

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

RYAN JANCIK, on behalf of himself
and all others similarly situated,

Plaintiff,

v.

ORDER
Civil File No. 06-3104 (MJD/AJB)

CAVALRY PORTFOLIO SERVICES,
LLC,

Defendant.

Thomas J. Lyons, Jr. Consumer Justice Center, PA, Counsel for Plaintiff.

Scott R. Carlson and Russell S. Ponessa, Hinshaw & Culbertson LLP, Counsel for Defendant.

I. INTRODUCTION

This action is brought under Rules 23(a), 23(b)(2) and 23(b)(3) of the Federal Rules of Civil Procedure on behalf of Plaintiff Jancik and other members of a putative class of consumers who claim Defendant debt collection agency sent false, misleading and unfair settlement letters in violation of the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692 et seq. Plaintiff seeks statutory damages in the amount of \$1000, actual damages in the amount of \$300, declaratory relief, and reasonable attorneys fees.

This matter is currently before the Court on Plaintiff's Motion for Class Certification. [Doc. No. 7.] Oral argument was heard on March 6, 2007.

II. BACKGROUND

Plaintiff fell behind in his debt to Sprint Cellular Telephone Services and Sprint transferred the debt to Defendant for collection. On April 24, 2006, Plaintiff received a letter ("the letter") from Defendant. The letter contained the following language:

- I. 40% INSTANT DISCOUNT OFFER
YOU PAY ONLY
\$259.95
- II. 25% DISCOUNT OFFER
PAID IN 5 EASY INSTALLMENTS OF
\$64.99
- III. INSTALLMENTS AS LOW AS:
\$10 per month
for the first 6 months if you qualify

Please call our toll free number [XXX-XXX-XXXX] to discuss the details of these plans, as well as all available payment options.

(Compl. Ex. A) (emphasis in original). The bottom of the page contained a dotted line, meant to look like a perforation, and contained the words "please detach on perforation and return bottom portion with your payment." (Id.) (emphasis omitted). This bottom portion contained the following language: "60% INSTANT DISCOUNT PAYMENT COUPON" and stated that the balance due on Plaintiff's account was \$433.25, and that the 60% settlement amount was

\$259.95. (Id.) The bottom portion also contained the address to which payments could be remitted. (Id.)

According to Plaintiff, this offer was false and misleading in violation of 15 U.S.C. § 1692e because a 60% settlement amount would have actually been \$173.30. Sixty percent of \$433.25 is \$259.95. Forty percent off \$433.25 is also \$259.95. Plaintiff avers that the letter was so confusing that he spent \$300 worth of his time investigating and calculating the true settlement amount contained in the letter.

Plaintiff filed his class action complaint on July 26, 2006, and Defendant answered on September 11, 2006. (Doc. Nos. 1, 2.) Defendant made a Rule 68 offer for settlement to Plaintiff on October 9, 2006, and Plaintiff rejected the offer on October 13, 2006. (Jancik Suppl. Decl. ¶ 5.) The pretrial scheduling order was issued on October 18, 2006, and Plaintiff filed the instant motion for class certification on December 15, 2006. (Doc. Nos. 6, 7.)

III. DISCUSSION

A. Jurisdiction

Federal courts are only able to adjudicate “actual, ongoing cases or controversies.” Potter v. Norwest Mortgage, Inc., 329 F.3d 608, 611 (8th Cir. 2003) (citing Deakins v. Monaghan, 484 U.S. 193, 199 (1988)). “Article III requires parties to have a continuing ‘personal stake in the outcome’ of the

lawsuit.” Id. (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

At oral argument, Defendant argued for the first time that this Court lacks jurisdiction to certify a class in this case because Defendant made a \$1000 offer of judgment to Plaintiff under Fed. R. Civ. P. 68. Rule 68 does not address mootness, but many courts find that a Rule 68 settlement offer that satisfies a plaintiff’s entire claim for relief “eliminates the controversy between the parties and leaves nothing for the court to resolve, effectively mooting the action and removing jurisdiction.” Jones v. CBE Group, Inc., 215 F.R.D. 558, 562 (D. Minn. 2003). Under the FDCPA, individual plaintiffs may seek actual damages, statutory damages of up to \$1000, and costs and fees. 15 U.S.C. § 1692k(a). In class actions, named plaintiffs may seek the same relief as individuals. Id. Unnamed class members may “share in an award not to exceed the lesser of \$500,000 or one percent of the defendant’s net worth.” 15 U.S.C. § 1692k(a)(2)(B)(ii).

The courts are split on the issue of whether a class action case or controversy continues to exist in a FDCPA case when a defendant makes a Rule 68 offer of judgment to a class representative prior to class certification. See Jones, 215 F.R.D. at 563-64 (gathering cases). In Jones, the plaintiff filed a class action complaint alleging that the defendant’s collection letters violated the FDCPA. Id. at 561. Two days after filing its answer in the case, the defendant served the plaintiff with an offer of judgment of \$1000 plus reasonable costs and attorneys

fees. Id. at 562. One month later, the defendant filed a motion to dismiss arguing, inter alia, that the case was moot as a result of its Rule 68 offer of judgment. Id. Approximately six weeks later, the plaintiff moved to certify the class. Id. After noting the split on this issue, the court held that since the Rule 68 offer satisfied all the plaintiff's claims,¹ and since a class had not yet been certified, the plaintiff's claim was moot and the court granted the defendant's motion to dismiss. Id. at 565. The court relied, in part, on the Eighth Circuit's reasoning in Potter v. Norwest Mortgage, Inc., 329 F.3d 608 (8th Cir. 2003). The Potter court held that a district court "should normally dismiss an action as moot when the named plaintiff settles its individual claim, and the district court has not certified the class." Id. at 611.

The Court does not find the reasoning of the Jones court persuasive. First, Potter, upon which Jones relied, can be distinguished from this case because in Potter the plaintiff entered into a voluntary settlement with the defendant after the district court denied class certification. Id. at 610. In fact, the Potter court distinguished the situation in that case from other precedent cases because the precedent cases under discussion involved situations in which the plaintiffs' claims became moot involuntarily. Id. at 612 (noting that in one case, the plaintiff's case

¹The Court had already decided that the plaintiff did not fit under an exception to the mootness doctrine because he was not entitled to declaratory relief and because he would not be subjected to repeated harms without a remedy.

became moot because he was released from prison and in the other case, the plaintiff's case became moot because the court entered judgment in plaintiff's favor his objections). In this case, Plaintiff has rejected Defendant's settlement offer, the Court has not entered judgment on Plaintiff's claims, and the Court has not denied the motion for class certification.

Second, the plaintiff in Jones filed a motion for class certification six weeks after the defendant moved to dismiss the case based on its Rule 68 offer. In this case, Defendant never filed a motion to dismiss and, indeed, did not even raise the jurisdictional question until oral argument on Plaintiff's motion for class certification. Thus, Plaintiff was more diligent in pursuing class certification than the plaintiff in Jones.

Moreover, although there is no Eighth Circuit precedent directly on point, the Eighth Circuit has reasoned that allowing class action defendants to "pick off" plaintiffs with settlement offers prior to obtaining an affirmative ruling on class certification "obviously would frustrate the objectives of class actions' and 'would invite waste of judicial resources.'" Potter, 329 F.3d at 612 (quoting Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980)) (affirming trial court decision to deny motion for class certification in FDCPA case because, inter alia, plaintiff voluntarily entered into settlement agreement with defendant prior to class certification). Furthermore, allowing a defendant to buy its way out of class

litigation merely by making a Rule 68 offer prior to a plaintiff's filing a motion for class certification would set a bad precedent that would, as one court stated,

encourage a "race to pay off" named plaintiffs very early in the litigation, before they file motions for class certification. A different situation could be presented if class certification had been considered and denied, but that is not the case here. Class certification has not been denied, and defendant will not be permitted to force an end to the putative class action.

Liles v. American Corrective Counseling Serv., Inc., 201 F.R.D. 452, 455 (S.D. Iowa 2001) (footnote omitted). See also Roper v. Conserve, Inc., 578 F.2d 1106, 1110 (5th Cir. 1978) ("The notion that a defendant may short-circuit a class action by paying off the class representatives either with their acquiescence or, as here, against their will, deserves short shrift. Indeed, were it so easy to end class actions, few would survive."); Schaake v. Risk Mgmt. Alternatives, Inc., 203 F.R.D. 108, 112 (S.D.N.Y. 2001) ("Taken to its absurd logical conclusion, the policy urged by defendant would clearly hamper the sound administration of justice, by forcing a plaintiff to make a class certification motion before the record for such motion is complete – indeed before an Answer is filed – would result in sweeping changes to accepted norms of civil litigation in the Federal Courts."); Asch v. Teller, Levit, & Silvertrust, P.C., 200 F.R.D. 399, 401 (N.D. Ill. 2000) (holding that plaintiff in FDCPA case could file motion for class certification during pendency of Rule 68 settlement offer to avoid the offer, and reasoning that allowing this practice served Rule 68's purpose as a "means of facilitating and encouraging

settlements, rather than a clever device for gaining an advantage by racing to the courthouse”).

In addition, the Eighth Circuit recognizes that settlement offers do not automatically entitle defendants to judgment.

Judgment should be entered against a putative class representative on a defendant’s offer of payment only where class certification has been properly denied and the offer satisfies the representative’s entire demand for injuries and costs of the suit. This rule protects a class representative’s responsibilities to the putative class members from being terminated by a defendant’s attempts to pay off the representative’s claims. Acceptance of a tendered offer “need not be mandated,” as then Justice Rehnquist explained, “since the defendant has not offered all that has been requested in the complaint (i.e., relief for the class).”

Alpern v. UtiliCorp United, Inc., 84 F.3d 1525, 1539 (8th Cir. 1996) (rejecting argument, made in securities class action, that offer of payment was proper basis upon which to deny relief based on Fed. R. Civ. P. 60(a)) (citations omitted) (emphasis added).

The Court finds that in spite of Defendant’s offer, a live case or controversy exists in this case. First, Plaintiff properly rejected Defendant’s settlement offer in a timely fashion, and the offer is therefore deemed withdrawn. See Fed. R. Civ. P. 68. Second, Plaintiff seeks relief on behalf of the class – relief Defendant clearly has not offered. See Alpern, 84 F.3d at 1539 (reasoning that judgment should be entered against a putative class representative only where class certification has been properly denied and the defendant’s offer satisfies the representative’s entire

demand for injuries and costs of the suit). “By the very act of filing a class action, [Plaintiff] assume[d] responsibilities to members of the class. . . . [and] even had [all Plaintiff’s claims] been satisfied with the offer of judgment, . . . the individual plaintiff[] . . . [maintains] a stake in procuring class-wide relief.” Roper, 578 F.2d at 1110-1111.

More importantly, this is not a situation in which Plaintiff dragged his feet on bringing a proper motion for class certification. Plaintiff did so in a timely manner after the pretrial scheduling order was issued. As discussed above, allowing defendants to avoid liability merely by winning the race to the courthouse and by proffering settlement offers that have the effect of denying all putative plaintiffs’ claims even before scheduling orders are issued and plaintiffs have the applicable motion deadlines in front of them, would be bad policy and would effectively eviscerate the effectiveness of class actions in cases such as this one. It would also create an absurd situation in which plaintiffs’ attorneys would need an endless supply of willing class representatives to file complaints identical to the class action complaints that would be dismissed as defendants buy off named representatives one by one. See Schaaake, 203 F.R.D. at 110-11 (noting that if defendants are allowed to “hamstring” litigation by “buying off” plaintiffs, plaintiffs’ attorneys will be forced to “scrounge[] for a class representative to keep

their suits alive). Defendant's argument is rejected. The Court has jurisdiction to decide the motion for class certification.

B. Class Certification

“The class action serves to conserve the resources of the court and the parties by permitting an issue that may affect every class member to be litigated in an economical fashion.” In re Baycol Prod. Liab. Litig., 218 F.R.D. 197, 203 (D. Minn. 2003) (citing Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 471 (5th Cir. 1986))(quotation omitted). Whether an action should be certified as a class action is governed by Rule 23 of the Federal Rules of Civil Procedure. A district court should not certify a class until it has been determined that all the prerequisites of Rule 23(a) are satisfied. General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 161 (1982). If these prerequisites are met, the Court must then determine if the putative class is maintainable under Rule 23(b)(1), (2) or (3). District courts ultimately retain broad discretion in determining whether or not to certify a class. Gilbert v. City of Little Rock, 722 F.2d 1390, 1399 (8th Cir. 1983). Plaintiff bears the burden of proof regarding the Rule 23 requirements. In re Worker's Compensation, 130 F.R.D. 99, 103 (D. Minn. 1990).

Plaintiff seeks to certify the class pursuant to subdivision (b)(2), (b)(3), or both. Specifically, Plaintiff seeks certification of a class defined as follows:

All consumers, as that term is defined by 15 U.S.C. § 1692a(3), with an address in the state of Minnesota to whom letters in the form of

Complaint Exhibit A were sent in an attempt to collect a debt incurred for personal, family, or household purposes which were not returned undelivered by the U.S. Post Office during the one year period prior to the filing of the complaint in this action.

(Pl. Mem. Supp. Mot. Class Cert. at 1.)

1. Rule 23(a) Requirements

Certain prerequisites must be met to certify a class action.

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

a. Numerosity

A class should be certified only if the “class is so numerous that joinder of all members is impracticable.” *Id.* The putative class includes 9697 people who received the letter from Defendant. The Parties have stipulated that the numerosity requirement is satisfied in this case.

b. Commonality

The next prerequisite focuses on questions of law and fact common to the class. Fed. R. Civ. P. 23(a)(2). It is not necessary that all questions of law and fact are common to the class, rather the commonality requirement may be met where, for example, “the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated.” *Paxton v. Union Nat’l Bank*, 688 F.2d 552, 561 (8th Cir. 1982) (quotation omitted). In most cases, the commonality requirement is easily

satisfied because it “requires only that the course of conduct giving rise to a cause of action affects all class members, and that at least one of the elements of that cause of action is shared by all class members.” Egge v. Healthspan Servs. Co., 208 F.R.D. 265, 268 (D. Minn. 2002) (quoting Lockwood Motors, Inc. v. General Motors Corp., 162 F.R.D. 569, 575 (D. Minn. 1995)). In addition, the fact that each class member may be entitled to different damages, some actual and some statutory, is not a bar to class certification. Id.

Defendant argues that Plaintiff’s claims are not common to the claims of the class insofar as Plaintiff did not even call Defendant for clarification of the letter’s meaning, and also because Plaintiff spent \$300 of his time investigating and calculating the “true settlement amount” in the letter. Thus, according to Defendant, Plaintiff’s injuries are unique and destroy commonality in this case.

Plaintiff’s claims are common to the claims of the class. First, the letter is a “course of conduct giving rise to a cause of action that affects all class members.” Sonmore v. Checkrite Recovery Servs., Inc., 206 F.R.D. 257, 262 (D. Minn. 2001) (finding that “[n]umerous courts have held that a claim that language in a form letter violates a statute presents common issues of law and fact so as to satisfy Rule 23(a)(2)”) (quotation omitted). Second, Plaintiff’s injuries are not necessarily unique. There is no evidence as to the confusion suffered by other class members. Plaintiff’s confusion stemmed from the language in the letter that

all putative class members received. In fact, this is the basis of the entire suit.

Third, as discussed above, the fact that Plaintiff seeks actual damages for the time he spent investigating and calculating does not destroy commonality. Thus, the commonality requirement is satisfied.

c. Typicality

The next prerequisite provides that the claims or defenses of the representative party are typical of the claims or defenses of the class. Fed. R. Civ. P. 23(a)(3). “It is intended to assure the claims of the class representatives are similar enough to those of the class, so that the representatives will adequately represent the class.” Baycol, 218 F.R.D. at 205 (citation omitted). The typicality requirement is generally met “if the claims or defenses of the representatives and the members of the class stem from a single event or are based on the same legal or remedial theory.” Paxton, 688 F.2d at 261-62 (citation omitted). This burden is “fairly easily met so long as other class members have claims similar to the named plaintiff.” Alpern, 84 F.3d at 1540 (quotation omitted).

While a court may not decide the merits of a case at this stage of the litigation, “[t]he preliminary inquiry at the class certification stage may require the court to resolve disputes going to the factual setting of the case, and such disputes may overlap the merits of the case.” Munoz v. Pipestone Fin., LLC, No. 04-CV-4142, 2006 WL 2786911, at *5 (D. Minn. Sept. 26, 2006) (unpublished opinion)

(citing Blades v. Monsanto Co., 400 F.3d 562, 566-67 (8th Cir. 2005)).

“Nonetheless, such disputes may be resolved only insofar as resolution is necessary to determine the nature of the evidence that would be sufficient, if the plaintiff’s general allegations were true, to make out a prima facie case for the class.” Id. (quoting Blades, 400 F.3d at 566-67). See also Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 177 (1974) (holding that courts may not conduct preliminary inquiries into the merits of a case in order to decide if it should be certified as a class action).

Defendant argues that Plaintiff’s claims are not typical of the class claims because there is no evidence that anyone other than Plaintiff found the letter confusing, or that any other Plaintiff spent \$300 of his time investigating and calculating the letter. Defendant proffers that the letter is clear that the 40% discount offer is the same offer as the 60% discount coupon. In order to take advantage of the 40% discount, recipients had to mail in the coupon agreeing to pay 60% of their balances. For support, Defendant cites, inter alia, Durkin v. Equifax Check Servs., Inc., 406 F.3d 410, 415 (7th Cir. 2005) which held that when a letter “does not plainly reveal that it would be confusing to a significant portion of the population, the plaintiff must come forward with evidence beyond the letter and beyond his own self-serving assertions that the letter is confusing in order to create a genuine issue of material fact at trial.”

The typicality requirement is met in this case because all class members received the same letter and all were potentially misled by the letter. See Alpern, 84 F.3d at 1540 (finding typicality requirement satisfied when “[t]he same set of events . . . underlie the claims of the other putative class members”). All Plaintiffs’ damages are based on the same legal and remedial theories.

Although Defendant seems to be arguing that the case is without merit, the Court cannot decide whether the letter was confusing to other class members at this stage of the litigation. To that end, Durkin and the other case cited by Defendant are distinguished because those cases addressed motions for summary judgment or motions for judgment on the pleadings, not motions for class certification. See Durkin, 406 F.3d at 413-14 (summary judgment motion after class was certified); Taylor v. Cavalry Inv., L.L.C., 365 F.3d 572, 575 (7th Cir. 2004) (one motion for summary judgment and one motion for judgment on the pleadings in consolidated cases). Thus, the typicality requirement is satisfied.

d. Adequacy

Finally, the Court must determine whether the named representative and his counsel will adequately represent the interests of the class members. Fed. R. Civ. P. 23(a)(4). In making this determination, the Court must ascertain whether the named representative’s interests are “sufficiently similar to those of the class to the extent that it is unlikely that their goals and viewpoints will diverge.” Baycol,

218 F.R.D. at 206 (citation omitted). Specifically, the Court must determine if “the class representatives have common interests with the members of the class, and [] whether the class representative will vigorously prosecute the interests of the class through qualified counsel.” Paxton, 688 F.2d at 562-63. A representative has a common interest with class members when the representative has an economic stake in the outcome – even if that stake is based solely on the recovery of statutory damages – as long as the injuries arose out of the same conduct. See Egge, 208 F.R.D. at 269-70.

Defendant argues that Plaintiff cannot adequately represent the class because he has asserted an individual claim, as well as class claims. Plaintiff responds that his claims are not antagonistic to the claims of the class, especially in light of the fact that he is willing to forgo his individual claim in order to be the class representative and because he, like all class members, stands to recover damages if he prevails in this action.

Plaintiff can adequately represent the class. He has a common interest with members of the class and stands to recover damages along with the rest of the class members. Moreover Plaintiff’s individual claims are not antagonistic to the claims of the class.

Defendant does not dispute that Plaintiff’s counsel can adequately represent the class, and the Court finds that Counsel can do so. Therefore, Plaintiff has

satisfied the Rule 23(a) requirements. In addition, Plaintiff must satisfy one of the following Rule 23(b) requirements to maintain a class action.

2. Rule 23(b)(2) Requirements

Rule 23(b)(2) provides for class certification of an action seeking declaratory or injunctive relief where “the party opposing the class has acted or refused to act on grounds generally applicable to the class.” Plaintiff seeks declaratory relief. The Eighth Circuit has not decided if declaratory relief is available under the FDCPA, and there is a split in the circuits on this issue.

The FDCPA provides that individuals who sue under the Act are allowed the following damages:

- (1) any actual damage sustained by such person as a result of such failure;
- (2)(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding \$1,000; or
(B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of \$500,000 or 1 per centum of the net worth of the debt collector; and
- (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

15 U.S.C. § 1692k(a).

Declaratory relief is not available under the FDCPA because declaratory relief is equitable in nature, and equitable relief is not available under the FDCPA.

Jones v. CBE Group, Inc., 215 F.R.D. 558, 563, 569 (D. Minn. 2003) (citing Novak v. Andersen Corp., 962 F.2d 757, 760 (8th Cir. 1992)) (“Courts have uniformly held that injunctive relief is not available in private actions under the FDCPA.”); Bishop v. Global Payments Check Recovery Servs., Inc., No. 03-CV-1018, 2003 WL 21497513, at *4 (D. Minn. June 25, 2003) (unpublished opinion) (“The FDCPA does not provide for equitable relief, and a declaratory judgment is undisputedly equitable relief.”). See also Sibley v. Fulton DeKalb Collection Serv., 677 F.2d 830, 834 (11th Cir. 1982) (same).

The Court cannot expand the relief available to Plaintiff to include relief unavailable under the statute. Declaratory relief is equitable relief. The statute does not provide for relief other than damages. Thus, the requirements of 23(b)(2) are not satisfied, and this part of Plaintiff’s motion is denied.

3. Rule 23(b)(3) Requirements

To certify a class under Rule 23(b)(3), the requisites of 23(a) must be satisfied and the Court must find the following:

[Q]uestions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of

the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b). “Rule 23(b)(3) class actions are intended to achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about undesirable results.” Sonmore, 206 F.R.D. at 264 (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615 (1997)) (ellipses in original).

a. Predominance

Under Rule 23(b)(3), proposed classes must be “sufficiently cohesive to warrant adjudication by representation.” Amchem Prods., 521 U.S. at 623. Class questions predominate if there is generalized evidence that will prove or disprove an element of the claim on a “simultaneous, class-wide basis.” In re Potash Antitrust Litig., 159 F.R.D. 682, 693 (D. Minn. 1995).

Common issues predominate this case. All putative plaintiffs received the same letter, and all will be seeking similar damages.

b. Superiority

A class action is a superior form of litigation to address “the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.” Amchem Prods., 521 U.S. at 617. It is at this stage that the court examines the four factors listed in the rule. However, in this case, the Parties focus all their arguments only on the first factor.

The first factor focuses on whether individual claims are so small that “aggrieved persons may be without any effective redress unless they may employ the class-action device.” Deposit Guaranty Nat’l Bank v. Roper, 445 U.S. 326, 336, 339 (1980). The Court must also consider whether pursuing a class action would limit individual recovery. Sonmore, 206 F.R.D. at 265.

The FDCPA provides that in the case of a class action the total recovery shall “not exceed the lesser of \$500,000 or 1 per centum of net worth of the debt collector.” 15 U.S.C. § 1692k(a)(2)(B).

The maximum potential award of statutory damages is “clearly relevant” when considering certification of a Rule 23(b)(3)(A) class. Bryant v. Bonded Acct. Serv./Check Recovery, Inc., 208 F.R.D. 251, 261 (D. Minn. 2000). Defendant states that its net worth is \$6,731,541. (Carlson Aff. Ex. B.) One percent of this figure is \$67,315.41. There are 9697 putative class members. Thus, the maximum damages award any class member could receive is \$6.94.

Defendant argues that under this statute, any recovery in this case would be de minimus, and class certification should be denied on this basis. For support, Defendant cites cases, including District of Minnesota cases, in which the courts found that the potential for de minimus recovery rendered class certification improper. (Def. Mem. Opp. Mot. Class Cert. at 11-12 (citing, inter alia, Jones, 215 F.R.D. at 570 (potential de minimus individual recovery); Bryant, 208 F.R.D. at

261 (potential \$100 individual recovery); Sonmore, 206 F.R.D. at 260-61 (potential \$25 individual recovery)). The Eighth Circuit has not decided if de minimus recovery makes class certification improper.

In addition, Defendant asserts that the administrative fees for mailing out notices and damage award checks, should Plaintiffs be successful, would be between \$16,911.76 and \$28,130.47. (Carlson Aff. Ex. C.) Defendant queries whether Plaintiff would actually properly administer a class of this size when he only stands to gain \$6.94. According to Defendant, the only winner in this situation would be Plaintiffs' counsel who is entitled to attorneys fees, class administrative fees, and costs even though his clients would receive only de minimus recovery.

In Sonmore, putative class members would have received a maximum of \$25 in damages, had they prevailed in a class action suit. 206 F.R.D. at 265. The court found this amount "shockingly low" compared to the \$1000 statutory damages that each individual could collect by pursuing individual lawsuits, and therefore found that a class action was not the superior mechanism for adjudicating plaintiffs' claims. Id. (citation omitted). Similarly, in Jones, the court found that one of the main reasons justifying class certification – that small claims are not worth pursuing individually – was not valid in FDCPA actions

because statutory damages of \$1000 plus costs and attorneys fees provide incentive for individuals and counsel to pursue such claims. 215 F.R.D. at 570 (denying motion for class certification, in part, because class members' damages would be de minimus).

However, other courts have found that the potential for de minimus recovery is not a bar to class certification. For example, in Nichols v. Northland Groups, Inc., No. 05 C 2701, 05 C 5523, 06 C 43, slip op., 2006 WL 897867, at *11 (N.D. Ill. March 31, 2006), the court certified a class with potential recovery of \$13.40 per class member. The court in Levin v. Kluever & Platt, LLC also concluded that de minimus recovery was not a bar to class certification, and noted that class certification would allow class members to avoid the hassle and cost of individual actions. No. 03 C 2160, 2003 WL 22757764, at *3 (N.D. Ill. Nov. 19, 2003) (unpublished opinion). Both Nichols and Levin relied on mandatory Seventh Circuit authority, Mace v. Van Ru Credit Union Corp., 109 F.3d 338, 344 (7th Cir. 1995), which held that de minimus recovery is not an automatic bar to class certification.

One court certified a FDCPA class when each member stood to receive less than two dollars in damages, reasoning that although individuals could get \$1000 in statutory damages, the court had to consider the possibility that individuals did not know their rights, would not be able to find counsel willing to take their cases,

and would not be willing to take on the burdens of litigation. See Weber v. Goodman, 9 F. Supp. 2d 163, 170 (E.D.N.Y. 1998). The Weber court opined that it made no sense that class certification should be denied merely because the defendants allegedly perpetrated their fraud on so many people that the damages per individual were thus diminished, when class certification would be allowed if the number of victims was smaller. Id. at 171.

The Court finds the reasoning of the Weber court compelling because the truth is that the putative plaintiffs in this case are not likely to know their rights and are therefore not likely to pursue these claims on their own. Id. at 170. See also Egge, 208 F.R.D. at 271-72. In fact, no other plaintiff has filed an action against Defendant based on the letter. Moreover, individual plaintiffs will have the option to opt out of the class action and pursue statutory damages on their own if they so choose. Fed. R. Civ. P. 23(c)(2)(B).

If it is ultimately determined that Defendant violated the FDCPA, Defendant should not be allowed to avoid paying damages simply because each individual plaintiff will receive only a small recovery. Doing so would create an illogical situation in which a defendant that harmed many people could avoid class liability while a defendant that harmed fewer people could not avoid liability. The Court declines to create a dynamic in which such obvious disparities are allowed to operate. See Weber, 9 F. Supp. 2d at 170. Moreover, at this stage of the

litigation, Plaintiff is still unsure about Defendant's value. Plaintiff needs more time to examine Defendant's documents. It is not inconceivable that Defendant may be worth more than \$6,7312,541, and Plaintiffs' collective potential recovery will be more than \$6.94 per Plaintiff.

Accordingly, the Court finds the requirements of Rule 23(a) and Rule 23(b)(3) satisfied, and Plaintiff's proposed class is certified under Federal Rule of Civil Procedure 23(b).

Based upon the files, records, and proceedings herein, **IT IS HEREBY ORDERED:**

1. Plaintiffs' Motion for Class Certification. [Doc. No. 7] is **GRANTED IN PART and DENIED IN PART** as set forth in the body of this Order;
2. The motion is **GRANTED** as to Class Certification under Fed. R. Civ. P. 23(b)(3); and
3. The motion is **DENIED** as to Class Certification under Fed. R. Civ. P. 23(b)(2).

Dated: July 3, 2007

s/Michael J. Davis
Michael J. Davis
United States District Court