#37 (3/13 HRG OFF)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV15-8519 PSG (KSx)	Date	March 8, 2017
Title	Jasmine White, *et al.* v. RBD Staffing, Inc., *et al.*		

Present: The Honorable	Philip S. Gutierrez, United States District Judge

Wendy Hernandez	Not Reported
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings (In Chambers): Order GRANTING Preliminary Approval of Class Action Settlement

Before the Court is Plaintiff Jasmine White's motion for preliminary approval of a class action settlement. Dkt. #37. The Court considers this matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78(b); L.R. 7–15. After considering the arguments in the moving papers, the Court GRANTS the motion for preliminary approval of class settlement.

I. Background

In March of 2015, Plaintiff Jasmine White ("Plaintiff") applied for employment as a sales specialist with Defendant Sprint/United Management Company ("Sprint") through a staffing company, Defendant RBD Staffing, Inc. d/b/a Salesmakers, Inc. ("RBD") (collectively, "Defendants"). Dkt. #40, *Second Amended Complaint* ("SAC") ¶ 30. As part of the application process, Plaintiff alleges that RBD procured consumer and/or investigative reports (collectively, "background reports") on Plaintiff and subsequently denied her application without providing proper pre-authorization and adverse action disclosures. *Id.* ¶¶ 4, 35–42.

On October 30, 2015, Plaintiff filed a putative class action lawsuit against Defendants, alleging violations of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681, *et seq*., the California Investigative Consumer Reporting Agencies Act ("ICRAA"), California Civil Code §§ 1786, *et seq*., and California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq*. *See SAC*. Specifically, Plaintiff alleges that (1) RBD conducted background checks on applicants and employees after providing improper disclosure and authorization forms, in violation of the FCRA and ICRAA; (2) RBD failed to provide the required disclosures before taking adverse action against applicants and employees based on a background check, in violation of the FRCA; and (3) RBD failed to provide those applicants and employees subject to adverse action with an adverse action disclosure in violation of the FCRA and ICRAA. *SAC* ¶¶

35–42. Plaintiff asserts her claims against both Defendants on the basis that RBD is an agent and/or employee of Sprint, or in the alternative, that RBD and Sprint are joint employers. *Mot.* 4; *Orshansky Decl.* ¶ 4.

Since filing suit, the parties have litigated the case for over a year, conducting a thorough investigation into the pertinent facts and laws at issue, and engaging in numerous discussions over the strength and weaknesses of the parties' respective positions. Dkt. #37 ("Mot.") 2–3, 6. The parties also conducted informal discovery, during which Defendants produced documents and other evidence of Defendants' hiring polices and guidelines, background check procedures, adverse action procedures, the disclosure and authorization forms used during the applicable class periods, and the estimated size of the settlement classes. *See Mot.* 6; Dkt. #37–1, *Declaration of Anthony J. Orshansky* ("Orshansky Decl.") ¶ 10. In order to evaluate the potential range of settlement outcomes, Plaintiff's counsel researched the applicable case law on whether Defendants' alleged violations of the FCRA and ICRAA were "willful," and whether Defendants' status as joint-employers could be established. *Orshansky Decl.* ¶ 13–14. In addition, Plaintiff considered settlements in similar cases asserting FCRA violations. *Id.* ¶ 14. The parties' informal discovery and investigation revealed two important issues. First, Plaintiff learned that RBD was on the verge of insolvency and unable to fund a class settlement. *Mot.* 2; *Orshansky Decl.* ¶¶ 11–12. RBD however, carries a "burning limits" employment practices liability insurance policy, which will provide the funding for this settlement. *Mot.* 2; *Orshansky Decl.* ¶ 11. Second, Sprint asserted that it utilized different hiring procedures for its direct-hire employees, and vigorously denies conducting any background checks with respect to Plaintiff and the putative class, thus negating Plaintiff's ability to succeed on a joint-employer theory of liability. *Orshansky Decl.* ¶ 7, 13.

On September 6, 2016, the parties mediated the matter before the Honorable Herbert B. Hoffman (Ret.). *Mot.* 3. After accepting the mediator's proposal, the parties continued to negotiate the final terms and ultimately reached a class-wide settlement on the terms and conditions set forth in the Joint Stipulation of Class Action Settlement. *Mot.* 7; *Orshansky Decl.*, Ex. A ("Settlement Agreement"). Plaintiff now moves for an order from the Court to (1) grant preliminary approval of the proposed Settlement Agreement; (2) conditionally certify the proposed settlement classes; (3) approve the proposed notice; (4) appoint Plaintiff as Class Representative; (5) appoint Plaintiff's counsel as Class Counsel; (6) appoint CPT Group, Inc. as the Claims Administrator; and (7) set a hearing date for final settlement approval. *See Mot.* 3.

II. Class Certification for Settlement Purposes Only

Plaintiff seeks to certify two classes for settlement purposes only defined in the Settlement Agreement as:

> (1) "All persons residing in the United States who applied for employment or were employed by RBD Staffing, Inc., . . . and on whom RBD Staffing, Inc., . . . procured one or more background checks (including, as defined under California law, investigative background checks) through consumer reporting agencies HireRight and/or backgroundchecks.com between October 30, 2013, and May 23, 2016." ("FCRA/California Pre-Authorization Class"); and
>
> (2) "All persons residing in the United States who applied for employment or were employed by RBD Staffing, Inc., . . . and against whom RBD Staffing, Inc., . . . took adverse employment action between October 30, 2013, and July 21, 2016, based, in whole or in part, on information in a background check (including, as defined under California law, an investigative background check) procured through consumer reporting agencies HireRight and/or backgroundchecks.com." ("FCRA/California Adverse Action Class").

Settlement Agreement ¶ 8, 9. For purposes of the Settlement Agreement, members of both classes are collectively referred to as "class members." *Id.* ¶ 7.

A. Legal Standard

Parties seeking certification of a settlement-only class must still satisfy the familiar Federal Rule of Civil Procedure 23 standards. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019-24 (9th Cir. 1998). To proceed as a class action under Rule 23, a plaintiff must satisfy four prerequisites of Rule 23(a) and demonstrate that the action is maintainable under Rule 23(b)(1), (2), or (3). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-14 (1997). The four prerequisites of Rule 23(a) are: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. Plaintiff seeks certification under Rule 23(b)(3), *see Mot.* 14, which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed R. Civ. P. 23(b)(3).

B. Discussion

i. Numerosity

The first requirement for maintaining a class action under Rule 23(a) is that the class is "so numerous that joinder of all members would be impracticable." Fed. R. Civ. P. 23(a)(1). Courts generally presume numerosity when there are at least forty members in the proposed class. *See Charlebois v. Angels Baseball, LP*, No. SACV 10-0853 DOC (ANx), 2011 WL 2610122, at *4 (C.D. Cal. June 30, 2011) (citations omitted); *see also Jordan v. Cnty. of L.A.*, 669 F. 2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982). Here, information provided by Defendants identifies approximately 14,313 potential class members in the FCRA/California Pre-Authorization Class and approximately 331 potential class members in the FCRA/California Adverse Action Class. *See Orshansky Decl.* ¶ 8. Numerosity is therefore easily satisfied.

ii. Commonality

To fulfill the commonality requirement of Rule 23(a)(2), Plaintiff must establish questions of law or fact common to the class as a whole. *See* Fed. R. Civ. P. 23(a)(2). The class claims must depend on a common contention that "is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). "What matters to class certification . . . is not the raising of common 'questions' – even in droves – but rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Id.* (internal quotation omitted). For the purposes of Rule 23(a)(2), "even a single common question" satisfies the requirement. *See id.* at 2556 (internal quotation omitted); *Abdullah v. U.S. Sec. Assocs.*, 731 F.3d 952, 957 (9th Cir. 2013) (citing *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012)).

Here, all potential class members are individuals who applied for employment with Sprint and were thus subject to RBD's hiring policies and procedures during the relevant class periods. Therefore, the class members share the common questions of whether Defendants violated the FCRA and ICRAA by procuring background checks through improper disclosure and authorization forms, and whether RBD took adverse action based on background checks without providing the required adverse action disclosures. *Mot.* 12; *Orshansky Decl.* ¶ 36(b). These determinations constitute common questions of law and fact because they would be answered on a class-wide basis and apply uniformly to all members of the proposed class. Commonality is therefore satisfied.

iii. Typicality

Typicality requires a showing that the named plaintiffs are members of the class they represent and that their claims are "reasonably coextensive with those of absent class members," but not necessarily "substantially identical." Fed. R. Civ. P. 23(a)(3); *Hanlon*, 150 F.3d at 1020. The test of typicality "is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir. 2011) (quoting *Hanon v. Dataprods. Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). The typicality and commonality requirements somewhat overlap. *See Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n. 13 (1982).

Here, Plaintiff, like every other member of the class, was subject to RBD's procurement of background checks using improper disclosure forms and procedures in violation of the FCRA and ICCRA. *Mot.* 13. Because the same alleged course of conduct is applicable to all potential class members who applied for employment with Sprint during the relevant class periods, the class members possess a similar interest and have suffered similar injuries as Plaintiff. Typicality is therefore satisfied.

iv. Adequacy

The final requirement of Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Ninth Circuit has indicated that "[t]he proper resolution of this issue requires that two questions be addressed: (a) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (b) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000).

In this case, there is no apparent conflict of interest between Plaintiff and the putative class members. Plaintiff and the class members share the same complaint that Defendants violated the FRCA and ICRAA by using improper disclosure and authorization forms before procuring background checks and taking adverse employment action against the applicants. Because Plaintiff and the class members seek monetary relief under identical sets of facts and legal theories, the Court does not discern a potential for a conflict of interest.

Furthermore, Plaintiff is represented by attorneys who have significant class action experience and who have served as lead counsel in other FCRA, consumer protection, and wage-and-hour class actions. *Orshansky Decl.* ¶¶ 37–39. Both Plaintiff and her counsel are adequate because they have prosecuted the action to proposed settlement, and there is no indication that

they will cease their efforts throughout the settlement process. Accordingly, the adequacy requirement is satisfied.

v. Predominance and Superiority

Rule 23(b)(3) provides that a class may be certified where common questions of law or fact predominate over individual questions and a class action is the superior method for adjudicating the controversy as a whole. *See* Fed. R. Civ. P. 23(b)(3). The predominance aspect specifically "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon*, 150 F.3d at 1022.

Here, the basic question of whether Defendants failed to provide the required disclosures as mandated by the FCRA and ICRAA to individuals applying for employment is common to the entire class, and predominates over any individual issues which might exist. Moreover, the Court finds that a class action is the superior method for adjudicating this controversy. Requiring thousands of class members to litigate their FCRA claims separately would be inefficient and costly, resulting in duplicative and potentially conflicting proceedings. *See Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.3d 507, 512 (9th Cir. 1978) ("Numerous individual actions would be expensive and time-consuming and would create the danger of conflicting decisions as to persons similarly situated."). Class members could face difficulty finding legal representation and could lose incentive to bring their claims if forced to do so in isolation. *See In re Napster, Inc. Copyright Litig.*, No. C 04-1671 MHP, 2005 WL 1287611, at *8 (N.D. Cal. June 1, 2005) (finding superiority in part because "many small composers individually lack the time, resources, and legal sophistication to enforce their copyrights"). Accordingly, the Court finds that the class action is the superior method for adjudicating the controversy, and the requirements of Rule 23(b)(3) are therefore satisfied.

C. Conclusion

Plaintiff has met the requirements for class certification under Rule 23. Therefore, the Court CERTIFIES the proposed classes for settlement purposes only; APPOINTS Plaintiff's counsel as Class Counsel; and APPOINTS Plaintiff as Class Representative.

III. Preliminary Approval of the Proposed Class Action Settlement

The next step is to determine whether the settlement reached is "fair, reasonable, and adequate" under Rule 23(e). *See* Fed. R. Civ. P. 23(e)(2).

A. Legal Standard

The approval of a class action settlement is a two-step process under Rule 23(e). *See In re Am. Apparel, Inc. S'holder Litig.*, No. CV1006352 MMM CGx, 2014 WL 10212865, at *5 (C.D. Cal. July 28, 2014). "At the preliminary approval stage, a court determines whether a proposed settlement is within the range of possible approval and whether or not notice should be sent to class members." *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1063 (C.D. Cal. 2010). Preliminary approval amounts to a finding that the terms of the proposed settlement warrant consideration by members of the class and a full examination at a final approval hearing. *Manual for Complex Litigation* (Fourth) § 13.14 at 173. Preliminary approval is appropriate if "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval." *In re Tableware Antitrust Litig.*, No. SACV 12-02161-DOC, 2014 WL 360196, at *4 (C.D. Cal. Jan. 31, 2014); *Eddings v. Health Net, Inc.*, No. CV 10-1744-JST RZX, 2013 WL 169895, at *2 (C.D. Cal. Jan. 16, 2013).

After notice is given to the class, preliminary approval is followed by a review of the fairness of the settlement at a fairness hearing, and, if appropriate, a finding that it is "fair, reasonable and adequate." Fed R. Civ. P. 23(e)(2); *see also Lane v. Facebook, Inc.*, 696 F.3d 811, 818 (9th Cir. 2012); *Hanlon*, 150 F.3d at 1027. In making this determination, the district court must "balance a number of factors: the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." *Hanlon*, 150 F.3d at 1026; *see also Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003); *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982) (noting that the list of factors is "by no means an exhaustive list").

The district court must approve or reject the settlement as a whole. *See Hanlon*, 150 F.3d at 1026 ("It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness."). The Court may not delete, modify, or rewrite particular provisions of the settlement. *See Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012); *Hanlon*, 150 F.3d at 1026. The district court is cognizant that the settlement "is the

offspring of compromise; the question…is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Hanlon*, 150 F.3d at 1027. Because it is provisional, courts grant preliminary approval where the proposed settlement lacks "obvious deficiencies" raising doubts about the fairness of the settlement. *In re Vitamins Antitrust Litig.*, No. MISC 99-197(TFH), MDL 1285, 2001 WL 856292, at *4 (D.D.C. 2001) (quoting *Manual for Complex Litigation* (Third) §30.41).

B. Overview of the Settlement Agreement

The Settlement Agreement provides for a non-reversionary gross settlement amount of $700,000 ("GSA") to be paid in consideration for the settlement and the release of any related claims as described in the Settlement Agreement. *Settlement Agreement* ¶¶ 21, 23, 40–43; *see also Mot.* 7–8. The GSA will fund (1) cash payments to participating class members; (2) a class representative incentive award to Plaintiff of up to $5,000; (3) class counsel's attorneys' fees in an amount not to exceed 30% of the GSA ($210,000); (4) class counsel's costs of up to $10,000; and (5) claims administration costs of approximately $73,000. *Settlement Agreement* ¶¶ 26–28, 33. The remaining funds ("Net Settlement Fund" or "NSF"), estimated at approximately $402,000, will be distributed on a pro rata basis to class members who submit timely and valid claim forms. *Settlement Agreement* ¶ 26; *Orshansky Decl.* ¶ 20.

Each participating class member in the FCRA/California Pre-Authorization Class will receive an equal share of the NSF, and those who are also part of the FCRA/California Adverse Action Class will receive a double payment. *Settlement Agreement* ¶ 26(a). The amount of the individual settlement payments will depend on the claim participation rate, and, according to Plaintiff, should range between $55 (50% participation rate) and $275 (10% participation rate) per class member. *Orshansky Decl.* ¶¶ 20, 28. Settlement awards will be paid in cash through settlement checks. *Settlement Agreement* ¶ 30. Any funds from uncashed or returned checks will revert to the NSF and be re-distributed pro rata to participating class members. *Id.* at 33(O). If, however, pro rata re-distribution is not economically feasible, unclaimed funds will proceed to the National Consumer Law Center, a non-profit organization dedicated to pursuing consumer justice and economic security for low-income and other disadvantaged individuals. *Id.*; *Orshansky Decl.* ¶ 26.

The Settlement Agreement also contemplates a release by the participating class members of "all claims . . . which relate to or arise out of the allegations asserted in the operative complaint of the Action and any and all related claims, including but not limited to claims for violations of the FCRA and ICRAA and each and every claim that could have been alleged against Defendants arising out of the facts, circumstances, and primary rights in the Action."

Settlement Agreement ¶ 40. The release does not extend beyond the designated class period or to any unemployment compensation, disability, workers' compensation, discrimination, retaliation, and other claims unrelated to this action. *Id*. Any class member who does not effectively opt-out will be bound by the release. *Id* ¶ 42.

C. Analysis of Settlement Agreement

i. Fair and Honest Negotiations

In general, evidence that a settlement agreement is arrived at through genuine arms-length bargaining with a private mediator supports a conclusion that the settlement is fair. *See Rodriguez v. West Publishing Corp.*, 563 F. 3d 948, 965 (9th Cir. 2009) ("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution."); *see also Sarabi v. Weltman, Weinberg & Reis Co., L.P.A.*, 10-CV-1777 AJB NLS, 2012 WL 3809123, at *1 (S.D. Cal. Sept. 4, 2012) (holding that a settlement should be granted preliminary approval after the parties engaged in extensive negotiations); *see also Aarons v. BMW of North America, LLC*, No. 11-CV-7667 PSG (CWx), 2014 WL 4090564 at *10 (C.D. Cal. Apr. 29, 2014) (declining to apply a presumption but considering the arms-length nature of the negotiations as evidence of reasonableness).

Here, the evidence supports the conclusion that the settlement is fair. The Settlement Agreement was reached after more than a year of litigation during which the parties conducted a thorough investigation into the claims and defenses involved in this action. *Mot.* 2. Although formal discovery had not commenced, Plaintiff interviewed witnesses, reviewed thousands of documents produced by Defendants, including RBD's financial documents and the applicants' disclosure forms at issue in this case. *Id.*; *see Glass v. UBS Fin. Servs., Inc.*, No. C-06-4068 MMC, 2007 WL 221862, at *5 (N.D. Cal. Jan. 26, 2007), *aff'd* 331 F. App'x 452 (9th Cir. 2009) (reasoning that the parties' having undertaken informal discovery prior to settling supports approving the class action settlement) (citing *In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 459 (9th Cir. 2000)). Class counsel also researched the applicable case law on the question of whether Defendants' alleged violations were "willful," as well as settlements in similar cases. *Orshansky Decl.* ¶ 14. Class counsel indicates that the parties engaged in months of arms-length negotiations and discussions regarding the strength and weaknesses of the case, the risks of certification and ongoing litigation, and the risk of no recovery should litigation continue. *Mot.* 15–16; *Orshansky Decl.* 15–16. On September 6, 2016, the parties attended an all-day mediation with the Honorable Herbert B. Hoffman, whose mediation proposal led to the parties' settlement. *Id.* at 3; *Orshansky Decl.* ¶¶ 16–17. There is no indication that there were any dishonest or collusive dealings between the parties in reaching this settlement.

Therefore, because the Settlement Agreement was reached after arms-length negotiations, mediation, informal discovery, and thorough consideration of the legal issues by counsel, the Court concludes that the Settlement Agreement was the result of fair and honest negotiations.

ii. Settlement Amount

The settlement provides for a GSA of $700,000. From this amount, Plaintiff asks the Court to authorize the deduction of attorneys' fees, estimated at $210,000 (or 30%); litigation costs, estimated at $10,000; an incentive award for Plaintiff in the amount of up to $5,000; and costs of administration of the settlement, estimated at $73,000. The net amount available for class members' individual awards will be approximately $402,000.[1]

Plaintiff submits that the Settlement Agreement is fair, reasonable, and adequate, conferring a substantial benefit on class members who would face significant risk of no recovery if forced to proceed with litigation. *Mot.* 3; *see Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) (approval of settlement is "preferable to lengthy and expensive litigation with uncertain results."). Foremost among Plaintiff's arguments is the risk that class members would not recover at all due to RBD's insolvency. *Mot*. 6. In her motion, Plaintiff cites to *Torrisi v. Tuscson Elec*., where the Ninth Circuit affirmed the district court's approval of a class action settlement, noting that the predominant factor considered was the defendant's financial plight that, in the absence of settlement, could have left class members without any recovery at all. *Torrisi*, 8 F.3d 1370, 1376 (9th Cir. 1993); *see also Nat'l Rural Telecommunications Coop. v. DIRECTV, Inc*., 221 F.R.D. 523, 525–26 (C.D. Cal. 2004) ("Under certain circumstances, one factor alone may prove determinative in finding sufficient grounds for court approval. ") (citing *Torrisi*, 8 F.3d 1370, 1376). Plaintiff thus asserts that RBD's financial condition weighs heavily in favor of settlement approval. *Mot. 10*; *Orshansky Decl*. ¶ 11–12. Moreover, RBD's burning limits insurance policy, which is the only source of funds for the settlement, includes both indemnification and the costs of defense. *Mot.* 10. Ongoing litigation thus not only poses significant risks of prevailing on the merits but will also deplete the insurance funds, leaving little, if anything, to fund a class recovery.

Although the exact amount each class member will recover is unknown until the rate of participation is determined, Plaintiff asserts that participating class members "are likely to recover a substantial portion, if not more, than the amount they could have recovered

[1] NSF $402,000 = $700,000 (GSA) - $210,000 (attorneys' fees) - $10,000 (costs) - $5,000 (incentive award) - $73,000 (administration costs).

individually." *Mot*. 17. The amount of damages available to a plaintiff under the FCRA depends on whether the defendant's violation was willful or negligent. *Id*. Willful violations carry a statutory penalty of $100 to $1000, *see* 15 U.S.C. § 1681n(a)(1)(A), whereas negligent violations limit the plaintiff to actual damages, *see id*. § 1681(a)(1). Here, class members will recover between $55 (based on a 50% participation rate) to $275 (based on a 10% participation rate). *Orshansky Decl*. ¶¶ 20, 28. An award of $55 thus represents more than 50% of the potential $100 statutory recovery, which, Plaintiff argues, is significant in light of the difficulties in establishing "willful" violations. *Id.* Moreover, such awards are comparable, if not superior, to other settlements that have recently been approved in similar FCRA cases. *Mot*. 18; *see Aceves v. Autozone, Inc*., No. 5:14-cv-2032-VAP-DTB, Dkt. 49 (C.D. Cal. Nov. 18, 2016) (approving settlement award of $20 cash payment or an optional $40 gift card per class member in an analogous FCRA case); *De Santos v. Jaco Oil Co*., No. 1:14-CV-0738-JLT, 2015 WL 4418188, at *8 (E.D. Cal. July 17, 2015) (approving settlement award of $50 per class member in FCRA case). While Plaintiff believes her case is meritorious, she recognizes the inherent difficulty of establishing that the violations were "willful," and that both Defendants are liable under a joint-employment theory of liability. *Settlement Agreement* ¶ 13; *Orshansky Decl*. ¶ 13, 28. Defendants vigorously deny any liability or wrongdoing associated with the claims in this action, and further deny that these claims are appropriate for class treatment outside of the proposed settlement. *Mot*. 5; *Settlement Agreement* ¶ 13.

Accordingly, the Court acknowledges that, in light of the challenges to Plaintiff's case, RBD's insolvency, and the significant prospect of no class recovery at all, acceptance and approval are preferable to ongoing litigation. The Court therefore preliminarily approves the settlement amount.

iii. Attorneys' Fees

When approving attorneys' fees in common fund cases, courts in the Ninth Circuit have discretion to apply the percentage-of-the-fund method or the lodestar method to determine reasonable attorneys' fees. *See Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000). If employing the percentage-of-the-fund method, the "starting point" or "benchmark" award is 25 percent of the total settlement value. *See Vizcanio v. Microsoft Corp.*, 290 F.3d 1043, 1048-1050 (9th Cir. 2002); *Torrisi*, 8 F.3d at 1376. A court may exceed the benchmark but must explain its reasons for so doing. *See Powers*, 229 F.3d at 1255-57.

Here, the Settlement Agreement provides that class counsel may request the Court to award attorneys' fees in an amount up to $210,000 or 30 percent of the GSA. *Mot*. 9; *Settlement Agreement* ¶ 27. Because the contemplated attorneys' fees award is greater than the 25 percent

"benchmark" established in this Circuit, Plaintiff must justify an upward departure from the benchmark under the *Viscaino* factors. *See Viscaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002) (examining "(1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of the work; (4) the contingent nature of the fee and the financial burden carried by plaintiffs; and (5) awards made in similar cases").

Considering Defendants' challenges to Plaintiff's claims, RBD's insolvency, and the risks involved in this litigation, the Court acknowledges that the settlement constitutes a favorable outcome for the class. At this point, however, the Court does not have enough information to determine whether an upward departure from the 25 percent benchmark is warranted. Plaintiff has not included any information about class counsel's performance, hourly rate, hours expended, or awards in similar cases. "Calculation of the lodestar, which measures the lawyers' investment of time in the litigation, provides a check on the reasonableness of the percentage award." *Vizcalino*, 290 F.3d at 1050. That check would be particularly useful in this case, where Plaintiff's counsel asks for an award which constitutes a significant portion of the GSA.

Before final approval therefore, the Court will require additional memoranda justifying the amount of requested attorneys' fees.

iv. Incentive Award

"Incentive awards are fairly typical in class action cases." *Rodriguez v. W. Publ'g Corp.*, 563 F. 3d 948, 958 (9th Cir. 2009) (citations omitted). The Settlement Agreement provides that Plaintiff will request an incentive award in an amount not to exceed $5,000. *Mot.* 9; *Settlement Agreement* ¶ 28. Courts typically examine the propriety of an incentive award by comparing it to the total amount other class members will receive and considering the efforts the plaintiff made in furtherance of the litigation. *See Staton v. Boeing Co.*, 327 F.3d 938, 975 (9th Cir. 2003).

Here, the Court notes that Plaintiff's request of an amount up to $5,000 is comparatively large in comparison to the estimated class member recovery that ranges between $55 and $275. *See Mot.* 8. This raises concerns because incentive awards that are significantly disproportionate to the amount unnamed plaintiffs will receive "raise serious concerns as to [an agreement's] fairness adequacy, and reasonableness." *See Staton*, 327 F.3d at 975 ("Indeed, '[i]f class representatives routinely expect to receive special awards in addition to their share of the recovery, they may be tempted to accept suboptimal settlements at the expense of the class members whose interests they are appointed to guard.").

Moreover, the Court does not have sufficient information about the efforts Plaintiff made in pursuit of the litigation, nor has Plaintiff submitted a declaration detailing her efforts. While Plaintiff's counsel indicates that Plaintiff has assisted "in developing the facts and identifying witnesses, . . . assessing the strengths and weaknesses of the case, . . . and participating in settlement negotiations and mediation," *Orshansky Decl.* ¶ 36(d), Plaintiff does not provide details regarding how much time she dedicated to the action and how active her involvement was. Further, these statements are not supported by a declaration by Plaintiff.

The Court notes however that Plaintiff is the only representative in this case and has been involved in this litigation since March of 2015. An award compensating Plaintiff appears to be appropriate in this case, provided that the amount requested reflects Plaintiff's efforts and is proportionate to other class members' awards. Accordingly, before the final approval, counsel will be ordered to submit a memorandum and declaration justifying Plaintiff's incentive award, including a detailed description of her efforts in pursuit of the case.

v. Cy Pres

The settlement provides that the residue of any un-cashed or returned checks will revert to the NSF and be re-distributed to class members on a pro-rata basis. *Settlement Agreement* ¶ 33(O). Only if the parties and Claims Administrator determine that such re-distribution is not economically feasible, the residue funds will proceed to the National Consumer Law Center ("NCLC"), as a cy pres recipient. *Id.*; *Orshansky Decl.* ¶ 21.

Courts may approve cy pres distributions if there is "a driving nexus between the plaintiff class and the cy pres beneficiaries." *Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012). A cy pres award must be "guided by (1) the objectives of the underlying statute(s) and (2) the interests of the silent class members, and must not benefit a group too remote from the plaintiff class[.]" *Id.*; *see also Six (6) Mex. Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990).

Here, Plaintiff's counsel indicates that the NCLC "will further the objectives of this litigation because it prosecutes FCRA and other consumer-protection lawsuits, including class actions, and provides extensive public information and analysis regarding the FCRA." *Orshansky Decl.* ¶ 26. Indeed, courts have repeatedly found the NCLC to have the requisite nexus with consumer classes for qualification as a cy pres recipient. *See, e.g.*, *Johnson v. Gen. Mills, Inc.*, 2013 WL 3213832, *3 (C.D. Cal. 2013) (approving NCLC as cy pres designee); *Tadepalli v. Uber Techs., Inc.*, 2015 WL 9196054, *10 (N.D. Cal. 2015) (same); *Durham v. Cont'l Cent. Credit, Inc.*, 2011 WL 2173769, *2 (S.D. Cal. 2011) (same). The court finds that

NCLC's work with respect to consumer protection and unfair and deceptive acts and practices provides the requisite nexus to the interests of the class members, the nature of their claims, and the purpose of the underlying statutes, and thus qualifies as the "next best distribution" to the class. *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011) (affirming the Ninth Circuit's position that the "cy pres doctrine allows a court to distribute unclaimed or non-distributable portions of a class action settlement fund to the 'next best' class of beneficiaries."). Moreover, the cy pres distribution to the NCLC will only take place if re-distribution to class members is not economically feasible, thereby significantly reducing the likelihood of a large cy pres distribution at all. *Orshansky Decl*. ¶¶ 20, 34. Finally, there is no concern of a conflict of interest in remitting funds to the NCLC. In his declaration, Plaintiff's counsel attests that neither Plaintiff nor her counsel has any interest in NCLC, financial or otherwise, nor has Plaintiff's counsel ever co-counseled a case with NCLC. *Orshansky Decl*. ¶ 26.

Accordingly, the Court preliminarily approves the proposed cy pres distribution.

D. Notice

Before the final approval hearing, the Court requires adequate notice of settlement be given to all class members. Federal Rule of Civil Procedure 23(c)(2)(A) provides that the Court may direct "appropriate" notice to a class certified under Rule 23(b)(1). "Notice is satisfactory if it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'" *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (quoting *Mendoza v. Tuscon Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir. 1980)).

Plaintiff has appended a proposed long-form notice to the Settlement Agreement which sets forth in clear language: (1) the nature of the litigation and the essential terms of the Settlement Agreement; (2) class counsel's application for attorneys' fees, the proposed incentive payment for Plaintiff, and the estimated administration costs; (3) how to participate in the settlement; (4) how to object to the settlement; (5) how to opt out of the settlement; (6) information concerning the release; (7) information concerning the final approval of the Settlement Agreement; and (8) how to obtain additional information regarding this case and the Settlement Agreement. *See Settlement Agreement*, Ex. 3 ("Website Notice"). The notice will be posted on the settlement website to be developed and maintained by the Claims Administrator. In addition, shorter versions of the notice will be sent to all class members either by a postcard notice, *see id*., Ex. 1 ("Postcard Notice"), or via an email notice ("E-mail Notice"), *see id*., Ex. 2. Both will inform the class members of the essential terms of the settlement and direct them to the

settlement website. The parties also append samples of the Opt-Out Form and Claim Form that will be made available on the settlement website. *See id*, Exs. 4, 5.

The Settlement Agreement provides that, within 15 business days of preliminary approval, Defendants will provide the Claims Administrator with the names of the putative class members along with their most current mailing addresses and telephone numbers, must current e-mail addresses, and social security numbers. *Settlement Agreement* ¶ 34.[2] Prior to the mailing of the notice, the Claims Administrator will perform a search in the National Change of Address Database to update and correct any known or identifiable address changes. *Id*. Within 21 days of receiving the class data, the Claims Administrator will send the Postcard Notice to all potential class members via first class mail, or will send the E-Mail Notice to all known class members' e-mail addresses. *Id*. ¶ 35. Any notice materials that are returned as undeliverable will be skip-traced and re-sent to a forwarding address. *Id*. ¶ 36. If a class members' e-mail address is no longer valid, the Claims Administrator will use best efforts to locate a mailing address, including the steps applicable to mailed notices. *Id*.

Class members will have 45 days from the mailing or e-mailing of the notice to submit a Claim Form or an Opt-Out Form, by submitting such requests electronically through the settlement website. *Id*. ¶ 37. Class members who do not exclude themselves may also object to the Settlement Agreement by submitting a written statement to the Claims Administrator and/or Court as well as Class Counsel within 45 days after Notice is mailed. *Id*. ¶ 39. Similarly, class members will have 30 days from the mailing of the notice to submit any dispute regarding their estimated settlement payments. *Id*. ¶ 38. The notice explains the opt-out and objection procedures. *See Website Notice* p. 6–7.

Based on the foregoing, the Court finds that the proposed notice complies with the requirements of Fed. R. Civ. P. 23(c). However, the Court notes two problems.

First, the notice materials instruct class members to file objections with the Court, rather than just with Class Counsel and the Claims Administrator. *See Settlement Agreement* ¶ 39; *Website Notice* p. 7. These instructions must be eliminated from the notice materials. Class members should send objections solely to the Claims Administrator and Class Counsel, who will consolidate and present them to the Court when filing the final settlement approval.

[2] RBD has agreed to provide a list to the Claims Administrator of all e-mail addresses it has on file for approximately 15% of the putative class members, as well as the last known mailing addresses for the remaining 85% of the putative class members. *Orshansky Decl*. ¶ 30.

Second, as it currently stands, the notice materials instruct class members that the final approval hearing will take place at the Court's former courtroom in the Edward R. Roybal Federal Building and Courthouse. Because the Court has recently moved, the notice should refer class members to the Court's new chambers: U.S. Courthouse, 350 West 1st Street, Los Angeles, CA 90012, Courtroom 6A, 6th Floor. It should also refer class members to the court's website at http://www.cacd.uscourts.gov/judges-schedules-procedures for up-to-date locations for court hearings and chambers locations.

IV. Conclusion

For the foregoing reasons, the Court GRANTS Plaintiff's motion for preliminary approval of class settlement. The Court PRELIMINARILY APPROVES the Settlement Agreement, APPOINTS CPT Group, Inc. as the Claims Administrator, and APPROVES the proposed notice (provided that the notice materials are amended as requested above). The final approval hearing is set for **July 10, 2017** at 1:30pm.

The Court ORDERS, at least 30 days before the final approval hearing and in addition to the motion for final approval for class action settlement:

- A motion for attorneys' fees and costs that includes declarations supporting the reasonableness of each attorney's requested hourly rate, itemized billing statements showing hours worked, hourly rates, expenses incurred thus far, and expenses to be incurred in the future. The motion should also explain why an upward departure from the benchmark percentage rate is warranted;

- A memorandum justifying the incentive award for Plaintiff, including a detailed description of Plaintiff's efforts in pursuit of this case, and supporting declarations.

- A copy of the amended notice reflecting the changes requested above.

IT IS SO ORDERED.