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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GREGORY HOWELL, on behalf of himself and all others similarly situated, Plaintiff, v. CHECKR, INC., Defendant.	Case No.: 3:17-cv-04305-SK **PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF THE PROPOSED SETTLEMENT AND MEMORANDUM IN SUPPORT [UNOPPOSED]** Date: June 25, 2018 Time: 9:30 AM Courtroom: A, 15th Floor Judge: Hon. Sallie Kim

NOTICE OF MOTION AND MOTION

Pursuant to Fed. R. Civ. P. 23, and for the reasons discussed in the accompanying Memorandum below, Plaintiff Gregory Howell ("Plaintiff") respectfully moves the Court for an order:

a. Finding that the Federal Rules of Civil Procedure and all other requirements for certification of a settlement class have been satisfied, and certifying the Settlement Class;

b. Preliminarily approving the Settlement Agreement as fair, reasonable, and adequate;

c. Finding that the class notice procedure set forth below satisfies the requirements of due process and applicable law and procedure;

d. Setting a date for the hearing at which the Court will finally determine the fairness, reasonableness, and adequacy of the proposed settlement (the "Final Fairness Hearing");

e. Appointing Plaintiff as class representative for the Settlement Class; and

f. Appointing Berger & Montague, P.C., as Class Counsel to the Settlement Class.

Defendant Checkr, Inc. ("Defendant") does not oppose this Motion. For good cause shown, Plaintiff's Motion should be granted.

MEMORANDUM OF POINTS & AUTHORITIES

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I. INTRODUCTION

Plaintiff Gregory Howell ("Plaintiff"), individually and on behalf of the Settlement Class,[1] seeks preliminary approval of the proposed Settlement Agreement with Defendant Checkr, Inc. ("Defendant" or "Checkr") which resolves this putative class action brought under the Fair Credit Reporting Act ("FCRA"). The Settlement Agreement between Plaintiff and Defendant (collectively, the "parties"), if approved, will resolve all claims of the Plaintiff and all members of the Settlement Class in exchange for Defendant's agreement to pay $4,460,000 into a common settlement fund, and to affirm and continue changes to its procedures intended to improve its reporting algorithm and prevent a recurrence of the reporting practices which are alleged in this action. The majority of class members will receive an automatic payment, without need to file a claim form. This settlement represents a substantial recovery for the Settlement Class. The proposed settlement of this action follows extensive arms-length negotiations by experienced and informed counsel. Its terms are "fair, reasonable, and adequate" and it warrants preliminary approval. Fed. R. Civ. P. 23(e)(2).

II. STATEMENT OF THE ISSUE TO BE DECIDED

Whether the Settlement Agreement should receive preliminary approval.

III. RELEVANT FACTS

A. THE PARTIES ENGAGED IN LITIGATION, INFORMAL DISCOVERY, AND MEDIATION BEFORE REACHING THIS SETTLEMENT

1. Summary of Settled Claims

For purposes of the claims and alleged conduct in this action, Defendant is a consumer reporting agency ("CRA") under the FCRA. All of the settled claims relate to

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

background checks that Defendant produced on applicants for employment or other work engagements with third parties. As alleged in the Complaint, the FCRA generally prohibits CRAs from including adverse information in a consumer report that is older than seven years from the date of the report. (Compl., ECF No. 1-1, ¶ 17; *see also* 15 U.S.C. § 1681c.) This general restriction, however, does not apply to criminal conviction records, which may be reported indefinitely. (*Id.*) However, non-criminal conviction information, such as information about arrests or civil infractions, may not be included in a consumer report if the information predates the report by more than seven years. (*Id.*)

Plaintiff alleged that Defendant violated the FCRA by producing a background report that included information relating to non-criminal infractions that predated the report by more than seven years. (Compl. ¶¶ 25-27.) As alleged, for Plaintiff, the challenged information concerned non-criminal civil and driving offenses. (*Id.*) Defendant denies any liability for these claims, denies that it violated the FCRA, and denies any wrongdoing whatsoever.[2] If this case proceeded, Defendant intended to vigorously oppose class certification.

2. Litigation History

Prior to reaching the Settlement Agreement in this matter, the parties thoroughly investigated the claims in this case. On June 23, 2017, Plaintiff filed a Class Action Complaint against Defendant in the Superior Court for the County of San Francisco. (*See* ECF No. 1.) On behalf of himself and the proposed classes, Plaintiff sought statutory damages, plus attorneys' fees, costs, injunctive relief, and all other available relief. (*See* Compl.) Defendant removed the action to this Court on July 28, 2017, and answered on

[2] Plaintiff also alleged violations of two additional FCRA provisions, 15 U.S.C. § 1681e(b) and 15 U.S.C. 1681g (brought as an individual claim). After extensive discussion with Defendant about the merits of these claims, the parties agreed to resolve only the Section 1681c claim on a class basis.. As part of the Settlement Agreement, Plaintiff has agreed to release all individual claims.

November 3, 2017. (ECF Nos. 1, 37.)

Following a case management conference on November 9, 2017 and a scheduling order issued on January 9, 2018 (ECF No. 40), on March 1, 2018, the parties engaged in an adversarial day-long mediation in San Francisco, California with experienced third-party neutral Rodney Max, Esq. (*See* ECF No. 45.) In preparation for the mediation, the parties engaged in a substantial amount of formal and informal discovery. (Drake Decl. ¶ 3.) Plaintiff propounded over 40 requests for production to Defendant, to which Defendant responded. (*Id.*) Further, the parties engaged in a substantial informal exchange of information and documents, including detailed communications about Defendant's policies and procedures. (*Id.*) Crucially, Defendant provided Plaintiff with information about its filtering algorithms and procedures, as well as the text of the queries it was running to identify potential class members. (*Id.*) Plaintiff, with the assistance of an expert, evaluated and provided feedback on these queries. (*Id.* ¶ 4.)

The parties did not reach resolution at the March 1 mediation. However, with the continued assistance of the mediator, the parties subsequently engaged in additional arm's length negotiations in the days and weeks after the mediation, eventually executing a terms sheet and formalizing a class-wide settlement. (*Id.* ¶ 5.) Plaintiff now brings that settlement before the Court with this Motion.

B. THE PARTIES' SETTLEMENT AGREEMENT

1. Overview of Terms and Settlement Administration

To avoid the further costs and burdens of litigation, the parties have agreed to settle the claims and resolve this matter in its entirety. The proposed Settlement Class consists of the approximately 100,959 persons upon whom, from July 28, 2015 through March 20, 2018, Defendant produced a consumer report which included records older than seven years, which included the following terms in the "charge type" field: "infraction," "ordinance," "violation," "petty offense," "traffic," citation," and "civil," (collectively,

"low-level offenses"). (Drake Decl., Ex. 1 ¶ 1.10.) As part of the Settlement Agreement, the Settlement Class Members will release, among other claims, all claims arising under 15 U.S.C. § 1681c of the FCRA and any analogous state law claims.

In connection with the settlement of the litigation, Defendant will create a common fund for class members consisting of $4,460,000 for the benefit of the Settlement Class. (Ex. 1 ¶ 1.21.) Defendant has also agreed not to report low-level offenses older than seven years for at least 18 months – regardless of whether such low level offenses are criminal in their jurisdiction. If, after that time period, Defendant decides to resume reporting criminal low level offenses that are more than seven years old, it will use data from Plaintiff's Counsel and consult an expert before engaging in any changes to its reporting procedure of these types of records.

2. Monetary and Injunctive Relief

After Court-approved deductions for attorneys' fees and costs, settlement administration costs, and a service award for the Named Plaintiff, the entire remaining balance of the Settlement Fund will be allocated *pro rata* to Class Members who are entitled to receive a payment. (*Id.* ¶ 8.5.2.) Participating Class Members fall into two categories for payment purposes. The majority of Class Members will receive a check, automatically, and without need to return a claim form. Other Class Members will need to return a simple claim form in order to be eligible to receive a payment. (*Id.* ¶¶ 1.4, 1.5.) All Class Members who receive a check will receive the same amount, regardless of their payment category.

There are 56,629 Class Members who are entitled to receive a check without having to return a claim form. These individuals are people who Defendant produced a consumer report about between July 28, 2015 and March 20, 2018 where (1) the consumer report included a North Carolina, Florida or Virginia record of an "infraction" older than seven years from the date of the report; **and/or** (2) the consumer report included infraction and/or other low-level offense records older than seven years old, the Class Member disputed

information on their background report, and the dispute resulted in a change to the records on their report which were older than seven years. (*Id.* ¶ 1.4.) The remaining Class Members are people whose records are from a state other than North Carolina, Florida or Virginia, and/or who did not previously successfully dispute the inclusion of a low-level offense in their consumer report.

The text of the FCRA itself provides the basis for distinguishing between (a) people from North Carolina, Florida and Virginia and people who successfully disputed the inclusion of outdated information; and (b) people from other states who did not successfully dispute information on their background reports. Specifically, the FCRA expressly allows records of *crimes* to be reported indefinitely. However, whether something is a crime is a question of state law. In some states, like North Carolina, Florida or Virginia, records referred to as "infractions" under state law are, by definition, non-criminal in nature. *Glenn-Robinson v. Acker*, 140 N.C. App. 606, 616 (2000) (in North Carolina, an infraction is a "noncriminal violation of law"); Fla. Stat. § 318.14(4) (defining infractions as non-criminal); *Turnbull v. Cty. of Spotsylvania*, No. 0532-11-2, 2012 WL 266344, at *2 n. 4 (Va. Ct. App. Jan. 31, 2012) (in Virginia, "an infraction is neither a felony nor a misdemeanor, and thus, it is not criminal") (quotation omitted). In other states, the offense type alone is not determinative—some "infractions" are criminal, while others are not. *See, e.g.*, *State v. Bettwieser*, 143 Idaho 582, 586–87, 149 P.3d 857, 861–62 (Ct. App. 2006) (in Idaho, "[a]lthough there is language in I.C. § 49–110(5) defining 'infraction' as a 'civil public offense,' traffic infractions are criminal in nature and are treated as criminal for both constitutional and statutory purposes"). The majority of Class Members' reports have records from three states: North Carolina, Florida and Virginia. These states' laws do not require an individualized offense-by-offense analysis to determine whether the reported record was criminal or non-criminal. However, for people whose reports include records from other states, a determination will need to be made on an offense-by-offense basis.

Individuals in those states will be required to submit a simple claim form requesting that their low level offense record be reviewed for eligibility in the Settlement Class. For individuals who submit a claim form, Defendant will send Plaintiff's Counsel an anonymized version of their background report. Plaintiff's Counsel will evaluate that report to determine if it contained non-criminal information older than seven years. (Drake Decl., Ex. 1 ¶ 5.1.) If Plaintiff's Counsel determines that the report contains *non-criminal* information older than seven years, that Class Member would be entitled to receive a payment from the Settlement Fund; if the report does not contain non-criminal information older than seven years, that Class Member will not receive a payment, but will still benefit from the settlement's injunctive components (which bars reporting of low-level offenses beyond seven years for at least 18 months, even if those offenses are criminal under state law). (*Id.* ¶ 5.3.2.)

Plaintiff's Counsel will provide the results of all of the claim evaluations to Defendant. This ensures that, in the event Defendant decides that, at the end of 18 months, it wants to report these categories of offenses beyond seven years in its reports, it will have a significant amount of data on hand about state by state variations in the law. Defendant will be able to use this information to enhance and improve filtering procedures in future reports, and will be required to consult with an expert in the event Defendant decides to report low-level criminal offenses beyond seven years in its reports. (*Id.* ¶ 5.3.3.)

If any settlement checks are not negotiated by Class Members, remaining amounts will be donated as *cy pres* to Public Justice and the Southern Center for Human Rights, both of which are national nonprofit legal advocacy organizations who do work to advance enforcement of the FCRA and/or in service of assisting individuals who are facing collateral consequences as a result of interactions with the criminal justice system. (*Id.* ¶ 8.8.) No portion of the Settlement Fund will revert to Defendant in any circumstance.

After soliciting bids from three different settlement administrators, the parties have

jointly selected JND Administration, an independent third party, to serve as the settlement administrator in this case. The settlement administrator will undertake mailing and emailing notice to Class Members, mailing of settlement payments, and other administrative tasks. All fees and expenses charged by the administrator will be deducted from the Settlement Fund, pursuant to Court approval. (Drake Decl., Ex. 1 ¶ 1.2.)

3. Form of Notice to Settlement Class Members

The parties have agreed to a notice procedure which provides for notice to be sent via email and/or mail, and to be posted on a settlement website. (*Id.* ¶¶ 6.4, 6.6.) Notice will first be sent via email to the email address Defendant has on file for each Settlement Class Member. If that email is undeliverable, or if the email remains unopened after seven days, notice will be sent via first class mail to the last known mailing address for that Class Member, as updated by the settlement administrator. (*Id*.) In addition to sending the email and/or mail notices, the administrator will also establish a settlement website, where the Complaint, long form notice, Settlement Agreement and other settlement-related documents will be posted. (*Id.* ¶ 6.4.)

The proposed long form and email/mail notices are attached to the Settlement Agreement as Exhibits A-C. Defendant, through the settlement administrator, will also comply with the notice requirements of the Class Action Fairness Act of 2005, 28 U.S.C. § 1715(b), by providing notice of this proposed settlement to appropriate officials. (Drake Decl., Ex. 1 ¶ 6.3.)

These extensive efforts to provide notice to the Settlement Class are "the best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *Spann v. J.C. Penney Corp.*, 314 F.R.D. 312, 332 (C.D. Cal. 2016) (approving hybrid mail/email notice program). This notice program meets the requirements of Fed. R. Civ. P. 23, and should be approved.

4. Opt-Out Right

The parties propose that the Settlement Class be certified pursuant to Fed. R. Civ. P. 23(b)(3). Settlement Class Members may send opt-out requests to the address contained in the notice, and the settlement administrator will maintain that address. (Drake Decl., Ex. 1 ¶ 7.3.1.) The deadline for Class Members to postmark any opt-out of the settlement will be 60 days after the date on which notices are initially e-mailed to Class Members. (*Id.*)

5. Right to Object

Class Members who wish to object to the Settlement Agreement may mail their objection to the settlement administrator no later than the objections deadline, 60 days after the date on which the initial notices are e-mailed. (*Id.* ¶¶ 7.4.1.) Settlement Class Members who fail to make objections in the manner specified in the Settlement Agreement shall be deemed to have waived any objections and shall be foreclosed from making any objection (whether by appeal or otherwise) to the Settlement Agreement. (*Id.*)

6. Attorneys' Fees, Expenses, and Service Award

The Settlement Agreement provides that Plaintiff's Counsel's fees and service award for the Named Plaintiff are to be deducted from the Fund, subject to Court approval. (*Id.* ¶¶ 8.3, 8.4.) Counsel will petition the Court for up to 25 percent of the common fund, plus 25 percent of the value of the injunctive relief as attorneys' fees, as well as documented, customary expenses, and a service award of $3,500 for Plaintiff. (*Id.*) Plaintiff's Counsel will formally make this request prior to final approval, but no later than fourteen days prior to the deadline for objections, so that the papers are available to class members prior to the deadline for opt-outs and objections. *Id.*; s*ee In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 993 (9th Cir. 2010). Neither settlement approval nor the size of the Settlement Fund are contingent upon the full amount of any requested fees or class representative service award being approved. (Drake Decl., Ex. 1 ¶¶ 8.3.1, 8.4.1.)

IV. ARGUMENT

Federal courts favor the voluntary resolution of litigation through settlement, particularly in the class action context. *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 59 F. Supp. 2d 1021, 1029 (N.D. Cal. 1999) ("There is a strong judicial policy in favor of settlements in complex class actions"); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (noting "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned"); *Armstrong v. Board of Sch. Directors*, 616 F.2d 305, 312-13 (7th Cir. 1980); *Franks v. Kroger Co.*, 649 F.2d 1216, 1224 (6th Cir. 1981) *on reh'g*, 670 F.2d 71 (6th Cir. 1982); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999).

These considerations apply here. For the reasons set forth below, the Court should grant preliminary approval of the settlement, and authorize the issuance of notice to the Settlement Class.

A. CERTIFICATION OF THE SETTLEMENT CLASS IS APPROPRIATE.

The parties request that the Court certify the following Settlement Class under Fed. R. Civ. P. 23 for settlement purposes only:

> all natural persons upon whom Defendant produced a report which included records older than seven years, which included the following terms in the "charge type" field: "infraction," "ordinance," "violation," "petty offense," "traffic," citation," and "civil," from July 28, 2015 to March 20, 2018.

The class definition differs only slightly from the Section 1681c class pled in the Complaint and the changes are based on information adduced in discovery and during pre-mediation information exchanges.[3] (*See* Compl. ¶ 31(b).)

Even a class certified for settlement purposes only must satisfy the requirements for class certification pursuant to Rule 23, though the court "need not inquire whether the case,

[3] Specifically, this class definition includes the specific terms used to identify low-level offenses, which were unknown to Plaintiff at the time of filing.

if tried, would present intractable management problems, *see* Fed. R. Civ. P. 23(b)(3)(D), for the proposal is that there be no trial." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997). The proposed Settlement Class here meets the prerequisites for certification under Rule 23(a) and 23(b)(3).

1. The Prerequisites of Rule 23(a) Are Met.

Under Fed. R. Civ. P. 23(a), a class may be certified only when (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. The proposed Settlement Class meets these requirements.

a. The Proposed Settlement Class Meets the Numerosity Requirement.

Fed. R. Civ. P. 23(a)(1) requires a proposed class be "so numerous that joinder of all members is impracticable." In this case, where the Settlement Class consists of over 100,000 people, there is no question that joinder would be impracticable, and that the numerosity requirement is met.

b. The Class Shares Common Questions of Law and Fact.

A proposed class satisfies the "commonality" requirement "if there are questions of fact and law which are common to the class." Fed. R. Civ. P. 23(a)(2). This requirement, however, has been

> construed permissively. All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class.

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998).

Commonality has been found in similar cases in which it was alleged a consumer reporting agency reported outdated adverse information in violation of 15 U.S.C. § 1681c.

Hawkins v. S2Verify, No. C 15-03502, 2016 WL 3999458, at *3 (N.D. Cal. July 26, 2016) (finding commonality, certifying class based on claim of reporting of outdated non-criminal information); *Massey v. On-Site Manager, Inc.*, 285 F.R.D. 239, 244 (E.D.N.Y. 2012) (finding commonality, certifying class, in case where consumer reporting agency reported outdated information on class members' reports); *King v. General Info. Servs.*, No. 10-cv-6850, ECF No. 124 (E.D. Pa. Nov. 4, 2014) (certifying §1681c settlement class); *Haley v. TalentWise, Inc.*, No. 2:13-cv-01915-MJP (same); *Ernst v. Dish Network, LLC*, No. 12-cv-08794, ECF No. 175 (S.D.N.Y. 2015) (same); *Smith v. A-Check*, No 16-cv-00174, ECF No. 66 (C.D. Ca. 2017) (same).

Here, there are common issues of law and fact with respect to the Settlement Class, which would be determinative of the claims at issue, that are based on Defendant's common procedures. The common determinative question here is whether Defendant's process and policy of reporting certain offenses and violations was improper. Further, Defendant's willfulness, a prerequisite to liability under the FCRA, would also be a common legal question. *Massey*, 285 F.R.D. at 245 ("the central issues of whether defendant issued reports containing obsolete information about members of the class and whether it did so willfully can be proved on a generalized basis through records and testimony from defendant").

Accordingly, the commonality requirement is satisfied.

c. The Named Plaintiff's Claims Are Typical.

A named plaintiff's claims are typical if "they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. In this case, Plaintiff's claims are the same as the claims of every other class member, and are based upon the same legal theory. As alleged, Plaintiff, like every member of the Settlement Class, had a background report produced on him by Defendant which included a low-level offense older than seven years from the date of the report.

d. The Class Representative's Interests Are Aligned with Those of the Settlement Class, and the Class Representative Will Vigorously Represent the Class Through Qualified Counsel.

To make a determination on adequacy, the court must evaluate both the named plaintiffs and their counsel:

> Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?

Hanlon, 150 F.3d at 1020.

The resolution of the first question is simple: the Named Plaintiff and his Counsel have no conflicts of interest with the Settlement Class. (Drake Decl. ¶ 6.) Second, both the Named Plaintiff and his Counsel have vigorously worked in the best interest of the Settlement Class, and will continue to do so.

The Named Plaintiff has been actively engaged in this case. The Named Plaintiff reached out to Counsel about his potential claims, assisted Counsel in gathering information about those claims, including obtaining copies of his background report and court records, reviewed the Complaint prior to filing, stayed abreast of developments in the litigation and settlement negotiations, and reviewed and evaluated the Settlement Agreement. (*Id.* ¶ 7.)

Second, Plaintiff's Counsel is highly experienced in complex class action litigation and consumer litigation in general. (*See* Drake Decl. ¶¶ 8-16, Ex. 2.) Berger & Montague, P.C. ("Berger") was founded in 1970, and has been concentrated on representing plaintiffs in complex class actions ever since. (*Id.*) The firm has been recognized by courts for its skill and experience in handling major complex litigation. (*Id.*) Berger has been recognized by The National Law Journal in 11 of the last 15 years for its "Hot List" of top plaintiffs' oriented litigation firms in the nation. (*Id.*) Lead counsel from Berger, E. Michelle Drake, has worked extensively on FCRA class actions. (*Id.*) Joseph C. Hashmall, also from Berger, has concentrated his practice on FCRA litigation as well, and is counsel of record

in many active FCRA cases throughout the country. (*Id.*) Local counsel Carolyn H. Cottrell, of Schneider Wallace Cottrell Konecky Wotkyns LLP, has litigated hundreds of class actions and individual claims including wage and hour, employment discrimination and civil rights actions. Ms. Cottrell was selected as a Super Lawyer and in 2010 she was honored as a "Top Woman Litigator" by the Daily Journal.

In sum, the numerosity, commonality, typicality, and adequacy requirements of Rule 23(a)(1)–(4) are met here.

2. The Prerequisites of Rule 23(b) Are Met.

The Settlement Class Members' claims also meet the predominance and superiority prerequisites of Fed. R. Civ. P. 23(b)(3). In evaluating this prong, the court may consider class members' interests in prosecuting their claims individually, the extent and nature of litigation thus far, and the desirability of concentrating the litigation in the particular forum. Fed. R. Civ. P. 23(b)(3)(A)–(C). In the context of a classwide settlement, the court need not consider whether the case, if tried, would present difficult management problems. *Amchem*, 521 U.S. at 620. The applicable requirements are met in this case.

a. Common Questions of Law or Fact Predominate.

When considering predominance, the core issue is "whether the proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623.

In this case, classwide issues predominate over any individual concerns. Common issues predominate for Class Members in that Defendant reported a low-level offense on their background report that was older than seven years from the date of the report. Further, issues such as the sufficiency of Defendant's procedures and willfulness of any violation can be determined on a classwide basis. The predominance requirement is therefore met.

Second, the alleged willfulness of Defendant's violations presents a critical common question. The ability of Class Members to obtain statutory damages is contingent upon a

finding that Defendant's violations were willful. 15 U.S.C. § 1681n(a)(1). Because Defendant's alleged actions affected every member of the Settlement Class, the answer to the question of whether Defendant's violations were willful can be determined on a class-wide basis. *Chakejian v. Equifax Info. Servcs. LLC*, 256 F.R.D. 492, 500 (E.D. Pa. 2009) ("Thus, the inquiry is to [defendant's] state of mind in implementing its policies and procedures, not on the customer's particular interaction with the CRA…. To prove willfulness here, a consumer-by-consumer inquiry is not necessary.").

Third, if this case were litigated, the amount of damages could also be determined on a classwide basis. Because Plaintiff sought statutory and punitive damages, no individual analysis of damages would be required. *See Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952-53 (7th Cir. 2006). In determining the amount of statutory damages to impose pursuant to the FCRA, courts have looked to "the importance, and hence the value, of the rights and protections" at issue in the case. *Ashby v. Farmers Ins. Co. of Oregon*, 592 F. Supp. 2d 1307, 1318 (D. Or. 2008); *In re Farmers Ins. Co., Inc., FCRA Litig.*, 741 F. Supp. 2d 1211, 1224 (W.D. Okla. 2010). Consideration of this factor requires no individual analysis. Thus, virtually every aspect of this case can be determined on a classwide basis, and the predominance requirement is met.

b. A Class Action Is the Superior Vehicle for Adjudication.

To be certified, a class action must be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Again, in the settlement context, the court need not address the manageability requirements of Rule 23(b)(3)(D). *Amchem*, 521 U.S. at 620. Courts in this District have found that "[i]f no viable alternative to a class action is available, the class action is necessarily the superior method of adjudication. Where plaintiffs' anticipated award is relatively small, class actions ... may permit the plaintiffs to pool claims which would be uneconomical to litigate individually." *Grannan v. Alliant Law Grp., P.C.*, C10-02803 HRL, 2012 WL 216522, at

*5 (N.D. Cal. Jan. 24, 2012) (internal citation and quotation omitted). Such is the case here.

In a matter such as this, where the claims of all Class Members are identical and are based on the same common core of facts, it is clear that adjudicating this matter as a class action will achieve economies of time, effort, and expense, and promote uniformity of results. *See White v. E-Loan, Inc.*, No. C05-02080SI, 2006 WL 2411420, at *9 (N.D. Cal. Aug. 18, 2006) ("[W]ithout class actions, there is unlikely to be any meaningful enforcement of the FCRA by consumers whose rights have been violated."); *Singleton v. Domino's Pizza, LLC,* 976 F. Supp. 2d 665, 677 (D. Md. 2013) (finding class action superior and certification for settlement purposes justified "particularly in light of the relatively modest amount of statutory damages available under the FCRA").

B. THE SETTLEMENT TERMS ARE FAIR, REASONABLE, AND ADEQUATE AS SET FORTH UNDER RULE 23(E).

Under Fed. R. Civ. P. 23(e), court approval is required for any settlement agreement that will bind absent class members. *In re Charles Schwab Corp. Secs. Litig.*, No. 08-01510, 2011 WL 1481424, at *4 (N.D. Cal. Apr. 19, 2011). This involves a "two-step process." Manual for Complex Litigation § 30.41, at 236 (3d ed. 1995). First, counsel submits the proposed terms of the settlement to the court, and the court makes a preliminary fairness evaluation. *Id*. Second, following preliminary approval of the settlement, class members are provided notice of a formal fairness hearing, at which time arguments and evidence may be presented in support of, or in opposition to, the settlement. *Id.*

The determination of whether a proposed settlement is fair falls within the sound discretion of the district court. *Class Plaintiffs*, 955 F.2d at 1276. However, this discretion is exercised somewhat differently, depending on whether preliminary or final approval is being sought. At the preliminary approval stage, the court is not required to answer the ultimate question of whether the settlement is fair, reasonable, and adequate. *See* 5 Moore's Federal Practice § 23.83[a], at 23-336.2 to 23-339. Rather, the court simply makes an initial

determination concerning whether the settlement

> (1) appears to be the product of serious, informed, non-collusive negotiations; (2) has no obvious deficiencies; (3) does not improperly grant preferential treatment to class representatives or segments of the class; and (4) falls within the range of possible approval.

Harris v. Vector Mktg. Corp., C-08-5198 EMC, 2011 WL 1627973 (N.D. Cal. Apr. 29, 2011). In the absence of any "obvious deficiencies," preliminary approval should be granted, and notice of the settlement should be directed to the class so that class members may have a chance to be heard. Newberg on Class Actions § 13:13 (5th ed.).

The proposed Settlement Agreement in this case more than meets the standard for preliminary approval.

1. The Settlement Is the Product of Serious, Informed, Non-Collusive Negotiations

As recounted above, the settlement in this case was the result of arms-length negotiations facilitated by an experienced and well-respected mediator after substantial pre-mediation discovery. "An initial presumption of fairness is usually involved if the settlement is recommended by class counsel after arm's-length bargaining." *Riker v. Gibbons*, No. 3:08-cv-115, 2010 WL 4366012, at *2 (D. Nev. Oct. 28, 2010); *see also Hanlon*, 150 F.3d at 1027 (affirming approval of settlement after finding "no evidence to suggest that the settlement was negotiated in haste or in the absence of information illuminating the value of plaintiffs' claims"). The settlement here was reached after substantial informal and formal discovery and preliminary settlement discussions between the parties' counsel. Further, settlement negotiations continued during an all-day mediation with a third party neutral, and no terms relating to attorneys' fees or class representative service award were negotiated until the total amount of the settlement, and the method for distribution to class members, had been agreed upon. (Drake Decl., Ex. 1 ¶¶ 2.5, 8.3.)

2. The Settlement Has No Deficiencies

This settlement achieves a remarkable recovery for the Settlement Class and contains none of the deficiencies which can stand in the way of judicial approval. All deductions from the Settlement Fund, such as attorneys' fees, settlement administration expenses, and Named Plaintiff service award require judicial approval, and the settlement is not contingent upon approval of the requested amounts. The totality of the Settlement Fund will be paid out, and there is no reversion of any funds to the Defendant. Class Members and other consumers will also receive the non-monetary benefit of Defendant agreeing to not report low-level offenses that are more than seven years old for at least 18 months. And, in the event Defendant elects to begin reporting low-level offenses that are older than seven years, Defendant must consult with an expert and utilize Plaintiff's Counsel's evaluation of Class Member reports to ensure its reporting methodologies comply with the law.

3. The Settlement Does Not Grant Preferential Treatment

Preferential treatment is not a concern in this case. The settlement calls for the certification of a single class. Every participating Class Member will be treated equally and have an equal opportunity to share in the Settlement Fund. When the Fund is paid out, all Class Members will receive checks for the same amount.

The settlement does make a distinction between Class Members, in that some Class Members are entitled to autopay, and some must submit a claim form and have their claims evaluated by Counsel in order to receive a settlement payment. This, however, is not preferential treatment, but the most rational way to fairly administer the Fund. Counsel have identified specific states in which offenses termed as "infractions" are exclusively associated with non-criminal events. For Class Members in other states, a certain amount of legal research and evaluation will be required to determine whether the reported offense is criminal or non-criminal in the jurisdiction at issue. *See* § III.B.2, *supra*. Additionally,

Class Members who have already successfully disputed outdated information on their reports will not be required to submit a claim form.. The procedure adopted by the settlement both ensures that those with valid claims recover, and that the settlement can be administered effectively and efficiently.

The settlement also calls for a modest, $3,500 service award for the Named Plaintiff, but that requested award is subject to the Court's review and approval. Furthermore, the Ninth Circuit has recognized that service awards to named plaintiffs in a class action are permissible and do not render a settlement unfair or unreasonable. *See Stanton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003); *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958–69 (9th Cir. 2009).

4. The Settlement Falls Well Within The Range of Approval

The settlement in this case is impressive when considering the range of possible recoveries for the Settlement Class, the number of procedural and merits-based hurdles between Plaintiff and a final judgment, the significant uncertainties of a final judgment for Plaintiff, and Defendant's intent to vigorously oppose class certification if the case were to proceed.

In light of these factors, the proposed settlement amount is substantial. Plaintiff filed this case seeking statutory damages under the FCRA, which provides for between $100 and $1000 for each willful violation. 15 U.S.C. § 1681n(a)(1). The FCRA itself does not provide any guidance to courts in choosing the appropriate recovery for a statutory violation, *see* 15 U.S.C. § 1681n(a)(1), but in determining the amount of statutory damages to impose pursuant to the FCRA, courts have looked to "the importance, and hence the value, of the rights and protections" at issue in the case. *Ashby*, 592 F. Supp. 2d at 1318; *In re Farmers Ins. Co., Inc., FCRA Litig.*, 741 F. Supp. 2d at 1224. The monetary recovery of

between $40 and $55 per participating class member,[4] and significant non-monetary relief, is a substantial percentage of the likely award if this case had proceeded all the way through a final judgment in Plaintiff's favor, and is an excellent recovery for the Settlement Class. *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). It also compares favorably with other, similar settlements involving similar claims. *See, e.g. King v. General Info. Servs.*, No. 10-cv-6850, ECF No. 124 (E.D. Pa. Nov. 4, 2014) (approving §1681c settlement that provides class members $50); *Haley v. TalentWise, Inc.*, No. 2:13-cv-01915-MJP, ECF No. 88 (final approval of settlement which pays class members approximately $50 for claims based on reporting outdated charges). Notably, while *King* and *Haley* both involved per person payments of similar amounts, those cases generally involved the reporting of outdated information related to criminal incidents (felonies and misdemeanors) which were either never charged (such as arrests) or which were dismissed after charging. In *Smith v. A-Check*, No 16-cv-00174, ECF No. 66 (C.D. Cal. 2017), the settlement included both individuals with outdated criminal information and outdated non-criminal information, and the recovery was tiered – individuals with criminal information received approximately $114, while those with non-criminal information received approximately $28. The recovery here is significantly better than for class members in *A-Check* with similar information on their reports.

The impressive nature of this recovery comes into even sharper focus when the risks

[4] This estimate assumes that the Court grant's Plaintiff's requests for attorney's fees, costs and award for the Named Plaintiff, and reflects a range of potential recoveries based upon the number of claim forms which are likely to be returned. The actual recovery per participating Class Member will depend on the Court's ruling on the requested fees, costs and awards, as well as the actual number of claim forms submitted.

of further litigation are considered. Plaintiff would have to prevail on a contested motion for class certification, survive Defendant's summary judgment motion on the merits, survive Defendant's summary judgment motion on the issue of willfulness, and, ultimately, prevail at trial. Plaintiff was confident that these obstacles could have been overcome, but each of these phases of litigation presents risks and represents significant time and costs, which the settlement allows Plaintiff to avoid. *See, e.g., In re Painewebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997) ("Litigation inherently involves risks.").

In addition to the generalized uncertainty surrounding all litigation, Plaintiff in this case faced the specific risk of being able to demonstrate that Defendant's alleged conduct was "willful" under the FCRA. 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 only where the defendant has acted negligently or willfully. But where the defendant's violation was only negligent, recovery is limited to actual damages. *See* 15 U.S.C. §§ 1681n(a)(1), 1681o(a)(1). Because he does not allege any actual damages, in order to recover anything, Plaintiff would have had to prove not only that Defendant violated the FCRA, but that it did so willfully.

Moreover, the non-monetary relief here, which will help ensure that Defendant does not report such offenses older than seven years in the future, represents a substantial accomplishment. Not only will Settlement Class Members receive monetary compensation, they also will receive valuable prospective relief. Because Defendant performs background checks for a substantial number of "gig economy" companies, including many driving-related jobs, injunctive relief that ensures that low-level offenses older than seven years will not be reported for at least 18 months (and ensures the procedures described above after 18 months) is a very valuable development for Class Members. Given that there is a disagreement about injunctive relief being available to private plaintiffs under the FCRA, this accomplishment is remarkable, and may achieve more for Class Members than could

have ever been achieved in litigation. *See Gauci v. Citi Mortgage*, No. CV 11-01387, 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.").

Viewed in the context of the significant litigation risks faced, Defendant's defenses and anticipated motion practice, as well as the substantial delay and costs that Settlement Class Members would have experienced in order to receive proceeds from an adversarially-obtained judgment, not to mention the judicial resources required, this settlement is in the best interests of the Named Plaintiff and the Settlement Class Members, and should be approved.

V. CONCLUSION

Based on the foregoing, the Court should grant preliminary approval to the proposed settlement.

Date: May 21, 2018

BERGER & MONTAGUE, P.C.

/s/E. Michelle Drake

E. Michelle Drake (*pro hac vice*)

ATTORNEYS FOR PLAINTIFF