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11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**
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14 MARIA CHONA RODRIGUEZ, an
15 individual, on behalf of herself, and on
16 behalf of all persons similarly situated,

17 Plaintiff,

18 vs.

19 EL TORO MEDICAL INVESTORS
20 LIMITED PARTNERSHIP, a Limited
21 Partnership; LIFE CARE CENTERS
OF AMERICA, INC., a Corporation;
and DOES 1 through 50, inclusive,

22 Defendants.
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CASE No. **8:16-CV-00059-JLS-KES**

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR PRELIMINARY
APPROVAL OF CLASS
SETTLEMENT**

Judge: Hon. Josephine L. Staton

Hearing Date: December 8, 2017

Hearing Time: 2:30 p.m.

Action Filed: January 15, 2016

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1 **I. INTRODUCTION**

2 Plaintiff Maria Rodriguez ("Plaintiff") and Defendants El Toro Medical Investors,
3 L.P. and Life Care Centers of America, Inc. ("Defendants") have reached a full and final
4 settlement of the above-captioned class action, which is embodied in the Class Action
5 Settlement Agreement ("Agreement") filed concurrently with the Court as Exhibit 1 to
6 the Declaration of Kyle Nordrehaug ("Decl. Nordrehaug").¹ By this motion, Plaintiff
7 seeks preliminary approval of the Agreement as fair, reasonable and adequate, entry of
8 the Preliminary Approval Order, and scheduling of the Final Approval Hearing to
9 determine final approval of the Settlement.

10 **II. DESCRIPTION OF THE SETTLEMENT**

11 Counsel for the Parties, after litigation and contentious settlement negotiations,
12 agreed to a settlement that is fair, reasonable and favorable to the Class, which is defined
13 as: "(all individuals who applied for employment with any Released Party (defined
14 below) in the United States who executed a background check disclosure and/or
15 authorization form that included a liability release clause and whose background check
16 report was procured pursuant to such form at any time between January 15, 2014 and the
17 date of preliminary approval ("Class Period")." (Agreement at ¶ I(B).) Decl.
18 Nordrehaug, ¶3.

19 Under the terms to which the Parties have agreed, Defendants agree to pay Six
20 Hundred Seventy-Five Thousand Dollars (\$675,000) ("Gross Settlement Amount") in
21 consideration for the settlement and the release of the Released Claims as described in
22 the Agreement. This amount is the maximum settlement sum and is all-inclusive of all
23 payments contemplated in final resolution of the remaining first and second causes of
24 action in this Action. The Gross Settlement Amount consists of: (i) the Settlement
25 Shares; (ii) any award of attorneys' fees and costs to Class Counsel; (iii) the Class
26 Representative Service Payment; and, (iv) the fees and expenses of the Settlement

27 _____
28 ¹ Capitalized terms have the same meaning as set forth in the Agreement.

1 Administrator. (Agreement at ¶¶ III(A)-(C).) Decl. Nordrehaug, ¶3.

2 After deduction of for the Class Representative Service Payment, Class Counsel
3 Fees Payment, Class Counsel Litigation Expenses Payment and settlement
4 administrator's costs, the remaining funds will constitute the Net Settlement Amount.
5 The Settlement Administrator will pay a Settlement Share from the Net Settlement
6 Amount to each Participating Class Member (i.e. those Class Members who do not opt
7 out of the settlement or otherwise exclude themselves from the settlement by submitting
8 an Election Not to Participate in Settlement). The submission of a claim form is not
9 required to be paid. (Agreement at ¶ III(C)(1).) The Settlement Share for each
10 Participating Class Member will be calculated by dividing the Net Settlement Amount
11 by the total number of Participating Class Members on an equal pro rata basis, but in no
12 event may the individual settlement payment exceed \$1,000 for each Participating Class
13 Member. (Agreement at ¶ III(C)(2).) Decl. Nordrehaug, ¶4.

14 This is an excellent result for the Class Members. The litigation risks that the
15 Plaintiff and Class Members face if the case were not settled include, among other
16 things, Defendants prevailing on class certification, an adverse decision on the merits,
17 loss of motions which would result in limiting any exposure, and the possibility that a
18 jury would return a less favorable verdict. Liability in this case was uncertain because
19 a jury may have found that Defendants were not liable. Decl. Nordrehaug, ¶5.
20 Moreover, there was further uncertainty as to whether class certification could have been
21 obtained and maintained throughout the trial. These defenses could have reduced the
22 amount recovered or denied a recovery altogether to the members of the Class. Class
23 Counsel and Plaintiff wish to avoid these risks and uncertainties, as well as the
24 consumption of time and resources of litigation, through settlement pursuant to the terms
25 and conditions of the Agreement. Decl. Nordrehaug, ¶5.

26 **III. NATURE OF THE CASE**

27 On January 15, 2016 Plaintiff filed a Complaint against Defendants in the United
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1 States District Court, Central District of California. Plaintiff asserted claims against
2 Defendants for: (1) Violation of the Fair Credit Reporting Act (FCRA) for failure to
3 make proper disclosures (15 U.S.C. § 1681, et seq.); (2) Violation of the Fair Credit
4 Reporting Act for failure to obtain proper authorization (15 U.S.C. § 1681, et seq.); (3)
5 Unfair competition in violation of California Business and Professions Code §17200 et
6 seq.; (4) Failure to pay overtime wages in violation of Cal. Lab. Code §§ 510 & 1198, et
7 seq.; (5) Failure to provide accurate itemized wage statements in violation of California
8 Labor Code § 226; and, (6) Failure to timely provide wages due in violation of California
9 Labor Code §§ 201, 202, and 203. On March 15, 2016, Plaintiff filed a First Amended
10 Complaint adding a claim under the Private Attorneys General Act, Cal. Labor Code §§
11 2698 et seq. ("PAGA"). Decl. Nordrehaug, ¶6.

12 Defendants filed a motion for dismiss the Fair Credit Reporting Act claims on
13 August 9, 2016. [Doc. No. 23]. On November 16, 2016, the Court denied Defendants'
14 motion to dismiss these FCRA claims (causes of action numbers 1 and 2). [Doc. No. 50].
15 On January 25, 2017, the Court granted the Parties' stipulation to dismiss Plaintiff's
16 Third, Fourth, Fifth, Sixth and Seventh causes of action. As a result, only the FCRA
17 claims remained in the Action. On January 31, 2017, Defendants filed an Answer to the
18 First Amended Complaint, which denied Plaintiff's claims and allegations in their
19 entirety and alleged nineteen affirmative defenses. Decl. Nordrehaug, ¶7.

20 In the Action currently, Plaintiff's First Amended Complaint only alleges two
21 claims based upon alleged violations of the FCRA. This is because Plaintiff's wage and
22 hour claims against Defendants as alleged in the Third, Fourth, Fifth, Sixth and Seventh
23 causes of action of the First Amended Complaint and all allegations related thereto have
24 been dismissed in their entirety. Defendants vigorously deny and continue to deny all
25 of the material allegations asserted in the Action, and denies that it has violated any law
26 or other obligation to the Plaintiff or any of the Class Members. Decl. Nordrehaug, ¶8.

27 During the course of litigation, the Parties each performed analysis of the merits
28

1 and value of the claims. Prior to settlement discussions, Defendants produced
2 information and documentation concerning its policies and the composition of the Class.
3 The parties agreed to negotiate a settlement in an attempt for early resolution of the
4 Action. Decl. Nordrehaug, ¶9.

5 Plaintiff and Defendants have engaged in investigation in connection with the
6 Action, including the informal exchange of information regarding the number of possible
7 class members, Defendants' background check release, and other relevant issues. Class
8 Counsel has thoroughly analyzed the value of the Class Members' claims during the
9 prosecution of these Action. This discovery, investigation, and prosecution has included,
10 among other things, (a) multiple meetings and conferences with Plaintiff; (b) inspection
11 and analysis of the documents and materials produced by Plaintiff and Defendants; (c)
12 analysis of the various legal positions taken and defenses raised by Defendants; (d)
13 investigation and law and motion regarding the claims; (e) analysis of potential
14 class-wide recovery; (f) research of the applicable law with respect to the claims asserted
15 in the Action and the potential defenses thereto; (g) the exchange of information through
16 informal discovery; and, (h) assembling data for calculating damages/penalties. The
17 investigation conducted in this matter, as well as discussions between counsel, have been
18 more than sufficient to give the Plaintiff and Class Counsel a sound understanding of the
19 merits of their positions and to evaluate the worth of the claims of the Class Members
20 in light of the defenses to them. Plaintiff and Class Counsel believes that the settlement
21 with Defendants for the consideration and on the terms set forth in the Agreement is fair,
22 reasonable, and adequate and is in the best interest of the Class in light of all known facts
23 and circumstances, including the risk of significant delay, the likelihood that Defendants
24 would prevail on its defenses, and numerous potential appellate issues. Decl.
25 Nordrehaug, ¶10.

26 Defendants do not admit any liability and denies and wrongdoing and denied that
27 the Class Members are entitled to any recovery. Defendants deny any and all allegations
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1 relating to this matter, including, amount other things, that it has violated the FCRA, or
2 that it otherwise violated its legal obligations. Defendants have asserted several
3 affirmative defenses, including the lack of standing under *Spokeo v. Robins*, 136 S. Ct.
4 1540 (2016), and that the claims were based on individualized facts and were not
5 appropriate for class certification. Defendants maintain that they have acted lawfully at
6 all times. Decl. Nordrehaug, ¶11.

7 On May 16, 2017, the Parties participated in a good-faith, arms-length mediation
8 presided over by David A. Rotman, Esq., a prominent and experienced mediator of class
9 actions. Mediator Rotman assisted the parties in their negotiations and was ultimately
10 able to facilitate a settlement pursuant to the terms and conditions of a mediator's
11 proposal. The principal terms of which were memorialized by the Parties in a signed
12 Memorandum of Understanding executed on executed on May 19 and May 22, 2017.
13 Based on those negotiations and additional arms-length settlement discussions between
14 the Parties, the Parties agreed to settle the Action on the terms and conditions set forth
15 in the Agreement. Decl. Nordrehaug, ¶12.

16 **IV. PLAN OF ALLOCATION**

17 To implement the terms of this Settlement, Defendants agree to pay the Gross
18 Settlement Amount of Six Hundred Seventy-Five Thousand Dollars (\$675,000). This
19 amount is the maximum settlement sum and is all-inclusive of all payments contemplated
20 in final resolution of the remaining first and second causes of action in this Action.
21 (Agreement at ¶ III(A).) This Gross Settlement Amount shall be an all-in payment with
22 no reversion to Defendants. (Id.) The Gross Settlement Amount will be used to fund:
23 (i) the Settlement Shares; (ii) any award of attorneys' fees and costs to Class Counsel or
24 otherwise; (iii) the Class Representative Service Payment; and, (iv) the fees and expenses
25 of the Settlement Administrator. After deduction of items (ii)-(iv), the remaining funds
26 will constitute the Net Settlement Amount to be distributed as the Settlement Shares to
27 Participating Class Members. (Agreement at ¶ III(C).) Decl. Nordrehaug, ¶13.

1 As per Paragraph III(C) of the Agreement, a participatory Class Members' share
2 will be calculated by dividing the Net Settlement Amount by the total number of
3 Participating Class Members on an equal pro rata basis, but in no event may the
4 individual settlement payment exceed \$1,000 for each Participating Class Member. The
5 excess amount, if any, shall be distributed as a cy pres distribution. (Agreement at ¶
6 III(C)(2).) Decl. Nordrehaug, ¶14.

7 Defendants shall fund the Gross Settlement Amount within 14 days after the
8 Effective Date of the Settlement by wire transfer and as agreed upon with the Settlement
9 Administrator. (Agreement at ¶ III(E)(9).) Within thirty (30) business days after
10 Defendants fund the Gross Settlement Amount, the Settlement Administrator will pay
11 to Participating Class Members their Settlement Shares; to Plaintiff her Class
12 Representative Service Payment; and to Class Counsel the Class Counsel Fees Payment
13 and the Class Counsel Litigation Expenses Payment. (Id.) Settlement checks issued to
14 the Participating Class Members shall remain valid for one-hundred and eighty (180)
15 calendar days from the date of issue. If any Participating Class Members do not cash
16 their settlement payment check before the void date, the funds from such uncashed
17 checks will be paid to the DLSE Unpaid Wage Fund in the name of the Participating
18 Class Member. (Agreement at ¶ III(E)(12).) Decl. Nordrehaug, ¶15.

19 Subject to Court approval, the Parties have agreed that KCC Class Action Services
20 (formerly Gilardi & Co.) will be appointed as Settlement Administrator. All
21 administrative fees, costs and expenses incurred by the Settlement Administrator in
22 connection with administering the Settlement will be deducted from the Gross Settlement
23 Amount. The Settlement Administrator has estimated that administering this settlement
24 will not exceed the cost of \$25,000. (Agreement at ¶¶ III(B)(3) and III(D).) Decl.
25 Nordrehaug, ¶16.

26 Class Counsel will apply to the Court for an award of an amount up to 1/3 of the
27 Gross Settlement Amount for reasonable attorneys' fees, and for reimbursement of
28

1 litigation costs not to exceed \$20,000. (Agreement at ¶ III(B)(2).) Plaintiff will also
2 apply for approval of Class Representative Service Payments in an amount not to exceed
3 \$10,000. (Agreement at ¶ III(B)(1).) The motion for these awards shall be scheduled
4 for determination at the Final Approval Hearing but will be filed before the deadline for
5 objections. Decl. Nordrehaug, ¶17.

6
7 **V. THE SETTLEMENT MEETS ALL CRITERIA NECESSARY FOR**
8 **PRELIMINARY APPROVAL**

9 When a proposed class-wide settlement is reached, the settlement must be
10 submitted to the court for approval. Fed. R. Civ. P. 23(e)(1)(A); 2 H. Newberg & A.
11 Conte, *Newberg on Class Actions* (3d ed. 1992) at §11.41, p.11-87. Preliminary
12 approval is the first of three steps that comprise the approval procedure for settlements
13 of class actions. See e.g. *Louie v. Kaiser Found. Health Plan, Inc.*, 2008 U.S. Dist.
14 LEXIS 78314 (S.D. Cal. 2008). The second step is the dissemination of notice of the
15 settlement to all class members. The third step is a final settlement approval hearing, at
16 which evidence and argument concerning the fairness, adequacy, and reasonableness of
17 the settlement may be presented and class members may be heard regarding the
18 settlement. See *Manual for Complex Litigation*, Second §30.44 (1993).

19 The question presented on a motion for preliminary approval of a proposed class
20 action settlement is whether the proposed settlement is "within the range of possible
21 approval." *Manual for Complex Litigation*, Second §30.44 at 229; *Gautreaux v. Pierce*,
22 690 F.2d 616, 621 n.3 (7th Cir. 1982); *Louie, supra*, at *7. Preliminary approval is
23 merely the prerequisite to giving notice so that "the proposed settlement . . . may be
24 submitted to members of the prospective Class for their acceptance or rejection."
25 *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 323
26 F. Supp. 364, 372 (E.D. Pa. 1970). There is an initial presumption of fairness when a
27 proposed settlement, which was negotiated at arm's length by Class Counsel, is presented
28 for court approval. *Newberg*, 3d Ed., §11.41, p.11-88. However, the ultimate question

1 of whether the proposed settlement is fair, reasonable and adequate is made after notice
2 of the settlement is given to the class members and a final settlement hearing is held by
3 the Court.

4
5 **A. The Role Of The Court In Preliminary Approval Of A Class Action Settlement**

6 The approval of a proposed settlement of a class action suit is a matter within the
7 broad discretion of the trial court. *Staton v. Boeing*, 327 F.3d 938, 959 (9th Cir. 2003).
8 Preliminary approval does not require the trial court to answer the ultimate question of
9 whether a proposed settlement is “fair, reasonable and adequate.” *In re Jiffy Lube Sec.*
10 *Litig.*, 927 F.2d 155, 158 (4th Cir. 1991); *Manual for Complex Litigation*, Third, §§
11 20.212. That determination is made only after notice of the settlement has been given
12 to the members of the class and after the class members have been given an opportunity
13 to voice their views of the settlement or to be excluded from the settlement class. See,
14 e.g., 3B J. Moore, *Moore's Federal Practice* §§23.80 - 23.85 (2003).

15 In considering a potential settlement for preliminary approval purposes, the trial
16 court does not have to reach any ultimate conclusions on the issues of fact and law which
17 underlie the merits of the dispute (*Detroit v. Grinnell Corp.*, 495 F.2d 448, 456 (2d Cir.
18 1974)), and need not engage in a trial on the merits. *Officers for Justice v. Civil Serv.*
19 *Comm'n*, 688 F.2d 615 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983). The court is
20 not required to determine that certification of a settlement class is appropriate until the
21 final settlement approval. *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods.*
22 *Liab. Litig.*, 55 F.3d 768, 797 (3d Cir. 1995).

23 The question of whether a proposed settlement is fair, reasonable and adequate
24 necessarily requires a judgment and evaluation by the attorneys for the parties based
25 upon a comparison of “the terms of the compromise with the likely rewards of
26 litigation.” *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982), cert. denied 464
27 U.S. 818 (1983) (quoting *Protective Comm. for Indep. Stockholders of TMT Trailer*
28

1 *Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968)). Therefore, many courts
2 recognize that the opinion of experienced counsel supporting the settlement is entitled
3 to considerable weight. *Kirkorian v. Borelli*, 695 F. Supp. 446, 451 (N.D. Cal. 1988);
4 *Reed v. General Motors Corp.*, 703 F.2d 170, 175 (5th Cir. 1983); *Weinberger*, 698 F.2d
5 at 74; *Armstrong v. Board of School Directors*, 616 F.2d 305, 325 (7th Cir. 1980); *Fisher*
6 *Bros. v. Cambridge-Lee Indus., Inc.*, 630 F. Supp. 482, 489 (E.D. Pa. 1985). For
7 example, in *Lyons v. Marrud, Inc.*, [1972-1973 Transfer Binder] Fed. Sec. L. Rep.
8 (CCH) Paragraph 93,525 (S.D.N.Y. 1972), the court noted that "[e]xperienced and
9 competent counsel have assessed these problems and the probability of success on the
10 merits. They have concluded that compromise is well-advised and necessary. The
11 parties' decision regarding the respective merits of their position has an important
12 bearing on this case." *Id.* at ¶ 92,520.

13 **B. Factors To Be Considered In Granting Preliminary Approval**

14 A number of factors are to be considered in evaluating a settlement for purposes
15 of preliminary approval. No one factor should be determinative, but rather all factors
16 should be considered. These criteria have been summarized as follows:

17 "If the proposed settlement appears to be the product of serious, informed,
18 non-collusive negotiations, has no obvious deficiencies, does not improperly grant
19 preferential treatment to class representatives or segments of the class, and falls within
20 the range of possible approval, then the court should direct that the notice be given to the
21 class members of a formal fairness hearing." *In re Tableware Antitrust Litig.*, 484 F.
22 Supp. 2d 1078, 1079 (N.D. Cal. 2011), citing *Manual of Complex Litigation*, Second
23 §30.44. Here, the settlement meets all of these criteria.

24 **1. The Settlement is the Product of Serious, Informed and** 25 **Noncollusive Negotiations**

26 This settlement is the result of extensive and hard fought negotiations. Defendants
27 deny each and every one of the claims and contentions alleged in this Action.
28

1 Defendants have asserted and continues to assert many defenses thereto, and has
2 expressly denied and continues to deny any wrongdoing or legal liability arising out of
3 the conduct alleged in the Action. Nonetheless, Defendants have concluded that the
4 Action be settled in the manner and upon the terms and conditions set forth in the
5 Agreement in order to avoid the expense, inconvenience, and burden of further legal
6 proceedings, and the uncertainties of trial and appeals. Defendants have decided to put
7 to rest the alleged claims of the Class.

8 Settlement negotiations took place between experienced counsel with the
9 assistance of David A. Rotman, Esq., a preeminent and experienced mediator of class
10 actions. Counsel for the Parties, after arm's length settlement negotiations with Mr.
11 Rotman as mediator, reached an agreement based upon a mediator's proposal and in
12 consideration of the experience of counsel and the uncertainties and risks of protracted
13 litigation. Most importantly, Plaintiff and Class Counsel believe that this settlement is
14 fair, reasonable and adequate. Decl. Nordrehaug, ¶12.

15 Class Counsel has conducted a thorough investigation into the facts of the class
16 action, including a review of relevant documents and data and a diligent investigation
17 of the Class Members' claims against Defendants. Class Counsel also prepared a class-
18 wide valuation based upon the class information and the FCRA. Based on the foregoing
19 documents and data, and their own independent investigation and evaluation, Class
20 Counsel is of the opinion that the settlement with Defendants for the consideration and
21 on the terms set forth in the Agreement is fair, reasonable, and adequate in light of all
22 known facts and circumstances, including the risk of significant delay, defenses asserted
23 by Defendants, and numerous potential appellate issues. The parties and their counsel
24 recognize that, in the absence of an approved settlement, they would face a protracted
25 litigation course, a contested motion for certification, motions for summary judgment,
26 and trial and appellate proceedings that would consume time and resources and present
27 each of them with ongoing litigation risks and uncertainties. Decl. Nordrehaug, ¶18.

1 Plaintiff and Class Counsel recognize the expense and length of continuing to
2 litigate and trying the Action against Defendants through possible appeals which could
3 take several years. Class Counsel has also taken into account the uncertain outcome and
4 risk of litigation, especially in complex actions such as this litigation. Class Counsel is
5 also mindful of and recognize the inherent problems of proof under, and alleged defenses
6 to, the claims asserted in the Action. Based upon their evaluation, Plaintiff and Class
7 Counsel have determined that the settlement set forth in the Agreement is in the best
8 interest of the Class Members. Decl. Nordrehaug, ¶19.

9 Here, the negotiations have been hard-fought and aggressive with capable
10 advocacy on both sides. Decl. Nordrehaug, ¶19. Accordingly, "[t]here is likewise every
11 reason to conclude that settlement negotiations were vigorously conducted at arms'
12 length and without any suggestion of undue influence." *In re Wash. Public Power*
13 *Supply System Sec. Litig.*, 720 F. Supp. 1379, 1392 (D. Ariz. 1989).

14
15 **2. The Settlement Has No "Obvious Deficiencies" and Falls Within
the Range for Approval**

16 The proposed Settlement herein has no "obvious deficiencies" and is well within
17 the range of possible approval. All Participating Class Members will receive an
18 opportunity to participate in and receive payment according to the same formula.

19 In advance of negotiations, Class Counsel received class information, which
20 permitted Class Counsel to make an intelligent evaluation. Decl. Nordrehaug at ¶20.
21 For the individuals whose claims are at issue in these Action, Class Counsel reviewed
22 the data and used information provided by Defendants to determine the potential value
23 of the claim for purposes of settlement. Plaintiff calculated the alleged maximum
24 damages that could be recovered if she prevailed. Decl. Nordrehaug, ¶20.

25 The FCRA provides for statutory damages of \$100 to \$1,000 per willful violation.
26 15 U.S.C. § 1681n. Using the class data, based upon the allegations of the FCRA claims,
27 Plaintiff calculated that at \$100 to \$1,000 per violation under FCRA for the 2,503
28

1 unlawful forms Defendants used the range of exposure is \$250,00 to \$2.5 million. Decl.
2 Nordrehaug, ¶20. The settlement of \$675,000, before deductions, represents far more
3 than the bottom of the range and 27% of the maximum damages for the Class, assuming
4 these amounts could be proven in full at trial. Decl. Nordrehaug at ¶20. This settlement
5 amount is fair and reasonable given the defenses asserted by Defendants. Because the
6 alternative to this Settlement could likely be the Class receiving nothing, Class Counsel
7 accepted the settlement as fair and reasonable. Clearly the goal of this litigation to obtain
8 redress for the Class has been met. Decl. Nordrehaug, ¶20.

9 A comparison of recently approved FCRA settlements involving similar facts
10 further confirms the reasonableness of this settlement. The Court in *Pietras v. Sentry*
11 *Ins. Co.*, 513 F. Supp. 2d 983, 985 (N.D. Ill 2007), cited “cited eighteen cases, which
12 settled for an average of \$ 34.59 per class member.” The settlement in this case far
13 exceeds this range. Similarly, in *Bailes v. Lineage Logistics, LLC*, 2016 U.S. Dist.
14 LEXIS 110943 (D. Kan 2016), the District Court approved a FCRA class settlement
15 which provided for a fund of \$149,205 for a class of 3,430, which correlates to \$43.50
16 per person.² Here, the settlement fund also exceeds the settlement approved in *Bailes*,
17 because the fund is \$675,000 for a class of 2,503, which correlates to \$270 per person.
18 In *Hawkins v. S2Verify*, 2016 U.S. Dist. LEXIS 153576, at *3 (N.D. Cal. 2016), the
19 District Court approved a settlement fund of \$1,090,750.00 for the estimated 4,363 class
20 members, which amounts to approximately \$250 per person. Judge Alsup noted that the
21 *Hawkins* settlement “amount falls within the range of statutory damages that would be
22 available to individual class members under FRCA, i.e., ‘not less than \$100 and not more
23 than \$1,000.’” *Id.* The settlement in this case exceeds the per person amount approved
24

25 ² See also *Lengel v. HomeAdvisor, Inc.*, 2017 U.S. Dist. LEXIS 10471, at *22 (D.
26 Kan 2017) (approving FCRA settlement of \$115 per person, and noting that other courts
27 have approved FCRA settlements which were less than \$100 per person). *Singleton v.*
28 *Domino's Pizza, LLC*, 976 F. Supp. 2d 665 (D. Md. 2013) (approving 2.5 million
reversionary settlement for 45,000 people).

1 in *Hawkins* and similarly falls within the range of statutory damages.

2 Where both sides face significant uncertainty, the attendant risks favor settlement.
3 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). "Generally, unless the
4 settlement is clearly inadequate, its acceptance and approval are preferable to lengthy
5 and expensive litigation with uncertain results." *Ching v. Siemens Indus., Inc.*, 2014 U.S.
6 Dist. LEXIS 89002, 2014 WL 2926210, at *4 (N.D. Cal. 2014). Here, a number of
7 defenses asserted by Defendants presented serious threats to the claims of Plaintiff and
8 the other Class Members. Defendants contend that their practice complied with all
9 applicable laws.

10 First, in its answer, Defendants denied all of Plaintiff's substantive allegations.
11 Second, statutory damages under the FCRA — ranging from \$100 to \$1,000 — are only
12 available if Plaintiff establishes that Defendants violated the FCRA willfully. 15 U.S.C.
13 § 1681n(a)(1)(A). This could be a significant hurdle under the Supreme Court's opinion
14 in *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57-59, 127 S. Ct. 2201, 167 L. Ed. 2d
15 1045 (2007), which left open a defense for a defendant's reasonable or even careless
16 construction of a statute. Third, Some district courts have ruled that a disclosure form
17 that contains other information—for instance, a liability waiver—does not violate the
18 FCRA. E.g., *Smith v. Waverly Partners, LLC*, 2012 U.S. Dist. LEXIS 119403, 2012 WL
19 3645324, at *6 (W.D.N.C. Aug. 23, 2012); *Burghy v. Dayton Racquet Club, Inc.*, 695
20 F. Supp. 2d 689, 699 (S.D. Ohio 2010). Finally, the court may find remitter/reduction
21 of the statutory damages appropriate. See e.g. *Klingensmith v. Max & Erma's*
22 *Restaurants, Inc.*, 2007 U.S. Dist. LEXIS 81029, 2007 WL 3118505, at *5 (E.D.Pa.
23 2007). If successful, Defendants' defenses could eliminate or substantially reduce any
24 recovery to the Class. While Plaintiff believes that these defenses could be overcome,
25 Defendants maintain these defenses have merit and therefore present a serious risk to
26 recovery. Decl. Nordrehaug at ¶21.

27 Moreover, there was also a significant risk that, if the Action was not settled,
28

1 Plaintiff would be unable to obtain class certification and maintain a certified class
2 through trial, and thereby not recover on behalf of anyone other than themselves.
3 Certifying a class encompassing approximately 2,500 prospective employees presents
4 complex issues that could undermine certification. At the time of the settlement
5 negotiations, Defendants forcefully opposed the propriety of class certification, arguing
6 that individual issues precluded class certification. While other cases have approved
7 class certification of FCRA claims, class certification in this action would have been
8 hotly disputed and was by no means a foregone conclusion. Decl. Nordrehaug at ¶22.

9 After vigorous negotiations, the Parties agreed to the Settlement of \$675,000.
10 Recognizing the potential risks, both sides agreed. As the federal court recently held in
11 *Glass*, where the parties faced uncertainties similar to those here:

12 In light of the above-referenced uncertainty in the law, the risk, expense,
13 complexity, and likely duration of further litigation likewise favors the
14 settlement. Regardless of how this Court might have ruled on the merits of
15 the legal issues, the losing party likely would have appealed, and the parties
16 would have faced the expense and uncertainty of litigating an appeal. "The
17 expense and possible duration of the litigation should be considered in
18 evaluating the reasonableness of [a] settlement." See *In re Mego Financial*
19 *Corp. Securities Litigation*, 213 F.3d 454, 458 (9th Cir. 2000).

20 Here, the risk of further litigation is substantial.

21 3. The Settlement Does Not Improperly Grant Preferential 22 Treatment To The Class Representative or Segments Of The 23 Class

24 The relief provided in the settlement will benefit all Class Members equally. The
25 settlement does not improperly grant preferential treatment to the Class Representative
26 or any individual segments of the Class. Each Participating Class Member will be
27 entitled to cash payment based on the plan of allocation. Decl. Nordrehaug at ¶4. Each
28 Participating Class Member's Settlement Share will be determined based upon an
equal pro rata basis. Decl. Nordrehaug at ¶14.

In addition, the Plaintiff will apply to the trial court for a service award in an
amount not to exceed \$10,000. (Agreement at ¶ III(B)(1).) In *Glass*, the District Court

1 awarded each of the class representatives in an overtime wages class action a service
2 award of \$25,000. *Glass*, 2007 U.S. Dist. LEXIS 8476 at *51-52. The payment of
3 service award in this amount to the named plaintiff in a wage and hour class action is
4 approved by settled authority, and the requested service awards in the amount not to
5 exceed \$10,000 is within the range of reasonableness in light of the amount approved in
6 *Glass* and other decisions. Plaintiff will further support the requested service award at
7 final approval.

8
9 **4. The Stage Of The Proceedings Is Sufficiently Advanced To
Permit Preliminary Approval Of The Settlement**

10 The stage of the proceedings at which this settlement was reached also militates
11 in favor of preliminary approval and ultimately, final approval of the settlement. Class
12 Counsel has conducted a thorough investigation into the facts of the class action. Class
13 Counsel began investigating the Class Members' claims before this action was filed.
14 Class Counsel reviewed the necessary class data and documents concerning the alleged
15 claims. The parties engaged in law and motion over the sufficiency of the claims. In
16 advance of negotiations, Defendants provided the information necessary for Class
17 Counsel to intelligently negotiate a settlement. Decl. Nordrehaug at ¶23.

18 Class Counsel obtained production of the release forms and class information.
19 Class Counsel engaged in an extensive review and analysis of the relevant documents
20 and data. Class Counsel also examined the applicable law governing these claims and
21 the alleged defenses. Class Counsel has previously litigated similar claims concerning
22 FCRA violations, and was therefore familiar with the legal issues and risks for these
23 claims. Accordingly, the agreement to settle did not occur until Class Counsel possessed
24 sufficient information to make an informed judgment regarding the likelihood of success
25 on the merits and the results that could be obtained through further litigation. Decl.
26 Nordrehaug at ¶23.

27 Based on the foregoing information and data and their own independent
28

1 investigation and evaluation, Class Counsel is of the opinion that the settlement with
2 Defendants for the consideration and on the terms set forth in the Agreement is fair,
3 reasonable, and adequate and is in the best interest of the class in light of all known facts
4 and circumstances, including the risk of significant delay, defenses asserted by
5 Defendants, and numerous potential appellate issues. There can be no doubt that
6 Counsel for both parties possessed sufficient information to make an informed judgment
7 regarding the likelihood of success on the merits and the results that could be obtained
8 through further litigation. Decl. Nordrehaug at ¶24.

9 In *Glass*, the Northern District of California recently granted final approval of an
10 overtime and meal wage action although in *Glass* no formal discovery had been
11 conducted prior to the settlement:

12 Here, no formal discovery took place prior to settlement. As the Ninth
13 Circuit has observed, however, "[i]n the context of class action settlements,
14 'formal discovery is not a necessary ticket to the bargaining table' where the
15 parties have sufficient information to make an informed decision about
16 settlement." See *In re Mego Financial Corp. Securities Litigation*, 213 F.3d
17 at 459.

18 2007 U.S. Dist. LEXIS 8476 at *14.

19 Here, Class Counsel was in similar position to evaluate the fairness of this
20 settlement as in *Glass*, as they engaged in the same analysis, as well as contested law and
21 motion, independent investigations and due diligence to confirm the accuracy of the
22 information supplied by Defendants.

23 **VI. THE CLASS IS PROPERLY CERTIFIED FOR SETTLEMENT** 24 **PURPOSES**

25 The proposed settlement meets all of the requirements for certifying a settlement
26 class under Fed. R. Civ. Proc. 23(b)(2) as demonstrated below, and therefore, the Court
27 may appropriately approve the Class as defined in the Stipulation. This Court should
28 conditionally certify a class for settlement purposes only that consists of "all individuals
who applied for employment with any Released Party (defined below) in the United

1 States who executed a background check disclosure and/or authorization form that
2 included a liability release clause and whose background check report was procured
3 pursuant to such form at any time between January 15, 2014 and the date of preliminary
4 approval ("Class Period"). (Stipulation at ¶ II.D.)

5 **A. Rule 23 Of The Federal Rules Of Civil Procedure**

6 Plaintiff seeks certification of this action for settlement purposes under Federal
7 Rules of Civil Procedure 23(b)(3). This portion of Rule 23 applies to class actions where
8 "the court finds that the questions of law or fact common to the members of the class
9 predominate over any questions affecting only individual members, and that a class
10 action is superior to other available methods for the fair and efficient adjudication of the
11 controversy." Fed. R. Civ. Proc. 23(b)(3).

12 To maintain a class action under Rule 23(b)(3), the four prerequisites of Federal
13 Rules of Civil Procedure 23(a) must first be satisfied. These prerequisites are referred
14 to as numerosity, commonality, typicality, and adequacy of representation, and are set
15 forth in Rule 23(a) as follows:

- 16 (1) the class is so numerous that joinder of all members is impracticable,
17 (2) there are questions of law or fact common to the class,
18 (3) the claims or defenses of the representative parties are typical of the
19 claims or defenses of the class, and
20 (4) the representative parties will fairly and adequately protect the
21 interests of the class.

22 The Parties agree that, for purposes of settlement only, these requirements may be
23 satisfied in this case, and therefore, the proposed Class should be certified for purposes
24 of settlement only. (Agreement at II(H).)

25 **B. The Numerosity Requirement Is Satisfied**

26 Rule 23(a) merely requires that the class be "so numerous that joinder of all
27 members is impracticable." Fed. R. Civ. Proc. 23(a). "Courts have routinely found the
28 numerosity requirement satisfied when the class comprises 40 or more members."
EEOC v. Kovacevich "5" Farms, 2007 U.S. Dist. LEXIS 32330 at *57 (E.D.Cal. April
18, 2007); see also *Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 654 (C.D. Cal. 2000); *Ansari*

1 v. *New York Univ.*, 179 F.R.D. 112, 114 (S.D.N.Y. 1998).

2 Here, the Class is composed of 2,503 Class Members, which is sufficiently
3 numerous for settlement purposes. Decl. Nordrehaug at ¶25.

4 **C. Common Questions Of Law And Fact Bind The Class**

5 Rule 23(a) requires that there be a common question of law or fact. Rule 23(a) is
6 satisfied where "the course or conduct giving rise to the cause of action affects all class
7 members, and at least one of the elements of that cause of action is shared by all of the
8 class members." *Lockwood Motors, Inc. v. General Motors Corp.*, 162 F.R.D. 569, 575
9 (D. Minn. 1995). This requirement is met if common questions of liability are present,
10 even if there may be individual variations. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,
11 1019 (9th Cir. 1998); *Kurihara v. Best Buy Co.*, 2007 U.S. Dist. LEXIS 64224, *17
12 (N.D. Cal. 2007).

13 Here, common questions of law and fact, as alleged by the Plaintiff, are present.
14 Specifically, the common questions include whether Defendants violated the FCRA in
15 using the release forms, whether Defendants' conduct was willful, and whether the Class
16 is entitled to statutory damages. Certification of this settlement class is appropriate
17 because (i) Defendants engaged in uniform practices with respect to the Class Members,
18 and (ii) all of the Class Members were subjected to this same background check release
19 form. As a result, these common questions of liability could be answered on a class wide
20 basis. Decl. Nordrehaug at ¶25.

21 **D. The Plaintiff's Claims Are Typical Of The Class Claims**

22 The typicality requirement of Rule 23(a) requires that the members of the class
23 have the same or similar claims as the named plaintiff. "The typicality requirement is
24 met when the claims of the named plaintiff arise from the same event or are based on the
25 same legal theories." *Tate v. Weyerhaeuser Co.*, 723 F.2d 598, 608 (8th Cir. 1983). In
26 *Hanlon v. Chrysler Co.*, 150 F.3d 1011 (9th Cir. 1998), the Ninth Circuit held that
27 "[u]nder the rule's permissive standards, representative claims are 'typical' if they are
28

1 reasonably coextensive with those of absent class members; they need not be
2 substantially identical." 150 F.3d at 1020. Typicality "does not mean that the claims of
3 the class representative[s] must be identical or substantially identical to those of the
4 absent class members." *Stanton, supra*, at 957.

5 In the instant case, there can be little doubt that the typicality requirement is fully
6 satisfied. Plaintiff, like every other member of the Class, was subject to the Defendants'
7 practice concerning the background check liability release form. Plaintiff, like every
8 other member of the Class, also claim compensation as a result of the Defendants'
9 uniform policies and practices. Thus, the claims of both Plaintiff and the members of the
10 Class arise from the same course of conduct by Defendants, involve the same issues, and
11 are based on the same legal theories. Decl. Nordrehaug at ¶ 25. The typicality
12 requirement of Rule 23 is met as to the common issues presented in this case. While
13 Defendants dispute that Plaintiff have typical claims, Defendants do not oppose a finding
14 of typicality for purposes of this Settlement only.

15 **E. The Class Representative Has Fairly And Adequately Protected**
16 **The Interests Of The Class**

17 Plaintiff provided adequate representation of the interests of the class in that: (a)
18 her attorneys are competent, experienced in class litigation and generally able to conduct
19 the proposed litigation; and (b) the Class Representative doed not have interests
20 antagonistic to those of the class. *White v. Local 942*, 688 F.2d 85 (9th Cir. 1982).
21 Simply put, Rule 23 asks whether the Class Representatives will vigorously prosecute
22 the action on behalf of the class and have a basic understanding of the claims. This
23 requirement has been met here. First, Plaintiff is well aware of her duties as the
24 representative of the Class and have actively participated in the prosecution of this case
25 to date. Plaintiff effectively communicated with Class Counsel, providing documents
26 to Class Counsel, and participated extensively in the investigation of the action. The
27 personal involvement of the Plaintiff was essential to the prosecution of the action and
28 the monetary settlement reached. Decl. Nordrehaug at ¶25. Second, Plaintiff retained

1 competent counsel with extensive experience in class actions. Class Counsel has
2 extensive experience in class action litigation in California and throughout the country.
3 Class Counsel has been involved as class counsel in more than two hundred (200) class
4 action matters, including many employment class actions. See e.g., Resume, attached
5 as Exhibit 2 to the Decl. Nordrehaug at ¶26. Third, there is no antagonism between the
6 interests of Plaintiff and those of the Class. Both Plaintiff and the Class Members seek
7 monetary relief under the same set of facts and legal theories. Under such circumstances,
8 there can be no conflicts of interest, and adequacy of representation is presumed. *In re*
9 *Wirebound Boxes Antitrust Lit.*, 128 F.R.D. 268 (D. Minn. 1989). While Defendants
10 disputes that Plaintiff are adequate, Defendants do not oppose a finding that Plaintiff is
11 adequate to represent the Class for settlement purposes only.

12 **F. The Additional Requirements Of Rule 23 Are Satisfied**

13 Since the requirements of Rule 23(a) have been satisfied, the Court now looks to
14 Rule 23(b)(3) in order to determine whether a class should be maintained under one of
15 the listed categories. Under Rule 23(b)(3), a class action may be maintained if two basic
16 conditions are met. First, common questions must predominate over individual issues,
17 and second, the class action must be superior to available other methods for the fair and
18 efficient adjudication of the controversy.

19 **1. The Predominance Requirement Is Met**

20 Rule 23(b)(3) provides that a class may be maintained if "the court finds that the
21 questions of law and fact common to the members of the class predominate over any
22 questions affecting only individual members."

23 Here, Plaintiff contends that the adjudication of the common issues surrounding
24 Defendants' uniform employment practice could establish Defendants' liability on a
25 class-wide basis. Plaintiff contends that Defendants engaged in a uniform course of
26 violating the FCRA in using the background check liability release form and that
27 Defendants' policies with respect to these issues are uniform. The only question is
28

1 whether Defendants' conduct supports a meritorious claim for liability. Accordingly,
2 Plaintiff maintain that the common issues of law and fact present in this case
3 predominate. Decl. Nordrehaug at ¶ 25. While Defendants dispute that the
4 predominance requirement may be satisfied for purposes of a litigation class, Defendants
5 do not oppose such a finding for purposes of this Settlement only.

6 **2. The Superiority Requirement Is Met**

7 To certify a class, the Court must also determine "that a class action is superior to
8 other available methods for the fair and efficient adjudication of the controversy." Fed.
9 R. Civ. Proc. 23(b)(3). "Where classwide litigation of common issues will reduce
10 litigation costs and promote greater efficiency, a class action may be superior to other
11 methods of litigation." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir.
12 1996). Here, a class action is the superior mechanism for the settlement of the claims as
13 pled by Plaintiff. While Defendants dispute that the superiority requirement may be
14 satisfied, Defendants do not oppose such a finding for purposes of this Settlement only.

16 **VII. THE PROPOSED METHOD OF CLASS NOTICE IS APPROPRIATE**

17 The Parties have agreed upon procedures by which the Class will be provided with
18 written notice of the Settlement similar to that approved and utilized in hundreds of class
19 action settlements. The Parties have jointly drafted a Class Notice, attached to the
20 Agreement as Exhibit A and is hereby submitted for approval.

21 The Class Notice, drafted jointly and agreed upon by the Parties through their
22 respective counsel, includes information regarding the nature of the Action; a summary
23 of the substance of the Settlement, including Defendants' denial of liability; the
24 definition of the Class; the procedure and time period for objecting to the Settlement,
25 exclusion from the Settlement and participating in the Settlement; a statement that the
26 District Court has preliminarily approved the Settlement; information regarding the
27 calculation of Settlement Shares; and the estimated Settlement Share for each Class
28

1 Member. See Exhibit A to the Stipulation.

2 The Class Notice explains that Class Members who wish to participate in the
3 settlement do not have to do anything to receive their share of the Settlement. The Class
4 Notice shall also provide that any Class Member may choose to opt out of the Class, and
5 that any such person who chooses to opt out of the Class will not be entitled to any
6 recovery obtained by way of the settlement and will not be bound by the settlement or
7 have any right to object, appeal or comment thereon. Decl. Nordrehaug at ¶27.

8 The Class Notice will provide that all objections to the Settlement by anyone,
9 including members of the Class, must be submitted to the Court no later than forty-five
10 (45) days from the mailing of the Class Notice. All objections must state with
11 particularity the basis on which they are asserted. In accordance with *Mercury*
12 *Interactive Corp. Secs. Litig. v. Mercury Interactive Corp.*, 618 F.3d 988 (9th Cir 2010),
13 the application for attorneys' fees and costs will be filed before the end of the objection
14 period and posted on a website as indicated in the Class Notice. Thus, all Class
15 Members will have ample opportunity to review and comment on the attorneys' fees and
16 costs before the objection deadline. The attorneys' fees and costs will be heard in
17 conjunction with the motion for final approval on the Final Approval Hearing date.
18 Decl. Nordrehaug at ¶27.

19 The Class Notice also informs members of the Class about the release.
20 Specifically, the notice explains that unless they exclude themselves, upon final approval
21 they will release all of the Released Claims. This notice program was designed to
22 meaningfully reach the largest possible number of potential Class Members. The
23 mailing and distribution of the Class Notice satisfies the requirements of due process,
24 and is the best notice practicable under the circumstances and constitutes due and
25 sufficient notice to all persons entitled thereto. Decl. Nordrehaug at ¶28.

26 This notice satisfies the content requirements for notice following the exemplar
27 class notice in the *Manual for Complex Litigation*, Second §41.43. This notice also
28

1 fulfills the requirement that Class notices be neutral. *Newberg*, at §8.39.

2
3 **VIII. CONCLUSION**

4 Counsel for the Parties have committed substantial amounts of time, energy, and
5 resources litigating and ultimately settling this case. In the judgment of Plaintiff and
6 Class Counsel, the proposed settlement is a fair and reasonable compromise of the issues
7 in dispute in light of the strengths and weaknesses of the claims. After weighing the
8 certain and immediate benefits of these settlements against the uncertainty of trial, and
9 appeal, the proposed settlement is fair, reasonable and adequate, and warrants this
10 Court's preliminary approval. Accordingly, Plaintiff respectfully requests that the Court
11 preliminarily approve the proposed settlement and enter the proposed Preliminary
12 Approval Order submitted herewith and schedule a final approval hearing date that is
13 120 days from the date of preliminary approval .

14
15 Dated: October 10, 2017

BLUMENTHAL, NORDREHAUG & BHOWMIK

17 By: /s/ Kyle Nordrehaug
18 Norman B. Blumenthal
19 Kyle R. Nordrehaug
20 Attorneys for Plaintiff

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