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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

**DECLARATION OF KELSEY M.
SZAMET IN SUPPORT OF
PLAINTIFF'S MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

Date: TBD

Time: TBD

Magistrate Judge: Jennifer L. Thurston

DECLARATION OF KELSEY M. SZAMET

I, Kelsey M. Szamet, state and declare as follows:

1. I am an attorney admitted before all courts of the State of California and a partner in the law firm of Kingsley & Kingsley, APC, counsel of record for Plaintiffs in this action. I am completely familiar with the present litigation, including the pleadings, discovery, and filings submitted in this matter. I make this Declaration from my own personal knowledge, and, if called upon, I could and would competently testify to the following.

2. I graduated cum laude from the University of California, San Diego in 2004 with a degree in Human Development. I graduated from the University of California, Los Angeles School of Law in 2008. I am admitted to practice before the following Courts: United States Supreme Court; United States District Court, Northern, Eastern, Southern and Central of California; all California State Courts.

3. I make this Declaration in support of Plaintiffs' Motion for Preliminary Approval of the Class Action Settlement in the above-captioned case.

RELEVANT PROCEDURAL HISTORY

4. 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, 15 U.S.C. § 1681b(b)(2)(A)(i), by allegedly requiring Plaintiff and the FCRA Class Members¹ to execute a "Consent to Request Consumer Report & Investigative Consumer Report Information" form to permit Sterling Infosystems Inc. to obtain and use consumer report information for employment purposes for Plaintiff and all the FCRA Class Members, and Defendant therefore 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

¹ "Class" means those individuals who are within the Settlement Class, each of whom is a "Class Member."

1 alleged Defendant failed to provide lawful meal and rest breaks to the Proposed
2 California Class Members.

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

11 6. The Parties exchanged initial discovery disclosures, and engaged in
12 extensive discussions about their respective positions and the information and data
13 needed to properly evaluate the merits of the claims alleged. The Parties reached a
14 proposed class action settlement on September 6, 2019 through arms-length direct
15 negotiations, now submitted to this Court for preliminary approval.

16 7. On September 13, 2019, the Court issued an Order setting Plaintiff's
17 deadline to file his Motion for Preliminary Approval for November 8, 2019. (ECF
18 No. 24.)

19 8. The operative FAC defined the class as: "all applicants in the United
20 States who filled out WM. BOLTHOUSE FARMS, INC.'s standard "Consent to
21 Request Consumer Report & Investigative Consumer Report Information" form at
22 any time during the period beginning five (5) years prior to the filing of this action
23 to the present."

24 9. The Settlement Class, which includes approximately 1,245
25 individuals, is defined as: "all applicants in the United States who filled out WM.
26 BOLTHOUSE FARMS, INC.'s standard 'Consent to Request Consumer Report &
27 Investigative Consumer Report Information' form as administered by Sterling
28 Infosystems Inc. during the Class Period."

1 10. The “Class Period” is March 17, 2017 to July 31, 2018. (Settlement,
2 Ex. 1 at § I, ¶7.) While the class start period in the complaint is 5 years prior to the
3 filing of this action, the settlement period has been narrowed to reflect the two-year
4 statute of limitations and the date that Defendant stopped using the Consent to
5 Request Consumer Report & Investigative Consumer Report Information form at
6 issue in this case.

7 **SETTLEMENT’S KEY PROVISIONS**

8 11. The Settlement provides a maximum recovery of \$118,275.00 (the
9 “Gross Settlement Amount”). (Settlement at §§ I, ¶14, II, ¶2 and III, ¶3.) If the
10 Court approves the Settlement, the following estimates the breakdown of payments
11 from the Gross Settlement Amount:

- 12 • \$54,350.00 for estimated settlement funds to the Settlement Class
13 (the “Net Settlement Amount”);
- 14 • \$18,500 for administration costs regarding the Settlement;
- 15 • \$5,000 for a Service Award to Plaintiff; and
- 16 • \$39,425.00 for attorneys’ fees and \$1,000.00 in litigation costs (the
17 “Class Counsel Award”).

18 12. As of the date of this filing, Plaintiff’s Counsel has \$767.05 in costs.
19 Counsel requests reimbursement of up to \$1,000 at this time, but will limit the request
20 to actually incurred costs at the time of filing the Motion for Final Approval.

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

24 14. The number of consumer reports obtained for each Class Member may
25 differ, and thus Class Members may be entitled to more, or less, than others, based on the
26 number of consumer reports obtained for each of them.

27 15. During the Class Period, Defendant estimated there to be approximately
28 1,245 members of the Settlement Class.

1 16. Based on this data, the Parties anticipate the approximate gross payment per
2 class member on average will be \$95 with an approximate net payment on average of
3 \$43.65.

4 17. To ensure the Settlement Class and Class Counsel are adequately
5 compensated, the Gross Settlement Amount may be increased if data reflects the
6 total number of consumer reports is more than 5% above 1,245.

7 18. The Parties met and conferred regarding a third-party settlement
8 administrator to administer the Settlement claims process (ILYM Group, Inc. and
9 JND Legal Administration). Plaintiff obtained administration bids from two
10 third-party settlement administrators. LYM submitted a bid for \$21,426.08,
11 while JND's bid was for \$18,500.

12 19. Accordingly, the Parties agreed to use JND Legal Administration to
13 administer the Settlement claims process.

14 20. Given the size of the class, the price for the class administration is
15 reasonable.

16 21. The Settlement Administration Costs shall be paid from the Gross
17 Settlement Amount, including, if necessary, any such costs approved by the Court
18 in excess of the amount represented by the Settlement Administrator as being the
19 maximum costs necessary to administer the Settlement. (Settlement, Ex. 1 at § I,
20 ¶24.) If the costs exceed those preliminarily approved, then the amount will
21 come out of the Settlement Fund.

22 **CLASS CERTIFICATION ANALYSIS**

23 22. For settlement purposes only, the parties agree that the Court can
24 conditionally certify the following Settlement Class under FRCP 23(b)(3): "all
25 applicants in the United States who filled out WM. BOLTHOUSE FARMS, INC.'s
26 standard 'Consent to Request Consumer Report & Investigative Consumer Report
27 Information' form as administered by Sterling Infosystems Inc. during the Class
28 Period (namely, March 7, 2017 to July 31, 2018)."

1 23. The Parties agree, but only for purposes of the Settlement, the
2 criteria for certifying a settlement class are satisfied.

3 24. Here, approximately 1,245 individuals comprise the Settlement Class.

4 25. Plaintiff asserts that the question of law and fact common to the
5 proposed class that predominate over questions that may affect individual class
6 members are: (a) whether Defendant's standard FCRA disclosure meets 15 U.S.C.
7 § 1681b(b)(2)(A)(i)'s "clear and conspicuous disclosure" requirement; (b) whether
8 Defendant's standard FCRA disclosure is "in a document that consists solely of
9 the disclosure"; (c) whether Defendant acquires applicants' consumer reports
10 without authorization in violation of 15 U.S.C. § 1681b(b)(2)(A)(ii); and (d)
11 whether Defendant "willfully" violated the FCRA pursuant to 15 U.S.C. § 1681n.
12 Here, all members of the Settlement Class executed the same FCRA disclosure
13 form and suffer from the same types of injury arising from the same conduct
14 committed by Defendant in regard to the claims alleged. Based on these common
15 factual and legal issues, the Parties submit sufficient commonality exists.

16 26. Plaintiff alleges that on or about May of 2017, he was required to sign
17 a standardized form labeled "Consent to Request Consumer Report & Investigative
18 Consumer Report Information," provided by Sterling Infosystems Inc., a company
19 hired by Defendant to obtain a consumer report verifying employees' background
20 and experience.

21 27. According to Plaintiff, Defendant required all applicants to complete
22 the same form that violated the FCRA's prohibition against including extraneous
23 information in a required disclosure. (ECF No. 12, ¶20.) Thus, the claims of
24 Plaintiff and the Class Members arise from the same alleged course of conduct by
25 Defendant and are based on the same legal theories. Although Defendant does not
26 admit these allegations, for purposes of approving this Settlement, Defendant does
27 not oppose Plaintiff's assertion sufficient typicality exists.

28 ///

1 28. Plaintiff and Class Counsel do not have interests antagonistic to those
2 of the Settlement Class. To the contrary, Plaintiff shares the same interest—*i.e.*,
3 recovering damages resulting from alleged violations of Defendant’s FCRA
4 obligations.

5 29. Moreover, Class Counsel have extensive experience prosecuting
6 similar such class actions. Kingsley & Kingsley is experienced in prosecuting and
7 defending employment and consumer matters, and the firm has focused its practice
8 since 2000 on complex litigation including wage and hour and consumer class
9 actions. Kingsley & Kingsley currently serves as class counsel for dozens of
10 pending class action lawsuits in Northern, Eastern, Central, and Southern
11 California. Below is a representative sampling of those cases:

- 12 a. *Ryan v. Hilton Hotels Corporation*, Los Angeles County Superior
13 Court (BC364260). The matter was approved for final settlement by
14 the Honorable Mary Thornton House in March 2008, in the gross
15 amount of \$1,675,000.00, with attorneys' fees request of 33 1/3%.
- 16 b. *Benitez v. GRA-GAR LLC*, San Bernardino County Superior Court
17 (CIVSS709965). The matter was approved for final settlement by the
18 Honorable W. Robert Fawke in February 2009, in the gross amount of
19 \$250,000.00, with attorneys' fees request of 33 1/3%.
- 20 c. *Rollins v. Big Wangs, Inc.*, Los Angeles County Superior Court
21 (BC393775). The matter was approved for final settlement by the
22 Honorable Malcolm H. Mackey in October 2009, in the gross amount
23 of \$195,000.00, with attorneys' fees request of 33 1/3%.
- 24 d. *Sevier v. Excalibur Well Service*, Kern County Superior (S-1500-CV-
25 265391-WDP). Preliminary approval of settlement was granted
26 March 10, 2010 by Honorable William D. Palmer. The matter was
27 approved for final settlement in May 2010, in the gross amount of
28 \$550,000.00, with attorneys' fees request of 33 1/3%.

- 1 e. *Lewis v. Collabrus, Inc., et al.*, Santa Clara County Superior Court
2 (109CV-142927). The matter was approved for final settlement by
3 the Honorable James P. Kleinberg in March 2012, in the gross amount
4 of \$2,000,000.00, with attorneys' fees request of 33.3%.
- 5 f. *Hirschinger v. Blue Cross of California*, Los Angeles Superior Court
6 (BC402739). The matter was approved for final settlement by the
7 Honorable Lee Smally Edmund in June 2013, in the gross amount of
8 \$4,700,000.00, with attorney's fees request of 38%.
- 9 g. *Perry v. GSF Properties*, Fresno County Superior Court
10 (11CECG02434MWS). The matter was approved for final settlement
11 by the Honorable Mark W. Snauffer in October 2013, in the gross
12 amount of \$700,000.00, with attorney's fees request of 33.33%.
- 13 h. *Anderson v. Total Renal Care, Inc.*, Los Angeles County Superior
14 Court (BC388335). The matter was finally approved for final
15 settlement by the Honorable William F. Highberger in January 2014,
16 in the gross amount of \$1,500,000, with attorney's fees request of
17 33.33%.
- 18 i. *Randell v. Tuesday Morning, Inc.*, Los Angeles Superior Court
19 (BC403298). The matter was finally approved for final settlement by
20 the Honorable Richard E. Rico in October 2014, in the gross amount
21 of \$899,000.00, with attorney's fees request of 33.33%.
- 22 j. *Westbrook v. International Surfacing Systems*, Alameda Superior
23 Court (RG10510015). This certified class action was approved for
24 final settlement by the Hon. Wynne Carvill in August 2015, in the
25 gross amount of \$995,000.00, with attorney's fees request of 33.33%.

26 A representative sampling of recent class action and wage and hour cases
27 successfully certified by Kingsley & Kingsley while serving as Lead and/or Class
28 Counsel follows:

1 a. *Munoz, et al. v. Guimarra Vineyards Corporation*, Eastern District
2 (1:09-cv-00703 AWI-JLT). The Hon. Jennifer Thurston granted the
3 plaintiffs' class certification motion and appointed Kingsley &
4 Kingsley as class counsel.

5 b. *Melendrez v. JK Communications*, Los Angeles Superior Court
6 (BC497692). The Hon. John Shepard Wiley, Jr. certified five classes
7 and appointed Kingsley & Kingsley as class counsel.

8 c. *Budrow v. Dave & Buster's of California, Inc.*, Los Angeles County
9 Superior Court (BC349060) approved for Class Certification.

10 d. *Suarez v. Mazatlan, Inc.*, San Diego County Superior Court (37-2015-
11 00002978-CU-OE-CTL) approved for Class Certification.

12 30. Thus, Plaintiff and Class Counsel are adequate representatives for the
13 Class. The firm has diligently and aggressively pursued this action. After factoring
14 in the risks discussed herein, Class Counsel believes that the proposed settlement is
15 fair and reasonable.

16 31. Predominance is readily met because, as in numerous other class
17 actions, Plaintiff's claim is premised on his allegation Defendant maintained a
18 uniform policy of providing the Settlement Class with a standardized form facially
19 violating the FCRA. (ECF No. 12, ¶20.)

20 32. Plaintiff's claim is based on factual and legal questions about
21 Defendant's policy that are not only common to the Settlement Class, but
22 predominate under FRCP 23(e).

23 33. These aspects of the case strongly support a finding that the
24 predominance requirement is satisfied.

25 34. For purposes of approving the Settlement, the Parties submit
26 superiority is equally satisfied.

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ANALYSIS OF SETTLEMENT

1
2 35. Neither Plaintiff nor his counsel has any conflicts of interest with any
3 of the proposed class members.

4 36. Class Counsel has extensive experience in prosecuting FCRA class
5 actions throughout California. Class counsel regularly litigates and tries FCRA
6 class actions, and have considerable experience settling such actions.

7 37. It was very difficult for the Parties to reach this settlement.

8 38. This settlement is the result of adversarial, non-collusive, and arms-
9 length negotiations.

10 39. The Parties arrived at this settlement only after initial discovery,
11 extensive investigation and discussion, and a careful evaluation of the law, risks,
12 and all information substantiating the amount of damages reasonably likely to be
13 awarded to the Class were the trier of fact to find Defendant was liable.

14 40. Based on the risks and evaluations above, Class Counsel determined
15 Plaintiff's maximum potential recovery at trial to be \$2,490,000 ($1,245 \times \$1,000 =$
16 $\$1,245,000 \times 2 = \$2,490,000$.) This recovery would only be possible if Plaintiff
17 proved that each violation was "willful" and recovered the statutory maximum for
18 each claim (i.e. disclosure and authorization.) If, however, Plaintiff was not able to
19 prove the violation was willful and was only able to recover for one of the claims
20 at the statutory minimum of \$100, then maximum recovery would be \$124,500
21 ($1,245 \times \$100$).

22 41. Based upon these numbers, and applying discounts based upon the
23 risks discussed above, Plaintiff's Counsel believes that the proposed Gross
24 Settlement Amount of \$118,275 is fair and reasonable.

25 42. There is risk associated with continued litigation, including the
26 prospect that a class might not be certified, or a certified class may be
27 significantly smaller than proposed.

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1 43. While Plaintiff maintains his confidence in Defendant's liability for
2 violation of the FCRA on two separate grounds, Plaintiff must acknowledge that
3 Defendant's likely arguments posed risks.

4 44. Defendant likely would have advanced an argument that Plaintiff
5 lacked standing because he did not suffer, or allege, a concrete injury under the
6 Supreme Court's *Spokeo* decision.

7 45. Because of the uncertainty regarding FCRA liability, the
8 \$118,275.00 Gross Settlement Amount is more than reasonable.

9 46. Risks and uncertainties are also present regarding damages. In
10 particular, Plaintiff seeks statutory damages under the FCRA ranging between
11 \$100 and \$1,000 per violation.

12 47. Defendant would have certainly argued the alleged violations were
13 technical, and thus did not result in any injuries or damages.

14 48. Here, estimating the average number of reports procured for each
15 Class Member to be 1, the proposed Gross Settlement Amount represents 95% of
16 Plaintiff's likely recovery at trial if Defendant's conduct was not found to be
17 willful (1,245 reports x \$100), with an average gross settlement amount of \$95 to
18 each proposed class member. Thus, the proposed settlement falls well above the
19 approved discounted range for similar class settlements.

20 49. Furthermore, while Class Counsel believe Plaintiff's claims are
21 meritorious, they are experienced class action litigators, and understand the
22 outcome of class certification, trial, and any attendant appeals are inherently
23 uncertain, as well as likely to consume many months or years.

24 50. The public policy favoring class action settlements applies with
25 particular force here because the Settlement provides Class Members substantial,
26 prompt, and efficient relief.

27 51. This case has not been certified to be tried as a class action.

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1 52. While Plaintiff believes there is strong evidence to support
2 certification of the proposed class, certification is always hard fought and subject
3 to judicial discretion. Moreover, in class actions, decertification is always a
4 possibility.

5 53. In attempting to certify a class, the parties would need to conduct
6 multiple depositions, including person(s) most knowledgeable regarding
7 Defendant's hiring and background check policies. There is a risk for both sides as
8 to what these depositions will reveal and whether they will support class
9 certification to the extent expected.

10 54. A copy of the Parties' proposed class notice is attached to the
11 Settlement as Exhibit A. The Notice explains the claims in the Lawsuit, the
12 essential terms of the settlement, that class members need to do nothing to recover
13 under the Settlement, the procedures for requests to be excluded from the
14 Settlement, and how to object to the Settlement. The Notice also advises the
15 Settlement Class about the fairness hearing, Class Members' rights with respect to
16 that hearing, and how to get more information about the Settlement.

17 55. The time period for submitting an opt out request from the Settlement
18 is reasonable, as is the time for filing objections; the Settlement Class will have
19 adequate time to (1) digest the information provided in the Notice, and (2) obtain
20 answers to questions about the Settlement.

21 56. Finally, JND Legal has significant experience in the administration of
22 class action settlements and is qualified to perform all of the duties required of it in
23 the Settlement.

24 57. The allocation of the Gross Settlement Amount between Class
25 Members and Class Counsel is also fair because Class Counsel may seek to
26 recover no more than one-third of the Gross Settlement Amount in fees.

27 58. The requested fees are fair compensation for undertaking complex,
28 risky, expensive, and time-consuming litigation solely on a contingency basis.

1 Furthermore, the fee request is in line with other attorneys' fees awards for similar
 2 actions, particularly when class members do not have to allege or prove they
 3 suffered injuries.

4 59. Class Counsel requests a fee award in the amount of \$39,425.00,
 5 which represents 33% of the \$118,275.00 common fund. Class Counsel's
 6 application for an award of attorneys' fees is reasonable and fair.

7 60. This litigation resulted in the creation of a common fund for the Class,
 8 namely a non-reversionary settlement fund of \$118,275.00.

9 61. Because no Class Members will pay fees to Class Counsel for their
 10 efforts during the litigation, equity requires them to pay a fair and reasonable fee
 11 based on what the market would traditionally require, no less than if they had hired
 12 private counsel to litigate their cases individually. Class Counsel is therefore
 13 entitled to fees from the settlement fund as a whole.

14 62. A lodestar cross-check also confirms that the percentage requested is
 15 reasonable.

16 63. Class Counsel's attorneys' fees in the present case to date are broken
 17 down as follows:

	<u>HOURS</u>	<u>HOURLY RATE</u>	<u>TOTALS</u>
Eric B. Kingsley	5.60	\$750.00	\$4,200.00
Kelsey M. Szamet	29.50	\$500.00	\$14,750.00
Justin M. Aufderhar	22.10	\$325.00	\$7,182.50
TOTAL	57.20		\$26,132.50

23 64. Here, Class Counsel has already spent over 57.20 hours on this
 24 litigation, resulting in lodestar fees through the present of \$26,132.50.

25 65. Using the above lodestar, the percentage of the fund requested
 26 represents a multiplier of approximately 1.51, which is well within the range of
 27 reasonable multipliers approved by courts within the Ninth Circuit.

28 ///

1 66. Comparison with the lodestar thus demonstrates that the requested fee
2 award of \$39,425.00 is reasonable.

3 67. Finally, Kingsley & Kingsley is experienced in prosecuting
4 employment and consumer litigation, and the firm has focused its practice since the
5 year 2000 on wage, hour, and working condition violations. They are well-versed
6 in class action litigation and has diligently and aggressively pursued this action.
7 Kingsley & Kingsley currently serves as class counsel for dozens of pending class
8 action lawsuits in Northern, Central, and Southern California.

9 68. Throughout the past decade, attorneys at Kingsley & Kingsley have
10 also actively litigated countless wage and hour and consumer class actions. This
11 Declaration discusses Kingsley & Kingsley's depth of experience.

12 69. Class Counsel requests the Court grant the requested fee award of
13 \$39,425.00. Additionally, Class Counsel requests \$1,000 for litigation costs, for a
14 total Class Counsel Award of \$40,425.00

15 70. The relief provided for in the Settlement will benefit all Participating
16 Class Members fairly because the basis for recovery is the same for each
17 Participating Class Member on a per background check basis. All individuals
18 comprising the Settlement Class are eligible to receive individual payments from
19 the Net Settlement Amount, and each Class member will be bound by the same
20 release.

21 71. Plaintiff provided invaluable assistance in the prosecution of this case.
22 Mr. Felix's time includes researching and identifying competent counsel with
23 relevant expertise, providing information to Class Counsel regarding the claims at
24 issue, compiling documents, conducting several meetings and telephone
25 conferences with his attorneys to discuss the status of the case and the theories of
26 liability, and reviewing all relevant case documents.

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1 72. Moreover, Plaintiff incurred personal risk by bringing the Lawsuit; he
2 could have been responsible for Defendant’s costs, and his potential employment
3 opportunities may have been impacted by his public prosecution of the Lawsuit.

4 73. As outlined above, Class Counsel conducted a thorough investigation
5 into the facts of the claims alleged. The agreement to settle did not occur until
6 Counsel possessed sufficient information to make an informed judgment regarding
7 the likelihood of success on the merits and the results that could be obtained
8 through further litigation.

9 74. There is no governmental participant in this action.

10 75. The Proposed Class Members have not yet been notified of the
11 proposed Class Settlement, and thus there has yet to be a reaction from Class
12 Members to the Proposed Settlement. After the Notice process, Plaintiff will
13 inform the Court about the response of the Class.

14 **EXHIBITS**

15 76. Attached hereto as Exhibit “1” is a true and correct copy of the
16 Parties’ Class Action Release and Settlement Agreement (“Settlement Agreement”
17 or “Settlement”).

18 I declare under penalty of perjury under the laws of the State of California
19 that the foregoing is true and correct. Executed this 8th day of November, 2019, in
20 Encino, California.

21
22 /s/ Kelsey M. Szamet
23 _____ Kelsey M. Szamet
24 Declarant
25
26
27
28