Joshua P. Davis, SBN 193254
jdavis@bm.net
BERGER MONTAGUE PC
505 Montgomery Street, Suite 625
San Francisco, CA 94111
T. 415-906-0684; F. 215.875.4604

E. Michelle Drake (*pro hac vice*)
emdrake@bm.net
Joseph C. Hashmall (*pro hac vice*)
jhashmall@bm.net
BERGER MONTAGUE PC
1229 Tyler Street NE, Suite 205
Minneapolis, MN 55413
T. 612.594.5995; F. 612.584.4470

Attorneys for Plaintiffs

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN MATEO
UNLIMITED CIVIL

DAVID WALKER, MELISSA ROSS, and BENJAMIN WILSON, individually and as representatives of the Class,

Plaintiffs,

v.

INFLECTION RISK SOLUTIONS, LLC,

Defendant.

Case No.: 22-CIV-02954

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Assigned for all purposes to
Hon. V. Raymond Swope

Date: November 4, 2024
Time: 3:00 PM
Department: 23

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules & Statutes

Other Authority

INTRODUCTION

Named Plaintiffs David Walker, Melissa Clark (nèe Ross), and Benjamin Wilson ("Plaintiffs"), individually and on behalf of the Settlement Class,[1] seek preliminary approval of a proposed settlement of the Named Plaintiffs' claims against Defendant Inflection Risk Solutions, LLC ("Defendant") (together with Plaintiffs, the "Parties") for alleged violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* ("FCRA"). The Settlement Agreement between Plaintiffs and Defendant, if approved, will resolve all class claims asserted in this action in exchange for the establishment of a substantial $1,765,000 all cash non-reversionary common fund for the benefit of the Settlement Class.

The proposed settlement is the product of extensive arm's-length negotiations by experienced and informed counsel and warrants preliminary approval, as the terms are fair, reasonable, and adequate, and the relief for the Class is very meaningful. Accordingly, Plaintiffs request that the Court: (1) preliminarily approve the proposed settlement, (2) certify the Settlement Class for settlement purposes only, (3) appoint Named Plaintiffs as Class Representatives, (4) appoint Named Plaintiffs' counsel as Class Counsel, (5) direct notice to be distributed to the Settlement Class, and (6) schedule a final approval hearing. Defendant does not oppose the relief sought in this motion.

This Court has set a hearing for this motion on November 4, 2024. If, however, the Court determines that this motion can be resolved on the papers, the Parties request that the November 4 date be used for the final approval hearing instead, which provides enough time for class notice as long as preliminary approval issues on or before May 30, 2024.

BACKGROUND

I. PROCEDURAL HISTORY.

Plaintiffs filed their initial class action complaint on July 20, 2022, in the Superior Court of California, County of San Mateo, alleging violations of the FCRA and of Cal. Civ.

[1] Unless otherwise explicitly defined herein, all capitalized terms have the same meanings as those set forth in the Parties' Settlement Agreement, attached to the Declaration of E. Michelle Drake ("Drake Decl.") as Ex. 1.

Code § 1786.20 and Cal. Bus. & Prof. Code § 17200 by Defendant for failing to maintain and follow reasonable procedures to assure maximum possible accuracy in the reports it furnished on consumers. (*See* Compl.) On August 25, 2022, Plaintiffs filed the First Amended Complaint, adding Plaintiff Clark (nèe Ross), and clarifying class allegations under the same statutory provisions. (*See* First Am. Compl.) On November 10, 2022, Defendant filed a General Denial of the First Amended Complaint allegations. (*See* Gen. Denial.)

The Parties then commenced informal exchanges of information, and Defendant provided data samples which Plaintiffs reviewed and analyzed. This analysis was a complex multi-step process, wherein the Plaintiffs received an initial data set from Defendant. Plaintiffs then engaged in extensive meet and confers with Defendant regarding the meaning of the data and the availability of additional data. Based on these meet-and-confers, Defendant produced a supplemental data set. Plaintiffs then analyzed the initial data and the supplemental data, comparing those data sets to public record data, and consulting with experts regarding the data sets and how they could be used and reviewed on a class-wide basis. Armed with this information, the Parties participated in a full day mediation with third party neutral Lou Peterson, Esq. on August 17, 2023. While the case did not settle at mediation, the Parties continued to have fruitful arms' length negotiations through counsel over the next months, and on March 7, 2024, a binding Terms Sheet was fully executed.

On March 29, 2024, by the Parties' agreement, Plaintiffs filed the Second Amended Complaint, re-asserting the prior allegations, narrowing and clarifying the class allegations to one class in alignment with the settlement terms, and removing prior named plaintiffs who settled with Defendant individually, and adding Plaintiff Wilson. (*See* Second Am. Compl.)

The Parties also formalized and executed the Settlement Agreement and its Exhibits, presented here. Plaintiffs now submit this unopposed motion requesting that the Court certify the proposed Settlement Class for settlement purposes and preliminarily approve the

Parties' Settlement Agreement.

II. SUMMARY OF THE PLAINTIFFS' SETTLED CLAIMS.

As alleged in the Second Amended Complaint, the claims in this case are regarding Defendant's inaccurate reporting of criminal histories due to its failure to employ reasonable procedures to ensure maximum possible accuracy in its reporting. Specifically, Plaintiffs allege that Defendant used loose matching criteria that failed to exclude matches to sex offender registries and criminal record databases even when the consumer's and the offender's date of birth and address information were different. (*See* Second Am. Compl. ¶¶ 1-9.)

Defendant raised numerous defenses during litigation. Among other things, Defendant asserted that even if there were any FCRA violations, which it contended there were not, those violations were not willful, thus foreclosing recovery of statutory damages, as well as contested that a class was certifiable in litigation. Defendant also raised concerns about the ease with which information in a public record could be compared, using automated means, to information submitted by an applicant. For example, Defendant pointed out that many public records contain both aliases and multiple dates of birth that have been used by the convicted individual. Although Plaintiffs do not concede that they agree with any of the defenses asserted by Defendant, Plaintiffs acknowledge that, based on the defenses asserted by Defendant, there was a recognizable risk to the Plaintiffs, as well as the Settlement Class Members, that their claims could fail on the merits.

III. THE SETTLEMENT AGREEMENT.

A. Overview of Terms.

Defendant denies any liability for the claims asserted, but to avoid the further costs and burdens of litigation, and without any admission of liability, the Parties have agreed to settle. The proposed Settlement Class is defined to encompass the following groups of individuals:

Name & DOB Match Group:
All consumers who were: (1) subject to at least one Inflection report under its

SafeDecision brand provided to a third-party from July 20, 2020 to May 30, 2024 ; (2) which included a criminal record attributed to the consumer; and (3) the consumer's first name, last name, and date of birth provided to Inflection to conduct the consumer's screening as indicated on the report did not match the first name, last name, and date of birth fields included on the report for the criminal record.

SOR Reports Group:
All consumers who were subject to at least one Inflection report provided to a third-party indicating that the consumer was listed on a sex offender registry ("SOR Report") from July 20, 2020 to May 30, 2024.

Successful Disputes Group:
All consumers who were (1) subject to at least one SOR Report from July 20, 2020 to May 30, 2024; (2) where Inflection's data tables pertaining to disputes contain codes that Inflection reasonably believes indicate that the consumer may have disputed with Inflection that the sex offender registry record in the SOR Report did not belong to them; and (3) by the date of preliminary approval , Inflection's records reflect that the consumer's dispute of the report was successful.

(SA ¶ 23.)

The Parties presently believe that the Name & DOB Match Group contains approximately 2,100 individuals, the SOR Reports Group contains approximately 26,000 individuals, and the Successful Disputes Group contains approximately 350 individuals. Settlement Class Members who do not opt out will release all claims arising out of or relating directly or indirectly to the facts alleged or which could have been alleged in the operative complaint in this matter. (*Id.*)

In consideration for the release of the Settlement Class Members' claims, Defendant will pay $1,765,000 to the Settlement Class as part of a common settlement fund. (*Id.* ¶ 22.) In no circumstance will any portion of this fund revert to the Defendant. (*Id.* ¶ 32.) After any Court-approved deductions for attorneys' fees, costs, settlement administration costs, and Class Representative service awards, the entire remaining fund will be distributed such that Successful Dispute Group Members will each be entitled to an automatic payment of $1,500, and the balance will then be distributed *pro rata* to those SOR Reports and Name & DOB Match Group Members who returned timely, valid claim forms, with payments capped at $1,500. (*Id.* ¶ 28.)

While the precise per-claiming class member recovery cannot be calculated until the number of claim forms received is known, the Parties expect the recovery for claiming members of the SOR Reports and Name & DOB Match Groups to approach $500.[2]

Should any funds remain after the close of the check cashing period, if sufficient funds remain to allow for a pro rata redistribution to the class, those funds will be so distributed. (*Id.* ¶ 32.) If funds still remain, then those funds will be requested to be donated evenly to the Parties' designated charitable *cy pres* recipients, Bay Legal, Defy Ventures, and Breakthrough Colorado. (*Id.*) These organizations, which are dedicated to providing legal services to the underserved and helping individuals with criminal records reintegrate, meet the requirements of Cal. Civ. Code § 384(b), as they are advocacy organizations, aimed at social inequalities, and provide representation to those who would not normally have access to the justice system.

After soliciting bids, the Parties selected American Legal Claim Services, an independent third party, to serve as the Settlement Administrator. The Settlement Administrator will handle preparation and mailing of the notices, receive and track Claim Forms and exclusion requests, implement and maintain the Settlement Website and telephone line, calculate, issue and mail settlement payments, and other administrative tasks. Administration costs are currently estimated to be $97,991, which will be requested to be deducted from the settlement fund. (*Id.* ¶ 31.)

B. Form of Notice.

The Parties have agreed to the forms of notice attached to the Settlement Agreement as Exhibits A-E. All Settlement Class Members shall be mailed a postcard notice via first class U.S. mail, and sent notice via email if they have a known email address, and the notice shall inform the Class Members of which Group they are a member of. (*Id.* ¶ 34.) Prior to mailing, the Settlement Administrator shall update the addresses provided by Defendant,

[2] Specifically, at a 5% claims rate, the expected recovery for these class members will approach $500. That said, depending on the response and validation rate, the recovery could be more or less.

through the use of any appropriate databases routinely used for the purpose of updating mailing addresses. (*Id.* ¶ 35.) All of the notices inform Settlement Class Members of basic information about the settlement. (*Id*., Exs. A-E.) Further, the notices will inform Settlement Class Members how to obtain additional information about the settlement, including the URL for the Settlement Website and a toll-free telephone number to contact the Settlement Administrator. (*Id*.) The mailed notice to SOR Reports and Name & DOB Match Group Members will also include directions to complete the Claim Form online, and inform of the deadline by which to do so. (*Id.*) The Claim Forms are simple, requesting only the information necessary to assure the Group Members is truly eligible to receive a payment. (*Id.* ¶ 37.)

Claim Forms will be verified and validated by Class Counsel, subject to Defendant's review. (*Id.* ¶ 41.) This means that Class Counsel will affirmatively review the claims received to ensure that the individual making the claim is in fact not the actual subject of the criminal or sex offender record at issue, including, if needed, requesting and reviewing relevant public records, and comparing those records to the information received on the Claim Form. This will ensure that only those eligible will receive payment. It also means that Class Counsel's work on this matter is far from complete.

The Settlement Website will contain the Long Form Notice (Ex. E), copies of relevant pleadings, and will provide Settlement Class Members with the ability to submit Claim Forms, tax information and/or change-of-address information. The Website will be updated on a regular basis throughout the settlement process. (*Id.* ¶ 43.) The Settlement Administrator will also maintain a toll-free telephone number for questions related to the settlement. (*Id.* ¶ 44.)

C. Opt-Outs and Objections.

The proposed notices also inform all Settlement Class Members of their right to opt out of or object to the settlement and of the associated deadlines. Settlement Class Members who choose to opt out must send a written notice to the Settlement Administrator stating the individual's desire to opt out of the settlement. (*Id.* ¶ 45.) To object, a Settlement Class

Member must mail their objection by first class mail to the Settlement Administrator and the Court. (*Id.* ¶ 48.) The statement must state the case name and number; list the Class Member's name, address, phone, and email information; state the basis of the objection; and be signed by the Settlement Class Member. (*Id.*)

D. Attorneys' Fees, Costs, and Named Plaintiff Service Awards.

The Settlement Agreement contemplates Class Counsel petitioning the Court for attorneys' fees in an amount not to exceed 25% of the settlement fund, as well as documented, customary costs incurred by Class Counsel. (*Id.* ¶ 30.) Class Counsel may also petition the Court for $5,000 per Named Plaintiff, as service payments for Plaintiffs. (*Id.* ¶ 29.) Any approved awards will be deducted from the Settlement Fund prior to distribution to the participating Settlement Class Members. Class Counsel will formally petition the Court for these amounts fourteen (14) days prior to the Opt-Out Deadline and will post a copy of the motion papers on the Settlement Website so that Settlement Class Members are able to review them prior to the deadline to opt out or object to the settlement. (*Id.* ¶ 58.) Neither the attorneys' fees nor the proposed service awards were negotiated before the other settlement terms were agreed upon, and neither final approval, nor the size of the settlement fund, are contingent upon the full amount of any requested fees or service awards being approved. (*Id.* ¶ 30.)

ARGUMENT

A class action may not be settled or compromised without "the approval of the court after hearing." Cal. Rules of Court, rule 3.769. The purpose of this requirement is "[t]o prevent fraud, collusion, or unfairness to the class," and the court must determine whether "the settlement is fair, adequate, and reasonable." *Dunk v. Ford Motor Co.*, 56 Cal. Rptr. 483, 487-88 (Ct. App. 1996) (internal quotation omitted). "Public policy generally favors the compromise of complex class action litigation." *In re Cellphone Termination Fee Cases*, 104 Cal. Rptr. 3d 275, 281 (Ct. App. 2009) (internal quotation omitted). Review is accomplished through a two-step process. At the preliminary approval stage, the court need only determine whether the proposed settlement is within the range of reasonableness, and

thus whether notice to the class of the settlement terms and conditions and the scheduling of a formal fairness hearing are worthwhile. *See* Cal. Rules of Court, rule 3.769(c); Newberg on Class Actions § 13:13 (5th ed.) ("[C]ourts grant[] preliminary approval where the proposed settlement [i]s neither illegal nor collusive and is within the range of possible approval.") (internal quotation omitted). In this context, "the Court need not address whether the settlement is ideal or the best outcome, but only whether the settlement is fair, adequate, free from collusion and consistent with Plaintiff's fiduciary obligations to the class." *Hopson v. Hanesbrands Inc.*, No. CV-08-0844 EDL, 2008 WL 3385452, at *2 (N.D. Cal. Aug. 8, 2008). In the event a court finds that the settlement falls within the range of possible approval, notice is issued and a final approval hearing scheduled.

For the reasons set forth below, the Court should: (1) preliminarily approve the Parties' proposed settlement, (2) certify the Settlement Class for settlement purposes only, (3) approve the class notices for distribution, (4) appoint Named Plaintiffs as Class Representatives and Named Plaintiffs' counsel as Class Counsel, and (5) set a date for the final approval hearing.

I. THE SETTLEMENT TERMS ARE FAIR, REASONABLE, AND ADEQUATE.

"In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as the strength of plaintiffs' case, the risk, expense, 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 stage 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." *Wershba v. Apple Comput., Inc.*, 110 Cal. Rptr. 2d 145, 162 (Ct. App. 2001). In the class settlement context "a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." *Dunk*, 56 Cal. Rptr. 2d at 488; *Carter v. City of Los Angeles*, 224 Cal. App. 4th 808, 820, 169 Cal. Rptr. 3d 131, 141

(2014). Under these factors, the settlement here should be preliminarily approved.

A. The Proposed Settlement Was Reached After Motions Practice, Discovery, and Arm's-Length Negotiations Between Experienced Counsel.

Prior to settlement, the Parties engaged in an extensive investigation of the claims and informal discovery, exchanging documents and significant amounts of data regarding the class and Defendant's practices and procedures, including holding a number of meet and confers, conducting extensive data review and comparison of the data with available public record data, as well as expert consultation. The settlement was reached only after a full-day mediation and months-long negotiations between counsel. Additionally, attorneys' fees and service payments for the Class Representatives were not discussed or negotiated until all other material settlement terms had been agreed upon, eliminating the possibility of a trade-off between compensation for the Settlement Class and compensation for Class Counsel or the Named Plaintiffs.

Furthermore, both Plaintiffs and Defendant are represented by counsel who have significant experience in class action litigation and settlements, and, for Plaintiffs' Counsel, in FCRA cases in particular. Plaintiffs' Counsel have litigated FCRA class actions for over a decade and are recognized as national leaders in the field. (Declaration of E. Michelle Drake ("Drake Decl.") ¶¶ 4-12.) The judgment of Counsel is entitled to deference. *See Kullar v. Foot Locker Rental, Inc*., 85 Cal. Rptr. 3d 20, 31 (Ct. App. 1998) ("The court … should give considerable weight to the competency and integrity of counsel and the involvement of a neutral mediator in assuring itself that a settlement agreement represents an arm's-length transaction entered without self-dealing or other potential misconduct.").

B. The Settlement Is Well Within the Range of Approval.

1. Recovery for the Class Is Substantial.

The settlement is impressive when considering the range of possible recoveries for the Settlement Class, Defendant's potential defenses, and the number of procedural hurdles between the Plaintiffs and a final judgment.

Here, the settlement provides substantial relief for Settlement Class Members. For

participating Class Members, the estimated net payment is likely to range between $500 and $1,500, depending on the group. This is an impressive recovery given that the statutory damages range provided by the FCRA is $100 to $1,000 per violation. 15 U.S.C. § 1681n. To achieve this result in litigation, Plaintiffs would have had to recover the maximum possible statutory damages amount, as well as actual or punitive damages on a class basis, a difficult feat. This range of recovery also compare favorably to other FCRA settlements involving inaccurate reporting. *See, e.g.*, *Saylor v. Realpage*, No. 1:22-cv-00053, ECF No. 109 (E.D. Va. 2022) (approving FCRA settlement regarding inaccurate sex offender records with base payment for class members of roughly $399); *Brown v. On-Site*, No. 20-cv-482, ECF No. 82 (E.D. Va.) (case alleging similar §1681e(b) claims where net automatic payments were approximately $473); *Patel v. Trans Union, LLC*, No. 14-522, 2018 WL 1258194, *1 (N.D. Cal. Mar. 11, 2018) (settlement of inaccurate reporting claims provided for automatic payments of $400); *Feliciano v. CoreLogic SafeRent, LLC*, No. 17-5507 (S.D.N.Y.) (settlement of inaccurate reporting claims, providing $450 each for 1,921 class members); *Brown v. Corelogic*, No. 3:20-cv-363 (E.D. Va.) (settlement of $8,250,000 for approximately 8,250 class members); *Steinberg v. CoreLogic Credco, LLC*, No. 3:22-cv-498, ECF No. 46 at 15, ECF No. 49 (S.D. Cal 2023) (preliminary approval of settlement regarding deceased reporting where claiming class members are expected to receive roughly $600); *McAfee v. CIC Mortgage Credit, Inc.*, No. 3:22-cv-772, ECF No. 40 at 3, ECF No. 44 (E.D. Va. 2023) (preliminary approval of settlement where claiming class members are expected to receive roughly $525); *Roe v. IntelliCorp Records, Inc.*, No. 12-2288, ECF No. 139 (N.D. Ohio June 5, 2014) (final approval of settlement of alleged inaccurate reporting, and other FCRA claims, providing for $50-$270 net per class member); *Ryals v. HireRight Sols. Inc.*, No. 09-625, ECF No. 127 (E.D. Va. Dec. 22, 2011) (final approval of settlement involving §1681e(b) claims, providing $15-$200 *gross* per class member recovery); *Ori v. Fifth Third Bank, Fiserv, Inc.*, No. 08-432, ECF No. 217 (E.D. Wis. Jan. 10, 2012) (final approval of settlement of alleged inaccurate mortgage loan reporting, claims-made, each claimant receiving approximately $55); *Speers v. Pre-Employ.com, Inc.*, No. 13-1849, ECF No. 83

(D. Or. Feb. 10, 2016) (final approval of settlement of failure to maintain strict procedures when reporting adverse public record information, resulting in approximately $153 net per class member); *Villaflor v. Equifax Info. Servc. LLC*, No. 09-329, ECF No. 177 (N.D. Cal. May 3, 2011) (final approval of settlement of §1681e(b) claims, providing credit monitoring for class members with a retail value of $155).

Class Members are thus likely to recover, under the settlement, a considerable portion of what they could have recovered in litigation. A recovery of a meaningful percentage of the likely award if these claims had proceeded all the way through final judgment is a significant result. *See Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) ("it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators.") (quote omitted)*; City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 n.2 (2d Cir. 1974) ("[T]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery."), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000); *see also 7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135, 1150, 102 Cal. Rptr. 2d 777, 787 (2000).

The differences in recovery between groups and the requirement for a claim form for some groups is also permissible. A claim form is required here for the SOR Reports and Name & DOB Match Group Members to ensure that the record reported about them was, in fact, not theirs. That is, in order to recover under the settlement, members of those groups will have to make clear that they are not in fact the party in the criminal or sex offender record that Defendant reported about them. This is reasonable, as it ensures that only those entitled to compensation receive it. Members of the Successful Disputes Group, in contrast, have already undertaken the work to establish that the record reported about them was, in fact, not theirs – they filed disputes with Defendant doing exactly that and there would be no purpose in requiring them to undertake that process again. Further, it is reasonable to

ensure that those who contemporaneously undertook the process of correcting their reports receive the maximum compensation under the settlement – those individuals presumptively were harmed and/or upset by the error, as demonstrated by the effort they put into correcting it.

Taken all together, the gross recovery, the per-class member recovery, and the method of distributing the settlement proceeds are all fair and reasonable and warrant preliminary settlement approval. *See In Re Toys R Us-Delaware, Inc.--Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 453-54 (C.D. Cal. 2014) ("Viewed from the perspective of each class member, had the class member sued Toys individually and proved that it acted wil[l]fully, he or she could have recovered between $100 and $1,000 in statutory damages. . . . A $5 or $30 award, therefore, represents 5% to 30% of the recovery that might have been obtained. This is not a *de minimis* amount. Given the likelihood that plaintiffs would have been unable to prove actual damages and the risk that they would have been unable to prove willfulness and recover any damages at all, the court finds that the amount of the settlement weighs in favor of approval.").

2. The Release is Appropriate

The release of claims is narrowly tailored to claims arising out of or relating directly or indirectly to the facts alleged or which could have been alleged in the operative complaint in this matter. (SA ¶ 52.) Such a release is appropriate, as it ensures finality for the parties without releasing class member claims with no relation to the claims asserted here. *See Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal. App. 4th 399, 411, 112 Cal. Rptr. 3d 324, 334 (2010) (overruling objection to release of similar scope and wording); *Spann v. J.C. Penney Corp.*, 314 F.R.D. 312, 327 (C.D. Cal. 2016) (approving similar release).

3. Plaintiffs Face Significant Risks in the Absence of Settlement.

The impressive nature of this recovery comes into even sharper focus when the risks of further litigation are considered. Plaintiffs had yet to survive class certification or summary judgment. While Plaintiffs are confident that these obstacles could have been

overcome, each of these phases of litigation presents serious risks, which the settlement allows Plaintiffs to avoid.

Plaintiffs faced specific risk on the issue of willfulness. The FCRA is not a strict liability statute. *Dalton v. Capital Associated Indus.*, 257 F.3d 409, 417 (4th Cir. 2001). A FCRA plaintiff can recover statutory damages only where the defendant has acted willfully. 15 U.S.C. § 1681n(a)(1). Plaintiffs expect that if the matters were litigated, Defendant would contest the question of willfulness vigorously. Establishing that there were errors in Defendant's reporting is not sufficient to establish that Defendant had unreasonable procedures: Plaintiffs would need to point to systemic issues in the way that Defendant matched individuals with criminal and sex offender records, prove that those issues amounted to unreasonable procedures, and prove that Defendant's alleged failure to enact reasonable procedures was willful. *See Chakejian v. Equifax Info. Servs., LLC*, 275 F.R.D. 201, 212 (E.D. Pa. 2011) (proving willfulness in FCRA case was "a high hurdle to clear," was a factor weighing in favor of settlement approval).

Plaintiffs also faced risks at class certification, specifically with respect to ascertaining the class. Here, the Parties are proposing to use a claim form to allow members of the Class to self-identify as individuals to whom a criminal or sex offender record was wrongly attributed, and to then verify such attestations by reviewing available public records. Outside of the settlement context, that proposition becomes much more difficult. While Plaintiffs believe that mismatches can largely be identified on a systematic basis, that public records could be admitted wholesale and serve as the subject of expert and summary witness testimony, and that any remaining individualized issues would not have predominated in the litigation, Plaintiffs recognize that, in the unique factual context of this case, Plaintiffs' proposed methodologies for identifying affirmative mismatches, on a class basis, was one which the Court might have rejected (or substantially modified) on a contested motion.

II. CERTIFICATION OF THE SETTLEMENT CLASS IS APPROPRIATE.

Plaintiffs request that the Court certify the Settlement Class for settlement purposes

under Cal. Code Civ. P. § 382, which authorizes class actions where "[t]he question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." "To obtain certification, a party must establish the existence of both an ascertainable class and a well-defined community of interest among the class members." *Linder v. Thrifty Oil Co.*, 2 P.3d 27, 31 (Cal. 2000). "The community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." *Richmond v. Dart Indus., Inc.*, 629 P.2d 23, 28 (Cal. 1981). "In addition, the assessment of suitability for class certification entails addressing whether a class action is superior to individual lawsuits or alternative procedures for resolving the controversy." *Bufil v. Dollar Fin. Grp., Inc.*, 76 Cal. Rptr. 3d 804, 812 (Ct. App. 2008).

Here, certification of the Settlement Class is warranted, because the Class is numerous and the community of interest requirement is satisfied by the existence of common facts and legal claims.

A. Certification of a National Class is Appropriate.

Certification of a national class is appropriate in this Court for several reasons. First, the claims asserted by Plaintiffs on behalf of the Class Members are federal in nature, meaning that the legal claims at issue do not vary based on the state where the Class Member resides. Second, California courts may constitutionally exercise jurisdiction over the claims of non-California class members. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985), the Supreme Court held:

> [A] forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant. If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel . . . Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove

> himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.

Id.

California caselaw reflects the principles pronounced in *Shutts*. *See Clothesrigger, Inc. v. GTE Corp.*, 236 Cal. Rptr. 605, 608 (Ct. App. 1987) (citing *Shutts*, "[a] state may constitutionally exercise jurisdiction over the claims of nonresident plaintiffs in a nationwide class action case where the named plaintiff adequately represents the absent class members' interests and the members of the plaintiff class are given adequate notice, the opportunity to be heard and the opportunity to remove themselves from the class."). *Shutts* sets forth the minimum due process protections that are required to bind absent class members to a class action settlement. This constitutional requirement is met here because the Named Plaintiffs adequately represent the absent class members' interests (*see* § II.C.3 *infra*), the absent class members, including the nonresidents of California, will receive adequate notice (*see* § III *infra*), the opportunity to be heard, and the opportunity to remove themselves from the class action settlement (*see* § III.C. *supra*). *See, e.g., Nesbitt v. Postmates, Inc.*, No. CGC-15-547146 (Cal. Super., San Fran Cnty. Nov. 8, 2017) (finally certifying, for settlement purposes, a nationwide class in FCRA litigation in California court).

B. The Proposed Class is Ascertainable and Numerous

Numerosity is satisfied if the class is so large that joinder of all members would be impracticable. Cal. Code Civ. P. § 382. "No set number is required as a matter of law for the maintenance of a class action" and classes of as few as 28 members have been certified. *Rose v. City of Hayward*, 179 Cal. Rptr. 287, 292–93 (Ct. App. 1981). Here, the Name & DOB Match Group contains approximately 2,100 individuals, the SOR Reports Group contains approximately 26,000 individuals, and the Successful Disputes Group contains approximately 350 individuals, thus the Settlement Class contains approximately 28,450 members. Numerosity is satisfied.

As for ascertainability, "[c]lass members are ascertainable where they may be readily identified without unreasonable expense or time by reference to official records." *Aguiar v. Cintas Corp. No. 2*, 50 Cal. Rptr. 3d 135, 146 (Ct. App. 2006) (internal quotation omitted). Here, Class Members are identifiable from Defendant's records, and the use of claim forms, in conjunction with official records, will establish their eligibility for settlement payments. *See Saylor*, No. 1:22-cv-00053, ECF No. 109 (approving FCRA class action settlement with similar method of identifying settlement class members and vetting submitted claims through comparison to available public records); *In. re TransUnion Rental Screening Solutions FCRA Litigation*, No. 1:20-md-02933, ECF No. 116 (N.D. Ga. 2023) (same). Thus, the Class is ascertainable. *See Bufil*, 76 Cal. Rptr. 3d at 815 (class could be ascertained from defendant's records).

C. The Community of Interest Requirements Are Met.

1. Common Questions Predominate.

"The ultimate question the element of predominance presents is whether the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." *Brinker Rest. Corp. v. Superior Court*, 273 P.3d 513, 523 (Cal. 2012) (internal quotations omitted). Here, Plaintiffs contend there are three class-wide issues that predominate over any individual concerns. First is the question of the reasonableness of Defendant's matching procedures, and whether they violated 15 U.S.C. § 1681e(b). *See, e.g.*, *Patel v. Trans Union, LLC*, 308 F.R.D. 292, 304 (N.D. Cal. 2015) (finding common question of whether "there [were] reasonable procedures in place … to ensure the maximum possible accuracy of the information"); *Ramirez v. Trans Union, LLC*, 301 F.R.D. 408, 418 (N.D. Cal. 2014) (finding "question of whether using the name-only matching logic assures maximum accuracy"); *Soutter v. Equifax Info. Servs., LLC*, 307 F.R.D. 183, 205 (E.D. Va. 2015) (finding consumer reporting agency's procedures to "raise a common contention of reasonableness that can be resolved with common answers on a classwide basis").

Second, the willfulness of Defendant's conduct presents a critical common question. The ability to obtain statutory damages is contingent upon a finding that Defendant's violation was willful. 15 U.S.C. § 1681n(a)(1). Plaintiffs contend Defendant followed the same procedures with respect to every member of the Settlement Class, thus the answer to the question of whether Defendant's alleged violations were willful can be determined on a class-wide basis. *See Chakejian v. Equifax Info. Servs., LLC*, 256 F.R.D. 492, 500 (E.D. Pa. 2009) ("Thus, the inquiry is to [defendant's] state of mind in implementing its policies and procedures, not on the customer's particular interaction with the CRA . . . To prove willfulness here, a consumer-by-consumer inquiry is not necessary."); *Soutter*, 307 F.R.D. at 207 ("[C]ommon evidence applicable across all class members regarding willfulness will resolve a common contention and drive the litigation forward by common answers."); *Milbourne v. JRK Residential Am., LLC*, No. 12 Civ. 861, 2014 WL 5529731, at *6 (E.D. Va. Oct. 31, 2014); *see also Taha v. Cnty. of Bucks*, 862 F.3d 292, 309 (3d Cir. 2017) ("the trier of fact should be able to determine whether a violation was 'willful' by considering common evidence regarding defendants' actions and intent without taking into account information regarding the individual class members.").

Third, if this case were litigated, Plaintiffs contend the amount of damages could also be determined on a class-wide basis. Because Plaintiffs sought statutory and punitive damages, no individual analysis of damages would be required. *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952-53 (7th Cir. 2006).

Thus, common questions predominate here, and certification of the Settlement Class is warranted.

2. The Named Plaintiffs' Claims Are Typical.

Typicality requires that the named plaintiff's interests in the action be significantly similar to those of other class members. *See Richmond*, 629 P.2d at 28-31. A representative plaintiff's claims are typical if they (1) arise from the same event, practice, or course of conduct that gives rise to the claims of other class members, and (2) are based on the same legal theories. *See Miller v. Woods*, 196 Cal. Rptr. 69, 77 (Ct. App. 1983). When the same

underlying conduct affects the named plaintiffs and the class sought to be represented, the typicality requirement is met irrespective of varying fact patterns that may underlie individual claims. *See Daniels v. Centennial Grp., Inc.*, 16 Cal. Rptr. 2d 1, 3-4 (Ct. App. 1993). The class representative's claims do not need to be "identical" to the claims of other members of the class. *Classen v. Weller*, 192 Cal. Rptr. 914, 925 (Ct. App. 1983) ("[I]t has never been the law in California that the class representative must have *identical* interests with the class members.").

In this case, the Named Plaintiffs have the same claims as all members of the Settlement Class: violation of the requirement that consumer reporting agencies use reasonable procedures to ensure maximum possible accuracy. Claims of this sort are routinely found to be typical. Notably, at least one of the Named Plaintiffs represents each of the factual scenarios typified by the three groups in this case: Plaintiffs Walker and Wilson are members of the SOR Reports Group, Plaintiff Clark is a member of the Name & DOB Match Group, and all Plaintiffs are members of the Successful Disputes Group. Typicality is therefore satisfied.

3. The Class is Adequately Represented by the Named Plaintiffs and Plaintiffs' Counsel.

"Adequacy of representation depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class." *McGhee v. Bank of Am.*, 131 Cal. Rptr. 482, 487 (Ct. App. 1976). The Named Plaintiffs have been actively engaged in litigation. Each of the groups of the Settlement Class contains at least one of the Named Plaintiffs. The Named Plaintiffs have provided counsel with relevant documents, stayed abreast of developments and settlement negotiations, and evaluated the Settlement Agreement. (Drake Decl. ¶ 14.) They understand what it means to be a class representative and have put the interests of the Settlement Class first in making all decisions related to litigation and settlement. (*Id.*) Further, the Named Plaintiffs do not have any known conflicts of interest that would

compromise their representation of the Settlement Class. (*Id.*)

Proposed Class Counsel are highly qualified. As noted above, Plaintiffs' Counsel are experienced in class actions and FCRA litigation and are qualified to conduct this litigation. Counsel are experienced in complex class action litigation and consumer litigation in general, and FCRA litigation in particular. (Drake Decl. ¶¶ 4-13.) They are highly qualified to represent the Class here.

4. Class Action is the Superior Vehicle for Adjudication.

Finally, "class treatment in this case is plainly the superior means for resolving the litigation for both the parties and the court." *Aguiar*, 50 Cal. Rptr. 3d at 148. A class action is superior where individual claims are too small to warrant separate actions, and where duplicative or repetitious litigation is avoided through the use of the class device. *See id.*

A class action in this case is superior to other available methods for the fair and efficient adjudication of the case. A class resolution of the issues described above outweighs the difficulties in management of separate, individual claims and allows access to the courts for those who might not gain such access standing alone. This is particularly true here, in light of the relatively small amount of the damages claims that would be available to individuals, with the FCRA providing for statutory damages of $100 to $1,000 per violation. Moreover, the settlement permits individual Class Members to opt out and pursue their own actions separately if they wish to pursue a higher recovery. *See Murray*, 434 F.3d at 953 ("Unless a district court finds that personal injuries are large in relation to statutory damages, a representative plaintiff must be allowed to forego claims for compensatory damages in order to achieve class certification. When a few class members' injuries prove to be substantial, they may opt out and litigate independently.").

III. THE COURT SHOULD APPROVE DISSEMINATION OF THE CLASS NOTICES.

"In determining how to disseminate class notice of settlement—whether by direct mail, e-mail, publication, or something else—the standard is whether the notice has 'a reasonable chance of reaching a substantial percentage of the class members." *Duran v. Obesity Research Inst., LLC*, 204 Cal. Rptr. 3d 896, 907–08 (Ct. App. 2016) (internal

quotations omitted). Attached to the Settlement Agreement, the Parties have submitted their proposed notices: postcard notices to be mailed to all Class Members, and emailed if possible, and a Long Form Notice to be posted on the Settlement Website. (Drake Decl., Ex. 1 at Exs. A-E.) The postcard notices inform Settlement Class Members of the terms of the settlement and their rights and deadlines in which to exercise them, and will be mailed by group and inform Class Members of which group they are in. The Long Form Notice includes additional detail and is written in plain English. The Settlement Administrator will be updating the mailing addresses from Defendant with all appropriate, routinely used, databases at its disposal, prior to sending notice.

The proposed notices satisfy the requirement of Cal. Rules of Court, rule 3.766(d) and should be approved as they "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *7-Eleven*, 102 Cal. Rptr. 2d at 796 (internal quotations omitted).

CONCLUSION

Based on the foregoing, the Court should grant the Plaintiffs' motion and enter a preliminary approval order.

BERGER MONTAGUE PC

Date: April 19, 2024

/s/E. Michelle Drake
E. Michelle Drake (*pro hac vice*)

ATTORNEYS FOR PLAINTIFFS