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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 AWARD OF ATTORNEY FEES AND EXPENSES AND CLASS REPRESENTATIVE ENHANCEMENT AWARD

Hearing Information

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

Submitted Under Separate Cover

1. Declaration of Shaun Setareh;
2. Declaration of Danyell Sanders

[Proposed Order to be submitted with Final Approval Motion]

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 ("Plaintiff"), on behalf of herself and all others similarly situated, will, and hereby does, move this Court to:

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

(2) Award litigation expenses in the amount of $9,755;

(3) 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) the Memorandum of Points and Authorities in Support of Motion for Attorney Fees and Expenses and Class Representative Enhancement; (3) the Declaration Shaun Setareh; (4) the Settlement Agreement; (5) the Notice of Class Action Settlement; (6) the records, pleadings, and papers filed in this action; and (7) 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: July 19, 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

Plaintiff and her counsel have through their efforts, created an excellent settlement for the class in this case. The settlement provides for a non-reversionary common fund of $4,029,300. No class member will have to make a claim. Instead, checks will be mailed directly to class members.

The Settlement is for alleged violations of the Fair Credit Reporting Act ("FCRA") in connection with the pre-employment background checks allegedly conducted on Plaintiff and the class by Defendants. 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.

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. The gross settlement amount of $100 per class member ($4,029,300/ 40,293) is an excellent result. As set forth herein, it compares favorably to other FCRA stand-alone disclosure settlements. It also represents 100% of the most likely award ($100 per violation) that the class would have received if successful at a trial.

Class Counsel was able to obtain this excellent result in large part because of their experience in litigating FCRA stand-alone disclosure cases. For example, Class Counsel was counsel of record *Gilberg v. California Check Cashing Stores, LLC*, 913 F.3d 1169 (9th Cir. 2019) a landmark Ninth Circuit decision interpreting the stand-alone disclosure requirement.

Class Counsel here seeks fees under the percentage of the benefit method approved by the California Supreme Court in *Laffitte v. Robert Half Internat. Inc.,* 1 Cal.5th 480 (Cal.,2016). The fees sought are reasonable both under a percentage of the benefit analysis and a lodestar cross-check. The requested fees of $1,343,100 are one third of the $4,029,300 fund. The requested amount represents a multiplier of 3.8 given Class Counsel's lodestar of $347,650.

The Settlement here is an excellent one that was achieved in the face of substantial risk. As such, the Court should grant the motion for attorney fees and expenses, and the class

representative enhancement award. The settlement administration expenses which are reasonable and necessary to effectuate the settlement should also be approved.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Overview of the Litigation

On August 20, 2021, Plaintiff filed a Complaint in the California Superior Court for the County of San Francisco, Case No. CGC-21-594659 (the "Action"). (Settlement, ¶ 1.1.) The claim currently pending in the Action alleges that Defendants provided non-compliant background check disclosure forms prior to obtaining background reports in violation of Section 1681b(b)(2) of the FCRA, 15 U.S.C. § 1681b(b)(2)(A). (Settlement, ¶ 2.1.) If the case proceeded, Plaintiff may also have alleged violations of Section 1786 of the ICRAA, Cal. Civ. Code § 1786; Section 1785 of the CCRAA, Cal. Civ. Code § 1785; and California's UCL, Cal. Bus & Prof. Code § 17200, based on the allegations above. (*Id.*)

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. (Setareh Decl., ¶ 15.) 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.

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

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 $1000 . . . such amount of punitive damages as the court may allow."

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" 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 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, like 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 FRA 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 Decl., ¶¶ 10-12.) Plaintiff engaged Defendants in informal discovery in advance of

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

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.)

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 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. (Settlement, ¶ 2.3; Setareh Decl., ¶ 14.)

F. Material Terms of the Proposed Class Action Settlement

1. The Proposed 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 estimated number of class members is 40,293. (*Id.* ¶ 1.4)

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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.)

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4. A Consumer- Friendly Settlement Payment Distribution Process

The Parties have negotiated a notice procedure to minimize the burden to Settlement Class Members. (Settlement, ¶ 5.2.) The Settlement Agreement provides that the Settlement Administrator will send the Notice of Settlement to the last-known e-mail address for each Class member. For those individuals for whom Defendants do not possess a last-known e-mail address or e-mail delivery fails, the Settlement Administrator shall mail the Notice (Settlement, ¶ 5.2.2.) Unlike some other FCRA settlements under Section 1681b(b)(2), Class Members will not have to submit a claim form in order to receive payment. (*Id.*, ¶ 3.5.) Instead, the Individual Settlement Payments will be mailed by the settlement administrator to the Participating Class Members within 45 days after the Effective Date of the Settlement. (*Id.*, ¶ 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)

G. Class Counsel's Experience in FCRA Cases

Class Counsel are highly experienced at litigating FCRA stand-alone disclosure cases. *See* Setareh Decl. ¶¶ 6-9. 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.

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

III. ARGUMENT

A. The Court Should Approve the Requested Attorney Fees.

The request award of one third of the common fund comports with California law. As set forth herein, the settlement that Class Counsel achieved is an excellent one, and it was achieved in the face of substantial risk. Class Counsel is experienced in litigating FCRA actions, and was able to use that experience to obtain a substantial benefit for the class. This case involved substantial risk, and the litigation was undertaken on a contingent basis with no guarantee of recovery. A lodestar cross-check also supports the requested fee.

1) The Court Should Use the Percentage of the Fund Method to Approve Attorneys Fees.

It is well recognized that a litigant who creates a fund on behalf of a class is entitled to payment out of the fund. As the U.S. Supreme Court has said: "A litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

"The primary basis of the fee award remains the percentage method." (*Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1050.) The Supreme Court of California has held that where a common fund has been created, 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).

> As the California Supreme Court explained in *Lafitte*:
> We join the overwhelming majority of state and federal courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, a court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created. The recognized advantages of the percentage method, including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency fee case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation (citation) convince us the percentage method is a valuable tool that should not be denied our trial courts.

Lafitte supra at 503.

As the Ninth Circuit has similarly explained: "Because the benefit to the class is easily quantified in common fund settlements, we have allowed courts to award attorneys a percentage of the common fund in lieu of the often more time-consuming task of calculating the lodestar." *In re Bluetooth Headsets Prods. Liability Litig.,* 654 F.3d 935, 942 (9th Cir. 2011).

"Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery." (*Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 47 fn. 11.) "Under the percentage method, California has recognized that most fee awards based either on a lodestar or percentage calculation are 33 percent." *Smith v. CRST Van Expedited Inc*., 2013 WL 163293 *5 (S.D. Cal. 2013); "California courts routinely award attorney fees of one third of the common fund." *Beaver v. Tarsadia Hotels*, 2017 WL 4310707 *9 (S.D. Cal. 2017).

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).

And, many courts have awarded one third of the common fund in similar FCRA standalone disclosure cases. *See e.g., Moore v. Aerotek, Inc.,* 2017 WL 2838148 *8 (S.D. Ohio 2017), Report and Recommendation Adopted in 2017 WL 3142403 (S.D. Ohio 2017); *Flores v. Express Servs., Inc.,* 2017 WL 1177908 (E.D. Pa. 2017); *Smith v. Res-Care, Inc.,* 2015 WL 6479658 *8 (S.D. W. Va. 2015); and *Burnthorne-Martinez v. Sephora USA, Inc.*, 2018 WL 5319833 (N.D. Cal. 2018).

2) The Settlement Provides a Substantial Benefit to the Class.

The settlement provides for a non-reversionary common fund of $4,029,300 for a class comprised of 40,293 people or a gross settlement amount of $100 per person. This compares favorably to other FCRA standalone disclosure settlements.

As a preliminary matter, while statutory damages in an FCRA case can range from a minimum of $100 per violation to a maximum of $1000 per violation (15 U.S.C. § 1681n(a)(1)(A)) courts have recognized that it is appropriate to use the $100 number as the comparator for evaluating the fairness of the settlement.

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).

Many FCRA stand-alone disclosure settlements approved by courts have substantially lower per violation settlement amounts than here. As a recent decision from the Southern District of California explains:

> Courts have approved similar FCRA class settlements measured on a per-class member basis. *See, e.g., In re Toys R Us-Del., Inc.—Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 454 (C.D. Cal. 2014) (holding that, because each class member could have recovered between $100 and $1000, a $5 or $30 settlement award for each member's FCRA claim was "not a de minimis amount"); *Moore v. Aerotek, Inc.*, No. 2:15-CV-2701, 2017 WL 2838148, at *4 (S.D. Ohio June 30, 2017) (approving a FCRA class settlement with per class member payments of between $13 and $80).

Estes v. L3 Technologies, Inc., 2019 WL 141564 (S.D. Cal. 2019) (approving settlement where 764 class members received $75 each).

Multiple district courts have approved FCRA stand-alone disclosure settlements where the gross and net settlement amounts were substantially 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); *In re Uber FCRA Litig.*, 2017 WL 2806698 (N.D. Cal. 2017) (gross settlement amount of $7.31 per class member); *Feist v. Petco Animal Supplies, Inc.*, 2018 WL 6040801 (S.D Cal. 2018) (gross settlement amount of $33.63 per class member).

Many of the FCRA stand-alone disclosure settlements detailed herein were claims made. Here by contrast, the settlement provides for direct payment to class members with no necessity of making a claim.

3) Class Counsel Incurred Substantial Risk Litigating This Case on a Contingent Basis with Recovery Uncertain.

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, as noted this Court, and 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.

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4) A Lodestar Crosscheck Supports Approval.

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. As the concurrently filed Declaration of Shaun Setareh indicates, Class Counsel has incurred a lodestar of $347,650. (Setareh Decl., ¶ 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.

B. The Court Should Approve the Requested Expenses.

Plaintiff has incurred litigation costs of $9,755 in this matter, including filing fees and mediation fees. As the evidence submitted herewith shows, all of these costs are documented and reasonably incurred. (Setareh Decl., ¶ 22; Exh 2.) Thus, Plaintiffs 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).

Indeed, 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.

C. 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, ¶ 3.2.) 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 $5000 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 $5000 incentive award as 'presumptively reasonable.'"

Plaintiff spent a considerable amount of time on this case. (Declaration of Danyell Sanders ¶ 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.* at ¶ 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 Defendants' costs and/or attorneys' fees if this action had been unsuccessful. (*Id.*) Such costs would have exceeded any individual recovery for Plaintiff in this case, including the amount of the Incentive Award.

Further, Plaintiff entered into a broad general release of claims in exchange for the incentive award[4]. (Settlement, ¶ 13). This further supports the incentive award. *Harris v. Vector Marketing Corp.*, 2012 WL 381202 *7-8 (N.D. Cal. 2012).

Respectfully submitted,

SETAREH LAW GROUP

Dated: July 19, 2023

BY */s/ Farrah Grant*
SHAUN SETAREH
THOMAS SEGAL
FARRAH GRANT
Attorneys for Plaintiff
DANYELL SANDERS

[4] Excluded from Plaintiff's general release of claims are those claims currently plead in Plaintiff's two other lawsuits (*Id.*, ¶ 4.2.)

PROOF OF SERVICE

I am a citizen of the United States and am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 9665 Wilshire Blvd., Suite 430 Beverly Hills, CA 90212.

On July 19, 2023, I served the foregoing documents described as:

NOTICE OF MOTION AND MOTION FOR AWARD OF ATTORNEY FEES AND EXPENSES AND CLASS REPRESENTATIVE ENHANCEMENT AWARD

in this action by transmitting a true copy thereof addressed as follows:

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[X] BY E-MAIL OR ELECTRONIC TRANSMISSION

Based on a court order or an agreement of the parties to accept service by electronic transmission, I electronically served the document(s) to the persons at the electronic service addresses listed above.

[X] STATE I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on July 19, 2023, at Beverly Hills, California.

/s/ Diana Maytorena
Diana Maytorena