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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF NEW YORK**

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| CARNELLA TIMES and ERVING SMITH, on behalf of themselves and all others similarly situated, and THE FORTUNE SOCIETY, INC., | : |
| Plaintiffs, | : |
| -against- | : |
| TARGET CORPORATION, | : |
| Defendant. | : |

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, CONDITIONAL CERTIFICATION OF SETTLEMENT CLASS, APPOINTMENT OF CLASS COUNSEL, AND APPROVAL OF PLAINTIFFS' PROPOSED NOTICE OF SETTLEMENT**

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## INTRODUCTION

Plaintiffs Carnella Times and Erving Smith, on behalf of those similarly situated, and The Fortune Society ("Fortune Society"), which supports the successful reentry of formerly incarcerated individuals, respectfully submit for the Court's preliminary approval, a proposed settlement with Target Corporation ("Defendant" or "Target") (collectively, "the Parties"), which seeks to remedy Target's job applicant screening processes, which Plaintiffs allege has resulted in thousands of qualified African-Americans and Latinos being denied jobs in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq*. As set forth below, the settlement was reached after extensive investigation, pre-litigation discovery, and negotiations. The proposed Settlement Agreement and Release ("Settlement Agreement"),[1] which is attached as Exhibit A to the Miazad Decl.,[2] is the product of several years of arm's-length, good faith negotiations, including eight mediation sessions between experienced counsel aided by a well-respected mediator.

The Settlement Agreement provides for significant class member and programmatic relief. First, the settlement provides class members with hourly, non-exempt entry-level jobs at Target stores through a Priority Hiring process. Class members can also opt for consideration for a Team Lead role and automatically advance to the second stage of the interview process for these positions that have a supervisory component. If class members are not qualified for such

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[1] Defendant does not oppose preliminary approval of the Settlement Agreement, conditional certification of the settlement class, approval of the proposed notice of class action settlement, or approval of the proposed schedule for final settlement approval. *See* Declaration of Ossai Miazad in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement, Conditional Certification of Settlement Class, Appointment of Class Counsel, and Approval of Plaintiffs' Proposed Notice of Settlement ("Miazad Decl.") ¶ 27.

[2] Unless otherwise indicated, all Exhibits are attached to the Miazad Declaration and all capitalized terms have the definitions set forth in the Settlement Agreement.

priority hiring, they may be eligible to receive a monetary award in lieu of employment. Second, the Parties have jointly selected experts, paid by Target, to work together as independent consultants to revise and validate Target's guidelines developing substantial programmatic relief remedying the hiring practices at issue in this litigation. Lastly, Target has agreed to make a financial contribution of $600,000 to nonprofits that provide re-entry support to individuals with criminal history records, with the goal of supporting these organizations' efforts in developing a pipeline of qualified applicants who have successfully completed work ready programs.

As set forth below, the Settlement Agreement is fair, reasonable, and adequate, and satisfies all of the criteria for preliminary approval under federal law. Plaintiffs respectfully request that the Court: (1) grant preliminary approval of the Settlement Agreement; (2) conditionally certify the proposed settlement class, for settlement purposes only, under Federal Rule of Civil Procedure 23; (3) appoint Outten & Golden LLP ("O&G") and the NAACP Legal Defense and Educational Fund, Inc. ("LDF") (together, "Plaintiffs' Counsel") as Class Counsel; (4) approve the proposed Court-Authorized Notice and Claim Form ("Notice and Claim Form"), attached as Exhibit B to the Miazad Decl., and authorize its distribution; and (5) order the parties to provide an update to the Court within sixty (60) days of the Court's Preliminary Approval Order proposing a date for the fairness hearing for final approval of the settlement.

## BACKGROUND

### I. Target's Criminal History Screening Process.

Since 2001, Target has performed criminal background checks on all applicants for employment to its U.S.-based stores. *See* ECF No. 1 (Compl.) ¶¶ 4-5. Over the years, Target has revised various aspects of its criteria for excluding applicants with criminal backgrounds, which Target calls its "Adjudication Guidelines." *Id.* ¶ 5. However, important aspects of

Target's background check policies and procedures have remained unchanged, including its use of a centralized background check process designed and directed by its management team headquartered in Minneapolis, Minnesota, and its use of human relations and managerial personnel who apply these policies and procedures to all U.S.-based Target stores and applicants for employment. *Id*.

Target's hiring process begins with two initial interviews. *Id.* ¶ 6. Target's interviewers utilize a standard set of questions based on interview guides provided by Target's headquarters. *Id.* After the second interview, Target interviewers may extend a conditional offer of employment and inform the applicant that the offer is contingent upon the results of a criminal background check. *Id.* The applicant is then required to fill out a previous conviction questionnaire form, which requests information about the applicant's criminal record. *Id.* Since 2001, Target has also contracted with various third-party vendors to perform criminal background checks on applicants. *Id.*

The third-party vendor, on behalf of Target, applies Target's mandated Adjudication Guidelines to the applicant's criminal record to determine if the applicant should be excluded from employment or if the applicant's record requires further review. *Id.* ¶ 7. Pursuant to Target's uniform Adjudication Guidelines, Target mandates rejection of applicants with certain criminal convictions that may involve violence, theft, or controlled substances—whether misdemeanor or felony—within the past seven years. *Id.* ¶ 8.

Target's Adjudication Guidelines also mandate that applicants must be rejected from employment for what Target identifies as inaccurate disclosure of prior criminal convictions. *Id.* ¶ 9. Target labels such inaccuracies as "falsifications" ("Target's Falsification Policy"). *Id.*

When the vendor applies Target's Adjudication Guidelines, three determinations are possible: (1) the applicant is eligible for employment; (2) the applicant is ineligible; or (3) the applicant needs further review by Target's Team Member Screening Team ("Screening Team"). *Id.* ¶ 10. If the applicant is deemed ineligible pursuant to Target's Adjudication Guidelines, the vendor notifies the applicant in writing by sending the applicant the required Fair Credit Reporting Act ("FCRA") notices with a copy of the background check. *Id.* ¶ 11.

If the vendor determines that the applicant's criminal history requires further review pursuant to Target's Adjudication Guidelines, it is forwarded to Human Resources at Target's headquarters. *Id.* ¶ 12. The Screening Team assesses the applicants who require further review. Target's policies allow members of the Screening Team to use their discretion rather than apply any objective or validated measures to assess applications. *Id*.

Plaintiffs allege that Target's Screening Process, which consists of the Adjudication Guidelines, the Falsification Policy, and the review by the Screening Team, imports the racial and ethnic disparities that exist in the criminal justice system into the employment process, thereby multiplying the negative impact on African-American and Latino job applicants. *Id.* ¶ 13.

## II. EEOC Filing.

On March 6, 2007, Plaintiff Carnella Times (born McDade) filed a Charge of Discrimination ("Charge") with the U.S. Equal Employment Opportunity Commission ("EEOC") based on Target's denial of employment. *Id*. ¶ 17. On August 4, 2011, the EEOC issued an adverse finding against Target, finding reasonable cause to believe that through the application of its background check policy, Target had discriminated against a class of applicants because of their race and national origin by denying them employment and/or refusing to

consider them for employment. *Id.* ¶ 18; Miazad Decl. ¶ 9. On September 14, 2015, after years of investigation, the EEOC issued Plaintiff Times a Notice of Right to Sue, Compl. ¶ 19, and produced documents that Target had provided to the EEOC. Miazad Decl. ¶ 10.

On November 17, 2015, Plaintiffs' Counsel sent Target a letter on behalf of Plaintiff Times and the putative class inviting Target to negotiate a resolution of the claims. *Id.* ¶ 11. On December 10, 2015, Plaintiff Times entered into a tolling agreement with Target on behalf of herself and the class. Compl. ¶ 20.

## III. Investigation and Settlement Negotiations.

Plaintiffs have conducted a thorough investigation of Target's hiring practices and potential remedies to eliminate any disparate impact on African-American and Latino applicants. Miazad Decl. ¶ 14. As part of this effort, Plaintiffs' Counsel regularly met and communicated with organizational Plaintiff Fortune Society in order to understand the challenges that Target's Screening Process imposed on individuals with criminal histories. *Id.* ¶ 16. Plaintiffs' Counsel also conducted in-depth interviews of potential class members, including Plaintiffs, and conducted research regarding the claims, defenses, and damages. *Id.* ¶ 17. Plaintiffs' Counsel also obtained and reviewed the EEOC investigation file, consisting of hundreds of pages of documents and data. *Id.* ¶ 18.

Following the execution of the tolling agreement, the Parties engaged in an informal exchange of discovery to facilitate the dispute resolution process. *Id.* ¶ 19. Target produced voluminous records about its Screening Process and applicant data. *Id.* Plaintiffs' Counsel engaged experts to assess and analyze Target's Screening Process and data. *Id.*

With a well-informed understanding of the scope of the legal issues and underlying facts, the Parties agreed to mediate the dispute with the assistance of an experienced mediator, Lynn

Cohn. *Id.* ¶ 21. Because the liability issues and hiring processes were complex, the Parties understood that one mediation session would not suffice. *Id.* ¶ 22. Instead, the Parties agreed to, and participated in, ongoing, intensive mediation sessions over a period of 15 months. *Id.* From March 2016 to June 2017, the Parties attended eight mediation sessions in Chicago, Illinois, and New York, New York. *Id.* Throughout the entire process, the Parties also held private conferences with the mediator to facilitate the settlement discussions. *Id.* ¶ 23.

By mid-2017, the Parties had an agreement in principle and finalized a Settlement Term Sheet on October 27, 2017. *Id.* ¶ 24. Over the following six months, the Parties negotiated a detailed settlement agreement. *Id.* On March 26, 2018, the Parties executed the Settlement Agreement. *See* Ex. A (Settlement Agreement).

## SUMMARY OF SETTLEMENT TERMS

### I. The Proposed Settlement.

The settlement requires Target to retain two experts in the field of Industrial and Organizational ("I/O") psychology to design, develop, and implement properly validated adjudication guidelines for the hiring of job applicants with criminal histories for hourly, non-exempt jobs at Target stores. Ex. A (Settlement Agreement), § 3.3(B). The validated criteria are intended for use both in future hiring and in determining class member eligibility for jobs. *Id.* § 3.3(G). The settlement provides eligible class members with relief directly tied to the harm they suffered: entry-level jobs at Target stores. *Id.* § 3.4(A)(1). Class members who can show that they will not benefit from a Target job (for reasons articulated in the Settlement Agreement, such as because they obtained other employment or do not reside within 20 miles of a Target store), *see id.* § 3.4(B)(1), may be eligible to receive a monetary award not to exceed $1,000 in lieu of employment. *Id.* § 3.4(B)(2). Finally, the settlement provides funding to non-profit

organizations who assist individuals with criminal histories re-enter the workforce. *Id.* § 3.5. Target has agreed to pay $3,742,500 (the "Settlement Fund") to resolve the lawsuit, exclusive of the I/O experts' fees and the cost of administering the settlement. *Id.* § 1.36.

**A. Programmatic Relief.**

Target has agreed to adopt meaningful programmatic relief. The Parties jointly selected the I/O experts, Drs. Kathleen Lundquist and Nancy Tippins, to work together to revise and validate Target's guidelines for use of criminal history records in making its hiring decisions. *See* Ex. A (Settlement Agreement), § 3.3(A).

First, the I/O experts will meet and confer with the Parties as they begin the Scoping Phase of their work. *Id.* § 3.3(D). The Scoping Phase includes: developing a detailed scope of work and budget proposal; identifying relevant data, documents, and other information necessary to conduct their work; and providing a time line for the work completion, which will be documented in a Scope of Work and Budget Report ("SOW"). *Id.* §§ 3.3(D), (E). The Parties will have an opportunity to review and comment on the SOW. *Id.* § 3.3(E)(2).

Once there is a SOW, the I/O experts will research and draft Interim Criteria, which are the revised adjudication guidelines and revised screening process for Target's evaluation of criminal history records of job applicants, informed by validation techniques set forth in the Society for Industrial Organizational Psychology ("SIOP") Principles, the EEOC's Uniform Guidelines on Employee Selection Procedures ("Uniform Guidelines"), and/or other applicable professional standards. *Id.* §§ 3.3(B), (E). The Settlement Agreement will also guide the I/Os' work by outlining considerations specific to Target's hiring needs and Plaintiffs' concerns for fairness and equity in the screening process. *Id.* § 3.3(F).

The Parties will have an opportunity to review and comment on the I/Os' Interim Criteria, with any conflicts to be negotiated with a mediator. *Id.* § 3.3(G). Upon completion of

the review and negotiation process, the undisputed Interim Criteria will be used for hiring applicants with criminal history records for jobs at Target stores (prior to the implementation of the Final Criteria), *see infra*, determining membership in the Settlement Class, and determining if class members are qualified to participate in Priority Hiring/Interviewing. *Id.* For any individual who was denied employment at Target for what Target defined as "falsification," membership in the Settlement Class will be based on whether the individual would have qualified for employment under the Interim Criteria based on their incomplete disclosure and their criminal history. *Id*.

For a period of one year, during which the Interim Criteria are implemented, the I/Os will continue to monitor and explore further refinements to develop the Final Criteria. The Parties will have an opportunity to review and comment, with any conflicts negotiated with a mediator. *Id.* § 3.3(H). The I/Os will then revise and finalize the Final Criteria to maximize their validity and minimize their potential for adverse impact. *Id.*

**B. Priority Hiring/Interviewing for Non-Exempt Jobs at Target Stores or Monetary Relief.**

Target will engage in Priority Hiring of class members for hourly, non-exempt, non-supervisory jobs for which they are qualified, but were denied based on Target's Screening Process ("Group A Filers"). *See id.* § 3.4(A). Qualified class members will be offered available Target store positions before other applicants. *Id.* If an hourly position is not immediately available within a twenty (20) mile commuting distance of the class member, the class member will be offered the first Target store job for which he or she is qualified that becomes available for a period of 12 months from judicial approval of the settlement. *Id.* Additionally, class members who are qualified for a supervisory role (*e.g.*, "Team Lead" or "Senior Team Lead") will bypass the initial screening interview and be given an opportunity to interview for those

positions. *Id.* § 3.4(A)(2)(b).

Moreover, Group A Filers who are hired pursuant to the Priority Hiring process and remain employed for six months will receive a letter of employment that states that Target hired them with knowledge of their criminal record, and as of that date, they remained employed with Target. *Id.* § 3.4(A)(4)(a). Group A Filers who are hired pursuant to the Priority Hiring process, but are terminated less than six months for reasons outside of their control, will receive a letter of employment that states that Target hired them with knowledge of their criminal record, and that the Group A Filer's employment was terminated due to business reasons. *Id.* § 3.4(A)(4)(b). Such letters of employment can be a valuable resource to class members in assisting them in seeking future employment opportunities. Miazad Decl. ¶ 32.

Some class members will not be successful in gaining employment with Target because, among other things, they are already employed, retired, or have a disability; do not reside within a defined commuting distance of a Target store; are or will be out of the workforce due to family medical obligations or military service obligations; or are ineligible to participate in Priority Hiring/Interviewing pursuant to reasons specified in the Settlement Agreement. Ex. A (Settlement Agreement) § 3.4(B). For those class members ("Group B Filers"), Target has agreed to individual monetary awards not to exceed $1,000.00. *Id*. § 3.4(B)(2). The Settlement Administrator will pay Group B Filers pro rata based on the number of participants, not to exceed $1,000. *Id.* Target's total contribution toward cash awards will not exceed $1,200,000.00 of the Settlement Fund. *Id*. § 3.4(B)(3).

### C. Pipeline Project Supporting Re-Entry of Individuals with Criminal History Records.

Target has agreed to contribute $600,000.00 to organizations that provide re-entry support to individuals with criminal history records, with the goal of supporting those

organizations' efforts to develop a pipeline of qualified applicants who have successfully completed work ready programs at such organizations (the "Pipeline Project"). *Id.* § 3.5(A). The parties will work cooperatively to identify potential organizations, and have already identified the following organizations: A New Way of Life Reentry Project; AccessAbility Career & Education Pathways; The Center for Employment Opportunities; The Fortune Society, Inc.; RS Eden Correctional Services; and Community Partners in Action. *Id.* § 3.5(B). These organizations will receive written information about the Pipeline Project and an invitation to submit statements of interest and other materials to assist in the selection of participant organizations. *Id.* Moreover, class members will receive notice of the selected, Target-funded work ready programs participating in the Pipeline Project. *Id.*

## II. Class Members.

The Class consists of: all African-American and Latino applicants who were denied employment from a Target Stores Job due to a final adjudication on a pre-employment background check that did not clear the applicant to proceed based on their criminal history record, from the start of the class liability period on May 11, 2006, to the date of preliminary approval of the proposed settlement, except: (1) individuals are excluded if Target can establish they were, or would have been, denied employment for reasons other than their criminal history records, *see id.* § 3.2(A)(1); (2) individuals are excluded if they have convictions that would have rendered them unqualified for employment under the revised criteria determined by the expert I/Os, *see id.* § 3.2(A)(2); and (3) individuals are excluded if they are current Target Team Members, *see id.* at Ex. 2. According to information produced by Target, over 41,000 African American and Latino applicants were denied jobs based on the criminal history screening process from May 2008 to December 2016 alone. *See* Miazad Decl. ¶ 34.

## III. Release.

All class members who do not exclude themselves from the settlement will release:

> all claims, demands, causes of action, and liabilities, known and unknown, that they had, have, or may have under any legal or equitable theory, against Defendant arising from or relating to or concerning their denial of a Target Stores Job based on criminal history records under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq*. and parallel state and local laws, rules, regulations and ordinances. The Class Release will not include claims under the federal Fair Credit Reporting Act, which is the subject of a separate, unrelated settlement.

Ex. A (Settlement Agreement) §§ 1.7, 5.1.

## IV. Attorneys' Fees, Costs, and Service Awards.

Plaintiffs will seek Court approval of an award of no more than $1,900,000.00 for attorneys' fees plus actual litigation expenses and costs. *Id.* § 3.7. Pursuant to Rules 23(h) and 54(d)(2) of the Federal Rules of Civil Procedure, Plaintiffs will move for Court approval of attorneys' fees and costs simultaneously with the Motion for Final Approval of the Settlement. The Court need not decide attorneys' fees and costs now.

Plaintiffs will also apply for service awards of no more than $20,000.00 each for Plaintiffs Times and Fortune Society, and $2,500.00 for Plaintiff Smith. *Id.* § 3.8. Plaintiffs will move for Court approval of the service awards simultaneously with the Motion for Final Approval.

## V. Settlement Administrator.

If the proposed settlement is approved by the Court, the Parties will jointly select a Settlement Administrator, through a Request for Proposal process, to manage the settlement account, distribute the Notice and Claim Form, distribute service awards and settlement payments, distribute approved attorneys' fees and costs, and otherwise administer the settlement.

*Id.* § 1.35. Target will pay the Settlement Administrator's fees and costs on top of the Settlement Fund. *Id.*

## CLASS ACTION SETTLEMENT PROCEDURE

Rule 23's class action settlement procedure includes three distinct steps:

1. Preliminary approval of the proposed settlement after submission to the Court of a written motion for preliminary approval;

2. Dissemination of notice of settlement to all affected class members by first class mail and electronic mail; and

3. A final settlement approval hearing at which class members may be heard regarding the settlement, and at which arguments concerning the fairness, adequacy, and reasonableness of the settlement may be presented.

*See* Fed. R. Civ. P. 23(e); *see also* Herbert B. Newberg & Alba Conte, 4 *Newberg on Class Actions* ("Newberg"), § 13:10 (5th ed. 2017). This process safeguards class members' procedural due process rights and enables the Court to fulfill its role as the guardian of the class's interests. With this motion, Plaintiffs request that the Court take the first step: grant preliminary approval of the Settlement Agreement; conditionally certify the settlement class; and approve Plaintiffs' proposed Notice and Claim Form, and order their distribution.

## ARGUMENT

### I. Preliminary Approval of the Class Action Settlement is Appropriate.

The law favors compromise and settlement of class action suits. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc*., 396 F.3d 96, 116-17 (2d Cir. 2005) (quoting *In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998)) (internal quotation marks omitted) (noting the "strong judicial policy in favor of settlements, particularly in the class action context"). The approval of a proposed class action settlement is a matter of discretion for the trial court. *See Maywalt v. Parker & Parsley Petroleum Co*., 67 F.3d 1072, 1079 (2d Cir. 1998). In exercising discretion,

courts should give "proper deference to the private consensual decision of the parties." *Torres v. Gristede's Operating Corp.*, Nos. 04 Civ. 3316, 08 Civ. 8531, 08 Civ. 9627, 2010 WL 2572937, at *2 (S.D.N.Y. June 1, 2010) (quoting *Clark v. Ecolab, Inc.*, Nos. 07 Civ. 8623, 04 Civ. 4488, 06 Civ. 5672, 2009 WL 6615729, at *3 (S.D.N.Y. Nov. 27, 2009)) (internal quotation marks omitted).

Review of a class settlement proceeds in two steps. First, "counsel submit the proposed terms of settlement and the judge makes a preliminary fairness evaluation." Manual for Complex Litigation (Fourth) § 21.632 (2004). The Court need only find that there is "'probable cause' to submit the [settlement] to class members and hold a full-scale hearing as to its fairness." *In re Traffic Exec. Ass'n E. R.R.*, 627 F.2d 631, 634 (2d Cir. 1980); *see Newberg* § 13:10 ("[I]f a court's preliminary evaluation of the proposed settlement shows that it [is neither illegal nor collusive and is within the range of possible approval], the court will direct that notice of the settlement be given to the class members . . . ."). Second, after notice is given to the class, the court holds a fairness hearing. *See* Manual for Complex Litigation (Fourth) § 21.634.

Preliminary approval requires an "initial evaluation" of the fairness of the proposed settlement based on written submissions and an informal presentation by the settling parties. *Newberg* § 13:10. "Fairness is determined upon review of both the terms of the settlement agreement and the negotiating process that led to such agreement." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 184 (W.D.N.Y. 2005). "A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Wal-Mart Stores*, 396 F.3d at 116 (quoting Manual for Complex Litigation, Third, § 30.42 (1995)) (internal quotation marks omitted). "Absent fraud or collusion, [courts] should be hesitant to substitute [their] judgment

for that of the parties who negotiated the settlement." *Willix v. Healthfirst, Inc.*, No. 07 Civ. 1143, 2011 WL 754862, at *2 (E.D.N.Y. Feb. 18, 2011) (quoting *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ.10240, 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007)).

The first step in the settlement process simply allows notice to issue to the class and for class members to object to or opt out of the settlement. After the notice period, the Court will be able to evaluate the settlement with the benefit of the class members' input. In evaluating a class action settlement, courts in the Second Circuit consider the nine factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberg v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). Although the Court need not evaluate the *Grinnell* factors to conduct its initial evaluation of the settlement, for purposes of evaluating the settlement's fairness, it is useful for the Court to consider these criteria.

The *Grinnell* factors are:

> (1) the complexity, expense and likely duration of the litigation;
> (2) the reaction of the class to the settlement;
> (3) the stage of the proceedings and the amount of discovery completed;
> (4) the risks of establishing liability; (5) the risks of establishing damages;
> (6) the risks of maintaining the class action through the trial;
> (7) the ability of the defendants to withstand a greater judgment;
> (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and]
> (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

*Grinnell*, 495 F.2d at 463 (citations omitted).

Here, the relevant *Grinnell* factors weigh in favor of preliminary approval.

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

By reaching a favorable settlement early, before certification and dispositive motions, trial, or appeals, Plaintiffs avoid significant expense and delay and ensure timely individual and

programmatic relief for the class. "Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000), *aff'd sub. nom. D'Amato v. Deutsche Bank,* 236 F.3d 78 (2d Cir. 2001). This case is highly complex, with thousands of class members raising Title VII disparate impact claims that have been litigated in very few cases. Miazad Decl. ¶ 15.

Plaintiffs would likely have faced a motion to dismiss, and if their claims survived, strong opposition to class certification and a motion for summary judgment after a lengthy discovery process. If Plaintiffs were able to certify the class and overcome a summary judgment motion, a trial on the merits would have involved significant risk as to both liability and damages. While Plaintiffs believe they could ultimately defeat Target's defenses and establish liability, this would require significant factual development and favorable outcomes at trial, and on appeal, all of which are inherently uncertain and lengthy. The proposed settlement eliminates this uncertainty and guarantees class members prompt relief. This factor therefore weighs in favor of preliminary approval.

### B. The Court Cannot Assess the Reaction of the Class Until After Notice Issues (*Grinnell* Factor 2).

After notice issues and class members have had an opportunity to be heard, the Court can fully analyze the second *Grinnell* factor. The settlement addresses a principal concern of the lawsuit – ensuring that individuals with criminal histories have access to stable employment. It does so by providing for priority hiring for class members and allocating funds to those who cannot be hired. It also provides programmatic relief that addresses the causes of class members' harm – a process for replacing Target's Screening Process with one that is validated and under

the supervision of expert I/Os. For these reasons, Plaintiffs' Counsel are confident that the class will respond favorably to the Settlement Agreement.

### C. The Parties Have Completed Sufficient Discovery to Evaluate the Claims and Defenses (*Grinnell* Factor 3).

The Parties have completed sufficient discovery to recommend settlement. The proper question is "whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 537 (3d Cir. 2004) (quoting *In re Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001)). "[T]he pretrial negotiations and discovery must be sufficiently adversarial that they are not designed to justify a settlement . . . [, but] an aggressive effort to ferret out facts helpful to the prosecution of the suit." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 176 (quoting *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 263 (S.D.N.Y. 1998)).

The Parties' efforts and discovery here meet this standard. The Parties engaged in significant investigation before entering into negotiations and in preparing for multiple mediations. Miazad Decl. ¶¶ 14, 16-20. Throughout the mediation process, the Parties exchanged detailed mediation statements setting forth their respective positions, and extensively arguing their positions. *Id.* ¶ 23. Target produced a substantial number of documents, including its policies and procedures used to screen applicants, such as the Adjudication Guidelines, Falsification policies, and procedures involving the Screening Team, which Plaintiffs' Counsel and Plaintiffs' experts reviewed and analyzed. *Id.* ¶ 20.

The Parties attended eight full-day mediation sessions. *Id.* ¶ 22. The Parties also had multiple telephone conferences to discuss the information Target produced and the Parties' positions. *Id.* ¶ 23.

Plaintiffs' Counsel also conducted their own independent investigation, including extensively interviewing Plaintiffs and reviewing hundreds of documents produced as part of the EEOC's investigation. *Id.* ¶¶ 17-20.

Based on these circumstances, the Parties were well equipped to evaluate the strengths and weaknesses of the case. Thus, this factor supports preliminary approval. *See, e.g.*, *Katz v. ABP Corp.*, No. 12 Civ. 4173, 2014 WL 4966052, at *1 (E.D.N.Y. Oct. 3, 2014) (granting preliminary approval of settlement based on "pre-mediation discovery and arms-length negotiations").

**D. The Risk of Establishing Liability and Damages for the Class Through Trial Favor Approval (*Grinnell* Factors 4 and 5).**

Although Plaintiffs believe their claims are meritorious, they also recognize the significant legal and procedural obstacles they would face in establishing liability and recovering damages. Indeed, "if settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome." *In re Ira Haupt & Co.,* 304 F. Supp. 917, 934 (S.D.N.Y. 1969).

Title VII disparate impact class actions are subject to considerable risk. This is especially true here, where Plaintiffs' legal theory is relatively novel. Additionally, establishing damages for a class of thousands of class members is not without challenges. Target likely would argue that questions concerning individual employment decisions and entitlement to damages would overwhelm the litigation. If the Court agreed, even if Plaintiffs prevailed on the merits, eligibility for back pay for tens of thousands of class members would likely have to be determined through some form of individualized hearings. *See Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 361 (1977). Each class member first would have to prove that he or

she would have been minimally qualified for the position, based on the validated criminal history adjudication process, and then satisfy other conditions to demonstrate a right to monetary relief.

In contrast to these known risks, the settlement ensures that Target will offer employment to qualified class members or compensation and will change its policies. These circumstances favor preliminary approval.

**E. The Risk of Obtaining Class Certification (*Grinnell* Factor 6).**

The risk of obtaining class certification and maintaining it through trial is also present. The Court has not yet certified the class and such a determination would likely be reached only after extensive briefing. Target may argue that individual questions preclude class certification, including whether the relevant policies and procedures were consistently applied in all 1,800 stores. Should the Court certify the class, Target would likely later challenge certification and move to decertify, requiring another round of briefing. Target may also seek permission to file an interlocutory appeal under Rule 23(f). *See, e.g., Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, 659 F.3d 234 (2d Cir. 2011). Risk, expense, and delay permeate such a process. Settlement eliminates this risk, expense, and delay. This factor also favors preliminary approval.

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

The relief provided in the settlement is comprehensive and targeted to the harm addressed in this litigation. In particular, it provides a process for remedying Target's allegedly flawed hiring policies; it affords class members opportunities to obtain jobs or compensation; and it funds a Pipeline Project that will help nonprofit organizations engaged in reentry work.

When, as here, settlement ensures immediate relief to class members tailored to the alleged harms, "even if it means sacrificing 'speculative payment of a hypothetically larger amount years down the road,'" the settlement should be found reasonable. *See Gilliam v.*

*Addicts Rehab. Ctr. Fund*, No. 05 Civ. 3452, 2008 WL 782596, at *5 (S.D.N.Y. Mar. 24, 2008) (quoting *Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01 Civ. 11814, 2004 WL 1087261, at *5 (S.D.N.Y. May 14, 2004)).

In sum, the terms of the Settlement Agreement are fair and reasonable, as evidenced by application of the relevant *Grinnell* factors. The Court should grant preliminary approval.

## II. Conditional Certification of the Class is Appropriate.

For settlement purposes, Plaintiffs seek to certify the following Settlement Class under Federal Rule of Civil Procedure 23:

> All African-American and Latino applicants who were denied employment from a Target Stores Job due to a final adjudication on a pre-employment background check that did not clear the applicant to proceed based on their criminal history record, from the start of the class liability period on May 11, 2006, to the date of preliminary approval of the proposed settlement, with the following exceptions:
>
> (1) The Settlement Class will exclude all individuals that Target can establish were, or would have been, denied employment for reasons other than their criminal history records (*e.g.* failed drug test, SSN name-match screen, or similar reasons). Target shall provide a list of potentially excluded Settlement Class Members to Class Counsel with an explanation for the proposed exclusion; and
> (2) The Settlement Class will exclude all individuals with convictions that would have rendered them unqualified for employment under the Interim Criteria, if those criteria had been in effect at the time of their application.

*See* Ex. A (Settlement Agreement) § 3.2; *see also id.* at Ex. 2.

The Settlement Class satisfies Rule 23's requirements.

Rule 23(a) requires that:

(1) the class is so numerous that joinder of all members is impracticable;
(2) there are questions of law or fact common to the class;
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
(4) the representative parties will fairly and adequately protect the interests of the class.

Rule 23(b)(3) requires that: (1) questions of law or fact common to the members of the class predominate over any questions affecting only individual members; and (2) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

The approval of a proposed class action settlement is a matter of discretion for the trial court. *Maywalt*, 67 F.3d at 1079. "[I]n the Second Circuit, 'Rule 23 is given liberal rather than restrictive construction, and courts are to adopt a standard of flexibility'" in evaluating class certification. *Reade-Alvarez v. Eltman, Eltman & Cooper, P.C.*, 237 F.R.D. 26, 31 (E.D.N.Y. 2006) (quoting *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997)).

**A. Numerosity.**

"[N]umerosity is presumed at a level of 40 members." *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (citation omitted). According to information produced by Target, there are over 41,000 Class members from May 2008 to December 2016 alone. Miazad Decl. ¶ 34. While the precise number of putative class members is not known at this stage, Plaintiffs estimate that there will be thousands of class members easily satisfying this requirement. *Id*.

**B. Commonality.**

The proposed class also satisfies the commonality requirement, the purpose of which is to test "whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982).

Here, all members of the class are unified by common factual allegations and legal theory—they were subjected to the same criminal history screening process that had a disparate impact on African-Americans and Latinos due to their overrepresentation in the criminal justice

system. These common issues predominate over any issues affecting only individual class members. *See Houser v. Pritzker*, 28 F. Supp. 3d 222 at 243-45 (certifying class of applicants in lawsuit challenging Census Department's criminal history hiring screen).

**C. Typicality**

"Like the commonality requirement, typicality does not require the representative party's claims to be identical to those of all class members." *Frank*, 228 F.R.D. at 182. Typicality is satisfied "when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Marisol A.*, 126 F.3d at 376 (quoting *In re Drexel Burnham Lambert Grp.*, 960 F.2d 285, 291 (2d Cir. 1992)) (internal quotation marks omitted). "Minor variations in the fact patterns underlying individual claims" do not defeat typicality when the defendant directs "the same unlawful conduct" at the named plaintiffs and the class. *Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993).

Here, like the putative class, Plaintiffs Times and Smith allege that they were denied employment because of Target's unlawful Screening Process. *See* Compl. ¶¶ 1, 13, 44-45, 51, 54. Typicality is met because Plaintiffs Times and Smith and all putative class members were subjected to the same procedures, which Plaintiffs challenge. *See Duling v. Gristede's Operating Corp.*, 267 F.R.D. 86, 97-98 (S.D.N.Y. 2010).

**D. Adequacy of the Plaintiffs and Their Counsel.**

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." "The adequacy requirement exists to ensure that the named representatives will have an interest in vigorously pursuing the claims of the class, and . . . have no interests antagonistic to the interests of other class members." *Toure v. Cent. Parking Sys. of N.Y.*, No. 05 Civ. 5237, 2007 WL 2872455, at *7 (S.D.N.Y. Sept. 28, 2007) (quoting *Penney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006)) (internal quotation marks omitted).

"[O]nly a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." *Dziennik v. Sealift, Inc.*, No. 05 Civ. 4659, 2007 WL 1580080, at *6 (E.D.N.Y. May 29, 2007) (quoting *Martens v. Smith Barney Inc.*, 181 F.R.D. 243, 259 (S.D.N.Y. 1998)) (internal quotation marks omitted).

Plaintiffs Times and Smith meet the adequacy requirement because there is no evidence that they have interests that are antagonistic to or at odds with those of putative class members. *See Duling*, 267 F.R.D. at 99 ("The interests of the proposed class representatives . . . are well aligned with those of the absent class members."). Further, Plaintiffs Times and Smith have suffered the same alleged Title VII violations as members of the putative class. Plaintiff Fortune Society also meets the adequacy requirement because its interests are aligned with the putative class members: to secure stable employment for formerly incarcerated individuals and to address the negative impact of unvalidated and flawed criminal background check procedures.

Plaintiffs' Counsel also meet the adequacy requirement of Rule 23(a)(4). *See, e.g.*, *Little v. Wash. Metro. Area Transit Auth.*, 249 F. Supp. 3d 394, 422 (D.D.C. 2017) (finding class counsel, which included LDF, adequate in a Title VII challenge to employer's use of criminal background checks, and noting that "class counsel are experienced in class actions and other complex litigation"); *Houser*, 28 F. Supp. 3d at 248 (finding O&G and non-profit partners "bring to the case a wealth of class action litigation experience" and were adequate to represent approximately half-million person Black and Latino job applicant class in background check litigation); *Easterling v. Conn., Dep't of Corr.*, 265 F.R.D. 45, 51 (D. Conn. 2010), *modified,* 278 F.R.D. 41 (D. Conn. 2011) (holding O&G attorneys met standard of qualified and experienced class counsel in Title VII discrimination class case); *Wright v. Stern*, 553 F. Supp. 2d 337, 346 (S.D.N.Y. 2008) (commending class counsel, which included LDF, in employment

discrimination case); *see also* Miazad Decl. ¶¶ 6-7; Declaration of Coty Montag ("Montag Decl.") ¶ 8. Thus, the adequacy requirement is satisfied.

**E. Certification Is Proper Under Rule 23(b)(3).**

Rule 23(b)(3) requires that common questions of law or fact not only be present, but also that they "predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). This inquiry examines "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Tyson Foods Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). For the purposes of settlement, these requirements are met.

**1. Common Questions Predominate.**

The Rule 23(b)(3) predominance inquiry tests whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc.*, 521 U.S. at 623. Predominance requires that "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, . . . predominate over those issues that are subject only to individualized proof." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir. 2001) (internal quotation marks omitted), *abrogated on other grounds by Miles v. Merrill Lynch & Co*. (*In re Initial Pub. Offering Sec. Litig*.), 471 F.3d 24 (2d Cir. 2006). The essential inquiry is whether "liability can be determined on a class-wide basis, even when there are some individualized damage issues." *In re Visa Check*, 280 F.3d at 139. Where plaintiffs are "unified by a common legal theory" and by common facts, the predominance requirement is satisfied. *McBean v. City of New York*, 228 F.R.D. 487, 502 (S.D.N.Y. 2005).

Here, Plaintiffs' common contentions—that Target's Screening Process had a disparate impact on African-Americans and Latinos in violation of Title VII—predominate over any issues

affecting only individual class members. *See Easterling v. Conn. Dep't of Corr.*, No. 08 Civ. 826, 2011 WL 5864829, at *8 (D. Conn. Nov. 22, 2011) (holding that individual questions regarding class member status, qualifications, and mitigation were less substantial than the issues that were subject to generalized proof, including whether the challenged physical fitness test had a disparate impact on female applicants; whether that impact was justified by business necessity; the total amount of back pay, the rate at which those women would have been paid; the total number of priority hiring slots that should be awarded, if any; and the total amount of front pay); *United States v. City of New York*, 276 F.R.D. 22, 48-49 (E.D.N.Y. 2011) (finding that common issues, including the aggregate amount of relief available and the criteria used to establish who is eligible to receive retroactive seniority and priority hiring relief, predominated in a disparate impact case challenging a written entrance examination, despite individual questions regarding claimants' mitigation efforts).

**2. A Class Action Is a Superior Mechanism.**

Rule 23(b)(3) next considers whether "the class action device [is] superior to other methods available for a fair and efficient adjudication of the controversy." *Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir. 1968). Rule 23(b)(3) sets forth a non-exclusive list of relevant factors, including whether individual class members wish to bring, or have already brought, individual actions; and the desirability of concentrating the litigation of the claims in the particular forum.[3]

[3] Another factor, whether the case would be manageable as a class action at trial, is not of consequence in the context of a proposed settlement. *See Amchem*, 521 U.S. at 620 ("[c]onfronted with a request for settlement-only class certification, a [trial] court need not inquire whether the case, if tried, would present intractable management problems, . . . for the proposal is that there be no trial") (internal citation omitted); *Frank*, 228 F.R.D. at 183 ("The court need not consider the [manageability] factor, however, when the class is being certified solely for the purpose of settlement."). Moreover, denying class certification on manageability

Here, certification of the Settlement Class is "superior to individual adjudication because it will conserve judicial resources and is more efficient for class members, particularly those who lack the resources to bring their claims individually." *Capsolas v. Pasta Res., Inc.,* No. 10 Civ. 5595, 2012 WL 1656920, at *2 (S.D.N.Y. May 9, 2012). Plaintiffs and class members have limited financial resources with which to prosecute individual actions. Employing the class device here will achieve economies of scale for putative class members, conserve judicial resources, and preserve public confidence in the system by avoiding repetitive proceedings and preventing inconsistent adjudications.

## III. Plaintiffs' Counsel Should Be Appointed as Class Counsel.

O&G and LDF should be appointed as Class Counsel. Rule 23(g), which governs the standards and framework for appointing class counsel for a certified class, sets forth four criteria the district court must consider in evaluating the adequacy of proposed counsel: (1) "the work counsel has done in identifying or investigating potential claims in the action;" (2) "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;" (3) "counsel's knowledge of the applicable law;" and (4) "the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A). The Court may also "consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class[.]" Fed. R. Civ. P. 23(g)(1)(B). The Advisory Committee has noted that "[n]o single factor should necessarily be determinative in a given case." Fed. R. Civ. P. 23(g) advisory committee's note.

Plaintiffs' Counsel satisfy these criteria. They have done substantial work identifying,

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grounds is "disfavored" and "should be the exception rather than the rule." *In re Visa Check*, 280 F.3d at 140 (internal quotation marks omitted).

investigating, negotiating, and settling Plaintiffs' and putative class members' claims. Miazad Decl. ¶¶ 14-25; Montag Decl. ¶¶ 9-11, 13. Plaintiffs' Counsel have substantial experience prosecuting and settling employment class actions, including background check cases. Miazad Decl. ¶ 6; Montag Decl. ¶ 7. Plaintiffs' Counsel are well-versed in the impediments to employment that criminal records create. Further, courts have repeatedly found Plaintiffs' Counsel to be adequate class counsel. *See supra* Argument § II.D; Miazad Decl. ¶ 7; Montag Decl. ¶ 8.

## IV. The Notice and Award Distribution Process are Appropriate.

The Notice and Claim Form, which is attached to the Miazad Decl. as Exhibit B, fully comply with due process and Rule 23(c)(2)(B), which requires:

> the best notice that is practicable under the circumstances . . . . The notice must clearly and concisely state in plain, easily understood language:
>
> (i) the nature of the action;
> (ii) the definition of the class certified;
> (iii) the class claims, issues, or defenses;
> (iv) that a class member may enter an appearance through an attorney if the member so desires;
> (v) that the court will exclude from the class any member who requests exclusion;
> (vi) the time and manner for requesting exclusion; and
> (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

The Notice and Claim Form satisfy these requirements. They are written in plain English and organized and formatted to be as clear as possible. The Notice is based on the model notice forms provided by the Federal Judicial Center ("FJC") on its website.[4] *See Reyes v. Altamarea Grp., LLC*, No. 10 Civ. 6451, 2010 WL 5508296, at *2 (S.D.N.Y. Dec. 22, 2010) (approving

[4] *See* Federal Judicial Center, *Illustrative Forms of Class Action Notices: Notice Checklist and Plain Language Guide*, https://www.fjc.gov/content/301350/illustrative-forms-class-action-notices-notice-checklist-and-plain-language-guide (last visited April 3, 2018).

notice based on FJC model). The Notice describes the settlement's terms, informs putative class members about the allocation of fees and costs, explains how to opt out or object, and will provide the date, time, and place of the final approval hearing. *See* Ex. B (Notice and Claim Form).

The Settlement Agreement provides that the settlement administrator will mail and email (where available) the Notice and Claim Form to class members, take reasonable steps to obtain correct addresses of any class member whose Notice and Claim Form is returned as undeliverable and attempt a re-mailing, and send reminder notices by mail and email. *See* Ex. A (Settlement Agreement), §§ 4.1(D), (G). The Claim Form is simple and straightforward, and can be returned by mail, email, or via a case website. *See* Ex. B (Notice and Claim Form).

## CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court preliminarily approve the settlement, conditionally certify the proposed settlement class, appoint Plaintiffs' Counsel as Class Counsel, approve the Notice and Claim Form, and enter an Order granting Plaintiffs' Motion.[5]

[5] For the Court's convenience, a Proposed Order Granting Plaintiffs' Motion for Preliminary Approval of the Settlement is attached as Exhibit C to the Miazad Declaration.

Dated: April 5, 2018
New York, New York

Respectfully submitted,

*/s/ Ossai Miazad*

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**Pro hac vice* motion forthcoming

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