The Honorable Michael Scott
Noted for Consideration: March 4, 2024 at 8:30 a.m.
With Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

COLUMBIA DEBT RECOVERY, LLC, a Washington limited liability company, Plaintiff/Counterclaim-Defendant, v. JORDAN PIERCE, an individual and DONTE GARDINER, an individual, Defendants/ Counterclaimants/ Third-Party Plaintiffs, and GUSTAVO CORTEZ, TOWANA PELTIER and DARIUS MOSELY, Third-Party Plaintiffs, v. COLUMBIA DEBT RECOVERY, LLC, a Washington limited liability company, Third-Party Defendant. and JORDAN PIERCE, DONTE GARDINER, THOMAS G. HELLER, MARY ASHLEY ANCHETA, RORY WALTON, BETHANY HANSON, MEGAN SHANHOLTZER, CRYSTAL PAWLOWSKI, and TALIA LUCKEN,	Case No.: 20-2-16403-8 SEA COLUMBIA DEBT RECOVERY'S OPPOSITION TO DEFENDANTS' AND THIRD-PARTY PLAINTIFFS' MOTION FOR ATTORNEY FEES

Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

Third-Party Plaintiffs

v.

THRIVE COMMUNITIES MANAGEMENT, LLC, a Washington limited liability company, THRIVE COMMUNITIES, INC., a Washington corporation, BELKORP HOLDINGS, INC., a Washington corporation d/b/a THE EDEN,

Third-Party Counterclaim Defendants.

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LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

I. INTRODUCTION AND RELIEF REQUESTED

This action began more than three years ago as a small District Court collection case brought by Columbia Debt Recovery ("CDR") against Jordan Pierce and Donte Gardiner ("Defendants") for amounts owing under a residential lease. Defendants defaulted, retained counsel, vacated the default (claiming excusable neglect), and eventually counterclaimed. After a modest amount of discovery, Defendants lost a motion for class certification. The Court of Appeals denied Defendants' motion for discretionary review of that denial. Over the course of three years of sporadic litigation, Defendants effectively accomplished nothing. As part of the settlement of this action, they are dismissing their claims against CDR with prejudice and, unsurprisingly, do not request service awards.

In response to a motion by CDR in early 2023 seeking to strike Defendants' continuing class allegations from the case based in part on the demonstrable inadequacy of Defendants as class representatives, Gustavo Cortez, Towana Peltier and Darius Mosely (the "Class Representatives") joined the action as Third-Party Plaintiffs on May 22, 2023, asserting new claims against CDR. The Class Representatives settled their claims against CDR four months later, with minimal discovery, no depositions, and no substantive motion practice of any kind. The benefit to the entire settlement class—of which ***Defendants are not members***—is $87,000.

In the Settlement Agreement and Release of Claims (the "SA"), "Class Counsel" reserved the right to seek fees, and CDR reserved the right to oppose such a request. Defendants and the Class Representatives (collectively "Movants")—or perhaps more accurately, their counsel—now move the Court for an award of ***more than $300,000*** in fees and costs. CDR opposes the motion, and requests that it be denied for the following reasons:

- ***First,*** Defendants are not "prevailing parties" in this action. Counsel's work for Defendants is not compensable, and the fees and costs, if any, that are awarded are limited to those that accrued after the joinder of the Class Representatives last May.

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920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

- ***Second,*** the Movants have utterly failed to meet their burden of demonstrating with specificity the fees and costs to which they are allegedly entitled, and have instead indiscriminately dumped essentially ***all*** of their lawyers' combined work into a single, unwarranted fee request without segregating the fees as required by Washington law.
- ***Third,*** even if the Class Representatives are entitled to some fees for securing a modest class settlement, the requested fees are unreasonable. The time identified by Movants was excessive, duplicative, and devoted to a long list of unsuccessful efforts.

The fees and costs recoverable by Movants, if any, are those that were incurred after the Class Representatives were joined, a sum that should not exceed $33,497.[1] For the reasons stated below, CDR objects strenuously to any award above this amount.

II. STATEMENT OF RELEVANT FACTS

A. Background.

Much of the history of the claims asserted under this cause number is recited in the Settlement Agreement.

This action was originally filed by CDR on September 13, 2019 in District Court as a simple collection action to recover the amounts owed by Defendants, who had defaulted on a residential lease. SA, ¶ 2.01. A default judgment was entered against Defendants. Defendants vacated the default judgment, arguing excusable neglect. In the main, Defendants' defense to CDR's claim was that they were not obligated to pay anything under their lease, claiming they had some sort of agreement with the property manager to live in their apartment for free.

Defendants eventually asserted counterclaims against CDR, and amended their counterclaims two times before seeking class certification, a motion which was denied by order

[1] Per paragraph 3.03.2 of the Settlement Agreement, CDR has no objection to service awards of $1,000 to each of the Class Representatives.

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Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

dated March 11, 2022. Defendants petitioned for discretionary review of the Court's rulings on class certification, a petition that was similarly denied. SA, ¶ 2.09.

On March 29, 2023, CDR filed its Motion to Deny Class Certification of Counterclaims against CDR and Strike Class Allegations in Defendants' Fourth Amended Counterclaims. Dkt No. 223. ("CDR's Motion to Strike"). Defendants correctly state that CDR argued, in part, that Pierce and Gardiner's "injuries were atypical because they did not make payments . . . to CDR." *See* Dkt. No. 363, p. 4.

CDR's Motion to Strike was noted for argument April 27, 2023.

On or about April 6, 2023, argument on CDR's Motion to Strike was continued to May 19, 2023.

On April 21, 2023, Defendants frantically sought leave to file Fifth Amended Counterclaims that would add new class representatives to the action, alleging that (unlike Defendants) the new class representatives had made payments to CDR. Dkt. No. 235. The motion to amend was noted for May 4, 2023, a date shortly before Defendants' response to CDR's Motion to Strike was due.

On April 27, 2023, CDR's Motion to Strike was again re-noted to June 9, 2023, due to an unexpected health issue of Defendants' counsel.

Over CDR's objection, on May 22, 2023, the Class Representatives joined as parties against CDR in the Fifth Amended Counterclaims. SA, ¶ 2.16.

On June 9, 2023, the Court held a hearing on CDR's Motion to Strike, and on similar motions by the other Third-Party Defendants, Thrive and Belkorp.

On June 20, 2023, the Court denied CDR's Motion to Strike. Dkt. No. 288.

On July 14, 2023—less than a month after argument on CDR's Motion to Strike—the Court ordered a stipulated stay on discovery so the parties could negotiate a settlement. Dkt. Nos. 296 and 299.

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Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

On or about September 25, 2023, the parties entered into the Settlement Agreement. In relevant part:

- CDR and Defendants released their claims against one another, with prejudice. SA, ¶ 6.03.
- CDR settled with the Class Representatives, and agreed to pay a total of $87,000 to class members who paid some sort of interest to CDR. *Id.*, ¶ 1.06. Defendants are neither class representatives, nor members of the class.
- The parties agreed that Class Counsel could apply for fees, and that CDR could oppose any such request. *Id.*, ¶ 3.03.

III. STATEMENT OF ISSUES

Do Movants bear the burden of proving the reasonableness of the requested fees?

Can counsel claim fees and costs incurred in representing persons who are not prevailing parties?

Are Movants required to segregate the time spent on the claim that allegedly gives rise to a fee award?

Are the fees requested by Movants reasonable?

IV. EVIDENCE RELIED UPON

The Pleadings on file, and the Declarations of Benjamin Stone and Jeffrey Hasson.

V. AUTHORITY

A. Washington Law on Fees

"The general rule in Washington, commonly referred to as the 'American rule,' is that each party in a civil action will pay its own attorney fees and costs. [T]rial courts may award attorney fees when authorized 'by contract, statute, or a recognized ground in equity.'" *Berryman v. Metcalf*, 177 Wn. App. 644, 312 P.3d 745 (2013). Here, Movants assert a right to fees exclusively under the Consumer Protection Act, a statute which provides that a successful claimant may recover "a reasonable attorney's fee." RCW 19.86.090. Mtn at 5.

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206.622.3150 main · 206.757.7700 fax

In general, "a prevailing party is one who receives an affirmative judgment in his or her favor." *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997). "If neither wholly prevails, then the determination of who is a prevailing party depends upon who is the substantially prevailing party, and this question depends upon the extent of the relief afforded the parties." *Id.* A dismissal with prejudice constitutes a final judgment on the merits. *Elliott Bay Adjustment Co. v. Dacumos*, 200 Wn. App. 208, 213, 401 P.3d 473 (2017) (citing various cases).

A party seeking fees bears the burden of proving the fees requested are reasonable. *Hamblin v. Castillo Garcia*, 23 Wn. App. 2d 814, 840, 517 P.3d 1080, 1095 (2022), *rev. denied sub nom. Hamblin v. Nat'l Gen. Ins. Co.*, 200 Wn. 2d 1029, 523 P.3d 1178 (2023) (citing *Berryman*, 177 Wn. App at 657). Where, as here, a party claims fees for a specific cause of action, the party ***must segregate the time devoted to work on that claim***. *Manna Funding, LLC v. Kittitas Cnty.*, 173 Wn. App. 879, 901, 295 P.3d 1197, 1209 (2013) ("'If attorney fees are recoverable for only some of a party's claims, the award must properly reflect a segregation of the time spent on issues for which fees are authorized from time spent on other issues.' . . . The party claiming an award of attorney fees has the burden of segregating its lawyer's time.") (citations omitted). It is not incumbent upon the court or the opposing party to attempt to segregate fees; the movant's failure to segregate fees as required by law may result in denial of a fee application. *Loeffelholz v. Citizens for Leaders with Ethics Accountability Now (C.L.E.A.N.)*, 119 Wn. App. 665, 690-91, 82 P.3d 1199 (2004).

Attorney time that is properly segregated to the claim on which a movant prevailed is evaluated using the "lodestar" method, which multiplies the "total number of hours reasonably expended . . . by the reasonable hourly rate of compensation." *Bowers v. Transamerica Title Ins. Co.*, 100 Wash. 2d 581, 597, 675 P.2d 193 (1983). "To this end, the attorneys must provide reasonable documentation of the work performed. … The court must limit the lodestar to hours reasonably expended, ***and should therefore discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time.***" *Id.* (emphasis added). While not

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920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

dispositive, "the proportionality of the fee award to the amount at stake remains a vital consideration." *Berryman*, 177 Wn. App. at 660; *ADA Motors, Inc. v. Butler*, 7 Wn. App. 2d 53, 68, 432 P.3d 445, 453 (2018) ("a key consideration is the proportionality of the award of fees to the amount in controversy").

Based on the evidentiary record presented, the Court must ultimately make findings and conclusions to support its ruling on fees:

> For any attorney fees award, the trial court must articulate the grounds for the award, making a record sufficient to permit meaningful review. . . . This generally means that the trial court "must supply findings of fact and conclusions of law sufficient to permit a reviewing court to determine why the trial court awarded the amount in question." If the trial court does not make findings of fact and conclusions of law supporting the attorney fees award, the preferred remedy is to remand to the trial court for entry of proper findings and conclusions.

White v. Clark Cnty., 188 Wn. App. 622, 639, 354 P.3d 38, 45–46 (2015) (citations omitted).

In this case, Movants and their counsel have utterly failed to meet their burdens, have requested a grossly excessive award that bears no relation to what actually happened in the litigation, and their request is properly denied.

B. Defendants are Not Prevailing Parties, and Are Not Entitled to Fees or Costs

Defendants are not "prevailing parties," and certainly not on the Consumer Protection Act claim that ostensibly supplies the basis for Movants' fee request. As part of the settlement, Defendants agreed to dismiss any and all claims they might have against CDR, with prejudice. After failing to certify a class (and failing to convince a Commissioner that Judge McCoy's denial of certification was improper), Defendants ultimately abandoned their class claims, because they could not prove the right to any damages. As part of the settlement, judgment is being entered ***against*** Defendants on the CPA claim that consumed most of the litigation prior to May 2023 in the form of a dismissal with prejudice.

Defendants never paid any disputed sums, never suffered any injury to their "business or property," and are not even part of the settlement class. Defendants are not prevailing parties in

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Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

any sense of the word, and counsel are not entitled to any fees for work on Defendants' quixotic CPA claims. Counsel wrongly requests payment for 569.6 hours of work resulting in fees totaling $266,503.00 for work performed for Defendants before May 22, 2023. These fees are not recoverable as part of the Class Representatives' settlement, and must be deducted from the fee request. Hasson Dec., ¶ 4 & Ex. C.

C. Movants Fail to Segregate Fees as Required by Washington Law

To the extent the Court considers awarding fees or costs incurred prior to the joinder of the Class Representatives in May of 2023, Movants' fee request is properly denied for want of segregation. While counsel represent that they have excluded time devoted to claims asserted against other parties, Movants have not identified and segregated the fees related to the Class Representatives' CPA claims, nor have they excluded the fees associated with their "unsuccessful [and] unproductive" time on the matter.

1. No segregation of fees attributable to the CPA claim that was settled with the Class Representatives.

The only fees and costs that are properly considered are those attributable to the prosecution of the Consumer Protection Act claim that was settled with the Class Representatives—the claim asserted in the fifth amended counterclaim. The fees associated with ***that claim*** must be segregated from counsel's other work on the matter:

> If, as in this case, an attorney fees recovery is authorized for only some of the claims, the attorney fees award must properly reflect a segregation of the time spent on issues for which attorney fees are authorized from time spent on other issues. . . .
>
> > [T]he court must separate the time spent on those theories essential to [the cause of action for which attorneys' fees are properly awarded] and the time spent on legal theories relating to the other causes of action.... This must include, on the record, a segregation of the time allowed for the [separate] legal theories....
>
> *Travis*, 111 Wash.2d at 411, 759 P.2d 418.

Hume v. Am. Disposal Co., 124 Wn.2d 656, 672–73, 880 P.2d 988, 997 (1994). Here, Movants have made no effort to segregate the fees as required by Washington law, and for this reason,

Davis Wright Tremaine LLP
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920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

their motion is properly denied. *Milcic v. Estes*, 4 Wn. App. 2d 1069, 2018 WL 3738250 (2018) ("Failure to segregate, where segregation is possible, may constitute failure to meet the burden of proof, which would justify a denial of a fee award.").

2. No segregation of fees and costs on unsuccessful claims and unproductive time.

"The court must limit the lodestar to hours reasonably expended, and should therefore discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time." *Subcontracting Concepts CT, Inc. v. Manzi*, 26 Wn. App. 2d 707, 719, 529 P.3d 440, 447 (2023) (citation omitted). The work of Defendants' counsel prior to the joinder of the Class Representatives is the definition of unsuccessful and unproductive time that is not properly awarded as part of a fee motion. Defendants spent an inordinate amount of time vacating the judgment that had been entered against them, and then lost on class certification. They recovered nothing on their Consumer Protection Act claim, and agreed to a walk away from the lawsuit without any compensation. Here, Movants have made no effort to cull the unproductive time from their application, and for this additional reason, the motion is properly denied. *Cornish Coll. of the Arts v. 1000 Virginia Ltd. P'ship*, 158 Wn. App. 203, 234, 242 P.3d 1, 17 (2010).

D. The Fees Requested are Otherwise Excessive and Unwarranted

Beyond the structural shortcomings in Movants' motion, there are a myriad of specific deficiencies in the fee request that mandate reductions.

1. The relief obtained does not support the requested fees.

After three years of failed litigation by Defendants, the Class Representatives negotiated an $87,000 class settlement in the span of a few months. The fee request is devoid of proportionality and shows poor billing judgment. Even if the Defendants had litigated the entire action and settled their own claims as part of a class settlement (which they did not), Movants are not entitled to $300,000. *Berryman*, 177 Wn. App. at 661.

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2. The case was overlawyered, with too many lawyers and too much unproductive intra-counsel communication.

For reasons that are unexplained, Defendants' case was handled by at least ten different lawyers, spread across three different law firms—several of them experienced lawyers, charging high rates. The staffing on the case was unreasonable and unnecessary, and led to unjustified fees. *See* Stone Dec., ¶¶ 11-18. Mr. Leonard charges $495 an hour, claims to have extensive experience in the area, and should have been able to handle the case himself. *Id.*, ¶ 12. Despite this, Terrell Marshall joined the case, adding eight lawyers and nine paralegals or legal assistants. *Id.*, ¶ 13. Another lawyer, Paul Arons, joined the case—at $550 per hour—with charges for many small increments of time. *Id.*, ¶ 15 (61 entries of .1 or .2 hours, including time communicating with co-counsel). Incredibly, counsel are asking for $63,479 for Arons' time alone, even though the case was already fully staffed. *Id.*, ¶ 17.

The gross overstaffing of the case resulted in things such as two senior attorneys billing 37 hours for a motion to vacate a default judgment; multiple senior attorneys billing for the same discovery conference; three attorneys working on the preparation for a single deposition, and three attorneys billing thousands of dollars for "observing" the deposition taken by Defendants' counsel; four senior lawyers working on a failed motion for class certification, and two additional lawyers working on the reply; five attorneys worked on the losing motion for discretionary review; and three senior attorneys working on a reply on a motion to compel. Stone Dec., ¶ 18. Because the case was so poorly staffed and supervised, the lawyers spent a full 92.9 hours—or $46,831 in fees—*communicating with each other*. *Id.*, ¶ 19. The case was mismanaged, misstaffed and overworked, and any fee award must be reduced accordingly.

3. Notwithstanding their claims of segregation, Movants request fees incurred in prosecuting their claims against Thrive and Belkorp.

Counsel wrongly request 7.9 hours and $3,910 for work dedicated to pursuing their claims against Third-Party Defendants Thrive or Belkorp. Hasson Dec., ¶ 3 & Ex. B. These fees must be excluded from any fee request.

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Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

4. Attorney's fees incurred to vacate CDR's default judgment against Defendants are not recoverable.

Fees related to vacating CDR's default judgment against Defendants are not recoverable; even if they were, the requested fees for that work are excessive. CDR obtained a District Court judgment against Pierce and Gardiner for about $18,000 in February, 2020. On October 7, 2020, the District Court vacated the default judgment based on Defendants' argument that their neglect in failing to respond to process was excusable. Counsel request reimbursement for 52.1 hours or $26,515.50 in attorney fees for work through August 31, 2020, the date of the filing of the motion vacate. Both Mr. Arons and Mr. Leonard billed for this work. Hasson Dec., ¶ 5 & Ex. D. While these fees are excessive, between September 1, 2020 and October 1, 2020, Mr. Arons, Mr. Leonard and Ms. Chandler billed an ***additional*** 20.2 hours and $10,180.50 attorney fees. Mr. Leonard billed another 0.7 hours and $346.50 related to the motion to vacate on November 2, 2020. In total, counsel billed $37,042.50 to vacate a small judgment that was entered as a result of Defendants' neglect, work with had nothing to do with any Consumer Protection Act claim. *Id.* All of these fees should be deducted from Class Counsel's attorney fee request.

5. Counsel wrongly request fees for multiple, unproductive amendments to Defendants' claims.

Movants request an award of fees for a series of unproductive amendments to Defendants' failed counterclaims:

- Counsel wrongly request 4.1 hours and $1,193.50 in fees for preparation of the first amended counterclaim and motion to disqualify judge. Hasson Dec., ¶ 6 & Ex. E.
- Counsel wrongly request 7.1 hours and $2,930.50 in fees for preparation of the second amended counterclaim. Hasson Dec., ¶ 7 & Ex. F.
- Counsel wrongly request 4.4 hours and $2,203.25 in fees for preparation of the third counterclaim amended counterclaim. Hasson Dec., ¶ 8 & Ex. G.

All of these fees should be deducted from Movant's fee request.

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When CDR filed its motion to strike the residual class allegations based on the manifest deficiencies in Defendants' claims, counsel scrambled to find new class representatives before the motion was heard. The records show that between April 13, 2023 and May 9, 2023, counsel identified the Class Representatives as potential class representatives and drafted documents in support of a motion to file fourth and fifth amended counterclaims. Despite having already filed three other amended counterclaims by this time, counsel wrongly requests 39.4 hours for this work, or $19,975.50 in attorney fees to amend to correct deficiencies in Defendants' case. Hasson Dec., ¶ 9 & Ex. H. The fees for this additional amendment are excessive, and should not be awarded.

6. Movants wrongfully request fees incurred in Defendants' failed class certification motion.

Defendants were unsuccessful in certifying a class, and were unsuccessful in obtaining discretionary review of the order denying their failed motion for class certification. Defendants are neither class representatives nor even members of the settlement class that is being certified. Despite this, counsel request 159.7 hours or $71,518.50 in fees for work between September 16, 2021 and November 3, 2022 for Defendants failed motion to certify, losing motion for discretionary review, and a motion to stay that accompanied those motions. In addition, counsel request 43.7 hours and $21,764.00 in fees related to CDR's motion to strike. All these fees ($93,282.50) should be deducted from any fee award. Hasson Dec., ¶ 10 & Ex. I.

7. Movants wrongfully request fees for discovery on Defendants' failed claims.

Defendants did not prevail on their CPA claims, and, as discussed above, fees related to the collection case are not recoverable. Despite this, counsel seek an exorbitant amount of attorney fees for discovery and discovery motions related to Defendants' claims and defenses. Counsel request 197.0 hours or $91,009.00 in fees for discovery-related work between November 11, 2020 and May 15, 2023, as well as $997.50 in reporter fees and $2,072.95 for transcripts. Hasson Dec., ¶ 11 & Ex. J. The Class Representatives were not joined in the case

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Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

until the fifth amended counterclaims were allowed on May, 22, 2023. All of these fees for pre-joinder discovery should be deducted from Class Counsel's attorney fee and cost request.

8. Many of the time entries are too vague to permit a meaningful analysis, or reflect inconsistences among counsel.

In addition to the other deficiencies described above, many of the time entries for which Movants seek an award of fees are too vague to allow any meaningful analysis. Stone Dec., ¶ 20. To the extent the work can be identified, counsel's disparate billings show they were recording different time increments for the same work. *Id.*, ¶ 21.

9. In toto, the fees are excessive.

A review of the course of the litigation and the work involved shows that counsel simply billed too much time for the work that was performed. Senior lawyers supposedly spent 36.3 hours on a simple motion to vacate—work that should have taken at most 8-10 hours. Stone Dec., ¶ 23. The same senior lawyers spent 16.4 hours on a reply. *Id.*, ¶ 24. Counsel billed in excess of $12,000 to amend pleadings. *Id.*, ¶ 25. Counsel spent more than 30 hour--$20,000--on a failed motion for discretionary review that had little chance of success. *Id.*, ¶ 28. Counsel spent another 65.9 hours responding to CDR's Motion to Strike. *Id.*, ¶ 31.

10. Movants are not entitled to the requested costs.

The costs requested by Movants are not recoverable. The requested costs are from the Defendants' failed case, and are none are properly awarded. And even in cases where costs are recoverable, they do not include the costs of transcripts and reporters that are requested by Movants. *Hume*, 124 Wash. 2d at 674 ("Costs have historically been very narrowly defined, and RCW 4.84.010 limits cost recovery to a narrow range of expenses such as filing fees, witness fees, and service of process expenses. … Absent a statute that expressly allows expanded cost recovery, however, plaintiffs are not entitled to such generous cost awards. For example, in *Nordstrom, Inc. v. Tampourlos*, 107 Wash. 2d 735, 733 P.2d 208 (1987), we refused to award extended costs to successful plaintiffs under the Consumer Protection Act, finding that an expanded recovery was unwarranted.").

Davis Wright Tremaine LLP
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920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

VI. CONCLUSION

Defendants are not prevailing parties and their counsel are not entitled to fees from CDR. Excluding the time recorded before the Class Representatives joined the case from the Movants' $300,000 fee request results in a fee award of $33,497.

If the Court instead analyzes the source of the fees on a line-by-line basis, the $300,000 fee request is properly reduced for the following:

Thrive	$3,910.00
MTV	$37,042.50
FAC	$1,193.50
2AC	$2,930.50
3AC	$2,203.25
4&5AC	$19,975.50
MTC	$93,282.50
Discovery failed claims	$91,009.00
Total	$251,546.75

This analysis produces a fee award of no more than $48,453.

Under any compliant analysis, counsel are not entitled to $300,000, or anything close to it. The fee request is not reasonable, and should be rejected by the Court.

DATED this 22nd day of January, 2024.

Davis Wright Tremaine LLP

By *s/ Brad Fisher*
Brad Fisher, WSBA #19895

Hasson Law, LLC
Jeffrey I. Hasson, WSBA # 23741

I certify that this pleading, not counting the caption or the signature block, contains 4,183 words.

Attorneys for Columbia Debt Recovery, LLC

Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court and sent a copy to the following via the method indicated:

Jeffrey I. Hasson HASSON LAW, LLC 9385 SW Locust Street Tigard, Oregon 97223 Email: hasson@hassonlawllc.com	☐ Via Messenger ☐ Via Federal Express ☐ Via U.S. Mail ☒ Via Electronic Mail or E-service application
Beth E. Terrell Blythe H. Chandler 936 North 34th Street, Suite 300 Seattle, Washington 98103-8869 Email: bterrell@terrellmarshall.com Email: bchandler@terrellmarshall.com	☐ Via Messenger ☐ Via Federal Express ☐ Via U.S. Mail ☒ Via Electronic Mail or E-service application
Samuel R. Leonard LEONARD LAW 9030 35th Ave SW, Suite 100 Seattle, Washington 98126 Email: sam@seattledebtdefense.com	☐ Via Messenger ☐ Via Federal Express ☐ Via U.S. Mail ☒ Via Electronic Mail or E-service application
Paul Arons LAW OFFICE OF PAUL ARONS 175 Gretchen Way Friday Harbor, Washington 98250 Email: lopa@rockisland.com	☐ Via Messenger ☐ Via Federal Express ☐ Via U.S. Mail ☒ Via Electronic Mail or E-service application
Kenneth W. Hart Scott R. Weaver CARNEY BADLEY SPELLMAN, P.S. 701 Fifth Avenue, Suite 3600 Seattle, WA 98104-7010 Email: hart@carneylaw.com Email: weaver@carneylaw.com	☐ Via Messenger ☐ Via Federal Express ☐ Via U.S. Mail ☒ Via Electronic Mail or E-service application
William H. Walsh Karl Neumann COZEN O'CONNOR 999 Third Avenue, Suite 1900 Seattle, WA 98104 Email: wwalsh@cozen.com Email: kneumann@cozen.com	☐ Via Messenger ☐ Via Federal Express ☐ Via U.S. Mail ☒ Via Electronic Mail or E-service application

Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

Dated this 22nd day of January, 2024.

s/ Brad Fisher
Brad Fisher, WSBA #19895

Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax