UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ERIC KEELS and SANDRA INMAN, individually and on behalf of all others similarly situated, **Plaintiffs,** **v.** **THE GEO GROUP, INC. and ACCURATE BACKGROUND, INC.,** **Defendants.**	**No. 1:15-cv-06261-CBA-SMG**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR CERTIFICATION OF THE SETTLEMENT CLASS AND FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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INTRODUCTION

Plaintiffs Eric Keels and Sandra Inman (together, "Plaintiffs") respectfully submit this memorandum of law in support of their motion for final approval of the class settlement reached by Plaintiffs and The GEO Group, Inc. ("GEO" or "Defendant") (together with Plaintiffs, the "Parties"). The proposed settlement is fair, reasonable, and adequate, and satisfies all of the criteria for final approval under applicable law. Accordingly, Plaintiffs seek an order: (1) certifying the settlement class described below; and (2) approving as fair and adequate the class-wide settlement of this action, as set forth in the Settlement Agreement, attached as Ex. A to the Declaration of Ossai Miazad in Support of Plaintiffs' Motions for Certification of the Settlement Class and Final Approval of the Class Action Settlement, Approval of Attorneys' Fees and Reimbursement of Expenses and Approval of Service Payments ("Miazad Decl.").[1]

On September 30, 2017, the Court took the first step in the settlement approval process by preliminarily approving the Settlement Agreement; provisionally certifying the Settlement Class[2] pursuant to Federal Rule of Civil Procedure 23; appointing Outten & Golden LLP ("O&G") as Class Counsel; directing that notice be sent to the Class Members through a variety of means; and setting a date for the final fairness hearing. ECF No. 53 (Order Preliminarily Approving Settlement ("PA Order")).

Class Members have been notified of the terms of the settlement, including the monetary relief, the allocation of settlement funds, and their right to opt out of or object to the settlement. Ex. B (Declaration of Zachary Cooley Re: Notice Procedures ("Cooley Decl.")) at Ex. C (Notice). As of January 23, 2018, 1,513 Class Members have submitted claim forms, no Class

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1 Unless otherwise indicated, all exhibits are attached to the Miazad Declaration.

2 Unless otherwise indicated, all capitalized terms have the definitions set forth in the Settlement Agreement.

Members have objected, and one Class Member has requested exclusion from this settlement. Ex. B (Cooley Decl.) ¶¶ 12-14. Accordingly, for the reasons stated below, the Court should grant final approval.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs incorporate by reference the factual allegations and procedural history set forth in Plaintiffs' Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement, Conditional Certification of the Settlement Class, and Appointment of Plaintiffs' Counsel as Class Counsel, and Approval of Plaintiffs' Proposed Notice of Settlement. *See* ECF No. 49; *see also* Miazad Decl. ¶¶ 12-26.

II. SUMMARY OF THE SETTLEMENT TERMS

A. The Settlement Amount

GEO has agreed to pay a maximum Settlement Amount of $900,000.00 to cover payment to Class Members, Court-approved costs and fees including Plaintiffs' Counsel's attorneys' fees and costs and the Settlement Administrator's fees and costs, and any Court-approved Service Awards. Ex. A (Settlement Agreement) §§ I(Q), (TT).

B. Equitable Revisions to GEO's Policies Relief

GEO also has agreed to significant equitable changes to its policies and business practices above and beyond the Settlement Amount. *See id.* § III(A). First, GEO has implemented a formal Background Check Policy to codify the procedures it uses to ensure FCRA compliance across all GEO locations nationwide. GEO's affirmative obligations are to: (1) consolidate background check vendors ("vendors"); (2) contract with those vendors to assume the administration process for sending pre- and post- adverse action notices and engage in periodic compliance audits/reviews; (3) perform FCRA training for existing and new HR employees; (4) transfer responsibility for initiating the adverse action notice process from the

facility to regional or corporate level; (5) standardize FCRA-related forms across all facilities; (6) make copies of the periodic background check reports obtained by GEO available to employees upon request and inform employees of this right; and (7) conduct periodic audits of the process. *See id.* § III(A)(1). In addition, GEO has agreed to revise its corporate policies and procedures manuals to include a copy of its Background Check Policy. *See id.* § III(A)(2). GEO also is obligated to ensure that all current and new human resources employees will be trained regarding the Background Check Policy. *See id.* § III(A)(3).

C. Class Members

Class Members are:

> All persons for whom GEO obtained a Consumer Report, from October 30, 2010, through September 30, 2017, as part of the GEO hiring or employee retention process, and at some point later in time either were not hired or were terminated.

See id. at p.2.

D. Releases

All Class Members who do not exclude themselves from the settlement will release claims "that were or could have been asserted by the named Plaintiffs . . . based upon the FCRA and FCRA State Equivalent that are the subject of this Litigation[.]" *Id.* § VII(1).

E. Allocation Formula

Class Members are divided into Class A Members and Class B Members, depending on when their claims arose. Class A Members are those who had a Consumer Report that was completed and returned to GEO on or after October 30, 2013, through September 30, 2017. *See id.* § I(E). Class B Members are those who had a Consumer Report that was completed and returned to GEO on or after October 30, 2010, and on or before October 29, 2013. *See id.* § I(F). Each Eligible Settlement Class Member is entitled to claim a pro rata share of the Settlement

Amount (after fees and costs are subtracted), not to exceed $200.00 per Class A Member or $100.00 per Class B Member. *Id.* § III(C)(1). Any unclaimed funds will revert to GEO. *Id.*

F. Attorneys' Fees and Costs

Plaintiffs also move the Court for approval for up to 33% of the Settlement Amount for their attorneys' fees, plus their actual litigation expenses and costs. *Id.* § III(D). Plaintiffs submitted a Motion for Approval of Attorneys' Fees and Reimbursement of Expenses simultaneously with the instant motion.

G. Service Awards

In addition to their payment under the allocation formula, Plaintiffs seek Service Awards of $5,000.00 each for Named Plaintiffs Keels and Inman. *Id.* § VIII. Plaintiffs submitted a Motion for Approval of Service Awards simultaneously with the instant motion.

H. CAFA Notice

The Settlement Administrator sent notices to federal and state authorities as required by the Class Action Fairness Act ("CAFA") on October 12, 2016. *See* 28 U.S.C. § 1715(d); Ex. B (Cooley Decl.) ¶¶ 2-4.

I. Settlement Administration

The Parties selected KCC LLC, an experienced class action claims administrator, to administer the settlement. The Settlement Administrator's costs and expenses of $65,000.00 will be paid from the Gross Settlement Amount. Ex. A (Settlement Agreement) § III(B)(2), (5); *see* Ex. B (Cooley Decl.) ¶ 15.

On October 27, 2017, the Settlement Administrator mailed 11,808 Court-approved notices. *Id.* ¶ 6. On November 11, 2017, the Settlement Administrator mailed reminder postcards to 11,111 Class Members who had not submitted a Claim Form or Request for Exclusion. *Id.* ¶ 8. During the notice process, Plaintiffs' Counsel identified Class Members with

duplicate addresses. *Id.* ¶ 9. As a result, the Parties agreed that notice would be reissued to the 264 Class Members who had updated addresses. *Id.* Those Class Members also were provided with an additional 30 days to submit claim forms. *See id.*

J. Objections and Opt-Outs

The Notice advised Class Members that they could object to or exclude themselves from the settlement. Ex. B (Cooley Decl.) at Ex. C (Notice) ¶¶ XIV, XIX. No Class Members have objected to the settlement and one Class Members has requested exclusion from the settlement.

ARGUMENT

I. The Settlement Class Meets the Legal Standard for Class Certification.

On September 30, 2017, the Court preliminarily certified the Settlement Class. *See* ECF No. 53 (PA Order). Plaintiffs now respectfully request that the Court grant final certification because the Settlement Class meets all of the requirements of Rule 23.[3]

A. Numerosity

"[N]umerosity is presumed at a level of 40 members." *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). Here, the proposed Class is comprised of 11,808 job applicants and employees, making joinder impracticable. Ex. B (Cooley Decl.) ¶ 5; *See* Fed. R. Civ. P. 23(a)(1); *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993).

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[3] Under Rule 23, a class action may be maintained if all of the prongs of Rule 23(a) are met, as well as one of the prongs of Rule 23(b). Rule 23(a) requires that: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). Rule 23(b)(3) requires the Court to find that questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. *Id.* at (b)(3). Here, Plaintiffs seek certification of a Settlement Class only, and GEO's non-opposition to such certification is only for purposes of a Settlement Class. To the extent the Settlement were not approved for any reason and this litigation were to proceed, GEO retains all rights to challenge certification of a litigation class.

B. Commonality

The proposed Settlement Class satisfies the commonality requirement, which tests "whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). The requirement requires only "questions of law or fact common to the class." *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998). Some factual variation among class members will not defeat a class action. *Rosario v. Livaditis*, 963 F.2d 1013, 1017-18 (7th Cir. 1992).

This case involves numerous common issues. Plaintiffs and Class Members all share the common contention that they were denied employment without being provided pre-adverse action notice packets. These common factual and legal questions satisfy commonality for settlement purposes. *Thomas v. FTS USA, LLC*, 312 F.R.D. 407, 417-18 (E.D. Va. 2016) (finding commonality when pre-adverse action notices were never sent); *Manuel v. Wells Fargo Bank, N.A.*, No. 14 Civ. 238, 2015 WL 4994549, at *10-12 (E.D. Va. Aug. 19, 2015) (substantively same); *see also Pickett v. Simos Insourcing Sols., Corp.*, 249 F. Supp. 3d 897, 899 (N.D. Ill. 2017) (for settlement purposes, commonality satisfied where defendant "uniformly failed to provide individuals with pre-adverse action notice packets"). Plaintiffs also allege that Defendant's violations were willful. Courts routinely find that the question of willfulness is a common question. *Thomas*, 312 F.R.D. at 417; *Manuel*, 2015 WL 4994549, at *12; *Katz v. ABP Corp.*, No. 12 Civ. 4173, 2014 WL 4966052, at *2 (E.D.N.Y. Oct. 3, 2014) (for FCRA settlement purposes); *see also Engel v. Scully & Scully, Inc.*, 279 F.R.D. 117, 128 (S.D.N.Y. 2011) ("The critical questions of the defendant's business practices and willfulness are common to all class members, and are likely to generate common answers which drive the resolution of the litigation.").

C. Typicality

Rule 23 requires that the claims of the representative party be typical of the claims of the Settlement Class. "Like the commonality requirement, typicality does not require the representative party's claims to be identical to those of all class members." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 182 (W.D.N.Y. 2005). Typicality is often satisfied "when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997).

Here, like the putative Settlement Class, Keels alleges that he was a job applicant denied employment because of his background check without having been provided pre-adverse action notice packets. *See* ECF No. 16 (First Amended Complaint) ¶¶ 45-49. Also like the putative Settlement Class, Inman alleges that she was an employee denied employment because of her background check without having been provided pre-adverse action notice packets. *See id.* ¶¶ 64-68. Typicality is met for the Settlement Class because Plaintiffs were "subjected to the same procedures as all putative class members and it is those procedures that are challenged." *Manuel*, 2015 WL 4994549, at *14; *see also Thomas*, 312 F.R.D. at 419 ("[L]ike every other class member, Thomas did not receive any pre-adverse action materials[.]").

D. Adequacy of the Named Plaintiffs and Their Counsel

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The adequacy requirement exists to ensure that the named representatives will "have an interest in vigorously pursuing the claims of the class, and . . . have no interests antagonistic to the interests of other class members." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006). "[O]nly a conflict that goes to the very

subject matter of the litigation will defeat a party's claim of representative status." *Dziennik v. Sealift, Inc.*, No. 05 Civ. 4659, 2007 WL 1580080, at *6 (E.D.N.Y. May 29, 2007).

Plaintiffs do not have interests that are antagonistic to or at odds with the Settlement Class Members' interests. *See Puglisi v. TD Bank, N.A.*, No. 13 Civ. 637, 2015 WL 4608655, at *1 (E.D.N.Y. July 30, 2015) (adequacy satisfied where, *inter alia*, there was no evidence that named plaintiffs' and class members' interests were at odds). Plaintiffs also have selected Counsel capable of adequately representing the Settlement Class's interests. *See, e.g.*, *Houser v. Pritzker*, 28 F. Supp. 3d 222, 248 (S.D.N.Y. 2014) (finding O&G and non-profit partners "bring to the case a wealth of class action litigation experience" and were adequate to represent approximately half-million person Black and Latino job applicant class in background check litigation); Ex. F (July 30, 2015 Hr'g Tr. for *Puglisi v. TD Bank, N.A.*, No. 13 Civ. 637 (E.D.N.Y.)) at 11-12 (lawyering by plaintiffs' counsel—including O&G—was "excellent" and noting "the high level of service that was provided to the class"); *Beckman v. Keybank, N.A.*, 293 F.R.D. 467, 477 (S.D.N.Y. 2013) (attorneys at O&G "are experienced employment lawyers with good reputations among the employment law bar"); *Pickett v. Simos Insourcing Sols., Corp.*, No. 17 Civ. 1013, 2017 WL 3444755, at *1 (N.D. Ill. Aug. 10, 2017) (same when finally approving Section 1681b(b)(3) FCRA settlement); *see also* Miazad Decl. ¶¶ 4-10. Thus, for the purposes of settlement, the adequacy requirement is satisfied.

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

Rule 23(b)(3) requires that the common questions of law or fact "predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). This inquiry examines '"whether proposed classes are sufficiently cohesive to warrant adjudication by representation."' *Tyson Foods Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (quoting

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997)). For the purposes of settlement, these requirements are met in this case.

1. Common Questions Predominate.

The predominance requirement is more demanding than the Rule 23(a) commonality inquiry and "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *In re Am. Int'l Grp., Inc. Sec. Litig.*, 689 F.3d 229, 239-40 (2d Cir. 2012) (internal quotation omitted). To establish predominance, Plaintiffs must demonstrate that "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." *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 107-08 (2d Cir. 2007). The essential inquiry is whether "liability can be determined on a class-wide basis, even when there are some individualized damage issues." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 139 (2d Cir. 2001), *abrogated on other grounds by Miles v. Merrill Lynch & Co., Inc. (In re Initial Pub. Offering Sec. Litig.)*, 471 F.3d 24 (2d Cir. 2006); *see also Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 405 (2d Cir. 2015) (individualized damages are merely a factor that courts "consider in deciding whether issues susceptible to generalized proof outweigh individual issues[,]" not an absolute bar to class certification) (internal quotation omitted). Where plaintiffs are "unified by a common legal theory . . . and by common facts[,]" the predominance requirement is satisfied. *McBean v. City of N.Y.*, 228 F.R.D. 487, 502 (S.D.N.Y. 2005).

Here, Plaintiffs' common contentions—that Defendants have uniformly failed to provide job applicants and employees with pre-adverse action notice packets—predominate over any issues affecting only individual Settlement Class Members. *See Thomas*, 312 F.R.D. at 425 (predominance satisfied where defendant never provided pre-adverse action notices to any class

members); *Manuel*, 2015 WL 4994549, at *17 (noting that "[n]o individualized proof would be necessary to determine the issue of willfulness"); *see also Katz*, 2014 WL 4966052, at *2 (finding predominance when parties dispute defendant's business practice and complaint sought statutory, not individualized, damages) (citing *Engel*, 279 F.R.D. at 130); *Lengel v. HomeAdvisor, Inc.*, No. 15 Civ. 2198, 2017 WL 364582, at *7 (D. Kan. Jan. 25, 2017) ("[T]he question whether HomeAdvisor willfully violated the FCRA is the same for each settlement class member.").

2. A Class Action is a Superior Mechanism.

The second part of the Rule 23(b)(3) analysis examines whether "the class action device [is] superior to other methods available for a fair and efficient adjudication of the controversy." *Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir. 1968). The superiority analysis considers four factors: (1) individual interest of class members in controlling prosecution of the action; (2) the extent of similar, prior litigation commenced by members of the class; (3) the desirability of concentrating the litigation in a particular forum; and (4) the difficulties of managing the class action. Fed. R. Civ. P. 23(b)(3). Here, potential recovery for Settlement Class Members is comparatively modest—even if Class Members were to recover full statutory damages. *See, e.g.*, *Thomas*, 312 F.R.D. at 425 (in FCRA cases, "potential class members' claims for statutory damages are small when considered in comparison to the effort it would take to assert them in court"); *Katz*, 2014 WL 4966052, at *3 (class adjudication superior "due to the low damages incentive for individual litigation"); *see also Pickett*, 2017 WL 3444755, at *1 ("Class adjudication is superior because, among other reasons, the potential recovery for Class Members [under the FCRA] is comparatively modest—even if Class Members were to recover full statutory damages—when compared with the effort it would take to assert them individually in court."). Employing the Settlement Class device to concentrate litigation in this Court will

achieve economies of scale, conserve the resources of the judicial system, and avoid the waste and delay of repetitive proceedings and inconsistent adjudications of similar issues and claims. *See, e.g.*, *Thomas*, 312 F.R.D. at 426; *Manuel*, 2015 WL 4994549, at *18. Moreover, "many plaintiffs will not be aware that their rights were violated because of the technical nature of the FCRA and thus would not be able to bring a suit at all" without this settlement. *Thomas*, 312 F.R.D. at 425-26.[4]

II. The Proposed Settlement is Fair, Reasonable, and Adequate and Should Be Approved.

Rule 23(e) requires court approval for a class action settlement to ensure that it is procedurally and substantively fair, reasonable, and adequate. Fed. R. Civ. P. 23(e). To determine procedural fairness, courts examine the negotiating process leading to the settlement. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc*., 396 F.3d 96, 116 (2d Cir. 2005); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001). To determine substantive fairness, courts evaluate whether the settlement's terms are fair, adequate, and reasonable according to the factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc*., 209 F.3d 43 (2d Cir. 2000).

Courts examine procedural and substantive fairness in light of the "strong judicial policy in favor of settlement[]" of class action suits. *Wal-Mart Stores*, 396 F.3d at 116 (internal quotation omitted); *see also Spann v. AOL Time Warner Inc.*, No. 02 Civ. 8238, 2005 WL 1330937, at *6 (S.D.N.Y. June 7, 2005) ("[P]ublic policy favors settlement, especially in the case of class actions.").

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[4] Manageability need not be considered in deciding whether to certify a class for settlement purposes only, as the litigation would not proceed on the basis of the certified settlement class if settlement is unsuccessful. *Amchem*, 521 U.S. at 620 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems.").

A. The Proposed Settlement is Procedurally Fair.

The proposed settlement is procedurally fair because it was reached as a result of vigorous, arm's-length negotiations and mediation conducted under the auspices of the Honorable Diane M. Welsh, an experienced and well-respected employment, consumer and class action law mediator, and a former United States Magistrate Judge in the Eastern District of Pennsylvania. Miazad Decl. ¶ 24. The Parties' negotiations took place against a backdrop of hard-fought litigation involving anticipated motion practice concerning complex legal issues at the motion to dismiss stage. *See, e.g.*, ECF Nos. 23, 24, 25.

Before their mediation, the Parties entered into a confidentiality agreement and exchanged information relevant to Plaintiffs' claims—including client files and information relating to the size and ascertainability of the putative Class. Miazad Decl. ¶ 18. All told, Defendant produced over 600 pages of documents, which Counsel reviewed. *Id.* ¶ 19. The Parties held multiple telephone conferences where they discussed this information, and its implication for the merits of the case. *Id.* ¶ 20. Plaintiffs then conducted a preliminary damages analysis for purposes of settlement negotiations. *Id.* ¶ 21. Before mediation, the Parties also exchanged detailed mediation briefs outlining their respective evaluations of the strengths and weaknesses of the claims at issue. *Id.* ¶ 22. Plaintiffs' Counsel also conducted their own independent investigation, interviewing multiple putative Class Members. *Id.* ¶ 23.

On April 22, 2016, the Parties participated in a full day of mediation in New York, New York with Judge Welsh. *Id.* ¶ 24. After concluding a full day of arms-length negotiations, the Parties reached an agreement on the material terms of a settlement. *Id.* ¶ 25. Over the next approximately five months, the Parties extensively negotiated the detailed Settlement Agreement to finalize topics including equitable revisions to GEO's policies and the notice and claims process. *Id.* ¶ 26; *see* Ex. A (Settlement Agreement).

This process afforded the Parties' experienced counsel an ample basis to evaluate the merits of the claims. *See Toure v. Amerigroup Corp.*, No. 10 Civ. 5391, 2012 WL 3240461, at *3 (E.D.N.Y. Aug. 6, 2012) (finding settlement to be "procedurally fair, reasonable, adequate, and not a product of collusion" after plaintiffs engaged in significant discovery and enlisted the services of an experienced employment law mediator); *Flores v. Anjost Corp.*, No. 11 Civ. 1531, 2014 WL 321831, at *4 (S.D.N.Y. Jan. 29, 2014) (same). A "presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Wal-Mart Stores*, 396 F.3d at 116 (internal quotation omitted); *see also D'Amato*, 236 F.3d at 85. "Absent fraud or collusion, [courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement." *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, Nos. 05 Civ. 10240, *et al*., 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007).

B. <u>The Proposed Settlement Is Substantively Fair.</u>

In *Grinnell*, the Second Circuit provided the analytical framework for evaluating the substantive fairness of a class action settlement. 495 F.2d at 463. The *Grinnell* factors guide district courts in making this determination. They are: (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *Id.* All of the *Grinnell* factors weigh in favor of final approval of the settlement.

1. Litigation Through Trial Would Be Complex, Costly, and Long (*Grinnell* Factor 1).

By reaching a settlement prior to dispositive motions or trial, Plaintiffs seek to avoid significant expense and delay, and instead ensure recovery for the Class Members. The FCRA is a "complex statute[.]" *Galper v. JP Morgan Chase Bank, N.A.*, 802 F.3d 437, 444 (2d Cir. 2015). "[P]articularly in the class action context, [it] is a complex and challenging area of law." *White v. Experian Info. Solutions*, 993 F. Supp. 2d 1154, 1172 (C.D. Cal. 2014); *see also In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000) ("Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them."), *aff'd sub. nom. D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001). This case is no exception, with FCRA claims covering 11,808 individuals.

Extensive discovery would be required to establish liability and damages and to support Plaintiffs' class certification motion and defend against Defendant's opposition to such motion. This discovery would include further electronic and paper discovery of Defendant's background check and hiring policies; depositions of Class Members and Defendant's employees, such as relevant hiring managers and human resources personnel; and depositions of Defendant's corporate representatives. In Counsel's experience, there is a strong possibility that discovery as to the Section 1681b(b)(3) claims also would include third-party subpoenas of the consumer reporting agency contracted with by GEO (with discovery disputes likely arising as to the propriety and scope of such subpoenas). After completing discovery, the Parties would likely move for summary judgment on the merits of the claims. If the Court determined that fact disputes precluded summary judgment, a trial would be necessary. Any judgment would likely be appealed, further extending the Litigation. This settlement, on the other hand, provides

significant relief to Class Members in a prompt and efficient manner. Therefore, the first *Grinnell* factor weighs in favor of final approval.

2. The Reaction of the Class Has Been Positive (*Grinnell* Factor 2).

The absence of objections by Class Members is significant in determining whether the proposed class settlement is reasonable to the class as a whole. *See Slomovics v. All for a Dollar, Inc.*, 906 F. Supp. 146, 150 (E.D.N.Y. 1995) (The lack of class member objections "may itself be taken as evidencing the fairness of the settlement.") No Class Member has objected to the settlement and only one Class Member has requested exclusion. This is strong evidence of the fairness of the settlement. *See, e.g.*, *Behzadi v. Int'l Creative Mgmt. Partners, LLC*, No. 14 Civ. 4382, 2015 WL 4210906, at *2 (S.D.N.Y. July 9, 2015) (noting that "reaction to the settlement was positive [because] [n]o Class Member objected to the Settlement Stipulation, and only 24 Exclusion Forms were timely submitted"); *Lizondro-Garcia v. Kefi LLC*, No. 12 Civ. 1906, 2014 WL 4996248, at *4 (S.D.N.Y. Oct. 7, 2014) (finding class's reaction to settlement to be "extremely positive" when no class member objected and only one opted out) (collecting cases); *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 619 (S.D.N.Y. 2012) (where 16 out of 1,500 class members excluded themselves and only one objected, the "response demonstrates strong support for the settlement").

In addition to the absence of objections and sole request for exclusion, Class Members' participation rate supports final approval of the settlement. Here, approximately 12.8% of Class Members have submitted claim forms. *See* Ex. B (Cooley Decl.) ¶¶ 5, 12 (the Parties have agreed that the 54 late-filed claim forms will be accepted, for a total to date of 1513 claim forms). This participation rate well exceeds the claims rate approved by other courts in FCRA settlements. Miazad Decl. ¶ 51; *see Rhom v. Thumbtack, Inc.*, No. 16 Civ. 02008, 2017 WL 4642409, at *6 (N.D. Cal. Oct. 17, 2017) (granting final approval to FCRA settlement with

66,676 class members, 3.5% claims rate, one objection, and one request for exclusion); *Watkins v. Hireright, Inc.*, No. 13 Civ. 1432, 2016 WL 5719812, at *3 (S.D. Cal. Sept. 30, 2016) (granting final approval to FCRA settlement with 298, 318 class members, 5.9% claims rate, and several objectors). It is all the more reasonable given Defendant's position that the class list was over-inclusive. *See infra* n. 5.

3. Discovery Has Advanced Far Enough to Allow the Parties to Resolve the Case Responsibly (*Grinnell* Factor 3).

The Parties have completed enough discovery to recommend settlement. The proper question is '"whether counsel had an adequate appreciation of the merits of the case before negotiating."' *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 537 (3d Cir. 2004) (quoting *In re Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001)); *see also Karic v. Major Auto. Cos., Inc.*, No. 09 Civ. 5708, 2016 WL 1745037, at *6 (E.D.N.Y. Apr. 27, 2016). '"[T]he pretrial negotiations and discovery must be sufficiently adversarial that they are not designed to justify a settlement;"' rather, they must be '"an aggressive effort to ferret out facts helpful to the prosecution of the suit."' *In re Austrian*, 80 F. Supp. 2d at 176 (quoting *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 263 (S.D.N.Y. 1998)).

Here, the Parties' discovery meets this standard. In the months leading up to mediation, the Parties engaged in informal discovery. Defendant provided Plaintiffs information relevant to Plaintiffs' claims including client files and information relating to the size and ascertainability of the putative Class. Defendant produced over 600 pages of documents, which Plaintiffs reviewed. The Parties also had multiple telephone conferences to discuss the information produced by Defendant, and its potential impact on the claims at issue. Plaintiffs' Counsel conducted their own independent investigation, interviewing multiple putative Class Members involved in the hiring process. Before the mediation, Plaintiffs' Counsel crafted a damages model based on

information provided by Defendant and their own evaluation of the merits. Accordingly, the third *Grinnell* factor favors final approval. *See, e.g., Katz*, 2014 WL 4966052, at *1, *9 (granting preliminary approval of FCRA settlement based on pre-mediation discovery and arms-length negotiations); *see also Ballinger v. Advance Magazine Publishers, Inc.*, No. 13 Civ. 4036, 2014 WL 7495092, at *2 (S.D.N.Y. Dec. 29, 2014); *Morris*, 859 F. Supp. 2d at 620 (collecting cases).

4. Plaintiffs Would Face Risk If the Case Proceeded (*Grinnell* Factors 4 and 5).

Although Plaintiffs believe their case is strong, it is subject to risk. "[R]isks are inherent in litigation." *Sewell v. Bovis Lend Lease, Inc.*, No. 09 Civ. 6548, 2012 WL 1320124, at *8 (S.D.N.Y. Apr. 16, 2012). Indeed, "[i]f settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome." *In re Ira Haupt & Co.*, 304 F. Supp. 917, 934 (S.D.N.Y. 1969). In weighing the risks of establishing liability and damages, the Court "must only weigh the likelihood of success by the plaintiff class against the relief offered by the settlement." *Sykes v. Harris*, No. 09 Civ. 8486, 2016 WL 3030156, at *13 (S.D.N.Y. May 24, 2016) (quoting *In re Austrian*, 80 F. Supp. 2d at 177).

Here, Plaintiffs first would have had to survive a motion to dismiss. In its pre-motion letter to the Court, Defendant stated that it intended to move to dismiss Inman's claims as time-barred (among other arguments). *See* ECF No. 23 at 3. Should Defendant have succeeded, two categories of individuals provided recovery through this settlement would have had their claims barred—employees who were fired after a background check, and employees and job applicants who only had timely claims if the longer five-year statute of limitation applied (three entire years of claims). *See* 15 U.S.C. § 1681p. In 2016, the Supreme Court also issued a new decision on standing, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), which courts are still in the process of

interpreting, and which might have subjected Plaintiffs to further motion to dismiss briefing. Although Plaintiffs are confident that they would have survived both bases for motions to dismiss, the putative Class nonetheless faced risk.

If Plaintiffs' claims survived, they would have faced risks as to class certification and summary judgment after a lengthy discovery process. If they lost on the issue of willfulness at summary judgment, recovery of statutory damages for the class would have been barred. Surviving those motions, a trial on the merits would involve significant risk as to both liability and damages. While Plaintiffs believe they could ultimately defeat Defendant's defenses and establish liability, this would require significant factual development and favorable outcomes at trial, and on appeal, all of which is inherently uncertain and lengthy. The proposed settlement alleviates uncertainty. This factor weighs in favor of final approval.

5. Maintaining the Class Through Trial Would Not Be Simple (*Grinnell* Factor 6).

The risk of obtaining class certification and maintaining it through trial also is present. Defendant would likely contest class certification resulting in extensive discovery and briefing. Defendant may have argued different defenses for certain Class Members based on their particular factual circumstances. Although many FCRA cases are certified, there is nonetheless a legitimate risk that the Court would conclude that individualized factual inquiries would preclude class treatment. *See, e.g.*, *Delmoral v. Credit Prot. Ass'n, LP*, No. 13 Civ. 242, 2015 WL 5793311, at *6 (E.D.N.Y. Sept. 30, 2015) (denying class certification in FDCPA case where "each proposed class member's claim would require an individualized determination of exactly when he or she received the" relevant communications). If the Court were to grant class

certification, Defendant would likely challenge that determination, requiring additional briefing including opposing a Rule 23(f) petition.[5] Accordingly, this factor favors final approval.

6. Defendants' Ability to Withstand a Greater Judgment Is Not Determinative (*Grinnell* Factor 7).

A "defendant['s] ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *In re Austrian*, 80 F. Supp. 2d at 178 n.9. Here, the settlement eliminates the risk of collection by requiring Defendant to pay the full Settlement Amount owed within five days after the Effective Date, and significant amounts before then. *See* Ex. A (Settlement Agreement) § III(B). Accordingly, this factor is neutral.

7. The Settlement Fund Is Substantial, Even in Light of the Best Possible Recovery and the Attendant Risks of Litigation (*Grinnell* Factors 8 and 9).

The $900,000 Settlement Amount represents substantial value given the risks of litigation, even though the recovery might be greater if Plaintiffs survived a motion to dismiss, summary judgment, and prevailed and maintained a class through trial and on appeal. The determination of whether a settlement is reasonable "'is not susceptible of a mathematical equation yielding a particularized sum.'" *In re Austrian*, 80 F. Supp. 2d at 178 (*quoting In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 66 (S.D.N.Y. 1993)); see also *Ballinger*, 2014 WL 7495092, at *3 ("The inquiry . . . is to see whether the settlement falls below the lowest point in the range of reasonableness.") (internal quotation omitted). "Instead, 'there is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties

[5] Moreover, Defendant's position is that GEO's records do not uniformly contain information regarding whether an adverse employment decision was made on the basis of a background check, or on other grounds not implicated by the FCRA and, thus, the class list is necessarily over-inclusive. To address this potential, the parties have employed a claims process requiring individuals to state that they "believe in good faith that GEO's adverse employment decision was related to information in [their] Consumer Report, and [they] did not receive timely notices under the Fair Credit Reporting Act." Ex. B (Cooley Decl.) at Ex. C (Claim Form).

of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion."' *Frank*, 228 F.R.D. at 186 (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)). "[T]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Grinnell*, 495 F.2d at 455 n.2.

Here, the settlement provides more than "a fraction of the potential recovery." *Id.* at 455. If (and only if) willfulness is proven by Plaintiffs, Class Members' best outcome under the FCRA would be damages between $100 and $1,000 per claim. 15 U.S.C. § 1681n. Through this settlement, Class Members will receive $200 if they fall within the two-year statute of limitations period and $100 if they fall within the five-year statute of limitations (*i.e.* years 3-5). These potential recoveries are similar to, and in some cases well exceed, the range of acceptable recoveries approved by courts in FCRA settlements. *White v. First Am. Registry, Inc.*, No. 04 Civ. 1611, 2007 WL 703926, at *2 (S.D.N.Y. Mar. 7, 2007) (finally approving payments up to $100 for class members who submit claims with pro rata reduction if total claims exceeds available balance after settlement expenses including claims administration and attorneys' fees and costs deducted); *Domonoske v. Bank of Am., N.A.*, 790 F. Supp. 2d 466, 470 (W.D. Va. 2011) (finally approving proportional payments up to $100, but no less than $2, for class members who submit claim forms).[6]

[6] *See also Watkins*, 2016 WL 1732652, at *7 (preliminarily approving settlement where cap to recovery was $200, but parties estimated each class member would receive approximately $58.00); *Manuel v. Wells Fargo Bank, Nat'l Ass'n*, No. 14 Civ. 238, 2016 WL 1070819, at *2 (E.D. Va. Mar. 15, 2016) (finally approving settlement where class members would receive either $35 or $75 dollars); *Syed v. M-I LLC,* No. 14 Civ. 742, 2016 WL 310135, at *8 (E.D. Cal. Jan. 26, 2016) (finally approving settlement where class members would receive approximately $16).

When a settlement assures immediate payment of substantial amounts to class members, "even if it means sacrificing speculative payment of a hypothetically larger amount years down the road," settlement is reasonable under this factor. *Gilliam v. Addicts Rehab. Ctr. Fund*, No. 05 Civ. 3452, 2008 WL 782596, at *5 (S.D.N.Y. Mar. 24, 2008) (internal quotation omitted).

Further, beyond the cash payment, Plaintiffs have achieved significant equitable revisions aimed at ensuring that job applicants and employees will be provided with notification of their FCRA rights before an adverse action is taken—the issue at the heart of this litigation. This includes consolidating background check vendors, having the vendors send required notices, centralizing the process, training employees on the process, and auditing the process. GEO's policies also will be included in its corporate policies and procedures manuals, helping inform employees of their FCRA rights (one of the central purposes of Section 1681b(b)(3)).

Significantly, the settlement also provides employees with the right to request copies of their background check reports even if no adverse action is taken. This provides employees with a free opportunity to review their credit and criminal history and address any issues presented (and is otherwise not a right provided by the FCRA). The equitable revisions are all the more significant given that the FCRA does not provide for injunctive relief and these revisions could not have been achieved absent this settlement. *See White v. First Am. Registry, Inc.*, 378 F. Supp. 2d 419, 424 (S.D.N.Y. 2005) (holding injunctive and declaratory relief unavailable to private parties under FCRA); *cf. Watkins*, 2016 WL 1732652, at *7 (including equitable relief as benefit when weighing fairness of FCRA settlement).

Weighing the benefits of the settlement against the available evidence and the risks associated with proceeding in the litigation, the Settlement Amount is reasonable.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court grant their Motion for Certification of the Settlement Class and Final Approval of the Class Action Settlement, and enter the Proposed Order filed herewith.

Dated: January 23, 2018
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Respectfully submitted,

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