Shaun Setareh (SBN 204514)
shaun@setarehlaw.com
Thomas Segal (SBN 222791)
thomas@setarehlaw.com
Farrah Grant (SBN 293898)
farrah@setarehlaw.com
SETAREH LAW GROUP
9665 Wilshire Blvd. Suite 430
Beverly Hills, California 90212
Telephone (310) 888-7771
Facsimile (310) 888-0109

Attorneys for Plaintiff
DANYELL SANDERS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DANYELL SANDERS, on behalf of herself, all others similarly situated,

Plaintiff,

vs.

KAISER FOUNDATION HOSPITALS, a California corporation; KAISER PERMANENTE INTERNATIONAL, a California corporation, and DOES 1 through 50, inclusive,

Defendants.

Case No. CGC-21-594659

NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Hearing Information

Date:	September 21, 2023
Time:	2:00pm
Department:	613
Judge:	Andrew Cheng

Submitted Under Separate Cover

1. Declaration of Mark Unkefer;
2. Proposed Order

NOTICE OF MOTION AND MOTION

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on September 21, 2023 at 2:00 pm, in Department 613 of the above-captioned Court, located at 400 McAllister Street, San Francisco, California 94012, the Honorable Andrew Cheng presiding, Plaintiff Danyell Sanders"), on behalf of herself and all others similarly situated, will, and hereby does, move this Court to:

Finally approve the Settlement;

Finally approve certification of the Settlement Class;

Award attorney fees in the amount of $1,343,100;

Award litigation expenses in the amount of $9,755; and

Award Plaintiff Danyell Sanders a Class Representative Service Payment in the amount of $5,000.

This Motion is based upon: (1) this Notice of Motion and Motion; (2) Motion for Award of Attorney Fees and Expenses And Class Representative Enhancement Award; (3) the Declaration of Mark Unkefer; (4) the Settlement Agreement; (5) the Notice of Class Action Settlement; (6) the [Proposed] Order; (7) the records, pleadings, and papers filed in this action; and (8) such other documentary and oral evidence or argument as may be presented to the Court at or prior to the hearing of this Motion.

Respectfully submitted,

Dated: August 29, 2023

SETAREH LAW GROUP

BY /s/ *Farrah Grant*
SHAUN SETAREH
THOMAS SEGAL
FARRAH GRANT

Attorneys for Plaintiff
DANYELL SANDERS

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The settlement provides substantial relief in the form of a $4,029,300 settlement fund on a non-reversionary basis for Defendant's failure to satisfy the Fair Credit Reporting Act ("FCRA") regarding pre-employment background checks performed on the Settlement Class. The gross settlement amount per class member is $100, which compares extremely favorably to similar settlements involving pre-employment background checks. No Settlement Class Members will have to make claims. Instead, checks will be mailed directly to them. No money will revert to Defendant. The residue from uncashed checks will be distributed in a second distribution to class members who cashed their checks. Any remaining residue will go to the proposed cy pres recipient California Rura Legal Assistance.

Plaintiff alleges that Kaiser failed to provide applicants with a stand-alone document that consists solely of the disclosure, as required under the FCRA. Instead, Plaintiff alleges that the disclosure form used included impermissible extraneous information.

This Court granted preliminary approval of the settlement on April 11, 2023. Notice has gone out to the class by email or mail. There are only 3 requests for exclusion and zero objections. Thus only .007% of the Class have requested exclusion.

In an FCRA case, a prevailing plaintiff will receive statutory damages of between $100 and $1,000. 15 U.S.C. § 1681n(a)(1)(A.) The settlement amount of $4,029,300 is an excellent result for the class. In this settlement the gross amount per class member is $100 ($4,029,300 / 40293). This compares extremely favorably to other recent FCRA settlements in California. See Rohm v. Thumbtack, Inc., 2017 WL 4642409 (N.D. Cal. 2017)(granting final approval) involved a claims made settlement (albeit a non-reversionary one) where 66,676 class members shared in a $225,000 settlement or a gross recovery of $3.30 per class member. Similarly, In re Uber FCRA Litigation, 2017 WL 2806698 (N.D. Cal. 2017) (granting preliminary approval) involved a claims made settlement (also non-reversionary) where 1,025,954 class members shared in a $7.5 million settlement or a gross recovery of $7.31 per class member. Also, Nesbitt v. Postmates, Inc. CGC-15-547146 Superior Court of California, San Francisco County (final approval granted) where

there was a partially claims made settlement with a gross settlement amount of 2.5 million and 186,988 settlement class members. Additionally, Esomonu v. Omnicare (N.D. Cal. 2018)(granting final approval) involved a claims made settlement (albeit a non-reversionary one) where 43,069 class members shared in a $1,300,000 settlement or a gross recovery of $30.18 per class member.

In order to arrive at this settlement, Plaintiff engaged in arms'-length negotiations with Kaiser, including a day-long mediation session. At the mediation session, the parties extensively discussed their views of the strengths and weaknesses of the case including the merits and risks. Aa a result of the mediation session with Mediator Rodney A. Max, the parties were able to reach this Settlement.

The Settlement here not only was negotiated with an experienced mediator, it was entered into with the parties fully cognizant of the risks of the case. Defendant contends that Plaintiff would not be able to establish that any alleged violation was willful.

The settlement is an excellent result. The underlying legal claims under the FCRA involve substantial risk because of the uncertain and evolving legal landscape regarding such claims. Class counsel has obtained a certain recovery for the class in face of great risk and uncertainty.

Plaintiff requests that the Court approve an award of attorney fees in the amount of $1,343,100 which is 1/3 of the Settlement Fund. Plaintiff also requests that the Court approve litigation expenses in the amount of $9,755. Plaintiff also requests that the Court approve the Settlement Administrator's expenses in the amount of $73,019.80, and an incentive award in the amount of $5,000. In light of the risks of continuing with this litigation, Plaintiff submits that this settlement, which guarantees that all Settlement Class Members will be paid, is fair, reasonable, and adequate and should be approved.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Overview of the Litigation

On August 20, 2021, Plaintiff filed this case alleging that Defendant committed violations of the Fair Credit Reporting Act ("FCRA"). The action alleges that Defendant conducted pre-employment background checks without complying with the requirements of the FCRA,

including the requirement of 15 U.S.C. § 1681b (b) (2)(A) that the background check be disclosed in a document that "consists solely of the disclosure."

On February 7, 2022, the Parties participated in a private mediation session with Rodney A. Max, a well-regarded and experienced class action mediator with specific expertise in mediating and assisting in the resolution of purported class actions brought under the FCRA. (Settlement, ¶ 2.3.) As a result of the mediation, the Parties, through counsel, reached and signed a memorandum of understanding which outlined the material terms of a proposed class action settlement that would fully resolve this Action in its entirety, subject to the Parties entering into a more comprehensive written settlement agreement. (Id.) On July 12, 2022, the Parties executed the original Settlement. In March 2023 the parties executed the amended Settlement. (*Id.*, ¶ 15.)[1]

B. Summary of Relevant Law

1. The Fair Credit Reporting Act ("FCRA")

The Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681b(b), requires employers to use certain documents and to follow specified policies and practices when they use "consumer reports" to assess the qualifications of prospective and current employees.

Pursuant to section 1681b of the FCRA, no person can obtain a consumer report for employment purposes without providing a "clear and conspicuous disclosure . . .in a document that consists solely of the disclosure." 15 U.S.C. § 1681b(b)(2)(A)(i.) The person obtaining the consumer report must also obtain the consumer's written authorization which can be done as part of the disclosure form. 15 U.S.C. § 1681b(b)(2)(A)(ii.) A plaintiff may be entitled to statutory and punitive damages when a defendant has willfully violated the provisions of the FCRA. 15 U.S.C. § 1681n(a)(1)(A): "any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of . . . damages of not less than $100 and not more than $1,000 . . . such amount of punitive damages as the court may allow."

///

[1] The Amended Settlement Agreement is attached as Exhibit 1 to the Declaration of Shaun Setareh in Support of the Motion for Attorney Fees.

2. The Landmark *Syed* Decision

In 2017 the Ninth Circuit issued a major decision on the issue of violation of the stand-alone disclosure requirement of the FCRA. *Syed v. M-I, LLC*, 853 F.3d 492 (9th Cir. 2017.) In *Syed*, the FCRA disclosure contained a term purporting to waive any liability of the employer related to the background check. *Id.* at 498. The Ninth Circuit held that under the plain language of the FCRA the required disclosure must be in "a document that consists solely of the disclosure" and that the inclusion of the liability release was impermissible: "We must begin with the text of the statute. Where congressional intent has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive . . . . The ordinary meaning of 'solely' is '[a]lone; singly' or entirely exclusively." *Id*. at 500. The Ninth Circuit also held that due to the clarity of the statutory language requiring that the disclosure be in a document consisting "solely" of the disclosure: "a prospective employer's violation of the FCRA is "willful" when the employer includes terms in addition to the disclosure." *Id*. at 496.

While *Syed* involved a liability release, its holding is broader. *Syed* broadly analyzed the "solely" requirement governing the disclosure apart from any release language:

> "It is our duty to give effect, if possible, to every clause and word of a statute." *United States v. Menasche*, 348 U.S. 528, 538–39, 75 S.Ct. 513, 99 L.Ed. 615 (1955) (internal quotation marks omitted). M-I's interpretation fails to give effect to the term "solely," violating the precept that "statutes should not be construed to make surplusage of any provision." *Wilshire Westwood Assocs. v. Atl. Richfield Corp.*, 881 F.2d 801, 804 (9th Cir. 1989) (alterations and internal quotation marks omitted). ***That other FCRA provisions mandating disclosure omit the term "solely" is further evidence that Congress intended that term to carry meaning in 15 U.S.C. § 1681b(b)(2)(A)(i)***. *See* 15 U.S.C. §§ 1681d, 1681s-3. *Syed*, 853 F.3d at 501 (emphasis added).

Put in simplest terms, "solely" means just what it appears to mean, and, in Plaintiff's view *no* implied exceptions to the "solely" requirement should be judicially added to the *one* express exception allowing the authorization to accompany the correct disclosure. The FCRA expressly states that the *sole* additional element that may be included with the disclosure is an authorization, "which authorization may be made on the document referred to in clause (i). . . ." 15 U.S.C.A. § 1681b(b)(2)(A)(ii).

The United States Court of Appeals for the Ninth Circuit has found that a background check

document that Plaintiff contends is similar to the one here did not comply with the FCRA standalone document requirement and was not clear. *Gilberg v. California Check Cashing Stores, LLC*, 913 F.3d 1169 (C.A.9 (Cal.), 2019).[2] The form in *Gilberg* included references to state rights, as Plaintiff alleges regarding the form here.

C. The Disclosure Forms at Issue

In Plaintiff's view, the disclosure form utilized by Defendants during the Class Period falls short of meeting the standards set forth in Syed and Gilberg. Plaintiff contends that the forms include text that is extraneous to the disclosure and, thus, not compliant with Section 1681b(b) of the standalone disclosure requirement.

Defendants, however, disagreed that the disclosure form at issue violated the FCRA and believed that, even if there was a technical violation of the law, that any such violation was not "willful," which is required under the FCRA for class certification and a potential award of statutory damages and possible punitive damages. Defendants further disagreed that Plaintiff's purported class would have been certified in whole or in part. At all times, Defendants have denied liability.

D. Plaintiff's Investigation and Discovery

Prior to and throughout the action, Plaintiff and her counsel thoroughly investigated her claims. (Setareh Declaration ISO Motion for Fees filed July 20, 2023 ("Setareh Decl.", ¶¶ 10-12.)) Plaintiff engaged Defendants in informal discovery in advance of mediation. (Id., ¶ 11.) As part of the investigation, Plaintiff's counsel reviewed documents and data produced by Defendant in order to confirm which background check disclosure and authorization forms were used by Defendants during the Class Period. (Id.) Because this case turns, in part, on Defendants' legal defense that Defendants' alleged noncompliance purportedly was not "willful" under the FCRA, Plaintiff's counsel thoroughly analyzed the evolving – and often conflicting – case law governing FCRA class actions. (Id., ¶ 12.) This review and investigation allowed Plaintiff's counsel to structure a settlement that provides benefits directly to the persons who received the allegedly non-compliant forms. (Id., ¶ 13.)

[2] Setareh Law Group is lead counsel in *Gilberg v. California Check Cashing Stores, Inc.*

Defendants raised several defenses again liability. First, Defendants' position is that the allegedly extraneous information is separate from the disclosure or lawful and consistent with Section 1681b(b)(2).

Defendants further contend that Plaintiff would not be able to establish that any alleged violation was willful, arguing, among other things, that no appellate court had found the specific language challenged here to be extraneous at the time most putative class members were screened.

To show willfulness, a plaintiff must establish that the defendant acted in "reckless disregard of statutory duty," which is not shown "unless the action in question is not only a violation under a reasonable reading of the statute's terms, but shows that that company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless." See Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 69 (2007). To refute willfulness, Defendants also rely on the fact that it was not until three years ago that the Ninth Circuit addressed what it called "a matter of first impression" of exactly "what qualified as part of that 'disclosure… that a consumer report may be obtained for employment purposes.'" Walker v. Fred Meyer, Inc. (9th Cir.2020) 953 F.3d 1082, 1084.

Ultimately, willfulness under the FCRA is generally a question of fact for determination by a jury. Hebert v. Barnes & Noble, Inc., (2022) 78 Cal.App.5th 791, 803-04. While willfulness under the FCRA includes reckless statutory violations in addition to knowing statutory violations, Id., it is not certain that a jury would return a favorable verdict. If a jury concluded that the violation was not willful, the class would recover nothing. This is one of the major risks that is avoided by this Settlement.

In addition, Defendants argued that Plaintiff's purported class was limited to a two-year class period, and not the five-year class that is subject to this Settlement. Under the FCRA, any action must be brought "not later than the earlier of -- (1) 2 years after the date of discovery by the plaintiff of the violation that is the basis for such liability; or (2) 5 years after the date on which the violation that is the basis for such liability occurs. Defendants' position is that those individuals on whom consumer reports had been procured more than two years from the filing of this Action were all on constructive

notice of their claims and thus, at most, Plaintiff would only be able to certify a two-year class. If this case proceeded, Defendants intended to introduce additional defenses to liability as well.

Without a settlement, the Parties would be litigating these matters, and potentially no statutory damages would be awarded, even for the two-year class. For the reasons discussed above (and below), Plaintiff and the Class faced liability risks, class certification risks, and statute of limitations risks if this case proceeded.

E. The Parties Engaged in Mediation and Arm's-Length Settlement Negotiations

The proposed Settlement was the culmination of protracted discussions between the Parties following a thorough analysis of the pertinent facts and law at issue. (Settlement, ¶¶ 2.3; Setareh Decl., ¶ 14.) Following informal discovery and arm's-length negotiations, the Parties reached a settlement in principle on a class basis. (*Id.*) On February 7, 2022, the Parties held an all-day, in-person mediation with Rodney A. Max, Esq., on the claims at issue in this Action. (*Id.*)

F. Material Terms of the Proposed Class Action Settlement

1. The Settlement Class

The Settlement Class consists of "all persons on whom Defendants obtained a consumer report for employment purposes between August 20, 2016 and January 31, 2022." (Settlement, ¶ 1.4.) The Class Period means the time period from August 20, 2016 and January 31, 2022. (*Id.* ¶ 1.7.) The Class Members were the subject of a consumer report procured by Defendants for employment purposes and were the persons to whom Defendants made the disclosures required at 15 U.S.C. § 1681b(b)(2)(A). The number of class members is 40,293. (*Id.* ¶ 1.4)

2. The Settlement Benefits

Under the Settlement, all Class Members who do not opt out will receive an Individual Settlement Payment. The gross settlement amount per class member is expected to be $100 ($4,029,300 / 40,293 = $100). This is an excellent result for the class. Courts have approved similar FCRA settlements, where class members received less on a gross basis. *See Rohm v. Thumbtack, Inc.*, 2017 WL 4642409 (N.D. Cal. 2017)(granting final approval) involved a claims

made settlement (albeit a non-reversionary one) where 66,676 class members shared in a $225,000 settlement or a gross recovery of $3.30 per class member. Similarly, *In re Uber FCRA Litigation*, 2017 WL 2806698 (N.D. Cal. 2017) (granting preliminary approval) involved a claims made settlement (also non-reversionary) where 1,025,954 class members shared in a $7.5 million settlement or a gross recovery of $7.31 per class member. Also, *Nesbitt v. Postmates, Inc.* CGC-15-547146 Superior Court of California, San Francisco County (final approval granted) where there was a partially claims made settlement with a gross settlement amount of 2.5 million and 186,988 settlement class members. Additionally, *Esomonu v. Omnicare* (N.D. Cal. 2018)(granting final approval) involved a claims made settlement (albeit a non-reversionary one) where 43,069 class members shared in a $1,300,000 settlement or a gross recovery of $30.18 per class member.

3. A Narrow Release

Upon the entry of a Final Approval Order and Judgment, Plaintiff and all other Participating Class Members in the Class shall be deemed to have released their respective Released Claims against the Released Parties as follows:

> **Released Claims by All Members of the Settlement Class**. Upon the Effective Date, Plaintiff and each member of the Settlement Class fully release and forever discharge the Released Parties from the Released Claims. Each Settlement Class Member who does not opt out of the Settlement shall release Kaiser Foundation Hospitals, Kaiser Foundation Health Plan, and their predecessors, successors, subsidiaries, parent companies, other corporate affiliates, and assigns, and each and all of their current or former subsidiaries, parents, affiliates, predecessors, insurers, agents, servants, employees, successors, assigns, officers, officials, directors, attorneys, personal representatives, registered representatives, executors, and shareholders, including their respective pension, profit sharing, savings, health, and other employee benefits plans of any nature, the successors of such plans, and those plans' respective current or former trustees and administrators, agents, employees, and fiduciaries, and any other persons acting by, through, under, or in concert with any of them, from any and all claims, debts, liabilities, demands, obligations, penalties, guarantees, costs, expenses, attorneys' fees, interest, damages, actions or causes of action that such individuals have or could have had under the facts pled or alleged by Plaintiff in this Action under: 15 U.S.C. § 1681b of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681d and 1681g of the FCRA, California Civil Code Section 1786, et seq. (the Investigative Consumer Reporting Agencies Act ("ICRAA")), California Civil Code Section 1785, et seq. (the Consumer Credit Reporting Agencies Act ("CCRAA")), California Business & Professions Code section 17200, et seq. (the Unfair Competition Law ("UCL")), and similar claims under the law of any other State.

(Settlement, ¶ 4.1.) "Released Parties" means Kaiser Foundation Hospitals and Kaiser Foundation Health Plan and their predecessors, successors, parent companies, subsidiaries, affiliates, officers, directors, attorneys, insurers, and assigns, and each and all of their current or former subsidiaries, parents, affiliates, predecessors, insurers, agents, servants, employees, successors, assigns, officers, officials, directors, attorneys, personal representatives, registered representatives, executors and shareholders, and any other persons acting by, through, under, or in concert with any of them. (*Id.*, ¶ 1.29.) This release is narrowly and appropriately tailored to the allegations asserted by Plaintiff in this Complaint.

In addition, Plaintiff will further provide the following general release (*Id.*, ¶ 4.2-4.3):

> In addition to the Released Claims set forth in Section 4.1 of this Agreement, the Class Representative expressly releases any and all claims, known or unknown, they may have against Defendants (and other Released Parties), including but not limited to the claims asserted in the Action, or any other claims that could have been asserted in the Action, through and including the Effective Date, as permitted by law.

(Settlement ¶ 4.2). Plaintiff also agrees to a waiver of unknown claims under Cal. Civ. Code § 1542. (*Id.* ¶¶ 4.2-4.3.)

Finally, notwithstanding the foregoing, the Parties acknowledge that Plaintiff is pursuing two separate lawsuits pending in the California Superior Court for the County of San Francisco and the California Superior Court for the County of Los Angeles, respectively entitled *Danyell Sanders v. Kaiser Foundation Hospitals, et al.*, Case No. CGC-21-595263, and *Danyell Sanders v. Kaiser Foundation Hospitals, et al.*, Case No. 21STCV40840. Excluded from Plaintiff's general release of claims are those claims currently plead in Plaintiff's two other lawsuits (*Id.*, ¶ 4.2.)

4. A Consumer- Friendly Settlement Payment Distribution Process

The parties have negotiated a mailing procedure to minimize the burden to Settlement Class Members. Class Members will not have to submit a claim form in order to receive payment. Instead, the Individual Settlement Payments will be mailed by the settlement administrator to the Settlement Class Members within 45 days of the Effective Date of the Settlement. (Agreement ¶ 7.2.)

Participating Class Members will have 180 days to cash their settlement check. (*Id.*, ¶ 7.3.) At the end of that 180-day period, any uncashed settlement funds will be redistributed to those Class

Members who cashed their check during the first distribution. (*Id.* ¶ 7.4.) At the end of the second 180-day distribution period, any remaining uncashed settlement funds will be transmitted to California Rural Legal Assistance, a non-profit law firm that provides free civil legal services to low-income residents of California's rural counties. (*Id.*, ¶ 7.5; *see* https://crla.org/about-crla)

5. Notice to the Settlement Class and the Class Response

On June 1, 2023, the Settlement Administrator American Legal Claim Services, LLC mailed notice to 9,020 Settlement Class Members. (Declaration of Mark Unkefer "(Unkefer Decl.)" ¶ 4.) The settlement administrator pre-validated and sent 31,273 of the notices via email from May 26, 2023 until June 1, 2023. (*Id*.) Of the 31,273 emails sent, 28,985 were deemed delivered. The remaining 2,288 were sent via US mail. (*Id*.) A total of 11,308 notices were sent via mail.

The Settlement Administrator processed all Class Notices returned by USPS. A minority of the returned mail included an update address provided by USPS. For those, the class member addresses were updated, and the Class Action Notices were re-mailed to the updated address provided. The remainder of the mail returned by the USPS did not contain an updated address. For these, the Settlement Administrator conducted address searches using a nationally recognized location service to attempt to locate new addresses for these class members. Of the 11,308 Initial Notices mailed, 834 were returned by USPS. The Settlement Administrator has remailed 661 Notices to updated addresses. Of the 661 remailed Notices, 31 were returned by USPS. (Unkefer Decl. ¶ 5.)

In summary, 28,985 notices were delivered via email and 11,308 notices were mailed via USPS. In total, 221 of the 40,293 notices were deemed undeliverable. Thus, 99.45% of the class is deemed to have received notice. (*Id*. ¶ 6.)

The Settlement Administrator maintained a case website containing important documents, such as the Settlement Agreement, the Motion for Preliminary Approval, the Long Form Notice, and the Motion for Attorney Fees. Class members had an opportunity to update their address online. (*Id*. ¶ 9.)

The Settlement Administrator also maintained a toll-free telephone number for class members to receive additional information about the settlement. (*Id*. ¶ 10.)

Only 3 Class Members have opted out of the litigation. (*Id*. ¶ 7.) Thus only .007% of the Class have requested exclusion. There have been zero objections to the settlement. (*Id*. ¶ 8.).

6. Class Counsel's Experience in FCRA Cases

Class Counsel are highly experienced at litigating FCRA stand-alone disclosure cases. *See* (Setareh Decl. ISO Motion for Attorney Fees ¶¶ 4-9.) For example, Class Counsel obtained certification of a nationwide FCRA unlawful disclosure class of more than 5 million employees and job applicants in *Pitre v. Walmart Stores, Inc.*, 2019 WL 365897 (C.D. Cal. 2019).[3] Similarly, Class counsel was counsel of record in the case of *Gilberg v. California Check Cashing*, 913 F.3d 1169 (9th Cir. 2019), a landmark decision from the Ninth Circuit interpreting the standalone disclosure requirement of the FCRA. This experience was critical in enabling Class Counsel to negotiate the extremely favorable settlement of this case.

III. ARGUMENT

A. The Court Should Reaffirm Its Conditional Certification of the Settlement Class for Settlement Purposes Only under CCP § 382

Under Code of Civil Procedure § 382 a class may be certified if: (1) it is ascertainable and its members are too numerous for joinder to be practical; (2) the representative and absent class members share a community of interest and questions of law and fact common to the class predominate over questions unique to individual class members; (3) the representative's claims are typical of the claims of the class; and (4) the representative will fairly and adequately represent the interests of the class. (*See, e.g., Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470.)

This Court found that the Settlement Classes meet all the requirements for class certification for settlement purposes when it granted preliminary approval on April 11, 2023. No subsequent events have cast doubt on this determination. Accordingly, this Court should reaffirm its conditional grant of class certification for settlement purposes.

B. The Court Should Finally Approve the Settlement Because It Is a Fair, Adequate, and Reasonable Compromise of A Disputed FCRA Claim in View of

[3] The class was later decertified solely because the district court concluded that federal subject matter jurisdiction was lacking and remanded to state court.

Defendant's Potential Liability Exposure and the Risks of Continued Litigation

California courts favor settlement. (*See, e.g., Stambaugh v. Sup. Ct.* (1976) 62 Cal.App.3d 231, 236.). Unlike most settlements, class action settlements involve a court approval process that exists to prevent fraud, collusion, and unfairness to class members. (*Malibu Outrigger Bd. of Governors v. Sup. Ct.* (1980) 103 Cal.App.3d 573, 578-79.). This approval process consists of preliminary settlement approval, notice being given to class members, and a final fairness and approval hearing at which class members may be heard with respect to the settlement. (*Id.*) For the reasons discussed herein, this Court should finally approve the Settlements and enter the [Proposed] Order Granting Final Approval of Class Action Settlement and Judgment submitted herewith.

1. The Settlement Is Reasonable

The Settlement results in a substantial benefit to the Settlement Classes. Courts often approve settlements where class members receive only pennies or even just coupons or vouchers. (*See, e.g., Nordstrom Commission Cases* (2010) 186 Cal.App.4th 576, 590 [affirming final approval of wage-and-hour class action settlement where 20% of the fund allocated to the class was merchandise vouchers].) Here, each Class Member will be sent a check for his or her Settlement share, in the form of a monetary payment. The estimated settlement payment for each participating class member (after attorney fees, expenses, administration expenses, and class representative enhancement payment) is $64.23. (Unkefer Decl. ¶ 12.) The Settlement provides significant, meaningful relief for hotly disputed background check violations, making it reasonable and in the best interests of the class.

2. The Settlement Was Reached Via Arm's-Length Negotiations of Experienced Counsel and an Experienced Mediator with Sufficient Information to Intelligently Negotiate a Fair Settlement

A settlement is presumptively fair where it is reached through arm's-length bargaining, based on sufficient discovery and investigation to allow counsel and the court to act intelligently, counsel is experienced in similar litigation, and the percentage of objectors is small. (Dunk, supra, Cal.App.4th at 1802.) In deciding whether to approve a proposed settlement, a trial court has broad powers to determine if the settlement is fair under the circumstances of the case. (Mallick v. Superior Court (1979) 89 Cal.App.3d 434, 438.) In exercising these powers, the overriding concern is to ensure that a proposed settlement is "fair, adequate, and reasonable." (Dunk, 48

Cal.App.4th at p. 1801 [internal quotations omitted].) Relevant factors for that determination, include, but are not limited to:

[T]he complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the state of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.

(Id.) These factors require balancing, are non-exhaustive, and, as such, trial courts should tailor the factors consider to each case and give due regard to "what is otherwise a private consensual agreement between the parties." (Id.)

"In the context of a settlement agreement, the test is not the maximum amount plaintiffs might have obtained at trial on the complaint, but rather whether the settlement is reasonable under all of the circumstances." (Wershba, supra, 91 Cal.App.4th at 250.) Because settlements inherently involve compromise, even settlements providing for substantially narrower relief than likely would be obtained if the suit were successfully litigated can be reasonable because "the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation." (Id. (quoting Air Line Stewards, etc., Local 550 v. Am. Airlines, Inc. (7th Cir. 1972) 455 F.2d 101, 109).) In addition, courts review the discovery process and information received through it to aid them in assessing whether the parties sufficiently developed the claims and their supporting factual bases before reaching settlement. (See Kullar v. Foot Locker Retail Inc. (2008) 168 Cal.App.4th 116, 129-131.) Information is sufficient where it allows the parties and the court to form "an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation." (Clark v. Am. Residential Servs. LLC (2009) 175 Cal.App.4th 785, 801.) This requirement exists so that the parties can provide the court with "a meaningful and substantiated explanation of the manner in which the factual and legal issues have been evaluated." (Kullar, supra, 168 Cal.App.4th at p. 118.)

Here, the Settlement resulted from thorough, arm's-length negotiations between experienced counsel, with the assistance of a highly regarded mediator, after sufficient information was exchanged to assess the relative strengths and weaknesses of Plaintiff's claims, both on their merits and for purposes of class certification, and Defendant's estimated exposure.

Plaintiff was represented by experienced class action counsel possessing significant experience in class action matters including experience in Fair Credit Reporting Act cases

involving allegations that the defendant employer failed to provide a legally compliant stand-alone disclosure. (See Setareh Decl. ¶¶ 5-9.) Setareh Law Group appealed an order to the United States Court of Appeals for the Ninth Circuit in Gilberg v. California Check Cashing Stores, Inc. et al. The Court of Appeals found in the plaintiff's favor that the background check document at issue violated the "clarity" requirement of the FCRA. Gilberg v. California Check Cashing Stores, LLC, 913 F.3d 1169 (C.A.9 (Cal.), 2019). Plaintiff's counsel has litigated a number of FCRA class actions involving claims of disclosure forms that violate the stand-alone disclosure requirement. Three of those cases were settled on a class-wide basis after class certification was fully briefed. (See Setareh Decl. ¶¶ 5-9.) Plaintiff's counsel has several FCRA stand-alone disclosure cases where summary judgment was granted in the defendant's favor including two such decisions after Syed. (Setareh Decl. ISO Preliminary Approval filed December 15, 2022, ¶ 23.) As such, Plaintiff's counsel is in a good position to evaluate the likelihood of success and the settlement value of the case. Recently, as lead counsel in Troester v. Starbucks Corporation, et al., Setareh Law Group was victorious when the California Supreme Court clarified and rejected the application of the widely adopted federal de minimis doctrine to California's wage and hour laws. Troester v. Starbucks Corp., 5 Cal.5th 829 (Cal., 2018). Troester is arguably one of the most important wage and hour decisions in years, as it effects every hourly employee who works in the state. Setareh Law Group has successfully handled hundreds of class actions and has over 140 Westlaw citable decisions. (Setareh Decl. ISO Preliminary Approval filed December 15, 2022 ¶ 17.)

Likewise, Kaiser's counsel, Seyfarth Shaw LLP, is an experienced firm that often represents management in employment law matters, including FCRA class actions.

C. Defendant's Estimated Liability Exposure

The FCRA's damages provision limits recovery when it is shown that a defendant's actions are willful to between $100 and $1,000 or actual damages, whichever is greater. With 40, 293 class members, the FCRA statutory damages are between $4,029,300 to $40,293,000. It is reasonable to assume that a jury in this case would enter an award at the lower end of the potential $100 to $1,000 range per violation and that a $50 million verdict, while permissible under the plain language of the statute, would be highly unlikely.

A recent decision from the Northern District evaluating whether to approve the settlement in a similar stand-alone disclosure case used the $100 per violation penalty as the comparator to judge the fairness of the settlement. *Lagos v. Leland Stanford Junior University*, 2017 WL 1113302 *4 (N.D. Cal. 2017).

As a district court explained:

> A review of Plaintiffs' claim indicates that, assuming success, the award at trial would be around $100. While the inclusion of the waiver and disclaimer might have been inconsistent with the language of the stand-alone disclosure requirement, it was arguably consistent with the purpose of that provision. *See* Letter from Cynthia Lamb, Investigator, Div. of Credit Practices, Fed. Trade Comm'n, to Richard Steer, Jones Hirsch Connors & Bull, P.C. (Oct. 21, 1997), 1997 WL 33791227 (F.T.C.), 1 ("The reason for specifying a stand-alone disclosure was so that consumers will not be distracted by additional information at the time the disclosure is given."). … As such, the violation of the FCRA asserted in this case is only technical in nature, and so the Court would expect class members to receive around $100—or less—should they prevail at trial. *See Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, 680 (D. Md. 2013) ("[T]his case involves allegations of technical FCRA violations, which creates the risk that even if a jury awarded the minimum requisite statutory damages, i.e., $100 to each of the individual class members, the court may find remitter/reduction appropriate.").

Hillson v. Kelly Servs., 2017 WL 279814 (E.D. Mich. 2017) (approving settlement where statutory damages award ranged from $14 to $41 per class member).

As another district court explained in approving a settlement with payments of between $13 to $80 per class member:

> In this case, Plaintiffs sought statutory damages under the FCRA, which provides for damages between $100 and $1,000 if the plaintiff can prove that violation of the statute was willful. 15 U.S.C. § 1681n(a)(1). To obtain statutory damages for an FCRA violation, plaintiffs must meet a very high standard of proof, and may even lose after a successful trial verdict. *See* S*mith v. LexisNexis Screening Solutions, Inc.*, 837 F.3d 604, 611 (6th Cir. 2016) (reversing jury verdict, finding that the consumer reporting agency's conduct did not constitute a willful violation of the FCRA); *Domonoske v. Bank of America, N.A.*, 790 F.Supp.2d 466, 476 (W.D. Va. 2011) ("given the difficulties of proving willfulness or even negligence with actual damages, there was a substantial risk of nonpayment [for FCRA violations]"). The FCRA does not provide specific guidance to courts as to the appropriate relief for a statutory violation. However, to recover actual damages Plaintiffs would need to prove that they suffered an actual injury; for example, that they lost job opportunities or their employment was terminated as a result of Aerotek's actions.

> The settlement at issue provides for a common fund of $15,000,000, and per class member payments of between $13-$80. (Doc. 33, p. 12). In the unopposed brief, Plaintiffs assert that given the breadth of violations, as well as the size of the Class, it is "unlikely that Plaintiffs would achieve an award of statutory damages which, on a per person basis, would substantially exceed $100." *Id.*

Moore v. Aerotek, Inc., 2017 WL 2838148 (S.D. Ohio 2017).

Multiple district courts have approved FCRA stand-alone disclosure settlements where the gross and net settlement amounts were lower than here. *See Aceves v. Autozone Inc.,* No. 5:14-cv-2032, ECF No. 41 (C.D. Cal. Mar. 25, 2016) (settlement with gross recovery of $20 per class member in the disclosure class); *Landrum v. Acadian Ambulance Serv., Inc.,* No. 14-cv-1467, ECF No. 37 (S.D. Tex. Nov. 5, 2015) (approving disclosure settlement of $10 per person); *Walker v. McClane/Midwest, Inc*., No. 2:14-CV-04315, ECF No. 26 (W.D. Mo. July 20, 2015) (granting preliminary approval of settlement in which disclosure class members will recover $24); *Esomonu v. Omnicare,* 2018 WL 3995854 (N.D. Cal. 2018) (net settlement amount of $16.50 per class member); *Schofield v. Delta Airlines*, 2019 WL 955288 (N.D. Cal. 2019) (gross settlement amount of $52 per person).

Using the $100 per class member figure, the gross settlement amount is 100% of the potential award at trial, which far exceeds percentages routinely approved by courts. Courts regularly approve settlements where the recovery is less than one quarter of the maximum potential realistic recovery. *E.g., Bravo v. Gale Triangle*, 2017 WL 708766 *9 (C.D. Cal. 2017)(approving settlement where recovery was 7.5% of projected maximum recovery amount); *Officers for Justice v. Civil Service Com'n of City & County of S.F.,* 688 F.2d 615, 628 (9th Cir. 1982).

1. Risks in Going Forward with Litigation

This case involved substantial risk. Importantly, in order to recover at all, Plaintiff and the class would have needed to prove not just that Defendants violated the FCRA but any violation was willful. The FCRA provides for actual damages incurred in the event of a negligent violation of the FCRA and for statutory damages if the violation is willful. 15 U.S.C. § 1681n(a)(1)(A).

Plaintiff believes that under the Ninth Circuit's decisions in *Syed v . M-I, LLC*, 852 F.3d 492 (9th Cir. 2017) and *Gilberg v. California Check Cashing*, 913 F.3d 1169 (9th Cir. 2019) Defendants willfully violated the FCRA. Those cases are not binding on this Court, but there is no published California authority contradicting them.

Plaintiff believes strongly that *Syed* is correctly decided and should be followed because the plain language of the FCRA disclosure requirement makes clear that extraneous information is not permitted and therefore any violation is willful. However, any reviewing court i.e. Court of Appeal or California Supreme Court would not have to follow *Syed.*

Defendants in FCRA stand-alone disclosure cases argue that under the Supreme Court's decision in *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47 (2007) a finding of willfulness under the FCRA requires a showing that appellate authority or authoritative guidance from a government agency indicated that the challenged conduct was unlawful.

Safeco was not a standalone disclosure case but instead involved a section of the FCRA requiring disclosure when credit risk is used as a justification for raising insurance rates. At issue was whether this section applies only when the consumer has an existing insurance premium rate which is raised, or when in a new transaction a higher rate is charged based a on credit score. In the relevant section of the *Safeco* decision, the Supreme Court states as follows:

> Before these cases, no court of appeals had spoken on this issue and no authoritative guidance has yet come from the Federal Trade Commission. Given this dearth of guidance and the less-than-pellucid statutory text, *Safeco's* reading was not objectively unreasonable, and so falls well short of raising the 'unjustifiably high risk' of violating the statute necessary for reckless liability.

Safeco supra at 50.

The defense bar reads this language in *Safeco* as creating a rule that willfulness requires that there has been appellate authority or authoritative guidance from the FTC to warn the defendant that its conduct was unlawful. The plaintiff's bar reads this language and focuses on the reference to the "less than pellucid (clear) statutory text" as showing that the absence of appellate authority and agency guidance matters only where the statutory language at issue is ambiguous.

To refute willfulness, Defendants also rely on the fact that it was not until three years ago that the Ninth Circuit addressed what it called "a matter of first impression" of exactly "what qualified as part of that 'disclosure… that a consumer report may be obtained for employment purposes.'" *Walker v. Fred Meyer, Inc.* (9th Cir.2020) 953 F.3d 1082, 1084.

IV. The Proposed Method of Allocating the Settlement Fund Among Settlement Class Members Is Fair, Adequate, and Reasonable

The proposed method of allocating the Settlement Fund to Settlement Class Members also is fair and reasonable. The Net Settlement Amount is to be divided equally among all Participating Class Members. (Agreement ¶ 3.5). This proposed method is fair and reasonable.

V. The Low Number of Exclusions and Absence of Objections Also Show That the Settlement is Fair, Adequate and Reasonable

The absence of objections and the fact that there is only three requests for exclusion supports the presumption of fairness and final approval of the Settlement. (*See 7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1152-1153 [finding 9 objections, and 80 opt-outs, from a class of 5,454, showed a positive response from class members supporting settlement approval].). Here, after being given Notice of the Settlement, there are zero objections, and only 3 Class Member have requested exclusion. (Unkefer Decl. ¶¶ 7-8.) Thus only .007% of the Class have requested exclusion. Accordingly, this positive response confirms that Class Members view the Settlement as fair and reasonable and the Settlement warrants final approval.

VI. The Court Should Approve the Class Representative Service Award

Courts routinely approve incentive awards to compensate named plaintiffs for the services they provide and the risks they incur during class action litigation, often in much higher amounts than that sought here. (*See, e.g., Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 726 [upholding incentive awards to named plaintiffs for their efforts in bringing the case]; *Van Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F.Supp. 294 [approving $50,000 incentive award].)

Here, pursuant to the Settlement Agreement, Plaintiff Danyell Sanders seeks a $5,000 incentive award. (Settlement, ¶ 1.3.) Multiple cases have held that a $5,000 incentive award is "presumptively reasonable." *E.g., Wren v. RGIS Inventory Specialists*, 2011 WL 1230826 *36 (N.D.

Cal. 2011): "There is ample case law finding $5,000 to be a reasonable amount for an incentive payment."; *Dickey v. Advanced Micro Devices, Inc.*, 2020 WL 870928 *10 (N.D. Cal. 2020): "Courts in this district have recognized a $5,000 incentive award as 'presumptively reasonable.'"

Plaintiff spent a considerable amount of time on this case. (Declaration of Danyell Sanders ISO Motion for Preliminary Approval ¶ 11.) Among other things, Plaintiff spent time retaining experienced counsel, assisting counsel in preparing for the mediation, attending the mediation and being actively involved in the settlement process. (*Id.*)

In addition, Plaintiff took the personal risks of disclosure to future employers that she sued a former employer, making her future career prospects uncertain. (*Id.* ¶ 13.) There is now a public record of this lawsuit and the fact that Plaintiff filed this lawsuit has now been publicized to all of her former co-workers through the notice process. Furthermore, in pursuing relief on behalf of the Settlement Class, Plaintiff risked being ordered to pay Defendant's costs and/or attorneys' fees if this action had been unsuccessful. (*Id.* ¶ 12). Such costs would have exceeded any individual recovery for Plaintiff in this case, including the amount of the Incentive Award.

VII. The Proposed Award of Attorneys' Fees and Costs Is Fair, Adequate, and Reasonable

Plaintiff's Motion for Attorney's Fees preciously filed addresses in further detail why the proposed award of attorneys' fees and costs is fair, adequate and reasonable. Below are a few of the points made in the Motion for Attorney Fees.

1. The Percentage of the Benefit Method Supports the Fee Request

As the prevailing parties in Settlement, Plaintiff and the Settlement Class are entitled to recover their attorneys' fees from the Maximum Settlement Amount per the terms of the Settlement Agreement

Here, the Settlement Agreement provides that Class Counsel may seek a fee award of up to $1,343,100 (one-third of the Gross Settlement Amount) from the Gross Settlement Amount. Accordingly, the amount of Class Counsel's fee request is authorized under the Settlement. The reasonableness of Class Counsel's requested fee award of one-third of the settlement fund is supported by the relevant case law, and by the experience of Class Counsel

When determining an attorneys' fee award, "the primary basis of the fee award remains the percentage method…" *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002). The Supreme Court of California has held that courts may use the percentage method for its primary calculation of attorney's fee award. *Laffitte v. Robert Half Internat. Inc.*, 1 Cal.5th 480 (Cal.,2016). Moreover, "[e]mpirical studies have shown that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery." (*See Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66, fn.11; *In re Pacific Enterprises Securities Litigation*, 47 F.3d 373, 379 (9th Cir. 1995) [affirming 33% fee award]; *Williams v. MGM-Pathe Comm. Co.* 129 F.3d 1026, 1027 (9th Cir. 1997) [awarding 33% of total fund amount].) This is also consistent with Class Counsel's experience in wage-and-hour class action matters, in that Class Counsel is routinely awarded fees amounting to one-third of the settlement fund.

Indeed, it is an accepted practice in wage-and-hour class action settlements to award attorneys' fees to Class Counsel based on a percentage of the total settlement value agreed upon by the parties. California courts have long recognized that an appropriate method for awarding attorneys' fees in class actions is to award a percentage of the fund. (*Serrano v. Priest (Serrano III)* (1977) 20 Cal.3d 25, 48-49 ["when a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs may be awarded attorney's fees out of the fund"]; *Wershba, supra,*, 91 Cal.App.4th at p. 254; *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 26-30.)

Further, California courts regularly approve attorneys' fees equaling one-third of the common fund or higher. *See, e.g., Chavez v. Netflix, Inc., supra,* 162 Cal.App.4th at 66, n.11; *Weber v. Einstein Noah Restaurant Group, Inc.*, No. 37-2008-00077680 (San Diego Super. Ct.) (40% award); *Chalmers v. Elecs. Boutique*, No. BC306571 (L.A. Super. Ct.) (33% award); *Boncore v. Four Points Hotel ITT Sheraton*, No. GIC807456 (San Diego Super. Ct.) (33% award); *Vivens, et al. v. Wackenhut Corp.*, No. BC290071 (L.A. Super. Ct.) (31% award); *Crandall v. U-Haul Intl., Inc.*, No. BC178775 (L.A. Super. Ct.) (40% award); *Albrecht v. Rite Aid Corp.*, No. 729219 (San Diego Super. Ct.) (35% award); *Marroquin v. Bed Bath & Beyond*, No. RG04145918 (Alameda Super. Ct.) (33% award); *In re Milk Antitrust Litig.*, No. BC070061 (L.A. Super. Ct.) (33% award); *Sandoval v. Nissho of*

California, Inc., No. 37-2009-00097861 (San Diego Super. Ct.) (33% award); *In re Liquid Carbon Dioxide Cases*, No. J.C.C.P. 3012 (San Diego Super. Ct.) (33% award); *In re California Indirect-Purchaser Plasticware Antitrust Litigation*, Nos. 961814, 963201, and 963590 (San Francisco Super. Ct.) (33% award); *Bright v. Kanzaki Specialty Papers*, No. CGC-94-963598 (San Francisco Super. Ct.) (33% award); *Parker v. City of L.A.*, 44 Cal. App. 3d 556, 567-68 (1974) (33% award); *Kritz v. Fluid Components, Inc.*, No. GIN057142 (San Diego Super. Ct.) (35% award); *Benitez, et al. v. Wilbur*, No. 08-01122 (E.D. Cal.) (33% award); *Chavez, et al. v. Petrissans, et al.*, No. 08-00122 (E.D. Cal.) (33% award); and *Leal v. Wyndham Worldwide Corp.*, No. 37-2009-00084708 (San Diego Super. Ct.) (38% award).

Accordingly, based upon the relevant case law, Class Counsel's own experience in other class actions, and similar results in California courts, Class Counsel's request for a fee award equaling to one-third of the Gross Settlement Amount is fair, adequate, and reasonable..

2. The Lodestar Crosscheck Supports Approval of the Requested Fees

The lodestar crosscheck "provides a mechanism for bringing an objective measure of the work performed into the calculation of a reasonable attorney fee." *Laffitte, supra,* 376 P.3d at 676. Only when the lodestar multiplier is "far outside the normal range" would the trial court "have reason to reexamine its choice of a percentage." *Id.* "[T]rial courts conducting lodestar cross-checks have generally not been required to closely scrutinize each claimed attorney-hour, but have instead used information on attorney time spent to focus on the general question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys." *Id.* (internal quotations omitted).

A lodestar crosscheck here confirms that the requested award is reasonable. Class Counsel has incurred a lodestar of $347,650. (Setareh Decl. ISO Motion for Fees, ¶ 20.) This results in a lodestar multiplier of approximately 3.8. The hours billed represent time spent on tasks that were essential to litigation and settlement. The standard hourly rates for Class Counsel – ranging from $325 to $1,150 for the attorneys who worked on this matter – are reasonable. Class Counsel's rates are in line with those charged by experienced class action lawyers who practice on a national scale and within the range of those approved by other courts in similar circumstances. *See, e.g., Spano v.*

Boeing Co., No. 06-CV-743-NJR-DGW, 2016 WL 3791123, at *3 (S.D. Ill. Mar. 31, 2016) (approving hourly rates of $460 to $998 for attorneys, $309 for paralegals, and $190 for legal assistants); *Laffey Matrix* http://www.laffeymatrix.com/see.html (last visited July 18, 2023) (setting forth rates between $413 to $997 for attorneys of similar experience levels).

The lodestar multiplier here – 3.8– is within a reasonable range. California courts generally approve multipliers between 2 and 4. *Wershba v. Apple Computer, Inc.*, 110 Cal. Rptr. 2d 145, 170 (Ct. App. 2001) ("Multipliers can range from 2 to 4 or even higher"); *In re Sutter Health Uninsured Pricing Cases*, 89 Cal. Rptr. 3d 615, 629 (2009) (affirming that multiplier of 2.52 was "fair and reasonable"); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002) (upholding multiplier of 3.65). Here the lodestar crosscheck supports Class Counsel's requested fee.

The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting. *In re Rite Aid Corp. Securities Litigation*, 396 F.3d 294, 306 (C.A.3 (Pa.),2005)

The Ninth Circuit has similarly recognized that the lodestar method "creates incentives for counsel to spend more hours than may be necessary on litigating a case so as to recover a reasonable fee, since the lodestar method does not reward early settlement." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050, n.5 (9th Cir. 2002). As a corollary, a defendant willing to recognize a potential error and settle at an early stage would face the increased risk that an early settlement overture would be rejected. That did not happen here, in part because a percentage of the fund award encourages efficient litigation. The Ninth Circuit has thus cautioned that, while a lodestar method can be used as a cross check on the reasonableness of fees based on a percentage of recovery method if a district court in its discretion chooses to do so, a lodestar calculation is not required and it did "not mean to imply that class counsel should necessarily receive a lesser fee for settling a case quickly." *Id.*

The percentage of recovery method "rests on the presumption that persons who obtain benefits of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Staton*, 327 F.3d 938, 967 (9th Cir. 2003). This rule, known as the "common fund doctrine," is designed to prevent unjust enrichment by distributing the costs of litigation among those who benefit from the efforts of others. *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 271 (9th Cir. 1989).

It is only fair that every class member who benefits from the opportunity to claim a share of the settlement pay his or her pro rata share of attorney's fees, and Plaintiff's request for fees here means that Class Counsel seek an amount of fees less than the amount Class Counsel would likely receive if they represented each class member individually. Typical contingent fee contracts of plaintiffs' counsel provide for attorney's fees of about 40% of any recovery obtained for a client. It would be unfair to compensate Class Counsel here at a substantially lesser rate because they obtained relief for hundreds of class members. To the contrary, equitable considerations dictate that Class Counsel be rewarded for achieving a settlement that confers benefits among so many people, especially without protracted litigation. The result achieved by Class Counsel merits an award of attorney's fees equal to 33.3% of the total recovered value in this case.

3. The Low Number of Requests for Exclusion and Absence of Objections Support the Fee Request

The low number of requests for exclusion and the lack of objections from the Settlement also demonstrates the fairness and reasonableness of the fee request. (*See Garner v. State Farm Mut. Auto Ins. Co.* (N.D. Cal. 2010) 2010 U.S. Dist. LEXIS 49482, at *5 ["a single objection out of a sizeable class, after notice, further demonstrates the reasonableness and fairness of Class Counsels' request"]; *In re Rite Aid Sec. Litig.* (3d Cir. 2005) 396 F.3d 294, 305 [low level of objections is "rare phenomenon"]).

Here, notices of the Settlement were sent to all 40,293 Class Members. (Unkefer Decl., ¶ 4.) To date, zero objections and only 3 requests for exclusion have been submitted. (*Id*., ¶¶ 7-8.) Only .007% of the Class have requested exclusion. Thus, the absence of objections and the low number of requests for exclusion speak to the fairness of the requested fee award.

VIII. The Requested Award of Costs is Also Fair, Adequate, and Reasonable and Warrants This Court's Final Approval

Here, the Agreement provides for Plaintiff to seek an award of costs in an amount not to exceed $20,000. (Agreement, ¶ 3.1). Plaintiff has incurred $9,755 in litigation expenses including filing fees, service of process fees, mediator's fees, and other expenses. (Declaration of Shaun Setareh ISO Fee Motion., ¶ 22; Exh 2.) All of these costs are documented and reasonably incurred. (*Id*.)

Plaintiff requests $9,755 in costs, which is less than the amount provided under the Settlement Agreement which provides for up to $20,000 in costs. (Agreement, ¶ 3.1). Thus, Plaintiff's request for litigation costs of $9,755 is fair and reasonable and should be granted.

The expenditure of costs by Class Counsel conferred a significant benefit to the Class, in that Class Counsel completely financed this risky litigation. Among other costs, Class Counsel fronted thousands of dollars in filing fees, service of process fees, mediator's fees, and other expenses. Each of these expenditures increased the value of the case significantly, since without expending these costs the case could not have moved forward to a favorable resolution.

Furthermore, actual litigation costs are not traditionally considered an "award" as they are costs that were actually expended by Plaintiff's counsel in the course of litigation. Plaintiff's counsel does not seek any additional benefit by requesting to be paid for these costs, since they are simply a dollar-for-dollar reimbursement. Indeed, given the time value of money, Class Counsel will actually *lose* money by being reimbursed only for actual costs, many of which were incurred months or years ago. Accordingly, Class Counsel's request for litigation costs is reasonable, and Plaintiff respectfully requests that it be finally approved.

IX. The Proposed Payment to the Claims Administrator Is Fair, Adequate, and Reasonable

American Legal Claim Services, LLC an experienced third-party administrator, was appointed to administer the notice and settlement distributions in this matter. Administration costs to date have been $18,680.52. Remaining costs are estimated to be $54,339.28. Total costs are estimated to be $73,019.80. This does not include the cost of a second distribution of uncashed checks to those individuals who cashed their checks. (Unkefer Decl., ¶ 11.) American Legal Claim Services, LLC will continue to perform services for the Settlement Class Members when it completes the calculation and distribution of payments made under the Settlement. Plaintiff therefore requests approval of a distribution to Rust Consulting, Inc. of $73,019.80 as its fee for third-party administration services.

X. California Rural Legal Assistance, Inc. is an Appropriate Cy Pres Beneficiary

The Parties designated California Rural Legal Assistance, Inc., a non-profit charitable

organization, as the *cy pres* beneficiary. In particular, according to its Executive Director, Jessica Jewell, California Rural Legal Assistance Inc. ("CRLA") is an ideal candidate to receive unclaimed or other class action or collective action funds. CRLA is a nonprofit organization providing civil legal services to California's rural indigent population. CRLA's mission is to fight for justice and individual rights alongside the most exploited communities of our society. CRLA is a nonprofit organization with 16 field offices and six programs covering rural California that support projects and work that will benefit class members in this matter or similarly situated low-wage workers. CRLA promotes the enforcement of the law consistent with the objectives and purposes of the underlying cause of action by engaging in advocacy that improves and protects information contained in consumers credit reports. (Declaration of Jessica Jewell filed on March 23, 2023 Supplemental Briefing ISO Motion for Preliminary Approval, ¶¶ 1-2.)

Established in 1966, CRLA meets its mission by serving low-income individuals residing in over 26 rural California counties. In In 2022, CRLA closed over 7,500 cases for low-income residents, impacting more than 20,000 household members. Over 60% of cases closed were resolved to the benefit of the client. Positive outcomes included preserving a client's housing, obtaining relief from workplace discrimination or harassment, and securing public benefits, among other outcomes. CRLA achieved approximately $8 million in financial benefits for clients. Financial benefits include money recovered for clients, such as unpaid wages, and money saved for clients, such as when foreclosure is prevented. In addition, CRLA estimates that the organization reached more than 20,000 Californians through workshops, community legal education, information distribution, and other forms of outreach. Of cases closed in 2022, 761 were labor and employment cases impacting 2,330 household members. CRLA advocate determination and advocacy (1) increase client access to high-quality, no-cost legal services; (2) ensured the equitable and fair distribution of resources in rural communities; and (3) protected the rights of low-income individuals to seek justice under the law. (*Id*. ¶ 3.)

California Rural Legal Assistance, Inc. is an appropriate *cy pres* beneficiary for this Settlement as it comports with the requirements of Code of Civil Procedure section 384. California

Rural Legal Assistance, Inc. has a national reputation for its aggressive and imaginative advocacy on behalf of California's farmworkers, the rural poor, including children, racial, cultural and linguistic minorities, and more recently lesbian, gay, bisexual and transgender (LGBT) individuals. CRLA focuses its service delivery and community support through five priority areas: Labor/Employment, Education, Health and Human Well-Being (including combatting environmental racism), Housing, and Leadership Development. Their work has brought about significant gains in educational funding for the children of migrant farmworkers in California, improvements in water supply and access in the Central Coast, recovery of unpaid worker wages from and penalties against employers who violate state and federal wage and hour laws, reductions in pesticide use and exposure for all Californians, adequate controls over local increases in water rates for poor communities, and the improved enforcement of housing elements in rural areas. (*Id*. ¶¶ 3-4.)

CRLA's Health Consumer Program, Fair Housing and Foreclosure Prevention Program and Rural Reentry Program all represent rural low-income Californians matters related to the Fair Credit Reporting Act. These three CRLA programs, in collaboration with legal aid partners, also conduct trainings and provide information on the importance of and how to improve and maintain their credit standing. (*Id*. ¶ 6.) Without CRLA's advocacy, California's rural poor, immigrant workers and non-English speaking workers would be ill-equipped or unable to assert their legal rights. Consequently, CRLA is a nonprofit organization whose representation and advocacy on the behalf of low-income individuals throughout rural California impacts class members and similarly situated persons consistent with the objectives and purposes of the underlying causes of action in this matter. Cy pres funding allows CRLA to perform much of the work detailed above, and CRLA plans to use any cy pres funds received in this case to further their advocacy on the behalf of low-income individuals in rural California. (*Id.* ¶ 7.)

CRLA's finance, management and operations systems allow them to provide the Court with proper accounting, at intervals the Court deems appropriate, to verify all awarded cy pres funds are properly used within the spirit of the interests of class members in this matter. (*Id.* ¶ 8.)

The parties have no interest or involvement in the governance or work of the cy pres recipient CRLA. Declarations disclosing the lack of interest by each counsel and Plaintiff were filed on March 23, 2023 with the Supplemental Briefing In Support of Plaintiff's Motion for Preliminary Approval

XI. CONCLUSION

Plaintiff negotiated a settlement that resolves claims and recovers money for approximately 40,293 Settlement Class Members. This settlement is fair and reasonable, especially given the claims and the potential defenses to them and to class certification. Plaintiff asks the Court to grant final approval of the settlement and adopt the proposed order submitted herewith.

Respectfully submitted,

SETAREH LAW GROUP

Dated: August 29, 2023

BY *__/s/ Farrah Grant*_____
SHAUN SETAREH
THOMAS SEGAL
FARRAH GRANT
Attorneys for Plaintiff
Danyell Sanders