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8 **SUPERIOR COURT OF CALIFORNIA**
9 **COUNTY OF SANTA CLARA**
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12 DOMENIQUE NEWMAN, on behalf of herself,
13 all others similarly situated,

14 Plaintiff,

15 vs.

16 SMITH+NOBLE HOME, INC., a Delaware
17 corporation; and DOES 1 through 50, inclusive,

18 Defendants.

Case No. 19CV346987

**ORDER RE: MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

19 The above-entitled matter came on for hearing on Wednesday, August 25, 2021, at 1:30
20 p.m. in Department 3, the Honorable Patricia M. Lucas presiding. The court reviewed and
21 considered the written submissions filed by the parties and issued a tentative ruling on Tuesday,
22 August 24, 2021. No party contested the tentative ruling; therefore, the court orders that the
23 tentative ruling be adopted as the order of the court, as follows:

24 **I. INTRODUCTION**

25 This is a putative class action for alleged violations of the Fair Credit Reporting Act
26 (“FCRA”). Plaintiff Domenique Newman (“Plaintiff”) alleges that defendant Smith+Noble
27 Home, Inc. (“Defendant”) routinely acquires consumer, investigative consumer, and/or consumer
28 credit reports to conduct background checks on Plaintiff and other employees and uses

1 information from the reports in connection with the hiring process without providing proper
2 disclosures and obtaining proper authorization. (Complaint, ¶ 2.) The Complaint, filed on April
3 17, 2019, sets forth a single cause of action for failure to provide proper disclosure in violation of
4 the FCRA.

5 The parties have reached a settlement. Plaintiff moves for preliminary approval of the
6 settlement.

7 **II. LEGAL STANDARD**

8 Generally, “questions whether a settlement was fair and reasonable, whether notice to the
9 class was adequate, whether certification of the class was proper, and whether the attorney fee
10 award was proper are matters addressed to the trial court’s broad discretion.” (*Wershba v. Apple*
11 *Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235, citing *Dunk v. Ford Motor Co.* (1996) 48
12 Cal.App.4th 1794.)

13 In determining whether a class settlement is fair, adequate and reasonable, the
14 trial court should consider relevant factors, such as “the strength of plaintiffs’
15 case, the risk, expense, complexity and likely duration of further litigation, the
16 risk of maintaining class action status through trial, the amount offered in
17 settlement, the extent of discovery completed and the stage of the proceedings, the
18 experience and views of counsel, the presence of a governmental participant, and
19 the reaction of the class members to the proposed settlement.”
(*Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at pp. 244-245, citing *Dunk, supra*, 48
20 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com’n, etc.* (9th Cir. 1982) 688
21 F.2d 615, 624.)

22 “The list of factors is not exclusive and the court is free to engage in a balancing and
23 weighing of factors depending on the circumstances of each case.” (*Wershba v. Apple*
24 *Computer, Inc., supra*, 91 Cal.App.4th at p. 245.) The court must examine the “proposed
25 settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is
26 not the product of fraud or overreaching by, or collusion between, the negotiating parties, and
27 that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” (*Ibid.*,
28 quoting *Dunk, supra*, 48 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com’n,*
etc., supra, 688 F.2d at p. 625, internal quotation marks omitted.)

The burden is on the proponent of the settlement to show that it is fair and
reasonable. However “a presumption of fairness exists where: (1) the settlement

1 is reached through arm’s-length bargaining; (2) investigation and discovery are
2 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.”

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4 (*Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at p. 245, citing *Dunk, supra*, 48
5 Cal.App.4th at p. 1802.)

6 **III. DISCUSSION**

7 **A. Provisions of the Settlement**

8 The case has been settled on behalf of the following class:

9 All applicants for employment with Defendant in the United States for whom
10 Defendant procured a background check report from April 17, 2014 to and
including October 1, 2020.

11 (Declaration of Shaun Setareh in Support of Plaintiff’s Motion for Preliminary Approval of Class
12 Action Settlement and Certification of Settlement Class (“Setareh Decl.”), Ex. A (“Settlement
13 Agreement”), ¶ 10.)

14 There are two subclasses. The “5 Year FCRA Subclass” includes class members for
15 whom Defendant procured a background check report from April 17, 2014 through and including
16 April 16, 2017. (Settlement Agreement, ¶ 10.) The “2 Year FCRA Subclass” includes class
17 members for whom Defendant procured a background check report from April 17, 2017 through
18 October 1, 2020. (*Ibid.*) Class members who are in both subclasses will be considered to be in
19 the 2 Year FCRA Subclass for purposes of allocating settlement funds. (*Ibid.*)

20 According to the terms of settlement, Defendant will pay a total non-reversionary amount
21 of \$170,000. (Settlement Agreement, ¶ 36.) The total settlement payment includes attorney fees
22 of \$56,666.66, costs up to \$20,000, an incentive award of \$5,000 for the class representative, and
23 settlement administration costs up to \$11,000. (*Id.* at ¶ 38.) From the net settlement amount,
24 40% will be allocated to the 5 Year FCRA Subclass and 60% will be allocated to the 2 Year
25 FCRA Subclass. (*Id.* at ¶ 39.) Checks remaining uncashed more than 180 days after issuance
26 will be void and the funds from those checks will be sent to the Employment Rights Project of
27 Bet Tzedek as a *cypres* recipient. (*Id.* at ¶ 39(f).)

1 **B. Fairness of the Settlement**

2 Plaintiff contends that the settlement is fair, adequate, and reasonable in view of
3 Defendant’s potential liability exposure and the risks of continued litigation. Plaintiff states that
4 the settlement was reached through arm’s-length negotiations and mediation. Plaintiff asserts
5 that there are approximately 500 class members, so potential liability would range from \$50,000
6 to \$500,000. The average payment to each class member is estimated to be \$154.67.

7 Overall, the court finds that the settlement is fair. The settlement provides for some
8 recovery for each class member and eliminates the risk and expense of further litigation.

9 **C. Incentive Award, Fees, and Costs**

10 Plaintiff requests an incentive award of \$5,000.

11 The rationale for making enhancement or incentive awards to named plaintiffs is
12 that they should be compensated for the expense or risk they have incurred in
13 conferring a benefit on other members of the class. An incentive award is
14 appropriate if it is necessary to induce an individual to participate in the suit.
15 Criteria courts may consider in determining whether to make an incentive award
16 include: 1) the risk to the class representative in commencing suit, both financial
17 and otherwise; 2) the notoriety and personal difficulties encountered by the class
18 representative; 3) the amount of time and effort spent by the class representative;
19 4) the duration of the litigation and; 5) the personal benefit (or lack thereof)
20 enjoyed by the class representative as a result of the litigation. These “incentive
21 awards” to class representatives must not be disproportionate to the amount of
22 time and energy expended in pursuit of the lawsuit.

23 (*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1394-1395, quotation marks,
24 brackets, ellipses, and citations omitted.)

25 Prior to the final approval hearing, the class representative shall file a declaration
26 specifically detailing her participation in the action and an estimate of the time spent. The court
27 will make a determination at that time.

28 The court also has an independent right and responsibility to review the requested
attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los*
Angeles Cellular Telephone Co. (2004) 118 Cal.App.4th 123, 127-128.) Plaintiff’s counsel will
seek attorney fees of \$56,666.66 (1/3 of the total settlement fund). Plaintiff’s counsel shall
submit lodestar information (including hourly rates and hours worked) prior to the final approval

1 hearing in this matter so the court can compare the lodestar information with the requested fees.
2 Plaintiff's counsel shall also submit evidence of actual costs incurred.

3 **D. Conditional Certification of Class**

4 Plaintiff requests that the putative class be conditionally certified for purposes of the
5 settlement. Rule 3.769(d) of the California Rules of Court states that “[t]he court may make an
6 order approving or denying certification of a provisional settlement class after [a] preliminary
7 settlement hearing.” California Code of Civil Procedure Section 382 authorizes certification of a
8 class “when the question is one of a common or general interest, of many persons, or when the
9 parties are numerous, and it is impracticable to bring them all before the court” As
10 interpreted by the California Supreme Court, Section 382 requires: (1) an ascertainable class; and
11 (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v.*
12 *Superior Court* (2004) 34 Cal.4th 319, 326.)

13 The “community-of-interest” requirement encompasses three factors: (1) predominant
14 questions of law or fact; (2) class representatives with claims or defenses typical of the class;
15 and, (3) class representatives who can adequately represent the class. (*Sav-On Drug Stores, Inc.*
16 *v. Superior Court, supra*, 34 Cal.4th at p. 326.) “Other relevant considerations include the
17 probability that each class member will come forward ultimately to prove his or her separate
18 claim to a portion of the total recovery and whether the class approach would actually serve to
19 deter and redress alleged wrongdoing.” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.)
20 The plaintiff has the burden of establishing that class treatment will yield “substantial benefits”
21 to both “the litigants and to the court.” (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d
22 381, 385.)

23 As explained by the California Supreme Court,

24 The certification question is essentially a procedural one that does not ask whether
25 an action is legally or factually meritorious. A trial court ruling on a certification
26 motion determines whether the issues which may be jointly tried, when compared
27 with those requiring separate adjudication, are so numerous or substantial that the
28 maintenance of a class action would be advantageous to the judicial process and
to the litigants.

1 (*Sav-On Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th at p. 326, internal quotation
2 marks, ellipses, and citations omitted.)

3 Class members can be ascertained from Defendant’s records. There are common issues
4 because Defendant’s potential liability is based on the same facts and legal issues that apply to
5 all class members regarding the background checks. No issue has been raised regarding the
6 typicality or adequacy of Plaintiff as class representative. In sum, the court finds that the
7 proposed class should be conditionally certified.

8 **E. Class Notice**

9 The content of a class notice is subject to court approval. “If the court has certified the
10 action as a class action, notice of the final approval hearing must be given to the class members
11 in the manner specified by the court.” (Cal. Rules of Court, rule 3.769(f).)

12 The notice generally complies with the requirements for class notice. (See Settlement
13 Agreement, Ex. 1.) It provides basic information about the settlement, including the settlement
14 terms, and procedures to object or request exclusion.

15 However, the notice states that class members may appear at the final approval hearing
16 only if they notify the court. The language shall be modified to make clear that class members
17 may appear at the final approval hearing without submitting any written objection and with no
18 prior notice. Additionally, the notice shall include the following:

19 Class members may appear at the final approval hearing either in person in the
20 courtroom or by telephone via CourtCall. Class members who wish to appear by
21 CourtCall should contact class counsel at least three days before the hearing if
22 possible, to arrange a telephonic appearance. Any CourtCall fees for an
23 appearance by an objecting class member will be paid by class counsel.

24 The amended notice shall be provided to the court for approval prior to mailing.

25 **IV. CONCLUSION**

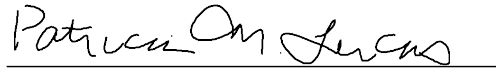
26 The motion for preliminary approval of the class action settlement is GRANTED, subject
27 to the modification to the notice. The final approval hearing is set for January 19, 2022, at 1:30
28 p.m.

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1 The Case Management Conference set for August 25, 2021, at 2:30 p.m. is vacated.

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3 Dated: August 25, 2021



4 Patricia M. Lucas
5 Judge of the Superior Court
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