Shaun Setareh (SBN 204514)
shaun@setarehlaw.com
Thomas Segal (SBN 222791)
thomas@setarehlaw.com
Farrah Grant (SBN 293898)
farrah@setarehlaw.com
SETAREH LAW GROUP
315 S. Beverly Drive, Ste. 315
Beverly Hills, California, 90212
Tel: (310) 888-7771
Fax: (310) 888-0109

Attorneys for Plaintiff,
KIERRE J. TOWNSEND

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

KIERRE J. TOWNSEND, on behalf of herself, all others similarly situated,

Plaintiff,

vs.

G2 SECURE STAFF, L.L.C., a Texas limited liability company; G2 SECURE STAFF CA, L.P., a Texas limited partnership; and DOES 1 through 50, inclusive,

Defendants.

Case No. 18STCV04429

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND FOR AN AWARD OF ATTORNEYS' FEES AND COSTS

[Filed Concurrently with the Declarations of Shaun Setareh; Kierre Townsend; Jennifer Keough; Farrah Grant; Thomas Segal; and [Proposed] Final Order and Judgment]

Date: July 7, 2020
Time: 11:00 a.m.
Place: Department 10
Judge: Hon. William Highberger

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

PLEASE TAKE NOTICE that on July 7, 2020 at 11:00 a.m. or as soon thereafter as the matter may be heard in Department 10 of the above-entitled Court located at 312 North Spring Street, Los Angeles, California 90012, Plaintiff Kierre Townsend will and does hereby move this Court for an Order:

1. Confirming the certification of the Settlement Class for settlement purposes pursuant to Code of Civil Procedure section 382;
2. Finally approving the Settlement Agreement (the "Settlement") between Plaintiff and Defendants G2 SECURE STAFF, L.L.C. and G2 SECURE STAFF CA, L.P. ("G2" or "Defendants");
3. Confirming the appointment of Shaun Setareh of Setareh Law Group as Class Counsel; and Plaintiff as Class Representative for the Settlement Class;
4. Finally approving Class Counsel's application for Class Counsel Fees in the amount of $253,000 as authorized under the Settlement;
5. Finally approving Class Counsel's application for litigation costs of $11,670.95 as authorized under the Settlement;
6. Finally approving settlement administration costs to JND Legal Administration in the amount of $51,000 as authorized under the Settlement;
7. Finally approving an enhancement award of $7,500 to Plaintiff, as authorized under the Settlement; and
8. Directing that the [Proposed] Order and [Proposed] Judgment be entered to give finality to the Settlement.

This Motion is made on the following grounds: (1) the Settlement meets all the requirements for class certification for settlement purposes under Code of Civil Procedure section 382; (2) Plaintiff and her counsel are adequate to represent the Settlement Class; (3) the terms of the Settlement are fair, adequate and reasonable; and (4) the notice process performed by the Settlement Administrator comports with all applicable due process requirements. In view of the foregoing, the [Proposed] Order Granting Final Approval of Class Action Settlement and [Proposed] Judgment

submitted with this Motion should be entered.

This Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the Declarations of Shaun Setareh, Kierre Townsend, Jennifer Keough, Farrah Grant, Thomas Segal, all exhibits thereto, all papers and pleadings on file with the Court in this action, all matters judicially noticeable, and on such oral and documentary evidence as may be presented at the hearing on this Motion.

DATED: June 4, 2020

SETAREH LAW GROUP

/s/ Farrah Grant
SHAUN SETAREH
THOMAS SEGAL
FARRAH GRANT
Attorneys for Plaintiff
KIERRE TOWNSEND

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Kierre Townsend ("Plaintiff") and Plaintiff's counsel the Setareh Law Group ("Class Counsel") have dedicated significant time, energy, and resources to litigating this case against G2 SECURE STAFF, L.L.C. and G2 SECURE STAFF CA, L.P. ("G2" or "Defendants"). Through their efforts, they successfully negotiated the settlement set forth in the Settlement Agreement (the "Settlement")[1], which provides for a Settlement Amount of $759,000 for 24,290 class members in compromise of disputed Fair Credit Reporting Act claims and related state action claims asserted against Defendants. Plaintiff negotiated an excellent result for the Settlement Class. The Settlement Administrator JND estimates that eligible class members who reside in California and/or had their background checks procured in California will each receive approximately $20.66, and eligible class members who reside outside California and/or had their background checks procured outside California will each receive approximately $16.52. (*See* Declaration of Jennifer Keough ("Keough Decl."), ¶ 8.) Class members have reacted extremely positively to the Settlement, with only one possible objection to the Settlement, and only nine requests for exclusion[2]. (*Id*. ¶¶ 15, 17.) Thus only .0003% of the Class have requested exclusion.

No class member will have to make a claim in order to recover; instead class members will be mailed their share of the settlement directly. No money will revert to Defendants. Any checks not cashed within 180 days will be void. Instead, any residue from uncashed checks will go to the California State Unclaimed Property Fund for the benefit of the respective Class Member whose state of residence is California, or the equivalent state unclaimed property fund for the benefit of the respective Class Member whose state of residence is not California.

Plaintiff claims that G2 violated the Fair Credit Reporting Act ("FCRA"), the California Consumer Credit Reporting Agencies Act ("CCRAA"), the California Investigative Consumer

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[1] The executed Settlement Agreement was filed as exhibit 2 to the notice of lodging on April 15, 2020.

[2] The possible objection, a letter from Jian Lian to JND, is attached as exhibit D to the declaration of Ms. Keough. It is unclear whether Jian Lian is seeking to object to the settlement in his letter.

Reporting Agencies Act ("ICRAA"), and the California Unfair Competition Law ("UCL"). Plaintiff alleges that G2 failed to provide applicants with a stand-alone document that consisted *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 $759,000 is an excellent result for the class. The gross settlement amount per class member is $31.24 ($759,000/ 24,290). This compares favorably to other recent FCRA settlements in California. *See Rohm v. Thumbtack, Inc.*, 2017 WL 4642409 (N.D. Cal. 2017)(granting final approval) involved a claims made settlement (albeit a non-reversionary one) where 66,676 class members shared in a $225,000 settlement or a gross recovery of $3.30 per class member. Similarly, *In re Uber FCRA Litigation*, 2017 WL 2806698 (N.D. Cal. 2017) (granting preliminary approval) involved a claims made settlement (also non-reversionary) where 1,025,954 class members shared in a $7.5 million settlement or a gross recovery of $7.31 per class member. Also, *Nesbitt v. Postmates, Inc.* CGC-15-547146 Superior Court of California, San Francisco County (final approval granted) where there was a partially claims made settlement with a gross settlement amount of 2.5 million and 186,988 settlement class members. Additionally, *Esomonu v. Omnicare* (N.D. Cal. 2018)(granting final approval) involved a claims made settlement (albeit a non-reversionary one) where 43,069 class members shared in a $1,300,000 settlement or a gross recovery of $30.18 per class member.

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 $253,000 are one third of the $759,000 fund. The requested amount represents a multiplier of approximately 2.5 given Class Counsel's lodestar of $98,110.12

For the reasons set forth below, and for their efforts in achieving this result, Plaintiff and Class Counsel, through this Motion, respectfully request that this Court:

(1) Confirm its conditional certification of the Settlement Class for settlement purposes;

(2) Confirm its appointment of Shaun Setareh of the Setareh Law Group as Class Counsel, and of Plaintiff as Class Representative, for the Settlement Class;

(3) Finally approve the Settlement between Plaintiff and Defendants;

(4) Finally approve the following awards from the Settlement Amount as authorized by the Settlement:

- Class Counsel Fees: $253,000 (1/3 of the Settlement Amount) (Settlement, ¶5.4);
- Class Counsel Expenses: $11,670.95 in litigation costs (*Id.*);
- Administration Costs: $51,000;
- Enhancement Payment to Plaintiff: $7,500 to Plaintiff (Settlement, ¶5.3.1); and

(5) Direct that the [Proposed] Order Granting Final Approval of Class Action Settlement and Judgment be entered.

Given the risks of this litigation, the result achieved here is laudable. As detailed in this Memorandum and accompanying declarations, the work performed by Plaintiff and Class Counsel was substantial. Among other things, Plaintiff and Class Counsel:

- Conducted initial investigation of this case and developed the theories and facts to support Plaintiff's claims for Defendants failure to comply with the Fair Credit Reporting act and related state claims;
- Conducted informal discovery to obtain, among other things, class information, Defendants' relevant forms;
- Defended Plaintiff's deposition;
- Conducted a detailed review of the record and prepared a thorough mediation brief and damages analysis in anticipation of mediation;
- Engaged in difficult arm's-length negotiations with Defendants at the mediation before

eventually agreeing to the Settlement with the assistance of the mediator; and

- Worked with Defendants to prepare the Settlement Agreement, related forms, and approval motions;

(*See* Declaration of Shaun Setareh In Support of Motion for Final Approval and Award of Attorneys' Fees and Costs, submitted herewith ("Setareh Decl."), ¶ 14.)

Moreover, in pursuing this case against Defendants, Plaintiff and Class Counsel faced serious risks, including but not limited to:

- The risk of being unable to establish class-wide liability for Plaintiff's claims;
- The risk that the arbitration agreement signed by Plaintiff and some class members would bar recovery;
- The risk that Plaintiff could not prove that Defendants' violation of the FCRA 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);
- The risk of a potentially prolonged and expensive trial;
- The risk of Plaintiff being held liable for Defendants' attorneys' fees and costs if this case had been unsuccessful; and
- The risk of lengthy appeals.

(*See* Setareh Decl., ¶ 15.)

Based on the foregoing risks, if Plaintiff had lost the case, there would have been no compensation to Plaintiff or to Class Counsel, nor would Class Counsel have been reimbursed for their costs incurred or paid at all for their time. (Setareh Decl., ¶ 15.)

Despite the many risks faced by Plaintiff and Class Counsel, and the difficulty in prosecuting such a complex case, they nevertheless achieved a strong result for the Class. Moreover, based on reports from the Settlement Administrator, JND Legal Administration ("JND"), the Settlement has been extremely well received by Class Members, with only nine requests for exclusion, and only one possible objection received. (Keough Decl."), ¶¶ 15, 17.) Thus only .0003% of the Class have requested exclusion. This extremely positive response rate is further proof that the

Settlement is fair, adequate, and reasonable for Class Members.

Accordingly, Plaintiff requests for Class Counsel fees of one-third of the Settlement Amount is also fair, adequate, and reasonable. The amount is well-earned, supported by controlling case law, is squarely within the range awarded by California courts in similar complex cases, and has been received positively by the Class.

Likewise, it is fair that Plaintiff and Class Counsel be reimbursed for their expenses and that the Settlement Administrator be paid its reasonable fee. All of the expenses incurred were reasonable and necessary to the prosecution of this action and administration of this Settlement, and they are of the kind that courts routinely approve as proper.

Finally, Plaintiff's requested Enhancement Award of $7,500 also warrants approval because it is fair and reasonable in view of Plaintiff's efforts in this case and the risks she has undertaken, especially considering that she jeopardized her future career prospects *and* exposed herself to the risk of awards of attorneys' fees and costs against her.

This Court should grant this Motion because: (1) the Settlement Class continues to meet the requirements for class certification under of Code of Civil Procedure section 382; (2) the Settlement warrants final approval based on all indicia for fairness, reasonableness, and adequacy; (3) Plaintiff is adequate to serve as Class Representatives; (4) Plaintiff's attorneys are adequate to serve as Class Counsel; (5) the requested amounts for fees, costs, and enhancement payment are fair and reasonable; (6) the notice procedures and related forms fully comport with due process and have adequately apprised Class Members of their rights—indeed, Class Members have shown a positive response to the Settlement; and (7) in view of the foregoing, final approval is warranted.

Accordingly, for the reasons detailed below, Plaintiff respectfully requests that this Court grant this Motion in its entirety and finally approve the Settlement.

II. OVERVIEW OF LITIGATION AND FACTUAL & PROCEDURAL BACKGROUND

On November 9, 2018, Plaintiff filed her complaint. The claims Plaintiff asserted in the Complaint on behalf of herself and a putative class are: (1) violation of 15 U.S.C § 1681b(b)(2)(A) (Fair Credit Reporting Act); (2) violation of 15 U.S.C. §§ 1681d(a)(l) and 1681g(e) (Fair Credit

Reporting Act); (3) violation of California Civil Code §§ 1786 *et seq*. (Investigative Consumer Reporting Agencies Act); (4) violation of California Civil Code §§ 1785 *et seq*. (Consumer Credit Reporting Agencies Act); (5) failure to provide meal periods (Lab. Code §§ 204, 223, 226.7, 512 and 1198); (6) failure to provide rest periods (Lab. Code §§ 204, 223, 226.7, and 1198; (7) failure to provide accurate written wage statements (Lab. Code §§ 226(a)); (8) failure to timely pay all final wages (Lab. Code §§ 201, 202 and 203); and (9) unfair competition (Business & Professions Code §§ 17200, *et seq*.)

The Parties stipulated as a condition of Settlement that the First Amended Complaint ("FAC") attached as Exhibit D to the Settlement Agreement be deemed filed by the Court. The proposed FAC asserts only Plaintiff's FCRA and related background check claims. Plaintiff agrees to dismiss her originally-pled wage and hour claims by way of the filing of the FAC in light of a pending, earlier-filed action, *Heaggans v. G2 Secure Staff, L.L.C. et al.*, United States District Court, Central District of California, Case No. 2:17-cv-09206-GW-PLA, where the wage and hour class claims in *Heaggans* completely subsume the wage and hour class claims originally pled in this Action. The Court deemed the FAC filed as of the date of the order granting preliminary approval.

Plaintiff's FCRA and related background check claims allege that Defendants conducted pre-employment background checks without complying with the requirements of the FCRA, including the requirement of 15 U.S.C. § 1681b (b) (2)(A) that the background check be disclosed in a document that "consists solely of the disclosure."

Defendants deposed Plaintiff on October 29, 2019.

On November 5, 2019, the Parties participated in a day-long mediation before Tripper Ortman, a well-regarded mediator who has mediated many employment class actions.

Thereafter, the Parties and JND, the Settlement Administrator, commenced the process of giving notice to Class Members, including mailing Notice to 24,290 class members; taking the necessary steps to locate the current addresses of class members, including conducting a national change of address search and/or skip traces; re-mailing Notice Packets as necessary; keeping track of all class member responses; and other responsibilities as prescribed by the Settlement. (*See* Keough Decl., ¶¶ 5-6.) In accordance with this Court's Order Granting Preliminary Approval of Class Action

Settlement, Plaintiff now submits this Motion for Final Approval of Class Action Settlement.

A. Summary of Relevant Law

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

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

Pursuant to section 1681b of the FCRA, no person can obtain a consumer report for employment purposes without providing a "clear and conspicuous disclosure . . .in a document that consists solely of the disclosure." 15 U.S.C. § 1681b(b)(2)(A)(i.) The person obtaining the consumer report must also obtain the consumer's written authorization which can be done as part of the disclosure form. 15 U.S.C. § 1681b(b)(2)(A)(ii.) A plaintiff may be entitled to statutory and punitive damages when a defendant has willfully violated the provisions of the FCRA. 15 U.S.C. § 1681n(a)(1)(A): "any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of . . . damages of not less than $100 and not more than $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).[3] The form in *Gilberg* included references to state rights, like the form here.

B. The Disclosure Forms at Issue

As set forth below, the background check disclosure form utilized by G2 is not a stand alone disclosure. The Form is attached as Exhibit 1 to the declaration of Shaun Setareh ISO the motion for preliminary approval.

First, the form it contains hyperlinks to notices regarding the applicant's rights under California and New York law and to other state law notices. This is illegal under *Gilberg supra*.

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

Second, the disclosure also has a prolix summary of every conceivable type of background check that could theoretically be done, without regard to what type of check G2 intended to do:

> The background report may contain information concerning your character, general reputation, personal characteristics, mode of living, and credit standing. The types of information that may be ordered include but are not limited to: Social Security number verification; criminal, public, educational and, as appropriate, driving records checks; verification of prior employment; reference, licensing and certification checks; credit reports; drug testing results; if applicable, workers' compensation injuries. The Company may order a background report under your legal name and any other names you may have used. Workers' compensation information will only be requested in compliance with federal Americans with Disabilities Act and/or any other applicable federal, state or local laws and only after a conditional job offer is made. Credit history will only be requested when permitted by law and where such information is substantially related to the duties and responsibilities of the position for which you are applying. The information may be obtained from private and public record sources, including personal interviews with your associates, friends, and neighbors. (An "investigative consumer report" is a background report that includes information from such personal interviews, except in California where that term means any background report that is not a credit report.) The nature and scope of the most common form of investigative consumer report is an investigation into your education and/or employment history conducted by ADP Screening and Selection Services or another outside organization.

The Federal Trade Commission has opined that the disclosure "may include a brief description of the nature of the consumer reports covered if the description does not confuse the consumer or detract from the mandated disclosure. *40 Years of Experience with the FCRA, An FTC Staff Report with Summary of Interpretations* at 51. Here, the description is lengthy and includes numerous things that G2 did not in fact do, including credit checks, workers compensation checks, licensing and certification checks and personal interviews with associates, friends, and neighbors.

The disclosure also includes a self-serving disclaimer that the background check is: "In the interest of maintaining the safety and security of our customers, employees and property . . . ."

The disclosure also advises that: "You may request more information about the nature and scope of an investigative consumer report (in person interviews), if any, by telephoning the Company at ." The form fails to provide the phone number to call regarding the background checks, and instead has a blank space.

This is similar to *Poinsignon v. Imperva, Inc.*, where the court held that a FCRA disclosure that

included references to state law, a URL link to a privacy policy, and an acknowledgment of another document – the "Summary of Rights under FCRA" – violated the FCRA's "stand alone" requirement and constituted a willful violation. *Poinsignon v. Imperva, Inc.*, No. 17-cv-05653-EMC, 2018 U.S. Dist. LEXIS 60161 (N.D. Cal. Apr. 9, 2018) The Court in *Poinsignon* stressed the importance of "[p]resenting the disclosure in a separate stand-alone document free from the clutter of other language" to call "consumers' attention to their rights and to the significance of their authorization."

C. Plaintiff's Investigation and Discovery

Prior to and throughout the action, Plaintiff and her counsel thoroughly investigated her claims. (Setareh Decl. ISO preliminary approval ¶¶ 5-9). As part of the investigation, Plaintiff's counsel reviewed documents produced by G2 in order to confirm which form was used and by whom during the class period. Plaintiff's counsel also reviewed G2's background check policies. (Setareh Decl. ¶ ISO preliminary approval ¶ 8.) Because this case turns on G2's legal defense that G2's noncompliance was purportedly not "willful" under the FCRA, Plaintiff's counsel thoroughly analyzed the evolving, and often conflicting case law governing FCRA class actions. All of this review and investigation allowed Plaintiff's counsel to structure a settlement that provides benefits directly to the persons who were required to use the allegedly unlawful forms. (Setareh Decl. ISO preliminary approval ¶ 9.)

G2 contends that each of the above allegedly extraneous excerpts is a lawful part of the relevant disclosure and, therefore, lawful. Defendants further contend that Plaintiff would not be able to establish that any alleged violation was willful, and that the claims of some Settlement Class Members would be barred by arbitration agreements that they signed that contain class action waivers. As a part of Plaintiff's due diligence and informal discovery efforts in this action, Plaintiff received documents that Defendants contend put applicants on notice that, as part of the application process, completion of the application process was contingent upon successful completion of the background check. Additionally, Defendants raised arguments about the ability of out-of-state class members with no contacts in California to recover in this action.

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D. 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. Following informal discovery and arm's-length negotiations, the parties reached a settlement in principle on a class basis. The parties held a an all-day in person mediation on November 5, 2019 with mediator Tripper Ortman. The mediation session resulted in this settlement.

III. OVERVIEW OF THE SETTLEMENT

The executed Settlement Agreement was filed as exhibit 2 to the notice of lodging on April 15, 2020. The Settlement provides for a Settlement Amount of $759,000 paid by Defendants on behalf of the defined Settlement Class. The essential terms are summarized below.

A. Settlement Class Definition

The Settlement Class consists of all persons in the United States who applied for employment with Defendants and were the subject of a background check(s) that was procured by Defendants, or caused to be procured by Defendants, at any time from November 9, 2016 through the Preliminary Approval Date, who do not timely send a signed and valid Opt-Out Request that is received by the Settlement Administrator. (*Agreement*. ¶ 2.2; 2.32.)

B. Allocation of Settlement Funds

The Settlement provides for a Settlement Amount of $759,000.00 to be paid by Defendants. The gross settlement amount per class member is expected to be $31.24 per class member ($759,000/ 24,290). 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. Several 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.

The following deductions will be made from the settlement fund: (1) class counsels' fees, which shall not exceed $253,000; (2) class counsels' costs of $11,670.95; (3) settlement administration costs of $51,000; and (4) a service payment to the named Plaintiff, which shall not exceed $7,500. (Settlement, ¶ 5).

In recognition of the fact that Defendants potentially have a jurisdictional defense against Class Members whose state of residence is not California and/or whose background check(s) was/were procured by Defendants outside of California, the Net Settlement Amount shall be distributed to Class Members as follows:

> a) Each Class Member whose state of residence is California and/or whose background check(s) was/were procured by Defendants in California during the Class Period shall be allocated 1.25 points;
>
> b) Each Class Member whose state of residence is not California and/or whose background check(s) was/were procured by Defendants outside of California during the Class Period shall be allocated 1 point;
>
> c) The total aggregate points for all Class Members shall be calculated by the Settlement Administrator; and
>
> d) Each Class Member will be paid from the Net Settlement Amount on a pro rata basis based on their individual point(s).

(Agreement ¶ 5.6.1) This proposed method is fair and reasonable.

C. <u>Release of Claims</u>

Pursuant to the Settlement Agreement, all Settlement Class members release Defendants for Released claims, defined as:

> "Released Claims" as to each member of the Settlement Class covers claims that were pled or could have been pled based on the factual allegations contained in the Complaint and/or FAC and covers the period from November 9, 2016 through the Preliminary Approval Date including, without limitation, any claims, actions,

> causes of action, demands, damages, losses, or remedies, whether based upon federal, state, or local statutes or federal, state, or local common law, relating to, based upon, resulting from, or arising out of the alleged violations of the Fair Credit Reporting Act, including but not limited to 15 U.S.C. § 1681b(b)(2)(A), (d)(a)(1), and/or (g)(c), Investigative Consumer Reporting Agencies Act (California Civil Code §§ 1786 *et seq*.), Consumer Credit Reporting Agencies Act (California Civil Code §§ 1785 *et seq*.), California Business & Professions Code §§ 17200, *et seq*., and/or any other federal, state or local law governing the procurement or use of background/credit checks, including laws regarding background check disclosures and authorizations and pre-adverse and adverse action notices, other penalties, related tort, contract, and punitive damages claims, claims for interest, attorneys' fees, litigation and other costs, expenses, restitution, and equitable and declaratory relief. Plaintiff and each settlement Class Member shall further automatically be deemed to have waived and released any and all provisions, rights, and benefits conferred by § 1542 of the California Civil Code with respect to the Released Claims which arise from the subject of this Settlement, including any and all claims under FCRA and any similar state or local claims, including those regarding an allegedly inadequate or otherwise improper disclosure about the procurement or use of consumer reports and/or background checks for employment purposes or pre-adverse and adverse action notices.

(Agreement. ¶ 2.27.) This release is narrowly and appropriately tailored to the allegations asserted by Plaintiff in this Complaint.

D. Payment of Settlement Amounts

The parties have negotiated a mailing procedure to minimize the burden to Settlement Class Members. Class Members will not have to submit a claim form in order to receive payment. Instead, the Individual Settlement Payments will be mailed by the settlement administrator to the Participating Class Members. (Agreement ¶ 6.4.2.) Within 35 days after the effective date, the Settlement Administrator shall issue Settlement Payments to Class Members in the form of a check. (*Id.* ¶ 6.4.2.) No money will revert to Defendants. Any checks not cashed within 180 days will be void. Instead, any residue from uncashed checks will go to the California State Unclaimed Property Fund for the benefit of the respective Class Member whose state of residence is California, or the equivalent state unclaimed property fund for the benefit of the respective Class Member whose state of residence is not California. (*Id.*)

E. Class Counsel's Experience in FCRA Cases

Class Counsel are highly experienced at litigating wage and hour matters and FCRA stand-alone disclosure cases. *See* (Setareh Decl., ¶¶ 3-13.; Declaration of Farrah Grant ¶¶ 2-4;

Declaration of Thomas Segal ¶¶ 2-3.). 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).[4] 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.

IV. CURRENT SUMMARY OF THE NOTICE PROCESS

On March 18, 2020, the postcard notice was mailed to 24,290 Class Members. (Keough Decl. ¶ 5). JND ran the mailing addresses contained in the Class Information through the National Change of Address database to ensure that it had up-to-date addresses for Class Members. (*Id.*, ¶ 4.)

JND tracked 3,456 Notices that were returned to JND as undeliverable. Of these undeliverable Notices, JND re-mailed 522 Notices to forwarding addresses provided by the USPS. For the remaining undeliverable Notices, JND conducted advanced address searches and received updated address information for 2,331 Class Members. JND re-mailed the Notice to the 2,331 Class Members, and 508 re-mailed Notices were returned as undeliverable. (*Id.*, ¶ 6.)

As of the date of this Declaration, 23,179 Class Members were mailed a Notice which was not returned as undeliverable, representing 95.4% of total Class Members from the Settlement. (*Id.*, ¶ 13.)

Class members have reacted extremely positively to the Settlement, with only one possible objection to the Settlement, and only nine requests for exclusion[5]. (*Id.* ¶¶ 15, 17.) Thus only .0003%

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

[5] The possible objection, a letter from Jian Lian to JND, is attached as exhibit D to the declaration of Ms. Keough. It is unclear whether Jian Lian is seeking to object to the settlement in his letter. Additionally, the Court received an ex parte letter from class member Kevin Fennick. The Court instructed via Caseanywhere that "what response, if any, should be made will be discussed at our next hearing on July 7, 2020." Notice was sent via email to opposing counsel and Mr. Fennick on June 1, 2020.

of the Class have requested exclusion. Clearly, Class Members approve of the Settlement.

V. ARGUMENT

A. This Court Should Reaffirm Its Conditional Certification of the Settlement Class Because It Meets All the Requirements for Class Certification for Settlement Purposes Only Under Code of Civil Procedure § 382.

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

This Court found that the Settlement Class meets all the requirements for class certification for settlement purposes when it granted preliminary approval on February 3, 2020. No subsequent events have cast doubt on this determination. Accordingly, this Court should reaffirm its conditional grant of class certification for settlement purposes.

B. This Court Should Finally Approve the Settlement Because It Is a Fair, Adequate, and Reasonable Compromise of the Disputed Claims in This Case in View of Defendants' Potential Liability Exposure and the Risks of Continued Litigation.

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

1. The Settlement Is Reasonable

1. The Settlement results in a substantial benefit to the Settlement Class. Courts often approve settlements where class members receive only pennies or even just coupons or vouchers. (*See, e.g.*, *Nordstrom Commission Cases* (2010) 186 Cal.App.4th 576, 590 [affirming final approval of wage-and-hour class action settlement where 20% of the fund allocated to the class was merchandise vouchers].) Here, each Class Member will be sent a check for his or her Settlement share, in the form of a monetary payment. JND estimates that eligible class members who reside in California and/or had their background checks procured in California will each receive approximately $20.66, and eligible class members who reside outside California and/or had their background checks procured outside California will each receive approximately $16.52. (Keough Decl. ¶ 8.) The Settlement provides significant, meaningful relief for hotly disputed background check violations, making it reasonable and in the best interests of the class.

2. The Settlement Was Reached at Arm's Length Through Experienced Counsel and an Experienced Mediator with Sufficient Information to Intelligently Negotiate a Fair Settlement in View of the Claims Asserted and Risks of Continued Litigation

A settlement is presumptively fair where it is reached through arm's length bargaining, is based on sufficient discovery and investigation to allow counsel and the court to act intelligently, counsel involved is experienced in similar litigation, and the percentage of objectors is small. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802 ("*Dunk*").). In deciding whether to approve a proposed settlement, a trial court has broad powers to determine if the proposed settlement is fair under the circumstances of the case. (*Mallick v. Sup. Ct.* (1979) 89 Cal.App.3d 434, 438.). In exercising these powers, the overriding concern is to ensure that a proposed settlement is "fair, adequate, and reasonable." (*Dunk*, 48 Cal.App.4th at p. 1801 [internal quotations omitted].). Relevant factors for that determination include, but are not limited to:

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

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

"In the context of a settlement agreement, the test is not the maximum amount plaintiffs might have obtained at trial on the complaint, but rather whether the settlement is reasonable under all of the circumstances." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 250.). Because settlements inherently involve compromise, even settlements providing for substantially narrower relief than likely would be obtained if the suit were successfully litigated can be reasonable because "the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation." (*Id.* [*quoting Air Line Stewards, etc., Local 550 v. Am. Airlines, Inc.* (7th Cir. 1972) 455 F.2d 101, 109].). In addition, courts review the discovery process and information received through it to aid them in assessing whether the parties sufficiently developed the claims and their supporting factual bases before reaching settlement. (*See Kullar v. Foot Locker Retail Inc.* (2008) 168 Cal.App.4th 116, 129-131 ("*Kullar*").). Information is sufficient where it allows the parties and the court to form "an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation." (*Clark v. Am. Residential Servs. LLC* (2009) 175 Cal.App.4th 785, 801.). This requirement exists so that the parties can provide the court with "a meaningful and substantiated explanation of the manner in which the factual and legal issues have been evaluated." (*Kullar*, 168 Cal.App.4th at p. 132-33.).

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

Plaintiff was represented by experienced class action counsel possessing significant experience in class action matters including experience in Fair Credit Reporting Act cases involving allegations that the defendant employer failed to provide a legally compliant stand-alone disclosure. (*See* Setareh Decl. ¶¶ 10-13.) Setareh Law Group appealed an order to the United States

Court of Appeals for the Ninth Circuit in *Gilberg v. California Check Cashing Stores, Inc. et al.* The Court of Appeals found in the plaintiff's favor that the background check document at issue violated the "clarity" requirement of the FCRA. *Gilberg v. California Check Cashing Stores, LLC*, 913 F.3d 1169 (C.A.9 (Cal.), 2019). Plaintiff's counsel has litigated a number of FCRA class actions involving claims of disclosure forms that violate the stand-alone disclosure requirement. Three of those cases were settled on a class-wide basis after class certification was fully briefed. (Setareh Decl. ¶¶ 11-13.) Plaintiff's counsel has several FCRA stand-alone disclosure cases where summary judgment was granted in the defendant's favor including two such decisions after *Syed*. (Setareh Decl. ISO Preliminary Approval ¶ 25.) As such, Plaintiff's counsel is in a good position to evaluate the likelihood of success and the settlement value of the case. Recently, as lead counsel in *Troester v. Starbucks Corporation*, et al., Setareh Law Group was victorious when the California Supreme Court clarified and rejected the application of the widely adopted federal *de minimis* doctrine to California's wage and hour laws. *Troester v. Starbucks Corp*., 5 Cal.5th 829 (Cal., 2018). *Troester* is arguably one of the most important wage and hour decisions in years, as it effects every hourly employee who works in the state. Setareh Law Group has successfully handled hundreds of class actions and has over 80 Westlaw citable decisions. (Setareh Decl. ¶ 5.) Shaun Setareh, principal of Setareh Law Group, received the prestigious California Lawyer Attorney of the Year award from the Daily Journal. (*Id*. ¶ 7.)

Likewise, G2's counsel, Morgan, Lewis & Bockius, is a global firm that has much experience representing management in employment law matters, including FCRA class actions.

a. Defendant's Estimated Liability Exposure

The FCRA's damages provision limits recovery when it is shown that a defendant's actions are willful to between $100 and $1,000 or actual damages, whichever is greater. With 24,290 class members, the FCRA statutory damages are between $2,429,000 to $24,290,000. It is reasonable to assume that a jury in this case would enter an award at the lower end of the potential $100 to $1,000 range per violation and that a $24 million verdict, while permissible under the plain language of the statute, would be highly unlikely.

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

As a district court explained:

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

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

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

> In this case, Plaintiffs sought statutory damages under the FCRA, which provides for damages between $100 and $1,000 if the plaintiff can prove that violation of the statute was willful. 15 U.S.C. § 1681n(a)(1). To obtain statutory damages for an FCRA violation, plaintiffs must meet a very high standard of proof, and may even lose after a successful trial verdict. *See* S*mith v. LexisNexis Screening Solutions, Inc.*, 837 F.3d 604, 611 (6th Cir. 2016) (reversing jury verdict, finding that the consumer reporting agency's conduct did not constitute a willful violation of the FCRA); *Domonoske v. Bank of America, N.A.*, 790 F.Supp.2d 466, 476 (W.D. Va. 2011) ("given the difficulties of proving willfulness or even negligence with actual damages, there was a substantial risk of nonpayment [for FCRA violations]"). The FCRA does not provide specific guidance to courts as to the appropriate relief for a statutory violation. However, to recover actual damages Plaintiffs would need to prove that they suffered an actual injury; for example, that they lost job opportunities or their employment was terminated as a result of Aerotek's actions.
>
> The settlement at issue provides for a common fund of $15,000,000, and per class member payments of between $13-$80. (Doc. 33, p. 12). In the unopposed brief, Plaintiffs assert that given the breadth of violations, as well as the size of the Class, it

> is "unlikely that Plaintiffs would achieve an award of statutory damages which, on a per person basis, would substantially exceed $100." *Id.*

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

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

Using the $100 per class member figure, the gross settlement amount is 31.24% of the potential award at trial, which exceeds percentages routinely approved by courts. Courts regularly approve settlements where the recovery is less than one quarter of the maximum potential realistic recovery. *E.g., Bravo v. Gale Triangle*, 2017 WL 708766 *9 (C.D. Cal. 2017)(approving settlement where recovery was 7.5% of projected maximum recovery amount); *Officers for Justice v. Civil Service Com'n of City & County of S.F.,* 688 F.2d 615, 628 (9th Cir. 1982).

a. Risks in Going Forward with Litigation

This case involved substantial risk. Plaintiff signed an arbitration agreement. Defendants contend the claims of some Settlement Class Members would be barred by arbitration agreements that they signed that contain class action waivers. Plaintiff argues that the arbitration agreement here does not contain a class action waiver. The arbitration agreement states: "To the extent permitted by applicable law, all rules of civil procedure and evidence shall apply to arbitrations, and you and the Company my (sic) conduct discovery, as would be available according to applicable law." The agreement goes on to state that: "The arbitrator will follow the applicable state law of the state in which the claim arose, or federal law, or both as applicable to the claim asserted, including all possible remedies." Plaintiff argues that by stating that "all rules of civil

procedure" apply to the arbitration, the agreement expressly makes applicable California Code of Civil Procedure 382 and Federal Rule of Civil Procedure 23 which authorize class action treatment of claims. The U.S. Supreme Court has recently said that where an arbitration agreement is ambiguous, the ambiguity may not be construed against the drafter to permit class arbitration. *Varela v. Lamps Plus, Inc.*, 139 S. Ct. 1407 (2019). Under *Varela supra* at 1416, in interpreting an arbitration agreement, "the task for courts and arbitrators [is] to give effect to the intent of the parties." Under California law, the words of the agreement are paramount in determining the parties' intent. "California recognizes the objective theory of contracts (citation) under which it is the objective intent as evidenced by the words of the contract, rather than the subjective intent of one of the parties that controls interpretation." *Founding Members of Newport Beach County Club v. Newport Beach County Club, Inc.*, 109 Cal.App.4th 944, 956 (2003). Plaintiff believes that here there is no ambiguity because the arbitration agreement provides that "all rules of civil procedure" apply to the arbitration. Since Code of Civil Procedure §382 and Rule 23 are rules of civil procedure, they apply to the arbitration. Thus Plaintiff believes that the objective words of the contract show that the parties agreed to class arbitration. This conclusion is further bolstered by the language providing that "all possible remedies" are available in the arbitration. The United States Supreme Court has interpreted similar language as follows: "It would seem sensible to interpret the 'all disputes; and 'any remedy or relief' language to indicate at a minimum, an intention to resolve through arbitration any dispute that would otherwise be otherwise be settled in a court, and to allow the chosen dispute resolvers to award the same varieties and form of damages or relief as a court would be empowered to award." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 61-62 n7 (1993). While Plaintiff believes that the arbitration agreement should be construed as allowing class arbitration because it says that "all rules of civil procedure" apply, if this Court or an arbitrator disagreed, the class would receive nothing.

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) G2 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.

G2 also would have argued that notwithstanding *Syed*, there was no violation and/or the violation was not willful, because its disclosure form was online and there is a paucity of authority as to whether parts of a webpage can be considered separate documents. *See, e.g., Shlahtichman v. 1-800 Contacts, Inc.*, 615 F.3d 794 (7th Cir. 2010) (holding that a defendant was not liable for statutory damages because the violation arose from a "reasonable construction" of the FCRA); *see also Apple Inc. v. Samsung Electronics*, 2012 WL 1123752 (N.D. Cal. 2012) (holding that content nested on a web page can constitute an "electronic document.") Again, if G2 had prevailed on this argument, the class would have received nothing.

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

The proposed method of allocating the Settlement Amount to Settlement Class Members also is fair and reasonable. In recognition of the fact that Defendants potentially have a jurisdictional defense against Class Members whose state of residence is not California and/or whose background check(s) was/were procured by Defendants outside of California, the Net Settlement Amount shall be distributed to Class Members as follows:

> a) Each Class Member whose state of residence is California and/or whose background check(s) was/were procured by Defendants in California during the Class Period shall be allocated 1.25 points;
>
> b) Each Class Member whose state of residence is not California and/or whose background check(s) was/were procured by Defendants outside of California during the Class Period shall be allocated 1 point;
>
> c) The total aggregate points for all Class Members shall be calculated by the Settlement Administrator; and
>
> d) Each Class Member will be paid from the Net Settlement Amount on a pro rata basis based on their individual point(s).

(Agreement ¶ 5.6.1) This proposed method is fair and reasonable.

4. The Low Number of Exclusions and Objections Also Show That the Settlement Is Fair, Adequate, and Reasonable

The fact that there is only one possible objection and the fact that there are only nine requests for exclusion supports the presumption of fairness and final approval of the Settlement. Only .0003%

of the Class have requested exclusion. (*See 7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1152-1153 [finding 9 objections, and 80 opt-outs, from a class of 5,454, showed a positive response from class members supporting settlement approval].). Here, after being given Notice of the Settlement, there is only one possible objection to the Settlement, and only nine Class Members have requested exclusion. (Keough Decl., ¶¶ 15, 17.). Accordingly, this positive response confirms that Class Members view the Settlement as fair and reasonable and the Settlement warrants final approval.

C. <u>The Court Should Approve the Requested Attorney Fees.</u>

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 Attorney's 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); *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 $759,000 for a class comprised of 24,290 people or a gross settlement amount of $31.24 per person. This compares favorably to other FCRA standalone disclosure settlements. Multiple 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); *In re Uber FCRA Litig*., 2017 WL 2806698 (N.D. Cal. 2017) (gross settlement amount of $7.31 per class member). Several 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 G2 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).

As described above, 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) G2 willfully violated the FCRA. Those cases are not binding on this Court, but there is no published California authority contradicting them.

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 $98,110.12. (Setareh Decl., ¶ 18.) This results in a lodestar multiplier of approximately 2.5. The hours billed represent time spent on tasks that were essential to litigation and settlement. The standard hourly rates for Class Counsel – ranging from $350 to $850 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 March 27, 2020) (setting forth rates between $371 to $899 for attorneys of similar experience levels).

While the lodestar of Class Counsel more than justifies the fee requested, Courts have nevertheless expressed frustration with the lodestar approach for deciding fee awards, which usually

involves wading through voluminous and often indecipherable time records. Commenting on the lodestar approach, Judge Marilyn Hall Patel wrote in *In re Activision Securities Litigation*, 723 F. Supp. 1373, 1375 (N.D. Cal 1989):

> This court is compelled to ask, "Is this process necessary?" Under a cost-benefit analysis, the answer would be a resounding, "No!" Not only do the Lindy Kerr-Johnson analyses consume an undue amount of court time with little resulting advantage to anyone, but in fact, it may be to the detriment of the class members. They are forced to wait until the court has done a thorough, conscientious analysis of the attorneys' fee petition. Or, class members may suffer a further diminution of their fund when a special master is retained and paid from the fund. Most important, however, is the effect the process has on the litigation and the timing of settlement. Where attorneys must depend on a lodestar approach, there is little incentive to arrive at an early settlement.

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

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

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

It is only fair that every class member who benefits from the opportunity to claim a share of the settlement pay his or her pro rata share of attorney's fees, and Plaintiff's request for fees here means that

Class Counsel seek an amount of fees less than the amount Class Counsel would likely receive if they represented each class member individually. Typical contingent fee contracts of plaintiffs' counsel provide for attorney's fees of about 40% of any recovery obtained for a client. (Setareh Decl., ¶ 16.) It would be unfair to compensate Class Counsel here at a substantially lesser rate because they obtained relief for hundreds of class members. To the contrary, equitable considerations dictate that Class Counsel be rewarded for achieving a settlement that confers benefits among so many people, especially without protracted litigation. The result achieved by Class Counsel merits an award of attorney's fees equal to 33.3% of the total recovered value in this case.

The lodestar multiplier here – 2.5 – 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.

D. <u>The Court Should Approve the Requested Expenses.</u>

Plaintiff has incurred litigation costs of $11,581 in this matter, including filing fees, mediation fees, parking expenses, postage charges and printing charges. As the evidence submitted herewith shows, all of these costs are documented and reasonably incurred. (Setareh Decl., ¶ 20; Exh 1.) Plaintiff estimates that Setareh Law Group will incur costs of $78.95 in attending the final approval hearing and filling fees. (*Id*. ¶ 20.) Thus, Plaintiff seeks an award of $11,670.95, which is allowed under the Settlement Agreement. (*Id*.) The Settlement agreement allows for "reasonable costs." (Agreement 5.4.1).

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 Plaintiffs' counsel in the course of litigation. Plaintiffs' 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.

E. 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 Kierre Townsend seeks a $7,500 incentive award. (Settlement, ¶ 5.3.1.) Plaintiff spent a considerable amount of time on this case. (Declaration of Kierre Townsend ¶ 6.) Among other things, Plaintiff spent time retaining experienced counsel, providing them with information regarding her work history with Defendants and Defendants' policies and practices, being deposed, 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 ¶ 7.) 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, Plaintiffs risked being ordered to pay Defendant's 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.

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F. The Requested Award of Administration Costs to JND Is Fair, Adequate, and Reasonable and Warrants This Court's Final Approval.

The request for $51,000 in administration costs to the Settlement Administrator, JND is also fair and reasonable. First, this amount was expressly authorized by the Settlement, which allowed for costs for the Settlement Administrator, estimated at $51,000 in the class notice. More-over, the administration costs benefit the class in a very significant way. Without administration of the Settlement, Class Members could not be paid their share of the Settlement. They also would not receive proper notice of the Settlement or of their ability to opt out or object to the Settlement.

Next, all of these costs were necessary in administering the Settlement, including but not limited to: (i) calculating the amounts owed to each Class Member; (ii) mailing notice to all 24,290 Class Members; (iii) tracing the addresses of Class Members as needed; (iv) re-mailing Notices to Class Members; (v) processing any exclusions; and other duties. (*See* Keough Decl., ¶¶ 3-22.)

VI. CONCLUSION

For the reasons set forth herein, this Court should confirm its conditional certification of the Settlement Class for settlement purposes under Code of Civil Procedure section 382, finally approve the Settlement, and adopt the [Proposed] Order Granting Final Approval of Class Action Settlement and Judgment submitted concurrently herewith.

DATED: June 4, 2020

SETAREH LAW GROUP

/s/ Farrah Grant
SHAUN SETAREH
THOMAS SEGAL
FARRAH GRANT
Attorneys for Plaintiff
KIERRE TOWNSEND

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 315 South Beverly Drive, Suite 315 Beverly Hills, CA 90212.

On June 5, 2020, I served the foregoing documents described as:

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND FOR AN AWARD OF ATTORNEYS' FEES AND COSTS

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

Robert Jon Hendricks
Rj.hendricks@morganlewis.com
Kathy H. Gao
Kathy.gao@morganlewis.com
Linda Shen
MORGAN, LEWIS & BOCKIUS LLP
300 South Grand Avenue, 22nd Floor
Los Aneles, California 90071

[X] (VIA CASE ANYWHERE)

A true and correct copy of said document was sent to the parties listed on the Electronic Service List maintained by Case Anywhere in the manner set forth in the Court's Order Authorizing Electronic Service.

[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 June 5, 2020 at Beverly Hills, California.

Lauren Farrington