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Attorneys for Plaintiffs and the Class

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

PETER LEE and LATONYA CAMPBELL, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

THE HERTZ CORPORATION, DOLLAR THRIFTY AUTOMOTIVE GROUP, INC.,

Defendants.

Case No.: CGC-15-547520

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

Date: August 16, 2019
Time: 1:30 PM
Judge: Hon. Teri L. Jackson
Department: 613

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INTRODUCTION

Named Plaintiffs and Class Representatives Peter Lee and Latonya Campbell[1] seek final approval of a proposed settlement of the Named Plaintiffs' claims against Defendants The Hertz Corporation and Dollar Thrifty Automotive Group, Inc. ("Defendants" or "Hertz") (together with Plaintiffs, the "Parties") for alleged violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* ("FCRA"). At the preliminary approval stage, the Court found the settlement to be within the range of possible final approval. (*See* Prelim. Approval Order.) The response from the Settlement Class Members confirms that the settlement is fair, reasonable, adequate. Notice was sent to the 24,484 Settlement Class Members.[2] There are no objections and only two (2) people submitted timely opt-out requests, about .008% of the Settlement Class. Thus, Plaintiffs request, and Defendants do not oppose, that the Court grant final approval of the Settlement.

BACKGROUND

The history of this litigation and Settlement, and the claims involved, are set forth in detail in Plaintiffs' preliminary approval papers and Plaintiffs' Motion for Attorneys' Fees, Costs, and Class Representative Service Awards, which are incorporated herein by reference and therefore will be only briefly summarized here.

I. SUMMARY OF PROCEDURAL HISTORY.

Plaintiffs filed their class action complaint on August 21, 2015, in the Superior Court of California, County of San Francisco, alleging violations of the FCRA by Defendants for (1) failure to provide notice to employees and applicants prior to taking adverse action based in whole or in part on information contained in a consumer report (15 U.S.C. § 1681b(b)(3)); and (2) failure to provide a stand-alone disclosure that a consumer report would be procured for employment purposes (15 U.S.C. § 1681b(b)(2)). (*See* Compl.)

[1] Unless otherwise explicitly defined herein, all capitalized terms have the same meanings as those set forth in the Parties' Amended Settlement Agreement, attached to the Supplemental Declaration of E. Michelle Drake filed in Support of Plaintiffs' Motion for Preliminary Approval ("Suppl. Drake Decl.") as Exhibit 1.

[2] This number represents the total number of class members on the class list after duplicate records were removed by the Settlement Administrator prior to Notice Mailing.

On September 30, 2015, Defendants filed a General Denial of the complaint's allegations, and on October 2, 2015, Defendants removed the action to the United States District Court for the Northern District of California. (*See* Gen. Denial; Not. of Removal.) On November 25, 2015, Defendants filed a motion to stay the case pending the U.S. Supreme Court's decision in *Spokeo, Inc. v. Robins*, 135 S. Ct. 1892 (2015), which the court granted on February 26, 2016 (N.D. Cal. ECF No. 35). Following the U.S. Supreme Court's decision in *Spokeo*, this action resumed litigation, with Plaintiffs filing a First Amended Complaint on July 15, 2016, reasserting their allegations regarding Defendants' violations of the FCRA's stand-alone disclosure and pre-adverse action notice requirements, and changing the class allegations to conform with Fed. R. Civ. P. 23. (N.D. Cal. ECF No. 43.)

Defendants moved to dismiss the First Amended Complaint on August 18, 2016 (N.D. Cal. ECF No. 47) which the court granted, and remanded the action to this Court, on December 2, 2016 (N.D. Cal. ECF No. 66). On February 16, 2017, Plaintiffs filed the Second Amended Complaint, re-asserting the prior allegations regarding Defendants' violations of the FCRA's stand-alone disclosure and pre-adverse action notice requirements, and changing the class allegations to conform with Cal. Code of Civ. P. § 382. (*See* Second Am. Compl.) On February 17, 2017, Defendants filed their demurrer to the Second Amended Complaint, which after briefing and oral argument, the Court overruled on April 5, 2017. *Lee v. The Hertz Corp.*, 2017 WL 1292819 (Cal. Super. Apr. 5, 2017). On April 12, 2017, Plaintiffs filed the Corrected Second Amended Complaint, which addressed inadvertent errors in the original, such as missing exhibits, and on May 5, 2017, Defendants filed a general denial of the Corrected Second Amended Complaint. Defendants petitioned for writs of mandamus regarding the demurrer decision to the California State Court of Appeals on June 2, 2017, which was denied on June 22, 2017. Defendants then petitioned for review by the California Supreme Court, which was denied on September 13, 2017. On December 12, 2017, Defendants petitioned the U.S. Supreme Court for a writ of certiorari, Plaintiffs, at the request of the Court, filed an opposition to

the petition on March 27, 2018, and the Supreme Court denied certiorari on April 30, 2018. *The Hertz Corp. v. Super. Ct. of Calif.*, 138 S.Ct. 1696 (2018).

Following this Court's overruling of the demurrer, the Parties had commenced discovery, exchanging written requests and responses, negotiating electronic discovery, and producing documents. In September 2018, the Parties began arm's-length discussions, through counsel, of the potential for settlement of this action. Negotiations continued through the next two months, with the Parties reaching a class-wide resolution in principle on November 14, 2018. On February 11, 2019, the Parties executed a formal Settlement Agreement (Feb. 15, 2019 Drake Decl., Ex. 1). On March 7, 2019, the Court held an initial preliminary approval hearing, at which, the Court raised certain matters regarding the Settlement Agreement, exhibits, and operative complaint, and made suggestions to the Parties on certain amendments to the same. The Parties subsequently agreed on the Amended Settlement Agreement and its Exhibits, and stipulated to the filing of the Third Amended Complaint to bring the class defined therein in line with the Settlement Class proposed in the Parties' Amended Settlement Agreement. On April 16, 2019, the Court preliminarily approved the Amended Settlement Agreement and authorized the dissemination of Notice to the Settlement Class. (*See* Prelim. Approval Order.)

II. NOTICE AND CLASS MEMBER REACTION.

On May 14, 2019, the Settlement Administrator, JND Legal Administration, Inc., sent the court-approved Class Notices via U.S. mail. (Keough Suppl. Decl. ¶ 5.) After de-duplicating the Class List, the Administrator sent a total of 24,484 Notices. (*Id.*) 2,916 Notices were returned as undeliverable, but JND either forwarded, or researched and obtained a new address for, 1,057 of those Notices. (*Id.* ¶ 7.) Thus, the mailed notices reached 92.4% of the Class.

Also on May 14, 2019, the Administrator caused the Settlement Website to go live, which provided Class Members with general information about the Settlement, court documents, copies of the Notices, and important dates and deadlines. (*Id.* ¶ 8.) The Website also provided a page for Category 3 Members to submit Claims. (*Id.*) The Administrator

established a toll-free telephone line, which provided responses to frequently asked questions. (*Id.* ¶ 11.)

On July 1, 2019, Class Counsel filed their motion for attorneys' fees, costs, administration expenses, and Class Representative Service Awards, which was promptly posted on the Settlement Website. No Class Members objected to those requests.

The deadline for Class Members to postmark any opt-outs or objections passed on July 15, 2019. To date, despite the size of the Class, there have been no objections and only two (2) timely opt-outs. (*Id.* ¶¶ 14, 16.)

Additionally, the deadline for Category 3 Class members to postmark or submit Claim Forms also passed on July 15, 2019. To date, 1,403 Category 3 Class members have submitted Claim Forms, resulting in an 11.3% claims rate. (*Id.* ¶ 18.)

III. SUMMARY OF SETTLED CLAIMS.

As alleged in the Third Amended Complaint, the claims in this case involve two related provisions of the FCRA. The first claim relates to the disclosure Defendants provided to prospective employees before procuring background checks on them. The FCRA requires that entities that are procuring a consumer report (i.e., a background check) for employment purposes must provide applicants and employees with written notice that such a report may be obtained for employment purposes. 15 U.S.C. § 1681b(b)(2)(A)(i). This notice must be made "in a document that consists solely of the disclosure." *Id.* Some courts have found that this requirement, commonly called the "stand-alone disclosure" requirement, is violated if the disclosure contains extraneous language, such as a provision purporting to release the employer from liability. *See, e.g.*, *Singleton v. Domino's Pizza, LLC*, No. 11-1823, 2012 WL 245965, at *8 (D. Md. Jan. 25, 2012) ("Had Congress intended for employers to include additional information in these documents, it could easily have included language to that effect in the statute. It did not do so, however, and its 'silence is controlling.'"). Plaintiffs alleged that Defendants violated the stand-alone disclosure requirement by providing prospective employees with a disclosure containing numerous items of extraneous information, including a liability waiver.

The second claim alleges that Defendants violated the FCRA's pre-adverse action notice provision, 15 U.S.C. § 1681b(b)(3). Under the pre-adverse action notice provision, an employer is required to provide the prospective employee with a copy of his or her background report and written summary of consumer rights under the FCRA before taking any adverse action based in whole or in part on the report. Pre-adverse action notice must be followed by a sufficient amount of time before the employer actually takes the adverse action so that the consumer may explain the report and/or rectify any inaccuracies contained therein. *See* Advisory Opinion to Weisberg, Federal Trade Commission (June 27, 1997), 1997 WL 33791228 (noting that a period of five business days after notice "appears reasonable."). Plaintiffs alleged that they did not receive pre-adverse action notice as required, and that Defendants instead took adverse action before providing a copy of the report and a summary of rights. Plaintiffs did not seek actual damages, but instead sought statutory damages of $100-$1000 which are available for each willful violation of the FCRA. 15 U.S.C. § 1681n.

Defendants raised numerous defenses during litigation. Among other things, Defendants asserted that even if there were any FCRA violations, which they did not concede, those violations were not willful, thus foreclosing recovery of statutory damages, Defendants further asserted that Plaintiffs did not have standing, as they did not allege actual harm from Defendants' alleged violations. Although Plaintiffs disagreed with those defenses, Plaintiffs acknowledge that these defenses posed a recognizable risk to the Plaintiffs, as well as the Settlement Class Members, that their claims could fail on the merits.

IV. RELIEF TO CLASS MEMBERS.

The Settlement Class is defined as:

> All persons who applied for employment with The Hertz Corporation or Dollar Thrifty Automotive Group, Inc. in the United States at any time from August 21, 2013 to September 8, 2016 and who are members of Category 1, 2 and/or 3 as set forth below:
>
> Category 1. All individuals who, at any time from August 21, 2013 to September 8, 2016, had a conditional offer of employment withdrawn by

Defendants.

> Category 2. All individuals who, at any time from August 21, 2013 to December 31, 2014, received conditional offers of employment from Defendants requiring a background check be run on the individuals, OR who, at any time from January 1, 2015 to December 31, 2015, received conditional offers of employment as Transporters from Defendants.
>
> Category 3. All individuals who, at any time from January 1, 2015 to September 8, 2016, received conditional offers of employment from Defendants.

(Prelim. Approval Order ¶ 2.) After de-duplicating the Class List, the Settlement Class contained 24,484 members, of which 2,330 are Category 1 members, 9,728 are Category 2, and 12,426 are Category 3 members. (Keough Suppl. Decl. ¶ 4.)

In consideration for the release of the Settlement Class Members' claims, Defendants will pay $1,619,000.00 to the Settlement Class as part of a common settlement fund. (Suppl. Drake Decl. Ex. 1 ¶ 40.) In no circumstance will any portion of this fund revert to the Defendants. (*Id.* ¶ 55.) After any Court-approved deductions for attorneys' fees, expenses, administration costs, and Class Representative service awards, the entire remaining fund will be distributed *pro rata* to all participating Settlement Class Members. (*Id.* ¶ 56.) The distribution will be allocated based on Settlement Class Category membership, with Category 1 members receiving two times the amount Category 2 members and Category 3 claimants receive. Based on the claims rate of 11%, and if the requested attorneys' fees, costs, and Class Representative Service Awards are approved, the estimated net payments per Category 1 Class member will be $122.38, and net payments per Category 2 Class member and Category 3 Claimant will each be $61.19.

Should any funds remain after the close of the check cashing period, then those funds are requested to be donated evenly to the Parties' designated charitable *cy pres* recipients, Public Justice and the Southern Center for Human Rights. (*Id.* ¶ 57.) These organizations both meet the requirements of Cal. Civ. Code § 384(b), as they are advocacy organizations, aimed at social inequalities, and provide representation to those who would not normally have access to the justice system. (*See* https://www.publicjustice.net/who-we-

are/mission/; https://www.schr.org/about/accomplishments.) Public Justice does legal work on the Fair Credit Reporting Act, among other issues, and the Southern Center for Human Rights does legal and advocacy work on behalf of individuals with criminal backgrounds. These missions support the objectives of this action, as many class members would not have had the means to pursue these claims, absent this class action, and by definition, at least 2,330 of the class members here had information on their background checks that prevented them from attaining employment.

Importantly, Defendants have also changed their background-check-related procedures to ensure compliance. Defendants have agreed to continue to utilize their current disclosure, which Plaintiffs' Counsel have reviewed, for at least thirty-six (36) months following the Effective Date of the settlement. (*Id.* ¶ 47.) Defendants have also agreed that, in addition to providing applicants with that stand-alone disclosure directly, Defendants will continue to take steps to ensure individuals processed through Defendants' web application/portal system, will also be provided with a legally compliant stand-alone disclosure. (*Id*. ¶ 48.) Also for the thirty-six (36) month period, Defendants will send an annual memorandum, or other similar guidance, to the individuals in recruiting positions for Defendants, reminding them of Defendants' FCRA-compliant policies and procedures for procuring and using consumer reports. (*Id.* ¶ 50.)

ARGUMENT

A class action may not be settled or compromised without "the approval of the court after hearing." Cal. Rules of Court, rule 3.769. The purpose of this requirement is "[t]o prevent fraud, collusion or unfairness to the class," and the court must determine whether "the settlement is fair, adequate, and reasonable." *Dunk v. Ford Motor Co.*, 56 Cal. Rptr. 2d 483, 487-88 (Ct. App. 1996) (internal quotation omitted). "Public policy generally favors the compromise of complex class action litigation." *In re Cellphone Termination Fee Cases*, 104 Cal. Rptr. 3d 275, 281 (Ct. App. 2009) (internal quotation omitted).

On a motion for final approval, the trial court is charged with determining whether, in light of the total circumstances of the action and the response of the class members to the

notice, the settlement is fair, reasonable, and adequate. *Dunk*, 56 Cal. Rptr. 2d at 487; *Wershba v. Apple Comput., Inc.*, 110 Cal. Rptr. 2d 145, 162 (Ct. App. 2001). The court has broad discretion in making that determination and may consider all relevant factors including the strength of the plaintiff's case; the likelihood of potential recovery; the risk, expense and likely duration of further litigation; the amount offered in settlement; the extent of discovery and stage of the proceedings; the experience and opinion of counsel; and the reaction of class members to the settlement. *See Wershba*, 110 Cal. Rptr. 2d at 162. Because of the strong judicial policy favoring the settlement of class actions, there is a presumption of fairness when: (1) the settlement is reached through arms-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the reaction of the Class is positive. For the reasons set forth below, the Settlement warrants final approval. *Id.*; *Dunk*, 56 Cal. Rptr. 2d at 488.

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

A. The Settlement Provides a Substantial Recovery for the Class.

As set forth in Plaintiffs' preliminary approval memorandum and motion for attorneys' fees, costs, and Class Representative Service Awards, the Settlement provides a substantial benefit for the Settlement Class, especially in light of Defendants' potential defenses, and the number of procedural hurdles between the Named Plaintiffs and a final judgment. The Named Plaintiffs filed their case seeking statutory damages under the FCRA, which provides for statutory damages of between $100 and $1,000 for each willful violation. 15 U.S.C. § 1681n(a)(1).

The statutory damages range applies to all FCRA violations, including violations involving willfully publishing inaccurate information which caused monetary harm. Given the breadth of violations that fall into the $100- $1,000 range, as well as the size of the Class at issue here, Plaintiffs here, even after a trial, might not achieve an award of statutory damages which, on a per-person basis, would substantially exceed $100 per person. As explained below, other FCRA settlements reflect that both disclosure and pre-adverse action

notice claims tend to fall on the lower end of the $100-$1000 range. The differing per-class-member amounts provided under the Settlement reflect that pre-adverse action claims often are determined to be more valuable than disclosure claims. In recognition of the varying severity of the harms experienced by the Class Members, the Class was divided into the three Categories – with those actually experiencing an adverse employment action based on the background check obtained receiving a higher allocation than those who were provided with an allegedly non-compliant form.

Overall, Class Members are likely to recover a considerable portion of what they could have recovered in litigation. While the precise net recovery per person cannot be known at this time as the claims period is still open, if the Court grants the requested fees, costs and service awards, based on the current claims rate, the net payouts will be approximately $122.38 per Category 1 Class member, and $61.19 per Category 2 Class member and Category 3 Claimant. A recovery of a meaningful percentage of the likely award if these claims had proceeded all the way through final judgment is a significant result. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 n.2 (2d Cir. 1974) ("[T]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery."), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000); *In Re Toys R Us-Delaware, Inc.--Fair & Accurate Credit Transactions Act (FACTA) Litig*., 295 F.R.D. 438, 453-54 (C.D. Cal. 2014) ("Viewed from the perspective of each class member, had the class member sued Toys individually and proved that it acted wil[l]fully, he or she could have recovered between $100 and $1,000 in statutory damages. . . . A $5 or $30 award, therefore, represents 5% to 30% of the recovery that might have been obtained. This is not a *de minimis* amount. Given the likelihood that plaintiffs would have been unable to prove actual damages and the risk that they would have been unable to prove willfulness and recover any damages at all, the court finds that the amount of the settlement weighs in favor of approval.").

The settlement amount is better than many of those achieved in settlements that have been approved in cases raising similar claims, especially those after the Supreme Court agreed to hear *Spokeo*. *See Nesbitt v. Postmates, Inc.*, No. CGC-15-547146 (Cal. Super., San Fran. Cnty. Nov. 8, 2017) (final approval of settlement with net payouts of $23.65 per disclosure class member (claims similar to Categories 2 & 3 here), and $70.96 per pre-adverse action notice class member (claims similar to Category 1 here); *Feist v. Petco Animal Supplies, Inc.*, 2018 WL 6040801 (S.D. Cal. Nov. 16, 2018) (approximate net payouts for $20 per disclosure class member, and $170 per pre-adverse action notice claim member (of which there were only 52 members, here, there are 2,330 (Cat. 1 Class Members))); *see also Rubio-Delgado v. Aerotek, Inc.*, Case No. 16-cv-1066, ECF No. 121 (S.D. Ohio July 25, 2017) (final approval of settlement with approximate net recovery for disclosure class members of $13, for disclosure class members who were determined to have unfavorable background checks, $21, and for pre-adverse action notice class members, $78); *Aceves v. Autozone Inc.*, No. 5:14-cv-2032, ECF No. 58 (C.D. Cal. Nov. 18, 2016) (final approval of 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); *Patrick v. Interstate Mgmt. Co., LLC*, No. 8:15-cv-1252, ECF No. 42 (M.D. Fla. Jan. 14, 2016) (granting preliminary approval of settlement with gross recovery per disclosure class member of $16.40); *Manuel v. Wells Fargo Bank, NA*, No. 14-cv-238-REP-DJN, 2016 WL 1070819, at *2 (E.D. Va. Mar. 15, 2016) (granting final approval to FCRA background check settlement where "each member of the Impermissible Use Class will receive a check for $35.00, and each Adverse Action Class member will receive a check for $75.00"); *Walker v. McClane/Midwest, Inc.*, No. 2:14-CV-04315, ECF No. 29 (W.D. Mo. Oct. 23, 2015) (final approval of settlement in which disclosure class members recovered $24); *Brown v. Lowe's*, 5:13-cv-00079, ECF No. 173 (W.D.N.C. Nov. 1, 2016) (granting final approval of a pre-adverse action claim in which the gross recovery was $60 per class member); *Fernandez v. Home Depot USA, Inc.*, No. 13-cv-648-DOC-RNB, ECF No. 59 (C.D. Cal.

Jan. 22, 2016) (granting final approval to FCRA background check settlement where claimants would receive $15 to $100 each); *Patrick v. Interstate Mgmt. Co., LLC*, No. 15-cv-1252, ECF No. 49 (M.D. Fla. April 29, 2016) (approving settlement of FCRA disclosure claim where class members received $9 each). The ratio between the amounts awarded to Settlement Class Members in the Categories is also in line with other similar settlements. *See, e.g.*, *Nesbitt*, No. CGC-15-547146 (ratio of three to one for pre-adverse action class members versus disclosure class members); *Rubio-Delgado*, No. 16-cv-1066 (ratio of six to one for pre-adverse action notice class members versus disclosure class members); *Feist*, 2018 WL 6040801, at *5 (approving similar payout structure).

Moreover, the non-monetary relief in the form of continuing practice changes promised by the settlement, which would prohibit Defendants from using the allegedly unlawful background check forms and practices that form the basis of this action, is a great benefit, particularly in light of the fact that analogous injunctive relief may be unavailable to private plaintiffs under FCRA. *See, e.g.*, *Gauci v. Citi Mortg.*, No. 11-cv-1387-ODW-JEM, 2011 WL 3652589, at *3 (C.D. Cal. Aug. 19, 2011) ("District courts in the Ninth Circuit agree that a private party may not obtain injunctive relief under the FCRA.").

Taken all together, the gross recovery, the per-class member recovery, the non-monetary relief, and the method of distributing the settlement proceeds are all fair and reasonable and warrant final settlement approval.

B. There Were Significant Risks to Recovery.

Plaintiffs faced risks that this litigation could have resulted in no recovery whatsoever. These risks are detailed in Plaintiffs' preliminary approval memorandum and motion for fees, costs, and Class Representative Service Awards, but are briefly restated here.

Plaintiffs faced specific risk on the issue of willfulness. The FCRA is not a strict liability statute. *Dalton v. Capital Associated Indus.*, 257 F.3d 409, 417 (4th Cir. 2001). A FCRA plaintiff can recover statutory damages only where the defendant has acted willfully. 15 U.S.C. § 1681n(a)(1). Because Plaintiffs did not allege any actual damages, in order to

recover *anything* for these claims, Plaintiffs would have to prove not only that Defendants violated the FCRA, but that they did so willfully. Plaintiffs expect that if the matters were litigated, Defendants would contest the question of willfulness vigorously. At least one court has found that allegations similar to Plaintiffs' allegations were insufficient to state a claim for a willful violation of the statute. *Schoebel v. Am. Integrity Ins.*, 2015 WL 3407895, *9 (M.D. Fla. May 27, 2015) (dismissing FCRA stand-alone disclosure claim for failing to adequately plead willfulness); s*ee also Chakejian v. Equifax Info. Servs., LLC*, 275 F.R.D. 201, 212 (E.D. Pa. 2011) (that proving willfulness in FCRA case was "a high hurdle to clear," was a factor weighing in favor of settlement approval); *Reibstein v. Rite Aid Corp.*, 761 F. Supp. 2d 241, 253 (E.D. Pa. 2011) (that willfulness presented "considerable — albeit not insurmountable — risks" weighs in favor of settlement approval).

C. The Proposed Settlement Was Reached After Substantial Discovery, and Arms-Length Negotiations Between Experienced Counsel.

As detailed above, the Settlement was reached after extended arms-length negotiations through counsel, and substantial discovery and motions practice. Both Plaintiffs and Defendants are represented by counsel who have significant experience in class action litigation and settlements, and in FCRA cases in particular. Counsel for the Parties have litigated numerous class action cases involving employment-related claims brought under the FCRA. Class Counsel are recognized nationally as FCRA and class action experts. (*See generally* Drake Decl. ISO Mot. for Fees; Sagafi Decl. ISO Mot. for Fees; Della-Piana Decl. ISO Mot. for Fees.) The judgment of Class Counsel is entitled to deference. *See Kullar v. Foot Locker Rental, Inc*., 85 Cal. Rptr. 3d 20, 31 (Ct. App. 1998) ("The court … should give considerable weight to the competency and integrity of counsel and the involvement of a neutral mediator in assuring itself that a settlement agreement represents an arm's-length transaction entered without self-dealing or other potential misconduct.").

D. The Class Has Reacted Favorably to the Settlement.

Of the approximately 24,484 Class Members, only *two* requested to opt out, and *zero* have objected. These are miniscule numbers in comparison to the size of the Settlement Class (.008% of the total), which decidedly weighs in favor of final approval. *See 7-Eleven Owners for Fair Franchising v. Southland Corp.*, 102 Cal. Rptr. 2d 777, 788 (Ct. App. 2000) (describing class reaction as "overwhelmingly positive" where 80 out of 5,454 class members opted out and 9 class members objected).

The Category 3 claims rate of 11.3% also supports final approval. Courts consistently approve consumer class action settlements where the claims rate is around 5%. *See Shames v. Hertz Corp.*, No. 07-cv-2174, 2012 WL 5392159, at *14 (S.D. Cal. Nov. 5, 2012) (granting final approval of settlement with 4.9% claims rate); *Zepeda v. PayPal, Inc.*, No. 10-cv-1668, 2017 WL 1113293, at *15-16 (N.D. Cal. March 24, 2017) (finding in consumer protection case that a 3.8% claims rate indicated that the email "notice process has been remarkably successful – and the Settlement Class's reaction to the Settlement has been overwhelmingly positive."); *In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573, 589 (N.D. Cal. 2015) (approving settlement and finding 5.9% claims rate to indicate an overall positive reaction to the settlement); *White v. Experian Info. Solutions, Inc.*, 803 F. Supp. 2d 1086, 1100 (C.D. Cal. 2011) (approving settlement with 5% response rate); *Tait v. BSH Home Appliances Corp.*, No. 10-cv-0711, 2015 WL 4537463, at *8 (C.D. Cal. July 27, 2015) (approving settlement with 3% claims rate); *Touhey v. U.S.*, No. 08-cv-01418, 2011 WL 3179036, at *7-8 (C.D. Cal. July 25, 2011) (approving settlement with 2% claims rate*); Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 329 n.60 (3d Cir. 2011) (en banc) (noting evidence that claims rates in consumer class settlements "rarely" exceed 7%, "even with the most extensive notice campaigns"). Here, the claims rate of 11.3% is in line with or exceeds all of these settlements.

The reaction from the Class has been positive and thus the Settlement should receive final approval.

II. THE COURT SHOULD GRANT CLASS COUNSEL'S REQUESTS FOR ATTORNEYS' FEES, COSTS, AND CLASS REPRESENTATIVE SERVICE AWARDS.

Two weeks prior to the objection deadline, on July 1, 2019, Class Counsel filed their motion for attorneys' fees, costs, administration expenses, and Class Representative Service Awards. The motion seeks one-third of the settlement fund ($539,666.67) for fees, $41,759.32 in out-of-pocket expenses, $61,507.00 in third-party settlement administration expenses, and Class Representative Service Awards of $5,000.00 for each of the two Named Plaintiffs. The motion and related filings were placed on the Settlement Website shortly after filing and there were no objections to the requests made in the motion. The motion for fees, costs, administration expenses, and Class Representative Service Awards should be granted.

CONCLUSION

Based on the foregoing, the Court should grant final approval and enter the final approval order.

BERGER MONTAGUE PC

Date: August 5, 2019

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

ATTORNEY FOR PLAINTIFFS