IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

CARLA RAWLINGS, individually and on behalf of all putative class members Plaintiff v. **THE SCOTTS COMPANY** Defendant.	)	Case No: 4:14-cv-00319

MEMORANDUM OF LAW IN SUPPORT OF JOINT MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

I. INTRODUCTION

The Parties to this lawsuit, Plaintiff Carla Rawlings (the "Named Plaintiff") and Defendant The Scotts Company ("Defendant"), by and through their respective counsel and pursuant to the terms of the Parties' Settlement Agreement, respectfully seek final approval of the settlement of this Fair Credit Reporting Act litigation (the "Settlement"). The Named Plaintiff alleges, on behalf of herself and all other similarly-situated individuals, that Defendant violated the Fair Credit Reporting Act (the "FCRA") by taking adverse employment actions in violation of Section §1681b(b)(3) and by utilizing an improper disclosure and authorization form in violation of Section §1681b(b)(2)(A)(i)(ii). Defendant denies all liability.

After the exchange of informal discovery, the Parties enlisted John Phillips of Kansas City, a well-respected and nationally recognized mediator with substantial experience in mediating class actions, to help them resolve their dispute. On October 21, 2014, after an all-day mediation, including subsequent phone negotiations, the Parties reached agreement on the terms of a class settlement. As described more fully below, the agreed upon settlement called for Defendant to make available a total settlement fund of $850,000.00 to the settlement class, which amount was inclusive of attorneys' fees and costs, estimated settlement administration expenses, an incentive payment to Named Plaintiff, and payments to Class Members.

On March 19, 2015, the Court entered an Order granting preliminary approval of the Settlement. [*See* Dkt. 53]. Defendant provided the names and contact information for the Class Members to the Settlement Administrator, AB Data, who subsequently mailed Notices to all of the Class Members. [*See* Decl. of Steve Straub, Exhibit 1, ¶¶ 7-9].

Following the Court's grant of preliminary approval, the Parties and the Settlement Administrator have complied with all of the requirements of the Settlement Agreement. Only

one of the Class Members have objected to the Settlement[1], and only [#] have requested exclusion. The terms of the Settlement are fair, reasonable, and adequate. For these reasons and for the reasons which are set forth more fully below, the Parties respectfully request that the Court enter an order granting final approval of the Settlement.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs' Memorandum of Law in Support of Joint Motion for Preliminary Approval of Settlement Agreement (Dkt. 52-1) contains a thorough summary of the factual and procedural background of this litigation. We summarize the key points again below.

A. The Named Plaintiff's Claims

Plaintiff filed this lawsuit on February 10, 2014, in the Jackson County Circuit Court. On April 14, 2014, Defendant removed the case to the United States District Court for the Western District of Missouri. The parties exchanged Rule 26 disclosures and informal discovery prior to mediation. The Named Plaintiff alleges, on behalf of herself and all other similarly-situated individuals, that Defendant violated the FCRA by taking an adverse employment action in violation of Section §1681b(b)(3) and by utilizing an improper disclosure and authorization form in violation of Section §1681b(b)(2)(A)(i)(ii). [*See generally* Dkt. 24].

Defendant denies Plaintiff's claims, and it maintains that the disclosure and authorization form used is proper and complies with the requirements of Sections 1681b(b)(2)(A)(i)-(ii) of the FCRA. In addition to denying liability, Scotts contends that the Plaintiff and the putative class members suffered no injury or actual damages as a result of the background check process. Scotts also contends that, in any event, it did not willfully violate the FCRA and that as a result, the Plaintiff

[1] The lone objection does not object to the settlement terms, but instead to what the individual claims are the Defendant's discriminatory practices unrelated to the FCRA issues in this litigation. *See* Dkt. No. 54. The individual, who admits to the accuracy of his criminal record, received both a pre-adverse action and post-adverse action letter required under the FCRA.

is not entitled to recover any statutory damages either. Scotts also denies that this case can or should be litigated as a class action.

B. Discovery and Damages Analysis

This Settlement is the result of arms-length negotiations based on a thorough investigation of the facts and the law by experienced counsel. Prior to the mediation, the Parties engaged in an initial round of discovery. Defendant provided additional informal discovery as part of the mediation. Class Counsel and counsel for Defendant have thoroughly studied the applicable legal principles and are confident that they have sufficiently investigated the key factual issues applicable to the claims that the Named Plaintiff has raised.

C. The Mediation, Preliminary Approval, and Notice to the Settlement Class

On October 21, 2014, the Parties mediated their dispute in Kansas City, Missouri, with the assistance of mediator John Phillips. The mediation lasted a full day, beginning at approximately 9:00 a.m. and concluding after 6:00 p.m. that evening, by which point the Parties had arrived at basic terms for a settlement. Thereafter, the Parties spent a considerable amount of time on continued discussions and negotiations regarding terms and other considerations. Finally, the Parties reached a full settlement, the terms of which are set forth in the Settlement Agreement. The Parties subsequently filed their Joint Motion for Preliminary Approval of Class Action Settlement. [*See generally* Dkt. 52]. On March 15, 2015, the Court granted the Parties' Joint Motion, preliminarily approved the settlement, and directed that notice be sent to the Settlement Class. [*See* Dkt. 53].

On April 17, 2015, the parties' Settlement Administrator, A.B.Data Ltd., mailed 21,140 Court-approved Notices based on class lists which Defendant provided containing the addresses that the Class Members used when they applied for employment with Defendant. [*See* Decl. of Steve Straub. Attached hereto as Exhibit 1]. Approximately 30% of the initial mailings ([6,328])

were returned as undeliverable; which was not surprising given the transient nature of the work force in today's society and the fact that, although Class Members applied for employment with Defendant, a large number of them did not actually work for Defendant. A.B. Data then ran a skip-trace and re-mailed the Class Notice. Of the approximately 21,140 Notices mailed, only one Class Member objected to the Settlement and only 21 Class Members timely elected to opt out of the Settlement.

D. Terms of the Proposed Settlement

The basic terms of the Parties' settlement are as follows:

1. Defendant will make available to the class members a total gross fund of $850,000.00 ("Settlement Fund") to settle the claims of all members of the settlement class, inclusive of (a) all individual payments to the Named Plaintiff and Class Members; (b) the enhancement payment to the Named Plaintiff; (c) attorneys' fees and costs of Class Counsel; and (d) the cost of the settlement administration, which have been estimated to be $80,000.00.

2. The Settlement requires that a check be issued to each Class Member who does not opt-out of the Class. As described in the Settlement Agreement, Class Members, including the Named Plaintiff, will provide Defendant with a complete release of claims relating to their background checks.

3. Subject to the approval of the Court, the Named Plaintiff will receive an Enhancement Payment of $5,000 for her service as the Named Plaintiff, including assisting Plaintiff's Counsel in prosecuting this litigation. As part of the settlement terms, the Named Plaintiff provided a general release of all claims.

4. Subject to the approval of the Court, Class Counsel seeks an award of attorneys' fees in an amount of one-third of the Settlement Fund, or $280,500.00. The Settlement Administrator, A.B.Data Ltd.., is to be paid for its actual expenses from the Settlement Fund to cover settlement administration costs, an amount estimated to be approximately $80,000.00.

III. DISCUSSION

When the parties to a class action lawsuit propose to settle their case, the district court will review the settlement under Rule 23 to ensure that it is fair, reasonable, and adequate. *Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932-33 (8th Cir. 2005). "The district

court need not make a detailed investigation consonant with trying the case; it must, however, provide the appellate court with a basis for determining that its decision rests on 'well-reasoned conclusions' and is not 'mere boilerplate.'" *Wireless Tel.*, 396 F.3d at 932-33. The Eighth Circuit has explained that district courts should consider four factors when they review proposed settlements to ensure that they are fair, reasonable, and adequate:

1. The merits of the plaintiff's case, weighed against the terms of the settlement;
2. The defendant's financial condition;
3. The complexity and expense of further litigation; and
4. The amount of opposition to the settlement.

Wireless Tel., 396 F.3d at 932.

These four factors – applied to the facts and circumstances of this case – demonstrate that the Settlement is in fact fair and equitable and the Court should grant the Parties' Joint Motion for Final Approval of Class Action Settlement.

A. The Merits of the Named Plaintiff's Claims, Weighed Against the Terms of the Settlement (Factor 1) Suggests that the Settlement is Fair, Reasonable, and Adequate.

In this case, Defendant has agreed to fund a gross Settlement Amount of $850,000.00 to the potential settlement class of 21,140 individuals in total, less the 21 timely exclusions. Given the legal and factual disputes in this case, Class Counsel believes that the amount of these payments – and the Settlement over all – is an excellent result in light of the relative merits of the Named Plaintiff's claims. Simply put, this is not a case where the parties agree that the defendant is liable to the plaintiff and where the determination of the extent of the plaintiff's damages is the crux of the litigation. Rather, the Parties to this lawsuit dispute *both* liability and damages and whether those issues could be tried on a class-wide basis under Rule 23. Among other things, the Named Plaintiff would have to prove that any alleged FCRA violations were

willful, in order to recover any available statutory damages. Defendant claims that it did not violate the provisions of the FCRA and that even if the Court did find a violation, Defendant's actions were done in good faith and do not amount to a willful violation. In short, whether or not the members of the Settlement Class would recover *anything* at trial is far from clear. *Cf. Wireless Tel.*, 396 F.3d at 933 (concluding that the "merits" factor weighed in favor of approval because "the outcome of the litigation would be far from certain"). As a result, the "merits" factor weighs in favor of approving the Settlement.

B. The Defendant's Financial Condition (Factor 2) Suggests that the Settlement is Fair, Reasonable, and Adequate.

Defendant has the financial resources to pay the settlement amount. As a result, the "financial condition" factor weighs in favor of approving the Settlement. *Cf. Wireless Tel.*, 396 F.3d at 933 (concluding that the "financial condition" factor weighed in favor of approval because there was "no indication that [the defendant's] financial condition would prevent it from raising the settlement amount").

C. The Expected Complexity and Expense of Further Litigation (Factor 3) Suggests that the Settlement is Fair, Reasonable, and Adequate.

Prior to engaging in mediation, the Named Plaintiff served discovery requests on Defendant, and Defendant produced company policies, documents, and interrogatory answers in response to those requests. Class Counsel reviewed and analyzed those responses and thoroughly reviewed and analyzed similar claims and available settlement information. Thus, heading into the mediation, both Parties had a reasoned understanding of what they stood to gain – and what they stood to lose – if the case continued to be litigated and perhaps left to a jury to decide.

Both Parties recognized, though, that FCRA cases are complex and time-consuming by nature. Both Parties also recognized that the members of the Settlement Class might not recover

anything at all. Additionally, both Parties recognized that the risks that are inherent in all lawsuits are likely to be greater in this particular lawsuit because very few FCRA class action cases have been litigated on their merits and this case is likely to entail complex (potentially class litigation-defeating) procedural and damages issues.

Finally, both Parties recognized that, if the case did not settle, years of expensive and time-consuming litigation would be potentially necessary before a determination could be made regarding whether or not the members of the Settlement Class were entitled to recover anything. Indeed, if the mediation had failed, the Parties would likely have had to depose multiple fact and expert witnesses; and would have needed to research, prepare, file, respond to, reply to, and potentially argue motions related to class certification, discovery and summary judgment. At the time of the filing of the Motion for Preliminary Approval, Class Counsel had already spent a substantial amount of time on the case. It is reasonable to assume that both Parties would spend a far greater amount of time and money on the case going forward if it were to proceed to trial. And the appeal that would surely follow any summary judgment ruling and/or any judgment obtained at trial would further delay any possible recovery to the settlement Class Members.

In sum, the Settlement is fair, reasonable, and adequate in light of the complexity and potential expense of further litigation. The immediate recovery that the Settlement provides to the Class Members is preferable to the possibility of recovering a greater amount of money at some unknown point in the future. *Cf. Wireless Tel.*, 396 F.3d at 933 (finding that a settlement was in the best interest of the class because, "barring settlement, this case would 'likely drag on for years, require the expenditure of millions of dollars, all while class members would receive nothing'"). As a result, the "complexity and expense" factor weighs in favor of approving the Settlement.

D. The Lack of Opposition to the Settlement (Factor 4) Suggests that the Settlement is Fair, Reasonable, and Adequate.

Class Counsel has years of experience litigating collective and class action lawsuits, and their years of experience led them to settle this lawsuit under the terms of the Settlement Agreement because they believe those terms to be fair, reasonable, and adequate. *See DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1178 (8th Cir. 1995) (finding that the fact that "class counsel [wa]s experienced in this type of litigation" weighed in favor of approval because class counsel could recognize a fair settlement when he saw one). Additionally, the Parties only decided to settle after they had engaged in a full day of intense mediation with the assistance of an experienced and respected mediator. The participation of a neutral facilitator, and the adversarial nature of those negotiations, demonstrate that this case was resolved and settled only after sufficient arms-length bargaining. *See DeBoer*, 64 F.3d at 1178 (finding that the act of engaging a neutral third party to preside over settlement negotiations suggested that the settlement was fair). This is not a case that was settled for a pittance shortly after it was filed. It was filed more than one year ago, and Class Counsel has moved with it from one judicial district to another. *Cf. Vollmer v. Publishers Clearing House*, 248 F.3d 698, 707 (7th Cir. 2001) (suggesting that the fact that a class action settles soon after the start of litigation may indicate collusion); *In re UnitedHealth Group Inc. Shareholder Derivative Litig.*, 631 F. Supp. 2d 1151, 1156 (D. Minn. 2009) (same). Additionally, the release of claims by Class Members, except the Named Plaintiff, is limited to those claims that were or could be asserted in the Amended Complaint.

These facts attest to the fairness, reasonableness, and adequacy of the Settlement. Furthermore, the fact that that only one member of the -[#]-plus Settlement Class has objected to the Settlement,[2] and only 21 members of the Settlement Class have opted out, likewise suggests

[2] As noted above, the lone objection does not challenge the fairness of the Settlement's terms or Defendant's FCRA

that the Settlement is fair and equitable. [*See* Decl. of Stacy Roe, Tab 1, ¶ 12]. As a result, the "amount of opposition" factor weighs in favor of approving the Settlement. *Cf. Wireless Tel.*, 396 F.3d at 933 (concluding that the "amount of opposition" factor weighed in favor of approval because the "silent majority" of the class had accepted the settlement as fair by reason of their silence); *DeBoer*, 64 F.3d at 1178 (finding that the absence of objections weighed in favor of approval).

IV. CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Parties' memorandum previously filed in support of preliminary approval of the Settlement, Named Plaintiff Carla Rawlings and Defendant The Scotts Company LLC respectfully request that this Court enter an Order finally approving the Parties' Settlement and authorizing payment from the Settlement Fund as set forth in the Settlement Agreement.

Respectfully submitted,

/s/ C. Jason Brown
C. Jason Brown, MO 49952
BROWN & ASSOCIATES, LLC
301 South U.S. 169 Hwy
Gower, MO 64454
Telephone: 816-505-4529
Facsimile: 816-424-1337
Email: brown@brownandwatkins.com
Attorneys for Plaintiffs

/s/ Susan F. Wiltsie

practices, but instead seems to suggests that Defendant's reliance on his criminal conviction was discriminatory – an issue that the FCRA does not address and not material to this litigation. *See* Dkt. No. 54.

William C. Martucci, Mo. No. 28237
Michael Barnett, Mo. No. 62742
SHOOK, HARDY & BACON
2555 Grand Boulevard
Kansas City, Missouri 64108
Phone: (816) 559-6550
Fax: (816) 421-5547

Susan F. Wiltsie*
Lindsay B. Velarde*
HUNTON & WILLIAMS LLP
2200 Pennsylvania Ave., N.W.
Washington, D.C. 20037
Phone: (202) 955-1500
Fax: (202) 778-2201
* admitted *pro hac vice*

Ryan A. Glasgow**
HUNTON & WILLIAMS LLP
951 E. Byrd Street
Richmond, Virginia 23219
Phone: (804) 788-8791
Fax: (804) 343-4897
rglasgow@hunton.com
***pro hac vice* motion to be filed

ATTORNEYS FOR DEFENDANT