UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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MICHAEL KIRCHNER, an individual, on behalf of himself and all others similarly situated, Plaintiff, v. SHRED-IT USA INC., a Delaware Corporation; FIRST ADVANTAGE LNS SCREENING SOLUTIONS, INC., and Does 1 through 10, Defendants.	CIV. No. 2:14-1437 WBS EFB MEMORANDUM AND ORDER RE: MOTION FOR PRELIMINARY SETTLEMENT APPROVAL

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Plaintiff Michael Kirchner brought this putative class-action lawsuit against defendants Shred-it USA ("Shred-it") and First Advantage Background Services Corp. ("First Advantage"), alleging that defendants failed to comply with federal credit reporting laws while conducting pre-employment background checks. Presently before the court is plaintiff and Shred-it's joint motion for preliminary approval of class action settlement.

(Docket No. 53.)

I. Factual and Procedural Background

Plaintiff applied for a job with Shred-it on April 13, 2011. (First Am. Compl. ("FAC") ¶ 14 (Docket No. 17).) As part of the application process, plaintiff received and signed a one-page disclosure form. (Id. ¶ 14, Ex. A.) In addition to disclosing the fact that Shred-it might procure a consumer report for employment purposes on plaintiff, the form also included release and discharge language that plaintiff alleges violated the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681 et seq. Specifically, plaintiff claims the language failed to comply with 15 U.S.C. § 1681b's requirement that an employer disclose that a consumer report may be obtained for employment purposes in a form consisting "solely of the disclosure." (FAC ¶ 17); see 15 U.S.C. § 1681b(b)(2).

On October 8, 2014, Shred-it moved to dismiss plaintiff's FAC. (Docket No. 31.) Before the court could rule on that motion, however, plaintiff and Shred-it notified the court that they had agreed to settlement terms and withdrew Shred-it's motion to dismiss without prejudice. (Docket No. 43.) The parties now seek preliminary approval of their stipulated class action settlement.

II. Discussion

Federal Rule of Civil Procedure 23(e) provides that "[t]he claims, issues, or defenses of a certified class may be settled . . . only with the court's approval." Fed. R. Civ. P. 23(e). "Approval under 23(e) involves a two-step process in which the Court first determines whether a proposed class action

settlement deserves preliminary approval and then, after notice is given to class members, whether final approval is warranted." Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc., 221 F.R.D. 523, 525 (C.D. Cal. 2004) (citing Manual for Complex Litig., Third, § 30.41 (1995)).

This Order is the first step in that process and only analyzes whether the proposed class action settlement deserves preliminary approval. See Murillo v. Pac. Gas & Elec. Co., 266 F.R.D. 468, 473 (E.D. Cal. 2010). Preliminary approval authorizes the parties to give notice to putative class members of the settlement agreement and lays the groundwork for a future fairness hearing, at which the court will hear objections to (1) the treatment of this litigation as a class action and/or (2) the terms of the settlement. See id.; Diaz v. Trust Territory of Pac. Islands, 876 F.2d 1401, 1408 (9th Cir. 1989) (stating that a district court's obligation when considering dismissal or compromise of a class action includes holding a hearing to "inquire into the terms and circumstances of any dismissal or compromise to ensure that it is not collusive or prejudicial"). The court will reach a final determination as to whether the parties should be allowed to settle the class action on their proposed terms after that hearing.

The Ninth Circuit has declared a strong judicial policy favoring settlement of class actions. Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992). Nevertheless, where, as here, "the parties reach a settlement agreement prior to class certification, courts must peruse the proposed compromise to ratify both [1] the propriety of the certification

and [2] the fairness of the settlement." Staton v. Boeing Co., 327 F.3d 938, 952 (9th Cir. 2003).

The first part of this inquiry requires the court to "pay 'undiluted, even heightened, attention' to class certification requirements" because, unlike in a fully litigated class action suit, the court "will lack the opportunity . . . to adjust the class, informed by the proceedings as they unfold." Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 620 (1997); see Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). The parties cannot "agree to certify a class that clearly leaves any one requirement unfulfilled," and consequently the court cannot blindly rely on the fact that the parties have stipulated that a class exists for purposes of settlement. See Windsor, 521 U.S. at 621-22 (stating that courts cannot fail to apply the requirements of Rule 23(a) and (b)).

The second part of this inquiry obliges the court to "carefully consider 'whether a proposed settlement is fundamentally fair, adequate, and reasonable,' recognizing that '[i]t is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness . . . .'" Staton, 327 F.3d at 952 (quoting Hanlon, 150 F.3d at 1026); see also Fed. R. Civ. P. 23(e) (outlining class action settlement procedures).

A. Class Certification

A class action will only be certified if it meets the four prerequisites identified in Rule 23(a) and additionally fits within one of the three subdivisions of Rule 23(b). See Ontiveros v. Zamora, Civ. No. 2:08-567 WBS DAD, 2014 WL 3057506,

at *4 (E.D. Cal. July 7, 2014); Fed. R. Civ. P. 23(a)-(b). Although a district court has discretion in determining whether the moving party has satisfied each Rule 23 requirement, see Califano v. Yamasaki, 442 U.S. 682, 701 (1979); Montgomery v. Rumsfeld, 572 F.2d 250, 255 (9th Cir. 1978), the court must conduct a rigorous inquiry before certifying a class, see Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161 (1982); E. Tex. Motor Freight Sys. v. Rodriguez, 431 U.S. 395, 403–05 (1977).

1. Rule 23(a) Requirements

Rule 23(a) restricts class actions to cases where:

> (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).

a. Numerosity

Under the first requirement, "[a] proposed class of at least forty members presumptively satisfies the numerosity requirement." Avilez v. Pinkerton Gov't Servs., 286 F.R.D. 450, 456 (C.D. Cal. 2012); see also, e.g., Collins v. Cargill Meat Solutions Corp., 274 F.R.D. 294, 300 (E.D. Cal. 2011) (Wanger, J.) ("Courts have routinely found the numerosity requirement satisfied when the class comprises 40 or more members."). The proposed class, which the parties estimate will contain approximately 3,328 members, (see Pl.'s Mem. at 6 (Docket No. 53-1)), easily satisfies this requirement.

b. Commonality

Commonality requires that the class members' claims "depend upon a common contention" that is "capable of classwide resolution--which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550 (2011). "[A]ll questions of fact and law need not be common to satisfy the rule," and the "existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." Hanlon, 150 F.3d at 1019.

Plaintiff states that, had the case proceeded to trial, all putative class members would have predicated their claims on Shred-it's alleged failure to comply with the FCRA by using a disclosure form with additional language, such as a liability release or indemnity provision. (Pl.'s Mem. at 14.) Although the exact factual predicates for each claim may vary, plaintiff argues that Shred-it's policy of including additional language in its disclosure forms creates common questions of fact and law regarding the adequacy of those forms under 15 U.S.C. § 1681b(b)(2). (See id.)

The court agrees that the potential claims of the class members would arise from a set of circumstances similar to that of plaintiff's, namely, the receipt or signing of a form provided by Shred-it that contained language beyond the disclosure and authorization language permitted by the FCRA. Whether these forms complied with § 1681b(b)(2) is a question common to all class members. Class members would also face the common question

of whether Shred-it "willfully" failed to comply with § 1681b(b)(2)'s requirement. See 15 U.S.C. § 1681n(a); Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 56-60 (2007). These questions of law are therefore applicable in the same manner to each member of the class, making class relief based on commonality appropriate. See Califano v. Yamasaki, 442 U.S. 682, 701 (1979) (holding that commonality issues of the class "turn on questions of law applicable in the same manner to each member of the class"); Acosta v. Trans Union, LLC, 243 F.R.D. 377, 384 (C.D. Cal. 2007) (finding commonality when "[t]he same alleged conduct of Defendants forms the basis for each of the plaintiffs' claims").

c. Typicality

Typicality requires that named plaintiffs have claims "reasonably coextensive with those of absent class members," but their claims do not have to be "substantially identical." Hanlon, 150 F.3d at 1020. The test for typicality "'is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992) (citation omitted).

Plaintiff argues that all putative class members were subject to the same course of conduct by Shred-it: providing them with disclosure and authorization forms that included extra language. (Pl.'s Mem. at 14-15.) The putative class members were thus deprived of proper disclosure in the form required by § 1681b(b)(2) in the same manner as plaintiff.

Because the parties proposed a settlement prior to certification, the court has little in the way of a record to independently verify these assertions. The court must instead rely on the declaration of plaintiff's counsel. (See Pl.'s Mem. at 21-24 (providing the declaration of Peter R. Dion-Kindem).) The parties' common interest in settling their dispute also deprives the court of adversarial briefs on this subject, making it difficult to assess whether plaintiff "possess[es] the same interest and suffer[s] the same injury" as the putative class members--an important part of the typicality inquiry. Rodriguez, 431 U.S. at 403 (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216 (1974)).

Nevertheless, for the purpose of preliminary certification, the court accepts that the injuries of the named plaintiff are likely to be "reasonably coextensive" with those of the putative class. The routine nature of the practice that allegedly violates the FCRA and the statutory damages available to the plaintiff and putative class members under 15 U.S.C. § 1681n(a) make it unlikely that any class member's particular background or situation diverges significantly from plaintiff's.[1]

[1] 15 U.S.C. § 1681n(a) provides, in relevant part:

> (a) In general
>
> Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of--
>
> (1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000 . . .

15 U.S.C. § 1681n(a)(1)(A).

See Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 176, 180 (2d Cir. 1990) (noting that class certification should not be granted if "there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it"). This settlement agreement does not appear to be the result of exceptional circumstances or atypical claims proffered by plaintiff.

d. Adequacy of Representation

Finally, to resolve the question of adequacy, the court must make two inquiries: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" Hanlon, 150 F.3d at 1020. These questions involve consideration of a number of factors, including "the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive." Brown v. Ticor Title Ins., 982 F.2d 386, 390 (9th Cir. 1992).

Under the first inquiry, plaintiff's interests appear to be aligned with those of the class. The class is defined to include individuals who suffered a similar injury as plaintiff: those on which Shred-it procured or caused to be procured a consumer report after that individual signed a form that included language other than the authorization and disclosure permitted by § 1681b(b)(2). This definition is narrowly tailored to reflect plaintiff's alleged injury and should adequately align his interests with those he seeks to represent. See Windsor, 521

U.S. at 625–26 ("[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members."); Murillo, 266 F.R.D. at 476 (finding that an appropriate class definition ensured that "the potential for conflicting interests will remain low while the likelihood of shared interests remains high").

The settlement also provides for an incentive award of $5,000 to plaintiff.[2] (Settlement Agreement § 11.) Although the Ninth Circuit has specifically approved the award of "reasonable incentive payments" to named plaintiffs, the use of an incentive award nonetheless raises the possibility that plaintiff's interest in receiving that award will cause his interests to diverge from the class's interest in a fair settlement. Staton, 327 F.3d at 977–78 (declining to approve a settlement agreement where size of incentive award suggested that named plaintiffs were "more concerned with maximizing [their own] incentives than with judging the adequacy of the settlement as it applies to class members at large"). As a result, district courts "scrutinize carefully the awards so that they do not undermine the adequacy of the class representatives." Radcliffe v. Experian Info. Sys., Inc., 715 F.3d 1157, 1163 (9th Cir. 2013).

The incentive award in this case does not appear to create a clear conflict of interest. "In general, courts have found that $5,000 incentive payments are reasonable." Hopson v. Hanesbrands Inc., Civ. No. 08-0844 EDL, 2009 WL 928133, at *10

[2] "Incentive awards are payments to class representatives for their service to the class in bringing the lawsuit." Radcliffe v. Experian Info. Solutions Inc., 715 F.3d 1157, 1163 (9th Cir. 2013).

(N.D. Cal. Apr. 3, 2009) (citing In re Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 463 (9th Cir. 2000); In re SmithKline Beckman Corp., 751 F. Supp. 525, 535 (E.D. Pa. 1990); Alberto v. GMRI, Inc., 252 F.R.D. 652, 669 (E.D. Cal. 2008)). The proposed amount of plaintiff's incentive award is lower than awards found to be fair and reasonable in other cases. See, e.g., Van Vranken v. Atl. Richfield Co., 901 F. Supp. 294, 300 (N.D. Cal. 1995) (holding that incentive award of $50,000 to each named plaintiff was fair and reasonable); Glass v. UBS Fin. Servs., Inc., Civ. No. 04-4068 MMC, 2007 WL 221862, at *16 (N.D. Cal. Jan. 26, 2007) (approving incentive award of $25,000 for each of four named plaintiffs).

Plaintiff states that each member of the proposed class will recover approximately $45.55 under the terms of the settlement agreement. (Pl.'s Mem. at 6.) An incentive award of $5,000 to plaintiff is thus somewhat disproportionate to the recovery of other class members. See, e.g., Monterrubio v. Best Buy Stores, L.P., 291 F.R.D. 443, 463 (E.D. Cal. 2013) (England, J.) (finding $7,500 incentive award unreasonable when average class member would receive $65.79 and reducing the award to $2,500). This disproportionality does not automatically render plaintiff an inadequate class representative, but it gives the court pause, particularly given the lack of evidence before the court demonstrating the quality of plaintiff's representative service.[3] The incentive award is not dispositive of plaintiff's

[3] In his declaration, plaintiff's counsel states, "Plaintiff has been instrumental in prosecuting this action and has personally risked liability for a large cost bill if the matter was not successful." (Pl.'s Mem. at 21; Dion-Kindem Decl.

adequacy, and its justification can be further explored at the final Fairness Hearing. See Alberto, 252 F.R.D. at 662-63, 669 (certifying plaintiff as an adequate class representative "pending the introduction at the final fairness hearing of evidence in support of counsel's findings"). Accordingly, the court preliminarily finds that the proposed incentive award does not render plaintiff an inadequate representative of the class. On or before the date of the Fairness Hearing, however, the parties shall present or be prepared to present evidence of the named plaintiff's efforts taken as class representative, such has his hours of service or an itemized list of his activities, to justify the discrepancy between his award and those of the unnamed plaintiffs.[4]

The second prong of the adequacy inquiry examines the vigor with which the named plaintiff and her counsel have pursued the common claims. "Although there are no fixed standards by which 'vigor' can be assayed, considerations include competency of counsel and, in the context of a settlement-only class, an assessment of the rationale for not pursuing further litigation." Hanlon, 150 F.3d at 1021.

Plaintiff's counsel states that he has expertise in prosecuting employment claims throughout his career and has

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¶ 6.) The declaration does not justify this assertion, however, rendering it of limited persuasive value.

[4] Relevant factors for the evaluation of the amount of incentive payments made to the named plaintiff include "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, . . . and reasonabl[e] fear[s of] workplace retaliation." Staton, 327 F.3d at 977 (citation omitted).

served as the counsel of record for at least twenty-three class actions in federal and state court. (Pl.'s Mem. at 21; Dion-Kindem Decl. ¶¶ 2, 4.) The court therefore has some assurance that plaintiff's counsel has the experience necessary to maximize the return on his labor and vindicate the injuries of the class.

Plaintiff's counsel also indicates that the decision to settle plaintiff's claim was made after taking into account the uncertainty and risk of further litigation, the potential outcome of pursuing the case, and the difficulties and delays inherent in litigation. (Pl.'s Mem. at 21; Dion-Kindem Decl. ¶ 7.) In particular, plaintiff's counsel points to this court's recent rejection of a nearly identical claim brought in a case involving different parties. (See Pl.'s Mem. at 18); Syed v. M-I LLC, Civ. No. 1:14-742 WBS, 2014 WL 5426862, at *3-4 (E.D. Cal. Oct. 23, 2014). The court agrees that these considerations weigh in favor of settlement. Therefore, the court holds that the named plaintiff is an adequate class representative.

2. Rule 23(b)

An action that meets all the prerequisites of Rule 23(a) may only be certified as a class action if it also satisfies the requirements of one of the three subdivisions of Rule 23(b). Leyva v. Medline Indus. Inc., 716 F.3d 510, 512 (9th Cir. 2013). Plaintiff seeks certification under Rule 23(b)(3), which provides that a class action may be maintained only if (1) "the court finds that questions of law or fact common to class members predominate over questions affecting only individual members" and (2) "that a class action is superior to other available methods for fairly and efficiently adjudicating the

controversy." Fed. R. Civ. P. 23(b)(3).

a. Predominance

"Because Rule 23(a)(3) already considers commonality, the focus of the Rule 23(b)(3) predominance inquiry is on the balance between individual and common issues." Murillo, 266 F.R.D. at 476 (citing Hanlon, 150 F.3d at 1022); see also Windsor, 521 U.S. at 623 ("The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation"). Here, plaintiff's claim turns on the legality of a common method used by Shred-it for disclosing that it will seek consumer reports for employment purposes and whether this method was a willful violation of the FCRA. All of the disclosure and authorization forms that predicate class members' claims were allegedly deficient because they included release and/or indemnity provisions. (See Pl.'s Mem. at 16-17.) The class claim therefore demonstrates "[a] common nucleus of facts and potential legal remedies" for putative class members that can be resolved in a single adjudication. See Hanlon, 150 F.3d at 1022.

To the extent that any variations may exist, there is no indication that those issues would be anything more than "local variants of a generally homogenous collection of causes" that derive from plaintiff's allegations. See id. These idiosyncratic differences are therefore "not sufficiently substantive to predominate over the shared claims." Id. at 1022-23. Accordingly, the court finds that common questions of law and fact predominate over those affecting only individuals.

b. Superiority

Rule 23(b)(3) also requires a showing that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). It sets forth four non-exhaustive factors to consider in making this determination:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Id. The parties' pre-certification settlement renders factors (C) and (D) inapplicable here. See Murillo, 266 F.R.D. at 477 (citing Windsor, 521 U.S. at 620).

The court is unaware of any concurrent litigation regarding the issues presented here against Shred-it. In the absence of competing lawsuits, it is also unlikely that other individuals have an interest in controlling the prosecution of this action or other actions, although objectors at the Fairness Hearing may reveal otherwise. See Alberto, 252 F.R.D. at 664. As it stands now, the class action device appears to be the superior method for adjudicating this controversy.

3. Rule 23(c)(2) Notice Requirements

If the court certifies a class under Rule 23(b)(3), it "must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Rule 23(c)(2) governs both the form and

content of a proposed notice. See Ravens v. Iftikar, 174 F.R.D. 651, 658 (N.D. Cal. 1997) (citing Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 172–77 (1974)). Although that notice must be "reasonably certain to inform the absent members of the plaintiff class," actual notice is not required. Silber v. Mabon, 18 F.3d 1449, 1454 (9th Cir. 1994) (citation omitted).

Here, the Settlement Agreement provides that Simpluris, Inc., the settlement administrator, will mail notice to each putative class member via first-class U.S. mail. (Settlement Agreement ¶ 12.) The court is satisfied that this system of providing notice is reasonably calculated to provide notice to class members and is the best form of notice available under the circumstances. See Monterrubio, 291 F.R.D. at 443 (approving settlement in which Simpluris provided notice by mail to class members in a similar manner).

The parties have also supplied the "Notice of Settlement and Release of Claims Form" that they propose to send to class members after filling in the dates and deadlines set by the court. (See Settlement Agreement Ex. B.) The form explains the proceedings, the definition of the class, the terms of the settlement, and the procedure for objecting or opting out of the settlement. (Id.) The content of the form therefore also satisfies Rule 23(c)(2)(B). See Fed R. Civ. P. 23(c)(2)(B); see also Churchill Vill., L.L.C. v. Gen. Elec., 361 F.3d 566, 575 (9th Cir. 2004) ("Notice is satisfactory if it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'" (quoting Mendoza v. Tucson Sch. Dist. No.

1, 623 F.2d 1338, 1352 (9th Cir. 1980)).

B. Preliminary Settlement Approval

After determining that the proposed class satisfies the requirements of Rule 23, the court must determine whether the terms of the parties' settlement appear fair, adequate, and reasonable. See Fed. R. Civ. P. 23(e)(2); Hanlon, 150 F.3d at 1026. This process requires the court to "balance a number of factors," including:

> the strength of the plaintiff's case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Hanlon, 150 F.3d at 1026. Many of these factors cannot be considered until the final Fairness Hearing, so the court need only conduct a preliminary review at this time to resolve any "glaring deficiencies" in the Settlement Agreement before authorizing notice to class members. Ontiveros, 2014 WL 3057506, at *12 (citing Murillo, 266 F.R.D. at 478).

1. Terms of the Settlement Agreement

The key terms of the Settlement Agreement can be summarized as follows:

(1) **Settlement Class**: All individuals as to whom, from June 16, 2009, through June 16, 2014, Shred-it procured or caused to be procured a consumer report for employment purposes who signed an authorization form, in electronic or written form, allowing for consumer reports to be

obtained which included a liability release or other language of any kind other than the authorization and disclosure permitted under the Fair Credit Reporting Act, 15 U.S.C. 1681b(b)(2). (Settlement Agreement ¶ 17.)

(2) **Notice:** Not more than seven days after the court has issued an order preliminarily approving the settlement, the Settlement Administrator will send a "Notice of Settlement and Release of Claims form" to all class members via first-class U.S. mail, postage prepaid and return service requested. The notice shall be mailed to each class member's last known mailing address, as updated by using the U.S. Postal Service's database of verifiable mailing addresses and the National Change-of-Address database. The notice shall bear the Settlement Administrator's mailing address as the return-mail address. The envelope in which the notice is sent will include an indication that it is a "Court Approved Settlement Notice Authorized by the U.S. District Court for the Eastern District of California" and may also include a bar code. If a notice is returned as undeliverable, the Settlement Administrator will use publically available databases as practicable to update the address and cause the notice to be re-mailed. The Settlement Administrator will also establish and staff a toll-free telephone line that class members can use to contact the Settlement Administrator with questions about the settlement or change their addresses. (Id. ¶¶ 33-35.)

(3) **Opt-out Procedure:** To opt out of the settlement, a class member must, within sixty days after the mailing date of the initial settlement notice, submit by first-class U.S. mail a written notice addressed to the Settlement Administrator indicating his or her name and stating that he or she desires to opt out or otherwise does not want to participate in the settlement. Any class member who does not timely (as measured by the postmark on that individual's written notice) opt out of the settlement by written notice containing the requisite information shall remain members of the settlement class and shall be bound by any orders of the court about the settlement or the settlement class. (Id. ¶ 36.)

(4) **Objections to Settlement:** Any class member who wishes to object to the settlement must file a timely written statement of objection with the Clerk of Court, and mail a copy of that objection with the requisite postmark to class counsel and defense counsel no later than sixty days from the date this Order is signed. The objection must state the case name and number; the basis for and an explanation of the objection; the name, address, telephone number, and email address of the class member making the objection; and a statement of whether the class member intends to appear at the final Fairness Hearing, either with or without counsel. In addition, any objection must be personally signed by the class member and, if represented by counsel, then by counsel. Any class member who fails to make objections in the

manner specified above shall be deemed to have waived any objections and shall be foreclosed from making any objections, whether by appeal or otherwise, to the settlement. No class member shall be entitled to contest in any way the approval of the terms and conditions of the Settlement Agreement or the court's final approval order except by filing and serving written objections in accordance with the provisions of the Settlement Agreement. Any settlement member who fails to object in the manner prescribed shall be deemed to have waived and shall be foreclosed forever from raising any objections to the settlement. (Id. ¶ 37.)

(5) **Settlement Amount:** Shred-it has agreed to pay a gross settlement amount of $250,000. That payment consists of up to $80,000 in attorneys' fees, subject to court approval, and a Settlement Fund of $170,000. The Settlement Fund shall be used to satisfy the claims of all participating class members, class counsel's litigation expenses, named plaintiff's incentive award, and settlement administration costs. (See id. ¶¶ 20-26.)

(6) **Attorney's Fees, Costs, and Plaintiff's Incentive Award:** Shred-it has agreed to pay class counsel up to $80,000 as reasonable attorneys' fees. Any attorneys' fees not approved by the court shall not increase the net Settlement Fund, but shall only result in less compensation from Shred-it. Class counsel will also apply to the court for litigation costs not to exceed $5,000, class administration costs not to exceed $31,000,

and an incentive award for plaintiff of $5,000. These amounts will be satisfied from the Settlement Fund, reducing the net amount available for distribution to class members. (See id. ¶¶ 4-5, 11, 21, 22.)

(7) **Settlement Distribution:** After being reduced by the amount of plaintiff's incentive award, litigation costs, and administration costs, the remaining Settlement Fund will be distributed pro rata in the form of a check to each class member who did not validly and timely opt out of the settlement. Class members shall have 180 days from the date on which checks are mailed to negotiate their checks. Any uncashed settlement compensation from the Settlement Fund after distributing the net Settlement Fund proceeds and after the 180-day period for negotiating checks will constitute a cy pres fund which will be donated to a mutually agreed upon and non-controversial charity, approved by the court that serves interests that are aligned with those of the settlement class. (Id. ¶ 22, § D-E.)

(8) **Release:** Class members who participate in the settlement agree to "fully and forever release, waive, acquit, and discharge . . . any and all claims that the Settlement Class has arising out of or relating directly or indirectly in any manner whatsoever to the facts alleged in the Action." This includes but is not limited to "any and all claims under 15 U.S.C. § 1681b(b)(2)(A) of the FCRA and any parallel state or common law claims." (Id. ¶ 28.) In addition, plaintiff agrees to discharge Shred-

it from any and all claims plaintiff has by reason of "any cause, matter or thing whatsoever . . . including both known and unknown and suspected and unsuspected claims and causes of action." Plaintiff's release does not apply, however, to any valid worker's compensation claims or any claims asserted on or before November 25, 2014, against Shred-it. (Id. ¶ 29.)

2. Preliminary Determination of Adequacy

At the preliminary stage, "the court need only 'determine whether the proposed settlement is within the range of possible approval.'" Murillo, 266 F.R.D. at 479 (quoting Gautreaux v. Pierce, 690 F.2d 616, 621 n.3 (7th Cir. 1982)). This generally requires consideration of "whether the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys." Id. (quoting W. v. Circle K Stores, Inc., Civ. No. 04-0438 WBS GGH, 2006 WL 1652598, at *11-12 (E.D. Cal. June 13, 2006)). Courts often begin by examining the process that lead to the settlement's terms to ensure that those terms are "the result of vigorous, arms-length bargaining" and then turn to the substantive terms of the agreement. See, e.g., West, 2006 WL 1652598, at *11-12; In re Tableware Antitrust Litig., 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007) ("[P]reliminary approval of a settlement has both a procedural and a substantive component.").

a. Negotiation of the Settlement Agreement

Plaintiff's counsel states that the settlement

agreement is the result of arms-length negotiations. (Pl.'s Mem. at 18-19.) This assertion is supported by the fact that the parties entered into the agreement at the same time that Shred-it had a pending motion to dismiss plaintiff's claims. (See id. at 10.) Counsel further declares that the decision to settle the case was informed by the time and expense that both sides would incur in the course of further litigation, as well as the substantial uncertainty of recovery posed by this court's recent rejection of a nearly identical claim brought in a case involving different parties. (Pl.'s Mem. at 18, 21; Dion-Kindem Decl. ¶¶ 5, 7.); see Syed, 2014 WL 5426862, at *3-4. In light of these considerations, the court sees no reason to second-guess counsel's determination that settlement is in the best interest of the class. See Fraley v. Facebook, Inc., 966 F. Supp. 2d 939, 942 (N.D. Cal. 2013) (holding that a settlement reached after informed negotiations "is entitled to a degree of deference as the private consensual decision of the parties" (citing Hanlon, 150 F.3d at 1027)).

b. Amount Recovered and Distribution

In determining whether a settlement agreement is substantively fair to the class, the court must balance the value of expected recovery against the value of the settlement offer. See Tableware, 484 F. Supp. 2d at 1080. This inquiry may involve consideration of the uncertainty class members would face if the case were litigated to trial. See Ontiveros, 2014 WL 3057506, at *14.

Here, 15 U.S.C. § 1681n provides for recovery of "not less than $100 and not more than $1,000" in statutory damages,

plus any punitive damages. See 15 U.S.C. 1681n(a)(1)(A). The average recovery under the terms of the settlement is expected to be approximately $45.55 per class member. (See Pl.'s Mem. at 6.) While this amount is lower than the minimum potential statutory damages available in § 1681n, "it is well-settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery that might be available to the class members at trial." DIRECTV, 221 F.R.D. at 527. Plaintiff's counsel states that this amount is fair and reasonable in light of the court's rejection of an identical claim in Syed. (Pl.'s Mem. at 6 (citing Syed, 2014 WL 5426862).

Turning to the distribution of this amount, Simpluris Inc., the settlement administrator, is an experienced claims administrator who has been appointed by the court in prior cases. See, e.g., Ontiveros, 2014 WL 3057506, at *14; Adoma v. Univ. of Phoenix, Inc., 913 F. Supp. 2d 964, 971–72 (E.D. Cal. 2012) (Karlton, J.). The settlement's cap on class administration costs of up to $31,000 is slightly higher than the fees awarded to it in other cases. See, e.g., Adoma, 913 F.Supp.2d at 985 (approving a $19,000 fee for Simpluris to manage 1,725-member class); Vasquez v. Coast Valley Roofing, Inc., 266 F.R.D. 482, 484 (E.D. Cal. 2010) (approving a $25,000 fee for a settlement administrator that managed 177 class members). However, this case involves a much larger class--estimated by Shred-it at 3,328 members, (see Pl.'s Mem. at 6)--which justifies a higher cost of settlement administration. Moreover, class counsel's claimed litigation costs of no more than $5,000 are lower than many other cases, helping to minimize the amount deducted from the common

fund available for distribution to class members. See, e.g., Ontiveros, 2014 WL 3057506, at *14 (preliminarily approving claimed expenses and costs of $50,000); Hartless v. Clorox Co., 273 F.R.D. 630, 646 (S.D. Cal. 2011) (awarding $111,002.22 in costs); Loretz v. Regal Stone, Ltd., 756 F. Supp. 2d 1203, 1218 (N.D. Cal. 2010) (awarding a total of over $70,000 in costs to two law firms acting as class counsel). The court therefore concludes that the amount recovered for class members and the method of distribution "fall[] within the range of possible approval." See Tableware, 484 F. Supp. 2d at 1079.

c. Attorneys' Fees

If a negotiated class action settlement includes an award of attorneys' fees, that fee award must be evaluated in the overall context of the settlement. Knisley v. Network Assocs., 312 F.3d 1123, 1126 (9th Cir. 2002); Monterrubio, 291 F.R.D. at 455. The court "ha[s] an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 941 (9th Cir. 2011).

"Under the 'common fund' doctrine, 'a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." Staton, 327 F.3d at 969 (quoting Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980)). The Ninth Circuit has approved two methods of assigning attorneys' fees in common fund cases: the "percentage of the fund" method and the "lodestar" method. Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1047 (9th Cir. 2002) (citing In re Wash.

Pub. Power Supply Sys. Litig., 19 F.3d 1291, 1295–96 (9th Cir. 1994)). Under the percentage method, the court may award class counsel a percentage of the common fund recovered for the class. Id. The percentage method is particularly appropriate in common fund cases, where "the benefit to the class is easily quantified." Bluetooth, 654 F.3d at 942. The Ninth Circuit has approved a "benchmark" percentage of twenty-five percent, and courts may adjust this figure upwards or downwards if the record shows "'special circumstances' justifying a departure." Id. (quoting Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990)).

Under the lodestar method, the court determines an appropriate attorney's fee by multiplying the number of hours reasonably expended by class counsel by a reasonable hourly rate. Id. at 941. The court may then adjust the lodestar upwards or downwards based on a "host of 'reasonableness' factors." Id. at 942 (citing Hanlon, 150 F.3d at 1029). While the lodestar method is most often applied in class actions brought under fee-shifting statutes or those where the relief obtained is not easily monetized, it may be used in common fund cases as well. Id. at 941–42. In addition, the lodestar method may be used to "crosscheck" the reasonableness of a percentage award. Vizcaino, 290 F.3d at 1050–51.

Here, the Settlement Agreement provides for attorneys' fees of up to $80,000. (See Settlement Agreement ¶¶ 20-22.) These fees "shall be paid separately by Shred-it to Class Counsel." (Id. ¶ 22, § B.) Shred-it has agreed not to oppose an application for attorney's fees, but "[a]ny fees not approved by

the Court shall not increase the Net Settlement Fund, but shall only benefit Shred-it." (Id.) The court understands this arrangement to mean that only $170,000 is available for distribution to class members and that plaintiff's counsel seeks a separate fee award directly from Shred-it.

Plaintiff's counsel states in a declaration that "Plaintiff's counsel will only be seeking 25% of the gross settlement, or $62,500." (Pl.'s Mem. at 22; Dion-Kindem Decl. ¶ 11.) He further states that "given that this is a settlement with a common-fund, a fee request of 25%, or $62,500 is fair and reasonable." (Pl.'s Mem. at 23; Dion-Kindem Decl. ¶ 16.) The court assumes counsel calculated this percentage in fees based on the $250,000 in total liability that Shred-it faces under the Settlement Agreement. (See Settlement Agreement ¶ 21 ("Shred-it will pay the amount of $250,000 in settlement of all claims asserted against it in this Action.").)

The court has doubts about the appropriateness of justifying a fee award using a percentage-of-the-fund calculation based on this amount. The Settlement Agreement does not establish a common fund of $250,000. It states only that "$250,000 is the total amount of money Shred-it will pay pursuant to this settlement," (id. ¶ 20), and it arrives at that number by combining the $170,000 available to class members with class counsel's right to be paid a maximum of $80,000 from Shred-it. Normal percentage-of-the-fund calculation arrives at an award based on the amount available for distribution to class members.[5]

[5] The arrangement devised by plaintiff's counsel and Shred-it differs from normal common fund procedure. "Under

See Staton, 327 F.3d at 967-69. It is therefore particularly troubling to the court that plaintiff's counsel bases his percentage-of-the-fund calculation in part on an amount that Shred-it may never pay. (See Settlement Agreement ¶ 22, § B ("Any fees not approved by the Court shall not increase the Net Settlement Fund, but shall only benefit Shred-it.").) Including funds earmarked for other purposes may distort the reasonableness of a fee award using the percentage method.[6]

If the court accepts plaintiff counsel's framing, the maximum attorneys' fee award of $80,000 is approximately thirty-two percent of $250,000. If the court measures this award against the amount available to for class members, however, an award of $80,000 represents approximately forty-seven percent of the amount recovered. The same disparity appears with regard to the amount plaintiff's counsel declares he will seek. His request of $62,500 is twenty-five percent of $250,000, but it is approximately thirty-seven percent of $170,000.

Having noted its reservations, the court need not make a final decision on the fee award in this Order. See Murillo,

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regular common fund procedure, the parties settle for the total amount of the common fund and shift the fund to the court's supervision. The plaintiffs' lawyers then apply to the court for a fee award from the fund." Staton, 327 F.3d at 969. "The court then determines the amount of attorney's fees that plaintiffs' counsel may recover from this fund, thereby diminishing the amount of money that ultimately will be distributed to the plaintiff class." Id. (quoting Florin v. Nationsbank of Georgia, N.A., 34 F.3d 560, 563 (7th Cir. 1994)).

[6] The Manual For Complex Litigation cautions judges to beware of agreements that "calculat[e] the fee based on the allocated settlement funds, rather than the funds actually claimed by and distributed to class members." Manual For Complex Litig., Fourth, § 21.61 (2004).

266 F.R.D. at 480 (granting preliminary approval of the settlement despite concerns that the proposed fee award was unreasonable). Plaintiff's counsel has not yet presented evidence to justify the amount he intends to request, such as documentation of the amount of hours worked or a reasonable hourly rate for a lawyer of his experience in the region. See Bluetooth, 654 F.3d at 942. Accordingly, the court will preliminarily approve the fee award on the understanding that plaintiff's counsel must demonstrate, on or before the date of the final Fairness Hearing, that the proposed award is reasonable in light of the court's concerns. In the event that counsel is unable to do so, the court will be forced to reduce fees to a reasonable amount or to deny final approval of this settlement. See Vizcaino, 290 F.3d at 1047; Alberto, 252 F.R.D. at 667-68.

IT IS THEREFORE ORDERED that plaintiff's motion for preliminary certification of a conditional settlement class and preliminary approval of the class action settlement be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that:

(1) the following class be provisionally certified for the purpose of settlement: All individuals as to whom, from June 16, 2009, through June 16, 2014, Shred-it procured or caused to be procured a consumer report for employment purposes who signed an authorization form, in electronic or written form, allowing for consumer reports to be obtained which included a liability release or other language of any kind other than the authorization

and disclosure permitted under the Fair Credit Reporting Act, 15 U.S.C. 1681b(b)(2);

(2) the proposed settlement is preliminarily approved as fair, just, reasonable, and adequate to the members of the settlement class, subject to further consideration at the final Fairness Hearing after distribution of notice to members of the settlement class;

(3) for purposes of carrying out the terms of the settlement only:

(a) plaintiff Michael Kirchner is appointed as the representative of the settlement class and is provisionally found to be an adequate representative within the meaning of Rule 23;

(b) The Dion-Kindem Law Firm and The Blanchard Law Group, APC are provisionally found to be a fair and adequate representatives of the settlement class and are appointed as class counsel for the purposes of representing the settlement class conditionally certified in this Order;

(4) Simpluris, Inc. is appointed as the settlement administrator;

(5) the form and content of the proposed Notice of Settlement and Release of Claims Form are approved, except to the extent that those forms

reflect dates modified by this Order;

(6) no later than five (5) days from the date this Order is signed, Shred-it's counsel shall provide the names and contact information of all settlement class members to Simpluris;

(7) no later than seven (7) days from the date this Order is signed, Simpluris shall mail the notice form to all members of the settlement class;

(8) no later than sixty (60) days from the date this Order is signed, any member of the settlement class who intends to object to, comment upon, or opt out of the settlement shall mail written notice of that intent to Simpluris pursuant to the instructions in the Notice of Settlement and Release of Claims Form;

(9) a final Fairness Hearing shall be held before this court on Monday, July 13, 2015, at 2:00 p.m. in Courtroom 5 to determine whether the proposed settlement is fair, reasonable, and adequate and should be approved by this court; to determine whether the settlement class's claims should be dismissed with prejudice and judgment entered upon final approval of the settlement; to determine whether final class certification is appropriate; and to consider class counsel's applications for attorneys' fees, costs, and an incentive award to plaintiff. The court may continue the final Fairness Hearing without further notice to the

members of the class;

(10) no later than twenty-eight (28) days before the final Fairness Hearing, class counsel shall file with this court a petition for an award of attorneys' fees and costs. Any objections or responses to the petition shall be filed no later than fourteen (14) days before the final Fairness Hearing. Class counsel may file a reply to any objections no later than seven (7) days before the final Fairness Hearing;

(11) no later than twenty-eight (28) days before the final Fairness Hearing, class counsel shall file and serve upon the court and Shred-it's counsel all papers in support of the settlement, the incentive award for the class representative, and any award for attorneys' fees and costs;

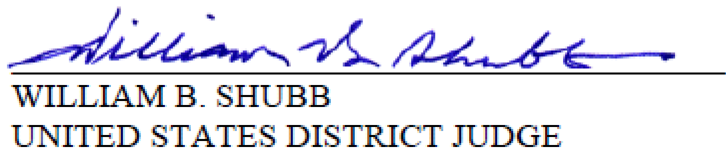
(12) no later than twenty-eight (28) days before the final Fairness Hearing, Simpluris shall prepare, and class counsel shall file and serve upon the court and Shred-it's counsel, a declaration setting forth the services rendered, proof of mailing, a list of all class members who have opted out of the settlement, a list of all class members who have commented upon or objected to the settlement, and copies of any forms received;

(13) any person who has standing to object to the terms of the proposed settlement may appear at the final Fairness Hearing in person or by counsel and be

heard to the extent allowed by the court in support of, or in opposition to, (a) the fairness, reasonableness, and adequacy of the proposed settlement, (b) the requested award of attorneys' fees, reimbursement of costs, and incentive award to the class representative, and/or (c) the propriety of class certification. To be heard in opposition at the final Fairness hearing, a person must, no later than sixty (60) days from the date this Order is signed, (a) serve by hand or through the mails written notice of his or her intention to appear, stating the name and case number of this action and each objection and the basis therefore, together with copies of any papers and briefs, upon class counsel and counsel for Shred-it, and (b) file said appearance, objections, papers, and briefs with the court, together with proof of service of all such documents upon counsel for the parties. Responses to any such objections shall be served by hand or through the mails on the objectors, or on the objector's counsel if any there be, and filed with the court no later than fourteen (14) calendar days before the final Fairness Hearing. Objectors may file optional replies no later than seven (7) calendar days before the final Fairness Hearing in the same manner described above. Any settlement class member who does not make his or her objection in

the manner provided herein shall be deemed to have waived such objection and shall forever be foreclosed from objecting to the fairness or adequacy of the proposed settlement, the judgment entered, and the award of attorneys' fees, costs, and an incentive award to the class representative unless otherwise ordered by the court.

Dated: March 31, 2015



WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE