Honorable Thomas S. Zilly

U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

SARAH CONNOLLY, individually and on behalf of all others similarly situated,

Plaintiff,

v.

UMPQUA BANK,

Defendant.

NO. 2:15-CV-00517-TSZ

PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF REVISED CLASS ACTION SETTLEMENT AND FOR CERTIFICATION OF SETTLEMENT CLASS

Note on Motion Calendar:
July 13, 2018

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I. INTRODUCTION

Plaintiff Sarah Connolly ("Plaintiff"), individually and on behalf of the proposed settlement class, respectfully seeks preliminary approval of the class action settlement reached with Defendant Umpqua Bank ("Umpqua"). The settlement requires Umpqua to pay $325,000 to establish a settlement fund for the benefit of Plaintiff and approximately 3,871 proposed Settlement Class Members.[1] Settlement Class Members who do not opt out will each receive an equal cash payment from this fund estimated to be approximately $40 - $47. The settlement fund also will be used to pay notice and administration expenses, any court-approved attorneys' fees, costs incurred by proposed class counsel, and any court-awarded incentive award for the named Plaintiff.

This settlement payment amount is within the range of other FCRA class action settlements approved by courts in this Circuit and elsewhere.

In addition, as described more fully *infra*, the Parties have revised the Settlement Agreement and notice plan to address the concerns raised by the Court in its May 7, 2018 Minute Order as follows: (1) the Parties have agreed to send a postcard notice to all Settlement Class Members by first class mail, followed by an emailed long-form notice to those for whom a valid email address exists, and by first class mail to others: (2) the post card notice contains the names of the proposed *cy pres* recipients; (3) the long-form notice contains the names of the proposed *cy pres* recipients and the amount of estimated administrations expenses, fees and costs to be paid form the Settlement Fund, along with an opt-out form; (4) a description is included of steps that will be taken to avoid the emailed notice being filtered to spam; (5) the revised agreement provides that opt outs and objections need only be sent to the Settlement Administrator; (6) the Settlement Administrator will maintain a website that will contain the settlement documents, the fee application and other important case documents; (7) the Parties

[1] Settlement Class Members are individuals and entities who are within the proposed settlement class.

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have proposed that the *cy pres* monies be paid to three organizations that perform work related to the FCRA, one each in Washington, Oregon and California, where the majority of Settlement Class Members reside; (8) social security numbers and dates of birth will not be included in the class list; (9) the motion for attorneys' fees and costs will be filed before the notice is sent; (10) to state that the CAFA notices have been sent by Defendant.

For the reasons set forth in this motion and the supporting documents, the settlement is fair and reasonable. Accordingly, Plaintiff respectfully requests that the Court: (1) grant preliminary approval of the settlement; (2) provisionally certify the proposed class; (3) appoint as class counsel the law firms of Bailey & Glasser LLP and Law Office of Nicholas F. Ortiz, P.C.; (4) appoint Sarah Connolly as class representative; (5) approve the proposed notice plan; (6) appoint JND Legal Administration to serve as settlement administrator; and (7) schedule the final fairness hearing and related dates.

II. STATEMENT OF FACTS

A. Plaintiff Alleges That Umpqua Violated The FCRA

Ms. Connolly brought this class action against Umpqua Bank ("Umpqua") on behalf of herself and other similarly situated job applicants and employees. Her complaint alleges that when she applied for a job, Umpqua obtained a copy of her credit report without first giving her a valid disclosure or authorization.

The Fair Credit Reporting Act ("FCRA") prohibits an employer from obtaining a credit report, without first giving a job applicant a stand-alone document that consists "solely" of the disclosure of its intent to obtain the applicant's credit report, and an authorization to do so. 15 U.S.C. § 1681(b)(2)(a)(i). This requirement maximizes the disclosure's clarity and conspicuousness, thereby protecting the job applicant's fundamental right to keep his or her credit and financial information private and to control access to it.

Ms. Connolly alleges that the Umpqua form disclosure she was required to sign did not stand alone, and in fact contained a *waiver* of liability, which did the opposite of protecting job

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seekers' rights. The Ninth Circuit recently held that the use of such a form disclosure and authorization is a willful violation of the FCRA, as a matter of law.

B. Case History

On April 4, 2015, Ms. Connolly filed this case in the United States District Court for the Western District of Washington at Seattle alleging that Umpqua violated the FCRA, 15 U.S.C. §§ 1681a-1681x. Dkt. No. 1. On July 9, 2015, Umpqua moved to dismiss the complaint for failure to state a claim. Dkt. No. 20. That motion was denied in part and allowed in part on October 23, 2015. Dkt. No. 38. The Court dismissed one count relating to the failure to provide adverse action notices. On December 31, 2015, Umpqua filed a motion to stay the litigation pending the outcome of the Supreme Court's ruling in *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540 (2016), which was to address what constitutes an injury and standing when a plaintiff asserts a violation of a statutory right but no concrete injury. Dkt. No. 42. Ms. Connolly opposed the stay request because she alleged concrete injuries. Dkt. No. 44. The Court granted the stay on January 26, 2016. Dkt. No. 46.

On June 21, 2016, after *Spokeo* was decided and the stay was lifted, Umpqua filed a new motion to dismiss for lack of subject matter jurisdiction, based on *Spokeo*, arguing that Ms. Connolly had not adequately alleged an injury for purposes of standing. Dkt. No. 49. That motion was denied on November 9, 2016, after oral argument. Dkt. No. 63.

On November 30, 2016, Umpqua filed a motion to certify the case for interlocutory review pursuant to 28 U.S.C. § 1292(b) and to stay. Dkt. No. 65. That motion was denied on December 20, 2016. Dkt. No. 68.

In March and April of 2017, Umpqua produced a large volume of documents in response to Plaintiff's discovery requests. *See* Declaration of Elizabeth Ryan ("Ryan Decl.") ¶ 11. The documents related to the disclosure forms used to obtain credit and background checks on job applicants and employees, the information obtained, and the size of the potential class. *See id.* Following the mediation session, the parties continued to engage in further class-wide,

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informal discovery regarding these disclosure forms, as well as an additional issue that arose regarding the existence of purported arbitration agreements as to class members. *See id.*, ¶¶ 16-17. Through the course of this litigation, and before, Plaintiff has thoroughly investigated the factual and legal claims at issue. *Id.*, ¶¶ 11-12.

The Parties reached agreement on January 26, 2018, which was filed with the Court on January 30, 2018. Dkt. No. 91-1. On May 7, 2018, the Court issued a Minute Order denying without prejudice the Plaintiff's motion for preliminary approval of the Parties' class action settlement, and asking the Parties to address certain issues identified by the Court relating to notice and other aspects of the settlement. Dkt. No. 93. The Parties have addressed these issues by this Revised Settlement Agreement and Release of Claims and Class Notice as described more fully herein.

C. The Parties Engaged In Arm's Length Settlement Negotiations With The Assistance Of An Extremely Experienced Mediator

The parties mediated for a full day on July 10, 2017, with Teresa A. Wakeen, J.D., in Seattle. *Id.*, ¶ 14. At the mediation, the parties engaged in a substantive and productive discussion regarding the disclosure forms used by Umpqua, including which forms were used as to which employees and applicants, which employees and applicants received disclosure forms, the substance of the forms, and FCRA compliance. *Id.*, ¶¶ 14-15. Although no agreement was reached during the mediation, the parties continued to engage in substantive discussions in the following months. *Id.*, ¶ 16. After further exchange of information and documents, the parties were able to reach an agreement in December 2017, which is currently before the Court for approval. *Id.*

D. The Terms Of The Proposed Settlement

The terms of the parties' proposed settlement are contained within the "Settlement Agreement" attached as Exhibit 1 to the Ryan Declaration. For purposes of preliminary approval, the following summarizes the Settlement Agreement's key terms:

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1. The Settlement Class

The proposed "Settlement Class" is comprised of: All individuals who applied for employment with Umpqua, or were employed by Umpqua, who completed a disclosure and authorization form between April 2, 2010, and through and including September 21, 2015 (the "Class Period"), about whom Umpqua obtained a consumer report for employment purposes during the Class Period.

The Settlement Class does *not* include Umpqua, any entity that has a controlling interest in Umpqua, and Umpqua's current or former directors, officers, counsel, and their immediate families. The Settlement Class also does not include any persons who validly request exclusion from it. The parties believe the records confirm there are approximately 3,871 Settlement Class Members. Ryan Decl. ¶ 18.[2]

2. The Settlement Relief

The Settlement Agreement requires Umpqua to pay $325,000 as consideration for the settlement (the "Settlement Fund"). Ryan Decl., Ex. 1, ¶ 22. The Settlement Fund will be used to pay Settlement Class Members cash awards estimated by Plaintiff to be approximately $40 to $47 each, any incentive award to the named Plaintiff approved by the Court, any court-approved attorneys' fees and litigation costs, and the costs of notice and administration.

The settlement administrator shall distribute in equal shares the individual Settlement Class Members' awards after deducting any court-awarded attorneys' fees, litigation costs, notice and administration expenses, and any court-awarded incentive award for the named Plaintiff. *Id.* at Ex. 1 ¶ 24.

3. Plaintiff's Incentive Award

Plaintiff will ask the Court to approve an incentive award that does not exceed $2,500 for Sarah Connolly, to be paid out of the Settlement Fund. Ryan Decl., Ex. 1 ¶ 24(a). This award will compensate Plaintiff for her time and effort serving as class representative and for

[2] The parties have agreed that if it turns out that the number of Class Members changes by more than 10%, Umpqua will pay an additional amount of $43 per Class Member over 10%. Settlement Agreement, Ryan Decl., Ex. 1 ¶ 19.

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the risks she undertook in prosecuting the case.

4. Attorneys' Fees and Litigation Expenses

The Agreement provides that Plaintiff's counsel may request that the Court approve an award of attorneys' fees and litigation expenses. Ryan Decl., Ex. 1 ¶ 24(c). Plaintiff's counsel will file a fee petition with the Court requesting an attorneys' fees award of up to $108,322.50 from the Settlement Fund to compensate and reimburse them for all of the work already performed in this case and all of the work remaining to be performed in connection with the settlement. *Id.*, Ex. 1 ¶ 38. This amount represents a negative multiplier of Plaintiff's lodestar as explained below in Section C(6). Plaintiff's counsel will also seek reimbursement for costs, which currently amount to approximately $5,173.11. *Id.*, at ¶ 38.

The Settlement Agreement is not contingent on the amount of attorneys' fees or costs awarded.

5. Administration Costs

The parties have agreed that settlement administrator JND Legal Administration ("JND") will administer the settlement. JND's charges are estimated to amount to approximately $25,000.00. JND's duties will include updating addresses in the Class List, preparing and emailing notice, mailing notice to Settlement Class Members without a valid email address, fielding questions from Settlement Class Members regarding the Settlement, processing opt-outs, and issuing checks to all members of the Settlement Class who do not opt-out. *Id.* at Ex. 1 ¶¶ 25-29.

6. Settlement Payments

The remainder of the Settlement Fund, approximately $185,000, will be distributed in equal shares to all Settlement Class Members who do not opt out. If the Court grants the requested attorneys' fees, litigation expenses, incentive award, and notice and settlement administration fees, as described in paragraphs 3 – 5 supra, Plaintiff estimates that each Settlement Class Member will receive approximately $40 - $47. Ryan Decl. ¶ 20.

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While the Parties expect that Settlement Payments will reach the vast majority of Settlement Class Members, an amounts remaining in the Settlement Fund because of uncashed checks will not revert to Umpqua, but will be donated to *cy pres* recipient(s). The Parties have proposed three *cy pres* recipients: the Northwest Consumer Law Center (NWCLC), the Oregon Law Center, and Privacy Rights Clearinghouse (PRC) in California. These organizations serve individuals in the states in which the vast majority of Settlement Class Members reside. *See* Exhibit A, CAFA notice (showing that 934 Settlement Class Members reside in Washington, 929 Settlement Class Members reside in California, and 1,548 Settlement Class Members reside in Oregon).

NWCLC is a non-profit organization focused on consumer law, including the Fair Credit Reporting Act on which this action is based, and is located in Washington. *See* Exhibit 2 to Ryan Decl. NWCLC provides representation and legal advice to individuals on credit reporting and other consumer issues, training and support to lawyers who represent consumers, and education for consumers about their rights and options. NWCLC has served clients in 34 of the 39 counties in Washington state, and provides referral services to out of state callers. *Id*.

The Oregon Law Center is a non-profit organization which provides civil legal services to individuals throughout Oregon and advice and education about their rights under the FCRA as well as employment and other consumer issues. *Id*.

PRC is a consumer education and advocacy organization which serves Californians statewide. https://www.privacyrights.org/about. Its mission is to educate and empower consumers to protect their privacy and it provides publications concerning privacy laws and rights, including the FCRA. *Id*. PRC publishes extensive consumer education resources, documents privacy-related consumer stories and complaints, and provides one-to-one assistance answering individuals' privacy-related questions. *Id*. PRC also publishes a guide to employment background checks. *See* https://www.privacyrights.org/consumer-guides/employment-background-checks-jobseekers-guide.

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The selection of the proposed *cy pres* recipients was guided by (1) the objectives of the underlying statute, here the FCRA, and (2) the interests of the silent class members, including their geographical diversity. *See Nachshin v. AOL, LLC*, 663 F.3d 1034, 1039 (9th Cir. 2011).

7. Settlement Administration and Notice

The Settlement calls for postcard notice to be sent by first class mail to all identified Settlement Class Members, and for a Longform notice to be sent by email to those class members for whom an email address is reasonably available, and by first class mail for all others. No later than ten (10) days after the Court enters a preliminary approval order, the Defendant will send JND, and Class Counsel, a Class List. Ryan Decl., Ex. 1 ¶ 4. No later than fifteen (15) days after receiving the Class List, JND will mail the post card notice, and will email and mail the Longform notice. *Id.*, at Ex. 1 ¶ 25. When sending the email notice, the Settlement Administrator will take steps to reduce the chances that the emails will get filtered into spam, and increase the chances the emails will be opened, including customizing the email content (to include for example, the recipient's name), including the notice as an attachment to avoid getting filtered to spam due to length and repeated references to amounts of money, and using a subject line using a subject line such as "Connolly v. Umpqua Bank – Notice of Class Action Settlement" to increase the open rate among email recipients. The Class Settlement Notice will set a deadline to opt-out of the class. *Id.*, at Ex. 1 ¶ 15.

III. AUTHORITY AND ARGUMENT

A. The Settlement Approval Process

As a matter of "express public policy," federal courts strongly favor and encourage settlements, particularly in class actions and other complex matters, where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *See Class Plaintiff v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (noting the "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned"); *see also* William B. Rubenstein, *Newberg on Class*

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Actions ("Newberg") § 13.1 (5th ed. updated 2015) (citing cases). The traditional means for handling claims like those at issue here — individual litigation — would unduly tax the court system, require a massive expenditure of public and private resources, and, given the small value of the claims of the individual class members, would be wholly impracticable. The proposed settlement is the best vehicle for Settlement Class Members to receive relief in a prompt and efficient manner.

The Manual for Complex Litigation describes a three-step procedure for approval of class action settlements: (1) preliminary approval of the proposed settlement; (2) dissemination of notice of the settlement to all affected class members; and (3) a "fairness hearing" or "final approval hearing," at which class members may be heard regarding the settlement, and at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented. *Manual for Complex Litigation (Fourth)* ("MCL 4th") §§ 21.632 – 21.634, at 430–31 (2015). This procedure safeguards class members' due process rights and enables the court to fulfill its role as the guardian of class interests. *See* Newberg § 13.1.

Plaintiff requests that the Court take the first step in the settlement approval process by granting preliminary approval of the proposed Settlement Agreement. The purpose of preliminary evaluation of proposed class action settlements is to determine whether the settlement "is within the range of possible approval" and thus whether notice to the class is worthwhile. Newberg § 13.13. This Court has broad discretion to approve or reject a proposed settlement. *In re Online DVD-Rental Antitrust Litig.* ("*Online DVD-Rental*"), 779 F.3d 934, 942, 944 (9th Cir. 2015) (noting standard of review is "clear abuse of discretion" and emphasizing appellate court's review is "extremely limited").

The Court's grant of preliminary approval will allow the Settlement Class to receive direct notice of the proposed Settlement Agreement's terms and the date and time of the final approval hearing, at which Settlement Class Members may be heard regarding the Settlement

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Agreement, and at which time further evidence and argument concerning the Settlement's fairness, adequacy, and reasonableness may be presented. *See* MCL 4th § 21.634.

B. The Settlement Is The Product Of Serious, Informed, And Arm's Length Negotiations

The Ninth Circuit has noted that the court's role in evaluating class action settlements is to ensure that "the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1027 (9th Cir. 1998) (internal quotes and citations omitted).

Here, the parties engaged the services of a highly respected mediator, Teresa A. Wakeen, who has over 25 years of mediation experience. Ryan Decl. ¶ 14. With Ms. Wakeen's assistance, the parties participated in a full day formal in-person mediation session. The parties prepared memoranda in advance of the in-person session and the negotiations were productive, including discussions about the merits of Plaintiff's legal claims, and the disclosure and authorization forms used by Umpqua. *Id.*, ¶ 15. Although no agreement was reached, the parties engaged in substantive discussions through which they gained greater understanding of the strengths and weaknesses of each side's positions. *Id.*, ¶¶ 16-17. Following this, the parties continued to engage in extensive direct settlement discussions, including the further exchange of information and documents, as well as legal authority regarding the effect of the purported arbitration agreements. *Id.*, ¶ 17. The extensive negotiations and the efforts of Plaintiff and counsel support settlement approval. *See Hanlon*, 150 F.3d at 1027 (no basis to disturb the settlement, in the absence of any evidence suggesting that the settlement was negotiated in haste or in the absence of information).

C. The Criteria For Settlement Approval Are Satisfied

A proposed settlement warrants approval if it is determined to be "fair, reasonable, and adequate." *Id.* To make this determination, courts consider a number of factors including (1) a defendant's ability to pay a larger settlement; (2) the strength of the plaintiff's case; (3) the

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extent of discovery completed and the stage of the proceedings; (4) the risk, expense, complexity, and likely duration of further litigation; (5) the amount offered in settlement; (6) the experience and views of counsel; (7) the reaction of the class members to the proposed settlement; (8) the presence of a governmental participant; (9) whether the attorney fees request is indicative of collusion; and (10) whether distribution favors certain class members at the expense of others. *See Rinky Dink, Inc. v. Elect. Merchant Sys.*, No. 13:cv-01347-JCC, Dkt. No. 143, at 8 (W.D. Wash. Dec. 11. 2015) (citing *In re Bluetooth*, 654 F.3d at 946–47; *Staton v. Boeing*, 327 F.3d 938, 974 (9th Cir. 2003); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000)). These factors favor preliminary settlement approval here.

1. Strength of Plaintiff's Case

Entering mediation, Plaintiff and Plaintiff's counsel were confident in the strength of their case. Ryan Decl. ¶ 15. Two motions to dismiss and a motion to stay had been fully briefed, and Plaintiff believed she had a strong chance of certifying a class and a strong likelihood of success on the merits. *See id.*, ¶¶ 12, 15.

That said, Plaintiff was aware of some class certification risk for the class as defined. For example, well into the litigation, Umpqua disclosed that some class members signed agreements which it claimed required them to arbitrate their claims. *Id.*, ¶¶ 13, 17. While Plaintiff believes there are grounds to challenge the arbitration agreements, their existence creates additional risk and would require further motions practice and delay. Further, Plaintiff is aware that uncertainty exists as to the amount of damages the class may be entitled. Under the FCRA, statutory damages are only available for willful violations. *See* 15 U.S.C. § 1681(n). These issues represent significant risks for the Plaintiff if she chose to continue to litigate this case.

2. The Extent of Discovery and the Stage of Proceedings

A key factor in assessing a settlement is whether the parties had enough information to make an informed decision about the strength of their respective cases. *In re Mego*, 213 F.3d at

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458. As discussed, the parties entered into mediation after a full year of discovery and after two motions to dismiss and a motion to stay had been fully briefed. Ryan Decl. ¶¶ 12, 14. Plaintiff's counsel propounded written discovery requests, reviewed documents, and participated in a full-day mediation session. *Id.*, ¶ 14. Even after mediation, Plaintiff's investigation continued, as counsel diligently sought and received additional discovery from Umpqua. As a result of Plaintiff's efforts, she received the information she needed to make an informed decision about settlement. *See id.*, ¶ 17.

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

Litigation would be lengthy and expensive if this action were to proceed. Although the parties had completed substantial discovery and briefing at the time they reached agreement, additional discovery, depositions, expert work, expert depositions, and motion work remained. For example, Plaintiff may need to depose an individual Umpqua representative. Then, the parties will need to fully brief Plaintiff's motion for class certification, as well as any motions for summary judgment and, if necessary, prepare for trial. Realistically, it could be a year before the case would proceed to trial and any subsequent appeals would further delay any judgment in favor of the Settlement Class. The Settlement avoids these risks and provides immediate and certain relief.

4. The Amount Offered in Settlement

The Settlement Agreement requires Umpqua to pay $325,000 to establish a Settlement Fund. The Settlement Fund will be used to pay a class representative incentive award in the requested amount of $2,500 if approved by the Court, attorneys' fees in the requested amount of $108,322.50 if approved by the Court, the out-of-pocket litigation costs that Plaintiff's counsel incurred up to $6,000, and notice and settlement administration costs, which are estimated at $25,000. The Settlement Fund is non-reversionary, ensuring that the monetary benefits will go to the Settlement Class; none of the Settlement Fund will be returned to Umpqua. If the Court approves counsel's requested fees, costs, and incentive award,

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approximately $185,000 will remain in the Settlement Fund. The settlement calls for this amount to be divided equally amongst all Settlement Class Members who do not opt out. As above, Plaintiff estimates that each Settlement Class Member will receive approximately $40 - $47. Ryan Decl. ¶ 20.

This estimated individual award is in line with or exceeds those in other FCRA settlements, particularly cases involving FCRA disclosure violations with no "adverse action" claim under the Act. FCRA statutory damages range between $100 and $1,000 for willful violations. Given the risks, costs and other settlement-related considerations, federal courts routinely approve FCRA settlements that confer amounts at or below the approximate $50.00 recovery per class member, especially since *Spokeo*. For example, in *Aceves v. Autozone Inc.*, No. 5:14-cv-2032, ECF No. 58 (C.D. Cal. Nov. 18, 2016), the district court approved a settlement that conferred on a class of plaintiffs, alleging various FCRA disclosure violations, a gross recovery of $20 per class member or alternatively a $40 gift card toward future business with the defendant. Similarly, in *Landrum v. Acadian Ambulance Serv., Inc.*, No. 14-cv-12 1467, ECF No. 37 (S.D. Tex. Nov. 5, 2015), the district court approved a FCRA settlement that provided both the disclosure class and the adverse action class $10 per person.

Federal courts here and around the country approved similar FCRA class settlements. *See, e.g.*, *Patrick v. Interstate Mgmt. Co., LLC,* No. 8:15-cv-1252, ECF No. 42 (M.D. Fla. Jan. 14, 2016) ($16.40 recovery per disclosure claim class member); *Patrick v. Interstate Mgmt. Co., LLC,* No. 15-cv-1252, ECF No. 49 (M.D. Fla. Apr. 29, 2016) ($9.00 recovery per disclosure claim class member); *Walker v. McClane/Midwest, Inc.*, No. 2:14-CV-04315, ECF No. 29 (W.D. Mo. Oct. 23, 2015) ($24.00 recovery per disclosure claim class member); *Brown v. Delhaize Am., LLC*, No. 1:14-CV-00195, 2015 WL 12780911, at *3 (M.D.N.C. July 20, 2015) ($48.00 recovery per disclosure claim class member).[3]

[3] *See also Hillson v. Kelly Servs. Inc.*, No. 2:15-CV-10803, 2017 WL 279814, at *7 (E.D. Mich. Jan. 23, 2017) (approval involving FCRA disclosure claims, with $41 for adjudicated

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In addition, unlike some cited settlements, identified Settlement Class Members here are not required to file claims, so they will receive their payments automatically. This provides a significant additional benefit to Settlement Class Members.

5. The Experience and Views of Counsel

Where plaintiff's counsel are qualified and well informed, their opinion that a settlement is fair, reasonable, and adequate is entitled to significant weight. *See Pelletz v. Weyerhaeuser Co*., 255 F.R.D. 537, 543 (W.D. Wash. 2009). Here, Plaintiff's counsel are very experienced in the litigation, certification, and resolution of consumer class action cases similar to this case. Ryan Decl. ¶¶ 3-9, 22-23. Plaintiff's counsel believe the Settlement is fair, reasonable, adequate, and in the best interest of the Settlement Class as a whole. *See id.* ¶ 10. This factor favors settlement approval.

6. Attorneys' Fees

In this fee-shifting case, at final approval, Plaintiff's counsel intends to seek a fee award of up to $108,322.50, which is considerably less than their current combined lodestar of $169,221.17, to compensate them for the reasonable fees they have incurred prosecuting this class action. This amount represents a negative multiplier of .64, and, as a percentage of the fund cross check, is no more than one-third of the Settlement Fund. Plaintiff's counsel also will seek reimbursement from the Settlement Fund for out-of-pocket costs they have incurred, up to $6,000. Ryan Decl. ¶ 19.

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ineligible class members and $14 for favorable rating class members); *Manuel v. Wells Fargo Bank, NA*, No. 14-cv-238-REP- DJN, 2016 WL 1070819, at *2 (E.D. Va. Mar. 15, 2016) (approval involving FCRA background check claims where "each member of the Impermissible Use Class will receive a check for $35.00, and each Adverse Action Class member will receive a check for $75.00"); *Brown v. Lowe's*, 5:13-cv-00079, ECF No. 173 (W.D.N.C. Nov. 1, 2016) (approval of a pre-adverse action claim in which the gross recovery was $60 per class member); *Fernandez v. Home Depot USA, Inc.*, No. 13-cv-648-DOC-RNB, ECF No. 59 (C.D. Cal. Jan. 22, 2016) (approval of FCRA background check settlement where claimants received $15 to $100 each).

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"Under a fee-shifting statute such as the FCRA, *see* 15 U.S.C. § 1681n(a)(3), the lodestar method is generally the correct method for calculating attorneys' fees." *Yeagley v. Wells Fargo & Co.*, 365 F. App'x 886, 887 (9th Cir. 2010) (citing *Staton v. Boeing Co.*, 327 F.3d 938, 965 (9th Cir. 2003)). Under this method, attorneys are awarded an amount calculated by multiplying the hours they reasonably expended on the litigation by their reasonable hourly rates. *Staton*, 327 F.3d at 965. But adjustments to the lodestar method are "sometimes appropriate and justify the use of a 'lodestar multiplier.'" *Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 453 (E.D. Cal. 2013). "Risk multipliers incentivize attorneys to represent class clients, who might otherwise be denied access to counsel, on a contingency basis." *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 741 (9th Cir. 2016). Here, however, Plaintiff's Class counsel is not seeking a multiplier, but is requesting less than their lodestar. Moreover, the Ninth Circuit has generally approved and may consider the percentage-of-recovery method. "Under the percentage-of-recovery method, the attorneys' fees equal some percentage of the common settlement fund." *Online DVD-Rental*, 779 F.3d at 949. Regardless of the method, "courts are vested with broad discretion in determining the amount of the attorney fees to be allowed and the general standard is one of 'reasonableness' in terms of the circumstances of each case." Attorney Fees—Standards for Assessing, 7B Fed. Prac. & Proc. Civ. § 1803.1 (3d ed.). Courts can cross check one method against the other.

To date, Plaintiff's counsel has already dedicated 415.11 hours on this case and expended more than $5,000 in costs. At the rates counsel charges for similar actions, their base lodestar totals $189,558.17, which is substantially more than the fee they are requesting. Ryan Decl. ¶ 19.

Plaintiff's counsel have specialized knowledge of the legal and technological issues necessary to succeed in high-stakes FCRA litigation and used that experience to obtain a settlement that will allow the Settlement Class to obtain relief sooner and with more certainty than through litigation. *See id.* ¶¶ 8-9, 22-23. Class Counsel persistently pursued data and

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documents from Umpqua, diligently reviewed that information, and expertly analyzed it to establish the claims of Plaintiff and the Class, despite the inherent risks involved in bringing this FCRA class action (as evidenced in, *e.g.*, *Spokeo*). *See* Ryan Decl. ¶¶ 11-17.

As a cross check, counsel's fee request represents 33.33 percent of the Settlement Fund which is a reasonable cross check under Ninth Circuit case law. *See, e.g.*, *Barbosa*, 297 F.R.D. at 450 (collecting class cases awarding approximately one-third of the common benefit fund). "The exact percentage awarded, however, varies depending on the facts of the case." *Id.* at 448 (finding that settlement agreement award of 33 percent of the total settlement was "fair and reasonable" based, in part, on the results achieved, the risks involved, skill required and quality of work performed, and the contingent nature of the representation) (quoting *Knight v. Red Door Salons, Inc.*, No. 08–01520 SC, 2009 WL 248367, at *3 (N.D. Cal. Feb. 2, 2009)); *see also In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1377 (N.D. Cal. 1989) ("nearly all common fund awards range around 30%"); *In re Heritage Bond Litig.*, No. 02-ML-1475 DT (C.D. Cal. 2005) (awarding attorneys' fees equal to one-third of common fund in complex class action and noting that "the brunt of the risk [of bringing the case] was absorbed by only two firms").

The Settlement treats all Settlement Class Members equally and fairly and the process for receiving settlement funds is simple. Every Settlement Class Member will receive notice and an opportunity to opt-out of the Settlement Fund, either online or by mail. Ryan Decl., Ex. 1, ¶¶ 5, 25-29. All Settlement Class Members who do not opt out will automatically receive equal payments. *Id.*, Ex. 1 ¶ 24(d). If, after checks have been distributed, any amount remains in the Settlement Fund, this amount will be donated to charity. *Id.* None of the Settlement Fund will revert to Umpqua. *Id.*

In their fee petition, Plaintiff's counsel will provide further documentation supporting their reasonable fee request.

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D. The Requested Incentive Award Is Reasonable

"[I]ncentive awards that are intended to compensate class representatives for work undertaken on behalf of a class 'are fairly typical in class action cases.'" *Online DVD-Rental*, 779 F.3d at 943 (quoting *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009)). Incentive awards are generally approved so long as the awards are reasonable and do not undermine the adequacy of the class representatives. *See Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157, 1164 (9th Cir. 2013) (finding incentive award must not "corrupt the settlement by undermining the adequacy of the class representatives and class counsel"). For example, if a settlement explicitly conditions an incentive award on the class representative's support for the settlement, the incentive award is improper. *See id.* By contrast, where a settlement "provide[s] no guarantee that the class representatives would receive incentive payments, leaving that decision to later discretion of the district court," an incentive award may be appropriate. *Online DVD-Rental*, 779 F.3d at 943.

Ms. Connolly will request an incentive award, not to exceed $2,500. Plaintiff's support of the settlement is independent of any service award and not conditioned on the Court awarding any particular amount or any award. Thus, Plaintiff's adequacy as class representative is unaffected by any incentive award that recognizes her efforts and contributions to the case. Plaintiff believes that the proposed incentive award is reasonable under the circumstances and well in line with awards approved by federal courts in Washington and elsewhere. *See, e.g.*, *Pelletz v. Weyerhaeuser Co.*, 592 F. Supp. 2d 1322, 1329–30 & n.9 (W.D. Wash. 2009) (approving $7,500 service awards and collecting decisions approving awards ranging from $5,000 to $40,000).

E. The Proposed Notice Program Is Constitutionally Sound

Rule 23(e)(1) requires the court to "direct notice in a reasonable manner to all class members who would be bound by" a proposed settlement. Fed. R. Civ. P. 23(e)(1); *see also* MCL 4th § 21.312. The best practicable notice is that which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an

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opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

According to the Manual for Complex Litigation, a settlement notice should: (1) define the class; (2) describe clearly the options open to the class members and the deadlines for taking action; (3) describe the essential terms of the proposed settlement; (4) disclose any special benefits provided to the class representatives; (5) indicate the time and place of the hearing to consider approval of the settlement, and the method for objecting to or opting out of the settlement; (6) explain the procedures for allocating and distributing settlement funds, and, if the settlement provides different kinds of relief for different categories of class members, clearly set out those variations; (7) provide information that will enable class members to calculate or at least estimate their individual recoveries; and (8) prominently display the address and phone number of class counsel and the procedures for making inquiries. MCL 4th § 21.312.

The proposed forms of notice, the postcard Notice attached as Exhibit B-1 to the Settlement Agreement ("Notice"), and the Longform Notice, attached as Exhibit B-2, satisfy all of the above criteria. The Notices are clear and straightforward. The postcard Notice advises Settlement Class Members of the existence of the settlement, and explains how to get more information. The Longform Notice provides the key details of the Settlement. Together these provide persons in the Settlement Class with enough information to evaluate whether to participate in the Settlement. Thus, the Notice plan satisfies the requirements of Rule 23. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808 (1985) (explaining a settlement notice must provide settlement class members with an opportunity to present their objections to the settlement).

The Settlement Agreement provides for direct notice via U.S. Mail of the postcard notice to members of the Settlement Class, many of whom are current or former employees of Umpqua. Ryan Decl., Ex. 1 ¶¶ 5, 25-29. The plan calls for email or U.S. Mail notice of the

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Longform Notice. The Settlement Administrator will also establish a website for this action which will contain key documents, including the settlement agreement and supporting documents, the plaintiff's fee application, the complaint, and Court orders. The Notice plan constitutes the best notice practicable under the circumstances, provides due and sufficient notice to the Settlement Class, and fully satisfies the requirements of due process and Federal Rule of Civil Procedure 23.

F. Provisional Certification Of The Settlement Class Is Appropriate

The Settlement Class meets the rigorous predominance certification standards recently described in *In Re Hyundai and Kia Fuel Economy Litigation*, No. 15-56014 (9th Cir. Jan. 23, 2018), because there are no significant factual or legal differences among class members – all signed disclosure and authorizations, all had their credit reports accessed, and all are subject to the protections of the FCRA. Plaintiff therefore requests that the Court provisionally certify the Settlement Class for settlement purposes.

1. The Rule 23(a) factors are met

a. Numerosity

"The prerequisite of numerosity is discharged if 'the class is so large that joinder of all members is impracticable.'" *Hanlon*, 150 F.3d at 1019 (quoting Fed. R. Civ. P. 23(a)(1)). Here, the Settlement Class consists of an estimated 3,871 persons. The large number of persons in the Settlement Class renders joinder impracticable. *See McCluskey v. Trs. of Red Dot Corp. Emp. Stock Ownership Plan & Trust*, 268 F.R.D. 670, 674 (W.D. Wash. 2010).

b. Commonality

The commonality requirement of Rule 23(a)(2) is satisfied because there are many questions of law and fact common to the Settlement Class that focus on Umpqua's alleged common practice of using unlawful disclosure forms to obtain credit and background checks on employees and job applicants. *See, e.g., Ramirez v. Trans Union, LLC*, 301 F.R.D. 408, 417-18

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(N.D. Cal. 2014) (finding question of law or fact was common to putative class as required for FCRA disclosure claim).

c. Typicality

"[R]epresentative claims are typical if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. "Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." *Hanon v. Dataprods. Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). Here, Plaintiff's claim is premised on the same conduct as the claims of proposed class members. Plaintiff and proposed class members each received the same or substantially similar disclosure forms from Umpqua, and each was given a disclosure form for the purpose of obtaining background and credit checks. Thus, Plaintiff's claims under the FCRA arise out of the same course of conduct, are based on the same legal theory, and resulted in the same injury as the claims of the proposed class. Accordingly, the typicality requirement is satisfied.

d. Adequacy

The final Rule 23(a) prerequisite requires that the representative parties have and will continue to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This factor has two components: (1) the named representatives must appear able to prosecute the action vigorously through qualified counsel, and (2) the representatives must not have antagonistic or conflicting interests with the unnamed members of the class. *See Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1031 (9th Cir. 2012).

Plaintiff has the same interests as the proposed class members—who all allegedly received unlawful disclosure forms from Umpqua in violation of the FCRA. Plaintiff is willing and able to prosecute this case, and has done so. Plaintiff does not have any interests that are antagonistic to the interests of the proposed class. Plaintiff's counsel are active practitioners

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with substantial experience in class action litigation, including FCRA cases. Ryan Decl. ¶¶ 8-9, 22-23. The Rule 23(a) requirements are satisfied.

2. The Rule 23(b)(3) factors are satisfied

Rule 23(b)(3)'s predominance requirement tests whether proposed classes are "sufficiently cohesive to warrant adjudication by representation." *Hanlon*, 150 F.3d at 1022 (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). The predominance inquiry measures the relative weight of the common questions. *Amchem*, 521 U.S. at 624. Common issues predominate here because the central liability question in this case — whether Umpqua used unlawful disclosure forms to obtain credit and background checks on employees and applicants — can be established through generalized evidence. *See, e.g.*, *Ramirez*, 301 F.R.D. at 421 (predominance requirement met where question of whether defendant used unlawful disclosure form under FCRA was common question among all class members).

Because the claims are being certified for purposes of settlement, there are no issues with manageability. *Amchem*, 521 U.S. at 620 ("Confronted with a request for settlement-only certification, a district court need not inquire whether the case, if tried, would present intractable management problems … for the proposal is that there be no trial."). Additionally, resolution of thousands of claims in one action is far superior to individual lawsuits and promotes consistency and efficiency of adjudication. *See id.* at 617 (noting the "policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights"). Certification for purposes of settlement is appropriate.

G. Scheduling A Final Approval Hearing Is Appropriate

The last step in the settlement approval process is a final approval hearing at which the court may hear all evidence and argument necessary to make its settlement evaluation. Proponents of the settlement may explain the terms and conditions of the settlement agreement, and offer argument in support of final approval. The court will determine after the final

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approval hearing whether the settlement should be approved, and whether to enter a final order and judgment under Rule 23(e). Plaintiff requests that the Court set a date for a hearing on final approval at the Court's convenience, but no earlier than 90 days after entry of an order preliminarily approving the settlement and 30 days after the objection/exclusion deadline.

IV. CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that the Court: (1) grant preliminary approval of the settlement based on the submissions of pleadings, and without a formal hearing; (2) provisionally certify the proposed class; (3) appoint as Class Counsel the law firms of Bailey and Glasser LLP and the Law Office of Nicholas F. Ortiz, P.C.; (4) appoint Sarah Connolly as class representative; (5) approve the proposed notice plan; (6) appoint JND to serve as the Settlement Administrator; and (7) schedule the final fairness hearing at the Court's convenience but no earlier than 90 days following entry of the Preliminary Approval Order and 30 days after the Exclusion/Objections deadline.

RESPECTFULLY SUBMITTED AND DATED this 25th day of June 2018.

By: */s/ Elizabeth Ryan*

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CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to counsel of record.

/s/ Elizabeth Ryan
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