Class Members to submit a claim for relief, since in essence Class Members have already submitted their claims by applying to the Fund. Instead, the Administrator will process each Class Member's application as previously submitted to The Contingent. (Proposed Settlement ¶¶ 51(a), 52.) *See, e.g.*, *Moreno*, 2020 U.S. Dist. LEXIS 122642, at *14 (finding the distribution method fair in part because it did not require class members to submit claims). In addition, the Proposed Settlement Class is opt-out, versus opt-in, placing less burden on Class Members to qualify for relief. (*See* Proposed Settlement ¶ 14.) And because the Administrator will process the applications (rather than an interested party), the proposed method of processing the applications is not only fair, but neutral. *See, e.g.*, *Jordan v. Michael Page Int'l*, No. SACV 18-1328 (DFMx), 2020 U.S. Dist. LEXIS 105537, at *19 (C.D. Cal. Feb. 24, 2020) (finding use of a settlement administrator provided an effective and not unduly demanding method of distributing relief).

c. The Proposed Settlement's award of attorneys' fees is fair.

As noted above, Great Northern's counsel requests a modest amount of attorneys' fees ($135,945), for work performed through February 14, 2021, plus an additional consented-to amount not to exceed $50,000 for further work on this matter. (Proposed Settlement ¶ 86.) Considering the amount of litigation undertaken by counsel, in comparison to the Settlement Class Fund, this award is fair and reasonable. *See e.g.*, *Ferrell*, 2020 U.S. Dist. LEXIS 9919, at *68 (summarizing standard attorneys' fees awards under Ninth Circuit precedent, but noting the court "need not resolve [attorneys' fees] at the preliminary approval stage, since the propriety of the fee request is an issue that can be determined at the Final Fairness Hearing." (citations omitted)).

d. The Parties will finalize the Settlement Agreement pending this Court's approval of the Proposal.

"The parties seeking approval must file a statement identifying any agreement made in connection with the proposal." Fed. R. Civ. P. 23(e)(3). Although Settling Parties will implement

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their agreement pending this Court's preliminary approval, the Settling Parties have resolved the matter on the terms set forth in the Settlement Agreement.

As each subfactor under Rule 23(e)(2)(C) supports a finding of adequacy, the proposed relief weighs in favor of preliminary approval of the Proposed Settlement.

4. The Proposed Settlement Treats Class Members Equitably.

In determining the equitable nature of a settlement, courts often consider whether the agreement "improperly grant[s] preferential treatment to class representatives or segments of the class." *Ferrell*, 2020 U.S. Dist. LEXIS 9919, at *69 (citing *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007)). Class representative enhancements should consider "the actions the plaintiffs took to protect the interests of the class, the degree to which the class has benefitted, the amount of time and effort the plaintiff expended in pursuing litigation, and any notoriety or personal difficulties encountered by the representative plaintiff." *Id.* (citing cases).

The Settlement Proposal provides Great Northern $45,000—$25,000 of which represents the pandemic-related expenses it claimed in its Fund application, and $20,000 of which is a service award if approved. (*See* ECF No. 21-1 at 23; Proposed Settlement ¶ 45.) This amount is proportional to Great Northern's efforts in this case, as it initiated this action and litigated two injunctions. (*See, e.g.*, ECF Nos. 12, 32, and 39). Great Northern, through its efforts, faced substantial publicity and potential retribution based on the nature of its claims. Accordingly, this last and final factor also weighs in favor of preliminary approval of the Proposed Settlement.

CONCLUSION

For the reasons set forth herein, the Settling Parties respectfully request that this Court approve the Proposed Settlement and direct the Settling Defendants and Great Northern to provide notice of the same.

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Dated: March 12, 2021

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