IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WALTER PICKETT, individually, and on behalf of others similarly situated,	
Plaintiff,	No. 17 Civ. 1013
v.	Hon. Matthew F. Kennelly
SIMOS INSOURCING SOLUTIONS, CORP., a Georgia corporation,	
Defendant.	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, CONDITIONAL CERTIFICATION OF SETTLEMENT CLASS, APPOINTMENT OF PLAINTIFF'S COUNSEL AS CLASS COUNSEL, AND APPROVAL OF PLAINTIFF'S PROPOSED NOTICE OF SETTLEMENT

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Plaintiff Walter Pickett submits this memorandum of law in support of his motion for preliminary approval of the class settlement reached by Plaintiff and Defendant SIMOS Insourcing Solutions, Corp. ("SIMOS" or "Defendant") (together with Plaintiff, the "Parties"). The proposed settlement is fair, reasonable, and adequate, and satisfies all of the criteria for preliminary approval under applicable federal law. Accordingly, Plaintiff respectfully requests that the Court: (1) grant preliminary approval of the settlement on the terms set forth in the Settlement Agreement ("Settlement Agreement"), attached as Exhibit A to the Declaration of Ossai Miazad ("Miazad Decl.")[1]; (2) conditionally certify the proposed settlement class, for settlement purposes only, under Federal Rule of Civil Procedure ("Rule") 23(b)(3); (3) appoint Outten & Golden LLP ("O&G") as Class Counsel; (4) approve the proposed Court-Authorized Notice and Claim Form ("Notice and Claim Form"), attached as Exhibit B to the Settlement Agreement, and direct its distribution; (5) appoint JND Legal Administration ("JND") as Settlement Administrator; and (6) schedule a fairness hearing for final approval of the settlement.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff applied to work for SIMOS in late 2014. As part of his application, Plaintiff authorized a consumer report that contained a criminal record and credit check. On approximately November 17, 2014, Plaintiff began working for SIMOS at its Elwood, Illinois warehouse. After three days of working for SIMOS, Plaintiff was terminated and provided with a separation notice formally notifying him of his termination and that he was being fired because of his background check. Plaintiff never received a copy of his consumer report or a statement of his rights under the FCRA. *See* ECF No. 1 (Class Action Complaint ("Complaint" or "Compl.")) ¶¶ 16-27.

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

On February 7, 2017, Plaintiff filed his Class Action Complaint. *Id.* Plaintiff alleged that SIMOS violated the Fair Credit Reporting Act ("FCRA") by providing him and the putative class with a consumer report form that was confusing and not a standalone document consisting solely of a document authorizing a background check and by taking adverse action before providing a copy of the consumer report run and/or a copy of rights under the FCRA. Miazad Decl. ¶ 11. SIMOS denies that it committed any wrongdoing or violated the FCRA and vigorously disputes the claims asserted in the litigation.

Before the initiation of this action, Plaintiff's Counsel conducted a thorough investigation into the merits of the potential claims and defenses. *Id.* ¶ 12. Plaintiff's Counsel focused their investigation and legal research on the underlying merits of the potential class action members' claims, the damages to which they were entitled, and the propriety of class action certification. *Id.* ¶ 13. Plaintiff's Counsel obtained and reviewed corporate documents and documents from Plaintiff related to his employment with SIMOS. *Id.* ¶ 14. Plaintiff's Counsel also conducted in-depth interviews of Plaintiff. *Id.* ¶ 15.

In a correspondence dated September 24, 2015, Plaintiff's Counsel informed SIMOS by letter of the allegations that it had violated the FCRA and of their intent to initiate litigation. The Parties subsequently agreed to toll the claims of Plaintiff and the putative classes as of September 30, 2015. *Id.* ¶ 16. The Parties then engaged in an informal exchange of discovery in an attempt to resolve their dispute. *Id.* ¶ 17. SIMOS produced information to allow the Parties to calculate damages, and Plaintiff's personnel file, which included his application and consumer report authorization forms, and other relevant documents. *Id.* ¶ 18. Plaintiff's Counsel constructed a damages model based on information provided by Defendant and their own evaluation of the merits. *Id.* ¶ 19. The Parties then drafted mediation briefs setting forth their

respective positions as to liability and damages, and exchanged those briefs before mediation so that each side could evaluate the strength of the other's claims. *Id.* ¶ 20.

On September 7, 2016, the Parties participated in a full day of mediation in Chicago, Illinois, with the Honorable Wayne R. Andersen, an experienced and well-respected employment, consumer and class action law mediator, and a former United States District Judge in the Northern District of Illinois. *Id.* ¶ 21. The Parties were unable to reach agreement, but continued their discussions for several months, including a second full-day mediation with Judge Andersen in Chicago, Illinois, on October 14, 2016, and further discussions after that mediation, before reaching an agreement on the material terms of a settlement. *Id.* ¶ 22. Over the next few weeks, the Parties negotiated a detailed settlement agreement and proposed notice and claim form, which was executed by the Parties on or about December 28, 2016. *Id.* ¶ 23 & Ex. A.

SUMMARY OF SETTLEMENT TERMS

I. The Settlement Amount

SIMOS has agreed to pay $1,130,000 to cover payments to Class Members, and Court-approved costs and fees including Plaintiff's Counsel's attorneys' fees and costs, the Settlement Administrator's fees and costs, and any Court-approved Service Awards. Ex. A § 5 ("Gross Settlement Amount").

II. Class Members

Class Members are individuals who fall within the FCRA Disclosure Class and/or FCRA Consumer Report Class:

> **FCRA Disclosure Class:** All individuals who, during the applicable two year statute of limitations period through July 17, 2015, applied for work with SIMOS and were provided with an Authorization and Disclosure Form.
>
> **FCRA Consumer Report Class:** All individuals who, during the applicable two year statute of limitations period through October 19, 2015, may have been separated or not hired based on their background check results.

Compl. ¶¶ 46-47; *see also id.* ¶¶ 58-66 (First Claim for Relief), ¶¶ 67-77 (Second Claim for Relief). According to information produced by Defendant, the FCRA Disclosure Class consists of 19,128 individuals and the FCRA Consumer Report Class consists of 1,811 individuals. *See* Ex. A (Settlement Agreement) § 3.

III. Releases

All Class Members who do not exclude themselves from the settlement will release:

> any and all claims, whether known or unknown, that were or could have been alleged or asserted in the Lawsuit under the FCRA, including but not limited to claims for violation of 15 U.S.C. § 1681b(b)(2); violation of 15 U.S.C. § 1681b(b)(3) and any right to recover any and all damages available under 15 U.S.C. §§ 1681o and 1681n, which shall include the right to recover actual damages, statutory damages, punitive damages, reasonable attorneys' fees and costs, unpaid wages, penalties, front pay, back pay, emotional distress and all interest associated with unpaid wages.

Ex. A (Settlement Agreement) § 8.

IV. Allocation Formula

All Class Members who submit a valid claim will recover a single, pro rata, share of the Gross Settlement Amount, less Settlement Expenses, based on the Class(es) to which they are a member. Recoveries are generally capped at a maximum recovery amount of $1,200 for each FCRA Consumer Report Class Member claim and $1,000 for each FCRA Disclosure Class Member claim. Any remaining funds (after Class Member payments and Settlement Expenses are paid) will be distributed to the Safer Foundation,[2] the *cy pres* designee. *See* Miazad Decl. ¶ 25; *id.* § 5(a).[3] There is no reversion to Defendant. Miazad Decl. ¶ 24.

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[2] The Safer Foundation provides persons with criminal records with help securing and maintaining gainful employment. *See, e.g.*, http://www.saferfoundation.org/about/overview (last visited Mar. 8, 2017).

[3] Class Member recoveries could exceed $1,200 or $1,000 per claim only in the unlikely event that the amount to be distributed to the *cy pres* designee exceeds $100,000. In that case, any excess will be distributed to Class Members on a pro rata basis. *Id.* § 5(a).

V. Attorneys' Fees and Costs and Service Awards

Plaintiff will seek Court approval for up to one-third of the Gross Settlement Amount for attorneys' fees, plus actual litigation expenses and costs. *Id.* § 5(e). Pursuant to Federal Rules of Civil Procedure 23(h) and 54(d)(2), Plaintiff 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. Moreover, in addition to his payment under the allocation formula, Plaintiff will apply for a Service Award of no more than $5,000.00, which will be paid from the Gross Settlement Amount. *Id.* § 5(c). Plaintiff will move for Court approval of the Service Awards simultaneously with the Motion for Final Approval.

VI. Settlement Administrator

The Parties have selected JND as Settlement Administrator to provide notice to the Class Members and otherwise administer the settlement. Miazad Decl. ¶ 26. The Settlement Administrator's costs and expenses, capped at no more than $75,000, will be paid from the Gross Settlement Amount. *See* Ex. A § 5(d); Miazad Decl. ¶ 27.

VII. Procedure for Settlement Administration

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 mailed and/or published notice of settlement to all affected Class Members; 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, *Newberg on Class Actions* ("Newberg"), §§ 11.22, *et seq.* (4th ed. 2002). 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, Plaintiff requests that the Court take the first step—granting preliminary approval of the Settlement Agreement, conditionally certifying the settlement class, approving Plaintiff's proposed Notice and Claim Form, and ordering their distribution.

The Parties respectfully submit the following proposed schedule for final resolution of this matter for the Court's consideration and approval:

1. Within 15 business days of the Court's order granting preliminary approval, Defendant shall provide the Settlement Administrator with the Settlement Class Members' Information. Ex. A (Settlement Agreement) § 14.

2. Within 14 days of receipt of the Class Members' Information, the Settlement Administrator shall distribute the Notice and Claim Form by email (where available) and first class mail to Class Members. The Settlement Administrator will take all reasonable steps to obtain the correct address of any Class Members (i.e. two skip traces) for whom a Notice is returned by the post office as undeliverable and shall attempt up to two re-mailings. *Id*.

3. Class Members will have up to 70 days from the date of mailing of the Notice and Claim Form to return a Claim Form to the Settlement Administrator. *Id*. § 15.

4. Within 30 days of the close of the claims period, the Settlement Administrator will send, by U.S. mail and email (where available), a reminder postcard to Class Members who have not submitted a Claim Form to remind them of their opportunity to do so. *Id.*

5. Class Members who wish to object or opt out must do so within 50 days from the date of the mailing of the Notice. *Id*. § 15.

6. Within 14 days of the closing of the claims period, Class Counsel shall file their motions for final approval, attorneys' fees, and a service award. *Id*. § 5(e).

7. A Fairness Hearing will be held as soon as is convenient for the Court.

8. Defendant shall fund the settlement within 30 days of the Effective Date. *Id*. § 5. The Effective Date is the later of: (i) the expiration of time for appeal of the Court's order finally approving the Settlement; or (ii) the final resolution of any appeal from the Court's order finally approving the Settlement. *Id*. § 20.

9. Within 30 days of Defendant's funding of the settlement, the Settlement Administrator shall distribute payment of: (1) Class Member claims (*id*. § 6); (2); attorneys' fees and costs (*id*. § 5(e)); and (3) the service award (*id*. § 5(c)).

10. Class Members shall have 180 days to cash their settlement checks. *Id*. § 19.

11. Within 90 days after the issuance of Class Members' settlement checks, the Settlement Administrator will send a reminder postcard, by First Class Mail and email (where available), a reminder of their opportunity to cash their settlement checks. *Id.*

12. Within 30 days after the void date of the last settlement check, the Settlement Administrator shall make payment to the *cy pres* designee. *Id.* § 5(a).

ARGUMENT

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

"Federal courts naturally favor the settlement of class action litigation." *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996); *see also Uhl v. Thoroughbred Tech. & Telecomms., Inc.*, 309 F.3d 978, 986 (7th Cir. 2002); *Newberg* § 11.41 ("The compromise of complex litigation is encouraged by the courts and favored by public policy."). "In reviewing a proposed settlement the court should consider the judgment of counsel and the presence of good faith bargaining." *Patterson v. Stovall*, 528 F.2d 108, 114 (7th Cir. 1976), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998). 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." *Zolkos v. Scriptfleet, Inc.*, No. 12 Civ. 9230, 2014 WL 7011819, at *1 (N.D. Ill. Dec. 12, 2014) (internal citation and quotation marks omitted); *cf. Smith v. Sprint Commc'ns Co.*, 387 F.3d 612, 614 (7th Cir. 2004) ("The fact that a settlement has been reached is, of course, relevant.").

At the preliminary approval stage, the Court's task is to "determine whether the proposed settlement is within the range of possible approval." *Armstrong v. Bd. of Sch. Dirs. of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980) (internal citation and quotation marks omitted) (at the final fairness hearing, the court will "adduce all information necessary to enable [it] intelligently to rule on whether the proposed settlement is fair, reasonable, and adequate"), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998).

Courts in this district perform a "summary version" of the final fairness inquiry at the preliminary approval stage. *See, e.g.*, *In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 346 (N.D. Ill. 2010) ("*In re AT&T*") (quoting *Kessler v. Am. Resorts Int'l's Holiday Network, Ltd.*, Nos. 05 Civ. 5944, 07 Civ. 2439, 2007 WL 4105204, at *5 (N.D. Ill. Nov. 14, 2007)). Preliminary approval requires only that the settlement figure is within a "reasonable range." *AIG, Inc. v. ACE INA Holdings, Inc.*, No. 07 Civ. 2898, 2011 WL 3290302, at *7 (N.D. Ill. July 26, 2011) ("*AIG*"). To grant preliminary approval, a court need only find that there is "'probable cause' to submit the [settlement] proposal 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) (quoting Manual For Complex Litigation (3d ed.) § 1.46 n.10); *Newberg* § 11.25 (noting that "[i]f the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness . . . and appears to fall within the range of possible approval," the court should permit notice of the settlement to be sent to class members) (citations omitted).

Preliminary approval is the first step in the settlement process. It allows notice to issue and for Class Members to object or opt out of the settlement. After the notice period, the Court will be able to evaluate the settlement with the benefit of Class Members' input.

II. <u>The Settlement Is Fair, Reasonable, and Adequate.</u>

The Court's task on a motion for preliminary approval is "limited to the consideration of whether the proposed settlement is lawful, fair, reasonable, and adequate." *Isby*, 75 F.3d at 1196; *see also E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985).

In making these determinations, the court considers five factors: (1) the strength of the plaintiff's case compared to the terms of the proposed settlement; (2) the likely complexity, length and expense of continued litigation; (3) the amount of opposition to settlement among affected parties; (4) the opinion of competent counsel; and (5) the stage of the proceedings and

the amount of discovery completed. *AIG*, 2012 WL 651727, at *2 (citing *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006)). Each of these factors weighs in favor of approval of the Settlement Agreement and preliminary approval.

A. The Settlement Amount Is Substantial Given the Strengths of Plaintiff's Claims and Attendant Risks (Factor 1).

Defendant has agreed to settle this case for $1,130,000.00, which is a substantial amount. For statutory claims limited in recovery to a range of not more than $100-$1,000 if Plaintiff had prevailed at trial, through this settlement Class Members are entitled to recover a pro rata share of the net settlement fund up to $1,200 for a FCRA Consumer Report Class claim and $1,000 for a FCRA Disclosure Class claim—depending on the amount of Class Members who submit Claim Forms. The settlement represents significant value given the attendant risks of litigation—including surviving a motion to dismiss, attaining class certification, overcoming motions to decertify any class, succeeding on all claims at summary judgment and trial, and surviving any appeal.

In evaluating the strength of Plaintiff's case on the merits balanced against the proposed settlement, courts refrain from reaching conclusions on issues that have not been fully litigated. *Patterson*, 528 F.2d at 114 (collecting cases). Because "[t]he essence of settlement is compromise," *Hiram Walker*, 768 F.2d at 889, courts should not reject a settlement "solely because it does not provide a complete victory[.]" *Isby*, 75 F.3d at 1200; *see also Armstrong*, 616 F.2d at 315 ("[T]he essence of a settlement is compromise[,] an abandonment of the usual total-win versus total-loss philosophy of litigation in favor of a solution somewhere between the two extremes[.]"). Parties to a settlement benefit by immediately resolving the litigation and receiving "some measure of vindication for [their] position[s] while foregoing the opportunity to achieve an unmitigated victory." *Hiram Walker*, 768 F.2d at 889 (internal citations omitted).

Establishing both liability and damages would require significant factual development. Plaintiff likely first would have had to survive a motion to dismiss as to his claims. The Supreme Court also recently issued a decision on standing in the FCRA context, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), which might have subjected Plaintiff to further briefing. Although Plaintiff is confident that he would survive a motion to dismiss,[4] there is risk.

If Plaintiff's claims survived, he would have faced risks as to class certification and summary judgment after a lengthy discovery process. Although FCRA cases are often certified, there is nonetheless a legitimate risk that the Court would conclude that individualized factual inquiries would preclude class treatment. *See, e.g.*, *Delmoral v. Credit Prot. Ass'n, LP*, No. 13 Civ. 242, 2015 WL 5793311, at *6 (E.D.N.Y. Sept. 30, 2015). Then, if at summary judgement Plaintiff lost on the issue of willfulness, recovery of statutory damages would have been barred. Surviving those motions, a trial on the merits would involve significant risk as to both liability and damages. While Plaintiff believes he could ultimately defeat Defendant's defenses and establish liability, this would require significant factual development and favorable outcomes at trial, and on appeal, all of which is inherently uncertain and lengthy. The proposed settlement alleviates uncertainty, and thus this factor weighs in favor of preliminary approval.

Here, the settlement provides a substantial recovery, comparable to what the Class could have obtained after trial. If Plaintiff proved willfulness, the putative Class Members' best

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[4] Post-*Spokeo*, multiple Courts have held that plaintiffs have standing under the FCRA and, specifically, for Section 1681b(b)(2) and (3) claims. *See, e.g.*, *Syed v. M-I, LLC*, 846 F.3d 1034, 1040 (9th Cir. 2017) (1681b(b)(2) claims); *Hargrett v. Amazon.com DEDC LLC*, __ F. Supp. 3d __, No. 15 Civ. 2456, 2017 WL 416427, at *4-6 (M.D. Fla. Jan. 30, 2017) (same); *Feist v. Petco Animal Supplies, Inc.*, No. 16 Civ. 1369, 2016 WL 6902549, at *3 (S.D. Cal. Nov. 22, 2016) (same); *Meza v. Verizon Commc'ns, Inc.*, No. 16 Civ. 739, 2016 WL 4721475, at *3 (E.D. Cal. Sept. 9, 2016) (same); *Thomas v. FTS USA, LLC*, 193 F. Supp. 3d 623, 633-38 (E.D. Va. 2016) (same with 1681b(b)(2) and (3) claims); *see also Chapman v. Dowman, Heintz, Boscia & Vician, P.C.*, No. 15 Civ. 120, 2016 WL 3247872, at *1 & n.1 (N.D. Ind. June 13, 2016) (granting final approval of FDCPA settlement and finding "*Spokeo* largely reiterated long-standing principles").

outcome would be damages between $100 and $1,000 per claim. 15 U.S.C. § 1681n. Through this settlement, Class Members will receive up to $1,200 or $1,000 depending on the classes to which they belong and if they belong to both classes they will receive up to $2,200. These potential recoveries well-exceed the range of acceptable recoveries approved by courts in FCRA settlements. *See, e.g.*, *White v. First Am. Registry, Inc.*, No. 04 Civ. 1611, 2007 WL 703926, at *2-3 (S.D.N.Y. Mar. 7, 2007) (finally approving payments up to $100 for class members who submit claims with *pro rata* reduction if total claims exceeds available balance after settlement expenses including claims administration and attorneys' fees and costs deducted); *Domonoske v. Bank of Am., N.A.*, 790 F. Supp. 2d 466, 470-71 (W.D. Va. 2011) (finally approving proportional payments up to $100, but no less than $2, for class members who submit claim forms).[5]

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

B. Litigation Would Be Complex, Costly, and Long (Factor 2).

By reaching a favorable settlement now, Plaintiff seeks to avoid significant expense and delay, and instead ensure recovery for the Class. "[A]n integral part of the strength of a case on the merits is a consideration of the various risks and costs that accompany continuation of the litigation." *Donovan v. Estate of Fitzsimmons*, 778 F.2d at 298 (7th Cir. Nov. 15, 1985).

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[5] *See also Watkins v. Hireright, Inc.*, No. 13 Civ. 1432, 2016 WL 1732652, at *7 (S.D. Cal. May 2, 2016) (preliminarily approving settlement where cap to recovery was $200, but parties estimated each class member would receive approximately $58.00); *Manuel v. Wells Fargo Bank, Nat'l Ass'n*, No. 14 Civ. 238, 2016 WL 1070819, at *2 (E.D. Va. Mar. 15, 2016) (finally approving settlement where class members would receive either $35 or $75 dollars); *Syed v. M-I LLC*, No. 14 Civ. 742, 2016 WL 310135, at *8 (E.D. Cal. Jan. 26, 2016) (finally approving settlement where class members would receive approximately $16).

Although Plaintiff's Counsel believe Plaintiff's case is strong, it is subject to risks and costs if the case is not settled.

Continued litigation carries with it a decrease in the time value of money, for "[t]o most people, a dollar today is worth a great deal more than a dollar ten years from now." *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284 (7th Cir. 2002); *see also Fitzsimmons*, 778 F.2d at 309 n.3; *Seiden v. Nicholson*, 72 F.R.D. 201, 208 (N.D. Ill. 1976) ("If this case had been litigated to conclusion, all that is certain is that plaintiffs would have spent a large amount of time, money and effort."). The proposed settlement, on the other hand, provides immediate benefits.

If litigation were to continue, Plaintiff would have to survive a motion to dismiss, and then extensive discovery would be required to establish liability and damages. A fact-intensive trial might be necessary. Any judgment would likely be appealed, further extending the litigation. While Plaintiff's Counsel believe that Plaintiff would ultimately establish Defendant's liability, again this would require significant factual development. The proposed settlement avoids further expense, delay and uncertainty. This factor weighs in favor of approval.

C. The Court Cannot Assess the Reaction of the Class Until After Notice Issues (Factor 3).

Because Class Members have not been notified of the settlement at this stage, the Court will be in a better position to more fully analyze this factor after notice issues and Class Members have had an opportunity to opt out or object to the settlement. Thus, this factor is neutral and supports Plaintiff's motion to the extent it does not preclude preliminary approval.

D. Competent Counsel Endorse this Agreement (Factor 4).

Courts are "entitled to rely heavily on the opinion of competent counsel." *Gautreaux v. Pierce*, 690 F.2d 616, 634 (7th Cir. 1982) (quoting *Armstrong*, 616 F.2d at 325); *see Isby*, 75

F.3d at 1200. Further, there is no indication that the proposed Settlement Agreement is the result of collusion. *See Isby*, 75 F.3d at 1200.

Putative Class Counsel are competent. *See, e.g.*, *Houser v. Pritzker*, 28 F. Supp. 3d 222, 248 (S.D.N.Y. 2014) (finding O&G and non-profit partners "bring to the case a wealth of class action litigation experience" and were adequate to represent approximately half-million person Black and Latino job applicant class in background check litigation); *Zolkos*, 2014 WL 7011819, at *3 (finding O&G met Rule 23(a)(4)'s adequacy requirements for purposes of class settlement); *Beckman v. Keybank, N.A.*, 293 F.R.D. 467, 477 (S.D.N.Y. 2013) (attorneys at O&G "are experienced employment lawyers with good reputations among the employment law bar"); *see also infra* Argument § III.D; Miazad Decl. ¶¶ 4-10.

Defendant also endorsed this settlement, as evidenced by its representative's signature on the Settlement Agreement. This factor therefore weighs in favor of preliminary approval.

E. Discovery Has Advanced Far Enough to Allow the Parties to Resolve the Case Responsibly (Factor 5).

Although preparing this case through trial would require hundreds of hours of discovery for both sides, the Parties have completed enough discovery to recommend settlement. Courts regularly approve settlements at a similar stage in discovery. *See Taifa v. Bayh*, 846 F. Supp. 723, 728-29 (N.D. Ind. 1994), *aff'd sub nom Isby*, 75 F.3d at 1199-1200 (approving settlement early in case where the parties had conducted a thorough investigation of the background and facts pertinent to the claims); *In re AT&T*, 270 F.R.D. at 350 (same); *Aboud v. Charles Schwab & Co., Inc.*, No. 14 Civ. 2712, 2014 WL 5794655, at *3 (S.D.N.Y. Nov. 4, 2014) (approving settlement reached pre-suit where parties had conducted "sufficient informal discovery to weigh the strengths and weaknesses of their claims and to accurately estimate the damages"). Courts also encourage parties to settle class actions early, without expending unnecessary resources.

See Yuzary v. HSBC Bank USA, No. 12 Civ. 3693, 2013 WL 5492998, at *5 (S.D.N.Y. Oct. 2, 2013) ("[E]arly settlement allows class members to recover without unnecessary delay and allows the judicial system to focus resources elsewhere.") (citations omitted).

Here, the Parties engaged in significant investigation before entering into negotiations and in preparation for the Parties' mediations. Defendant also produced the background check disclosure form at issue for the FCRA Disclosure Class and Plaintiff's personnel file, among other documents, which Plaintiff's Counsel reviewed and analyzed. Miazad Decl. ¶¶ 17-18. Before mediation, the Parties exchanged detailed correspondence setting forth their respective positions, and extensively argued their positions through two separate full-day mediations. The Parties also had multiple telephone conferences to discuss the information produced by Defendant and the potential impact of *Spokeo*. *Id.* ¶ 17. Plaintiff's Counsel conducted their own independent investigation, including extensive interviews of Plaintiff. *Id.* ¶¶ 12-15. Before the mediation, Plaintiff's Counsel crafted a damages model based on information provided by Defendant and their own evaluation of the merits. *Id.* ¶¶ 18-19. Accordingly, this factor also favors 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 FCRA settlement based on "pre-mediation discovery and arms-length negotiations").

In the event that a substantial number of objectors come forward with meritorious objections, the Court may reevaluate its determination. The settlement, on its face, is "fair, reasonable, and adequate," and not the product of collusion. *See Isby*, 75 F.3d at 1198, 1200.

III. <u>Conditional Certification of the Class is Appropriate.</u>

For settlement purposes, Plaintiff seeks to certify two classes under Federal Rule of Civil Procedure 23(e): the FCRA Disclosure Class and the FCRA Consumer Report Class. *See supra* Argument § II. "The certification of a class is within the sound discretion of the trial court . . . ."

Fitzsimmons, 778 F.2d at 306. "Provisional settlement, class certification, and appointment of class counsel have several practical purposes, including avoiding the costs of litigating class status while facilitating a global settlement, [and] ensuring notification of all class members of the terms of the proposed [s]ettlement [a]greement . . . ." *Zolkos*, 2014 WL 7011819, at *2; *see also Newberg* § 11.27 ("When the court has not yet entered a formal order determining that the action may be maintained as a class action, the parties may stipulate that it be maintained as a class action for the purpose of settlement only.").

Under Rule 23(a), a class action may be maintained if all of the prongs of Rule 23(a) are met, as well as one of the prongs of Rule 23(b). Rule 23(a) requires that:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Rule 23(b)(3) requires the court to find that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Id.* at (b)(3). District courts have broad discretion in making class certification decisions. *In re AT&T*, 270 F.R.D. at 340.

A. Numerosity

Numerosity is presumptively met where the class members number 40 or more. *Barragan v. Evanger's Dog & Cat Food Co.*, 259 F.R.D. 330, 333 (N.D. Ill. 2009). The putative classes easily satisfy this requirement: the FCRA Disclosure Class consists of 19,128 individuals

and the FCRA Consumer Report Class consists of 1,811 individuals. *See* Fed. R. Civ. P. 23(a)(1); Ex. A (Settlement Agreement) § 3.

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, Plaintiff and putative Class Members all share the common contentions that the form they signed authorizing a consumer report was defective and/or that they were denied employment without being provided pre-adverse action notice packets (i.e. consumer reports and statements of FCRA rights). These common factual and legal questions satisfy commonality for settlement purposes. *See Thomas v. FTS USA, LLC*, 312 F.R.D. 407, 417-18 (E.D. Va. 2016) (finding commonality through allegations of defective authorizations for consumer reports and that pre-adverse action notices were never sent); *Manuel*, 2015 WL 4994549, at *9-12 (substantively same). Plaintiff also alleges that Defendant's violations were willful. Courts routinely find that the question of willfulness is a common question that establishes commonality. *Thomas*, 312 F.R.D. at 417; *Manuel*, 2015 WL 4994549, at *10-12; *Katz*, 2014 WL 4966052, at *2 (for FCRA settlement purposes).

C. Typicality

"The question of typicality in Rule 23(a)(3) is closely related to the preceding question of commonality," *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992), but this requirement "primarily directs the district court to focus on whether the named representatives' claims have the same essential characteristics as the claims of the class at large." *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 596–97 (7th Cir. 1993) (internal quotation marks and

citation omitted). "A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *De La Fuente v. Stokely–Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983) (citations omitted). "The fact that there is some factual variation among the class grievances will not defeat a class action." *Rosario*, 963 F.2d at 1017 (citing *Patterson v. Gen. Motors Corp.*, 631 F.2d 476, 481 (7th Cir. 1980)).

Here, like the putative Class, Plaintiff Pickett signed an allegedly defective form authorizing a consumer report *and* was denied employment because of his background check without having been provided pre-adverse action notice packets. *See* Compl. ¶¶ 17-18, 25-27. Typicality is met because Plaintiff was "subjected to the same procedures as all putative class members and it is those procedures that are challenged." *Manuel*, 2015 WL 4994549, at *14; *see also Thomas*, 312 F.R.D. at 419 ("[L]ike every other class member, Thomas did not receive any pre-adverse action materials[.]").

D. Adequacy of the Named Plaintiff and His Counsel

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "To determine if the plaintiff has met the adequacy requirement of Rule 23(a)(4), the Court must ask whether the named Plaintiff: (1) has 'antagonistic or conflicting claims with other members of the class;' (2) has 'a sufficient interest in the outcome of the case to ensure vigorous advocacy;' and (3) has counsel that is 'competent, qualified, experienced and able to vigorously conduct the litigation.'" *Wahl v. Midland Credit Mgmt., Inc.*, 243 F.R.D. 291, 298 (N.D. Ill. 2007) (citation omitted). The proposed class representative must at a minimum "possess the same interest and suffer the same injury as the class members." *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (internal quotation marks and citation omitted); *accord Uhl*, 309 F.3d at 985. He also must not

have any interests in conflict with those of other members of the class and must have a "sufficient interest in the outcome to ensure vigorous advocacy." *Chandler v. Sw. Jeep-Eagle, Inc.*, 162 F.R.D. 302, 309 (N.D. Ill. 1995) (internal quotation marks and citation omitted); *see Spano v. The Boeing Co.*, 633 F.3d 574, 586 (7th Cir. 2011). Plaintiff Pickett meets the adequacy requirement because there is no evidence that he has interests that are antagonistic to or at odds with those of putative Class Members, and suffered the same alleged violations of the FCRA as members of both putative classes.

Plaintiff's Counsel also meet the adequacy requirement of Rule 23(a)(4). *See, e.g.*, *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); Ex. B (July 30, 2015 Hr'g Tr. for *Puglisi v. TD Bank, N.A.*, No. 13 Civ. 637 (E.D.N.Y.)) at 11-12 (lawyering by plaintiffs' counsel—including O&G—was "excellent" and noting "the high level of service that was provided to the class"); *Beckman*, 293 F.R.D. at 477 (attorneys at O&G "are experienced employment lawyers with good reputations among the employment law bar"); *see also* Miazad Decl. ¶¶ 4-10. Thus, for the purposes of settlement, the adequacy requirement is satisfied.

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

Rule 23(b)(3) requires that 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. The predominance inquiry examines "whether the shared attributes will be the main focus of the litigation." *Barragan*, 259 F.R.D. at 334 (citing *Amchem Prods., Inc.*, 521 U.S. at 623–24). "When a proposed class challenges a uniform policy, the validity of that policy tends to be the predominant issue in the litigation." *Nicholson v. UTi Worldwide, Inc.*, No. 09 Civ. 722, 2011 WL 1775726, at *7 (S.D. Ill. May 10, 2011) (internal quotation marks and citations omitted) (finding defendant's policy of not paying overtime predominates).

Here, Plaintiff's common contentions—that Defendant had a uniformly defective form authorizing consumer reports and uniformly failed to provide individuals with pre-adverse action notice packets—predominate over any issues affecting only individual Class Members. *See, e.g.*, *Thomas*, 312 F.R.D. at 425; *Manuel*, 2015 WL 499549, at *17 (also noting that "[n]o individualized proof would be necessary to determine the issue of willfulness"); *Katz*, 2014 WL 4966052, at *2 (citing *Engel v. Scully & Scully, Inc.,* 279 F.R.D. 117, 130 (S.D.N.Y. 2011) (finding predominance when parties dispute defendant's business practice and complaint sought statutory, not individualized, damages)).

2. A Class Action Is a Superior Mechanism.

Rule 23(b)(3) sets forth a non-exclusive list of factors pertinent to judicial inquiry into the superiority of a class action, including: the class members' interests in individually controlling the prosecution or defense of separate actions; 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. Fed. R. Civ. P. 23(b)(3). "[C]lass certification is a sensible and legally permissible alternative to . . . individual suits each of which would cost orders of

magnitude more to litigate than the claims would be worth to the plaintiffs." *Pella Corp. v. Saltzman*, 606 F.3d 391, 393 (7th Cir. 2010) (internal quotation marks and citations omitted); *see also Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997) ("The 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. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.").

Here, potential recovery for putative Class Members is comparatively modest—even if Class Members were to recover full statutory damages. *See, e.g.*, *Thomas*, 312 F.R.D. at 425 (in FCRA cases, "potential class members' claims for statutory damages are small when considered in comparison to the effort it would take to assert them in court"); *Katz*, 2014 WL 4966052, at *3 (citing *Engel*, 279 F.R.D. at 130) (class adjudication superior "due to the low damages incentive for individual litigation"). Concentrating litigation in this Court will achieve economies of scale, conserve the resources of the judicial system, and avoid the waste and delay of repetitive proceedings and inconsistent adjudications of similar issues and claims. *See, e.g.*, *Thomas*, 312 F.R.D. at 426; *Manuel*, 2015 WL 499549, at *18. Moreover, "many plaintiffs will not be aware that their rights were violated because of the technical nature of the FCRA and thus would not be able to bring a suit" without this settlement. *Thomas*, 312 F.R.D. at 425 -26.[6]

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

IV. Plaintiff's Counsel Should be Appointed as Class Counsel.

O&G 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.

Plaintiff's Counsel satisfy these criteria. They have done substantial work identifying, investigating, negotiating, and settling Plaintiff's and putative Class Members' claims. Miazad Decl. ¶¶ 11-23. Plaintiff's Counsel have substantial experience prosecuting and settling employment class actions, including background check cases. *Id.* ¶¶ 6-7, 10. Further, courts have repeatedly found Plaintiff's Counsel to be adequate class counsel. *See supra* Argument § III.D; Miazad Decl. *¶* 7.

V. The Notice and Award Distribution Process are Appropriate.

The Notice and Claim Form, which is attached to the settlement agreement as Exhibit B, fully complies 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 satisfies these requirements. It is written in plain English and is organized and formatted to be as clear as possible. It is based on the model notice forms provided by the Federal Judicial Center ("FJC") on its website (www.fjc.gov). *See Reyes v. Altamarea Grp., LLC*, No. 10 Civ. 6451, 2010 WL 5508296, at *2 (S.D.N.Y. Dec. 22, 2010) (approving notice based on FJC model). The Notice describes the settlement's terms, informs putative Class Members about the allocation of fees and costs, and provides the date, time, and place of the final approval hearing and Class Members' ability to exclude themselves or object. *See* Ex. A (Settlement Agreement) at Ex. B (Notice and Claim Form). The Settlement Agreement provides that the Settlement Administrator will mail and email Court-approved Notices and Claim Forms to Class Members, take reasonable steps to obtain correct addresses of any Class Member whose Claim Form is returned as undeliverable and attempt a re-mailing, and send reminder notice notices by mail and email (where available). *See infra* Summary of Settlement Terms § VIII. The Claim Form is simple and straightforward, and a Class Member may claim from the settlement simply by dating and signing it. *See* Ex. A (Settlement Agreement) at Ex. B. Every effort has been made to ensure that Class Members have the best practicable means to submit the Claim Form, and they may do so by mail, e-mail, fax, or through a case website. *Id.*

CONCLUSION

For these reasons, Plaintiff respectfully requests that the Court grant Plaintiff's motion.

Dated: March 10, 2017
New York, New York

Respectfully submitted,

/s/ Ossai Miazad

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