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19 **UNITED STATES DISTRICT COURT**
20 **NORTHERN DISTRICT OF CALIFORNIA**
21 **SAN FRANCISCO DIVISION**

22 AMIT PATEL, on behalf of himself and all
23 others similarly situated,

24 Plaintiffs,

25 v.

26 TRANS UNION, LLC in its own name and
27 t/a TRANS UNION RENTAL SCREENING
28 SOLUTIONS, INC. and TRANSUNION
BACKGROUND DATA SOLUTIONS, and
TRANS UNION RENTAL SCREENING
SOLUTIONS, INC. in its own name and t/a
TRANSUNION BACKGROUND DATA
SOLUTIONS,

Defendants.

Case No. 3:14-cv-00522-LB

**PLAINTIFF’S NOTICE OF
MOTION AND MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT;
MEMORANDUM OF LAW IN
SUPPORT THEREOF**

Date: October 19, 2017
Time: 9:30 a.m.
Place: Courtroom C

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 19, 2017, at 9:30 a.m., or as soon thereafter as the Court may order, in Courtroom C, United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California, the Hon. Laurel Beeler presiding, plaintiff Amit Patel will and hereby does move for an Order Granting Preliminary Approval of Class Action Settlement, pursuant to the Settlement Agreement filed concurrently herewith.

This Motion is made pursuant to Fed. R. Civ. P. 23 and is based upon this Notice of Motion and Motion, the accompanying Memorandum of Law, the Settlement Agreement and such evidence and argument as the Court may consider at the hearing on this Motion.

Defendants do not contest this Motion.

Dated: September 15, 2017

FRANCIS & MAILMAN, P.C.

By: /s/ James A. Francis
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MEMORANDUM OF LAW**I. INTRODUCTION**

Plaintiff Amit Patel brought this consumer protection class action against Defendants TransUnion LLC and TransUnion Rental Screening Solutions, Inc. (“Defendants” or “Trans Union”) under the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x (“FCRA”). As set forth in Mr. Patel’s Amended Class Action Complaint (ECF 41) and this Court’s Class Certification Order certifying a Class and Subclass (ECF 96), reported at *Patel v. Trans Union, LLC*, 308 F.R.D. 292 (N.D. Ca. 2015), this is a consumer class action brought on behalf of consumers who were the subjects of Trans Union SmartMove reports.

The Class Certification Order certified Class Claims asserted under the FCRA in Counts I and VI (misnumbered as “Count V”) of the Amended Complaint arising out of the allegations set forth therein. The other Counts in the Amended Complaint have been dismissed as to Plaintiff, and without prejudice to the class membership. (ECF 142).

By this motion, Plaintiff hereby commences the court approval process outlined in the MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.63 (2004) (hereinafter “MANUAL”) for the settlement of class actions. Plaintiff and his counsel respectfully request that the Court enter an order: (1) granting preliminary approval of the proposed Class Settlement Agreement and Release attached hereto as Appendix I;¹ (2) approving the Parties’ proposed notice program and form of notice; (3) directing that notice of the proposed Settlement be given to the Class; and (5) setting a Final Approval Hearing to determine whether the proposed Settlement is fair,

¹ Unless otherwise defined herein, all capitalized terms herein have the same meaning as in the Agreement.

1 reasonable and adequate and whether an order awarding a service award, attorneys' fees,
2 reimbursement of expenses should be approved.

3 As set forth below, the proposed settlement is well "within the range of possible
4 approval," such that the Court should grant preliminary approval, authorize notice to the Class,
5 and schedule a Final Approval Hearing. *See, e.g., In re Tableware Antitrust Litig.*, 484 F. Supp.
6 2d 1078, 1079 (N.D. Cal. 2007). Before engaging in settlement negotiations, the Parties
7 conducted a substantial amount of discovery, engaged in extensive motion practice and
8 understood the strengths, weaknesses and risks of proceeding through to trial. The settlement
9 discussions, overseen by a retired federal magistrate judge familiar with the claims at issue, were
10 protracted, adversarial and always at arm's length. Plaintiff and the Class are represented by
11 counsel experienced in class action litigation and believe the settlement is more than fair,
12 reasonable and adequate. Accordingly, Plaintiff respectfully requests that the Court grant this
13 motion.
14

15 **II. PROCEDURAL HISTORY**

16 On February 4, 2014, Plaintiff filed a Complaint in the United States District Court for
17 the Northern District of California challenging Defendants' alleged practice of mis-attributing
18 "Alert List" records on reports delivered to potential landlords, and subsequently compounding
19 such conduct by failing to disclose to the affected rental applicants the mis-attributed records
20 that Trans Union was reporting about them. Plaintiff filed an Amended Complaint on October
21 14, 2014. (ECF 41). Defendants filed Answers on October 31, 2014. (ECF 45, 46).
22

23 **A. Discovery Proceedings**

24 The Parties conducted substantial discovery in this matter, beginning with a first phase of
25 discovery limited to class action issues. During this initial phase, Plaintiff exchanged discovery
26

1 requests and responses with each Defendant independently, and the Parties exchanged and
2 reviewed several thousand pages of documents. The Parties conducted seven depositions,
3 including the deposition of the Plaintiff, five of Defendants' corporate representatives, and a third
4 party.

5 Following the Court's Class Certification Order, the Parties continued to a second phase
6 of discovery targeted to the merits of the claims of Plaintiff and the Class. The Parties exchanged
7 an additional set of interrogatories and document requests, and Plaintiff responded to requests for
8 admissions served by each Defendant. The Parties conducted three additional depositions of the
9 corporate representatives of Defendants, plus a deposition of an additional third party.
10

11 **B. Motion Practice and Class Certification**

12 In February 2015, Plaintiff filed his Motion for Class Certification. (ECF 56-4, 60).
13 Plaintiff sought class certification for two classes and two claims: (1) a national class challenging
14 the Defendants' willful failure to maintain and follow reasonable procedures to ensure the
15 maximum possible accuracy of their information, in violation of 15 U.S.C. § 1681e(b), and (2)
16 a national subclass challenging the Defendants' willful failure to provide consumers with all
17 information in their files, in violation of 15 U.S.C. § 1681g. *Id.*
18

19 Defendants opposed class certification. (ECF 70).

20 On June 26, 2015, the Court entered the Class Certification Order (ECF 96), reported at
21 308 F.R.D. 292 (N.D. Ca. 2015). The Court certified a Class and a Subclass, defined as follows:
22

23 All natural persons residing in the United States who, from February 2012
24 until December 2013, were the subjects of Trans Union Rental Screening Solutions
25 SmartMove reports containing at least one item of "Alert List" information (the
26 "Class").

27 All natural persons residing in the United States who, from February 2012
28 until December 2013, were the subjects of Trans Union Rental Screening Solutions
SmartMove reports containing at least one item of "Alert List" information who

1 requested a file disclosure from, and were sent a disclosure by, Trans Union, LLC
2 (the “Subclass”).

3 308 F.R.D. at 310.

4 Defendants sought permission to appeal the Class Certification Order under Rule 23(f),
5 which Plaintiff opposed. Subsequently, the Court stayed the Litigation pending a decision by the
6 Supreme Court in *Robins v. Spokeo, Inc.*, 742 F.3d 409 (9th Cir. 2014), *cert. granted*, 135 S. Ct.
7 1892 (2014). After the *Spokeo* decision issued, remanding the case to the Ninth Circuit, *see*
8 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), the Parties resumed the Litigation and a Revised
9 Scheduling Order was entered on June 27, 2016 (ECF 123). Thereafter, Defendants moved to
10 decertify the Class, Plaintiff opposed the motion, and the Court denied decertification on October
11 21, 2016. (ECF 132).

12
13 **C. Notice of the Litigation Sent to the Class**

14 Following the denial of decertification, notice of the Litigation was provided to the
15 certified Class and Subclass. The notice was approved by this Court. (ECF 133, 134).

16 On October 28, 2016, Defendants’ Counsel provided Class Counsel² with a list of names
17 and addresses for 10,505 Class Members, and 2,193 Subclass Members. Class Counsel provided
18 this list to RSM US LLP (“RSM”), a third-party class action administrator. *See* Exhibit A hereto,
19 Declaration of RSM US LLP in Connection with Notice Dissemination (“RSM Decl.”). RSM
20 determined that there were 10,501 Class Members. *Id.* at ¶ 3.
21
22
23

24 ² Class Counsel are Francis & Mailman, P.C. and Evans Law Firm, Inc. Agreement, § 1.14;
25 *see also* ECF 56-32, 56-33. The Evans Law Firm also worked extensively with the family
26 attorney for Mr. Patel, Michelle Noble Cain, Esq., prior to and in connection with investigating
27 this case, facilitating client communications and assisting in collecting documents and other
evidence and has a referral fee interest in the case, as will be discussed in detail in connection
with the Motion for Attorneys’ Fees and Costs.

1 RSM mailed the approved notice to the Class Members, via first class mail. *Id.* at ¶ 4.
2 Sixteen (16) notices were returned with a forwarding address provided by the USPS. *Id.* at ¶ 5(b).
3 RSM re-mailed those notices to the updated addresses. *Id.*

4 Two thousand and twenty-seven (2,027) such notices were returned without a forwarding
5 address. *Id.* at ¶ 5(a). RSM obtained new addresses for and then re-mailed one thousand eight
6 hundred and forty-nine (1,849) of those notices. *Id.* Two hundred and forty-three (243) of those
7 re-mailed notices were returned as undeliverable. *Id.* RSM calculates that the notice plan resulted
8 in notice reaching ninety-six percent (96%) of the Class membership. *Id.* at ¶ 6.

9
10 In response to the notice, the Settlement Administrator received a total of two (2)
11 requests by Class Members to be excluded from the Class. Those persons are identified on
12 Exhibit B hereto, filed under seal.

13 **D. Mediation and Documentation of Settlement**

14 The Parties participated in a private mediation session with the Hon. James Larson of
15 JAMS in San Francisco on January 28, 2015. The mediation did not result in a settlement.

16
17 After additional discovery and motion practice, the Parties continued their settlement
18 discussions, and conducted in-person settlement discussions in Philadelphia on November 9,
19 2016. As a result of this meeting, the Parties agreed to proceed to mediation with the Hon. Diane
20 Welsh of JAMS, in Philadelphia on May 15, 2017. The mediation resulted in a term sheet
21 reflecting an agreement to settle the Litigation. The Parties notified the Court of the agreement
22 in principle on June 12, 2017. ECF 139.

23
24 Documenting a formal settlement agreement and collateral documents took additional
25 time to prepare and exchange drafts, and a series of telephone negotiations concerning the details

1 of the terms and conditions of the agreement. The Parties eventually finalized their agreement
2 as of September 15, 2017, resulting in the settlement document attached hereto as Appendix I.

3 **III. THE PROPOSED SETTLEMENT**

4 Plaintiff and the Defendants arrived at the proposed settlement in this case after extensive
5 briefing on class certification, Defendants' attempt to stay the case, Defendants' unsuccessful
6 attempt to decertify the certified Class and Subclass, written discovery and eleven depositions
7 which included Defendants' witnesses, Mr. Patel and two third parties.
8

9 The Parties also conducted arm's-length, contentious negotiations (with the participation
10 of Defendants' insurance carrier) that included two separate full day mediation session with a
11 professional mediator and a series of additional sessions involving counsel for the Parties. After
12 several months of discussion following the mediation and numerous exchanges of draft
13 documents, the Parties reached a class-wide settlement.
14

15 **A. The Class And Subclass**

16 Under the Agreement, the Parties agreed to resolve the claims of the certified Class and
17 Subclass of natural persons as defined in the Class Certification Order, described above. The
18 Court also appointed Mr. Patel as the Class Representative and his counsel as Class Counsel.
19 (ECF 96).

20 **B. The Consideration Provided To The Class Under The Agreement**

21 The Agreement requires Defendants to establish a Settlement Fund of \$8,000,000.00 to
22 settle the Class Claims. An initial deposit of \$27,000.00 will be paid to the Settlement
23 Administrator within ten business days following the entry of the Preliminary Approval Order,
24 and the balance of \$7,973,000.00 will be paid to the Settlement Administrator following Final
25 Approval. Agreement, § 4(a)(ii). From the Settlement Fund, the Parties have agreed that
26

1 payments will be made as follows. The allocation of compensation to Class Members is
2 consistent with discovery produced by Defendants in the course of the Litigation.

3 **1. Automatic Payment Pool**

4 The sum of \$4,202,000.00 shall be allocated for the Automatic Payment Pool. Class
5 Members will each be automatically sent a check for \$400.00. *Id.*, § 10(a). There is no
6 requirement that a Class Member submit a claim in order to be mailed the Automatic Payment.
7 The Automatic Payment Checks must be cashed within sixty days from the date of mailing. To
8 the extent an Automatic Payment Check is not presented for payment within that time period, it
9 shall become null and void, and the proceeds of such checks shall be included and waterfall into
10 the Claims Made Pool. *Id.*

11 **2. Claims Made Pool**

12 In addition to receiving an Automatic Payment, a Class Member also has the option of
13 submitting a claim to be paid a *pro rata* share of the Claims Made Pool. *Id.*, §§ 8, 10(b). The
14 Parties calculate that after the estimated costs of notice and settlement administration, and
15 assuming the Court approves the agreed upon amounts for the Service Award to Mr. Patel and
16 the Fee Petition (see below), the Claims Made Pool will be in excess of \$1,000,000.00. As
17 mentioned above, the amount of funds in the Claims Made Pool is likely to increase as a result
18 of uncashed Automatic Payments which waterfall into the Pool. The amount of each Claimant's
19 individual *pro rata* share will depend on how many Claimants submit Claim Forms.
20
21

22 **3. Notice and Settlement Administration**

23 The Settlement Fund will be used to pay all costs of notice and settlement administration.

24 After an evaluation of several bids for settlement administration services, RSM was
25 chosen to be the Settlement Administrator in this case. Agreement, § 1.43. Having handled the
26

1 notice process following class certification in this case (see above), and submitting a competitive
2 bid for the work, RSM was deemed the best suited for settlement and claims administration.
3 RSM will perform all tasks specified and assigned to it in the Agreement, such as mailing and re-
4 mailing the Settlement Notice (Exhibit C to Agreement), sending out the CAFA Notice, setting
5 up a settlement website and toll-free telephone number, receiving and processing Claims Forms,
6 handling the payments to Class Members, and providing regular reports to the Parties and a report
7 to the Court prior to the Final Approval Hearing. *Id.*, § 5.

8
9 The Settlement Administrator shall ensure that the information that it receives from
10 Defendants and Class Members is secured and managed in such a way as to protect the security
11 and confidentiality of the information, consistent with the privacy policies of Defendants as well
12 as applicable law.

13 **4. Service Award**

14 Defendants agree to the sum of \$10,000.00 as the Service Award to be paid to the Class
15 Representative, subject to the approval of the Court. Agreement, § 9(b).

16
17 **5. Attorneys' Fees and Costs**

18 The Agreement provides that Class Counsel may file the Fee Petition for an award of
19 attorneys' fees and reimbursable expenses in an amount not to exceed one-third of the Settlement
20 Fund, without objection by Defendants. *Id.*, §§ 1.24, 9(a).

21 **6. Residual Funds to *Cy Pres* Recipients**

22 The Agreement provides that there will be no reversion of any funds to the Defendants
23 under any circumstances. *Id.*, § 4(b)(vii). To the extent money remains in the Settlement Fund
24 following payment of checks from the Claims Made Pool, the Parties have agreed that up to
25

1 \$10,000.00 may be paid to the Settlement Administrator to defray reasonable Notice and
2 Administration Expenses actually incurred by the Settlement Administrator. *Id.*, § 4(b)(vi).

3 Any remaining amounts shall be distributed to the *cy pres* recipients proposed by the
4 Parties: Consumer Federation of California (<https://consumercal.org/>), Credit Builders Alliance
5 (<https://www.creditbuildersalliance.org/>) and the JumpStart Coalition for Personal Financial
6 Literacy (<http://www.jumpstart.org/>). *Id.*, § 4(c).

7
8 **C. Release**

9 The scope of the release to which each Class Member would be bound is limited to claims
10 that were asserted or could have been asserted arising out of or related to the facts or claims
11 alleged in the Litigation relating to the Class Claims. *Id.*, § 11(a). Plaintiff, on behalf of himself
12 only, will provide Defendants with a general release. *Id.*, § 11(b).

13
14 **D. The Required Class Action Fairness Act Notice**

15 The Defendants shall prepare the notice required to be served under the Class Action
16 Fairness Act of 2005 (“CAFA”). 28 U.S.C. § 1715. *Id.*, § 5(e). The Settlement Administrator
17 shall mail the CAFA Notice within ten days after the filing of the Settlement Agreement with
18 the Court, and Defendants’ Counsel shall file a certificate of such service with the Court. *Id.*

19
20 **E. Objections**

21 Any Class Member who wishes to object to the Settlement or Fee Petition at the Final
22 Approval Hearing, and/or who wishes for any objection to be considered, must file a Notice of
23 Objection by the Objection Deadline. *Id.*, § 7.

24 The Notice of Objection shall be mailed to Class Counsel, Defendants’ Counsel and the
25 Clerk of the Court. Objections shall be personally signed and state: the caption of the Litigation;
26 the full name, address and telephone number of the Class Member objecting to the Settlement; a

1 detailed statement of each objection asserted, including the grounds for objection and reasons
 2 for appearing and being heard, together with any documents such Class Member wishes to be
 3 considered in support of the objection; the identity of all counsel who represent the objector,
 4 including any former or current counsel who may be entitled to compensation for any reason
 5 related to the objection to the Settlement or Fee Petition; any and all agreements that relate to
 6 the objection or the process of objecting—whether written or oral—between objector or
 7 objector’s counsel and any other person or entity; the identity of all counsel representing the
 8 objector who will appear at the Final Approval Hearing; and, all relief sought. *Id.*, § 7.1

10 Any objector wishing to be heard at the Final Approval Hearing must also file a notice
 11 of intent to appear with the Court Clerk’s office no later than ten (10) business days before the
 12 Final Approval Hearing, and must provide both Class Counsel and Defendants’ Counsel with
 13 copies of the notice of intent to appear. *Id.*, § 7.1.3.

14 **IV. THE SETTLEMENT WARRANTS PRELIMINARY APPROVAL**

15 **A. The Settlement Approval Process**

16 The Ninth Circuit has a “strong judicial policy that favors settlements, particularly where
 17 complex class action litigation is concerned.” *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234,
 18 1238 (9th Cir. 1998) (quoting *Class Plaintiffs v. Seattle*, 995 F.2d 1268, 1276 (9th Cir. 1992));
 19 *see also* HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 11.41 (4th ed.
 20 2002) (“NEWBERG”) (“By their very nature, because of the uncertainties of outcome, difficulties
 21 of proof, length of litigation, class action suits lend themselves readily to compromise.”). There
 22 is an “overriding public interest in settling and quieting litigation,” *Van Bronkhorst v. Safeco*
 23 *Corp.*, 529 F.2d 943, 950 (9th Cir. 1976), and the Ninth Circuit “has long deferred to the private
 24
 25
 26
 27

1 consensual decision of the parties” to settle, *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 965
2 (9th Cir. 2009) *vacated on other grounds* 688 F.3d 645.

3 Where, as here, the parties propose to resolve the claims of a class through settlement,
4 they must obtain the court’s approval. *See* Fed. R. Civ. P. 23(e)(1)(A). The typical process for
5 approving class action settlements is described in the MANUAL at §§ 21.632-.635 and is
6 comprised of three steps:

7 (1) Preliminary approval of the proposed settlement at an informal hearing;

8 (2) Dissemination of mailed and/or published notice of the settlement to all affected class
9 members; and
10

11 (3) A “formal fairness hearing,” or final approval hearing, at which class members may
12 be heard regarding the settlement, and at which evidence and argument concerning the fairness,
13 adequacy, and reasonableness of the settlement is presented. *Id.* at §§ 21.632-.635.

14 This procedure, commonly employed by federal courts, serves the dual function of
15 safeguarding class members’ procedural due process rights and enabling the court to fulfill its
16 role as the guardian of class members’ interests. *See* NEWBERG § 11.25.

17 Plaintiff asks that the Court grant preliminary approval of the proposed settlement. At
18 this stage, the Court “must make a preliminary determination of the fairness, reasonableness, and
19 adequacy of the settlement terms and must direct preparation of notice of the certification,
20 proposed settlement, and date of the final fairness hearing.” MANUAL § 21.632. Courts should
21 grant preliminary approval and direct notice to the class if the settlement has no obvious
22 deficiencies and “falls within the range of possible judicial approval.” *Beck-Ellman v. Kaz USA,*
23 *Inc.*, No. 10-cv-02134, 2013 WL 1748729, at *5 (S.D. Cal. Jan. 7, 2013); *Alberto v. GMRI, Inc.*,
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25
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27

1 252 F.R.D. 652, 666 (E.D. Cal. 2008); *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d at 1079;
 2 NEWBERG, *supra*, § 11.25.

3 **B. Preliminary Approval**

4 A proposed class action settlement is fair and should be preliminarily approved if the
 5 Court finds that: (1) the negotiations leading to the proposed settlement occurred at arm’s length;
 6 (2) there was sufficient discovery in the litigation for the plaintiff to make an informed judgment
 7 on the merits of the claims; and (3) the proponents of the settlement are experienced in similar
 8 litigation. *Young v. Polo Retail*, No. C-02-4546 VRW, 2006 WL 3050861, at *5 (N.D. Cal. Oct.
 9 25, 2006); *see also Rodriguez*, 563 F.3d at 965, (“We put a good deal of stock in the product of
 10 an arms-length, non-collusive, negotiated resolution.”); *In re Sumitomo Copper Litig.*, 189
 11 F.R.D. 274, 280-81 (S.D.N.Y. 1999) (“a ‘presumption of fairness, adequacy and reasonableness
 12 may attach to a class settlement reached in arms-length negotiations between experienced,
 13 capable counsel after meaningful discovery’”) (quoting MANUAL § 30.42 (3d ed. 1995));
 14 NEWBERG, *supra*, § 11.41. The settlement easily satisfies these requirements.

15
 16
 17 **1. The Settlement Negotiations Were at Arm’s Length**

18 Typically, “[t]here is a presumption of fairness when a proposed class settlement, which
 19 was negotiated at arm’s-length by counsel for the class, is presented for Court approval.”
 20 NEWBERG, *supra*, §11.41; *see also Nat’l Rural Telecomm. Coop. v. DIRECTV, Inc.*, 221 F.R.D.
 21 523, 528 (C.D. Cal. 2004) (great weight given to the recommendation of counsel who are the
 22 most closely acquainted with the facts of the litigation); *In re Employee Benefit Plans Secs. Litig.*,
 23 No. 3-92-708, 1993 WL 330595, at *5 (D. Minn. June 2, 1993) (same).

24
 25 There is no doubt that the proposed settlement was reached through arm’s length
 26 bargaining. From the beginning of the case, the Parties engaged in extensive, adversarial motion

1 practice and discovery. Class certification issues were extensively briefed and argued in the
2 context of both Plaintiff's Motion for Class Certification and Defendants' Motion to Decertify
3 Class. Further, Defendants sought and obtained a stay of the Litigation, pending the appeal of
4 the Ninth Circuit *Spokeo* decision to the Supreme Court.

5 With sufficient information to make the process meaningful, the Parties engaged in two
6 separate formal mediation sessions before well-respected mediators, armed with sufficient
7 discovery and well-researched and thought-out assessments of the likelihood of success of their
8 respective claims and defenses. While the class settlement in principle was reached on the date
9 of the second mediation, the Parties continued to negotiate among themselves and eventually
10 reached a written class settlement agreement, documented with the necessary collateral
11 documents, ultimately resulting in the formal settlement attached hereto as Appendix I.

12 Additionally, the fact that the settlement process and the progress made at that session
13 was overseen by an experienced mediator indicates the settlement was anything but collusive.
14 *See, e.g., Adams v. Inter-Con Sec. Sys. Inc.*, No. C-06-5428 MHP, 2007 WL 3225466, at *3
15 (N.D. Cal. Oct. 30, 2007); *see also In re Netflix Privacy Litig.*, No. 5:11-cv-00379 EJD, 2012
16 WL 2598819, at *1, 2 (N.D. Cal. July 5, 2012).

17
18
19 **2. Plaintiff's Counsel Had Ample Discovery to Make an Informed**
20 **Judgment on the Merits of the Claims**

21 As described above, before engaging in settlement negotiations, Class Counsel undertook
22 substantial factual discovery regarding class certification, liability, and damages. Class Counsel
23 reviewed many pages of documents and undertook a significant amount of factual discovery and
24 research. Counsel analyzed all this information in light of relevant rulings by federal District
25 Courts within California, and by the Ninth Circuit. Accordingly, Class Counsel made informed
26 decisions when negotiating the proposed settlement.

1 **3. Plaintiff’s Counsel, Who Are Highly Experienced in Class Action**
 2 **Procedure and the Claims at Issue in the Case, Believe the Settlement**
 3 **Is Fair, Reasonable and Adequate**

4 In negotiating the proposed settlement, Plaintiff had the benefit of highly skilled and
 5 experienced counsel. Class Counsel have broad experience litigating and trying consumer and
 6 class action cases on behalf of plaintiffs. (ECF 56-32, 56-33).³ In their view, the settlement
 7 provides substantial benefits to the Class, especially when one considers the attendant expense,
 8 risks, delays, and uncertainties of litigation, trial and post-trial proceedings.

9 **4. The Risks of Litigation Support Approval**

10 The Settlement provides all of the significant benefits described above to the Class
 11 without the risks, costs, and delays inherent in continued litigation, trial, and appeal of Plaintiff’s
 12 claims. The expense, complexity, and duration of litigation are important factors considered in
 13 evaluating the reasonableness of a settlement. *Churchill Village, LLC v. General Electric*, 361
 14 F.3d 566, 577 (9th Cir. 2004). Litigating this class action through trial would be time-consuming
 15 and expensive. As with most class actions, the claims at issue are complex and risky.

16 Even though Plaintiff succeeded in certifying the Class and Subclass, he now faces the
 17 task of proving liability on the merits, which would require further risky litigation and expert
 18

19

 20 ³ See *Ramirez v. Trans Union, LLC*, No. 3:12-cv-632 (N.D. Cal.); *White v. Experian Info.*
 21 *Solutions*, 993 F.Supp.2d 1154, 1169, 1172 (C.D. Cal. 2014) (finding Francis & Mailman “FCRA
 22 specialists” and appointing firm and its team as interim class counsel over objections from
 23 competing group because their team’s “credentials and experience [we]re significantly stronger
 24 in class action and FCRA litigation.”), *aff’d sub nom. Radcliffe v. Experian Info. Solutions, Inc.*,
 25 818 F.3d 537, 548 (9th Cir. 2016); *Sapp v. Experian Info. Solutions*, No. 10-4312, 2013 WL
 26 2130956 (E.D. Pa. May 15, 2013); *LaRocque v. TRS Recovery Services, Inc.*, 285 F.R.D. 139 (D.
 27 Me. 2012) (certifying firm of Francis & Mailman as class counsel in consumer class action);
 28 *accord, Giddiens v. First Advantage LNS Screening Solutions, Inc.*, No. 2:12-cv-2624 (E.D. Pa.)
 at Dkt. No. 55 (Jan. 20, 2015 order granting final approval and certifying Francis & Mailman as
 class counsel); *Serrano v. Sterling Testing Systems, Inc.*, 711 F. Supp. 2d 402, 412 (E.D. Pa.
 2010); *Summerfield v. Equifax Info. Services, LCC*, 264 F.R.D. 133 (D. N.J. 2009); *Chakejian v.*
Equifax Info. Services, LLC, 256 F.R.D. 492 (E.D. Pa. 2009); *Jones v. Midland Funding, LLC*,
 C.A. No. 3:08cv802 (RNC) (D. Conn. October 13, 2009); *Jordan v. Commonwealth Financial*
Systems, Inc., 237 F.R.D. 132 (E.D. Pa. 2006); *Bonett v. Education Debt Services, Inc.*, No. 01-
 6528, 2003 WL 21658267, at *3 (E.D. Pa. 2003).

1 work. Even if Plaintiff successfully passed the liability hurdle, a battle would likely ensue
2 concerning whether Plaintiff and other Class Members have sustained damages and, if so, the
3 proper measure of those damages, requiring yet more expert testimony and entailing further risks
4 to Plaintiff's and the Class's chances of recovery. Although Plaintiff is and remains confident
5 in the strength of his case and is prepared to litigate it through trial at all times, the risks are
6 numerous and real. The battles would be fought not only at trial but also on appeal.

7
8 By contrast, the settlement provides significant cash benefits to the Class in the form of
9 FCRA damages. Under the FCRA, a prevailing plaintiff in a class action may obtain, *inter alia*,
10 actual damages or between \$100 and \$1,000 in statutory damages for each member of a class.
11 15 U.S.C. § 1681n(a)(1)(A). At this stage of litigation, the automatic check in the amount of
12 \$400.00 per Class Member (without having to file a claim or take any other action) represents a
13 substantial benefit to the Class. Further, the additional option provided to Class Members of
14 submitting a claim for a *pro rata* share of the Claims Made Pool is a significant benefit available
15 to all members who believe they incurred actual damages as a result of Defendants' actions.
16

17 While Plaintiff's counsel firmly believes in the merits of the Class Claims, demonstrating
18 liability is not at all a certainty. Liability under the FCRA is not strict and only arises upon a
19 finding of negligence or willful failure to comply. 15 U.S.C. §§ 1681n and 1681o. Defendants
20 contest liability in all regards. Further, unless there is a finding of willful noncompliance,⁴
21

22
23 ⁴ In *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47, 69 (2007), the Supreme Court
24 considered the standard for whether a defendant "willfully" violates the FCRA, including whether
25 willfulness also includes "recklessness." *Id.* at 52. While it held that the former encompassed the
26 latter, the Court also concluded that this willfulness standard is not met "unless the action is not
27 only a violation [of the FCRA] under a reasonable reading of the statute's terms, but shows that
28 the company ran a risk of violating the law substantially greater than the risk associated with a
reading that was merely careless." *Id.* at 69. To overcome this hurdle, it is the plaintiff's
burden to prove that a defendant's attempts to comply with the FCRA were "objectively
unreasonable." *Id.*

1 Plaintiff (and thus the Class) must establish actual damages. Consequently, absent approval of
2 the Settlement, Plaintiff will be put to challenging proofs, including as to issues of willfulness,
3 and all Parties face the prospect of a long and expensive litigation which will likely culminate in
4 a trial on a class-wide basis and, thereafter, a lengthy appeal.

5 **5. The Settlement Presents No Deficiencies**

6 **a. The *Cy Pres* Beneficiaries Meet Ninth Circuit Requirements**

7 In *Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012), the Ninth Circuit held that
8 there must be a “driving nexus between the plaintiff class and the *cy pres* beneficiaries[.]” That
9 case involved claims for false advertising where the parties reached a settlement that provided
10 for \$5.5 million “worth” of Kellogg’s food to be donated to charities that feed the indigent. In
11 reversing the district court’s order granting final approval, the Ninth Circuit stated that any *cy*
12 *pres* award must be “guided by (1) the objectives of the underlying statute(s) and (2) the interests
13 of the silent class members, and (3) must not benefit a group ‘too remote from the plaintiff
14 class.’” *Id.* at 865.

15
16 Here, to the extent the Settlement Fund is not fully distributed to Class Members, any
17 residual amount would be distributed to three recipients: the Consumer Federation of California;
18 the Credit Builders Alliance; and, the Jump\$tart Coalition for Personal Financial Literacy. The
19 Class in this case is comprised of consumers who were the subject of background reports that
20 incorrectly identified them as being included on government “Alert Lists.” The underlying
21 statutory provisions alleged in the Litigation are intended to promote accuracy in consumer
22 reporting and to disclose to subjects of the reports all information in their files. The proposed *cy*
23
24
25
26
27

1 *pres* recipients provide services that benefit the interests of Class Members, and serve the
2 objectives of the underlying statute at issue in the Litigation.⁵

3 **b. Class Counsel’s Anticipated Application for Attorneys’ Fees**

4 District courts have the discretion to award attorneys’ fees based on a percentage of the
5 common fund or based on the lodestar method. *See In re Wash. Pub. Power Supply Sys. Sec.*
6 *Litig.*, 19 F.3d 1291, 1295 (9th Cir. 1994). Additionally, attorneys may recover their reasonable
7 expenses from a common fund. *See In re Omnivision Tech., Inc.*, 559 F. Supp. 2d 1036, 1042
8 (N.D. Cal. 2008). Here, Class Counsel will apply to the Court no later than ten days prior to the
9 Final Approval Hearing for an award of attorneys’ fees and expenses not to exceed one-third of
10 the Settlement Fund and will make a full presentation in their application for attorneys’ fees and
11 reimbursable costs. Ultimately, this Court will determine the amount of fees to award and this
12 should not prevent granting preliminary approval to the Settlement.

13
14 **V. ELEMENTS FOR CERTIFICATION OF A CLASS SETTLEMENT**

15 This Court has already ruled that the Class and Subclass may be certified, with Mr. Patel
16 as Class Representative and his lawyers as Class Counsel. *Patel v. Trans Union, LLC*, 308 F.R.D.

17
18
19 ⁵ The Consumer Federation of California (“CFC”) is a non-profit California corporation
20 that is based in Sacramento and advocates for consumer protection interests by working with state
21 and federal regulatory agencies and the California legislature. <http://consumercal.org/>. CFC has
22 been approved as a *cy pres* recipient in numerous California consumer protection class action
23 settlements. CFC will use any funds received from this settlement only for the protection of
24 consumer reporting and background checking rights of California consumers.

25 Credit Builders Alliance (CBA) describes itself as an innovative non-profit social
26 enterprise dedicated to building the capacity of a diverse and growing network of hundreds of
27 nonprofits in almost all 50 states, including Puerto Rico, that help low- and moderate- income
28 households build strong credit and other financial assets.
(<https://www.creditbuildersalliance.org/>).

Jump\$art focuses on teaching financial literacy to school-age children, including, among
other things, the Jump\$art Financial Foundations for Educators program, which helps school
teachers with personal finance topics. (<http://www.jumpstart.org/>).

292 (N.D. Ca. 2015). As such, all the elements for certification of the Class for whom the case is being settled have been met.

VI. THE PROPOSED CLASS NOTICE IS CONSTITUTIONALLY SOUND

Class notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *See Mullane v. Central Hanover Trust*, 339 U.S. 306, 314 (1950). Notice also must satisfy Rule 23(c)(2)(B), which provides that the notice must clearly and concisely state the following in plain, easily understood language:

(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; and (vi) the binding effect of a class judgment on members under Rule 23(c)(3).

Here, the original notice approved by this Court and sent to the Class contained the required information. The proposed Notice of the settlement is written in easy and plain language, and also complies with Rule 23(c)(2)(B). Settlement Agreement, Exhibit C. Accordingly, the form of notice and plan of dissemination should be approved.

VII. PROPOSED SCHEDULE

Plaintiff proposes, and the Settlement Agreement contemplates, the following schedule for the approval process. If the Court grants preliminary approval, these time frames and key deadlines will be triggered by the entry of the accompanying proposed Order Preliminarily Approving Class Action Settlement.

Event	Date
Entry of Preliminary Approval Order	Day 0

1	Settlement Fund established with initial payment of \$27,000	Business Day 10
2	Notice to Class, Claim Forms mailed out	Day 28
3	Claims Submission Deadline (allowing time for re-mailing)	Day 118
4	Objection Deadline	Day 118
5	Deadline for filing intent to appear at Final Approval Hearing	10 Business Days before Final Approval Hearing
6	Deadline for Plaintiff's Counsel to file Motion for Final Approval of Class Action Settlement, and for Award of Attorneys' Fees and Service Payment	10 Days before Final Approval Hearing
7	Final Approval Hearing	Day 130

VIII. CONCLUSION

12 The settlement is an excellent result considering the nature of the litigation and the
13 mediation process. Each Class Member is entitled to a cash recovery as a result of the settlement,
14 regardless of whether they were aware that Defendants' conduct potentially violated the FCRA
15 or whether they suffered actual harm. In addition, each Class Member may submit a claim for
16 actual damages should they so choose. The terms of the settlement, as well as the circumstances
17 surrounding negotiations and its elimination of further costs caused by litigating this case
18 through trial and appeal, satisfy the requirements for preliminary approval.
19

20 WHEREFORE, Plaintiff requests that the Court enter an Order, substantially similar to
21 the proposed Preliminary Approval Order filed concurrently with this Motion, that: (1) grants
22 preliminary approval to the proposed settlement; (2) approves of the proposed Notice filed
23 concurrently with this Motion; (3) orders that the proposed Notice be mailed to Class Members
24 in accordance with the Agreement; (4) approves the appointment of the Settlement
25
26

1 Administrator; and, (5) sets the date of the Final Approval Hearing at the Court’s earliest
2 availability, but no sooner than 130 days from the date of the granting of this Motion.

3 Respectfully Submitted,

4 Dated: September 15, 2017

FRANCIS & MAILMAN, P.C.

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