

1 Matthew C. Helland (SBN 250451)
helland@nka.com
2 NICHOLS KASTER, LLP
235 Montgomery Street, Suite 810
3 San Francisco, CA 94104
Tel.: 415.277.7235; Fax: 415.277.7238

4 E. Michelle Drake (MN Bar No. 0387366)*
emdrake@bm.net
5 John G. Albanese (MN Bar No. 0395882)*
jalbanese@bm.net
6 BERGER MONTAGUE PC
43 S.E. Main Street, Suite 505
7 Minneapolis, MN 55414
Tel.: 612.594.5999; Fax: 612.584.4470
8 *pro hac vice

9 *Attorneys for Plaintiff and the Proposed Classes*

10
11 **SUPERIOR COURT OF CALIFORNIA**
12 **COUNTY OF SANTA CLARA**

13 IAN DOUGLAS, individually, as a
14 representative of the class, and on behalf of
the general public,

15 Plaintiff,

16 v.

17 DHI GROUP, INC. and DICE INC.,

18 Defendants.

Case No.: 18-cv-331732

**PLAINTIFF'S MEMORANDUM
OF POINTS AND AUTHORITIES
IN SUPPORT OF UNOPPOSED
MOTION FOR FINAL APPROVAL
OF CLASS ACTION
SETTLEMENT**

Hon. Thomas E. Kuhnle

Date: August 2, 2019

Time: 9:00 a.m.

Department: 5

21
22
23
24
25
26
27
28
Case No.: 18-cv-331732

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 1

 I. SUMMARY OF CLAIMS AND PROCEDURAL HISTORY 1

 II. RELIEF TO CLASS MEMBERS..... 3

 III. NOTICE AND CLASS MEMBER REACTION 5

ARGUMENT 6

 I. THE SETTLEMENT TERMS ARE FAIR, REASONABLE, AND ADEQUATE 7

 A. The Settlement Provides a Substantial Recovery for the Class 7

 B. There Were Significant Risks to Recovery 9

 C. The Proposed Settlement Was Reached After Substantial
 Discovery, and Arms-Length Negotiations Between
 Experienced Counsel..... 11

 D. The Class Has Reacted Favorably to the Settlement 11

 II. THE COURT SHOULD GRANT CLASS COUNSEL’S REQUESTS
 FOR ATTORNEYS’ FEES, COSTS, AND CLASS REPRESENTATIVE
 SERVICE AWARD..... 12

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

7-Eleven Owners for Fair Franchising v. Southland Corp.,
102 Cal. Rptr. 2d 777 (Ct. App. 2000)..... 11

In re Cellphone Termination Fee Cases,
104 Cal. Rptr. 3d 275 (Ct. App. 2009)..... 6

Chakejian v. Equifax Info. Servs., LLC,
275 F.R.D. 201 (E.D. Pa. 2011)..... 10

City of Detroit v. Grinnell Corp.,
495 F.2d 448 (2d Cir. 1974)..... 7

Dunk v. Ford Motor Co.,
56 Cal. Rptr. 483 (Ct. App. 1996)..... 6, 7

Gauci v. Citi Mortg.,
2011 WL 3652589 (C.D. Cal. Aug. 19, 2011)..... 9

Goldberger v. Integrated Res., Inc.,
209 F.3d 43 (2d Cir. 2000)..... 7

Kullar v. Foot Locker Rental, Inc.,
85 Cal. Rptr. 3d 20 (Ct. App. 1998)..... 11

Reibstein v. Rite Aid Corp.,
761 F. Supp. 2d 241 (E.D. Pa. 2011) 10

In Re Toys R Us-Delaware, Inc.--Fair & Accurate Credit Transactions Act (FACTA)
Litig., 295 F.R.D. 438 (C.D. Cal. 2014)..... 7

Wershba v. Apple Comput., Inc.,
110 Cal. Rptr. 2d 145 (Ct. App. 2001)..... 6

Rules & Statutes

15 U.S.C. § 1681, *et seq.*..... 2, 7, 9, 10

28 U.S.C. § 1331, *et seq.*..... 2

Cal. Rules of Court, rule 3.769 6

1 **INTRODUCTION**

2 Plaintiff Ian Douglas (“Plaintiff”), individually and on behalf of the Settlement
3 Class,¹ seeks final approval of the proposed Settlement Agreement with Defendants DHI
4 Group, Inc. and Dice Inc. (together, “Dice” or “Defendants”), which resolves this Fair
5 Credit Reporting Act (“FCRA”) class action. At the preliminary approval stage, this
6 Court found the Settlement to be fair and worthy of approval (Prelim. Approval Order).
7 The response from the Settlement Class Members confirms the Court’s judgment. Notice
8 has been sent out to the 20,290 Settlement Class Members. There are no objections and
9 only 2 people have submitted timely opt out requests. Thus, Plaintiff requests, and
10 Defendant does not oppose, that the Court grant final approval of the Settlement.

11 **BACKGROUND**

12 The history of this litigation and Settlement, and the claims involved, are set forth
13 in detail in Plaintiffs’ preliminary approval papers and Plaintiffs’ Motion for Attorneys’
14 Fees, Costs, and Class Representative Service Award, which are incorporated herein by
15 reference and, therefore, will be only briefly summarized here.

16 **I. SUMMARY OF CLAIMS AND PROCEDURAL HISTORY.**

17 Defendants operate the website Dice.com. On Dice.com, job seekers can create
18 profiles, and recruiters and employers can access those profiles. Until recently,
19 Defendants also operated a separate service that gathered information from various
20 publicly available web sources regarding potential job candidates and compiled that
21 information into “Open Web Profiles.” The information was gathered from social media
22 sources such as LinkedIn and GitHub and sometimes included photographs of the
23 consumer and information purporting to relate to the consumer’s job history, professional
24 and technical skills, professional interests, and personal interests. The profiles also

25 _____
26 ¹ Unless otherwise explicitly defined herein, all capitalized terms have the same meanings
27 as those set forth in the Parties’ Settlement Agreement (“Settlement”), attached as Ex. A
28 to the Declaration of E. Michelle Drake in Support of Motion for Preliminary Approval of
Class Action Settlement (“Prelim. Drake Decl.”).

1 contained summaries of the potential job candidates' behavior on various social media
2 sites. Defendants sold access to these Open Web Profiles to employer and recruiter
3 customers as a stand-alone product.

4 Defendants no longer sell access to Open Web profiles as a stand-alone product.
5 However, Defendants' Dice.com website, which allows employers to post jobs and
6 candidates to post their resumes, still contains candidate profiles that are assembled by
7 Defendants in the same fashion that the stand-alone "Open Web" product was assembled.
8 In other words, the Open Web Profile product is no longer available on its own; now, it is
9 bundled with access to Defendant's website more generally. In this memorandum, the
10 term "Open Web Profile" is used to describe social media aggregation profiles created by
11 Defendants, both before and after Open Web was discontinued as a stand-alone product.

12 Plaintiff filed his initial complaint in the Superior Court of the State of California
13 for the County of Santa Clara on July 26, 2017. *Douglas v. DHI Group, Inc. et al.*, No.
14 17-cv-313578, Complaint (July 26, 2017) (attached to the Prelim. Drake Decl. as Ex. D.)
15 The initial complaint asserted six counts under the Fair Credit Reporting Act, alleging that
16 Defendants were "consumer reporting agencies" and that the Open Web Profiles were
17 "consumer reports" as regulated by the FCRA. Plaintiff alleged that Defendants violated
18 the FCRA by *inter alia* providing access to consumer reports to individuals and entities
19 who did not have any legal right to access such reports, failing to provide copies of
20 consumer reports to consumers upon request, and failing to ensure that the information
21 contained in the reports was maximally accurate. Plaintiff, on behalf of himself and those
22 similarly situated, sought recovery of statutory damages for Defendants' alleged willful
23 violations of the FCRA, 15 U.S.C. § 1681n.

24 On August 23, 2017, Defendants filed a General Denial. The same day,
25 Defendants removed on the basis that Plaintiff's claims under the FCRA (1) give rise to a
26 federal question under 28 U.S.C. § 1331, and (2) give rise to federal jurisdiction under the
27 Class Action Fairness Act, 28 U.S.C. § 1332(d). *Douglas v. DHI Group, Inc. et al.*, No.
28 17-cv-313578, Notice of Removal (August 23, 2017).

1 The Parties exchanged written discovery and agreed to an early mediation. Prior
2 to the mediation, the Parties exchanged detailed mediation statements setting forth their
3 respective views on the strengths and weaknesses of Plaintiff's claims. On March 14,
4 2018, the Parties engaged in an all-day mediation with the neutral Rodney Max, an
5 experienced FCRA and class action mediator. The mediation ended with Mr. Max's
6 proposal to be considered by both sides.

7 Due to changes in Defendants' management that were in process at the time of the
8 mediation, the Parties requested significant additional time to evaluate the mediator's
9 proposal. To ensure the parties had adequate time to respond to the proposal, the Parties
10 stipulated to dismiss the federal case while tolling the relevant statute of limitations for all
11 putative class members. *Douglas v. DHI Group, Inc.*, No. 5:17-cv-04887-LHK,
12 Stipulation of Voluntary Dismissal, ECF No. 33 (N.D. Cal. Mar. 19, 2018.) (Prelim.
13 Drake Decl., Ex. E.)

14 In May 2016, the U.S. Supreme Court issued its decision in *Spokeo, Inc. v. Robins*,
15 136 S. Ct. 1540 (2016), which held that an alleged bare procedural violation, divorced
16 from any concrete harm, is not a concrete injury-in-fact sufficient to meet Article III
17 standing requirements necessary for federal jurisdiction. After the Parties settled, in a
18 desire to avoid protracted litigation about whether Plaintiff possessed Article III standing
19 and whether the federal court could validly approve the Parties' Settlement, the Parties
20 agreed to present the settlement to this Court, the Court in which the action was originally
21 filed. The Parties agree that this Court has jurisdiction to approve and enforce the
22 Settlement. On November 29, 2018, the Parties executed a formal Settlement Agreement.
23 (Prelim. Drake Decl., Ex. A.)

24 On March 11, 2019, this Court preliminarily approved the Settlement Agreement
25 and authorized the dissemination of Notice to the Settlement Class. (Prelim. Approval
26 Order.)

27 **II. RELIEF TO CLASS MEMBERS.**

28 The Settlement Class is defined as:

1 All individuals about whom Defendants created an Open Web profile and
2 (a) for whom a third party used a feature on the Open Web profile to
3 communicate with the individual or (b) the individual requested deletion
4 of their Open Web profile. The Class Period is from July 26, 2012 to the
5 date that the Class List is prepared.

6 (Prelim. Drake Decl., Ex. 1 § 3.1.) The Settlement Class contains 20,290
7 members. In consideration for the release of the Settlement Class Members' claims,
8 Defendants will pay \$1,000,000 to the Settlement Class as part of a common settlement
9 fund. (*Id.* § 1.27.) After any Court-approved deductions for attorneys' fees, expenses,
10 claims administration costs, and Class Representative service award, the entire remaining
11 fund will be distributed *pro rata* to all Settlement Class Members who submitted valid and
12 timely claims. The claims rate is about 7.97%. If the requested attorneys' fees, costs, and
13 Class Representative Service Award and settlement administration costs are approved, it
14 is estimated that each Class Members who made a claim will receive approximately
15 \$330.²

16 Should any funds remain after the close of the check negotiation period (*i.e.*,
17 because class members fail to cash their checks), the remaining funds will be donated to
18 the Parties' designated charitable *cy pres* recipient, Public Justice. (Prelim. Drake Decl.,
19 Ex. 1 § 7.4.)

20 In addition to the monetary relief described herein, Defendants have also agreed to
21 make significant business practice changes regarding the Open Web Profiles. Defendants
22 have agreed to revise their Terms of Use to (a) clarify that the Dice service may only to be
23 used to identify candidates for possible recruitment and to make initial contact with such
24 candidates; (b) clarify that Dice users are not permitted to use Open Web profiles as a
25 factor in determining any consumer's eligibility for employment, retention, or promotion,
26 and (c) prohibit Dice users from reviewing the Open Web profiles of persons who are

26 ² Plaintiff's motion for attorneys' fees indicated that payouts would be approximately
27 \$350. That number was based on the claims submitted 10 days prior to the claims
28 deadline. Based on the updated data which includes claims through the claims deadline,
the current payouts are expected to be around \$330.

1 employed by the user or have already expressed interest in employment with the user
2 outside of the Dice search process. (Prelim. Drake Decl., Ex. 1 § 8.1.) Defendants have
3 also agreed to implement various protections for the subjects of Open Web Profiles
4 including (a) permitting consumers to review the Open Web profiles, (b) maintaining a
5 policy to correct mismatched Open Web Profiles, (c) allowing consumers to suppress
6 specific social media platforms from inclusion in an Open Web Profile, and (d) allowing
7 consumers to request removal of their profiles and providing guidance on how to prevent
8 the profiles from reappearing. (*Id.* ¶¶ 8.1-8.5.)

9 **III. NOTICE AND CLASS MEMBER REACTION.**

10 On March 26, 2019, the Settlement Administrator, Angeion Group, LLC
11 (“Angeion”), sent the court-approved Email Notices. (Declaration of Settlement
12 Administrator (“Admin. Decl.”) ¶ 4.) A total of 20,290 emails were sent, which resulted
13 in 19,085 Email Notices being delivered and 1,205 Email Notices not delivered. (*Id.*) On
14 June 7, 2019 Angeion sent a second reminder Email Notice to the 19,360 class members
15 who had not submitted a Claim Form. (*Id.* ¶ 5.)

16 On March 26, 2019, Angeion also commenced a targeted Facebook advertisement
17 campaign, which resulted in delivered 184,488 ad impressions. (*Id.* ¶ 6.) A copy of the
18 Facebook Notice is attached to the Admin. Decl. as Exhibit C.

19 Angeion also caused the Settlement Website to go live on March 26, 2019. The
20 Settlement Website provided Class Members with general information about the
21 Settlement, court documents, copies of the Notices, and important dates and deadlines.
22 (*Id.* ¶ 7.) The Website also allowed Class Members to submit their Claim Forms or
23 requests for exclusion online. (*Id.* ¶ 7.) The Settlement Website has had 16,483 page
24 views. (*Id.* ¶ 8.) 1,711 Claim Forms and 2 requests for exclusion submitted via the
25 Settlement Website. (*Id.* ¶ 8.)

26 On March 26, 2019, Angeion also established a 24/7 toll-free telephone line,
27 which provided responses to frequently asked questions. (*Id.* ¶ 9.) As of July 11, 2019,
28 the toll-free hotline had received 49 calls. (*Id.* ¶ 10.)

1 On July 3, 2019, Class Counsel filed their motion for attorneys’ fees, costs, and
2 Class Representative Service Award, which was promptly posted on the Settlement
3 Website. No Class Members objected to those requests.

4 The deadline for Class Members to submit objections is July 19, 2019. Thus far
5 there have been no objections and only 2 timely opt-outs. (*Id.* ¶¶ 12, 13.)

6 ARGUMENT

7 A class action may not be settled or compromised without “the approval of the
8 court after hearing.” Cal. Rules of Court, rule 3.769. The purpose of this requirement is
9 “[t]o prevent fraud, collusion or unfairness to the class,” and the court must determine
10 whether “the settlement is fair, adequate, and reasonable.” *Dunk v. Ford Motor Co.*, 56
11 Cal. Rptr. 2d 483, 487-88 (Ct. App. 1996) (internal quotation omitted). “Public policy
12 generally favors the compromise of complex class action litigation.” *In re Cellphone*
13 *Termination Fee Cases*, 104 Cal. Rptr. 3d 275, 281 (Ct. App. 2009) (internal quotation
14 omitted).

15 On a motion for final approval, the trial court is charged with determining whether,
16 in light of the total circumstances of the action and the response of the class members to
17 the notice, the settlement is fair, reasonable, and adequate. *Dunk*, 56 Cal. Rptr. 2d at 487;
18 *Wershba v. Apple Comput., Inc.*, 110 Cal. Rptr. 2d 145, 162 (Ct. App. 2001). The court
19 has broad discretion in making that determination and may consider all relevant factors
20 including the strength of the plaintiff’s case; the likelihood of potential recovery; the risk,
21 expense and likely duration of further litigation; the amount offered in settlement; the
22 extent of discovery and stage of the proceedings; the experience and opinion of counsel;
23 and the reaction of class members to the settlement. *See Wershba*, 110 Cal. Rptr. 2d at
24 162. Because of the strong judicial policy favoring the settlement of class actions, there is
25 a presumption of fairness when: (1) the settlement is reached through arms-length
26 bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to
27 act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of
28 objectors is small. For the reasons set forth below, the Settlement warrants final approval.

1 *Id.*; *Dunk*, 56 Cal. Rptr. 2d at 488.

2 **I. THE SETTLEMENT TERMS ARE FAIR, REASONABLE, AND ADEQUATE.**

3 **A. The Settlement Provides a Substantial Recovery for the Class.**

4 As set forth in Plaintiff’ preliminary approval memorandum and motion for
5 attorneys’ fees, costs, and Class Representative Service Award, the Settlement provides a
6 substantial monetary and non-monetary benefit for the Settlement Class, especially in
7 light of Defendants’ potential defenses, and the number of procedural hurdles Plaintiff
8 would have faced to achieve a final judgment.

9 Plaintiff filed his case seeking statutory damages under the FCRA, which provides
10 for statutory damages of between \$100 and \$1,000 for each willful violation. 15 U.S.C. §
11 1681n(a)(1). Through the Settlement, Class Members who made claims will achieve a
12 financial recovery that is three-and-a-half times the statutory minimum. If the Court
13 grants the requested fees, costs and service award, based on the current claims rate, the
14 payouts will be approximately \$330 for Class Members. This is an exceptional result and
15 weighs strongly in favor of settlement approval.

16 A recovery of a meaningful percentage of the likely award if the claims had
17 proceeded all the way through final judgment is a significant result. *See City of Detroit v.*
18 *Grinnell Corp.*, 495 F.2d 448, 455 n.2 (2d Cir. 1974) (“[T]here is no reason, at least in
19 theory, why a satisfactory settlement could not amount to a hundredth or even a
20 thousandth part of a single percent of the potential recovery.”), *abrogated on other*
21 *grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000); *In Re Toys R*
22 *Us-Delaware, Inc.--Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D.
23 438, 453-54 (C.D. Cal. 2014) (“Viewed from the perspective of each class member, had
24 the class member sued Toys individually and proved that it acted wil[l]fully, he or she
25 could have recovered between \$100 and \$1,000 in statutory damages. . . . A \$5 or \$30
26 award, therefore, represents 5% to 30% of the recovery that might have been obtained.
27 This is not a *de minimis* amount. Given the likelihood that plaintiffs would have been
28 unable to prove actual damages and the risk that they would have been unable to prove

1 willfulness and recover any damages at all, the court finds that the amount of the
2 settlement weighs in favor of approval.”).

3 The settlement amount is better than many of those achieved in settlements that
4 have been approved in cases raising similar claims, especially those after the Supreme
5 Court agreed to hear *Spokeo*. See *Aceves v. Autozone Inc.*, No. 5:14-cv-2032, ECF No. 58
6 (C.D. Cal. Nov. 18, 2016) (final approval of FCRA settlement with gross recovery of \$20
7 per class member in the disclosure class); *Landrum v. Acadian Ambulance Serv., Inc.*, No.
8 14-cv-1467, ECF No. 37 (S.D. Tex. Nov. 5, 2015) (approving FCRA disclosure
9 settlement of \$10 per person); *Patrick v. Interstate Mgmt. Co., LLC*, No. 8:15-cv-1252,
10 ECF No. 42 (M.D. Fla. Jan. 14, 2016) (granting preliminary approval of FCRA settlement
11 with gross recovery per disclosure class member of \$16.40); *Manuel v. Wells Fargo Bank,*
12 *NA*, No. 14-cv-238-REP-DJN, 2016 WL 1070819, at *2 (E.D. Va. Mar. 15, 2016)
13 (granting final approval to FCRA background check settlement where “each member of
14 the Impermissible Use Class will receive a check for \$35.00, and each Adverse Action
15 Class member will receive a check for \$75.00”); *Walker v. McClane/Midwest, Inc.*, No.
16 2:14-CV-04315, ECF No. 29 (W.D. Mo. Oct. 23, 2015) (final approval of FCRA
17 settlement in which disclosure class members recovered \$24); *Brown v. Lowe’s*, 5:13-cv-
18 00079, ECF No. 173 (W.D.N.C. Nov. 1, 2016) (granting final approval of a pre-adverse
19 action FCRA claim in which the gross recovery was \$60 per class member); *Fernandez v.*
20 *Home Depot USA, Inc.*, No. 13-cv-648-DOC-RNB, ECF No. 59 (C.D. Cal. Jan. 22, 2016)
21 (granting final approval to FCRA background check settlement where claimants would
22 receive \$15 to \$100 each); *Patrick v. Interstate Mgmt. Co., LLC*, No. 15-cv-1252, ECF
23 No. 49 (M.D. Fla. April 29, 2016) (approving settlement of FCRA disclosure claim where
24 class members received \$9 each).

25 Moreover, the non-monetary relief in the form of practice changes promised by the
26 Settlement is a great benefit to Class Members, as it both limits the purposes for which
27 profiles may be used, and also implements various safeguards to ensure that consumers
28 can both access and correct their profiles. This relief likely could not have been obtained

1 in litigation, as many courts have found that injunctive relief is not available to private
2 plaintiffs under FCRA. *See, e.g., Gauci v. Citi Mortg.*, No. 11-cv-1387-ODW-JEM, 2011
3 WL 3652589, at *3 (C.D. Cal. Aug. 19, 2011) (“District courts in the Ninth Circuit agree
4 that a private party may not obtain injunctive relief under the FCRA.”).

5 Taken all together, the gross recovery, the per-class member recovery, the non-
6 monetary relief, and the method of distributing the settlement proceeds are all fair and
7 reasonable and warrant final settlement approval.

8 **B. There Were Significant Risks to Recovery.**

9 There were a number of specific risks that Plaintiff faced that could have resulted
10 in no recovery whatsoever. These risks are detailed in Plaintiff’s preliminary approval
11 memorandum and motion for fees, costs, and Class Representative Service Award, but are
12 briefly restated here.

13 Litigation to judgment before a jury carries intangible risks with which the Court is
14 certainly familiar. In this case, Plaintiff faced not only the generic litigation risk that is
15 present in any case, but also specific risks on two issues that are particularly worthy of
16 consideration by this Court in its evaluation of the fairness of the settlement.

17 Specifically, Plaintiff would have confronted risks on the issues of whether the
18 FCRA applied to Defendants’ Open Web Profiles. Open Web Profiles are primarily used
19 by recruiters regarding people who have not yet applied for a job opening. As such,
20 Defendants would have argued that Open Web Profiles do not serve as a factor in
21 evaluating an applicant’s “eligibility” for employment, promotion, reassignment, or
22 retention, which is an element of the statutory definition of a “consumer report.” See 15
23 U.S.C. § 1681a(d)(1). For the same reason, Plaintiff faced risks in arguing that Open Web
24 Profiles were used as a factor in making an eligibility decision for “employment
25 purposes.” *Id.* Recent appellate decisions finding that other entities were not covered by
26 the FCRA suggest that the risk that Defendants would be found not to be covered by the
27 FCRA was real and substantial. *See Kidd v. Thomson Reuters Corp.*, 925 F.3d 99, 109
28 (2d Cir. 2019) (holding that defendant did not violate FCRA because reports produced by

1 defendant’s subscription-based internet platform were not “consumer reports”); *Zabriskie*
2 *v. Fed. Nat’l Mortg. Ass’n*, 912 F.3d 1192, 1195 (9th Cir. 2019) (holding that defendant
3 did not violate FCRA because reports produced by defendant’s proprietary software were
4 not “consumer reports”).

5 Plaintiff further faced significant risk on the issue of willfulness. A FCRA
6 plaintiff can recover statutory damages only where the defendant has acted willfully. 15
7 U.S.C. § 1681n(a)(1). Plaintiff expects that if this matter had been litigated to judgment,
8 Defendants would have hotly contested the question of willfulness. At least one court has
9 found that allegations similar to Plaintiff’s allegations were insufficient to state a claim for
10 a willful violation of the statute. *Schoebel v. Am. Integrity Ins. Co.*, No. 15-cv-380, 2015
11 WL 3407895, at *9 (M.D. Fla. May 27, 2015) (dismissing FCRA stand-alone disclosure
12 claim for failing to adequately plead willfulness); *see also Chakejian v. Equifax Info.*
13 *Servs., LLC*, 275 F.R.D. 201, 212 (E.D. Pa. 2011) (proving willfulness in FCRA case was
14 “a high hurdle to clear,” was a factor weighing in favor of settlement approval); *Reibstein*
15 *v. Rite Aid Corp.*, 761 F. Supp. 2d 241, 253 (E.D. Pa. 2011) (that willfulness presented
16 “considerable — albeit not insurmountable — risks” weighs in favor of settlement
17 approval).

18 Second, Plaintiff faced risks related to subject-matter jurisdiction. The Settlement
19 was negotiated in the shadow of the Supreme Court’s consideration of and decision in
20 *Spokeo*. Federal district courts are divided on the impact of *Spokeo* on claims under the
21 provisions of the FCRA at issue in this lawsuit. *Demmings v. KKW Trucking, Inc.*, No.
22 3:14-CV-494-SI, 2017 WL 1170856, at *10 (D. Or. Mar. 29, 2017) (discussing split in
23 authority). Plaintiff would have vigorously contended that jurisdiction was proper in
24 federal court. Plaintiff would have further contended that if there was no federal
25 jurisdiction the federal court was required to remand the case to this court, where it was
26 originally filed. This court is not bound by Article III of the Constitution and has much
27 broader jurisdiction. While Plaintiff views the law on these topics as clear, some courts
28 have dismissed cases from federal court for lack of Article III standing rather than

1 remanding those cases to state court. *See, e.g., Woods v. Caremark, L.L.C.*, No. 4:15-CV-
2 00535-SRB, 2016 WL 6908108, at *5 (W.D. Mo. July 28, 2016). Further, litigation on
3 the issue of standing could have persisted *ad infinitum*, and would have been raised at
4 various stages of the case, including on appeal. *Spokeo*-related jurisdictional issues are
5 likely to continue to be litigated in federal and state courts for years with no definitive
6 resolution until the U.S. Supreme Court revisits the issue. Given these risks, and the
7 attendant delays that would have impacted any judgment, the Settlement represents a
8 meaningful result for the Class and should be approved.

9 **C. The Proposed Settlement Was Reached After Substantial Discovery,**
10 **and Arms-Length Negotiations Between Experienced Counsel.**

11 As detailed above, the Settlement was reached after an all-day mediation session
12 with Rodney Max, an experienced FCRA and class action mediator, and substantial
13 discovery. Both Plaintiff and Defendants are represented by counsel who have significant
14 experience in class action litigation and settlements, and in FCRA cases in particular.
15 Counsel for the Parties have litigated numerous class action cases involving employment-
16 related claims brought under the FCRA. Class Counsel have litigated over forty FCRA
17 class actions, and are recognized nationally as FCRA experts. The judgment of Class
18 Counsel is entitled to deference. *See Kullar v. Foot Locker Rental, Inc.*, 85 Cal. Rptr. 3d
19 20, 31 (Ct. App. 1998) (“The court ... should give considerable weight to the competency
20 and integrity of counsel and the involvement of a neutral mediator in assuring itself that a
21 settlement agreement represents an arm’s-length transaction entered without self-dealing
22 or other potential misconduct.”).

23 **D. The Class Has Reacted Favorably to the Settlement.**

24 Of the approximately 20,290 Class Members, only 2 timely requested to opt out,
25 and none have objected. These numbers decidedly weigh in favor of final approval. *See*
26 *7-Eleven Owners for Fair Franchising v. Southland Corp.*, 102 Cal. Rptr. 2d 777, 788 (Ct.
27 App. 2000) (describing class reaction as “overwhelmingly positive” where 80 out of 5,454
28 class members opted out and 9 class members objected).

1 In spite of the fact that notice was limited to email (because Defendants did not
2 have mailing addresses for class members), the claims rate in this case reached 7.97%.
3 This also supports final approval. The claims rate in this settlement exceeds rates that are
4 commonly approved amount. *See Shames v. Hertz Corp.*, No. 07-cv-2174, 2012 WL
5 5392159, at *14 (S.D. Cal. Nov. 5, 2012) (granting final approval of settlement with 4.9%
6 claims rate); *Zepeda v. PayPal, Inc.*, No. 10-cv-1668, 2017 WL 1113293, at *15-16 (N.D.
7 Cal. March 24, 2017) (finding in consumer protection case that a 3.8% claims rate
8 indicated that the email “notice process has been remarkably successful – and the
9 Settlement Class’s reaction to the Settlement has been overwhelmingly positive.”); *In re*
10 *LinkedIn User Privacy Litig.*, 309 F.R.D. 573, 589 (N.D. Cal. 2015) (approving settlement
11 and finding 5.9% claims rate to indicate an overall positive reaction to the settlement);
12 *White v. Experian Info. Solutions, Inc.*, 803 F. Supp. 2d 1086, 1100 (C.D. Cal. 2011)
13 (approving settlement with 5% response rate); *Tait v. BSH Home Appliances Corp.*, No.
14 10-cv-0711, 2015 WL 4537463, at *8 (C.D. Cal. July 27, 2015) (approving settlement
15 with 3% claims rate); *Touhey v. U.S.*, No. 08-cv-01418, 2011 WL 3179036, at *7-8 (C.D.
16 Cal. July 25, 2011) (approving settlement with 2% claims rate); *Sullivan v. DB Invs., Inc.*,
17 667 F.3d 273, 329 n.60 (3d Cir. 2011) (en banc) (noting evidence that claims rates in
18 consumer class settlements “rarely” exceed 7%, “even with the most extensive notice
19 campaigns”). Here, the claims rate of 7.97% is in line with and exceeds that in these
20 settlements.

21 The reaction from the Class has been positive and thus the Settlement should
22 receive final approval.

23 **II. THE COURT SHOULD GRANT CLASS COUNSEL’S REQUESTS FOR ATTORNEYS’**
24 **FEES, COSTS, AND CLASS REPRESENTATIVE SERVICE AWARD.**

25 On July 3, 2019, Class Counsel filed their motion for attorneys’ fees, costs, and
26 Class Representative Service Award. The motion seeks one-third of the settlement fund
27 (\$333,333) for fees, up to \$32,098.08 in out-of-pocket expenses, \$56,800 in settlement
28 administration expenses, and Class Representative Service Award of \$5,000 for Plaintiff.

1 The motion and related filings were placed on the Settlement Website shortly after filing
2 and there were no objections to the requests made in the motion. The motion for fees,
3 costs, and Class Representative Service Award should be granted.

4 **CONCLUSION**

5 Based on the foregoing, the Court should grant final approval to the proposed
6 settlement.

7 BERGER MONTAGUE PC

8 Date: July 19, 2019

9 /s/E. Michelle Drake
E. Michelle Drake (*pro hac vice*)

10 ATTORNEYS FOR PLAINTIFF

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28