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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RANDY PITRE, on behalf of himself, all others similarly situated,

Plaintiff,

vs.

WAL-MART STORES, INC., a Delaware corporation; and DOES 1 through 100, inclusive,

Defendants.

Case No.: 8:17-cv-1281-DOC-DFMx

JUDGE: Hon. David O. Carter

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION

Date: January 14, 2019
Time: 8:30 a.m.
Courtroom: 9D
Judge: Hon. David O. Carter

Action Filed: June 20, 2017
Removed: Julv 21. 2017

TO THE COURT, TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on January 14, 2019, at 8:30 a.m., or as soon thereafter as may be heard, in Courtroom 9D of the above-entitled Court, located in the Ronald Reagan Federal Building, United States Courthouse, at 411 West Fourth Street, Courtroom 9D, Santa Ana, CA, 92701-4516, Plaintiff Randy Pitre will and hereby does move this Court, pursuant to Fed. R. Civ. P. 23(c)(1) for an order:

1. certifying the class described below;
2. appointing Randy Pitre, Cassandra Walters, and Desirae Wilson as representatives of the class proposed herein or later proposed and approved by the Court and any other sub-class the Court may approve or devise;[1]
3. appointing Shaun Setareh, Thomas Segal, and H. Scott Leviant of Setareh Law Group as Class Counsel pursuant to Fed. R. Civ. P. 23(g); and,
4. issuing such other Orders as necessary to effectuate the Court's certification Order.

This motion is brought on the grounds that this action properly may be certified as a class action under FRCP Rules 23(a) and 23(b).

This motion is based upon this Notice, the Memorandum of Points and Authorities filed in support thereof, the declarations filed herewith as well as the exhibits thereto, the pleadings and records on file in this action, and such additional argument and evidence as may be presented at the hearing on this motion.

Dated: October 15, 2018

SETAREH LAW GROUP

By: _____
Shaun Setareh
Thomas Segal
H. Scott Leviant

Attorneys for Plaintiff

[1] Concurrent with the filing of this Motion, Plaintiff Pitre filed a Motion for leave to amend the operative complaint to add two additional plaintiffs for the purpose of ensuring that the class will have full and complete representation by class representatives who applied for employment at different times within the class period.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff and the putative class of more than 5 million individuals are job applicants and employees at Defendant WAL-MART STORES, INC. ("Wal-Mart" or "Defendant") for whom Wal-Mart obtained employment related background checks without following basic requirements of state and federal law. The disclosure forms used to procure the background checks contained extraneous terms in plain violation of federal law. All elements for class certification are met: 1) the class of roughly 5 million is numerous; 2) commonality is present because all claims involve the same overarching legal issue of whether FCRA disclosure forms can contain extraneous terms; 3) Plaintiff is typical because his claims are if not identical, "reasonably co-extensive" with those of other class members who received deficient disclosure forms; 4) plaintiff and his counsel are adequate because they will zealously prosecute the case and have no conflicts of interest; 5) common questions predominate, any differences in the forms are minor and easily manageable; 6) a class action is plainly superior to thousands of individual lawsuits over the legality of the forms.

This case is readily amenable to class certification because it hinges on the legality of the several pre-employment disclosure forms provided to class members. All class members were provided with the background check language in the Application and then form sets from before or after November 5, 2015. The only issues that need to be adjudicated are whether the forms are lawful, whether any non-compliance was willful, the number of violations, and the amount to be awarded in statutory and punitive damages.

The Fair Credit Reporting Act ("FCRA"), and the Investigative Consumer Reporting Agencies Act ("ICRAA") mandates that employers provide a "disclosure form" that is "clear and conspicuous" and "consists solely of the disclosure form". According to the clear and express language of the statute, applicable opinion letters, and perhaps most importantly a Ninth Circuit Ruling rendered this year in the matter of *Syed v. M-I, LLC*, 853 F.3d 492 (9th Cir. 2017), the disclosure forms utilized by Defendant are all similar in

that they all contain extraneous information and are not standalone disclosures.

The multi-page forms that Wal-Mart used during the five-year class period all include extraneous information that has been held by many district courts and the Ninth Circuit to be actionable. For example the forms include one or more of the following: (1) exculpatory language (which the Ninth Circuit and numerous district courts have found unlawful to include); (2) criminal history data collected directly by Wal-Mart; (3) an authorization for Wal-Mart itself to obtain information from persons, schools, companies, corporations, and other sources; and (4) extraneous information about state law rights and other matters superfluous to the required, concise FCRA disclosure. ***Most significantly***, Wal-Mart admitted in deposition that, prior to November 5, 2015, its forms were unclear (violating the "clear and conspicuous" requirements), and liability for that sub-class is all but certain in this matter. Even *after* November 5, 2015, Wal-Mart presented applicants with multiple forms, containing similar disclosure language, unlawful surplusage, and irreconcilably inconsistent provisions likely to cause confusion.

This case should be certified because it meets each of the requirements of Rule 23. First, numerosity is beyond dispute. Second, all of the class members are typical of each other because they have been subjected to the same injury in that Defendant obtained a background check on them without providing legally compliant disclosures. Third, the element of commonality is met for the same reason (*i.e.* all class members assert the same legal claim that can be adjudicated with common evidence and legal findings). Beyond that, common issues predominate, as there are no major individualized issues that would impede determination of class claims based on the legality of Defendant's background check forms. Wal-Mart's legal defenses are also overwhelmingly common to the class.

Counsel who are experienced in class action litigation and have no conflict with the class are adequate. The proposed class representatives who were subjected to the same background check practices as the class are also adequate. A class action is superior, since the maximum any class member can recover under the FCRA is $1000 in statutory damages, plus punitive damages. Millions of lawsuits regarding the legality of the

background check forms would be essentially impossible.

II. SUMMARY OF APPLICABLE LAW

A. The Fair Credit Reporting Act ("FCRA")

The Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681b(b), requires employers to use certain standard form documents and to follow specified policies and practices when they use "consumer reports" to assess the qualifications of prospective and current employees. Section 1681a(d)(1) of the FCRA defines "consumer report" as:

> [A]ny oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility" for employment purposes.

As one of the many specified practices required of employers using "consumer reports" to assess the qualifications of prospective and current employees, the FCRA expressly requires employers to provide a "***clear and conspicuous*** disclosure . . . in a document that consists ***solely*** of the disclosure." 15 U.S.C. § 1681b(b) (2)(A)(i) (emphasis added). It recognizes only *one* exception to this, namely that the FCRA authorization can be combined with the FCRA disclosure in the same document. 15 U.S.C. § 1681(b)(2)(A)(ii) ("which authorization may be made on the document referred to in clause (i)"). Because the Congress determined that the policies underlying the FCRA are of substantial importance, a plaintiff is entitled to statutory damages when the defendant has willfully violated the provisions of the FCRA. 15 U.S.C. § 1681n(a)(1)(A).

B. The Ninth Circuit's Landmark *Syed* Decision

In 2017, the Ninth Circuit issued a major decision on the issue of violation of the stand-alone disclosure requirement of the FCRA. *Syed v. M-I, LLC*, 853 F.3d 492 (9th Cir. 2017). In *Syed*, the FCRA disclosure also contained a term purporting to waive any liability of the employer related to the background check. *Id.* at 498. The Ninth Circuit

held that, since under the plain language of the FCRA the required disclosure must be in "a document that consists solely of the disclosure," the inclusion of the liability release was impermissible: "We must begin with the text of the statute. Where congressional intent has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive . . . . The ordinary meaning of 'solely' is '[a]lone; singly' or entirely exclusively." *Id*. at 500. The Ninth Circuit also held that due to the clarity of the statutory language requiring that the disclosure be in a document consisting "solely" of the disclosure: "a prospective employer's violation of the FCRA is "willful" when the employer includes terms in addition to the disclosure." *Id*. at 496.

While *Syed* involved a liability release, its holding is broader. *Syed* broadly analyzed the "solely" requirement governing the disclosure apart from any release language:

> M-I's interpretation fails to give effect to the term "solely," violating the precept that "statutes should not be construed to make surplusage of any provision." *Wilshire Westwood Assocs. v. Atl. Richfield Corp.*, 881 F.2d 801, 804 (9th Cir. 1989) (alterations and internal quotation marks omitted). ***That other FCRA provisions mandating disclosure omit the term "solely" is further evidence that Congress intended that term to carry meaning in 15 U.S.C. § 1681b(b)(2)(A)(i)***. *See* 15 U.S.C. §§ 1681d, 1681s-3.

Syed, 853 F.3d at 501 (emphasis added). Continuing, the Ninth Circuit said:

> Congress's express exception to the "solely" requirement, allowing the disclosure document to also contain the authorization to procure a consumer report, does not mean that the statute contains other implicit exceptions as well. *See United States v. Johnson*, 529 U.S. 53, 58, 120 S.Ct. 1114, 146 L.Ed.2d 39 (2000). Indeed, in light of Congress's express grant of permission for the inclusion of an authorization, the familiar judicial maxim *expressio unius est exclusio alterius* counsels against finding additional, implied, exceptions. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 188, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978). We therefore reject M-I's contention that a liability

waiver is an implicit exception to the "solely" requirement in 15 U.S.C. § 1681b (b) (2) (A)(i).

Syed, 853 F.3d at 501. Put in simplest terms, "solely" means just what it appears to mean, and, *no* implied exceptions to the "solely" requirement should be judicially added to the *one* express exception allowing the authorization to accompany the correct disclosure. The FCRA expressly states that the *sole* additional element that may be included with the disclosure is an authorization, "which authorization may be made on the document referred to in clause (i). . . ." 15 U.S.C.A. § 1681b(b)(2)(A) (ii).

In *Syed*, the Ninth Circuit in effect followed, and admonished employers to follow, Justice Frankfurter's instructions to: "(1) read the statute; (2) read the statute; (3) read the statute!" Henry J. Friendly, Benchmarks, (1967) 202. An employer need only read the plain language of the statute to know that no extraneous terms can be included.

C. Under the Text of the FCRA and Syed a Five-Year Statute of Limitations Applies

A five-year statue applies to this case. The FCRA's statute of limitations is "not later than the earlier of 2 years after the date of discovery by the plaintiff of the violation that is the basis for such liability; or 5 years after the date on which the violation that is the basis for such liability occurs." 15 U.S.C. § 1681p. In *Syed*, the Ninth Circuit concluded that the two year "discovery statute" began to run when the plaintiff obtained his personnel file and discovered that the defendant employer had obtained a background check and that therefore the five-year statute applied to the case. *Syed,* at 507.

D. The Investigative Consumer Reporting Agencies Act

Plaintiff also asserts a cause of action under California's Investigative Consumer Reporting Agencies Act. ("ICRAA." California Civil Code § 1786 *et seq*.) Under the ICRAA an "'investigative consumer report' means a report in which information on a consumer's character, general reputation, personal characteristics or mode of living is obtained through any means." California Civil Code § 1786.2(c). Just as with the FCRA, when an employer obtains an investigative consumer report, the employer must provide "a

clear and conspicuous disclosure in writing to the consumer at any time before the report is procured or caused to be made in a document that consists solely of the disclosure." California Civil Code § 1786.16(2)(B).

III. STATEMENT OF FACTS

A. Plaintiff Pitre

Mr. Pitre applied for work with Wal-Mart in November of 2015 and was hired around that time. (Declaration of Randy Pitre ["Pitre Decl."], at ¶ 5; Declaration of H. Scott Leviant ["Leviant Decl."], Exh. K.)[2] Mr. Pitre is presently willing to serve as a class representative, despite health concerns that caused him to evaluate whether it would be in his best interest to do so. (Pitre Decl., at ¶¶ 3-6.)

B. The Additional Proposed Representatives Walters and Wilson

Proposed new class representative Cassandra Walters applied for work with Wal-Mart in 2014 and was hired to work in California at around that same time. (Declaration of Cassandra Walters ["Walters Decl."], ¶ 5.) Proposed new class representative Desirae Wilson applied for work with Wal-Mart in 2017 and was hired to work in California at around that same time. (Declaration of Desirae Wilson ["Wilson Decl."], ¶ 5.)

C. Claims at Issue in the Complaint

As a result of the Court's ruling on Defendant's Motion to Dismiss, the following three claims for relief are at issue: (1) Violation of 15 U.S.C. §§ 1681b(b)(2)(A) (Fair Credit Reporting Act); (2) Violation of 15 U.S.C. §§ 1681d(a)(1) and 1681g(c) (Fair Credit Reporting Act); and, (3) Violation of California Civil Code §1786 et seq. (Investigative Consumer Reporting Agencies Act). (Dkt. nos. 1-1, 26.)

D. Wal-Mart's Conduct and Beliefs Regarding FCRA Background Checks

Wal-Mart, for many years, has conducted background checks on job applicants. To do so, Wal-Mart utilizes the services of different entities to help it perform those checks.

[2] All alphabetic Exhibits (Exhibit A, et seq.) are attached to the Leviant Declaration and any alphabetic designation of an Exhibit refers to exhibits to the Leviant Declaration.

In 2015, Wal-Mart used three different CRAs to obtain background check information on applicants: "In 2015 we would have had Sterling, GIS, and I believe we were using Mintz at that time as well."[3] (Leviant Decl., Exh. A: Deposition of 30(b)(6) Witness Larisa Ivy, at 32:3-4.)[4] Wal-Mart randomly cycles through the CRAs that provide background checks as a form of "load balancing." (Depo. of 30(b)(6) Witness Ivy, at 86:1-12.)

Wal-Mart believes that, unless an FCRA disclosure mentions "criminal background checks," it is not an FCRA disclosure, though Wal-Mart does admit that it is possible to have multiple forms containing FCRA disclosures. (Depo. of 30(b)(6) Witness Ivy, at 37:1-14; Application: Exh. B ["It's not a disclosure because it does not mention criminal background check.…"].) Wal-Mart also believes that state law rules should appear on an FCRA disclosure. (*Id.*)

E. <u>The Forms Used by Wal-Mart</u>

Wal-Mart utilized multiple documents that Plaintiff contends are variations on FCRA disclosure forms. The different forms are discussed below.

1. The Employment Application

Wal-Mart's employment application contains language about background investigations. Specifically, that application says:

> Wal-Mart Stores, Inc., in considering my application for employment, may verify the information set forth on this application and ***obtain additional background information relating to my background***. I ***authorize*** all persons, schools, companies, corporations, ***credit bureaus*** and law enforcement agencies to supply any information concerning my background. I have read, understand and agree to this statement. (Please initial here.) ___

(Exh. B, emphasis added.)

Wal-Mart contends, as a common legal issue, that its employment application is *not*

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[3] "CRAs" are "credit reporting agencies." (Depo. of 30(b)(6) Witness Ivy, at 32:5-6).

[4] All excerpts of the Ivy Deposition are attached as Exhibit A to the Leviant Declaration, and that Exhibit shall be referred to as "Depo. of 30(b)(6) Witness Ivy."

an FCRA disclosure because it is, according to Wal-Mart, a deficient disclosure form:

> **Q**: Why is this authorization and disclosure language embedded in the employment application?
>
> **A**: This is not a disclosure as per the FCRA.
>
> **Q**: Why is that?
>
> **A**: *Because it doesn't include all of the portions that are needed*. And because we don't do a criminal background check until the individual becomes a candidate and they are offered a job.

(Depo. of 30(b)(6) Witness Ivy, at 40:8-15 (emphasis added).)

2. The 2012 Forms Used Prior to November 2015

In 2012, Wal-Mart utilized versions of a seven-page document as part of the package of materials related to background checks. The first version was the March 2012 version. (Depo. of 30(b)(6) Witness Ivy, at 68:3-9, identifying deposition Exhibit D.). Exhibit D is paginated as pages one through seven, suggesting that Wal-Mart intended to create a single, seven-page FCRA document packed. (Exh. D.) When pressed, Wal-Mart admitted that the single, seven-page document used as of 2012 was not clear, resulting in the subsequent revision in 2015. (Depo. of 30(b)(6) Witness Ivy, at 68:20-25; Exh. D.) Wal-Mart also admitted that, in 2015, it moved state law information onto separate pages to "make it clearer." (Depo. of 30(b)(6) Witness Ivy, at 71:4-12.) Notably, Wal-Mart claims to believe, at least since March 2012, that state law disclosures had to be included in its FCRA disclosure form:

> **Q**: So it's your testimony that the state law right needs to be combined with the Authorization and Disclosure?
>
> MR. SELLINGER: Objection to the form.
>
> **A**: The state law rights need to be part of the entire packet that we provide to the candidate.
>
> **Q**: So is it your belief that this March 2012 form is in compliance with the Fair Credit Reporting Act?

A: Yes.

(Depo. of 30(b)(6) Witness Ivy, at 77:15-22.) Exhibit E, the December 2012 version, is substantially similar. (Depo. of 30(b)(6) Witness Ivy, at 81:13-19; Exhs. D and E.)

Exhibits D and E contain extensive surplusage on the very first page of the multi-page packet, including statements by Wal-Mart about its purpose,[5] information about multiple CRAs, and information related to a variety of different states. The second page of the multi-page document contains exculpatory provisions along with the bare authorization.[6] In addition, Wal-Mart improperly requires an attestation of accuracy in the disclosure and authorization packet.[7]

The first and second pages of Exhibits D and E contain contradictory information, with one page (improperly) advising California residents that they can obtain a copy of any report by paying for copy costs, while the second page offers California residents a "free copy." (Exhs. D and E, at 1, 2.) Page three of the Exhibits D and E includes a criminal history supplement page, adding to the list of surplusage in the disclosure packet.

3. The Additional Forms Used After November 2015

The FCRA package used by Wal-Mart beginning on November 5, 2015 is described by Wal-Mart's designated 30(b)(6) deponent as containing 12 pages in total and including state law information. The Authorization portion of the packet, Exhibit C, was described as part of that 12-page packet:

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[5] "In the interest of maintaining a safe shopping and work environment for our customers and associates, Wal-Mart Stores, Inc. ("Wal-Mart") will order a consumer report and/or investigative consumer report ("background check report") on you in connection with your employment application, and if you are hired, or if you already work for Wal-Mart, may order additional background check reports on you for employment purposes." (Exhs. D and E, at 1.)

[6] "After carefully reading this Background Check Disclosure and Authorization form, I authorize Wal-Mart to order a background check report on me that is prepared by a consumer reporting agency." (Exhs. D and E, at 2.)

[7] "I promise the information that I provided on this form and the attached Criminal History Supplement is true and correct. I understand dishonesty will disqualify me from consideration for employment with Wal-Mart, or if I am hired or work for Wal-Mart, that I may be fired." (Exhs. D and E, at 2.)

Q: Okay. And what is Exhibit 3?

A: Exhibit 3 is portions of our packet of information regarding the FCRA Disclosure and Authorization. It's not the full packet.

Q: And what is missing from the full packet?

A: I'd have to have it in front of me to do a side-by-side comparison, but there's twelve full pages and this only has four.

Q: So, as of November 5th, 2015, the whole FCRA packet is the twelve pages?

A: Correct.

Q: You referred to the FCRA packet, what does that mean when you utilize that term "packet?"

A: I just mean that it contains different sections, different authorizations. In this one here, it's got -- for example, you've got the background authorization. There are several page one's here. It has different requirements for different states. There's a separate portion of the packet and pages related to California. It has different sections on it.

(Depo. of 30(b)(6) Witness Ivy, at 50:1-20; Exh. C.) Exhibit F contains the balance of the 2015 disclosure and authorization packet. Exhibit G is the full, 12-page disclosure and authorization packet placed into service by Wal-Mart in 2016. It is substantially similar to the 2015 packet. (*Compare*, Exhs. C and F *with* Exh. G.)

Generally speaking, the 2015 and 2016 disclosure and authorization packets were revised over the 2012 forms to move state law disclosures and other information to separately pages of the packet and add boldface formatting to text to make it, according to Wal-Mart, clearer and more conspicuous. (Depo. of 30(b)(6) Witness Ivy, at 83:8 – 84:16; *compare*, Exhs. D and E *with* Exhs. C, F and G.) In other words, Wal-Mart tried to fix its very bad 2012 forms by creating a sprawling, 12-page packet of material.

4. A Background Check is Triggered After Issuance of an Offer

Wal-Mart testified that a conditional offer of employment "triggers" steps leading to

a background check through a CRA. (Depo. of 30(b)(6) Witness Ivy, at 40:21-25.)

5. Wal-Mart Contends That a Document Referencing a "Background Report" Is Describing Something Substantially Different Than One Referencing a "Background Investigation"

Wal-Mart concedes that its Application describes an intention to obtain "background information," while its other disclosure forms refer to a "background report." (Depo. of 30(b)(6) Witness Ivy, at 59:24 – 60:5; *see also,* Exh. B, at 2.) But Wal-Mart universally contends that those two things are somehow different:

> As an individual, I feel like if you're looking at information, that's very broad. With regard to a background report, as a 30(b)(6) and for the FCRA documentation, a background report means that we're getting a consumer report from our credit reporting agency, on your criminal background.

(Depo. of 30(b)(6) Witness Ivy, at 60:19-24.) Wal-Mart's 30(b)(6) witness claimed to have no idea what was meant by "background information," either as a 30(b)(6) witness or as an executive at Wal-Mart. (Depo. of 30(b)(6) Witness Ivy, at 61:5-8.) Wal-Mart offers no explanation as to why including similar language in multiple documents would not undermine the "clear and conspicuous" requirement or create confusion.

F. Discovery Responses Confirm Classwide Factual and Legal Defenses

In response to discovery propounded by Plaintiff, Defendant has responded with a number of admissions that confirm the propriety of class certification. First, in a Supplemental response to Plaintiff's Second Set of Interrogatories, Defendant stated its reasons why it contends that certification is not appropriate, raising common legal issues. (Exh. H.) Second, in its initial response to Plaintiff's Second Set of Interrogatories, Defendant confirmed that the vast majority of its affirmative defenses are *legal* defenses, well suited to class resolution. (Exh. I.)

IV. THE CLASS FOR WHICH PLAINTIFF REQUESTS CERTIFICATION

Plaintiff requests that the Court certify the following class:

Class: All of DEFENDANTS' current, former and prospective applicants

> for employment in the United States who applied for a job with DEFENDANTS at any time during the period for which a background check was performed beginning five years prior to the filing of this action and ending on the date that final judgment is entered in this action.[8]

Plaintiff requests certification of two subclasses as follows:

> **Sub-Class 1**: All members of the **Class** who applied for employment prior to November 5, 2015.
>
> **Sub-Class 2**: All members of the **Class** who applied for employment on or after November 5, 2015.

Plaintiff further requests certification of other such sub-classes as are necessary to manage the proposed class and sub-classes and as approved by the Court.

DISCUSSION

V. STANDARDS GOVERNING MOTIONS FOR CLASS CERTIFICATION

Parties seeking certification bear the burden of demonstrating that they meet the four requirements of Federal Rule of Civil Procedure 23(a) and at least one of the requirements of Rule 23(b). *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979-80 (9th Cir. 2011), citing *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir.), amended by 273 F.3d 1266 (9th Cir.2001).[9] Rule 23 "should be liberally construed." 3 Conte & Newberg, *Newberg on Class Actions* § 7.20 (4th ed. 2002).

When deciding on a certification motion, all factual allegations in Plaintiffs' operative complaint must be accepted as true. *Arthur Young & Co. v. United States Dist. Court*, 549 F.2d 686, 688 n.3 (9th Cir. 1977), *cert. denied* 434 U.S. 829 (1977); *Blackie v. Barrack*, 524 F.2d 891, 907 n. 17 (9th Cir. 1975), cert. denied, 429 U.S. 816 (1976). As

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[8] Plaintiff's Complaint expressly advised Defendant as follows: "PLAINTIFF reserves the right to amend or modify the class definitions with greater specificity, by further division into subclasses and/or by limitation to particular issues." (Complaint: Dkt. 1-1, at Page ID #:12.)

[9] Plaintiff discusses Rule 23(a) requisites in Section VI.A, and Rule 23(b)(3) requisites in Section VI.B.

the Ninth Circuit reiterated in *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475 (9th Cir. 1983), a limited "inquiry into the substance of a case may be necessary to ascertain satisfaction of Rule 23(a)'s commonality and typicality requirements, [but] it is improper to advance a decision on the merits to the class certification stage." *Id.* at 480 (citing *Eisen*, 417 U.S. at 177-178); see also *Valentino v. Carter- Wallace, Inc.*, 97 F.3d 1227, 1231-32 (9th Cir. 1996). Instead, at this point, the Court need only determine if the Plaintiff has satisfied Rule 23, ***not weigh competing evidence***. *Staton v. Boeing Company*, 327 F.3d 938 (9th Cir. 2003); *Blackie*, 524 F.2d at, 901 n.17. Moreover, the Ninth Circuit has just held that ***the evidence presented need not be admissible***. *Sali v. Corona Regional Medical Center*, Case No. 15-56460, Slip op., at 14 (9th Cir. May 3, 2018) ("Although we have not squarely addressed the nature of the 'evidentiary proof' a plaintiff must submit in support of class certification, we now hold that such proof need not be admissible evidence.") At the certification stage, "the court makes no findings of fact and announces no ultimate conclusions on Plaintiffs' claims." *Mazza v. Am. Honda Motor Co.*, 254 F.R.D. 610, 616 (C.D. Cal. 2008), reversed on other grounds.

"The amount of damages is invariably an individual question and does not defeat class action treatment." *Blackie*, 524 F.2d at 905; *Stearns v. TicketMaster Corp.*, 655 F.3d 1013, 1026 (9th Cir.2011) (citing *Blackie* in a case decided after the *Wal–Mart* and *Ellis* decisions). In this matter, where statutory damages are sought, damage is a non-issue.

While some courts have imposed an ascertainability requirement onto the Rule 23 certification requisites, the Ninth Circuit, in 2017, joined other Circuits in expressly rejecting such a requirement: "We have never interpreted Rule 23 to require such a showing, and, like the Sixth, Seventh, and Eighth Circuits, we decline to do so now." *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1123 (9th Cir. 2017), *cert. denied sub nom. ConAgra Brands, Inc. v. Briseno*, 138 S. Ct. 313, 199 L. Ed. 2d 206 (2017).

VI. THE REQUIREMENTS FOR CERTIFICATION ARE SATISFIED

In this context, "the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule

23 are met." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974).

A. The Requirements of Rule 23(a) Are Satisfied Here

"Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate." *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S.Ct. 2541, 2551 (June 20, 2011).[10] Under Rule 23(a), the party seeking certification must demonstrate, first, 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.

1. Numerosity

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable," not impossible. FED. R. CIV. P. 23(a)(1); *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1019 (9th Cir. 1998). Here, class size has been acknowledged to be roughly 5,000,000 persons and numerosity cannot reasonably be disputed. (Exh. J, at 4.)

2. Typicality

Rule 23(a)(3) requires "the claims or defenses of the representative parties [to be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020; *see also Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D. Cal. 1985). The commonality, typicality, and adequacy-of-representation requirements "tend to merge" with each other. *Wal-Mart*, at 2551 n. 5 (citing *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S.

[10] Of course, this case has little in common with Defendant's *Wal-Mart Stores, Inc. v. Dukes* matter. The use of alleged unlawful forms to obtain private and protected background information presents an issue suitable for class treatment. This case suffers from none of the classwide core proof issues that plagued *Wal-Mart Stores, Inc. v. Dukes*, where decisions regarding promotions of millions of women were at issue. *See, e.g.*, *Vaquero v. Ashley Furniture Industries, Inc.*, 824 F.3d 1150 (9th Cir. 2016) (finding *Wal-Mart* inapposite because the plaintiffs' wage and hour claims raised a "common injury" well suited to class treatment).

147, 157 n. 13 (1982)).

Plaintiff and the proposed new representatives are members of the proposed class and suffered the same injury as fellow class members – namely, the background check violations alleged in the Complaint. Plaintiff's and absent class members' claims arise from the same conduct and are based on the same legal theories. Like all class members, the representatives were employed by an employer that used multi-part background check disclosures containing language alleged to be non-compliant under the FCRA and analogous California state law.

The fact that there may be some differences in the forms is not enough to preclude certification. Courts in this district have ruled that differences in form contracts or disclosures do not preclude certification. *Hofstetter v. Chase Home Fin., LLC*, 2011 WL 1225900, at *10 (N.D. Cal. 2011) (granting in part motion for class certification, despite variations in contract language, noting that "[t]he variations among these agreements, however, are manageable, can be kept straight, and will not overwhelm the main themes of the case."); *Lymburner v. U.S. Financial Funds, Inc.*, 263 F.R.D. 534, 541 (N.D. Cal. 2010): "even if the disclosures were not identical, claims need only be reasonably co-extensive." Typicality is satisfied here. (Exhs. B, D, E, C, F, G.)

3. Adequacy of Representation

The adequacy requirement under Rule 23(a)(4) requires: (1) that the proposed representative plaintiffs do not have conflicts of interest with the proposed class, and (2) that plaintiffs are represented by qualified and competent counsel. *See Hanlon*, 150 F.3d at 1020 (adequacy turns on absence of conflicts with other class members and whether named plaintiffs and their counsel prosecute the action vigorously). In *Staton v. v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003), the Ninth Circuit stated two questions that define adequacy of representation: (1) do the representative plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the representative plaintiffs and their counsel prosecute the action vigorously on behalf of the class? *Staton*, 327 F.3d at 957; *Hanlon*, 150 F.3d at 1020. Here, the answer to the first is "No," and the second,

"Yes."[11]

The declaration of Plaintiff submitted herewith demonstrates that Plaintiff applied for work, suffering the same background check issues as other class members, that he understands his role as class representative, and that, to his knowledge, he has no known conflicts of interest with any other class members.[12] (Pitre Decl., ¶¶ 2-6.)[13] The additional proposed class representatives likewise suffered the same violations of rights impacting all class members. Because the proposed representatives satisfy the adequacy requisite, this Court should appoint them to represent the class.

Similarly, counsel's declarations establish that Plaintiff's counsel are experienced litigating employment class actions and other complex cases. (*See, e.g.,* Setareh Decl., ¶¶ 3-11; Leviant Decl., ¶¶ 15-17.) Counsel have investigated the claims, demonstrated their knowledge of applicable law, and demonstrated that they can and will vigorously prosecute this class action.

4. Commonality Exists: All Class Members Were Subjected to the Similar Background Check Behaviors by Defendant

Rule 23(a)(2) requires that there be questions of fact or law common to the class. Fed. R. Civ. P. 23 (a)(2). The Ninth Circuit has explained the commonality requirement:

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[11] In *Sali v. Corona Regional Medical Center*, Case No. 15-56460 (9th Cir. May 3, 2018), the Ninth Circuit has substantially narrowed the scope of information that should be considered when evaluating whether class counsel are adequate. In *Sali*, the Ninth Circuit concluded it was an abuse of discretion to consider only negative instances of attorney conduct (including not attending witness depositions or complying with discovery orders) at the certification stage when the record also demonstrated that proposed class counsel had substantial experience.

[12] The test is "whether or not plaintiffs have demonstrated a willingness and vigor to prosecute the action, whether they have any disabling conflicts going to the heart of the controversy, and whether they have qualified counsel." *In re Adobe Systems, Inc. Securities Litig.*, 139 F.R.D. 150, 156 (N.D.Cal. 1991) (plaintiffs understood gravamen of their claims, and need not be intimately familiar with every issue). *See also, Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998) (Adequacy depends on counsel's qualifications, an absence of antagonism, a sharing of interests between representatives and absentees, and unlikelihood of collusion.)

[13] Mr. Pitre acknowledged his concerns about his health issues, and Plaintiff seeks to add additional representatives through a motion to amend to address that concern.

> [T]he key inquiry is not whether the plaintiffs have raised common questions, "even in droves," but rather, whether class treatment will "generate common *answers* apt to drive the resolution of the litigation." *Wal–Mart*, 131 S.Ct. at 2551 (quoting Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L.Rev. 97, 132 (2009)) (emphasis added) (internal quotation marks and alteration omitted). This does not, however, mean that *every* question of law or fact must be common to the class; all that Rule 23(a)(2) requires is "a single significant question of law or fact."

Abdullah v. U.S. Sec. Associates, 731 F.3d 952, 957 (9th Cir. 2013). Further, commonality can be provided by common claims *and* by common defenses. *See, e.g.*, *Del Campo v. American Corrective Counseling Servs., Inc.*, 254 F.R.D. 585, 592 (N.D. Cal. 2008) ("With respect to legal commonality, Defendants are asserting a common defense.").

Here, based on the class definitions and the issues described in Sections III and IV, above, class members share an overarching common set of claims regarding the legality of Defendant's background check practices. *See*, *e.g.*, *Negrete v. Allianz Life Ins. Co.*, 238 F.R.D. 482, 488 (C.D. Cal. 2006) (finding commonality satisfied where class members' claims "derive from a common core of salient facts, and share many common issues" and granting class certification). Similarly, Defendant's assertion of common defenses against class members (*e.g.*, Dkt. 30, asserting classwide defenses) also raises common questions.

The class claims here turn on a single overarching question: Did the form sets used by Wal-Mart comply with the requirements of the FCRA and the ICRAA? Specifically, are the disclosure forms "clear and conspicuous," "standalone" disclosures that "consist solely of the disclosure?" Can Defendant lade state law notices, attestations, and other surplusage into applications, disclosure forms and authorization forms to obtain public and private consumer information? Beyond that, the class claims will also involve the common questions of whether any violation is willful, what the amount of statutory damages awarded should be, and whether punitive damages should be awarded.

Courts have found commonality in contested motions for class certification

involving claims that an employer used a non-compliant form to obtain background checks on job applicants. *See*, *Manuel v. Wells Fargo Bank*, N.A., 3:14-cv-00238, ECF No. 95 at 24 (E.D. Va Aug. 19, 2015) ("the legality of the forms is of such a nature that it is capable of class wide resolution and satisfie[s] the commonality requirement") (internal quotation omitted); *Reardon v. ClosetMaid*, 2011 WL 1628041, *6 (W.D. Penn. April 27, 2011) ("Here, there are numerous questions of law or fact common to the class. These include, but are not limited to, whether the forms used by [defendant] to obtain consent to procure a consumer report from the class member violated the FCRA."); *Milbourne v. JRK Residential Am., LLC, No*. 3:12CV861, 2014 WL 5529731 (E.D. Va. Oct. 31, 2014).[14]

Similarly, courts have found commonality in other cases where the legality of a form document was at issue. *E.g., Ables v. JBC Legal Group, Inc.,* 227 F.R.D. 541, 545 (N.D. Cal. 2005) (legality of form debt collection letter under Fair Debt Collection Practices Act); *Connor v. Automated Accounts, Inc.,* 202 F.R.D. 265, 269 (E.D. Wa. 2001) (same); *Schwarm v. Craighead*, 233 F.R.D. 655, 661 (E.D. Cal. 2006) (same); *Lee v. Enterprise Leasing Company West, LLC*, 300 F.R.D. 466, 467 (D. Nev. 2014) (common legal issue of whether car rental companies had to separately disclose airport concession recovery fee under Nevada statute); *Winkler v. DTE Inc.,* 205 F.R.D. 235, 240 (D. Ariz.

[14] Such claims also often settle prior to certification and are routinely certified in that context. *See In re Uber FCRA Litigation,* 2017 WL 2806698 *3 (N.D. Cal. 2017) ("because Plaintiffs allege that Uber systematically failed to comply with FCRA's notification requirements, all class members suffered the same deprivation of their rights under the statute. Under *Hanlon*, this constitutes sufficient commonality to satisfy Rule 23."); *Singleton v. Domino's Pizza, LLC*, 2013 WL 5506027, *4 (D. Md. Oct. 2, 2013) (finding common question of "whether [defendant] violated the FCRA by using [a form] to obtain consent from prospective and/or current employees to procure consumer reports for employment purposes, which […] was allegedly not a 'stand-alone document' and included a liability release"); *Knights v. Publix Super Markets, Inc.,* No. 3:14-cv- 00270, ECF No. 46, 1-2 (M.D. Tenn. July 28, 2014) (certifying settlement class); *Avila v. NOW Health Grp., Inc*., No. 14 C 1551, ECF No. 76 (N.D. Ill. Sept. 22, 2014) (same); *Brown v. Delhaize America*, LLC, No. 1:14-cv-195, ECF No. 68 (M.D.N.C. Mar. 27, 2015) (same); *Arocho v. Pepco Holdings, Inc.,* No. 1:14-cv-01549, ECF No. 16 (D.D.C. June 8, 2015) (same); *Avery v. Boyd Bros. Transport.,* Inc., No. 13-cv-00579, ECF No. 34 (W.D. Mo. April 18, 2014) (same); *Kirchner v. Shred-It USA, Inc*., No. 2:14-1437, ECF No. 55 (E.D. Cal., March 31, 2015) (same); *Marcum v. Dolgencorp, Inc.,* No. 3-12-cv-00108, ECF No. 79 (E.D. Va. Oct. 16, 2014) (same).

2001) (legality of disclosures on odometer statement); *Mora v. Harley Davidson Credit Corp.*, 2012 WL 1189769 *11 (E.D. Cal. 2012) (legality of form repossession notices).

Whether Wal-Mart's disclosures were willfully unlawful is a common issue. The Ninth Circuit in *Syed* held: "in light of the clear statutory language that the disclosure document must consist 'solely' of the disclosure, a prospective employer's violation of the FCRA is willful when the employer includes terms in addition to the disclosure." *Syed*, 853 F.3d at 496. Under *Syed*, it appears likely that Wal-Mart willfully violated the FCRA by including extra terms in the disclosure. Commonality exists and is satisfied.

B. Plaintiff Also Satisfies the Requirements of Rule 23 (b)(3)

Under Rule 23(b)(3), certification is proper if (1) questions of law or fact common to the members of the class predominate over any questions affecting only individual class members; and (2) class treatment is superior to other available methods for the fair and efficient adjudication of the controversy. *Local Joint Exec. Bd. Of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162-63 (9th Cir. 2001); *Negrete*, 238 F.R.D. at 487, 489. Here, Plaintiffs satisfy both predominance and superiority.

1. Common Issues Predominate Over Individual Ones

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. v. Windsor*, 521 U.S. 591, 623 (1997). The Court must find that questions of law or fact common to the class members predominate over any questions affecting individuals. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc. (In re Visa Check/Mastermoney Antitrust Litig.)*, 280 F.3d 124, 136 (2nd Cir. 2001) (common questions predominate where "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, . . . predominate over those issues that are subject only to individualized proof.").

Predominance is met where common questions of liability are present and damages can be feasibly and efficiently calculated. *See*, *e.g.*, *Leyva v. Medline Industries, Inc.*, 716 F.3d 510, 514 (9th Cir. 2012) (finding predominance where wage & hour claims presented common questions and damages could be calculated using company documents and

testimony); *Abdullah*, 731 F.3d at 964-67 (predominance satisfied where plaintiffs' claims would prevail or fail in unison given the common legal questions and ability to calculate class damages). The Ninth Circuit looks for "a common nucleus of operative facts and potential legal remedies," but does not require complete identity among class members. *Hanlon*, 150 F.3d at 1022-23. Class certification is appropriate where the action focuses on the words and conduct of the defendants, rather than on the behavior of individual class members. *Ortega v. J.B. Hunt Transport, Inc.*, 258 F.R.D. 361, 367 (C.D. Cal. 2009) ("focus of the proposed class action will be on the words and conduct of the defendants rather than on the behavior of the individual class members"). "[T]he predominance requirement [does not] constitute a uniformity requirement, such that a single exception would defeat class certification." *Delagarza v. Tesoro Ref. & Mktg. Co.*, No. C-09-5803 EMC, 2011 WL 4017967, at *12 (N.D. Cal. Sept. 8, 2011).

Plaintiff herein demonstrates that there are numerous, important questions of law and fact which, as in the cases discussed above, are based on Defendant's conduct and policies that are common to the members of the class (here, the common conduct all arises from questions about the legality of Defendant's background check practices).

a) Common Issues of Law Predominate as to Defendant's FCRA Forms

This matter raises a small nucleus of common questions of law which predominate over any individualized issues of law; the legality of Defendant's forms comprises the near totality of issues that will need to be decided to resolve this matter on the merits.

(1) The "Standalone" Requirement

The first legal issue raised by Defendant's forms concerns whether Defendant complied with the standalone disclosure requirement. 15 U.S.C. § 1681b(b)(2)(A)(i). The forms submitted herewith demonstrate that Defendant's compliance is in significant doubt, given that it used multi-page "disclosure" packets while, at the same time, including extensive surplusage within those packets. The 2012 packets are sequentially numbered, seven-page documents. (Exhs. D and E.) The 2015 and 2016 packets are *12-page* packets

(longer, evidently, in a misguided effort to improve their clarity). (Exhs. C, F and G.)

(2) The "Clear and Conspicuous" Requirement

While the disclosure required by 15 U.S.C. § 1681b(b)(2)(A)(i) must be clear and conspicuous, it is fair to recognize that FCRA does not specially define the term "clear and conspicuous." Perhaps owing to the relative clarity of the words "clear and conspicuous," there is surprisingly little case law interpreting the term as used in 15 U.S.C. § 1681b. The Court of Appeals for the Seventh Circuit said "it is appropriate to draw upon the wealth of [Uniform Commercial Code ("UCC")] and [Truth in Lending Act ("TILA")] case law in determining the meaning of 'clear and conspicuous' under the FCRA." *See Cole v. U.S. Capital*, 389 F.3d 719, 730 (7th Cir. 2004); *see also Stevenson v. TRW Inc.*, 987 F.2d 288, 295-96 (5th Cir. 1993) (interpreting "clear and conspicuous" language used in section 1681i(d) of the FCRA with reference to TILA and UCC cases). The Third Circuit has interpreted a "clear and conspicuous" disclosure to mean, in the context of the TILA, "in a reasonably understandable form and readily noticeable to the consumer." *See Rossman v. Fleet Bank (R.I.) Nat. Ass'n*, 280 F.3d 384, 390 (3d Cir. 2002) (citing 15 U.S.C. § 1632(a)). The UCC defines conspicuous as "so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it." U.C.C. § 1-201(b)(10). Other courts have regarded a FCRA disclosure as being nonconspicuous where it was printed ***in small type***, on the back of a document, ***when it is the same size and typeface as the terms around it***, ***or when it is not in boldface or capital lettering***. *See, e.g., Murray v. GMAC Mortg, Corp.*, 274 Fed. Appx. 489, 490-91 (7th Cir. 2008) (disclosure was not "conspicuous" within the meaning of FCRA requirements where it appeared on backside of solicitation flyer and occupied two of ten paragraphs all in the same size type); *Cole*, 389 F.3d at 731 (disclosure not "clear and conspicuous" where it was made in a paragraph at very bottom of flyer, printed in small font, and that was not set off from remainder of text in any way); *Murray v. Sunrise Chevrolet, Inc.*, 441 F. Supp. 2d 940, 948 (N.D. Ill. 2006) (disclosure was not "clear and conspicuous" where notice appeared in a single paragraph at the bottom of a flyer and was printed in the smallest typeface on the page).

Because Defendant used an Application that included a background investigation disclosure (Exh. B), along with voluminous background check form packets that materially changed once within the class period (Exhs. D and E, or Exhs. C, F, and G), the legal standard for compliance with the "clear and conspicuous" requirement is common to the entire class, and can be applied to the two proposed sub-classes. If it is determined that Wal-Mart's forms, or any of the, violate legal standards under the FCRA and ICRAA, then the next common legal issue that must be decided is whether the violation is willful.

b) Common Issues of Fact Predominate as to Defendant's Forms

As discussed above, in Section III, the form sets used here are common to large sub-classes of the class. Common evidence will establish when the various disclosure forms were in use. Common evidence will establish what was contained in those form sets. Common evidence will establish which CRAs were used by Wal-Mart, and the types of information received by Wal-Mart from its CRAs. Common facts predominate.

c) Common Issues of Fact and Law Predominate as to Defendant's Affirmative Defenses

As shown in Defendant's Answer (Dkt. no. 30), and its discovery responses (Exh. I), Defendant's Affirmative Defenses are, predominantly, legal defenses asserted against the entire class or significant sub-classes. As a result, those Defenses will simply increase the number of common questions that must be adjudicated on a classwide basis.

d) The Related California Law Governing Background Checks, ICCRA, Raises no Predominance Issues.

Common questions predominate as to the ICRAA. Because the standards imposed under the ICRAA are essentially identical to standards imposed under the FCRA, the same common questions that must be decided under the FCRA will apply to the ICRAA.

2. The Ninth Circuit Rejected an Ascertainability Requirement, but Even if Such a Requirement Existed, It Would Be Easily Met

The Ninth Circuit held in 2017 that an "ascertainability" requisite is incompatible with the plain language of Rule 23. "Because the drafters specifically enumerated

'[p]rerequisites,' we may conclude that Rule 23(a) constitutes an exhaustive list." *Briseno*, 844 F.3d at 1125. The Ninth Circuit observed that "Supreme Court precedent also counsels in favor of hewing closely to the text of Rule 23." *Briseno*, 844 F.3d at 1126, citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

However, even if a non-textual prerequisite were imposed here, it would be easily satisfied. The proposed classes here are ascertainable because they are objectively described and identifiable from Defendant's records or the records of its CRAs.

Plaintiff anticipates that Defendant will attempt to avoid the Ninth Circuit's holding in *Briseno* by casting what would have been its ascertainability argument as a challenge to the "manageability" of the action. Perhaps aware of that temptation, the Ninth Circuit provided a strong admonition in *Briseno* against manageability challenges:

> [R]equiring class proponents to satisfy an administrative feasibility prerequisite "conflicts with the well-settled presumption that courts should not refuse to certify a class merely on the basis of manageability concerns." [Citations omitted.] This presumption makes ample sense given the variety of procedural tools courts can use to manage the administrative burdens of class litigation. For example, Rule 23(c) enables district courts to divide classes into subclasses or certify a class as to only particular issues. Fed. R. Civ. P. 23(c)(4), (5); *see also In re Visa Check/MasterMoney*, 280 F.3d at 141 (listing "management tools available to" district courts).

Briseno, 844 F.3d at 1128. There is no ascertainability issue here, whether expressly and improperly claimed, or cloaked in the guise of a "manageability" challenge.

3. Class-Action Treatment Is Superior to Individual Actions.

Rule 23(b)(3) requires this Court to determine whether "a class action is superior to other available methods for a fair and efficient adjudication of the controversy." A class action is superior to other methods of litigation "[w]here class wide litigation of common issues will reduce litigation costs and promote greater efficiency" and where "no realistic alternative exists to class wide treatment." *Valentino v. Carter- Wallace, Inc.*, 97 F.3d

1227, 1234-35 (9th Cir. 1996). Rule 23(b)(3) lists four factors to be considered in deciding superiority; additional factors also confirm the superiority of wage and hour class actions.

a) Based on the Nature and Size of the Claims, Class Members Have Little Incentive to Bring Individual Actions.

The first factor is the interest of each class member in "individually controlling the prosecution or defense of separate actions." Fed. R. Civ. P. 23(b)(3)(A). Here, any interest is minimal because, while the aggregate damages of class members may be large, the damages of each individual are small. *See Hanlon*, 150 F.3d at 1023. In fact, a class action is the only feasible means by which individual employees who are victims of Defendant's violations can hope to obtain a cost-effective remedy. "The class action is one of the few legal remedies the small claimant has against those who command the status quo." *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 186 (1974) (Douglas, J., conc. and diss. in part). The Supreme Court aptly explained that "[t]he 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." *Amchem Prods.*, 521 U.S. at 617. Therefore, because class actions were designed to thwart injustice (*see Amchem Prods.*, 521 U.S. at 617), certification is appropriate here.

"As courts have repeatedly recognized, the statutory damages available under the FCRA are too slight to support individual suits." *White v. E-Loan, Inc.*, No. C05-02080SI, 2006 WL 2411420, at *9 (N.D. Cal. Aug. 18, 2006) (internal citations and quotations omitted); *see also In re Farmers Ins. Co., Inc., FCRA Litig.*, No. CIV-03-158-F, 2006 WL 1042450, at *11 (W.D. Okla. Apr. 13, 2006); *Braxton v. Farmer's Ins. Grp.*, 209 F.R.D. 654, 662 (N.D. Ala. 2002). As Judge Easterbrook noted in *Murray v. GMAC Mortgage*, 434 F.3d 948, 953 (7th Cir. 2006), "Rule 23(b)(3) was designed for situations such as [those involving FCRA statutory damage claims], in which the potential recovery is too slight to support individual suits, but injury is substantial in the aggregate.

b) Other Actions are Not Known to Exists

Plaintiff is unaware of other active litigation against Defendant addressing the

specific issues raised in this matter, and Defendant has not disclosed any.

c) Concentrating Class Claims in a Single Forum Is Desirable.

Another factor to be considered is the desirability "of concentrating the litigation of the claims in the particular forum." *See* Fed. R. Civ. P. 23(b)(3)(C). The United States District Court for the Central District of California is an appropriate forum for this class action. This forum is convenient for the parties and their counsel. First, the named Plaintiff resides in California and members of the Classes currently reside and/or have resided in California. Second, Defendant conducts substantial business in California. Thus, because Plaintiff and Defendant are within this Court's jurisdiction, this Court is an appropriate forum for this suit. This venue is appropriate. *Hanlon*, 150 F.3d at 1023.

d) No Significant Management Difficulties Are Present.

The Court must compare "the difficulties likely to be encountered in the management of a class action" with other available alternatives. *See* Fed. R. Civ. P. 23(b)(3)(D). Management of this case as a class action will not involve such difficulty that individual actions would be a better way of resolving this controversy. Liability to the Classes will be determined on the basis of common proof. The claims in this matter will be proven primarily, with Defendant's forms. Regardless of class size, the proof in this matter is comparatively simple. Moreover, because the requested damages are statutory, there is no meaningful issue of individualized damages that must be managed.

VII. CONCLUSION

Based on the foregoing, Plaintiff requests that the Court grant class certification as requested.

Dated: October 15, 2018

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By: _____

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