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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ERIC FELIX, an individual, on behalf of himself and others similarly situated

PLAINTIFF,

v.

WM. BOLTHOUSE FARMS, INC.; and DOES 1 thru 50, inclusive,

DEFENDANTS.

CASE NO. 1:19-CV-00312-AWI-JLT

NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: May 4, 2020
Time: 9:00 a.m.
Courtroom.: 9A, 9th Floor

Magistrate Judge: Jennifer L. Thurston

TO THE COURT AND TO ALL PARTIES:

PLEASE TAKE NOTICE that on May 4, 2020, at 9:00 a.m., in the above-entitled Court located at the Bakersfield Federal Courthouse, 510 19th Street, Suite 200, Bakersfield, CA 93301, Plaintiff ERIC FELIX, an individual ("Plaintiff"), on behalf of himself, and on behalf of all persons similarly situated, through his attorneys of record ("Class Counsel"), and Defendant WM. BOLTHOUSE FARMS, INC. ("Defendant"), through its attorneys of record, will and hereby do, move this Court for an order granting final approval of a proposed class action settlement. Plaintiff and Defendant are referred to collectively as the "Parties". The terms of the settlement are contained within the Parties' Class Action Settlement Agreement and Release ("Settlement" or "Settlement Agreement"), which is concurrently submitted as Exhibit 1 to the Declaration of Kelsey M. Szamet.

This motion will be made on the grounds that the proposed Class Settlement is fair, adequate, reasonable, and in the best interest of the Class and the Parties. This motion is based on this Notice and accompanying Memorandum of Points and Authorities, the Declarations of Kelsey M. Szamet, Eric Felix, JND Class Action Administration, the Settlement Agreement, all other papers and records on file in this action, and on such further evidence as may be presented at the hearing.

DATED: April 10, 2020

KINGSLEY & KINGSLEY, APC

By: _____

KELSEY M. SZAMET
DAVID KELEDJIAN
Attorneys for Plaintiff ERIC FELIX and the proposed classes

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION[1]

Plaintiff ERIC FELIX, an individual ("Plaintiff"), on behalf of himself, and on behalf of all persons similarly situated, through his attorneys of record ("Class Counsel"), submit the fully-executed Class Action Settlement Agreement ("Settlement" or "Settlement Agreement"), which is concurrently submitted as Exhibit A to the Declaration of Kelsey M. Szamet at ¶4. ("Szamet Dec."), to the Court for final approval.

The Settlement Agreement purports to release the claims alleged in the operative First Amended Complaint (ECF No. 12), which asserts claims under the Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq. (the "FCRA").

The Court preliminarily approved the proposed Settlement on January 7, 2020. (ECF No. 29; Szamet Dec. ¶5).

As the Settlement satisfies all relevant standards for being deemed "fair, adequate and reasonable," Plaintiff asks the Court to: (1) grant final approval of the Settlement pursuant to the terms of the Settlement Agreement; (2) certify the proposed Settlement Class; and (3) enter judgment. In addition, Plaintiff asks the Court to award attorneys' fees and costs as detailed in the concurrently filed Motion for Attorneys' Fees and Costs; award a class representative payment of $5,000.00 to Plaintiff ERIC FELIX; and award administration costs of $18,500.00 to JND Class Action Administration. Defendant does not oppose this Motion.

II. RELEVANT PROCEDURAL HISTORY

Plaintiff Felix filed the Lawsuit against Defendant in the United States District Court, Eastern District of California, on March 7, 2019. (ECF No. 1.) In the Complaint, Plaintiff alleged that Defendant violated the Fair Credit Reporting Act,

[1] Unless otherwise indicated, this motion for Final Approval of the Settlement uses the defined terms in the Settlement Agreement.

15 U.S.C. § 1681b(b)(2)(A)(i), by allegedly requiring Plaintiff and the FCRA Class Members to execute a "Consent to Request Consumer Report & Investigative Consumer Report Information" form to permit Defendant to obtain and use consumer report information for employment purposes for Plaintiff and all the FCRA Class Members, and Defendant thereafter obtained consumer reports regarding Plaintiff and the Class Members without proper authorization in violation of 15 U.S.C. § 1681b(b)(2)(A)(ii). The Lawsuit further alleged Defendant failed to provide lawful meal and rest breaks to the Proposed California Class Members. (Szamet Decl. ¶6.)

On May 3, 2019, Defendant filed a Motion to Partially Dismiss and Strike Plaintiff's third and fourth causes of action. (ECF No. 10.) Subsequently, on May 20, 2019, Plaintiff filed his First Amended Complaint ("FAC") removing his third and fourth causes of action. (ECF No. 12.) The operative FAC alleges claims for (1) Violation of the Fair Credit Reporting Act for Failure to Make Proper Disclosures, 15 U.S.C. § 1681b(b)(2)(A)(i); and (2) Violation of the Fair Credit Reporting Act for Failure to Obtain Proper Authorization, 15 U.S.C. § 1681b(b)(2)(A)(ii). (Szamet Decl. ¶7.)

The Parties exchanged initial discovery disclosures, and engaged in extensive discussions about their respective positions and the information and data needed to properly evaluate the merits of the claims alleged. (Szamet Decl. ¶8). The Parties reached a proposed class action settlement on September 6, 2019 through arms-length, direct negotiations, which was submitted to this Court for preliminary approval. (*Id.*)

The Court granted preliminary approval of the proposed Settlement on April 19, 2019. (ECF No. 34; Szamet Dec. ¶9.)

Following preliminary approval, Class counsel coordinated with the Settlement Administrator to ensure the proper dissemination of the Class Notice and closely monitored the notice process. (Szamet Dec. ¶10.)

III. SUMMARY OF THE SETTLEMENT'S TERMS

A. The Settlement Class

The Settlement Class is defined as:

> "all applicants in the United States who filled out WM. BOLTHOUSE FARMS, INC.'s standard 'Consent to Request Consumer Report & Investigative Consumer Report Information' form as administered by Sterling Infosystems Inc. during the Class Period."

(Settlement at § I, ¶32.)

As of this filing, the Settlement Class includes 1,225 individuals. (*See* Declaration of Jennifer M. Keough, of JND Class Action Administration "Keough Dec." ¶¶4-16.)

The "Class Period" is March 17, 2017 to July 31, 2018. (Settlement, Ex. 1 at § I, ¶7.)

B. Monetary Recovery

The Settlement provides a maximum recovery of $118,275.00 (the "Gross Settlement Amount"). (Settlement at §§ I, ¶14, II, ¶2 and III, ¶3.) The following estimates the breakdown of payments from the Gross Settlement Amount:

- $54,350.00 for estimated settlement funds to the Settlement Class (the "Net Settlement Amount");
- $18,500 for administration costs of the Settlement;
- $5,000 for a Service Award to Plaintiff; and
- $39,425.00 for attorneys' fees and $931.11 in litigation costs[2] (the "Class Counsel Award").

(Szamet Decl. at ¶11; Settlement, Ex. 1 at § III, ¶¶3, 8, 12.)

The amount each Class Member receives from the Net Settlement Amount is contingent on the number of consumer reports obtained on individuals who remain in the

[2] While the Settlement Agreement permits for reimbursement of up to $1,000, Class Counsel requests reimbursement of actual costs of $931.11. (Szamet Decl. ¶12.)

Settlement Class. (Settlement, Ex. 1 at § III, ¶4.) The number of consumer reports obtained for each Class Member may differ, and thus Class Members may be entitled to more, or less, than others, based on the number of consumer reports obtained for each of them. (Settlement, Ex. 1 at § III, ¶4.) As of the date of this filing, there are 1,225 Class Members (1,227 total individuals, with two exclusions). (*See* "Keough Dec." ¶¶4-16.)

Based on this data and the anticipated Net Settlement Amount, the estimated approximate payment per Class Member, who completed Defendant's standardized form, is $37.38 if one consumer report was obtained and $74.76 if two consumer reports were obtained (Keough Dec. ¶18.)[2]

As this is a non-reversionary, total payout Settlement, any funds remaining in the Gross Settlement Amount due to uncashed Settlement checks (after a 180-day negotiability period) will be remitted to California Legal Aid Fund. (Settlement, Ex. 1 at § III, Settlement Administration, ¶9.)

C. The Release by Class Members

The release applies only to Settlement Class Members who do not request exclusion. As of the date of this filing two individuals have requested exclusion. As such, the release applies to 1,225 Settlement Class Members.

Class Members will release Defendant and others:

> from any and all claims of any kind whatsoever, whether known or unknown, whether based on common law, regulations, statute, or a constitutional provision, under state, federal or local law, arising out of the allegations made in the First Amended Complaint and that reasonably arise, or could have arisen, out of the facts alleged in the First Amended Complaint as to the Class Members, including, but not limited to, claims arising from the procurement of a consumer report on them by any of the Released Parties, and any other claims for violations of the Fair Credit Reporting Act, 15 U.S.C. §1681b, *et seq.,* whether willful, or otherwise, for declaratory relief, statutory

[2] These estimated amounts will increase very slightly due to the cost reimbursement of Class Counsel being approximately $69 less than the amount allocated in the Settlement Agreement.

> damages, punitive damages, costs, and attorneys' fees. Notwithstanding the foregoing, nothing in the Settlement releases any claims that cannot be released as a matter of law.

Settlement, Ex. 1 at § III, ¶13.

The release is narrowed to the facts and claims arising out of the operative FAC. A settlement agreement may release claims that are "based on the identical factual predicate as that underlying the claims in the settled class action" even though the claims were "not presented and might not have been presentable in the class action" at the time. *Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010). Where a proposed release "track[s] the breadth of Plaintiff's allegations in the action and the settlement does not release unreleased claims that class members have against defendants," the identical factual predicate doctrine is satisfied and the release is appropriate. *See Collins v. Cargill Meat Solutions Corp.*, 274 F.R.D. 294, 303 (E.D. Cal. 2011).

D. The Settlement Administration Process

After the Court granted preliminary approval, the Parties and the Settlement Administrator carried out their duties in connection with administration of the Settlement as set forth in detail in the Settlement Agreement. (Szamet Dec. ¶12.)

The Court approved the proposed Class Notice (ECF No. 35; ECF 33-1 Class Notice Packet) and directed the mailing of the Notice to Class Members in accordance with the Court's order and the Settlement Agreement. (Szamet Dec. ¶ 13.)

The Settlement Administrator mailed notices to 1,227 Class Members on February 14, 2020. (Keough Dec. ¶5.) Members of the Settlement Class had until April 5, 2020 to submit a valid request for exclusion or to object. (*Id.*, ¶¶ 13-16.)

Based on the declaration from the Settlement Administrator, there are zero (0) objections and two (2) requests for exclusion. (Keough Dec. ¶¶13-16.) As of today, there are 1,225 Settlement Class Members. The favorable reaction of the Class

Members is positive and weighs in favor of approval. (Szamet Dec. ¶14.)

IV. THE COURT SHOULD ORDER FINAL APPROVAL OF THE SETTLEMENT

A class action may not be dismissed, compromised or settled without court approval. Fed. R. Civ. P. ("FRCP") 23(e). "The purpose of Rule 23(e) is to protect the unnamed members of the class from unjust or unfair settlements affecting their rights." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2008). At the same time, the law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost and rigors of formal litigation. *See* 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11.41 (4th ed. 2002) (and cases cited therein); *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976).

On a motion for final approval of a class action settlement, the court inquires whether the settlement is "fair, adequate and reasonable," meaning that "the interests of the class are better served by the settlement than by further litigation." *Manual for Complex Litigation*, Fourth, § 21.6 at 309 (2004); *see also* Fed. R. Civ. Pro. 23(e)(1)(C); *Officers for Justice*, 688 F.2d 615, 625 (9th Cir. 1982). The fairness inquiry involves the balancing of several factors, including: (1) the strength of Plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; and (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement. *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004). Here, each of these factors weighs in favor of approving the current settlement.

A. The Strength of Plaintiff's Case

Plaintiff alleges that Defendant included extraneous information in its standard FCRA Form administered to Class Members. (Szamet Dec. ¶15.) Second,

Plaintiff alleges that Defendant failed to obtain proper authorization before obtaining a background check as a result of its allegedly unlawful disclosure form. (Szamet Decl. ¶15.)

However, Plaintiff and his Counsel recognize that there are risks associated with Plaintiff's claims, especially Plaintiff's ability to establish Article III standing. (Szamet Decl. ¶16.)

Based upon estimates of the number of potential class members that Defendant provided during settlement negotiations, Plaintiff determined that the maximum possible exposure for the FCRA claims arising under 15 U.S.C. § 1681(b)(2)(A)(i) and (ii) is $122,500 (1,225 class members x $100 per class member). (Szamet Decl. ¶17.)

The FCRA provides that "[a]ny person who willfully fails to comply with any requirement [of the Act] with respect to any [individual] is liable to that [individual]" for, among other things, either "actual damages" or statutory damages of $100 to $1,000 per violation, costs of the action and attorney's fees, and possibly punitive damages. *See* 15 U.S.C. § 1681n. The valuation of the maximum exposure assumes: (1) statutory damages of $1,000 per violation; (2) the authorization requirement is not duplicative of the disclosure requirement; and (3) no punitive damages are awarded. (Szamet Decl. ¶18.)

However, there are certainly cognizable risks associated with Plaintiff's claims. Class Counsel discounted the valuation of the FCRA claims due to Defendant's defenses to liability and certification. (Szamet Decl. ¶19.) Importantly, Defendant contends that Plaintiff cannot prove Article III standing to assert his FCRA claims. (Szamet Decl. ¶20.) In *Spokeo, Inc. v. Robins*, the Supreme Court explained that "a bare procedural violation [of a statute], divorced from any concrete harm, cannot satisfy the injury-in-fact requirement of Article III." 136 S. Ct. 1540, 1548 (2016). After *Syed*, 853 F.3d 492, district courts in the Ninth Circuit (and across the country) are split on whether 15 U.S.C. § 1681b(b)(2)(A) is merely

procedural or creates substantive rights such as the right to information and privacy. If § 1681b(b)(2)(A) creates substantive rights, then a violation of this provision automatically creates a "concrete injury" for purposes of Article III standing. [3] However, if § 1681b(b)(2)(A) is procedural, concrete injury requires factual allegations that support a statutory violation *and* allow a court to infer *additional* harm.[4]

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[3] *See Syed*, 853 F.3d at 499–500 ("Syed alleges more than a 'bare procedural violation.' The disclosure requirement at issue, 15 U.S.C. § 1681b(b)(2)(A)(i), creates a right to information by requiring prospective employers to inform job applicants that they intend to procure their consumer reports as part of the employment application process. The authorization requirement, § 1681b(b)(2)(A)(ii), creates a right to privacy by enabling applicants to withhold permission to obtain the report from the prospective employer, and [therefore] a concrete injury when applicants are deprived of their ability to meaningfully authorize the credit check."). Many district courts in the Ninth Circuit have interpreted *Syed* in this manner. *See Demmings v. KKW Trucking, Inc.*, No. 14-CV-494, 2017 WL 1170856, at *6–7 (D. Or. Mar. 29, 2017); *Terrell v. Costco Wholesale Corp.*, No. C16–1415JLR, 2017 WL 951053, at *3 (W.D. Wash. Mar. 10, 2017); *Cunha v. IntelliCheck, LLC*, 254 F.Supp.3d 1124, 1130 (N.D. Cal. May 26, 2017); *In re Ocwen Loan Servicing LLC Litig.*, No. 3:16–cv–00200–MMD–WGC, 2017 WL 1289826, at *3–5 (D. Nev. Mar. 3, 2017); *Mix v. Asurion Ins. Servs. Inc.*, No. CV-14-02357, 2016 WL 7229140, at *6 (D. Ariz. Dec. 14, 2016); *Meza v. Verizon Commc'ns, Inc.*, No. 1:16-CV-0739 AWI MJS, 2016 WL 4721475, at *3 (E.D. Cal. Sept. 9, 2016).

[4] *See e.g., Groshek v. Time Warner Cable, Inc.*, 865 F.3d 884, 887 (7th Cir. 2017); *Mitchell v. Winco Foods, LLC*, No. 1:16-CV-00076-BLW, 2017 WL 5349539, at *2 (D. Idaho Nov. 13, 2017); *Bercut v. Michaels Stores Inc.*, No. 17-CV-01830-PJH, 2017 WL 2807515, at *5 (N.D. Cal. June 29, 2017); *Saltzberg v. Home Depot, U.S.A., Inc.*, No. CV1705798RGKAKX, 2017 WL 4776969, at *2 (C.D. Cal. Oct. 18, 2017); *In re Michaels Stores, Inc., Fair Credit Reporting Act (FCRA) Litigation*, MDL No. 2615, 2017 WL 354023, at *7 (D.N.J. Jan. 24, 2017); *Dyson v. Sky Chefs, Inc.*, No. 3:16-CV-3155-B, 2017 WL 2618946, at *8–9 (N.D. Tex. June 16, 2017); *Landrum v. Blackbird Enters., LLC*, 214 F. Supp. 3d 566 (S.D. Tex. 2016); *Fisher v. Enterprise Holdings, Inc.*, No. 15-CV-00372, 2016 WL 4665899 (E.D. Mo. Sept. 7, 2016); *Smith v. Ohio State Univ.*, 191 F. Supp. 3d 750, 757 (S.D. Ohio 2016); *Shoots v. iQor Holdings US Inc.*, No. 15-CV-563 (SRN/SER), 2016 WL 6090723, at *7 (D. Minn. Oct. 18, 2016);

In addition to the risk of whether § 1681b(b)(2)(A) is procedural or substantive, Defendant also contended that Article III standing requires a court to "fairly infer that [the plaintiff] was confused by the inclusion of the liability waiver with the disclosure **and** would not have signed it had it contained a sufficiently clear disclosure, as required in the statute." *Syed*, 853 F.3d at 499-500 (emphasis added). Plaintiff anticipated that Defendant would argue that, although Plaintiff alleges he was "confused" by Defendant's disclosure form, Plaintiff did not allege that he "would not have signed" the authorization form absent the liability waiver. District courts go both ways on this issue.[5] While Class Counsel is reasonably confident that they could prove Article III standing, Article III standing was certainly a contested issue between the Parties. (Szamet Decl. ¶21.)

Defendant also asserts that Plaintiff cannot show that Defendant's alleged violation of the FCRA was "willful" as required for recovery. *See* 15 U.S.C § 1681n(a)(1). (Szamet Decl., ¶22.) However, Plaintiff believes the he could prove willfulness. *See Syed*, 853 F.3d at 502 ("We also hold that, in light of the clear statutory language that the disclosure document must consist 'solely' of the disclosure, a prospective employer's violation of the FCRA is 'willful' [as a matter of law] when the employer includes terms in addition to the disclosure.").

Defendant also argues that Plaintiff's claim for violating the FCRA's authorization requirement is duplicative of his first FCRA claim involving improper disclosure. *See Milbourne v. JRK Residential Am.*, LLC, No. 3:12CV861, 2016 WL 1071570, at *12 (E.D. Va. Mar. 15, 2016). (Szamet Decl. ¶23.)

With respect to class certification issues, Defendant contends the class

LaFollette v. RoBal, Inc., No. 1:16-CV- 2592-WSD, 2017 WL 1174020, at *3 (N.D. Ga. Mar. 30, 2017).

[5] *Compare Mitchell v. Winco Foods, LLC*, No. 1:16-CV-00076-BLW, 2017 WL 5349539, at *2 (D. Idaho Nov. 13, 2017) *with Bercut v. Michaels Stores Inc.*, No. 17-CV-01830-PJH, 2017 WL 2807515, at 5* (N.D. Cal. June 29, 2017).

definition is overbroad. A class can only be certified if it is defined so that every class member has Article III standing. *See Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) ("[N]o class may be certified that contains members lacking Article III standing."). Defendant contends that Plaintiff's Class is not limited to individuals who were confused by the inclusion of a liability waiver in the disclosure form and would not have signed an authorization but for its inclusion. (Szamet Decl. ¶24.)

Defendant would also contend that Plaintiff's alleged Class goes back five years, but the FCRA provides two statutes of limitations-one of which only goes back two years-and mandates that each plaintiff be bound by "the earlier of" the two. 15 U.S.C. § 1681p. Defendant would certainly take the position that each proposed Class Member was necessarily aware of the alleged violation at the time he or she signed the background authorization form, and thus each Class Member who filled out a FCRA disclosure with a liability waiver more than two years before the filing of the complaint would thus be subject to a statute of limitations defense. Further, Defendant would argue that the applicability of an individualized statute of limitations defense-which requires a separate inquiry into when each class member subject to the defense personally discovered the alleged violation-means that a class action is not superior to other methods of adjudication. *See Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 320 (4th Cir. 2006) (where statute of limitations defense cannot be resolved on a class-wide basis, class certification is inappropriate).

However, Plaintiff is reasonably confident that it could certify an FCRA class that goes back two (2) or five (5) years. Whether each class member had constructive notice of the violation is a common question that can be decided by the Court by looking solely at the allegedly invalid disclosure form. There is no need to depose each class member to determine their actual notice. *See In re Monumental Life Ins. Co.*, 365 F.3d 408, 421 (5th Cir. 2004), *cert. denied sub nom*, (holding that whether the policyholders had "constructive notice [of their cause of action] is an

issue that can be decided on a class-wide basis."). Moreover, certifying a class that goes back five years must be possible, otherwise 15 U.S.C. § 1681p(2) would not encourage employers to comply with the FCRA.

Finally, Defendant would argue that it changed its standard FCRA form around July of 2018, thus drastically limiting any potential liability and the scope of the putative Class as alleged. (Szamet Decl. ¶25.)

All of these risks required Class Counsel to significantly discount the value of the FCRA claims. (Szamet Decl. ¶26.)

B. The Risk, Expense, Complexity, and Likely Duration of Further Litigation

In making the fairness determination, the Court may also weigh the risk, expense, and complexity of continued litigation against the certainty and immediacy of recovery from a settlement. *See Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.),* 213 F.3d 454, 458 (9th Cir. 2000). "In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." 4 *Newberg on Class Actions* § 11.41 (4th ed. 2002 & Supp. 2008).

The "overriding public interest in settling and quieting litigation" is "particularly true in class action suits." *See Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976) (footnote omitted); see also *4 Newberg on Class Actions* § 11.41 (citing cases). This public policy favoring class action settlements applies with particular force here because the Settlement provides Class Members substantial, prompt, and efficient relief.

Given the risks outlined above, the issues in this case were complex and the risk for Plaintiff and the Class Members was high, given the uncertainty. (Szamet Decl. ¶27.) There is significant expense associated with the class certification process, which the Parties can avoid by entering into the contemplated settlement. (Szamet Decl. ¶28.) If the Court did eventually certify the class (other than for

purposes of settlement as requested below), a class trial involving over 1,200 individuals would require the retention of expensive expert witnesses, the accrual of extensive litigation costs, and a significant time commitment by the parties. (Szamet Decl. ¶29.) Finally, given the complexity and unsettled nature of the issues in this case, it is likely that any outcome at trial would have resulted in a lengthy and costly appeal. (Szamet Decl. ¶30.) An appeal would result in further delay for the Class Members, who are waiting for a resolution. (*Ibid.*)

C. The Risk of Maintaining Class Action Status Through Trial

A class has not been certified in this matter. Class Counsel is reasonably confident that the Court would certify the proposed classes in this case based on the reasons set forth in section V below. (Szamet Decl. ¶31.) However, Class Counsel had to acknowledge the risks posed by Defendant's foregoing arguments. (Szamet Decl. ¶32.) Furthermore, decertification is always a possibility. (Szamet Decl. ¶33.)

D. The Amount Offered in Settlement

It was difficult for the Parties to reach this Settlement. (Szamet Decl. ¶34.) The maximum potential value of all claims in this action amounted to $1,225,000 if Plaintiff was able to prove Defendant's conduct was willful and $122,500 if Plaintiff could not.[6] (Szamet Decl. ¶35.) This FCRA calculation assumes that the disclosure and authorization requirements are separate violations, and each violation results in the maximum $1,000 in statutory damages for a willful violation. This assumes that no punitive damages are awarded. *See* 15 U.S.C. § 1681n(a).

However, given the foregoing risks, Plaintiff believes that the settlement amount of $118,275.00 is adequate, reasonable, and in the best interests of the Settlement Class. (Szamet Decl. ¶37.)

There are also risks and uncertainties with respect to damages. In particular,

[6] This FCRA calculation assumes each violation results in the maximum $1,000 in statutory damages for a willful violation. This assumes that no punitive damages are awarded. *See* 15 U.S.C. § 1681n(a). (Szamet Decl. ¶36.)

Plaintiff seeks statutory damages under the FCRA ranging between $100 and $1,000 per violation. Defendant would have certainly argued the alleged violations were technical, and thus did not result in any injuries or damages. For example, in *Hillson v. Kelly Services*, E.D. Mich. No. 2:15cv10803, 2017 WL 279814, at *7-8 (E.D. Mich. Jan. 23, 2017), the court preliminarily approved a settlement awarding $19 to each class member for an alleged FCRA standalone disclosure violation. In *Hillson*, the court assumed each individual class member would recover $100 at trial, and observed, "once the $100 award is discounted by the likelihood of success at trial (which is conceivably in the ballpark of 19%), the amount of recovery under the settlement appears reasonable." *Id.* at *7.

The adequacy of a class action settlement must be judged as "a yielding of absolutes and an abandoning of highest hopes ... . Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation." *Officers for Justice*, 688 F.2d at 634 (citation omitted). The Settlement is not to be judged against a speculative measure of what may have been achieved. *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998). Moreover, determining the adequacy of the Settlement "involves a comparison of the relief granted relative to what class members might have obtained without using the class action process." *Manual for Complex Litigation* § 21.62. An additional consideration is that the Settlement provides for payment to now, rather than a payment many years down the road, if ever. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974). Likewise, there was a high probability of drawn out litigation and risks the Settlement Class may not have prevailed. (Szamet Decl. ¶38.)

Finally, the proposed Settlement is fair because the basis for recovery is the same for each Class Member. All individuals comprising the Settlement Class are eligible to receive individual payments from the Net Settlement Fund based upon

the number of Class Members, and each Class member will be bound by the same release. (Szamet Decl. ¶39.)

For all of these reasons, Plaintiff requests that the Court grant final approval of the Settlement.

E. The Extent of Discovery Completed, and the Stage of the Proceedings

A class action settlement must be informed by sufficient discovery. *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1174 (S.D. Cal. 2007). When a settlement following sufficient discovery and genuine arms-length negotiation is reached, the negotiation is presumed fair. *See Slezak v. City of Palo Alto*, 2017 WL 2688224, at *5 (N.D. Cal. June 22, 2017).

Here, discussions between counsel for the Parties, informal discovery, as well as the diligent investigation and evaluation of the claims of Plaintiff by the Parties, have permitted each side to assess the relative merits of the claims and the defenses to those claims. (Szamet Decl. ¶40.) In addition, Defendant provided estimates of the number of proposed class members. (Szamet Decl. ¶41.)

F. The Experience and Views of Counsel

In reviewing the opinions of counsel, "great weight" is accorded to the recommendation of the attorneys. *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litig.*, 229 F. Supp. 3d 1052, 1067 (N.D. Cal. 2017). They are the ones who are most closely acquainted with the facts of the underlying litigation. *Id.* "Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation." *Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Thus, "the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel." *Nunez v. BAE Systems San Diego Ship Repair, Inc.*, 292 F. Supp. 3d 1018, 1040 (S.D. Cal. 2017).

In the present case, the Settlement was negotiated by experienced counsel, who believe that it is fair and reasonable, and in the Settlement Class's best interests.

The firms of Kingsley & Kingsley APC and Davtyan Professional Law Corporation are well versed in class action litigation and have diligently and aggressively pursued this action. (Szamet Decl. ¶¶53-55.) Kingsley & Kingsley has focused its practice since the year 2000 on prosecuting complex wage, hour, and working condition violations. (Szamet Decl. ¶54.) Kingsley & Kingsley currently serves as class counsel for dozens of pending class action Actions in Northern, Central, and Southern California. *Id*. A list of representative cases that Kingsley & Kingsley has handled is included in the accompanying declaration of Kelsey M. Szamet. *Id*. After factoring in the risks explained above, Class Counsel believes that the proposed Settlement is fair and reasonable.

G. The Reaction of the Class Members to the Proposed Settlement

"The reactions of the members of a class to a proposed settlement is a proper consideration for the trial court." 5 *Moore's Fed. Practice* § 23.85[2][d] (Matthew Bender 3d ed.).

To date, there is only two (2) requests to be excluded from the proposed Settlement and zero (0) objections. (Keough Dec. ¶¶13-16.) Such indicates that the reaction of class members on the whole is positive and weighs in favor of approval.

H. The Parties Arrived at the Settlement Through Arm's Length Negotiations

As noted by the Ninth Circuit, the eight listed factors analyzed above is "by no means an exhaustive list of relevant considerations." *Officers for Justice*, 688 F.2d at 625. As such, courts often inquire into the procedure by which the settlement was reached.

Here, the Settlement Agreement was reached after an informal exchange of pertinent discovery, as well as an estimate of the number of FCRA class members. (Szamet Decl. ¶42.) Following informal discovery, the parties engaged in extensive arm's length negotiations. (Szamet Decl. ¶43.) This procedure weighs in favor of approving the settlement.

V. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS

To facilitate the Settlement, the Parties respectfully ask the Court to conditionally certify the following Settlement Class under FRCP 23 (e):

> all applicants in the United States who filled out WM. BOLTHOUSE FARMS, INC.'s standard 'Consent to Request Consumer Report & Investigative Consumer Report Information' form as administered by Sterling Infosystems Inc. from March 17, 2017 through July 31, 2018).[7]

Settlement at § I, ¶¶ 7 and 32.)

The Parties agree, for purposes of the Settlement, the criteria for certifying a settlement class are satisfied. (Settlement, at § I, ¶¶5, 7 and 32.)

A. Plaintiff Maintains That All Four FRCP 23(a) Criteria are Met

FRCP 23(a)(1): The class is so numerous that joinder of all members is impracticable. "As a general rule, classes numbering greater than forty individuals satisfy the numerosity requirement." *Quintero v. Mulberry Thai Silks, Inc.*, No. 08-2294, 28 I.E.R. Cas. (BNA) 607, 2008 U.S. Dist. LEXIS 84976, at *7 (N.D. Cal. Oct. 22, 2008) (citation omitted). Here, 1,225 individuals comprise the Settlement Class. (Keough Dec., ¶¶ 4-16.) Consequently, numerosity is easily satisfied.

FRCP 23(a)(2): There are questions of law or fact common to the Class. The commonality requirement is liberally construed. *Alberto v. GMRI, Inc.*, 252 F.R.D. at 660 (citation omitted); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998) (concluding Rule 23(a)(2) is "permissively" construed). The

[7] Under the FCRA, claims must be filed within the earlier of (1) "2 years after the date of discovery by the plaintiff of the violation that is the basis" for the FCRA claim, or (2) "5 years after the date on which the violation that is the basis for such liability occurs," without respect to the plaintiff's knowledge of the violation. 15 U.S.C. §§1681p (1)-(2). Here, While the class start period in the complaint is 5 years prior to the filing of this action, the settlement period has been narrowed to reflect the two-year statute of limitations and the date that Defendant stopped using the Consent to Request Consumer Report & Investigative Consumer Report Information form at issue in this case.

class' claims must share substantial issues of law or fact, but need not be identical. *Quintero*, 2008 U.S. Dist. LEXIS 84976, at *8. Either "shared legal issues with divergent factual predicates" or "a common core of salient facts coupled with disparate legal remedies within the class" suffices. *Hanlon*, 150 F.3d at 1019.

Under the FCRA, an employer, or prospective employer, cannot "procure, or cause a consumer report to be procured, for employment purposes with respect to any consumer unless ... a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes." 15 U.S.C. § 1681b(b)(2)(A)(i). Here, the Settlement Class is comprised of all individuals who, between March 7, 2017 and July 31, 2018, in connection with their application for employment with Defendant, completed Defendant's standard FCRA form purporting to authorize a consumer report verifying their background and experience. (Szamet Decl. ¶45.) Based on these common factual and legal issues, Plaintiff submits that sufficient commonality exists. (Szamet Decl. ¶46.)

FRCP 23(a)(3): Plaintiff's claims are typical of the class' claims. As with commonality, the typicality standard is "permissive[ly]" applied. *See Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003) (quoting *Hanlon*, 150 F.3d at 1020). More specifically, it is satisfied when a class representative's claim is "reasonably coextensive with those of absent class members; they need not be substantially identical." *Id*.

Plaintiff alleges that on or about May of 2017, he was required to sign a standardized form labeled "Consent to Request Consumer Report & Investigative Consumer Report Information," provided by Sterling Infosystems Inc., a company hired by Defendant to obtain a consumer report verifying employees' background and experience. (Szamet Decl. ¶47.) According to Plaintiff, Defendant required all applicants to complete the same form that violated the FCRA's prohibition against

including extraneous information in a required disclosure. (ECF No. 12; Szamet Decl., ¶48.) Thus, the claims of Plaintiff and the Class Members arise from the same alleged course of conduct by Defendant and are based on the same legal theories. (Szamet Decl. ¶49.) Although Defendant does not admit these allegations, for purposes of approving this Settlement, Defendant does not oppose Plaintiff's assertion sufficient typicality exists. (Szamet Decl. ¶50.)

FRCP 23(a)(4): Plaintiff and Class Counsel will fairly and adequately protect the class' interests. Courts have interpreted this requirement as posing two questions: whether the class representative and her counsel (1) have conflicts of interest with putative class members, and (2) will vigorously prosecute the action on behalf of the class. *See id*. (citing *Hanlon* and other cases). Plaintiff and Class Counsel do not have interests antagonistic to those of the Settlement Class. To the contrary, Plaintiff shares the same interest-*i.e.*, recovering damages resulting from alleged violations of Defendant's FCRA obligations. Moreover, Class Counsel have extensive experience prosecuting similar such class actions. (Szamet Dec. ¶¶53-55.) Kingsley & Kingsley is experienced in prosecuting employment litigation, and has focused its practice since 2000 on complex litigation including wage and hour and consumer class actions. (*Id.*) Kingsley & Kingsley currently serves as class counsel for dozens of pending class actions in Northern, Central, and Southern California. (*Id.*) A list of representative cases that Kingsley & Kingsley has handled is included in the accompanying declaration of Kelsey M. Szamet. Thus, Plaintiff and Class Counsel are adequate representatives for the Class. The firm has diligently and aggressively pursued this action. After factoring in the risks discussed herein, Class Counsel believes that the proposed Settlement is fair and reasonable.

B. Plaintiff Maintains That the FRCP 23(b)(3) Criteria are Met

To certify a class under FRCP 23(b)(3), a court must find (1) common questions of fact or law predominate over questions affecting individual members of the proposed class, and (2) a class action is a superior method for fairly and

efficiently adjudicating the controversy. FRCP 23(b)(3). The Settlement easily meets these criteria.

The predominance requirement is met. Predominance "focuses on the relationship between the common and individual issues. When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir), *cert. denied*, 534 U.S. 973,122 S. Ct. 395 (2001) ("Local Joint Executive Bd.") (quoting *Hanlon*, 150 F.3d at 1022).

Predominance is readily met because, as in numerous other class actions, Plaintiff's claim is premised in his allegation Defendant maintained a uniform policy of providing the Settlement Class with a standardized FCRA form facially violating the FCRA. (Szamet Decl. ¶51; ECF No. 12, ¶20.) Plaintiff's claim is based on factual and legal questions about Defendant's policy that are not only common to the Settlement Class, but predominate under FRCP 23 (e). These aspects of the case strongly support a finding that the predominance requirement is satisfied. *See, e.g., In re Wells Fargo Home Mortgage Overtime Pay Litig.*, 527 F. Supp.2d 1053, 1068 (N.D. Cal. 2007); *In re Wells Fargo Home Mortg. Overtime Pay Litigation*, 571 F.3d 953, 958 (C.A.9 2009).

Superiority is met. Whether a class action is a superior method of adjudicating a controversy involves a "comparative evaluation of alternative mechanisms of dispute resolution." *Hanlon*, 150 F.3d at 1023. The circumstances here are comparable with those involving the Las Vegas Sands' former casino employees who sought damages for their employer's failure to provide a statutorily required 60-day notice before closure. When affirming the district court's approval of a class action settlement, the Ninth Circuit stated:

> This case involves multiple claims, some for relatively small

> individual sums. Counsel for the would-be class estimated that, under the most optimistic scenario, each class members would recover about $1,330. If plaintiffs cannot proceed as a class, some - perhaps most - will be unable to proceed as individuals because of the disparity between their litigation costs and what they hope to achieve.

Local Joint Executive Bd., 244 F.3d at 1163 ("Class actions ... may permit the plaintiffs to pool claims which would be uneconomical to litigate individually.") (*citing Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809, (1985). In such a situation, superiority is "easily satisfied." *Id*. For purposes of approving the Settlement, the Parties submit superiority is equally satisfied. (Szamet Decl. ¶52.)

VI. CONCLUSION

The Settlement is fair and reasonable and all of the requirements for final approval are met. Plaintiff therefore requests that the Court grant this motion and enter an order: (1) granting Final approval of the Settlement; (2) certifying the Settlement Class; (3) awarding class representative payment of $5,000.00 to the Named Plaintiff; (4) awarding attorneys' fees and costs in the amount detailed in the concurrently filed Motion for Attorneys' Fees and Costs; (5) awarding $18,500 to JND Class Action Administration; and (6) entering judgment in the case.

DATED: April 10, 2020

KINGSLEY & KINGSLEY, APC

By: _____

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