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NATIONAL ARBITRATION AND MEDIATION

TERESA MEDINA and MORGAN THOMSON Claimants, v. SPENCER GIFTS D/B/A SPIRIT HALLOWEEN, Respondent.	NAM ID No. 238718 **MEMORANDUM OF LAW IN SUPPORT OF CLAIMANTS' UNOPPOSED MOTION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS** Arbitrator David B. Van Etten

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INTRODUCTION

Class counsel, Outten & Golden LLP, respectfully moves for an award of $601,666.67 in attorneys' fees, representing one-third of the Total Settlement Amount[1] of $1,805,000.00, and $12,426.19 in costs that Class counsel incurred in successfully prosecuting and settling this action. In addition, Claimants Teresa Medina and Morgan Thomson respectfully request that the Arbitrator approve a service payment of $10,000 each (for a total of $20,000) in recognition of the services they rendered on behalf of approximately 15,028 Settlement Class Members (including National FCRA Class Members and California ICRAA Class Members).

Class counsel's fees and costs to date have been incurred without reimbursement, and their entitlement to payment has been wholly contingent upon the result achieved, which has been significant. McNerney Decl. ¶ 37. In addition, Claimants have undertaken risk and devoted significant time and effort for the benefit of Settlement Class Members in this action without compensation. *Id*. ¶ 35. For the below reasons, Class counsel respectfully submits that the attorneys' fees and costs and service awards sought herein are fair and reasonable under the applicable legal standards and should be awarded considering the risk undertaken, the effort expended, and the result achieved in this case.

I. FACTUAL BACKGROUND

On September 23, 2019, Ms. Medina applied for an Assistant Store Manager position at a Spirit Halloween store in Burbank, California. First Am. Compl. ¶ 19. That same day, Ms. Medina provided her electronic consent authorizing Spencer to run a background check. *Id.* As part of the hiring process, she was also provided with a two-page disclosure form, copies of Article 23-A of the New York Corrections Law, and a FCRA Statement of Rights. *Id*. Spencer's disclosure form contained multiple categories of information, including state-specific information pertaining to numerous states (the majority of which were inapplicable to Ms. Medina), a copy of Article 23-A of the New York Corrections Law, and a FCRA Statement of Rights. *Id.* ¶ 21.

[1] Unless otherwise indicated, all capitalized terms have the definitions set forth in the Settlement Agreement and Release and Addendum to Settlement Agreement and Release (together the "Settlement Agreement").

Spencer also required Ms. Medina to sign an arbitration agreement that included a class action waiver. *Id.* ¶ 19.

Ms. Thomson worked at Spirit Halloween each year from 2015 to 2019 at various California locations including Solano Beach, Oceanside, Vista, and Escondido. First Am. Compl. ¶ 20. In her application, Ms. Thomson provided her electronic consent authorizing Spencer to run a background check. *Id.* As part of Spencer's hiring process, she was also provided with several documents, including a two-page disclosure form, copies of Article 23-A of the New York Corrections Law, and a FCRA Statement of Rights. *Id.*

Named Claimants Medina and Thomson brought this action on behalf of themselves and similarly situated persons provided with Spencer's Disclosure Form. Claimants allege that this form violated the FCRA and the ICRAA because it is not a standalone, clear and conspicuous disclosure that Spencer intended to procure a background check. *See generally id.*; *see also* 15 U.S.C. § 1681b(b)(2)(A); Cal. Civ. Code § 1786.16(a)(2); *Gilberg v. Cal. Check Cashing Stores, LLC*, 913 F.3d 1169, 1174-77 (9th Cir. 2019).

II. PROCEDURAL BACKGROUND

A. Investigation

Before initiating this action, Claimants' counsel conducted a thorough investigation, which included corporate research regarding Spencer's business locations, business entities, and past federal and state litigation; and factual and legal research regarding the underlying merits of Claimants' claims, possible defenses, the proper measure of damages, and the likelihood of class certification. Sagafi Decl. ¶ 21. Claimants' counsel also interviewed the Named Claimants and other impacted individuals. *Id.* This investigation enabled Claimants' counsel to ascertain whether Spencer's Disclosure form violated the FCRA and the ICRAA and whether there was a class-wide violation. *Id.*

B. The Arbitrator Found That Spencer Violated Ms. Medina's FCRA and ICRAA Rights Willfully and Entered Judgment Against Spencer.

Before initiating this arbitration, Ms. Medina reached out to Spencer to discuss settlement. *Id*. ¶ 22. The Parties engaged in extensive settlement discussions aiming to settle the claims on behalf of the putative class but were unable to resolve their claims at that point. *Id.* ¶ 22.

On June 3, 2020, Ms. Medina filed an Arbitration Demand, alleging that Spencer violated Section 1681b(b)(2) of the FCRA and Section 1786.16(a)(2) of ICRAA.[2] *Id*. ¶ 23. On August 5, 2020, Spencer answered, generally denying each of Ms. Medina's allegations and pleading various affirmative defenses. *Id*. The Parties engaged in targeted discovery. *Id.* ¶ 24. Spencer also sought written and testimonial discovery from Ms. Medina, which she opposed on relevance grounds. *Id*. On October 18, 2020, after motion briefing and oral argument, the Arbitrator granted Ms. Medina's protective order against Spencer's deposition and discovery requests. *Id.* ¶ 25. The Parties then briefed cross-motions for summary judgment. *Id.* ¶ 26.

On January 29, 2021, after oral argument, the Arbitrator granted Ms. Medina's motion for summary judgment and denied Spencer's motion for partial summary judgment. *Id.* ¶ 27. Specifically, the Arbitrator held that Spencer's disclosure form "violates the FCRA and the ICRAA because it is neither standalone nor clear." *Id*. The Arbitrator also held that Spencer "[w]illfully violated the FCRA," finding that "[t]he plain language of the FCRA and ICRAA put Spencer on notice that its form violated the law." *Id*. Because Spencer's violations were willful, the Arbitrator found Ms. Medina is entitled to statutory damages, punitive damages, and attorney's fees and costs. *Id*. The Arbitrator awarded to Ms. Medina $35,000, plus interest and attorney's fees and costs. *Id*. The matter was then stayed before the Parties could brief Claimant's entitlement to fees and costs, to allow for further settlement discussions. *Id*.

[2] Ms. Medina also brought additional claims that she withdrew as part of the arbitration process.

C. The Parties Entered into a Tolling Agreement to Discuss Settlement.

After the Arbitrator's decision on Ms. Medina's arbitration, the Parties reengaged in settlement discussions. *Id*. ¶ 28. On March 9, 2021, the Parties entered into a tolling agreement, agreeing to toll the statutes of limitations for the Affected Parties' FCRA and ICRAA claims from January 29, 2021, and mediate Claimants' claims. *Id*.

D. Mediation and Settlement

The Parties subsequently agreed to attend a full-day mediation before Dina Jansenson. *Id*. ¶ 29. In advance of mediation, Spencer provided information relevant to class-wide discovery, including the class size and the size of the subset of the class located in California. *Id*. Claimants used the discovery to calculate damages on a class-wide basis. *Id*. Prior to mediation, Claimants provided a detailed mediation statement to Ms. Jansenson, and Spencer. *Id*.

The Parties participated in a full-day mediation session with Ms. Jansenson on July 19, 2021, and a subsequent half-day mediation session with Ms. Jansenson on August 27, 2021. *Id*. ¶ 30. Through that mediation, and subsequent negotiations with Ms. Jansenson's assistance, the Parties reached a settlement in principle, resulting in a term sheet fully executed on February 17, 2022. *Id*. The Parties then negotiated the Settlement Agreement, which was fully executed on August 29, 2022. McNerney Decl., Ex. 1 ("Settlement Agreement").

Claimants subsequently filed their Amended Motion for Preliminary Settlement Approval, and the Arbitrator held a hearing on the Motion on September 29, 2022. The Arbitrator granted conditional class certification and preliminary approval of the Settlement on October 4, 2022.

ARGUMENT

I. Class Counsel Should be Awarded the Requested Attorneys' Fees

Federal and state courts have recognized that when counsel's efforts result in the creation of a common fund that benefits claimants and unnamed class members, counsel have an equitable right to be compensated from that fund as a whole for their successful efforts in creating it. *See, e.g., Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980) (observing that the United States Supreme Court "has recognized consistently that a litigant or a lawyer who recovers a common fund . . . is entitled to a reasonable attorney's fee from the fund as a whole"); *Cent. R. & Banking*

*Co. v. Pettus, 11*3 U.S. 116, 127 (1885) (recognizing common fund doctrines); *Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 769 (9th Cir. 1977) ("[A] private plaintiff, or his attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund of his litigation, including attorneys' fees."); *Staton v. Boeing Co.*, 327 F.3d 938, 967 (9th Cir. 2003) (same).

The common fund doctrine rests on the understanding that where the attorneys' unnamed class member clients have no express retainer agreement, those who benefit from the fund without contributing to it would be unjustly enriched if attorneys' fees were not paid out of the common fund. *See Id.* This litigation has resulted in a Gross Settlement Fund of $1,805,000. Settlement Agreement § 1.18. A majority of the settlement will be distributed to the Class Members, none of whom has paid Class counsel fees for their efforts during the litigation. McNerney Decl. ¶ 29. Equity requires them to pay a reasonable fee, based on what the market would traditionally require, no less than if they had hired private counsel to litigate their cases individually. *See Boeing*, 444 U.S. at 479–81; *see also Ochoa v. McDonald's Corp*., No. 14 Civ. 02098, 2016 U.S. Dist. LEXIS 157302, at *7-8 (N.D. Cal. Nov. 14, 2016) ("Class counsel's fees should be paid from the common fund because all class members should contribute their fair share of the costs of the litigation from which they benefitted.").

A. <u>The Percentage of the Fund Method is the Preferred Method for Awarding Attorneys' Fees in Common Fund Cases.</u>

The fairest and most efficient way to calculate a reasonable fee when contingency fee litigation has produced a common fund is to award class counsel a percentage of the total fund. *See, e.g., Blum v. Stenson,* 465 U.S. 886, 900 n.16 (1984) ("[U]nder the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class."); *In re Korean Air Lines Co., Antitrust Litig.*, MDL No. 1891, 2013 U.S. Dist. LEXIS 186262, at *3 (C.D. Cal. Dec. 23, 2013) (percentage-of-the-fund method "is the prevailing practice in the Ninth Circuit for awarding attorneys' fees and permits the Court to focus on a showing that a fund conferring benefits on a class was created through the efforts of plaintiffs' counsel"); *Six (6) Mexican Workers v. Ariz. Citrus Growers,* 904 F.2d 1301, 1311 (9th Cir. 1990) (finding that a common

fund fee is generally "calculated as a percentage of the recovery"); *Paul, Johnson, Alston & Hunt v. Graulty, 88*6 F.2d 268, 272 (9th Cir. 1989) (endorsing percentage of the fund approach); *State of Fla. v. Dunne*, 915 F.2d 542, 545 (9th Cir. 1990) (recognizing a "recent ground swell of support for mandating a percentage-of-the-fund approach in common fund cases"); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 773 (11th Cir. 1991) ("[E]very Supreme Court case addressing the computation of a common fund fee award has determined such fees on a percentage of the fund basis.").

The percentage of the fund method is appropriate for several reasons. The percentage method comports with the legal marketplace, where plaintiffs' counsel's success is frequently measured in terms of the results they have achieved. *See Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1269 (D.C. Cir. 1993) (finding that in common fund cases, "the monetary amount of the victory is often the true measure of [counsel's] success"). This method further reflects the use of contingency fee arrangements as a means of managing the prospective uncertainties, anticipated risks, and burdens of litigation. *See Elliott v. Rolling Frito-Lay Sales, LP*, No. 11 Civ. 01730, 2014 U.S. Dist. LEXIS 83796, at *25 (C.D. Cal. June 12, 2014) (highlighting "consistency with contingency fee calculations in the private market" among the "significant benefits to the percentage approach"); *see also Sutton v. Bernard*, 504 F.3d 688, 694 (7th Cir. 2007) (district court erred in failing to factor into its assessment of attorneys' fees "the value that the market would have placed on [c]ounsel's legal services had its fee been arranged at the outset").

Further, the percentage of fund method aligns the incentives of class members and counsel, encourages counsel to spend their time maximizing the size of the class's recovery, and reduces the burden on courts. *See Elliott*, 2014 U.S. Dist. LEXIS 83796, at *25 (holding that the percentage approach "align[s] the lawyers' interests with achieving the highest award for the class members, and reduc[es] the burden on the courts that a complex lodestar calculation requires"); *cf. Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 n.5 (9th Cir. 2002) ("[I]t is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee, since the lodestar method does not reward early settlement."). Considering these benefits, courts have widely approved the

percentage of the fund method for calculating a reasonable fee award in common fund cases. Claimants submit that this method is appropriate here.

B. <u>One-Third of the Common Fund Is Standard for Fee Awards.</u>

In the Ninth Circuit, 25% of the common fund is the "benchmark" for attorneys' fees awards in "mega-fund" class actions in the $50 million to $200 million range. *See, e.g.,* V*izcaino,* 290 F.3d at 1047-48, 1050 n.4 & App. The Ninth Circuit has instructed that district courts are entrusted with wide discretion to approve fees above or below that benchmark, based on the circumstances of the case. *See id.* at 1048 ("The 25% benchmark rate, although a starting point for analysis, may be inappropriate in some cases."); *see also In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2007) ("[I]n most common fund cases, the award exceeds that [25%] benchmark").

Here, Class counsel's request for one-third of the Total Settlement Amount is reasonable because it is consistent with the percentages awarded in non-mega-fund class action settlements. In such cases, federal courts in California frequently award approximately one-third of the common fund in attorneys' fees. *See, e.g.*, *In re Pac. Enters. Sec. Litig*., 47 F.3d 373, 379 (9th Cir. 1995) (affirming fee award equal to 33.3% of fund); *In re Mego Fin. Corp. Sec. Litig*., 213 F.3d 454, 457, 463 (9th Cir. 2000) (affirming award of 33.3%); *Deaver v. Compass Bank*, No. 13 Civ. 222, 2015 U.S. Dist. LEXIS 166484, at *33, *40 (N.D. Cal. Dec. 11, 2015) (awarding fees of one-third of the common fund); *Lusby v. GameStop Inc*., No. 12 Civ. 3783, 2015 U.S. Dist. LEXIS 42637, at *9, *13, *28 (N.D. Cal. Mar. 31, 2015) (awarding attorneys' fees of 33.3% of the common fund and collecting cases regarding same); *Ching v. Siemens Indus*., Inc., No. 11 Civ. 4838, 2014 U.S. Dist. LEXIS 89002, at *24-27 (N.D. Cal. June 27, 2014) (granting fee award comprising 30% of the common fund); *Burden v. SelectQuote Ins. Servs.*, No. 10 Civ. 5966, 2013 U.S. Dist. LEXIS 109110, at *12-14 (N.D. Cal. Aug. 1, 2013) (awarding 33.3% of common fund); *Vedachalam v. Tata Consultancy Servs., Ltd*., No. 06 Civ. 2013 U.S. Dist. LEXIS 100796, at *4-5 (N.D. Cal. July 18, 2013) (collecting cases awarding 30% or more); *Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 450-51 (E.D. Cal. 2013) (awarding 33% of common fund and collecting cases regarding same).

C. The Requested Fee Award is Reasonable.

When selecting a benchmark or other rate, courts "take into account all of the circumstances of the case, including: (1) the result achieved; (2) the risk involved in the litigation; (3) the skill required and quality of work by counsel; (4) the contingent nature of the fee; and (5) awards made in similar cases." *Larsen v. Trader Joe's Co.*, No. 11 Civ. 5188, 2014 U.S. Dist. LEXIS 95538, at *28-29 (N.D. Cal. July 11, 2014) (citing *Vizcaino*, 290 F.3d at 1048-50); *see also Six (6) Mexican Workers*, 904 F.2d at 1311 (The "benchmark percentage should be adjusted . . . when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors."). Together, those factors strongly support counsel's fee request.

1. Class Counsel Have Achieved an Excellent Result for the Class

The first factor, the overall result and benefit to the class, is often considered the "most critical" in granting a fee award. *Ching*, 2014 U.S. Dist. LEXIS 89002, at *24 (citing *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d at 1046). The $1,805,000 settlement achieved in this case was a highly favorable result for Class Members. Based on the Net Settlement Fund amount of is approximately $1,074,408.44 (i.e., after deducting attorneys' fees and expenses, Service Awards to Named Claimants, and the Settlement Administrator's fees and expenses of $96,500 from the Gross Settlement Fund), without accounting for the claims rate,[3] and assuming 100% participation, this settlement results in payments of approximately $56 per National FCRA Class Member and about $169 per California ICRAA Class Member. McNerney Decl. ¶ 29; Settlement Agreement ¶ 1.23. This is a substantial per-capita recovery and well exceeds many comparable class settlements. *See, e.g.*, *Aceves v. Autozone Inc.*, No. 14 Civ. 2032 (C.D. Cal. Nov. 18, 2016), Order at 8-9, 15, ECF No. 58 (granting final approval of settlement with minimum cash recovery of $20 or $40 gift card per class member who had not suffered any adverse employment action, and minimum $40 cash payment of $80 gift card per class member who had been subject to adverse employment action as a result of a consumer report, in case involving violations of 15 U.S.C. § 1681b(b)(2) and California analogues); *Feist v. Petco Animal Supplies, Inc.*, No. 16 Civ.

[3] The final per-person amount will likely increase after the claims process.

01369, 2018 U.S. Dist. LEXIS 197186, at *4 (S.D. Cal. Nov. 16, 2018) (granting final approval of settlement with net recovery of approximately $20 per class member who had not suffered any adverse employment action, and $170 per class member who had been subject to adverse employment action as a result of a consumer report, in a case involving failure to obtain certificates of compliance pursuant to 15 U.S.C. § 1681); *Syed v. M-I LLC*, No. 14 Civ. 742, 2016 U.S. Dist. LEXIS 9022, at *2, *4 (E.D. Cal. Jan. 26, 2016) (granting final approval of class settlement with net recovery of approximately $16 per class member, in a case involving failure to obtain certificates of compliance pursuant to 15 U.S.C. § 1681b(b)(1)); *Watkins v. Hireright, Inc.*, No. 13 Civ. 1432, 2016 U.S. Dist. LEXIS 58279, at *1, *4 (S.D. Cal. May 2, 2016) (granting final approval of class settlement with net recovery of approximately $58 per class member, in a case involving improper reporting of dismissed criminal charges and failure to provide full-file disclosures). This recovery is all the more remarkable, given the existence of arbitration agreements that might otherwise prevent a class recovery.

Significantly, 15,028 Class Members were sent Notices on October 28, 2022 and, to date, no Class Members have objected to Class counsel's requested fee award. McNerney Decl. ¶ 26; Settlement Agreement § 1.18. This factor therefore supports the requested fee award.

2. The Class and Class Counsel Faced Substantial Litigation Risk

As to the second factor, the risks of continued litigation in this case were substantial. McNerney Decl. ¶ 30. While the liability issues in this case are relatively straightforward, Claimants face real obstacles regarding damages. *Id.* The extent of possible recovery for both the FCRA and the ICRAA claims could turn on the existence and amount of actual damages. *See* 15 U.S.C. § 1681o(a)(1); Cal. Civ. Code § 1786.50(a)(1). Actual damages could be challenging to prove for all class members, because the violation at issue is arguably technical, and many Class Members were not denied employment based on their background check. McNerney Decl. ¶ 30. *See, e.g.*, *Barbano v. JP Morgan Chase Bank, N.A.*, No. 19 Civ. 1218, 2021 U.S. Dist. LEXIS 204354, at *17 (C.D. Cal. Oct. 18, 2021) (finding this factor satisfied based on the risk that the court would find that "calculable actual damages . . . do not exist"); *In re Uber FCRA Litig.*, No. 14 Civ. 05200, 2017 U.S. Dist. LEXIS 101552, at *21 (N.D. Cal. June 29, 2017)

(finding a litigation risk in a FCRA case based on defendant's contention that "Plaintiffs did not suffer any actual harm, given that any alleged violations were merely technical").

Additionally, as Claimants and Class Members all have arbitration agreements with class action waivers, *see* McNerney Decl. ¶ 30, in order to pursue their FCRA and ICRAA claims outside of this settlement, they would be required to do so through individual arbitration. Bringing individual arbitrations for each class member would be extremely risky, costly, and time consuming, and the reality is that this would result in many class members not receiving *any* recovery. *Id*. This settlement eliminates the risk that Class Members would encounter if they brought individual arbitrations to pursue their claims and ensures that all Class Members have the opportunity to achieve recovery. *Id*. ¶ 30. For example, Spencer would likely argue in subsequent arbitrations that its violations were not willful, which creates further risk. *See Schofield v. Delta Air Lines, Inc.*, No. 18 Civ. 00382, 2019 U.S. Dist. LEXIS 31535, at *16 (N.D. Cal. Feb. 27, 2019) ("[C]lass members ability to recover under the FCRA depends on a finding of willfulness. If they cannot show willfulness, they can only receive actual damages which may be as little as none.") (citation omitted). Thus, this factor also supports Class counsel's fee request.

3. Class Counsel are Experienced in Complex Class Litigation

As to the third factor, the complexity and potential duration of the case, and the relatively large class consisting of approximately 15,028 Class Members required an above-average degree of experience and skill. Class counsel, who specialize in complex class action litigation, navigated these challenges by performing a thorough investigation, obtaining and reviewing relevant documents, conducting an extensive damages analysis, participating in third-party mediation, and successfully negotiating a favorable settlement on behalf of the Class Members. McNerney Decl. ¶¶ 16, 23-27. Class counsel's substantial skill and effort in mediating, arbitrating, and settling Claimants' claims on a class-wide basis in background check cases, including under the FCRA and ICRAA, further supports Class counsel's requested fees.

4. Class Counsel Worked on a Contingency Basis and Carried Substantial Risk of Nonpayment

With respect to the fourth factor, Class counsel took this case on a contingency fee basis and therefore had to forego other financial opportunities. McNerney Decl. ¶ 37. "Courts have long recognized that the public interest is served by rewarding attorneys who assume representation on a contingent basis with an enhanced fee to compensate them for the risk that they might be paid nothing at all for their work." *Ching*, 2014 U.S. Dist. LEXIS 89002, at *25 (citation omitted). This principle applies with particular force where, as here, class counsel has "significant experience in the particular type of litigation at issue; indeed, in such contexts, courts have awarded the 33 percent benchmark percentage sought here." *Deaver*, 2015 U.S. Dist. LEXIS 166484, at *35, *40 (holding that attorneys' fees in the amount of 33% of the common fund were appropriate based in part on the favorable result achieved, the risks associated with the claims, and class counsel's extensive skill and experience); *In re Heritage Bond Litig.*, Nos. 01 Civ. 5752, 02 Civ. 382, 02 Civ. 993, 02 Civ. 2745, 02 Civ. 6484, 02 Civ. 6841, 02 Civ. 9221, 02 Civ. 6512, 2005 U.S. Dist. LEXIS 13555, at *74 (C.D. Cal. June 10, 2005) (awarding attorneys' fees in the amount of 33.3% of the common fund based in part on the effort, skill and experience of class counsel and collecting cases regarding same). This factor further supports Class counsel's fee request.

5. Courts Have Awarded Similar Fees in Comparable Cases.

With respect to the fifth factor, Class counsel's request for one-third of the Total Settlement Amount in attorneys' fees falls well within the range of acceptable fee awards in the Ninth Circuit for a settlement like this. *See In re Pac. Enters. Sec. Litig.*, 47 F.3d at 379 (affirming fee award equal to 33.3% of fund); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d at 460 (affirming award of 33.3%); *Deaver*, 2015 U.S. Dist. LEXIS 166484, at *40, *45 (awarding fees of one-third of the common fund); *Lusby*, 2015 U.S. Dist. LEXIS 42637, at *28 (awarding attorneys' fees of 33% of the common fund and collecting cases regarding same); *Ching*, 2014 U.S. Dist. LEXIS 89002, at *30 (granting fee award comprising 30% of the common fund); *Burden*, 2013 U.S. Dist. LEXIS 109110, at *14 (awarding 33% of common fund); *Vedachalam*,

2013 U.S. Dist. LEXIS 100796, at *4-5 (collecting cases awarding 30% or more); *Barbosa*, 297 F.R.D. at 450-51 (awarding 33.3% of common fund and collecting cases regarding same); *Linney v. Cellular Alaska P'ship*, 1997 U.S. Dist. LEXIS 243000, at *20-21 (N.D. Cal. July 18, 1997) (granting fee request for one-third of common fund), *aff'd*, 151 F.3d 1234 (9th Cir. 1998). The compensation sought for Class counsel—one-third of the common fund created by their efforts—is therefore consistent with Ninth Circuit authority and with fees awarded in similar cases in California federal courts.

D. A Lodestar Cross-Check Confirms the Requested Fee is Reasonable

When applying the percentage of the fund method, courts in the Ninth Circuit often use the lodestar method as a "cross-check" to confirm the reasonableness of the fee award. *See Covillo v. Specialtys Café*, No. 11 Civ. 0594, 2014 U.S. Dist. LEXIS 29837, at *21 (N.D. Cal. Mar. 6, 2014) (citing *Vizcaino*, 290 F.3d at 1050); *see also Crawford v. Astrue*, 586 F.3d 1142, 1151 (9th Cir. 2009) (holding that a district court may conduct a lodestar cross-check as an aid in assessing the reasonableness of the requested fee). "The lodestar cross-check calculation need entail neither mathematical precision nor bean counting . . . . [courts] may rely on summaries submitted by the attorneys and need not review actual billing records." *Covillo*, 2014 U.S. Dist. LEXIS 29837, at *21 (citing *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306–07 (3d Cir. 2005) (footnote and citation omitted)).

1. Class Counsel's Lodestar Reflects Reasonable Hours and Rates

The lodestar amount is calculated by multiplying "the number of hours the prevailing rate reasonably expended on the litigation multiplied by a reasonable hourly rate." *Gonzales v. City of Maywood*, 729 F.3d 1196, 1202 (9th Cir. 2013) (cleaned up). Here, Class counsel spent approximately 623.5 hours working towards obtaining this Settlement. *See* McNerney Decl. ¶ 38. Class counsel was careful to litigate this matter in a highly efficient matter, focusing on a pre-suit investigation followed by an invitation to Spencer to engage in pre-suit negotiations in pursuit of settlement. McNerney Decl. ¶¶ 16-17. Specifically, Class counsel devoted time to investigating Claimants' claims, which included corporate research regarding Spencer's business locations, business entities, and past federal and state litigation, along with factual and legal research

regarding the underlying merits of Claimants' claims, possible defenses, the proper measure of damages, and the likelihood of class certification. *Id*. ¶ 16. Class counsel spent time interviewing Ms. Medina and others regarding the facts underlying their claims, researching potential causes of action, and investigating Spencer's criminal background check process, business model, policies, and practices. *Id.* After the initial investigation, Class counsel then spent significant time working on Ms. Medina's individual arbitration, including engaging in targeted discovery, opposing Respondent's discovery requests on relevance grounds, and briefing cross-motions for summary judgment. *Id*. ¶ 18-21. After the Arbitrator granted Ms. Medina's motion for summary judgment, *id*. ¶ 22, Respondent agreed to mediate on behalf of the Classes. *Id*. ¶ 23. Class counsel then devoted time to calculating the damages model, preparing for and participating in multiple mediations, negotiating and drafting the settlement agreement and notices to Class Members over the course of a year, preparing a motion for preliminary approval of the settlement agreement, coordinating and overseeing administration of the settlement, communicating with the Settlement Claims Administrator and defense counsel, and responding to calls and emails from Class Members. *Id*. ¶ 24-27. These activities constitute reasonable uses of Class counsel's time.

Class counsel's hourly rates are also reasonable. "In determining a reasonable hourly rate, the district court should be guided by the rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation." *Destefano v. Zynga, Inc.*, No. 12 Civ. 04007, 2016 U.S. Dist. LEXIS 17196, at *63 (N.D. Cal. Feb. 11, 2016) (quoting *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210-11 (9th Cir. 1986). "The relevant community for the purposes of determining the prevailing market rate is generally the 'forum in which the district court sits.'" *Destefano*, 2016 U.S. Dist. LEXIS 17196, at *63 (quoting *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008)).

In support of this motion, Class counsel has submitted a declaration setting forth the hourly rates for the attorneys and paralegals who contributed to this action. *See* McNerney Decl. ¶ 39. These rates fall well within the range of those in the prevailing community. *See, e.g.*, *Destefano*, 2016 U.S. Dist. LEXIS 17196, at *63-66 (holding that attorney rates ranging from $185 to $875 per hour were "in line with those prevailing in the community"); *Elliott*, 2014 U.S.

Dist. LEXIS 83796, at *26 (holding that attorney rates ranging from $500 to $700 per hour, depending on experience, were reasonable); *Burden*, 2013 U.S. Dist. LEXIS 109110, at *14 (holding that hourly attorney rates of $475-$700 per hour were reasonable in 2013 wage and hour action); *Wren v. RGIS Inventory Specialists,* No. 06 Civ. 05778, 2011 U.S. Dist. LEXIS 38667, at *63-65 (N.D. Cal. Apr. 1, 2011) (holding that hourly attorney rates of $325-$725 per hour were reasonable in 2011 wage and hour action). The fact that Class counsel's hourly clients regularly pay these rates is further evidence of the reasonableness of the firm's rates. McNerney Decl. ¶ 40.

In prosecuting this case, Class counsel deployed a small team of core attorneys and paralegals at any given time in order to minimize duplication of efforts and maximize billing judgment, and made every effort to have the work performed by the attorney or paralegal with the lowest hourly rate who was able to perform it effectively. *Id.* ¶ 42. In addition, in preparing this motion, Class counsel proactively removed any attorneys or staff who worked less than five hours on this matter). *Id.* ¶ 43.

2. The Modest Lodestar Multiplier is Warranted Here

Once the court has fixed the lodestar, it may increase or decrease that amount by applying a positive or negative multiplier to account for a variety of factors. The Ninth Circuit set forth twelve factors that courts have since considered in evaluating the reasonableness of counsel's lodestar:

> (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the 'undesirability' of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975).

Several of these factors, namely, "(1) the novelty and complexity of the issues, (2) the special skill and experience of counsel, (3) the quality of representation, . . . (4) the results obtained, and (5) the contingent nature of the fee agreement" are presumptively "subsumed" in

the court's calculation of a reasonable lodestar, and therefore need not be reconsidered in assessing the propriety of a particular multiplier. *Morales v. City of San Rafael*, 96 F.3d 359, 364 n.9 (9th Cir. 1996), *opinion amended on denial of reh'g*, 108 F.3d 981 (9th Cir. 1997) (internal citations omitted); *see also Hamed v. Macy's W. Stores, Inc.*, No. 10 Civ. 2790, 2011 U.S. Dist. LEXIS 125838, at *13 (N.D. Cal. Oct. 31, 2011) ("To the extent that the *Kerr* factors are *not addressed* in the calculation of the lodestar, they may be considered in determining whether the fee award should be adjusted upward or downward with a multiplier, once the lodestar has been calculated." (emphasis added) (citing *Chalmers,* 796 F.2d at 1212).

Based on the proposed hours and rates, Class counsel's lodestar, representing their fees accrued to date in litigating and settling this action, is $288,588.50. McNerney Decl. ¶ 38. Dividing the total fees sought by the lodestar results in a multiplier of 2.08, which will decrease in the coming months as Class counsel continues to perform work for the Class Members. *Id.* ¶ 44. Consideration of the *Kerr* factors that have not already been addressed herein and subsumed in the calculation of Class counsel's lodestar supports Class counsel's requested multiplier of 2.08. *See Morales*, 96 F.3d at 364 n.10 (holding that district courts need not "recite" the Kerr factors and that "[t]he requirement is simply that [the court] consider those factors not already subsumed in the lodestar figure.").

a) Time and Labor Required

Class counsel devoted approximately 623.5 hours to this matter to date. McNerney Decl. ¶ 38. As described in the accompanying declaration, the hours that Class counsel have expended were reasonably spent and represent a modest amount of time given the substantial result achieved. *Id.* ¶ 41. In reaching this figure, Class counsel exercised billing judgment, ensuring that tasks were performed by the member of the team with the lowest hourly rate who could competently perform the work. *Id.* ¶ 42. Moreover, the attached declaration reports time only through November 21, 2022, and thus excludes some of the additional hours that Class counsel has spent on the instant motion, and time that will be spent securing final approval of the settlement, assisting the Settlement Administrator, counseling Class Members, and monitoring the distribution of payments. *Id.* ¶ 44.

The fact that this case was settled on behalf of the Classes without additional litigation beyond Claimant Medina's individual arbitration further reflects Class counsel's commitment to efficiently achieving results for the Class Members. As the Ninth Circuit held in *Vizcaino*, class counsel should not "receive a lesser fee for settling a case quickly; in many instances, it may be a relevant circumstance that counsel achieved a timely result for class members in need of immediate relief." 290 F.3d at 1050 n.5; *see also Sherin v. Smith*, Fed. Sec. L. Rep. (CCH) P 93, 582 (E.D. Pa. Oct. 23, 1987) ("[T]he commitment of attorneys' hours employed in this matter, viewed in light of the commitment which would have been required to litigate this to a conclusion, requires a substantial upward adjustment of the lodestar in order to fulfill the goal of this analysis—to determine a fair and reasonable fee. It is entirely appropriate to reward expeditious and efficient resolution of disputes in this matter."). Even so, here Class counsel had to litigate an entire arbitration through judgment to achieve this settlement.

b) The Preclusion of Other Employment

Prosecution of this arbitration action precluded Class counsel from accepting other potentially profitable work. *See* McNerney Decl. ¶ 47; *see also Parks v. Eastwood Ins. Servs., Inc.,* 240 Fed. App'x 172, 175 (9th Cir. 2007) (approving increase to lodestar multiplier because "[p]reclusion from seeking other employment is a proper basis for an enhancement"); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 197 (S.D.N.Y. 1997). This factor similarly supports the application.

c) Undesirability of the Case

Due to the existence of arbitration clauses, the related legal hurdles to litigating this case as an aggregate action and proving actual damages, the existence of a large and geographically dispersed group of individuals, and the potential for drawn out and contested litigation across multiple arbitrations, recovery for the Class Members was not guaranteed. McNerney Decl. ¶ 30. This fact underscores the appropriateness of a multiplier enhancement.

d) Nature and Length of Relationship with the Client

Class counsel has worked on this case with Ms. Medina since November 2019 and Ms. Thomson since February 2021. *Id.* ¶ 31. Claimants' decision to retain Class counsel was based

on the firm's record of success in other class actions on behalf of workers. *Id.* ¶¶ 45-46. Throughout the litigation, Class counsel has maintained a close and productive relationship with Named Claimants. *Id.* ¶ 33. Relatedly, Class counsel worked closely with other Class Members during the investigation and settlement negotiation phase, answering Class Members' questions about the Class Notice and providing advice. *Id.* ¶ 26.

e) Awards in Similar Cases

As discussed above, the requested one-third fee is consistent with Ninth Circuit authority and with fees awarded in similar cases in the Ninth Circuit. *See* Section I(C)(5), *supra.* The requested multiplier of 2.08 also falls at the lower range of multipliers routinely approved in California federal district and circuit court in comparable common fund settlements. *See Vizcaino*, 290 F.3d at 1051-52 (approving multiplier of 3.65 and citing cases approving multipliers as high as 19.6); *Steiner v. Am. Broad. Co.*, 248 Fed. App'x 780, 783 (9th Cir. 2007) (approving 6.85 multiplier); *In re IDB Commc'ns Grp., Inc. Sec. Litig.*, No. 94 Civ. 3618 (C.D. Cal. Jan. 17, 1997)[4] (approving multiplier of 6.2); *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 298 (N.D. Cal. 1995) ("Multipliers in the 3-4 range are common in lodestar awards for lengthy and complex class action litigation."); *see also* Newberg, *Attorney Fee Awards*, § 14.03 at 14-5 (1987) ("[m]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.").

Because Class counsel's proposed multiplier of 2.08 "falls within an acceptable range, it further supports the conclusion that the fees sought are, in fact, reasonable." *Destefano*, 2016 U.S. Dist. LEXIS 17196, at *67 (citation omitted); *see also Vizcaino*, 290 F. 3d at 1051 n.6 (finding that a multiplier of 1.7 is "towards the lower end of the Ninth Circuit's scale" and therefore reasonable). Considering both the customary percentage and the range of multipliers commonly approved, Claimants' request for one third of the settlement fund is reasonable.

[4] This order is not available in published form, but is cited in the Appendix cited in *Vizcaino*, 290 F.3d at 1052.

II. Reimbursement of Class Counsel's Costs Is Reasonable

Class counsel seeks reimbursement for out-of-pocket litigation expenses in the amount of $12,424.19. Reimbursement for reasonable out-of-pocket expenses that were "incidental and necessary to the effective representation of the Class" is appropriate. *De Mira v. Heartland Emp. Serv., LLC*, No. 12 Civ. 4092, 2014 U.S. Dist. LEXIS 33685, at *15 (N.D. Cal. Mar. 13, 2014) (citing *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994)); *see also Millan v. Cascade Water Servs., Inc.*, No. 11 Civ. 1821, 2016 U.S. Dist. LEXIS 72198, at *36 (E.D. Cal. May 31, 2016) ("[A]n attorney who has created a common fund for the benefit of the class is entitled to reimbursement of reasonable litigation expenses from that fund.") (internal quotation marks and citations omitted).

As with attorneys' fees, all beneficiaries should bear their fair share of the customary costs of the litigation, which clients traditionally pay. *See Harris*, 24 F.3d at 19 (holding that plaintiffs "may recover as part of the award of attorney's fees those out-of-pocket expenses that would normally be charged to a fee paying client" (internal quotation and citation omitted)); *see also Dang v. Cross*, 422 F.3d 800, 814 (9th Cir. 2005) (permitting recovery of costs for "an expense that would normally be charged to a fee paying client."); *Vincent*, 557 F.2d at 769 ("[T]he doctrine is designed to spread litigation costs proportionately among all the beneficiaries so that the active beneficiary does not bear the entire burden alone and the 'stranger' beneficiaries do not receive their benefits at no cost to themselves.").

To date, Class counsel has incurred $12,424.19 in costs and expenses and will incur additional costs through the conclusion of this matter. McNerney Decl. ¶ 36. These costs were necessary in connection with the prosecution of this arbitration, reasonable in light of the complexity and scope of the action, and expended solely for the benefit of the Class. Class counsel's costs and expenses include payment to the mediator, electronic research, costs related to discovery and document review, and other reasonable litigation-related costs. *Id.* ¶ 40; *Id*., Ex. 2 ("Costs Summary"). Such costs and expenses were "incidental and necessary" to Class counsel's representation, and are therefore reimbursable. *See, e.g.*, *Millan*, 2016 U.S. Dist. LEXIS 72198, at *36 (approving as reimbursable counsel's costs for filing fees, copies, electronic research,

postage, and other office-related costs as litigation expenses that would "normally be charged to a fee paying client") (internal quotation marks and citation omitted).

III. The Requested Service Awards Are Reasonable

Claimants Medina and Thomson respectfully request approval of service awards of $10,000 each in recognition of the services they rendered to the Settlement Classes and the time they incurred for the Class's benefit. Representative service awards are "fairly typical in class action cases." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009); *see also Staton*, 327 F.3d at 977 ("[N]amed plaintiffs . . . are eligible for reasonable incentive payments."). Such awards are intended to "compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez*, 563 F.3d at 958-59.

In evaluating the reasonableness of a proposed award, courts consider, *inter alia*, "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefited from those actions, the amount of time and effort the plaintiff expended in pursuing the litigation and reasonable fears of workplace retaliation." *Staton*, 327 F.3d at 977 (alterations omitted) (quoting *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)).

Courts in the Ninth Circuit routinely approve similar or larger service award payments. *See, e.g.*, *Nelson v. Avon Prods., Inc.*, No. 13 Civ. 2276, 2017 U.S. Dist. LEXIS 26451, at *18-20 (N.D. Cal. Feb. 24, 2017) (approving $10,000 service payment for plaintiff who was deposed, produced documents, and aided counsel's negotiation efforts); *In re Animation Workers Antitrust Litig.*, No. 14 Civ. 4062, 2016 U.S. Dist. LEXIS 156720, at *28-29 (N.D. Cal. Nov. 11, 2016) (approving $10,000 service payments for three named plaintiffs who participated in discovery and depositions and reviewed the proposed settlement); *Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326, 335-36 (N.D. Cal. 2014) (awarding $10,000 where lead plaintiff participated in a four-day mediation, and spent considerable time assisting counsel with the case); *Buccellato v. AT & T Operations, Inc.*, No. 10 Civ. 0463, 2011 U.S. Dist. LEXIS 85699, at *6-7 (N.D. Cal. June 30, 2011) (awarding $20,000 to one named plaintiff and $5,000 each to four other named plaintiffs

"in light of the time and effort . . . expended for the benefit of the [c]lass [m]embers"); *Stevens v. Safeway, Inc.*, No. 05 Civ. 01988, 2008 U.S. Dist. LEXIS 17119 (C.D. Cal. Feb. 25, 2008) (awarding $20,000 and $10,000 to two class representatives, respectively); *Glass v. UBS Fin. Servs.*, No. 06 Civ. 4068, 2007 U.S. Dist. LEXIS 8476, at *51-52 (N.D. Cal. Jan. 26, 2007) (awarding service enhancements of $25,000 each to four class representatives who risked their reputations and provided counsel with relevant information and discovery); *Van Vranken*, 901 F. Supp. at 300 (awarding $50,000 service payment to class representative who was deposed twice, participated in dozens of conference and meetings, and testified at trial).

Here, Named Claimants have contributed significantly to the prosecution of this action on behalf of the Settlement Class Members. Claimant Medina first started working with Class counsel in November 2019, providing critical information about her claims. McNerney Decl. ¶ 31. Ms. Medina agreed to be the first claimant to file an arbitration against Spencer for FCRA and ICRAA violations. *Id*. ¶ 18. After Ms. Medina received judgment in her favor, she agreed to wait on receiving her award and to act as a Named Claimant while the Parties pursued a class settlement. *Id*. ¶ 23. Ms. Medina's decision to act as a class representative was essential to achieving a class settlement in this case, and came at the cost of delaying her receipt of her arbitration award by at least two years. *Id*. In the initial investigation for this case, Ms. Medina also provided critical information about her claims, and she later, she worked with Class counsel to prosecute her claims in arbitration, frequently speaking with Class counsel and providing testimony in support of her claims. *Id*. ¶¶ 16-17.

Claimant Thomson joined the action in February 2021 and has similarly contributed a significant amount of time and knowledge on behalf of Class Members, which led to crucial settlement leverage. *Id*. ¶ 31.

Both Claimants contributed their time throughout the course of preparing for mediation and settlement negotiations and have assisted in the preparation the class complaint and the Motion for Preliminary Approval. *Id*. ¶ 35. Claimants made themselves available to speak to Class counsel on numerous occasions, and provided Class counsel with information relating to the claims. *Id*. ¶ 33. Claimants worked with Class counsel to provide testimony in support of

mediation that detailed their experience. *Id*. ¶ 33. Claimants were available by phone and reviewed, approved, and executed the Settlement Agreement. *Id*. Claimants' participation in the case was imperative to its success. The requested service awards are therefore reasonable considering the substantial recovery and applicable precedent.

CONCLUSION

For the foregoing reasons, Claimants respectfully request: (1) approval of Class counsel's request for one-third of the Gross Settlement Amount ($600,166.67) as their attorneys' fees; (2) approval of Class counsel's request for $12,426.19 in costs and expenses; and (3) approval of the Service Awards of $10,000 each to Claimants Teresa Medina and Morgan Thomson.

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Respectfully submitted,

/s/ *Christopher M. McNerney*

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