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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

REGMON HAWKINS, *individually and on behalf of all others similarly situated*,

Plaintiff,

v.

S2VERIFY, *a foreign limited liability company*,

Defendant.

CASE NO. 3:15-CV-03502-WHA

PLAINTIFF'S MOTION FOR CLASS CERTIFICATION AND MEMORANDUM IN SUPPORT

Date: July 21, 2016
Time: 8:00 a.m.
Crtrm: 8, 19th Floor
Judge: Hon. William Alsup

CLASS ACTION

JURY TRIAL DEMANDED

Please take notice that on Thursday, July 21, 2016, at 8:00 a.m., in Courtroom 8 of the 19th Floor of the United States District Courthouse, 450 Golden Gate Avenue, San Francisco, California, 94102, Plaintiff Regmon L. Hawkins will move the Court for an order certifying a class

of consumers described below pursuant to Rule 23 of the Federal Rules of Civil Procedure. The grounds supporting this motion are set forth further below in the Memorandum in Support.

Plaintiff seeks certification of the following Class:

> (1) Regmon L. Hawkins and (2) all other natural persons within the United States (including all territories and other political subdivisions of the United States) (a) who were the subject of a consumer report S2VERIFY furnished to Chase Professionals, IPC International, Inc., Foodtemps, Inc. d/b/a Foodstaff, Mississippi Gaming Commission, StaffMasters, Inc., T&T Staff Management, Inc., Tarrant Regional Water District, TRC Staffing Services, or United Refining Company, (b) from June 16, 2013 through February 28, 2014, and (c) whose report contained any public record of criminal arrest, charge, information, indictment, or other adverse item of information other than records of an actual conviction of a crime, which antedated the report by more than 7 years.
>
> Excluded from the class definition are any employees, officers, or directors of S2VERIFY, any attorneys appearing in this case, and any judges assigned to hear this case as well as their immediate family and staff.

Plaintiff further seeks an order appointing Regmon L. Hawkins as a proper representative of the Class, and appointing the law firms of Caddell & Chapman and DHF Law, P.C. as Class Counsel, with Caddell & Chapman serving as Lead Class Counsel.

MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

I. INTRODUCTION

Plaintiff Regmon L. Hawkins seeks certification of a class of consumers who, like himself, were the subject of a consumer report sold by S2VERIFY, LLC ("S2V") that included adverse items of information other than records of convictions of crimes, which were disposed of more than seven years before the report was created ("Obsolete Criminal History"). Discovery has confirmed that S2V had a regular practice, until March 2014, of sending certain clients—Chase Professionals, IPC International, Inc., Foodtemps, Inc. d/b/a Foodstaff, Mississippi Gaming Commission, StaffMasters, Inc., T&T Staff Management, Inc., Tarrant Regional Water District, TRC Staffing Services, and United Refining Company (the "Identified Clients")—consumer reports that included Obsolete Criminal History information. S2V knew that Section 1681c(a)(5) of the Fair Credit Reporting Act ("FCRA") prohibits inclusion of such Obsolete Criminal History in any consumer report. But when the Identified Clients pressured S2V to include non-conviction information more than 7 years old, S2V acquiesced. Because it can be shown on a class-wide basis that Class members are entitled to statutory damages in compensation for this willful, flagrant violation of the FCRA, class certification is appropriate.

Mr. Hawkins applied for a job as a security guard in June of 2013 at IPC International, Inc. ("IPC").[1] On June 7, 2013, as part of the pre-employment process, IPC purchased Mr. Hawkins's background report from S2V. In a letter dated June 18, 2013, IPC notified Mr. Hawkins that it was denying him employment on the basis of his background report. Mr. Hawkins later obtained a copy of the report, which contained multiple references to criminal charges that (1) did not reflect criminal convictions, and (2) were disposed of more than seven years before the report was issued to IPC.

As the extensive discovery in this case has revealed, it was no mere accident or mistake that Mr. Hawkins's report contained obsolete criminal history. S2V employs individuals it calls

[1] IPC was originally named as a defendant in this case, but was nonsuited by Plaintiff's First Amended Complaint. (Dkt. 35.)

"adjudicators," whose job is to manually review every consumer report sold by S2V to remove Obsolete Criminal History before sending the report to an S2V client. But as a concession to its client IPC's wishes, S2V did not have its adjudicators remove Obsolete Criminal History information from reports sent to IPC. According to S2V's President James Zimbardi, S2V routinely allowed IPC and the other Identified Clients illegal access to Obsolete Criminal History Information:

> My partner and I, so that represents S2Verify . . . have always understood the FCRA and I've mentioned in testimony that the large majority of our client base was held to the FCRA standards. **But we made exceptions, if you will, for approximately 16 or 17 clients who demonstrated either statutory, legal licensing requirements to be able to have or use that data.** And so we processed them as exceptions under FCRA based on our belief at that time that their requirements, and based on what they were trying to accomplish on behalf of the consumer, licensed them, put the health home care worker into someone's home, give them a right to that data.

As Mr. Zimbardi, a 30-year veteran of the consumer reporting industry, well knew or should have known, a company's licensing requirements do not provide an exception to FCRA Section 1681c(a)(5). In fact, no specific licensing, statutory, or legal requirements exist outside of the FCRA to allow IPC to receive Obsolete Criminal History information related to Mr. Hawkins. S2V has not, and cannot, specify any. Mr. Zimbardi knew S2V was violating the FCRA, and when he became concerned about the risk of FCRA lawsuits, S2V changed its policies in March and May of 2014 to no longer allow any clients access to Obsolete Criminal History.

Mr. Hawkins seeks certification of a Class that includes himself and other consumers whose reports containing Obsolete Criminal History information S2V furnished to the Identified Clients between June 16, 2013 and February 28, 2014. The evidence in this case clearly shows that during that time period, as to the Identified Clients, S2V regularly, willfully violated Section 1681c(a)(5) of the FCRA.

II. FACTUAL BACKGROUND AND HISTORY OF THE CASE

A. S2V sold Regmon Hawkins's background report to IPC containing Obsolete Criminal History information.

On June 6, 2013, Mr. Hawkins applied to IPC for a job as a security guard. (Ex. 1,

Declaration of Regmon Hawkins ("Hawkins Decl."), ¶ 3.) On June 7, 2013, as part of the pre-employment process, IPC ordered and obtained a background report on Mr. Hawkins from S2V. (*Id.* ¶ 4.) On June 18, 2013, on the basis of the information disclosed in the S2V consumer report, IPC denied Plaintiff's employment application in a letter from its Human Resources department. (*Id.* ¶ 3.) IPC did not actually send Mr. Hawkins a copy of his report until after that date. (*Id.* ¶ 4.) But when Mr. Hawkins's finally received his report, it revealed multiple references to criminal charges that (1) ultimately did not end in criminal convictions, and (2) were disposed of more than seven years before the report was issued to IPC. Specifically, the report listed three criminal charges where the court's ultimate disposition indicated a "No Bill by Grand Jury." (Ex. 1-A, Consumer Report of Regmon Hawkins.) And each of those "No Bill" dispositions happened more than seven years before the date that S2V produced and sent the report to IPC:

Case No.	Criminal Charge	Disposition	Date of Disposition
F-0056745	Theft ENH	No Bill by Grand Jury	January 4, 2001
F-0153160	POSS CS	No Bill by Grand Jury	June 25, 2001
F-9751467	Theft ENH	No Bill by Grand Jury	August 5, 1997

(*Id.*)

B. S2V's President James Zimbardi admitted that it was S2V's policy not to remove Obsolete Criminal History from reports sent to the Identified Clients.

Mr. Hawkins's counsel twice took the organizational deposition of S2V, with its President James Zimbardi serving as designated representative both times. Mr. Zimbardi is a 30-year veteran of the consumer reporting industry. (Ex. 2, Deposition of James Zimbardi ("Zimbardi Dep.," 10:2–12.) Mr. Zimbardi is S2V's designated FCRA compliance person. (*Id.* 51:16–18; 52:6–12.) Although Mr. Zimbardi is not an attorney, he claims to be "very well-versed" in the FCRA as it applies to S2V's business practices, including the requirements of Section 1681c(a)(5). (*Id.* 18:21–23, 52:6–12; 179:9–17.)

Mr. Zimbardi testified that S2V employs "adjudicators" whose sole responsibility is to review criminal history information (or "hits") before turning over consumer reports to S2V's

clients. (*Id.* 45:20–46:19, 79:9–12.) S2V's adjudicators are trained in FCRA compliance, and specifically to remove Obsolete Criminal History information in compliance with Section 1681c. (*Id.* 78:10–79:12)

But for reports ordered by IPC, StaffMasters, and other Identified Clients, this process of adjudication to remove Obsolete Criminal History information did not take place. Mr. Zimbardi admitted that Hawkins's report contained Obsolete Criminal History information that violated FCRA Section 1681c(a)(5). (*See id.* 76:24–77:7, 97:13–98:22.) When questioned why S2V's adjudicators did not remove the prohibited information, Zimbardi testified that S2V deliberately provided Obsolete Criminal History "[i]n concert with the requirements of IPC." (*Id.* 98:23–99:1; *see also id.* 99:2–100:23 (detailing IPC's "requirements").) Mr. Zimbardi testified that the instructions from Michael Crane, S2V's client contact at IPC, "were very clear. If you've got a record that matches, I need to see it. **I'll be the person that determines whether or not I use it.** You can't determine that . . ." (*Id.* 104:10–15) (emphasis added). Of course, as Mr. Zimbardi well knew or should have known, the FCRA does not allow any exceptions based on an individual client's wishes. *See* 15 U.S.C. §§ 1681b (providing exhaustive list of permissible purposes for uses of consumer reports and exceptions); 1681c(b) (listing "exempted cases" to section 1681c); 1681 t(b)(1)(E) (providing that a state law is preempted to the extent it conflicts with Section 1681c).[2]

IPC was not the only S2V client whose requests for Obsolete Criminal History information S2V chose to oblige in violation of the FCRA. Mr. Zimbardi testified that S2V permitted Staff Masters to "adjudicate their own records." (*Id.* 118:22–119:3.) That is, S2V would turn over consumer reports to StaffMasters without having their adjudicators first remove Obsolete Criminal History information. (*See id.* 174:14–175:14; 235:8–11.) In total, S2V identified 19 clients, including IPC and Staff Masters, whose agreements to purchase consumer reports from S2V, according to Mr. Zimbardi, were known by S2V to violate the FCRA (*See* Ex. 3-A, Interrogatory

[2] S2V has not pled any of these specific exceptions or exemptions to the applicable FCRA provisions here. (*See Dkt.* 61, Answer to First Amended Complaint.)

Responses; Zimbardi Dep. 170:11–171:19, 216:25–217:14, 218:3–9.)[3] Nine of those clients (the ones defined here as the Identified Clients) purchased the consumer reports for the individuals who make up the Class.

C. In March and May of 2014, S2V changed its policies to bring its reports to the Identified Clients into compliance with the FCRA.

Mr. Zimbardi noted that S2V "pay[s] attention to legislative and litigation activities." (Zimbardi Dep. 129:21–130:1; *see also id.* 193:1–194:3, 196:13–17, 246:14–247:5.) Given its exposure to FCRA litigation, S2V ultimately decided that it was not worth the risk to continue flagrantly violating the FCRA at the Identified Clients' request. (*See id.* 170:6–24, 171:6–19, 253:18–254:4.) In March and May of 2014, S2V changed its policies as pertaining to the Identified Clients. (*See id.* 125:1–126:6, 170:11–171:19, 193:1–194:3.) Mr. Zimbardi testified that the principal purpose of the March 2014 change was to get StaffMasters "in full compliance." (*Id.* 125:1–11, 126:1–6.)

D. The parties have exchanged extensive discovery, including production of more than 963,000 pages of S2V's consumer reports.

The parties have exchanged significant written discovery. On December 16, 2015, the Court entered an order compelling (1) the deposition of S2V's corporate representative under FED. R. CIV. P. 30(b)(1) on December 21, 2015, and (2) compelling S2V's production of consumer reports as requested by Hawkins. (Dkt. 57.) The Court's order required that S2V produce the documents before the deposition of S2V, or else Mr. Hawkins's counsel would be able to depose S2V a second time. (*Id.*) S2V did not timely produce the documents before the December 21 deposition, and Mr. Hawkins's counsel deposed S2V a second time on January 20, 2016. (Ex. 3, Declaration of Benjamin Wickert ("Wickert Decl.") ¶ 4.)

S2V ultimately produced the consumer reports, which constituted more than 963,000 pages of documents and more than 100,000 consumer reports. (*Id.* ¶ 5) But the reports did not contain the metadata Hawkins had requested. (*Id.*) That is, there was no way to meaningfully organize the

[3] Mr. Zimbardi referred to those "16 or 17" clients as "anomalies." (Zimbardi Dep. 195:22–196:17.)

reports by search field (e.g., by consumer name, criminal charge, disposition, or disposition date). (*Id.*) Given that deficiency in S2V's production, Mr. Hawkins issued a Rule 30(b)(6) deposition with subpoena *duces tecum* to Deverus, the third party company that hosts S2V's consumer reports. (*Id.*) After Mr. Hawkins's counsel conferred with Deverus's counsel, the parties reached an agreement whereby Deverus would produce the same consumer reports already produced by S2V, but with the metadata information that would allow Hawkins's counsel to search, organize, and manually review the reports. (*Id.* ¶ 6.) Deverus produced those reports and metadata. (*See* Ex. 4, Affidavit of Brent Breshers, ¶¶ 2–5.)

S2V deposed Mr. Hawkins on January 29, 2016.

E. Hawkins's counsel conducted an exhaustive and comprehensive review and analysis of S2V's consumer reports.

Lead Counsel for Mr. Hawkins and the Class, Caddell & Chapman, with the aid of its third-party ESI processing and database hosting vendor Lexbe, uploaded and Bates labeled the documents and metadata produced by Deverus. (Wickert Decl. ¶ 7.) With the aid of the metadata provided by Deverus, Lexbe was able to narrow the universe of documents to those that contained criminal charges that were disposed of more than seven years before the date of the report. (*Id.*) This yielded 29,172 consumer reports. (*Id.*) As a means to further narrow the scope of this detailed review and analysis, Hawkins's counsel performed various keyword searches of common terms indicating a conviction had not been obtained, such as "dismissed," "dismissal," "not guilty," and other similar terms. (*Id.*)

With those narrowing parameters in place, Caddell & Chapman then conducted a manual review of each of the consumer reports. (*Id.* ¶ 8.) For each report, it was noted (1) whether the report contained Obsolete Criminal History, (2) how many such violations occurred in each report, and (3) the S2V client who procured the report. (*Id.*) There were instances of criminal charges with no disposition (or "other") marked as a disposition; those instances were noted as violation (if obsolete). (*Id.*) And if a report indicated that a charge resulted in a deferred adjudication or probation that was not revoked—i.e., one that did not ultimately result in a conviction—this was

marked as a violation (if obsolete). (*Id.*) The reports with Obsolete Criminal History were identified as potential class members, with the number of violations per report noted. (*Id.* ¶ 9.) Any reports that contained (1) non-conviction information less than seven years old, and/or (2) a conviction, plea of guilt, or revocation of deferred adjudication or probation, regardless of age, were marked accordingly and not included as potential class members. (*Id.*)

Caddell & Chapman's review identified an initial subset of 5,360 persons whose reports contained Obsolete Criminal History. (*Id.* ¶ 10.) Those 5,360 reports were purchased by 83 different S2V clients. (*Id.*) Of those, a clear pattern emerged: 4,699 (or 87.7%) of those 5,360 reports were procured by one of nine companies, defined here as the Identified Clients: Chase Professionals, IPC International, Inc., Foodtemps, Inc. d/b/a Foodstaff, Mississippi Gaming Commission, StaffMasters, Inc., T&T Staff Management, Inc., Tarrant Regional Water District, TRC Staffing Services, and United Refining Company. (*Id.*) And all except 242 of the 4,699 had their reports accessed before March 2014—i.e., before S2V instituted its March 2014 policy to bring the Identified Clients into compliance with the FCRA. (*Id.*) In total, therefore, Caddell & Chapman's review identified 4,457 consumer reports containing Obsolete Criminal History that were accessed by the Identified Clients before March of 2014. (*Id.*) This review confirmed Mr. Zimbardi's testimony that S2V had a routine practice of willfully providing Obsolete Criminal History information to the Identified Clients up to March 2014.

III. THE PROPOSED CLASS

Plaintiff requests that the Court certify the following "Class":

> (1) Regmon L. Hawkins and (2) all other natural persons within the United States (including all territories and other political subdivisions of the United States) (a) who were the subject of a consumer report S2VERIFY furnished to Chase Professionals, IPC International, Inc., Foodtemps, Inc. d/b/a Foodstaff, Mississippi Gaming Commission, StaffMasters, Inc., T&T Staff Management, Inc., Tarrant Regional Water District, TRC Staffing Services, or United Refining Company, (b) from June 16, 2013 through February 28, 2014, and (c) whose report contained any public record of criminal arrest, charge, information, indictment, or other adverse item of information other than records of an actual conviction of a crime, which antedated the report by more than 7 years.
>
> Excluded from the class definition are any employees, officers, or directors of S2VERIFY, any attorneys appearing in this case, and any judges assigned to hear this case as well as their immediate family and staff.

IV. ARGUMENT AND AUTHORITIES

A. The Ninth Circuit standard for class certification is well-settled.

Plaintiffs seeking to represent a class must satisfy the four threshold requirements of Rule 23(a), as well as the requirements for certification under one of the three subsections of Rule 23(b). Rule 23(a) provides that a case is appropriate for certification as a class action if: "(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." *Wolin v. Jaguar Land Rover N. America*, 617 F.3d 1168, 1172 (9th Cir. 2010) (quoting FED. R. CIV. P. 23(a)). Here, Plaintiff seeks class certification under Rule 23(b)(3), which authorizes certification where the court finds "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Id.* (quoting FED. R. CIV. P. 23(b)(3)).

Plaintiffs seeking class certification bear the burden of demonstrating that each element of Rule 23 is satisfied, and a district court may certify a class only if it determines that the plaintiffs have borne their burden. *Zinser v. Accufix Research Institute, Inc.,* 253 F.3d 1180, 1186 (9th Cir.), amended by 273 F.3d 1266 (9th Cir. 2001). To make this determination, it is generally inappropriate to consider the merits of plaintiff's claims. *See Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177, 94 S. Ct. 2140, 40 L.Ed.2d 732 (1974) ("We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action"). Rather, the court must take the substantive allegations of the complaint as true. *Marsh v. First Bank of Del.*, No. 11-CV-05226-WHO, 2014 WL 554553, at *7 (N.D. Cal., Feb. 7, 2014) (citing *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975).)

Nonetheless, "Rule 23 does not set forth a mere pleading standard. A party seeking class

certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Wal–Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551–52 (2011). Ultimately, the decision to grant or deny class certification is within the district court's discretion. *Bateman v. American Multi-Cinema, Inc.*, 623 F.3d 708, 712 (9th Cir. 2010).

B. The Class satisfies the Rule 23 predicates to certification.

1. Not only are the Class members ascertainable, they have been ascertained.

Although there is "no explicit requirement concerning the class definition in [Rule] 23, courts have held that the class must be adequately defined and clearly ascertainable before a class action may proceed." *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 679–80 (S.D. Cal. 1999) (quoting *Elliott v. ITT Corp.*, 150 F.R.D. 569, 573–74 (N.D. Ill. 1992)). The class definition should be "precise, objective and presently ascertainable." *O'Connor v. Boeing North American, Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998). While the identity of the class members need not be known at the time of certification, the class definition must "definite enough so that it is administratively feasible for the court to ascertain whether an individual is a member." *Id.*

Here, not only is the Class ascertainable, it has already been *ascertained.* The Class consists of 4,457 individuals: Mr. Hawkins and others whose consumer reports were furnished to one of the Identified Clients from June 16, 2013 through February 28, 2014, and whose report contained any public record of criminal arrest, charge, information, indictment, or other item other than an actual conviction of a crime, which antedated the report by more than 7 years. As detailed above, Hawkins's counsel has meticulously organized, searched, and reviewed the consumer reports produced in this case for inclusion in the Class.

2. The Class meets the four requirements of Rule 23(a).

a. The Class is sufficiently numerous under Rule 23(a)(1).

A class satisfies the numerosity requirement when it is "so large that joinder of all members is impracticable." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998) (quoting FED. R. CIV. P. 23(a)(1)). It is not necessary to precisely identify the number of class members—it is

appropriate to rely on reasonable inferences. *Westways World Travel, Inc. v. AMR Corp.*, 218 F.R.D. 223, 233–34 (C.D. Cal. 2003). Courts generally recognize that Rule 23(a)(1) is satisfied when the proposed class contains one hundred or more members. *Woods v. Vector Mktg. Corp.*, No. C-14-0264 EMC, 2015 WL 5188682, at *11 (N.D. Cal., Sept. 4, 2015). Numerosity is easily satisfied here, with 4,457 identified Class Members.

b. There are common questions of law and fact under Rule 23(a)(2).

A class has sufficient commonality "if there are questions of fact and law which are common to the class." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349, 131 S. Ct. 2541, 2551, 180 L.Ed.2d 374 (2011); *Hanlon*, 150 F.3d at 1019. Not all questions of fact and law need be common to satisfy the test for commonality, and "even a single [common] question will do." *Dukes*, 564 U.S. at 359, 131 S. Ct. at 2556, 180 L.Ed.2d 374." Multiple common questions of law and fact exist as to all members of the Class, including:

- Whether the background reports sold by S2V were "consumer reports" as defined by the FCRA;
- Whether S2V had a policy of providing unscreened reports including Obsolete Criminal History information to the Identified Clients up to March 2014;
- Whether the FCRA allows a Consumer Reporting Agency to make exceptions to the FCRA at the request of a client;
- Whether S2V's violations of section 1681c(a)(5) were willful.

Commonality is therefore satisfied.

c. Plaintiff's claims are typical of other Class members under Rule 23(a)(3).

The purpose of the typicality requirement is to "assure that the interests of the named representative align with the interests of the class." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010). In determining whether the typicality requirement is met, the Court examines whether other class 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." *Id.* at 1175 (internal quotations omitted). A

plaintiff's claims are "typical" if they are "reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020.

Here, Mr. Hawkins's claims are typical of those of other Class Members. The proposed Class comprises individuals who, like Mr. Hawkins, were the subject of consumer reports that contained non-conviction criminal history information from more than seven years before the report date. And like Mr. Hawkins, whose report was purchased from S2V by IPC, each Class Member had his or her consumer report purchased by an Identified Client. Mr. Hawkins's claims are therefore typical of the Class's under Rule 23(a)(3).

d. Plaintiff and his Counsel will adequately represent the Class under Rule 23(a)(4).

The final element under Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." *Hanlon*, 150 F.3d at 1020 (quoting FED. R CIV. P. 23(a)(4)). In determining whether a proposed class representative will fairly and adequately protect the interests of the class, the Court asks two questions: (1) do the named plaintiff and his counsel "have any conflicts of interest with other class members" and (2) will the named plaintiff and his counsel "prosecute the action vigorously on behalf of the class?" *Id.*

Mr. Hawkins's counsel satisfies the adequacy requirement. In retaining Caddell & Chapman and DHF Law, Mr. Hawkins has employed counsel with the unquestionable qualifications, experience, and resources necessary to prosecute this case to a successful resolution. As detailed in their declarations, Plaintiff's counsel have extensive experience and success in class action and complex litigation involving the FCRA. Mr. Hawkins's lead counsel, Caddell & Chapman, has served in a leadership role asserting FCRA claims in numerous national class action cases including, *inter alia*: (1) *Teagle v. LexisNexis Screening Solutions, Inc.* (formerly "Choicepoint"), a nationwide FCRA Settlement given final approval on July 31, 2013, by Judge Richard Story for the Northern District of Georgia; (2) *Williams v. LexisNexis Risk Management*, a $22 million FCRA Settlement approved June 25, 2008, by Federal District Judge Robert Payne in Richmond, Virginia; (3) *In re Trans Union Corp. Privacy Litigation*, Case 1:00-cv-04729, MDL

Docket No. 1350, N.D. Illinois, at $75 million, the largest FCRA Settlement in history and one of the largest class actions in history including more than 190 million class members, where the settlement was approved by Judge Robert Gettleman on September 17, 2008; and (4) *Berry et al. v. LexisNexis Risk & Information Analytics Group, Inc., et al.*, Case 3:11-cv-00754, a nationwide FCRA settlement for $13.5 million in damages plus injunctive relief, which was affirmed by the Fourth Circuit Court of Appeals on December 4, 2015. (*See* Ex. 5, Declaration of Michael Caddell ("Caddell Decl."), ¶ 11.) With the litany of experience in class action and other complex litigation that Plaintiff's counsel brings, there can be no question that they satisfy the adequacy of representation requirement. (*See* Caddell Decl.; Ex. 6, Declaration of Devin Fok.)

Mr. Hawkins is an adequate representative of the Class because his interests do not conflict with those of the Class members. He has committed to vigorously pursue this litigation to obtain the best recovery for himself and members of the Class. (Hawkins Decl. ¶ 8.) For the entirety of this litigation, Mr. Hawkins has not shied away from the fact that he has an extensive criminal history. (*See id.* ¶¶ 5–8.) He was convicted of (or pled guilty to) several petty crimes in the 1990s, which he had committed to sustain his drug habit. (*Id.* ¶ 5.) He has been clean and sober for approximately 15 years. (*Id.* ¶ 7.) Mr. Hawkins has maintained employment and had no run-ins with the law except in January of 2006, when he pleaded guilty to a charge of child abduction in violation of Section 278 of the California Penal Code. (*Id.* ¶ 6.) This involved a domestic dispute that escalated into the filing of criminal charges. (*Id.*) Mr. Hawkins was sentenced to five years' probation. (*Id.*) Under the terms of probation, Mr. Hawkins was required to submit to drug testing. (*Id.*) He passed every drug test administered as part of the probation and satisfied all of the terms of his probation within three years. (*Id.*) In 2009, with the assistance of the East Bay Community Law Center in Berkeley, California, his probation was terminated early due to his extraordinary rehabilitation and the conviction was dismissed under CAL. PEN. C. §1203.4. (*Id.*; *see also* Frequently Asked Questions: How Do I get an Expungement?, Law Office of the Los Angeles County Public Defender, http://pd.co.la.ca.us/faqs_Expungement.html#accomplished (last visited June 6, 2016) (detailing expungement process under Penal Code section 1203.4).)

Mr. Hawkins's past crimes should not prevent him from acting as a fiduciary to the Class here. As this Court has recognized before, a plaintiff's adequacy to represent a class asserting violations under Section 1681c(a)(5) must be viewed in the context of that statutory provision. *Dunford v. American DataBank, LLC*, 64 F. Supp. 3d 1378, 1398 (N.D. Cal. 2014) (Alsup, J.). That is, when (as here) the Class is limited to obsolete non-conviction criminal history, "crime is inherent" in the analysis. *Id.* The obsolete criminal charges on Mr. Hawkins's report are what gives rise to the statutory violation in the first place; neither those charges, nor the convictions from more than a decade ago, should prevent Mr. Hawkins from acting in the best interest of the Class. Since his conviction in January 2006, Mr. Hawkins has devoted his life to rehabilitating himself. (*Id.* ¶¶ 7–8.) He has been drug-free for more than 15 years, and he has not been convicted, arrested, or charged with any crime since 2006. (*Id.* ¶ 7.) He is currently employed as a supervisor at Security Code 3, a security guard company, where he has worked since approximately July of 2012. (*Id.*) Part of each of his paychecks is directly debited to make child support payments to the mother of his 11-year old daughter. (*Id.*) He deeply regrets the crimes he committed and has focused on turning his life around and becoming a drug-free, law-abiding contributor to society. (*Id.*)

3. The Class meets the requirements of Rule 23(b)(3).

In addition to Rule 23(a), one of the three requirements of Rule 23(b) must be met. Here, Hawkins moves for class certification under Rule 23(b)(3). Claims may be certified under Rule 23(b)(3) when the Court finds that "questions of law or fact common to members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(b)(3).

a. Common issues predominate over individual ones.

The predominance inquiry under Rule 23(b)(3) tests whether the "proposed class is sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). The "main concern in the predominance inquiry . . . [is] the balance between individual and common issues." *Mevorah v. Wells Fargo Home Mortgage*, 571 F.3d 953, 959

(9th Cir. 2009). The efficiency, fairness, and superiority of a class action are lost if the material issues of law and fact must be resolved on an individual basis. *See Valentino v. Carter-Wallace*, 97 F.3d 1227, 1234 (9th Cir. 1996) ("Implicit in the satisfaction of the predominance test is the notion that the adjudication of common issues will help achieve judicial economy.") Here, there are basic, overriding questions of law and fact common to the Class, which are susceptible to class-wide proof. The issues of law and fact arising from S2V's uniform processes predominate over any individual issues.

The most important liability issue in this case will be whether S2V violated Class members' rights under 15 U.S.C. § 1681c(a)(5). S2V's violations can be demonstrated on a class-wide basis because the legal issue is the same as to each Class member. For every Class Member, S2V provided Obsolete Criminal History information in consumer reports to third parties with no legal justification. *See generally supra*, § II; 15 U.S.C. 1681c(a)(5). Liability is therefore a class-wide issue that favors certification of the Class. *See, e.g., Moore v. Ulta Salon, Cosmetics & Fragrance, Inc.*, 311 F.R.D. 590, 611 (C.D. Cal. 2015) ("where common liability issues that are susceptible to class-wide proof constitute a significant part of the case, predominance may be satisfied") (internal citations omitted).

Willfulness can also be shown on a class-wide basis. A "willful" violation under the FCRA includes "not only knowing violations of a standard, but reckless ones as well." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57, 127 S. Ct. 2201, 167 L.Ed.2d 1045 (2007); *Bateman v. American Multi-Cinema, Inc.*, 623 F.3d 708, 711 (9th Cir. 2010). Mr. Zimbardi has testified that S2V made a deliberate choice to provide Obsolete Criminal History information to the Identified Clients up to March of 2014. (Zimbardi Dep. 100:23–101:6; 171:6–19; 254:16–255:9). This testimony easily satisfies the recklessness requirement for willfulness. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. at 57, 127 S. Ct. 2201, 167 L.Ed.2d 1045; *Bateman v. American Multi-Cinema, Inc.*, 623 F.3d at 711. Going beyond recklessness, Mr. Zimbardi's testimony shows that he actually knew that S2V's reports to the Identified Clients were not compliant with the FCRA prior to March of 2014. (Zimbardi Dep. 253:21-254:1; *see also id.* 246:9–247:22 (Mr. Zimbardi testified that he told an attorney at

StaffMasters in "late 2013, early 2014" that S2V made the policy changes as to Identified Clients in March and May of 2014 because its then-current policies were violating the FCRA).) Here, the proposed Class includes only persons whose reports were purchased by Identified Clients before March of 2014. (*See supra* § III.) Because Mr. Zimbardi's testimony shows that S2V's violations of 15 U.S.C. § 1681c(a)(5) in reports to the Identified Clients during this period followed a company-wide policy of ignoring the FCRA's requirements, willfulness can be demonstrated on a class-wide basis.

b. Standing does not present any individual issues.

The Supreme Court recently re-affirmed in *Spokeo, Inc. v. Robins* that plaintiffs have Article III standing to sue for statutory violations so long as they have suffered concrete, particularized injuries. *Spokeo*, 136 S. Ct. 1540 (2016). As the Supreme Court made clear, "concrete" does not necessarily mean "tangible." *Spokeo*, 136 S. Ct. at 1549 ("[W]e have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete.") To the contrary, the common law has long recognized that intangible interests in reputation, such as the FCRA seeks to protect, are actionable. *Spokeo*, 136 S. Ct. at 1551 ("'Private rights' have traditionally included rights of personal security (**including security of reputation**), property rights, and contract rights.") (emphasis added). Furthermore, the FCRA's legislative history indicates that Congress judged consumers' interest in their reputations to be concrete and worthy of protection from Obsolete Criminal History information such as S2V reported about the Class members in this case:

> The legislative history of the FCRA reveals that it was crafted to protect consumers from the transmission of inaccurate information about them, and to establish credit reporting practices that utilize accurate, relevant, and current information in a confidential and responsible manner. These consumer oriented objectives support a liberal construction of the FCRA.

Dunford, 64 F. Supp. 3d at 1389 (citing *Guimond v. Trans Union Credit Info. Co.,* 45 F.3d 1329, 1333 (9th Cir.1995)). *See Spokeo*, 136 S. Ct. at 1543 (holding that "Congress is well positioned to identify intangible harms that meet minimum Article III requirements").

As this Court has recognized, it is clear that Mr. Hawkins has suffered a concrete injury. (*See* Dkt. 44 (finding that "named plaintiff Regmon Hawkins has alleged harm going well beyond the

bare violation of a federal statute").) Because all Class members, like Mr. Hawkins, suffered concrete reputational harm when they were the subject of consumer reports purchased by an Identified Client that contained Obsolete Criminal History, standing does not present any individual issues. (*See supra* § II.) To the extent that S2V might attempt to raise standing as a defense to Class members' claims, that defense can be dispensed with on a class-wide basis.

c. The class action device is the superior method for resolving this dispute.

The factors relevant to assessing superiority include "(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." *Wolin*, 617 F.3d at 1175; FED. R. CIV. P. 23(b)(3)(A-D). "[T]he purpose of the superiority requirement is to assure that the class action is the most efficient and effective means of resolving the controversy." *Id.* (quoting 7AA Charles Wright, Arthur Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE, § 1779 at 174 (3d ed. 2005).)

When addressing the superiority of a class action brought under the FCRA, the Court must harmonize the requirements of Rule 23(b)(3) with the statutory damages remedy provided by the FCRA (and sought here by Hawkins and the Class). *Bateman*, 623 F.3d at 717–18.[4] Specifically, Congress "expressly created a statutory damages scheme that intended to compensate individuals for actual or potential damages resulting from [FCRA] violations." *Id.* at 719. The range of statutory damages under the FCRA is "not less than $100 and not more than $1,000." 15 U.S.C. § 1681n(a). Given the relatively small amount at issue for each individual consumer, the risks of not obtaining relief at all, and the costs of pursuing a lawsuit, it is unlikely that individual consumers would pursue claims against S2V. This counsels in favor of a class action as the superior means of

[4] The Ninth Circuit in *Bateman* analyzed superiority in terms of the Fair and Accurate Credit Transactions Act ("FACTA"), which amended the FCRA to create the statutory damages framework for willful violations in place today. *Id.* at 717.

resolving the dispute. *See Amchem*, 521 U.S. at 617, 117 S. Ct. 2231 ("[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights"); *Sullivan v. Kelly Services, Inc.*, 268 F.R.D. 356, 365 (N.D. Cal. 2010) (Wilken, J.) (superiority met when the "small amount of money at issue in each individual case makes it highly unlikely that individual litigation would be undertaken, but a class action would offer those with small claims the opportunity for meaningful redress.").

The Class will not present significant manageability issues. Because Mr. Hawkins' counsel obtained metadata from Deverus and performed database coding allowing Class members' reports to be easily sorted, searched, and filtered by date, age of the reported criminal history information, and the client to whom the report was provided, Class members have already been identified, and the violations on their reports can be easily confirmed. (*See* Wickert Decl. ¶¶ 7–11.) The Court should therefore have no difficulty managing this case as a class action.

Superiority is clearly met here. S2V has violated the rights of more than 4,000 geographically dispersed Americans to such an extent that individual litigation to seek recovery against S2V is not feasible. If the Class is not certified, it is very likely that thousands of consumers will receive no relief. Even should the proposed Class Members become aware of their rights and seek to pursue them, a multiplicity of lawsuits will result in an inefficient administration of this controversy and needlessly expend a great deal of judicial resources. Accordingly, certification of the Class is favored as the superior method of adjudicating this controversy.

V. PRAYER FOR RELIEF REQUESTED

Plaintiff Regmon Hawkins respectfully requests that the Court certify the above Class under Rule 23, further prays for an order appointing him as a proper representative of the Class, and appointing his counsel, the law firms of Caddell & Chapman and DHF Law, P.C. as Class Counsel, with Caddell & Chapman serving as Lead Class Counsel.

Respectfully submitted,

Dated: June 6, 2016

By: */s/ Michael A. Caddell*

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