KEMAL HAMEED, on behalf of himself and others similarly situated, Claimant, v. PHARMACANN, INC., Respondent.	Arbitrator Michael Russell

CLAIMANT'S NOTICE AND UNOPPOSED MOTION FOR PRELIMINARY CLASS ACTION SETTLEMENT APPROVAL AND MEMORANDUM OF LAW

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Claimant Kemal Hameed submits this notice, motion and memorandum of law for preliminary approval of the class settlement reached by Claimant and Respondent PharmaCann, Inc. ("PharmaCann" or "Respondent") (together with Claimant, the "Parties"). The proposed settlement is fair, reasonable, and adequate, and satisfies all of the criteria for preliminary approval under applicable federal law. Accordingly, Claimant respectfully requests that the Arbitrator: (1) grant preliminary approval of the settlement on the terms set forth in the Settlement Agreement and Release ("Settlement Agreement"), attached as Exhibit A to the Declaration of Christopher M. McNerney in Support of Claimant's Unopposed Motion for Preliminary Class Action Settlement Approval and Memorandum of Law ("McNerney Decl.")1; (2) conditionally certify the proposed class, for settlement purposes only, under Federal Rule of Civil Procedure 23(b)(3); (3) appoint Claimant's Counsel, Outten & Golden LLP ("O&G") as Class Counsel; (4) approve the proposed notice papers attached as Exhibit 2 to the Settlement Agreement, and direct their distribution; and (5) schedule a fairness hearing to assess final approval of the settlement.

A proposed order granting preliminary approval is attached for the Arbitrator's consideration as Exhibit 1 to the Settlement Agreement.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Allegations

Claimant alleges that Respondent failed to obtain written authorization to run background checks, or disclose that it was running background checks, from Respondent's applicants and employees, in violation of Section 1681(b)(b)(2)(A)(i) and (ii) of the Fair Credit Reporting Act ("FCRA").

In December 2021, Claimant applied for a position as a Cultivation Technician in Maryland

[1] Unless otherwise indicated, all Exhibits are attached to the McNerney Declaration and all capitalized terms have the definitions set forth in the Settlement Agreement.

with Forward Gro, a Maryland medical marijuana company subsequently acquired by Respondent, a cannabis company with locations across the country. He attended an interview on January 11, 2022. After offering Claimant the position on or about January 14, 2022, Respondent procured a background check from the consumer reporting agency Court Record Searches on or around January 19 without Claimant's knowledge or permission. Claimant only learned that Respondent had procured a criminal background check when Senior Manager Courtney Carroll told him he could not be hired because of his arrest. Claimant alleges that Respondent then denied employment to Mr. Hameed because of his criminal history.

B. Overview of Investigation, Informal Discovery, and Settlement Negotiations

Before the initiation of this action, Claimant's Counsel conducted a thorough investigation into the merits of the potential claims and defenses. Claimant's Counsel focused their investigation and legal research on the underlying merits of the potential class action members' claims, the damages to which they were entitled, and the propriety of class action certification. Claimant's Counsel obtained and reviewed documents from Claimant related to his employment application and criminal history. Claimant's Counsel also conducted in-depth interviews of Claimant.

As a result of this investigation, on or about September 7, 2023, Claimant sent a letter to Respondent to explore a pre-litigation resolution of their dispute. The parties subsequently conferred, agreed to explore settlement discussions, and entered into a classwide tolling agreement.

In anticipation of mediation, the parties exchanged information regarding the claims at issue and Respondent's investigative efforts, and determined the contours of the potential impacted group of individuals. The parties also began to negotiate over a class settlement, but determined that the involvement of a mediator would be required, and thus exchanged mediator proposals and eventually scheduled a mediation with the well-respected mediator, R. Scott Callen, for April 18, 2024. In advance of the mediation, the parties put together mediation briefs, which they provided

to the mediator, and Claimant also shared his mediation brief with Respondent.

On April 18, 2024, the Parties participated in a mediation with Mr. Callen. After a full day of mediation, the parties reached agreement in principle as to a classwide settlement, and executed a term sheet. Over the next months, the parties negotiated a full class settlement agreement, including as notice papers, which was finalized and executed by the parties by December 18, 2024.

II. SUMMARY OF THE SETTLEMENT TERMS

A. The Settlement Fund

The Settlement Agreement creates a fund of $115,000.00 ("Gross Settlement Amount"), which covers payments to the class, attorneys' fees and costs, settlement administrative costs, and a $5,000 service payment to Claimant. *E.g.*, Ex. A (Settlement Agreement) §§ II.27. The class includes all applicants for employment to PharmaCann who were subject to a background check for employment purposes in Maryland, between September 7, 2021 and December 18, 2024. There are 66 Class Members.

B. Release

As to the release, each Class Members:

> on behalf of him or herself and to the extent allowable under law their respective heirs, executors, administrators, representatives, agents, attorneys, partners, successors, predecessors-in-interest, and assigns, will be deemed to have fully released and forever discharged Pharmacann, and each and all of its present, former and future direct and indirect parent companies, subsidiaries, successors, and/or predecessors in interest and all of the aforementioned respective officers, directors, employees, attorneys, majority or controlling shareholders, and assigns (together, the "**Released Parties**") from any and all rights, duties, obligations, claims, actions, causes of action or liabilities, whether arising under local, state or federal law, whether by Constitution, statute, contract, rule, regulation, any regulatory promulgation (including, but not limited to, any opinion or declaratory ruling), common law or equity, whether known or unknown, suspected or unsuspected, asserted or unasserted, foreseen or unforeseen, actual or contingent, liquidated or unliquidated, punitive or compensatory as of the date of Preliminary Approval that arise out of or are related in any way to Pharmacann' disclosure and compliance with 15 U.S.C. §§1681b(b)(2)(A)(i)-(ii), and any other analogous state or federal statutory or common law claim (including, but not limited to, for invasion of

privacy) arising out of the application for employment (the "**Released Claims**"). Pharmacann' vendors, including any consumer reporting agencies providing Pharmacann with consumer reports for employment purposes, are specifically excluded from the definition of "**Released Parties**."

Ex. A (Settlement Agreement) § III.H.

C. Allocation Formula

All Claimants who do not opt out will receive a *pro rata* portion of the Net Settlement Fund. Ex. A (Settlement Agreement) § III.G.1. Any funds remaining from any unclaimed checks will be donated to the The Weldon Project, the *cy pres* designee. *See* Ex. A (Settlement Agreement) § III.G.3. There is no reversion to Respondent.

D. Attorneys' Fees, Costs, and Service Award

Claimant will apply for up to one-third of the Gross Settlement Amount for Claimant's attorneys' fees, and will also seek reimbursement of actual out-of-pocket costs. Ex. A (Settlement Agreement) § III.I. Claimant will also apply for a service payment of $5,000.00 in recognition of the services Claimant provided on behalf of the class. *Id.* § III.G.1. Claimant will submit his application for attorneys' fees and costs and a service award simultaneously with his motion for final approval of the Settlement.

III. CLASS ACTION SETTLEMENT PROCEDURE

Rule 23's class action settlement procedure includes three distinct steps:

1. Preliminary approval of the proposed settlement after submission of a written motion for preliminary approval;

2. Dissemination of notice of settlement to all affected Class Members; and

3. A final settlement approval hearing at which Class Members may be heard regarding the settlement, and at which arguments concerning the fairness, adequacy, and reasonableness of the settlement may be presented.

See Fed. R. Civ. P. 23(e); *see also* Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* ("Newberg") §§ 11.22, *et seq.* (4th ed. 2002). This process safeguards Class Members' procedural

due process rights and enables the fact finder to fulfill its role as the guardian of the class's interests. With this motion, Claimant requests that the Arbitrator take the first step—granting preliminary approval of the Settlement Agreement, conditionally certifying the class, and approving Claimant's proposed notice and ordering its distribution.

The Parties respectfully submit the following proposed schedule for final resolution of this matter for the Arbitrator's consideration and approval:

- Notice will be sent to Class Members within thirty (30) days following entry of the Preliminary Approval Order (i.e., the "Notice Deadline");
- Class Members will have sixty (60) days after the Notice Deadline to opt out or object to the Settlement (the "Opt-Out and Objection Deadline");
- Plaintiff's Counsel will final a motion for final approval of the class action settlement, as well as approval of fees, costs and services awards, within fourteen (14) days after the Opt-Out and Objection Deadline; and
- The Arbitrator will set a Final Approval hearing for no earlier than twenty (20) days after the Opt-Out and Objection Deadline.

Ex. A (Settlement Agreement) § III.B.1.

IV. PRELIMINARY APPROVAL OF THE SETTLEMENT IS APPROPRIATE BECAUSE IT IS FAIR, ADEQUATE, AND REASONABLE.

There is a strong policy in favor of settlement, in order to conserve scarce resources that would otherwise be devoted to protracted litigation. *See In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158-59 (4th Cir. 1991); *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 663 (E.D. Va. 2001); *see also Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594-95 (3d Cir. 2010) (there is an "especially strong" presumption in favor of voluntary settlements "in class actions . . . where substantial judicial resources can be conserved by avoiding formal litigation"); Newberg § 11.41 ("The compromise of complex litigation is encouraged by the courts and favored by public policy."). This includes the "strong initial presumption" in class action cases "that the

compromise is fair and reasonable." *In re MicroStrategy*, 148 F. Supp. 2d at 663 (internal quotation marks omitted).

Preliminary judicial approval is the first step in the settlement process. *See Horton v. Merrill Lynch, Pierce, Fenner & Smith. Inc.*, 855 F. Supp. 825, 827 (E.D.N.C. 1994). It allows notice to issue and for class members to object or opt out of the settlement. Preliminary approval "is at most a determination that there is what might be termed 'probable cause' to submit the proposal to class members and hold a full-scale hearing as to its fairness." *In re Outer Banks Power Outage Litig.*, No. 17 Civ. 141, 2018 WL 2050141, at *2-5 (E.D.N.C. May 2, 2018) (quoting *Menkes v. Stolt-Nielsen S.A*., 270 F.R.D. 80, 101 (D. Conn. 2010)). In other words, the purpose of the preliminary approval is to determine that the proposed settlement agreement is "sufficiently within the range of reasonableness." *Id.* at *3 (citations omitted).

Arbitrators assess a proposed class settlement to determine whether, as a whole, it is fair, reasonable, and adequate to class members. *United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999); Fed. R. Civ. P. 23(e)(2). The Fourth Circuit has advised fact finders to evaluate the following factors in determining whether to approve a class action settlement: (1) whether the settlement was the product of good faith bargaining, at arm's length, and without collusion; (2) the relative strength of the parties' cases, as well as the uncertainties of litigation on the merits, and the existence of difficulties of proof or strong defenses that the Claimants are likely to encounter at trial; (3) the complexity, expense and likely duration of additional litigation; (4) the solvency of the Respondents and the likelihood of recovery on a litigated judgment; and (5) the degree of opposition to the settlement by class members. *In re Jiffy Lube Sec. Litig.*, 927 F.2d at 159; *see also Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir.1975), *cert. denied*, 424 U.S. 967 (1976);

S.C. Nat. Bank v. Stone, 139 F.R.D. 335, 338-39 (D.S.C. 1991). The relevant factors support preliminary approval here.

A. The Proposed Settlement Is the Product of Good-Faith Bargaining During Extensive, Arm's-Length Negotiations Between Experienced Counsel.

In determining if a class settlement was reached in good faith, the Fourth Circuit advises fact finders to examine: (1) the posture of the case at the time settlement was proposed; (2) the extent of discovery that had been conducted; (3) the circumstances surrounding the negotiations; and (4) the experience of counsel in the area of class action litigation. *In re Jiffy Lube Sec. Litig.*, 927 F.2d at 159. Substantial weight is given to the experience of the attorneys who prosecuted and negotiated the class settlement. *In re Bldg. Materials Corp. of Am. Asphalt Roofing Shingle Prod. Liab. Litig.*, No. 11 Mn. 02000, 2014 WL 12621614, at *4 (D.S.C. Oct. 15, 2014); *Muhammad v. Nat'l City Mortg., Inc.*, No. 07 Civ. 423, 2008 WL 5377783, at *4 (S.D. W. Va. Dec. 19, 2008) (citing Newberg § 11.28); *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 255 (E.D. Va. 2009); *see also In re MicroStrategy*, 148 F. Supp. 2d at 665 (holding "appropriate for the court to give significant weight to the judgment of class counsel that the proposed settlement is in the interest of their clients and the class as a whole, and to find that the proposed partial settlement is fair").

Here, the proposed settlement resulted from arm's-length negotiations between counsel well versed in the employment and FCRA claims and issues in this case. Claimant's Counsel, O&G, is a private law firm specializing in class action employment litigation and has been recognized repeatedly as well qualified class action counsel, including in FCRA cases. *E.g.*, *Reed v. Balfour Beatty Rail, Inc.*, No. 21 Civ. 1846, ECF No. 48 (C.D. Cal. Jan 11, 2023) (granting preliminary approval of FCRA disclosure settlement, and finding O&G to be adequate and appointing them as class counsel); *see also Houser v. Census*, 28 F. Supp. 3d 222, 248 (S.D.N.Y.

2014) (finding O&G "bring[s] to the case a wealth of class action litigation experience" and was adequate to represent approximately half-million person African American and Latino job applicant class in background check litigation); *see also* McNerney Decl. ¶¶ 4-10. Likewise, Respondent was well represented by experienced counsel.

Although the Parties settled early in the case, the Parties engaged in sufficient discovery prior to settlement to fully evaluate the merits of the case and perform damages calculations, and then engaged in vigorous negotiations before, during, and after the mediation. *See In re Jiffy Lube Sec. Litig.*, 927 F.2d at 159 (approving settlement, holding that although the settlement was reached early in the litigation before formal discovery had occurred, "documents filed by Claimants and evidence obtained through informal discovery yielded sufficient" information). At all times, the parties' negotiations were at arm's-length, and resulted in a settlement that Claimant's counsel believe is in the best interest of the class, that was achieved with the assistance of a well-respected mediator.

Accordingly, because the negotiations were conducted through robust months of arm's-length negotiations between experienced parties and a mediator, this factor supports a finding that the Settlement Agreement is fair, adequate, and reasonable.

B. The Relative Strength of the Parties' Positions and Complexity of Protracted Litigation Support Approval of the Settlement.

In evaluating the strength of a case on the merits balanced against a proposed settlement, fact finders refrain from reaching conclusions on issues that have not been fully litigated. *See S.C. Nat. Bank*, 139 F.R.D. at 339 (citing *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n. 14 (1981)). Because the object of settlement is to avoid, not confront, the determination of contested issues, the approval process should not be converted into an abbreviated trial on the merits. *See Flinn*, 528 F.2d at 1172-73 (noting that the settlement hearing is not "a trial or a rehearsal of the trial").

Although Claimant believes his FCRA claim has merit, Claimant also recognizes that he would face significant legal and procedural obstacles in establishing liability and recovering damages. Indeed, "[i]f settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome." *In re Ira Haupt & Co.,* 304 F. Supp. 917, 934 (S.D.N.Y. 1969).

Here, the Class faces several real risks. *First*, the class recovery is predicated on achieving statutory damages, which requires establishing willfulness, and are limited to a range of $100-$1,000 per violation. *See* 15 U.S. § 1681n. Claimant would have to engage in significant motion practice to establish willfulness, and it is not at all certain Claimant would succeed at summary judgment or trial. For example, Respondent would likely argue that willfulness is undercut by the fact that the company states it proactively addressed the background check issues once it learned of them. Respondent would also likely argue that statutory damages on the higher end of the spectrum would be impermissible given the circumstances of the case. While Claimant believes he has persuasive answers to these points, he also recognizes there is risk that this settlement addresses, by providing a certain, substantial recovery now. *See, e.g.*, *In re Uber FCRA Litig.*, No. 14 Civ. 05200, 2017 U.S. Dist. LEXIS 101552, at *21 (N.D. Cal. June 29, 2017) (finding a litigation risk in an FCRA case based on defendant's contention that "Plaintiffs did not suffer any actual harm, given that any alleged violations were merely technical"); *Schofield v. Delta Air Lines, Inc.*, No. 18 Civ. 00382, 2019 U.S. Dist. LEXIS 31535, at *16 (N.D. Cal. Feb. 27, 2019) ("[C]lass members['] ability to recover under the FCRA depends on a finding of willfulness. If they cannot show willfulness, they can only receive actual damages which may be as little as none.") (citation omitted). *Second*, the class size is relatively small, which limits potential recovery. *Third*, the risk of obtaining class certification pursuant to Rule 23(b)(3) and maintaining it through trial also is present. A class has not yet been certified and such a determination would be reached only after extensive briefing by both

parties. Respondent may argue that individual questions preclude class certification. Should a class be certified, Respondent would likely later challenge certification and move to decertify, requiring another round of briefing. Respondent might also seek permission to file an interlocutory appeal under Rule 23(f). *See, e.g.*, *Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, 659 F.3d 234 (2d Cir. 2011).

Risk, expense, and delay permeate litigation. Settlement eliminates this risk, expense, and delay. In contrast to this uncertainty, this settlement provides for significant compensation to Class Members. Class Members are entitled to a pro rata percentage of the settlement, with estimated payments of approximately $1,742 as gross recovery (i.e., $115,000/66).

Given that Claimant has alleged two violations of the FCRA, and statutory damages range from $100-$1,000 per violation based on a showing of willfulness, 15 U.S. § 1681n(a)(1)(A), the gross recovery here represents approximately $87% of the maximum statutory recovery they could receive – assuming two violations of the FCRA.[2] This is an excellent recovery. *See, e.g.*, *Reed v. Balfour Beatty Rail, Inc.*, No. 21 Civ. 1846, 2023 U.S. Dist. LEXIS 128546, at *11 (C.D. Cal. June 22, 2023) (finally approving FCRA and California state law settlement recovering approximately 21% of maximum damages); *Hawkins v. S2Verify*, No. 15 Civ. 3502 WHA, 2016 U.S. Dist. LEXIS 153576, at *3 (N.D. Cal. Nov. 4, 2016) (approving an FCRA settlement amount of roughly 25% of total potential liability).

When a settlement assures immediate payment of substantial amounts to class members, "even if it means sacrificing speculative payment of a hypothetically larger amount years down the road," the settlement is reasonable. *Gilliam v. Addicts Rehab. Ctr. Fund*, No. 05 Civ. 3452, 2008 WL

[2] Indeed, given that the parties dispute whether a claimant is entitled to recover separate statutory damages for disclosure and authorization claims, this recovery might well represent more than the maximum statutory damages recovery that Class Members could recover at trial.

782596, at *5 (S.D.N.Y. Mar. 24, 2008) (internal quotation marks and citation omitted). Here, in light of the Class recovery, the settlement is more than reasonable.

Accordingly, this factor also favors preliminary approval.

C. Respondent's Solvency Does Not Impact Preliminary Approval.

When comparing the amount of the settlement with the potential liability of the Respondent, the Fourth Circuit advises fact finders to consider a Respondent's ability to pay any subsequent judgment and the availability or lack thereof of insurance proceeds. *See Jiffy Lube*, 927 F.2d at 159. However, where a company is in no danger of becoming insolvent, this factor does not impede settlement approval. *See, e.g.*, *Temp. Servs., Inc. v. Am. Int'l Grp., Inc.*, No. 08 Civ. 271, 2012 WL 13008138, at *11 (D.S.C. July 31, 2012); *Gray v. Talking Phone Book*, 2012 WL 12978113, at *6 (D.S.C. Aug. 13, 2012) (company's "ability to pay is not in question and does not raise questions about the circumstances or adequacy of the Settlement."); *Clark v. Experian Info. Sols., Inc.*, 2004 WL 256433, at *9 (D.S.C. Jan. 14, 2004) ("The court has also considered but given little weight to the fourth *Jiffy Lube* factor: Defendant's ability to pay such judgments as could be rendered against it were this action to proceed to trial. This factor is either neutral or slightly favors settlement.").

Here, there is no record of a risk for insolvency. Thus, this factor does not impact the preliminary approval analysis.

D. Degree of Opposition to the Settlement Voiced by Class Members Can Be Evaluated at Final Approval.

As stated by the Fourth Circuit, "[t]he attitude of the members of the class, as expressed directly or by failure to object, after notice, to the settlement, is a proper consideration for the trial court[.]" *Flinn*, 528 F.2d at 1173. Because Class Members have not been notified of the settlement at this stage, the Arbitrator will be in a better position to fully analyze this factor after notice issues

and Class Members have had an opportunity to opt out or object to the settlement. Thus, this factor is neutral and supports Claimant's Motion to the extent it does not preclude preliminary approval.

* * *

In sum, the terms of the proposed settlement are fair and reasonable, as evidenced by application of the relevant Fourth Circuit factors, which support preliminary approval of the settlement.

V. CERTIFICATION OF THE SETTLEMENT CLASS IS APPROPRIATE.

For settlement purposes, Claimant seeks to certify the following class:

> All applicants for employment to Respondent in Maryland who were subject to a background check for employment purposes, between September 7, 2021 and December 18, 2024.

Under Rule 23(a), a class action may be maintained if all of the prongs of Rule 23(a) are met, as well as one of the prongs of Rule 23(b). Rule 23(a) requires that:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Rule 23(b)(3) 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).

A. Numerosity

Numerosity requires that the class be so numerous that "joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "There is no mechanical test for determining whether in

a particular case the requirement of numerosity has been satisfied." *Kelley v. Norfolk & W. Ry.,* 584 F.2d 34, 35 (4th Cir. 1978). However, the Fourth Circuit has indicated that a class with over thirty members is numerous enough to satisfy this inquiry. *See Williams v. Henderson*, 129 F. App'x 806, 811 (4th Cir. 2005) (citation omitted).

Here, there are 66 Class Members. Accordingly, the settlement class meets Rule 23(a)'s numerosity requirement.

B. Commonality

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." "Commonality is satisfied where there is one question of law or fact common to the class, and a class action will not be defeated solely because of some factual variances in individual grievances." *Jeffreys v. Commc'ns Workers of Am., AFL-CIO*, 212 F.R.D. 320, 322 (E.D. Va. 2003); *see also Woodard v. Online Info. Servs.*, 191 F.R.D. 502, 505 (E.D.N.C. 2000) (citing *Holsey v. Armour & Co.,* 743 F.2d 199, 216-217 (4th Cir. 1984) and *Brown v. Eckerd Drugs, Inc.*, 663 F.2d 1268, 1275 (4th Cir. 1981)). "Commonality requires the [Claimant] to demonstrate that the class members have suffered the same injury." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-50 (2011) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)) (internal quotation marks omitted).

Here, the common question of fact connecting the Class is whether Respondent's failure to provide authorization and disclosure forms to any Class Members violates the FCRA. Such a claim is susceptible to class treatment. *See, e.g.*, *Bebault v. DMG Mori USA, Inc.*, No. 18 Civ. 02373, 2020 U.S. Dist. LEXIS 75538, at *16 (N.D. Cal. Apr. 29, 2020) (in certifying Rule 23(b)(3) class seeking damages for violations of the FCRA's disclosure requirement, finding commonality and predominance satisfied when classwide violations were based on "the same disclosure form," because "[t]he legality vel non of the disclosures . . . is answerable in one fell swoop for the entire

class"); *Esomonu v. Omnicare, Inc.*, No. 15 Civ. 0003, 2018 U.S. Dist. LEXIS 142110, at *10-11 (N.D. Cal. Aug. 21, 2018) (in certifying Rule 23(b)(3) class asserting FCRA disclosure claims, finding commonality and predominance satisfied because "Plaintiff alleges that Defendant's forms were in violation of federal and state law in the same way for all class members, and that those violations were the result of the same set of actions and decisions"); *see also Fisher v. Va. Elec. & Power Co.*, 217 F.R.D. 201, 223 (E.D. Va. 2003) (finding commonality met when defendant engaged in common course of conduct).

C. Typicality

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." In the typicality analysis, "[a] class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 (4th Cir. 2001). "Nevertheless, the class representatives and the class members need not have identical factual and legal claims in all respects. The proposed class satisfies the typicality requirement if the class representatives assert claims that fairly encompass those of the entire class, even if not identical." *Fisher*, 217 F.R.D. at 212.

In this case, "[b]ecause the claims of the representative parties are the same as the claims of the class, the typicality requirement is satisfied." *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 339 (4th Cir. 2006) (Michael, J., dissenting). Like the putative class, Claimant was not provided with an authorization or disclosure form before a background check was run. Typicality is met because promoting Claimant's interest will "simultaneously tend to advance the interests of the absent class members." *Deiter v. Microsoft Corp*., 436 F.3d 461, 466 (4th Cir. 2006).

D. Adequacy of the Named Claimant

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "[T]he class representatives must adequately represent the interests of the class members[.]" *Jeffreys*, 212 F.R.D. at 323; *see also* Fed. R. Civ. P. 23(g). The adequacy of representation requirement is met here. Claimant understands and has accepted the obligations of a class representative, has adequately represented the interests of the putative class, and has retained experienced counsel who have handled numerous employment and FCRA class actions. Moreover, there is no evidence that Claimant has interests that are antagonistic to or at odds with those of putative Class Members; instead, Claimant suffered the same alleged FCRA violations as members of the putative class.

E. Certification Is Proper Under Rule 23(b)(3).

Rule 23(b)(3) requires that common questions of law or fact not only be present, but also that they "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). This inquiry examines "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Tyson Foods Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). For the purposes of settlement, these requirements are met.

1. Common Questions Predominate.

The Rule 23(b)(3) predominance inquiry tests whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc.*, 521 U.S. at 623. The predominance inquiry focuses on the balance between individual and common issues. *Brown v. Nucor Corp.*, 785 F.3d 895, 917-21 (4th Cir. 2015). Common issues of law and fact predominate "where the same evidence would resolve the question of liability for all class members." *Beaulieu*

v. EQ Indus. Servs., Inc., No. 06 Civ. 400, 2009 WL 2208131, at *20 (E.D.N.C. July 22, 2009); *see Stillmock v. Weis Mkts.*, 385 F. App'x 267, 273 (4th Cir. 2010); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 428 (4th Cir. 2003).

Here, Claimant's common contention—that Respondent failed to provide authorization and disclosure forms mandated by the FCRA—gets to the core liability issue for the case, and will predominate over any issues affecting only individual Class Members. *See, e.g.*, *Bebault*, 2020 U.S. Dist. LEXIS 75538, at *16; *Esomonu*, 2018 U.S. Dist. LEXIS 142110, at *10-11. Moreover, damages can be mechanically applied because they are set by statute.[3]

2. A Class Action Is a Superior Mechanism.

Rule 23(b)(3) sets forth a non-exclusive list of factors pertinent to judicial inquiry into the superiority of a class action, including: the class members' interests in individually controlling the prosecution or defense of separate actions; whether individual class members wish to bring, or have already brought, individual actions; and the desirability of concentrating the litigation of the claims in the particular forum. Fed. R. Civ. P. 23(b)(3).[4]

Here, granting certification of the settlement class is superior to individual adjudication because it will conserve judicial resources and is more efficient for class members, particularly those who lack the resources to bring their claims individually, especially given the relatively small recoveries at play. *See Capsolas v. Pasta Res., Inc.*, No. 10 Civ. 5595, 2012 WL 1656920, at *2 (S.D.N.Y. May 9, 2012). Claimant and Class Members have limited financial resources with

[3] Even so, the need for individualized determination of the amount of damages suffered by putative class members would not alone defeat certification. *Gunnells*, 348 F.3d at 429 (collecting cases).

[4] On a request for a settlement-only class certification, the Arbitrator need not consider the likely difficulties in managing a class action. *See Amchem*, 521 U.S. at 620; *Carter v. Forjas Taurus, S.A.*, 701 F. App'x 759, 765 (11th Cir. 2017); *In re Outer Banks Power Outage Litig.*, 2018 WL 2050141, at *2-5.

which to prosecute individual actions. Employing the class device here will achieve economies of scale for putative class members, conserve judicial resources, and preserve public confidence in the system by avoiding repetitive proceedings and preventing inconsistent adjudications. Counsel also are unaware of any other pending litigations by potential Class Members against Respondent as to the claims raised in this case.

VI. CLAIMANT'S COUNSEL SHOULD BE APPOINTED AS CLASS COUNSEL.

O&G should be appointed as Class Counsel. Rule 23(g), which governs the standards and framework for appointing class counsel for a certified class, sets forth four criteria in evaluating the adequacy of proposed counsel: (1) "the work counsel has done in identifying or investigating potential claims in the action"; (2) "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action"; (3) "counsel's knowledge of the applicable law"; and (4) "the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A). The Arbitrator may also "consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class[.]" Fed. R. Civ. P. 23(g)(1)(B). The Advisory Committee has noted that "[n]o single factor should necessarily be determinative in a given case." Fed. R. Civ. P. 23(g).

Claimant's counsel satisfy these criteria. They have done substantial work identifying, investigating, negotiating, and settling Claimant's and putative Class Members' claims. Claimant's counsel also have substantial experience prosecuting and settling employment class actions, including FCRA cases, and the resources to do so. McNerney Decl. ¶¶ 4-10. Further, courts have repeatedly found Claimants' counsel to be adequate class counsel. *See id.*

VII. THE PROPOSED CLASS NOTICE IS APPROPRIATE.

The notice, which is attached to the Settlement Agreement as Exhibit 2, fully complies with due process and Rule 23. It is written in plain English and organized and formatted to be as

clear as possible. It describes the settlement's terms, informs putative class members about the allocation of fees and costs, and provides information as to the final approval hearing and class members' ability to exclude themselves or object and a website to find additional information. The Settlement Agreement also provides that the settlement administrative will update addresses before and then mail Arbitrator-approved notices to Class Members. *See* Ex. A (Settlement Agreement) §§ III.D, E.

VIII. CONCLUSION

For the reasons set forth above, Claimant respectfully requests that the Arbitrator grant this motion and enter the Proposed Order.

Date: January 13, 2025

Respectfully submitted,

By: /s/ _____

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