Norman E. Siegel (*pro hac vice*)
J. Austin Moore (*pro hac vice*)
STUEVE SIEGEL HANSON LLP
460 Nichols Road, Suite 200
Kansas City, MO 64112
Tel: 816-714-7100
siegel@stuevesiegel.com
moore@stuevesiegel.com

Daniel S. Robinson (SBN 244245)
ROBINSON CALCAGNIE, INC.
19 Corporate Plaza Drive
Newport Beach, CA 92660
Tel: 949-720-1288
drobinson@robinsonfirm.com

Attorneys for Plaintiff and the Class

Additional Counsel on Signature Page

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DEMETA REYES, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

EXPERIAN INFORMATION SOLUTIONS, INC.,

Defendant.

Case No. 8:16-cv-563-AG-AFMx

Hon. Andrew J. Guilford

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO DIRECT CLASS NOTICE AND GRANT PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Hearing: January 27, 2020

Time: 10:00 a.m.

Courtroom: 10D

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

I. INTRODUCTION

After nearly four years of hard-fought litigation, the parties have reached a $24 million settlement to resolve consumer claims arising out of Experian's reporting of delinquent loan accounts. The settlement—one of the largest in history relating to inaccurate reporting violations under the Fair Credit Reporting Act ("FCRA")—was achieved only after significant discovery, contested discovery-related disputes, extensive motion practice that included several dispositive motions, a successful appeal reversing a judgment in Experian's favor, an order granting class certification, and months of arm's-length negotiations through an experienced mediator.

The result is an outstanding one for class members. The settlement fund is 100% non-revisionary and will be used solely for the benefit of the Class. It will pay for the costs of notice and administration, service award payments, and attorneys' fees and costs approved by the Court—with the remaining funds to be distributed equally to class members without the need to file a claim. Accordingly, every class member will automatically receive a payment of at least $270 without having to take any action under the settlement. In light of the valuable benefits conveyed to members of the Class, and the significant risks faced through continued litigation, the Court should readily conclude that it is likely to find the Settlement "fair, reasonable, and adequate" pursuant to Rule 23(e)(2). Because the Court has already found that the prerequisites to a class action under Rules 23(a) and (b)(3) have been satisfied, Plaintiff moves the Court for an order directing class notice and scheduling a final approval hearing.[1]

[1] This request is unopposed. Plaintiff submits herewith the executed Settlement Agreement and Release ("Settlement Agreement" or "Agreement") as Exhibit A; the Declaration of Norman E. Siegel ("Siegel Dec.") as Exhibit B; and the Declaration of Christian J. Clapp ("Angeion Dec.") regarding Angeion Group's qualifications and proposed notice program as Exhibit C.

II. SUMMARY OF THE LITIGATION

A. Case filing and discovery

On February 16, 2016, Plaintiff filed a one-count putative class action against Experian in the Superior Court of California for willfully violating § 1681e(b) of the FCRA by reporting accounts furnished by Delbert Services Corp. ("Delbert") on loans originated by online lender Western Sky Financial, LLC ("Western Sky") that had been deemed illegal by numerous states. Experian thereafter removed the case to this Court. Doc. 1. Following the initial case management conference, the parties engaged in early-stage discovery. Siegel Dec., ¶ 3. On August 29, 2016, Experian filed a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) with a corresponding request for judicial notice. Docs. 35, 36. Experian's Rule 12(c) motion argued that Plaintiff's pleading did not state a claim under the FCRA because Plaintiff's Western Sky loan was not unambiguously illegal under Georgia law and Experian had no obligation to determine the legality of the loan. Doc. 35.

On September 20, 2016, Plaintiff filed a motion to amend the complaint in order to conform the allegations to newly-discovered facts and assert a narrower class definition. Doc. 39. Specifically, Plaintiff learned through discovery that Experian had intended to delete the accounts in December 2014, but failed to do so after a series of internal mistakes even after Delbert went out of business and instructed Experian to stop reporting its data. Plaintiff amended her legal theory to contend that Experian's failure to delete the Delbert accounts rendered consumers' reports materially misleading and therefore inaccurate under the FCRA. *See id*. On October 27, 2016, the Court granted the motion and Plaintiff filed a First Amended Complaint on November 23, 2016. Doc. 48. The Amended Complaint mooted Experian's Rule 12(c) motion and Experian answered the complaint on December 7, 2016. Doc. 49.

During this period, Plaintiff aggressively sought discovery from Experian and relevant third parties. Plaintiff served document requests, requests for admission, and interrogatories on Experian, and served subpoenas and Freedom of Information Act (FOIA) requests on Delbert, CashCall, and more than 30 state and federal regulatory agencies who investigated or prosecuted cases relating to Western Sky loans. After the exchange and collection of documents, Class Counsel reviewed nearly 20,000 pages of documents, including more than 13,000 pages from third-party regulators. Siegel Dec., ¶ 3.

Class Counsel also deposed several key fact witnesses, including Experian employees Mary Cheatham, Richard Hills, and Carmen Hearn, as well two corporate representatives including Experian's membership director Peter Henke, and Experian's "in-house" expert witness Kimberly Cave, who testified she has been deposed more than 200 times in litigation involving Experian. Siegel Dec., ¶ 4. Plaintiff also engaged Dean Binder, a 13-year veteran of the credit reporting industry and former employee of FICO, who submitted a 28-page expert report supporting Plaintiff's positions that the presence of the Delbert account would create a misleading impression to third-party creditors and had a negative impact on Plaintiff's credit score. *See* Doc. 57-61. Experian likewise deposed Ms. Reyes and Mr. Binder in connection with the litigation. Siegel Dec., ¶ 5.

Discovery efforts in the litigation were significant on both sides and included numerous contested disputes that required Court resolution. For example, on January 26, 2017, Plaintiff moved the Court for an order compelling the production of nearly 300 documents redacted or being withheld by Experian on privilege grounds and compelling Experian to supplement its responses to certain requests for admission and interrogatories propounded by Plaintiff. Doc. 53; Siegel Dec., ¶ 6. Following numerous rounds of briefing, oral argument, and Experian's submission of a revised privilege log and voluntary production of certain

documents (*see* Docs. 53, 56, 60, 62, 63, 66, 67, 68, 72, 75, 76, 79, 80), Magistrate Judge MacKinnon issued an order granting and denying Plaintiff's motion in part. Doc. 86. Siegel Dec., ¶ 7.

B. Motion practice

While simultaneously litigating the discovery disputes described above, the parties engaged in significant motion practice in a condensed timeframe in order to comply with the scheduling order. On January 24, 2017, Experian filed a motion for summary judgment contending that Plaintiff's report was not inaccurate under the FCRA because (1) it did not contain "patent errors" relating to the loan account; and (2) the selective reporting of only the delinquent portion of Plaintiff's loan was not misleading. Experian also argued its conduct was not "willful" as a matter of law. *See* Doc. 52. Experian's filing included 18 exhibits and declarations from Experian employees Kimberly Cave, Mary Cheatham, Peter Henke, Melynda Brooker, and David Proctor supporting its position. *See id*. Siegel Dec., ¶ 8.

On February 17, 2017, Plaintiff opposed Experian's motion in a filing that included 60 exhibits in support. Doc. 57; Siegel Dec., ¶ 9. One week later on February 24, 2017, Plaintiff filed a motion for class certification seeking to certify two alternative classes under Rule 23(b)(3), with the primary class consisting of the following individuals:

> All persons whose Experian consumer report contained an account from Delbert Services Corp. reflecting delinquency on a loan originated by Western Sky Financial, LLC after January 21, 2015 (the "Class").

Doc. 58, at 11-12.

That same day, Plaintiff filed a cross-motion for partial summary judgment, asserting that her report was inaccurate as a matter of law because (1) Experian failed to delete the Delbert account no later than January 21, 2015; and (2)

Experian selectively reported only the delinquent portion of Plaintiff's Western Sky loan in a manner that would adversely affect credit decisions. Doc. 59; Siegel Dec., ¶ 10.

Each of these filings laid out the significant evidentiary record before the Court and briefing was hotly-contested. For example, class certification briefing included a motion, memorandum in support, response in opposition, reply in support, two notices of supplemental authority, an *ex parte* application to file a sur-reply, and a response in opposition to that motion. *See* Docs. 58, 73, 77, 81, 82, 89, 93; Siegel Dec., ¶ 11. Following full briefing on these motions, the Court issued an order requesting that the parties submit a statement regarding the proper sequence for ruling on the pending motions, including a chart outlining the various intersections between the cross-motions for summary judgment and motion for class certification. Doc. 85; Siegel Dec., ¶ 12.

The Court held a hearing on all pending motions on May 15, 2017. Prior to the hearing, the Court entered a tentative ruling granting Experian's motion for summary judgment and oral argument primarily addressed that motion. Siegel Dec., ¶ 13. On October 13, 2017, the Court issued an order granting summary judgment in favor of Experian, and denying Plaintiff's motions for partial summary judgment and class certification as moot. The Court held that (1) Plaintiff's report did not contain patent errors relating to the loan account; (2) Plaintiff's report did not create a misleading impression; and (3) "the evidence presented in this case doesn't appear to support a claim that Defendant 'willfully' failed to comply with the FCRA." Doc. 97. That same day, the Court entered judgment for Experian and against Plaintiff. Doc. 96; Siegel Dec., ¶ 14.

Plaintiff filed a timely notice of appeal on November 8, 2017. Doc. 101. Experian thereafter filed a motion to tax costs against Plaintiff, which was granted on December 19, 2017. Doc. 107; Siegel Dec., ¶ 15.

C. The Ninth Circuit appeal

On February 16, 2018, Plaintiff filed her opening brief before the U.S. Court of Appeals for the Ninth Circuit. The parties spent the next 13 months briefing and arguing the appeal, which was fully submitted on March 6, 2019. Siegel Dec., ¶ 16.

On May 17, 2019, the Ninth Circuit issued an order reversing the grant of summary judgment in Experian's favor and vacating the order denying Plaintiff's motions for partial summary judgment and class certification. *See* Doc. 112; *Reyes v. Experian Info. Sols., Inc.*, 773 F. App'x 882 (9th Cir. 2019). The Ninth Circuit held that Reyes raised genuine issues of material fact as to both inaccuracy and willfulness under the FCRA, which precluded a grant of summary judgment in Experian's favor. Siegel Dec., ¶ 17.

First, the Ninth Circuit held that a reasonable jury could conclude that "Experian's continued reporting of Reyes's Delbert account, either on its own, or coupled with the deletion of portions of Reyes's positive payment history on the same loan, was materially misleading" because "Experian was reporting an account that was no longer verifiable and that Reyes could not make current, despite having been specifically informed by Delbert that Delbert was no longer in business." *Id.* at 884.

Second, the Ninth Circuit Court concluded that a jury could find "Experian's continued reporting of the Delbert account" and "extraordinarily lengthy delay in implementing its internal decision to delete the Delbert accounts (after it made the decision and after it essentially told Delbert that it had deleted the accounts)" reckless and willful in that it "entail[ed] 'an unjustifiably high risk of harm that is either known or so obvious that it should be known.'" *Id.* (quoting *Safeco Ins. Co. v. Burr*, 551 U.S. 47, 68 (2007)). The Ninth Circuit remanded the *Reyes* case for further proceedings consistent with its decision.

D. Class certification and post-appeal briefing

Following remand, the parties filed a joint status report agreeing to submit on their prior class certification briefing with each side having the opportunity to file a five-page supplemental brief. Doc. 117. Class certification was fully briefed as of July 3, 2019, and argued on September 30. Doc. 128; Siegel Dec., ¶ 18. Experian dedicated nearly all of its supplemental briefing and argument to challenging Plaintiff's Article III standing to sue, an argument that had not been raised prior to the appeal. During this period, Class Counsel engaged Daniel Robinson of Robinson Calcagnie, Inc. as local counsel to assist in the anticipated trial of the case. Siegel Dec., ¶ 19.

On October 1, 2019, the Court issued an order granting Plaintiff's motion for class certification and certifying her primary class of "All persons whose Experian consumer report contained an account from Delbert reflecting delinquency on a loan originated by Western Sky after January 21, 2015." Doc. 132; Siegel Dec., ¶ 20. In so doing, the Court rejected Experian's argument that Plaintiff lacked Article III standing to sue, undertaking an in-depth analysis of the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) and the Ninth Circuit's subsequent decision in *Spokeo II*. *See id*.

First, this Court concluded that Plaintiff has standing to sue given that "[t]he nature of the statutory violation that allegedly occurred here—namely, Defendant's failure to use maximum reasonable procedures to prevent the continued reporting of delinquent Delbert accounts—presents a clear risk of material harm to Plaintiff's concrete interest in accurate credit reporting." *Id*. at 6. The Court rejected Experian's argument that some additional harm beyond the statutory violation—such as an adverse action decision by a creditor, employer, or insurer—is necessary to confer standing. The Court further rejected Experian's argument that Plaintiff must prove standing on behalf of unnamed class members, especially

where the class is narrowly-defined to only include those individuals who were harmed or exposed to the same risk of material harm as Plaintiff.

Second, this Court concluded that the proposed class met the requirements of Federal Rules of Civil Procedure 23(a) and 23(b)(3), including finding that common issues relating to accuracy, liability, and willfulness are subject to common proof. In so finding, the Court rejected each of Experian's arguments contending that individual issues predominate.

To ensure notice would be provided to the Class in advance of the January 28, 2020, trial setting, the day after the class certification order was entered, Plaintiff's counsel sent a draft class notice to Experian's counsel for comment or approval, along with a proposed schedule for exchanging class information. After the parties were unable to reach agreement, on October 14, 2019, Plaintiff moved the Court to approve the class notice and set scheduling deadlines. Doc. 135; Siegel Dec., ¶ 21. That same day, Experian filed a motion for reconsideration of the Court's order granting class certification, again challenging Plaintiff's Article III standing to sue. Doc. 136. Siegel Dec., ¶ 22.

On October 15, 2019, Experian filed a petition to the U.S. Court of Appeals for the Ninth Circuit for permission to appeal this Court's Order granting class certification pursuant to Rule 23(f). *See Reyes v. Experian Info. Sols., Inc*., Appeal No. 19-80139 ("23(f) Appeal"), Doc. 1-2 (9th Cir. filed Oct. 15, 2019). Again, the parties engaged in significant motion practice in a condensed timeframe. In the Ninth Circuit, Plaintiff filed an answering brief opposing Experian's Rule 23(f) petition within 10 days of the filing. 23(f) Appeal, Doc. 2. Several days later, Experian filed a motion for leave to file a reply brief, which Plaintiff promptly opposed. 23(f) Appeal, Docs. 3, 4. Siegel Dec., ¶ 23.

Plaintiff also notified this Court and the Ninth Circuit of supplemental authority supporting her position; in particular, the case *Nayab v. Capital One*

Bank, N.A., No. 17-55944 (9th Cir. Oct. 31, 2019), where the Ninth Circuit issued a published opinion reversing the district court's dismissal of a case under the FCRA for lack of Article III standing. *See* Doc. 139; 23(f) Appeal, Doc. 5.

The parties likewise fully briefed Plaintiff's motion to approve class notice and Experian's motion for reconsideration before this Court, with the pending motions set for hearing on November 18, 2019. On the evening before the Court issued an anticipated tentative ruling on those motions, the parties reached a settlement resolving the litigation on a classwide basis. Siegel Dec., ¶ 24.

E. Settlement negotiations

Virtually no settlement negotiations took place until several years into the litigation and only after Plaintiff prevailed on many of the key legal issues presented in the case. *Id.*, ¶ 25. For example, after discovery had uncovered many of the facts forming the basis for the Amended Complaint, Class Counsel presented Experian with a classwide settlement demand in October 2016. No settlement discussions resulted. *Id.*, ¶ 26. Following the order granting Experian's motion for summary judgment, the parties participated in the Ninth Circuit's mandatory mediation program, but quickly reached an impasse as to both the scope and amount of relief for any settlement. *Id.*, ¶ 27.

Only after Plaintiff's successful appeal did the parties for the first time discuss engaging a mediator to oversee settlement discussions. In August 2019, the parties agreed to engage the Honorable Jay C. Gandhi of JAMS ADR, a retired federal magistrate judge in this Court, to serve as the mediator in this matter. Although the parties discussed their respective positions through Judge Gandhi in advance of mediation, they made little progress towards settlement. *Id.*, ¶ 28.

On September 18, 2019, the parties participated in an all-day, in-person mediation session in Irvine, California before Judge Gandhi. The parties were unable to reach resolution at that session. Given the outstanding class certification

motion, Class Counsel believed the case would not be able to settle on terms they deemed sufficient until after a ruling was issued on that motion—and tabled further settlement discussions pending its resolution. *Id*., ¶ 29.

Following the Court's class certification order, the parties resumed settlement discussions through Judge Gandhi, but only began making significant progress after Experian's motion for reconsideration and Rule 23(f) appeal were fully briefed and ripe for determination. Judge Gandhi exchanged several offers and counteroffers throughout this period, but the parties again were at impasse with both sides entrenched in their position. *Id*., ¶ 30. On November 13, 2019, Judge Gandhi made a final double-blind mediator's proposal that was accepted by both sides. On the evening of November 14, 2019, the parties executed a binding term sheet setting forth the essential terms of settlement and notified the Court. *Id*., ¶ 31.

On November 15, 2019, the Court entered an order vacating pending motions, pretrial deadlines, and the trial date in light of settlement. Doc. 143. That same day, Experian voluntarily dismissed its 23(f) appeal. 23(f) Appeal, Doc. 6. Siegel Dec., ¶ 32. After executing the term sheet, the parties negotiated the Settlement Agreement and sought competitive bids from several third-party providers to administer the Settlement and provide notice to the Class. Plaintiff also conducted discovery on the class size, confirming it includes 56,375 individuals. Siegel Dec., ¶ 33. After soliciting competing bids, the parties selected Angeion Group to serve as the administrator and notice provider for the Settlement. *Id*., ¶ 34.

III. TERMS OF THE PROPOSED SETTLEMENT

A. The Settlement Class

Under the Agreement, the Settlement Class is defined the same as the Class certified by the Court in its order granting class certification. It includes the 56,375 individuals whose Experian consumer report contained an account from Delbert

reflecting delinquency on a loan originated by Western Sky after January 21, 2015, with customary exclusions. *See* Agreement, ¶ 27; Siegel Dec., ¶ 35. The Agreement also reflects the Court's prior appointment of Ms. Reyes as the "Class Representative" and her counsel Norman E. Siegel and J. Austin Moore of Stueve Siegel Hanson LLP as "Class Counsel." Agreement, ¶¶ 2, 3; Siegel Dec., ¶ 36.

B. Consideration

The Agreement requires Experian to establish a settlement fund of $24,000,000 to resolve classwide claims in this litigation. Agreement, ¶ 34. Experian is required to pay $500,000 into the settlement fund within 7 days after the Court issues an order directing class notice and pay an additional $23,500,000 into the fund within 10 days after the effective date of settlement. *See id.*; Siegel Dec., ¶ 37. The settlement fund is completely non-revisionary and will be used to fund the various relief described below.

1. Automatic cash payments to class members

The settlement fund will be used to make automatic cash payments to all class members who do not exclude themselves from the Settlement, without the need to file a claim. Within 3 days of an order directing notice, Experian will provide to the Settlement Administrator a class list containing the last known name and mailing address, as well as phone numbers and email addresses where known, for all class members. Agreement, ¶ 28; Siegel Dec., ¶ 38.

The Settlement Administrator will use the settlement class list to provide class notice and issue settlement checks. All class members will receive equal distributions of the settlement fund after payment is allocated for (1) the costs of notice and administration; (2) any service award payment approved by the Court; and (3) attorneys' fees and costs approved by the Court. Accordingly, each class member will receive a check for at least $270 sent via U.S. Mail no later than 45 days after the effective date of the Settlement. Agreement, ¶ 40; Siegel Dec., ¶ 39.

The parties have also agreed on a robust process to ensure class members receive and cash their checks. For example, if a settlement check is not cashed within 60 days after the date of issue, the Settlement Administrator is authorized to send an e-mail or place a telephone call to the class member reminding the class member to cash the check before it expires. Agreement, ¶ 41; Siegel Dec., ¶ 40.

For any settlement check that is returned to as undeliverable, the Settlement Administrator is required to make reasonable efforts to locate a valid address and resend the settlement payment within 30 days after the check is returned. In attempting to locate a valid address, the Settlement Administrator is authorized to send an e-mail or place a telephone call to that class member to obtain updated address information. Any replacement settlement checks issued to class members shall remain valid and negotiable for 60 days from the date of their issuance. Agreement, ¶ 42; Siegel Dec., ¶ 41.

To the extent that a settlement check is not cashed within 90 days after the date of issue, the Settlement Administrator is required to undertake the following actions: (1) attempt to contact the class member by e-mail and/or telephone to discuss how to obtain a reissued check; (2) if those efforts are unsuccessful, make reasonable efforts to locate an updated address for the class member using advanced address searches or other reasonable methods; and (3) reissuing a check or mailing the class member a postcard (either to an updated address if located or the original address if not) providing information regarding how to obtain a reissued check. Agreement, ¶ 43; Siegel Dec., ¶ 42; Angeion Dec., ¶ 21.

Finally, if the Settlement Administrator is notified that a class member is deceased, the Settlement Administrator is authorized to reissue the settlement check to the class member's estate upon receiving proof the individual is deceased and after consultation with Class Counsel. Agreement, ¶ 44; Siegel Dec., ¶ 43.

2. Notice and settlement administration

The Settlement Fund will be used to pay all costs of settlement administration and disseminating notice, which is described in the Declaration of Christian J. Clapp submitted herewith. *See generally* Angeion Dec. Within 21 days after receipt of settlement class list, Angeion is responsible for disseminating notice to the Settlement Class via U.S. Mail. Agreement, ¶ 46. In addition to the requirements described herein, Angeion's responsibilities will include: (1) creating, administering, and overseeing the settlement fund; (2) obtaining the settlement class list for the purpose of disseminating notice to class members; (3) sending notice to class members via U.S. mail; (4) establishing and maintaining the settlement website; (5) establishing and maintaining a toll-free telephone line for class members to call with Settlement-related inquiries, and answering the questions of class members who call with or otherwise communicate such inquiries within 24 hours; (6) responding to any mailed or emailed settlement class member inquiries within 24 hours; (7) receiving and processing requests for exclusion and objections from class members; (8) following the effective date, processing and transmitting settlement payments to class members; and (9) providing weekly or other periodic reports to Class Counsel and Experian's Counsel as requested. *See id*., ¶ 49. Angeion has represented that the costs of notice and administration will not exceed $110,950. Angeion Dec., ¶ 22.

3. Attorneys' fees, expenses, and service award payment

The settlement fund will be used to pay for an award of attorneys' fees and expenses and a service award payment as approved by the Court. Class Counsel will move for an attorneys' fee award not to exceed 35% of the settlement fund and for reimbursement of costs and expenses not to exceed $200,000. Agreement, ¶ 64. Class Counsel will also move for a service award payment for Ms. Reyes in an amount not to exceed $15,000 for her time and effort in pursing this action on

behalf of the Class. Class Counsel will file the motion for attorneys' fees, expenses, and a service award payment no later than 21 days before the opt-out and objection deadlines. Experian has agreed not to oppose these requests. *Id*., ¶ 62.

4. Residual funds

The Agreement provides that there will be no reversion of any funds to Experian. In the event there are funds remaining as the result of uncashed checks after the Settlement Administrator has undertaken the robust procedures described above to locate and contact class members, any remaining funds shall be distributed as required by state law or to a non-profit organization approved by the Court following distribution of settlement payments. Agreement, ¶¶ 12, 45; Siegel Dec., ¶ 45.

C. Proposed releases

In exchange for the benefits provided under the Settlement, class members will release any legal claims that may arise from or relate to the facts and claims alleged in the Complaint filed in this litigation, as specified in paragraphs 20-22 and 59-61 of the Agreement. *See id*., ¶¶ 20-22, 59-61; Siegel Dec., ¶ 46.

IV. ISSUING NOTICE TO THE CLASS IS JUSTIFIED

A. Legal standards

Under Rule 23(e)(1), as amended December 1, 2018, the Court must direct notice to the class of a class action settlement upon determining that notice is justified because the Court concludes it will likely be able to approve the settlement and certify the class for purposes of judgment on the settlement. Because the Court has already certified the Settlement Class pursuant to Rule 23(b)(3), the Court must determine that it is likely to conclude the settlement is "fair, reasonable, and adequate" under Rule 23(e)(2). Fed. R. Civ. P. 23(e)(2).

Judicial review of a proposed settlement generally involves two separate

hearings. Federal Judicial Center, Manual for Complex Litigation, § 21.632 (4th ed. 2004). First, the court makes a preliminary fairness evaluation. *Id.* It then holds a final approval hearing, where it "takes a closer look at the proposed settlement, taking into consideration objections and any other further developments in order to make a final fairness determination." *True v. Am. Honda Motor Co.,* 749 F. Supp. 2d 1052, 1062 (C.D. Cal. 2010).

In determining whether a settlement is fair, reasonable, and adequate under Rule 23(e)(2), the Court must "consider[] whether:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>
> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other."

Fed. R. Civ. P. 23(e)(2).

Additionally, courts in this Circuit may consider the following additional factors in determining whether a settlement agreement is fair, reasonable, and adequate: (1) the strength of plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed, and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the

reaction of the class members to the proposed settlement. *Staton v. Boeing Co.,* 327 F.3d 938, 959 (9th Cir. 2003) (citation omitted). "This is by no means an exhaustive list of relevant considerations." *Officers for Justice v. Civil Serv. Comm'n of City & Cty. of San Francisco,* 688 F.2d 615, 625 (9th Cir. 1982).

"The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case." *Id.* "It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness, and the settlement must stand or fall in its entirety." *Staton*, 327 F.3d at 960 (quoting *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1026 (9th Cir. 1998)).

At this 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,* 749 F. Supp. 2d at 1063; *see also* 4 W. Rubenstein, Newberg on Class Actions § 13:10 (5th ed.) (the primary objective a court at the preliminary approval stage is "to establish whether to direct notice of the proposed settlement to the class, invite the class's reaction, and schedule a final fairness hearing."). The "settlement need only be *potentially* fair." *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 386 (C.D. Cal. 2007) (emphasis in original). 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," the court should grant preliminary approval of the class and direct notice of the proposed settlement to the Class. *In re Tableware Antitrust Litig.,* 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007) (citation omitted).

At any rate, "the decision to approve or reject a settlement is committed to the sound discretion of the trial judge." *Hanlon*, 150 F.3d at 1026. Ultimately,

"[s]trong judicial policy favors settlements." *Churchill Vill., LLC. v. Gen. Elec.,* 361 F.3d 566, 576 (9th Cir. 2004) (omission and quotation marks omitted) (quoting *Class Plaintiffs v. City of Seattle,* 955 F.2d 1268, 1276 (9th Cir. 1992)).

B. The proposed notice meets the requirements of Rule 23(c)(2)(B).

The proposed class notice attached as Exhibit 1 to the Settlement Agreement meets the standards of Rule 23(c)(2)(B). The notice will be sent via U.S. Mail to class members' most current addresses as reflected in Experian's records, which is the best notice practicable under these circumstances. It uses plain English in an easy-to-read format that concisely explains to class members the nature of the case and their options under the Settlement. It includes information such as the case caption, a description of the Class, a description of the claims and the history of the litigation, a description of the Settlement and the claims being released, the names of Class Counsel, a statement of the maximum amount of attorneys' fees that will be sought by Class Counsel, the maximum amount Class Counsel will seek for a service award at the final approval hearing, a description of the procedures and deadlines for requesting exclusion and objecting to the Settlement, a link to the settlement website containing relevant case documents, and the manner in which to obtain further information. The notice thus satisfies the requirements of Rule 23(c)(2)(B). *See* Siegel Dec., ¶ 48.

C. Plaintiff and Class Counsel have adequately represented the Class and the Settlement is recommended by counsel

Mr. Reyes and Class Counsel have adequately represented the interests of the Class. Ms. Reyes has been an ideal class representative, demonstrated by her willingness to pursue this case for four years while regularly putting the interests of the class above her own. For example, Ms. Reyes produced significant discovery, sat for a deposition, provided declarations in support of filings on behalf of the Class, stayed in close contact with Class Counsel, and continued pursuing the case

even after a judgment was entered in Experian's favor and costs exceeding $12,000 were taxed against her. Doc. 111; Siegel Dec., ¶ 49. The result of Ms. Reyes's ongoing efforts is a meaningful recovery for more than 56,000 individuals. Additionally, Ms. Reyes does not have any interests that could be viewed as antagonist to the Class. As this Court previously recognized in its order granting class certification, "[t]he Court isn't aware of any conflict between Plaintiff and the proposed class members, and the record doesn't suggest any antagonism between the named Plaintiff and absent class members." *Reyes v. Experian Info. Sols., Inc*., 2019 WL 4854849, at *7 (C.D. Cal. Oct. 1, 2019).

Class Counsel have also adequately represented the interests of the Class. They have actively litigated this case from the outset—aggressively seeking discovery, opposing Experian's dispositive motions, and vigorously litigating this case even after a judgement was entered in Experian's favor. As this Court previously recognized: "As for Plaintiff's and counsel's willingness to vigorously prosecute this action on behalf of the class, the Court has no doubt. The Court knows only too well how actively this case has been litigated on both sides from its inception in 2016. Indeed, the present motion is before this Court only because Plaintiff's counsel successfully appealed a grant of summary judgment in Defendant's favor." *Reyes*, 2019 WL 4854849, at *7.

In negotiating the proposed Settlement, the Class had the benefit of highly skilled and experienced counsel who have broad experience litigating and trying some of the most significant consumer class actions in the country. *See* Siegel Dec., ¶¶ 50-55; *see also Reyes*, 2019 WL 4854849, at *10 ("Class counsel is amply qualified to litigate this case. They have extensive experience handling class actions and other complex litigation."). "Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation." *Nat'l Rural Telecommunications Coop. v. DIRECTV, Inc*.,

221 F.R.D. 523, 528 (C.D. Cal. 2004) (quotations omitted). Class Counsel strongly recommend approval of the proposed Settlement because it provides substantial, guaranteed benefits to the Class, especially when weighed against the expense, risks, delays, and uncertainties of trial and post-trial proceedings. Siegel Dec., ¶ 56.

D. The settlement negotiations were at arm's length

"There is a presumption of fairness when a proposed class settlement, which was negotiated at arm's-length by counsel for the class, is presented for Court approval." Herbert B. Newberg & Alba Conte, NEWBERG ON CLASS ACTIONS § 11.41 (4th ed. 2002). There is no doubt that the proposed settlement was reached through arm's length negotiations. As noted above, there were no settlement negotiations at all until after Plaintiff prevailed on an appeal addressing novel issues under the FCRA. Following the appeal, negotiations did not significantly progress until after Plaintiff prevailed on her motion for class certification, which implicated many hotly-contested legal issues, including Article III standing to sue. Additionally, settlement discussions were conducted through an experienced and capable mediator, the Honorable Jay C. Gandhi, who can corroborate the adversarial nature of the negotiations. *See Williams v. Brinderson Constructors, Inc*., 2017 WL 490901, at *2 (C.D. Cal. Feb. 6, 2017) (quotations omitted) ("The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive."). There was no collusion or fraud in the hard-fought negotiations that led to this Settlement.

E. The relief provided under the Settlement is fair and adequate

1. The stage of proceedings and extent of discovery completed

"A court is more likely to approve a settlement if most of the discovery is completed because it suggests that the parties arrived at a compromise based on a full understanding of the legal and factual issues surrounding the case." *In re Toys*

R Us-Delaware, Inc.—Fair & Accurate Credit Transactions Act (FACTA) Litig., 295 F.R.D. 438, 454 (C.D. Cal. 2014) (quotations omitted). As this Court is aware, the Settlement was reached well after the close of discovery, only after a class was certified, and just over two months before a class trial was set to commence. Given the late stage of the proceedings, there is little doubt that Plaintiff and Class Counsel gained sufficient information through nearly four-years of litigation to make an informed decision regarding Settlement. Siegel Dec., ¶ 57.

2. The cost, risks, and delay of trial and appeal

The expense, complexity, and duration of litigation are important factors considered in evaluating the reasonableness of a settlement and in this case weigh in favor of settlement approval. *See Churchill Village, LLC v. General Electric*, 361 F.3d 566, 577 (9th Cir. 2004).

Even though Plaintiff succeeded in certifying the Class, she faced risks in maintaining class action status throughout the trial. Experian moved for reconsideration of the Court's order granting class certification and petitioned the Ninth Circuit to review the order granting class certification under Rule 23(f). A ruling against Plaintiff in either instance could result in zero recovery for the Class. Siegel Dec., ¶ 58.

If Plaintiff prevailed, she still faced the task of proving liability on a classwide basis at trial, which is a time-consuming and risky proposition. While Class Counsel strongly believe in the merits of the claims, the facts forming the basis for liability in this case are novel and untested. Moreover, liability under the FCRA is not strict—it requires a finding of negligence or willful failure to comply with the statute. 15 U.S.C. §§ 1681n and 1681o. Plaintiff would likely be called upon to present significant witness and expert testimony in order to prove her case, entailing further risks to Plaintiff's and the Class's chances of recovery. *Id.*, ¶ 60.

Proving damages also presents a risk. Under the FCRA, a prevailing plaintiff

in a class action may obtain actual damages or between $100 and $1,000 in statutory damages for each class member. 15 U.S.C. § 1681n(a)(1)(A). Because Plaintiff is not pursuing actual damages, she would have to show Experian *willfully* violated the statute or otherwise forego recovery altogether. And even if the jury agrees that Experian's conduct was willful, convincing a jury to award damages on the higher end of the statutory range is not a foregone conclusion. Siegel Dec., ¶ 60. As recognized by one district court:

> Even if the Plaintiffs were to prevail on their FCRA claims at trial, it is far from certain that a jury would award the maximum of $1,000 to each Class member, especially given the statutory factors that have to be taken into account in making such an award, including frequency and persistence of noncompliance with the statute, nature of the noncompliance, and the extent to which noncompliance was willful or negligent.

Singleton v. Domino's Pizza, LLC, 976 F. Supp. 2d 665, 680 (D. Md. 2013) (internal citations omitted). Of course, even if Plaintiff prevailed at trial, Experian would likely appeal the verdict which could delay recovery for months or years.

By contrast, the settlement provides significant cash benefits to the Class in the form of FCRA damages. At this stage of litigation, an automatic check of at least $270 per class member without having to file a claim or take any other action represents a substantial benefit to the Class. Siegel Dec., ¶ 61. In fact, this resolution is far superior to many other publicly-reported FCRA settlements within this Circuit considered on a per-class member basis. *See, e.g.*, *Smith v. A-Check Am. Inc*., 2017 WL 1550158, at *6 (C.D. Cal. Mar. 1, 2017) (FCRA settlement providing for approximately $88 per class member); *Syed v. M-I LLC*, 2016 WL 310135, at *8 (E.D. Cal. Jan. 26, 2016) (FCRA settlement providing for approximately $16 per class member); *Kirchner v. Shred-It USA Inc*., 2015 WL 1499115, at *5 (E.D. Cal. Mar. 31, 2015) (FCRA settlement providing for average

of $45.55 per class member); *In re Toys R Us FACTA Litig*., 295 F.R.D. at 453-54 ("A $5 or $30 award, therefore, represents 5% to 30% of the recovery that might have been obtained. This is not a *de minimis* amount. Given the likelihood that plaintiffs would have been unable to prove actual damages and the risk that they would have been unable to prove willfulness and recover any damages at all, the court finds that the amount of the settlement weighs in favor of approval.").

Additionally, every class member is treated identically under the Settlement, alleviating any concerns that certain class members could receive preferential treatment. *See* Fed. R. Civ. P. 23(e)(2)(C) (court should consider whether settlement "treats class members equitably relative to each other.").

As set forth above, the Settlement provides significant benefits to the Class without the risks, costs, and delays inherent in continued litigation, trial, and appeal of Plaintiff's claims.

3. The means of distributing relief to class members is effective

Cash payments will be distributed to members of the Class in the most efficient means available. All class members who does not exclude themselves will automatically receive a check for at least $270 without having to take any affirmative action under the Settlement. If a class member does not cash her check within 60 days, the Settlement Administrator is tasked with proactively reaching out to the class member to remind her to cash her check or obtain updated information in the manner described above. Only after all reasonable efforts to reach class members have been exhausted will funds available from uncashed checks be provided to a non-profit recipient approved by the Court.

4. The terms of the proposed attorneys' fee award, including the timing of payment

Class Counsel will seek their fee as a percentage of the $24,000,000 settlement fund created for the Class and seek reimbursement of litigation expenses

up to $200,000. Experian has agreed not to oppose any fee request that is not more than 35% of the fund. Class Counsel will file their fee and expense motion at least 21 days before the opt-out and objection deadline and promptly post the filing on the settlement website so that class members will have the opportunity to present their views on the fee request. Importantly, the Settlement is not conditioned upon the Court's approval of the attorneys' fee and expense award. Agreement, ¶ 5; Siegel Dec., ¶¶ 62-64.

The Agreement's provision for an attorneys' fee award from the Settlement Fund is fair. "In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). "Where a settlement produces a common fund for the benefit of the entire class, courts have discretion to employ either the lodestar method or the percentage-of-recovery method." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011). But this "discretion must be exercised so as to achieve a reasonable result." *Id*. Courts generally first calculate a fee award using the percentage method, and then use the lodestar method as a "check" on that amount. *See, e.g.*, *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002). Class Counsel will argue that the percentage-of-recovery method is the appropriate method for determining attorneys' fees in this case. Siegel Dec., ¶ 63. While a 25% fee award is often cited as the benchmark for common fund cases in the Ninth Circuit, "[s]election of the benchmark or any other rate must be supported by findings that take into account all of the circumstances of the case." *Vizcaino*, 290 F.3d at 1048.

Class Counsel anticipate showing that an attorneys' fee award of up to 35% of the settlement fund is appropriate here given a number of factors, including the substantial risk Plaintiff and Class Counsel assumed in pursuing a novel legal theory against a highly sophisticated party with experienced counsel, as well as the

time, effort, and skill Class Counsel brought to this litigation in overcoming an adverse judgment to achieve one of the largest inaccurate reporting settlements in history. Siegel Dec., ¶ 65; *see also Syed v. M-I, L.L.C.*, 2017 WL 3190341, at *6 (E.D. Cal. July 27, 2017) ("Reasons to vary the benchmark award may be found when counsel achieves exceptional results for the class, undertakes 'extremely risky' litigation, generates benefits for the class beyond simply the cash settlement fund, or handles the case on a contingency basis."). Pursuant to the Settlement Agreement, the payment for attorneys' fees and expenses will be issued no later than 45 days after the effective date of Settlement, the same period which class members will be issued their settlement checks. *See* Agreement, ¶¶ 40, 64; Siegel Dec., ¶ 66.

While Class Counsel will provide a more thorough analysis of the reasonableness of its forthcoming motion for attorneys' fees and reimbursement of expenses, at this stage, the Court can conclude that it is likely to approve the Settlement for purposes of sending notice to the class, even if it has not yet concluded whether and in what amount it would award for attorneys' fees and expenses.[2]

F. There is no agreement required to be identified under Rule 23(e)(3)

Under Rule 23(e)(3), "[t]he parties seeking approval must file a statement identifying any agreement made in connection with the proposal." There is no agreement between the parties, except those expressly set forth in the Settlement Agreement. Siegel Dec., ¶ 68.

[2] Similarly, Class Counsel will request a service award payment of up to $15,000 for Demeta Reyes, which they contend is reasonable considering the time and effort Ms. Reyes expended in this litigation on behalf of the class. Siegel Dec., ¶ 67; *see also Syed*, 2017 WL 3190341, at *9 (approving incentive awards of $15,000 and $20,000 for named plaintiffs).

G. The Court should set settlement deadlines and schedule a final approval hearing

In connection with directing class notice, the Court must set a final approval hearing date, dates for mailing notice, and deadlines for opting-out or objecting to the Settlement and filing papers in support of the Settlement. Plaintiff proposes the following schedule:

EVENT	**TIMING**
Deadline for Experian to disseminate CAFA notices	January 10, 2020
Deadline for Experian to provide Settlement Class List to Settlement Administrator pursuant to paragraph 46 of the Settlement Agreement	[3 days after order permitting issuance of notice]
Deadline for the Settlement Administrator to mail Court-approved Notice to Settlement Class pursuant to paragraph 46 of the Settlement Agreement	[21 days after order permitting issuance of notice]
Notice deadline	[30 days after order permitting issuance of notice]
Deadline to file Plaintiff's motion for attorneys' fees, expenses and service award payment	[21 days before objection and opt-out deadline]
Deadline for Plaintiffs' Counsel to file motion for final approval of settlement and responses to any timely submitted Class member objections	[21 days prior to final approval hearing]
Objection deadline	[30 days after notice deadline]
Opt-out deadline	[30 days after notice deadline]
Final approval hearing	[At least 120 days after order permitting issuance of notice]

V. CONCLUSION.

For the foregoing reasons, Plaintiff's motion should be granted.

Dated: December 31, 2019

By: */s/ Norman E. Siegel*

Norman E. Siegel (*pro hac vice*)
J. Austin Moore (*pro hac vice*)
STUEVE SIEGEL HANSON LLP
460 Nichols Road, Suite 200
Kansas City, MO 64112
Tel: 816-714-7100
siegel@stuevesiegel.com
moore@stuevesiegel.com

Daniel S. Robinson (SBN 244245)
ROBINSON CALCAGNIE, INC.
19 Corporate Plaza Drive
Newport Beach, CA 92660
Tel: 949-720-1288
drobinson@robinsonfirm.com

Jason S. Hartley (SBN 192514)
HARTLEY LLP
101 West Broadway, Suite 820
San Diego, CA
Tel: 619-400-5822
hartley@hartleyllp.com

Attorneys for Plaintiff and the Class