IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Greensboro Division

DIANE OLIVER, *on behalf of herself and all similarly situated individuals,* Plaintiff, v. FIRSTPOINT, INC., d/b/a FIRSTPOINT INFORMATION RESOURCES, Defendant.	: : : : : : : : : : : :	Civil Action No. 1:14-cv-517

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND FOR ATTORNEY'S FEES, EXPENSES, AND CLASS REPRESENTATIVE SERVICE AWARD

Plaintiff, Diane Oliver ("Plaintiff" or "Class Representative"), on behalf of herself and the Class Members, respectfully submits this memorandum in support of final approval of the class settlement reached in this case.

OVERVIEW

On June 24, 2015, Plaintiff filed this class action lawsuit, alleging that the Defendant, FirstPoint, Inc., violated the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* ("FCRA"). After the Defendant moved to dismiss the Complaint, Plaintiff filed an Amended Complaint on October 29, 2014. (Dkt. No. 21). The claims in the First Amended Complaint were diligently litigated before the Parties reached a proposed Settlement. At all times during the case's pendency, FirstPoint resisted all claims asserted against it. It contended that its past and current procedures with respect to reporting public record information in employment-purposed consumer background reports were compliant with the FCRA and did not constitute a willful violation of the statute.

Ultimately, the Parties reached a settlement after an in-person mediation session and numerous follow-up phone calls regarding settlement, all supervised by John G. Bickerman. Mr. Bickerman is an experienced neutral with prior FCRA and class-action mediation experience. This extended effort finally resulted in an agreement on the principal terms of the settlement, preliminarily approved by this Court on January 14, 2016. (Dkt. No. 36). Plaintiff and her counsel have concluded that the settlement is fair, reasonable, adequate, and in the best interests of the Class based upon their investigation and discovery, after taking into account the contested issues involved, the uncertainty and cost of further prosecution, and the significant benefits to be received by the class members pursuant to the Settlement Agreement. As explained below, this Settlement is an excellent result for the Class Members. Class Counsel now moves the Court to grant final approval to the Settlement, and to approve their requested award of attorney's fees and costs, as well as a service award for the Class Representative for her role in the successful prosecution of this matter. A proposed Final Approval Order is attached as Exhibit "1".

THE SETTLEMENT, NOTICE, AND CLAIMS PROCESS

A. Settlement Terms

As described below and in the Motion for Preliminary Approval of this settlement, the outcome reached between Class Counsel and Defendant provides a cash fund for each of the two settlement classes, importantly, without a reversion of settlement funds to the Defendant.

The Court preliminarily certified two settlement classes:

Class A contains 35,873 members comprised of the following individuals that do not also meet the requirements for inclusion in Class B:

> All natural persons residing in the United States (including all territories and other political subdivisions of the United States) (a) who were the subject of a consumer report sold by FirstPoint to a third party on or after June 26, 2012 up to and including September 16, 2015, (b) furnished for an employment purpose, (c) where

> FirstPoint's records indicate that the report involved a courthouse search for public records, (d) which report contained at least one criminal record hit, and (e) where no notice was sent under § 1681k(a)(1). Excluded from the class definition are any employees, officers, directors of FirstPoint, any attorney appearing in this Lawsuit, and any judge assigned to hear this action together with his or her immediate family and staff.

This class litigated a claim for Defendant's alleged violation of 15 U.S.C. § 1681k(a), which required a contemporaneous notice to be sent to consumers whenever their report was furnished to an employer unless the consumer-reporting agency maintained strict procedures designed to ensure that the criminal records it furnished were complete and up to date.

Class B contains 112 members comprised of the following individuals that do not also meet the requirements for inclusion in Class A:

> All natural persons residing in the United States (including all territories and other political subdivisions of the United States) (a) who were the subject of an employment consumer report sold by FirstPoint to a third party, and (b) where FirstPoint's records indicate that the consumer filed a dispute with FirstPoint about the report on or after July 27, 2012 up to and including September 16, 2015. Excluded from the class definition are any employees, officers, directors of the FirstPoint, any attorney appearing in this Lawsuit, and any judge assigned to hear this action together with his or her immediate family and staff.

Class B consumers had previously made a dispute regarding the accuracy of information in their employment background check.

There are also 34 Class Members that belong to both Class A and Class B, for a total of 36,019 Class Members.

1. Settlement Consideration

The Settlement Agreement provides for the creation of two Settlement Cash Funds, one to compensate Class A Members and the other to compensate Class B Members. To the extent that a Class Member is a member of both Class A and Class B, he or she will recover from both Settlement Funds.

The Class A Settlement Fund is $525,000, inclusive of attorney's fees and costs, the Named Plaintiff's service award, and class member payments. Each Class A Member is eligible to receive a *pro rata* payment, subject to a $180 limit after payment of attorney's fees, from the Class A Settlement Fund. In order to receive this payment, Class A Members had to submit a claim form to the Settlement Administrator.[1] Accordingly, 3,188 Class A Members have submitted a valid claim form, resulting in an estimated $164 payment to each Class A Member, subject to a deduction for attorney's fees and costs. If the maximum amount of attorney's fees and costs are awarded, then each Class A Member who submitted a valid claim form will receive approximately $110.

Each of the 146 Class B Members will receive a check for $500, subject to deduction for attorney's fees and costs. These checks will be sent automatically and Class B Members do not have to submit a claim form or take any other action to receive this payment.[2] If the full amount of attorney's fees and costs is awarded, then each Class B Member will receive a check for $330. To the extent that a Class B Member was also a Class A Member and submitted a valid claim form, he or she will receive both the *pro rata* Class A Settlement Fund payment as well as the automatic $330 Class B Settlement Fund payment.

2. The Release

The release is very narrowly tailored to the specific claims and issues in this case.

Class A Members will release Defendant and related persons from any claims relating to

[1] The claim process required only that the class member verify that he or she had suffered some actual harm related to the accuracy, completeness or currency of their employment report.

[2] Class B members previously disputed information in their report they alleged to be inaccurate or incomplete. A claims process to require verification of that previously asserted belief would be redundant.

the preparation or provision of background checks and consumer reports by FirstPoint under 15 U.S.C. § 1681k or its state law equivalents, and any claims for class relief or punitive damages for claims that could have been brought in the Lawsuit.

Class B Members will release Defendant and related persons from any claims relating to the preparation or provision of background checks and consumer reports by FirstPoint under 15 U.S.C. §§ 1681e, 1681i,[3] or 1681k, or their state law equivalents, including any duties or obligations to investigate consumer disputes, and any claims for class relief or punitive damages for claims that could have been brought in the Lawsuit.

B. The notice process is complete.

In accordance with the Preliminary Approval Order, Class Counsel retained a national class administration company, American Legal Claim Services, LLC ("ALCS"), to accomplish printing, mailing, and processing of the notices for the settlement. All actions taken by the Class Administrator to date have been under the direct supervision of Class Counsel with many communications, decisions, and consultations required between the Administrator and Class Counsel throughout the notice process. In addition, Class Counsel and Defendant's counsel have consulted and worked together throughout the notice and claims process to reach consensus on its day-to-day implementation.

Defendant compiled the class lists, containing the names of each Class A and Class B Member, as well as their last verified address. These addresses were updated using the U.S. Postal Service's National Change of Address database. There were 35,873 Class A Members, 112 Class B Members, and 34 Class Members who were members of both Class A and Class B, for a total

[3] Section 1681e(b) requires Defendant to follow "reasonable procedures" to ensure that its furnished reports were maximally accurate. Section 1681i requires the Defendant to conduct a "reasonable reinvestigation" of information directly disputed by a consumer.

of 36,019 Class Members. ALCS mailed the appropriate notices to these class members. Declaration of American Legal Claim Services, LLC ¶ 4 (attached as Exhibit "2"). As of April 25, 2016, 4,181 notices were returned by the U.S. Postal Service as undeliverable. Ex. 1, ALCS Decl., ¶ 6. In addition, 126 were returned with a forwarding address. All of these notices were re-mailed. Ex. 1, ALCS Decl., ¶ 6. The Settlement Administrator used a nationally recognized location service to locate and update the remaining addresses, and re-mailed those 4,116 notices. *Id.* The Settlement Administrator was unable to locate updated addresses for 191 Class Members. *Id.* An additional 133 notices were returned as undeliverable, despite using the location service. *Id.* As of April 25, 2016, there were a total of 324 Class Members for which no forwarding or updated address was found. *Id.* Therefore, a total of 35,695 notices were delivered, or a 99.1% delivery rate. Ex. 1, ALCS Decl., ¶ 7.

In addition to the mailed notice, ALCS established a settlement website, at http://www.fpfcrasettlement.com/. The website provides class members and the general public access to the Settlement Agreement, the Preliminary Approval Order, the Class Notices, the key deadlines and court hearing information for the settlement process, a section with frequently-asked questions, instructions on how to submit a claim form, and the contact information for Class Counsel and the Settlement Administrator.

The notice process was certainly the best available given the facts of this case. While it is almost always difficult to obtain current addresses and identification information on class members, the Parties and Administrator were able to minimize this problem in this case by obtaining current mailing addresses for as many Class Members as possible from the U.S. Postal Service's National Change of Address database.

The Class Administrator reports a 99.1% effective delivery rate, which courts have

uniformly found to be an acceptable reach rate. *See e.g. In re Serzone*, 231 F.R.D. 221, 236 (S.D. W. Va. 2005) (approving notice program where direct mail portion was estimated to have reached 80% of class members); *Martin v. United Auto Credit Corp.*, 3:05cv00143 (E.D. Va. Aug. 29, 2006) (Final Order approving class notice with approximately 85% delivery rate); *In re Zurn Pex Plumbing Prod. Liab. Litig.*, No. 08–MDL– 1958 ADM/AJB, 2013 WL 716088 (D. Minn. Feb. 27, 2013) (approving settlement where 80.6% of the class received notice).

C. Class Member Reaction

Unquestionably, the settlement is an excellent result for the Classes. Out of the class members that received notice, the Settlement has produced only 11 timely requests for exclusion (opt-out), and one untimely request. Ex. 1, ALCS Decl., ¶ 11. This results in a .03081% opt-out rate.[4] Five class members also submitted *pro se* objections to the Settlement. Class Counsel are filing a separate response to these objections. These objections, while well intentioned, apparently miscomprehend the nature of the case, settlement, and release.

However, the fact that there were only five objections and eleven opt-outs from 36,091 Class Members is a factor that militates strongly in favor of finding the notice program and settlement a success. Whether the Court considers the thousands of Class Members who neither objected nor opted out, the 3,188 Class A Members who submitted a claim for a cash payment, or the 3,245 who affirmatively telephoned the Settlement Administrator for information about the Settlement and thereafter did not object or opt out, the collective voice of the Classes is clearly positive. Ex. 1, ALCS Decl., ¶¶ 8, 10. By any account, this settlement is a resounding success for the class members.

[4] In calculating the opt-out rate, Class Counsel assumed that 99.1% of all class members had been successfully found and reached by mail, thus yielding a .03081% opt-out rate. The opt-out as it relates to the entire class size is just .03053%.

ARGUMENT

A. The proposed settlement is fair, reasonable, and adequate and should be approved.

1. The Standard for Judicial Approval of Class Action Settlements

There is a strong judicial policy within this Circuit favoring resolution of litigation prior to trial. *See, e.g., S.C. Nat'l Bank v. Stone*, 749 F. Supp. 1419, 1423 (D.S.C. 1990) ("[t]he voluntary resolution of litigation through settlement is strongly favored by the courts") (citing *Williams v. First Nat'l Bank*, 216 U.S. 582 (1910)). Settlement spares the litigants the uncertainty, delay and expense of a trial and appeals while simultaneously reducing the burden on judicial resources. As the court in *S.C. Nat'l Bank* observed:

> In the class action context in particular, there is an overriding public interest in favor of settlement. Settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strains such litigation impose upon already scarce judicial resources.

749 F. Supp. at 1423 (quoting *Armstrong v. Bd. of Sch. Dirs*., 616 F.2d 305, 313 (7th Cir. 1980)).

Approval of a class action settlement is committed to the "sound discretion of the district courts to appraise the reasonableness of particular class-action settlements on a case-by-case basis, in light of the relevant circumstances." *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 663 (E.D. Va. 2001). However, "there is a strong initial presumption that the compromise is fair and reasonable." *Id. (quoting S. Carolina Nat'l Bank v. Stone*, 139 F.R.D. at 339).

Rule 23(e) requires judicial review of the resolution of a class action such as this one. Rule 23(e) imposes two basic requirements on the parties and on the Court before the approval of a class settlement and dismissal. First, the Court must determine that notice was directed "in a reasonable manner to all class members." Fed R. Civ. P. 23(e)(1)(B). The second part of the Court's

determination of compliance with Rule 23(e)(1)(c) requires a two-part analysis (often referred to in this Circuit as the *Jiffy Lube* factors). *US Airline Pilots Association, v. Velez*, Civ. No. 3:14-cv-00577, 2016 WL 1615408, *4 (W.D. N.C. April 22, 2016) (Conrad). *See In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158–59 (4th Cir. 1991)). The Court must determine whether the settlement is "fair and reasonable" and then whether the settlement is "adequate." The parties address each of these requirements below.

2. The notice to the Class Members was reasonable.

In a settlement class maintained under Rule 23(b)(3), the class notice must meet the requirements of both Federal Rules of Civil Procedure 23(c)(2) and 23(e). Rule 23(e) specifies that "[n]o class action may be 'dismissed or compromised without [court] approval,' preceded by notice to class members." Fed. R. Civ. P. 23(e). Rule 23(c)(2) requires that notice to the class must be "the best practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c). The Rule also requires that the notice inform potential class members that (1) they have an opportunity to opt out; (2) the judgment will bind all class members who do not opt out; and (3) any member who does not opt out may appear through counsel. *Id.* The Court must consider the mode of dissemination and the content of the notice to assess whether such notice was sufficient. *See* Federal Judicial Center, *Manual for Complex Litigation* § 21.312 (4th 2004).

In order to effectuate the notice process in this case, the Defendant compiled the class list and provided it to the Settlement Administrator. The Settlement Administrator then ran the class list through the U.S. Postal Service's National Change of Address database to obtain current mailing addresses for each class member. After class members' addresses were updated, the Settlement Administrator sent the appropriate notices to the class members by First Class U.S.

mail. After a re-mailing process, the Class Administrator determined that 99.1% of the notices were delivered.

The efforts that the Administrator used to identify class member addresses was thorough given the size of the class and the terms of the Settlement Agreement governing the methods by which the Administrator was to locate addresses. With a 99.1% delivery rate there was truly no better alternative that could have been attempted. The process by which the class list was developed and the mailing implemented is a tried-and-true method, and very likely the best method, for identifying class members, obtaining their addresses, and mailing the class notice to them.

As another court in the Fourth Circuit has held, "[w]hat amounts to reasonable efforts under the circumstances is for the Court to determine after examining the available information and possible identification methods . . . 'In every case, reasonableness is a function of [the] anticipated results, costs, and amount involved.'" *Fisher v. Va. Elec. & Power Co.*, 217 F.R.D. 201, 227 (E.D. Va. 2003) (citations omitted). The Supreme Court has concluded that direct notice satisfies due process, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812-13 (1985), and other courts—including courts within the Fourth Circuit—have approved mailed-notice programs that reached a much smaller percentage of class members than the class notice reached in this case. *See In re Serzone*, 231 F.R.D. at 236 (approving notice program where direct mail portion was estimated to have reached 80% of class members); *Martin v. United Auto Credit Corp.*, 3:05cv00143 (E.D. Va. Aug. 29, 2006) (Final Order approving class notice with approximately 85% delivery); *Alberton*, 2008 WL 1849774, at *3 (approving direct notice projected to reach 70% of class with internet and publication notice); *Grunewald*, 235 F.R.D. at 609 (approving 55% mailed delivery rate, with internet and publication notice).

FirstPoint also served notice of this settlement on the relevant state and federal authorities as required by the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1715. No appearance has been made by any state attorney general or the attorney general of the United States pursuant to CAFA, and none of these agencies or states objected to the Settlement. The Parties' efforts to provide class members with notice was the best available under the circumstances given: (a) the available information; (b) the possible identification methods; (c) the number of class members; and (d) the amount of the settlement. The Parties have complied fully with the Court's Preliminary Approval Order, and have taken reasonable steps to ensure that the class members were notified—in the best and most direct manner possible—of the Settlement's terms and excellent benefits.

3. An analysis of the Jiffy Lube factors demonstrates that the settlement is fair and reasonable.

The next part of the Court's Rule 23(e)(1)(c) determination requires a two-part analysis, often referred to as the *Jiffy Lube* factors. The Court must determine whether the settlement is "fair and reasonable" and then whether the settlement is "adequate." The approval of a proposed settlement agreement is in the sound discretion of the Court. *In re Jiffy Lube Sec. Litig.*, 927 F.2d at 158. As the Court has recently summarized, "A four-factor test is applied to determine the fairness of a proposed settlement: '(1) the posture of the case at the time the proposed settlement was reached, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the settlement negotiations, and (4) counsel's experience in the type of case at issue.'" *US Airline Pilots Association, v. Velez*, Civ. No. 3:14-cv-00577, 2016 WL 1615408, *4 (W.D. N.C. April 22, 2016) (Conrad) (citations omitted).

The first step in the *Jiffy Lube* analysis is a determination as to the fairness of the settlement. The fairness factors are critical to the protection of the class members from unscrupulous class counsel and relate to whether there has been arm's-length bargaining. *See In re Mid-Atlantic*

Toyota Antitrust Litig., 564 F. Supp. 1379, 1383 (D. Md. 1983); *S. Carolina Nat'l Bank v. Stone*, 139 F.R.D. 335, 339 (D.S.C. 1991). A proposed class action settlement is considered presumptively fair where there is no evidence of collusion and the parties, through capable counsel, have engaged in arm's-length negotiations. *See S. Carolina Nat'l Bank*, 139 F.R.D. at 339. As described below, the settlement reached in this case is clearly fair and each of the *Jiffy Lube* factors are satisfied.

i. The posture of the case at the time of settlement

The Parties agreed to settle only after exchanging and thoroughly reviewing the evidence and claims in this case. The Defendant filed a motion to dismiss, which resulted in the Plaintiff's filing of an amended complaint. The Parties conducted extensive and substantive settlement talks and an in-person mediation session, supervised by John Bickerman, a private mediator. There was substantial work between counsel leading up to and many, many more such communications following the mediation session, which were also facilitated by Mr. Bickerman. The posture of the case at the time of settlement is a factor that supports approval. *See In re Microstrategy, Inc.*, 148 F. Supp. 2d at 664 (approving of proposed settlement despite the fact that it was reached "early" in litigation).

ii. The extent of discovery that has been conducted

The Parties also engaged in discovery sufficient to aid counsel and the Court in evaluating Plaintiff's claims and Defendant's defenses. After the Defendant filed a Motion to Dismiss and the Plaintiff filed an Amended Complaint, the Parties exchanged numerous documents and information related to the merits of the case, as well as the class certification elements before engaging in an in-person mediation session mediated by a private mediator. These facts further point to the conclusion that the proposed Settlement was the product of arm's-length negotiation

by experienced counsel and thus warrants preliminary approval. *See In re Jiffy Lube*, 927 F.2d at 159.

iii. The circumstances surrounding the negotiations

The Parties only agreed to settle after the Defendant's Motion to Dismiss, as well as the Plaintiff's claims and class certification allegations, had been fully investigated. The Parties were each fully prepared to proceed with extensive written discovery and depositions, when they reached a settlement as a result of an arm's-length negotiation process with the assistance of a private mediator, John Bickerman. The parties attended a full-day, in-person mediation session, with substantial mediation discussions continuing after the mediation session. These post-mediation talks were heavily supervised by Mr. Bickerman, who helped the Parties reach the settlement terms memorialized in the Settlement Agreement. Importantly, the issue of attorney's fees was not discussed until all of the other settlement terms had been finalized. These facts surrounding the negotiations more than satisfy the requirement that the settlement not be one brokered through "collusion or coercion." *See, e.g.*, *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc*., 396 F.3d 96, 117 (2d Cir. 2005); *Weiss v. Regal Collections,* Civ. No. 01CV881-DMC, 2006 WL 2038493, at *2 (D.N.J. July 19, 2006); *Strang*, 890 F. Supp. at 501-02 (concluding fairness requirement met where "plaintiffs' counsel, with their wealth of experience and knowledge in the securities-class action area, engaged in sufficiently extended and detailed settlement negotiations to secure a favorable settlement for the Class").

iv. Experience of counsel

One of the most important factors for the Court to consider is the unique and substantial experience of Class Counsel. Class Counsel have successfully litigated more FCRA cases—both to individual trials and to class action results—than all or nearly all other attorneys who have

litigated under the statute. This is even more true with respect to claims brought against consumer-reporting agencies under the FCRA section at issue in this case, 15 U.S.C. §1681k. *See, e.g., Williams v. Lexis-Nexis Risk Mgt.*, No. 3:06CV241 (E.D. Va. 2008); *Berry v LexisNexis Risk & Info. Analytic Solutions, Inc., No.* 3:11CV274 (E.D. Va. Sept. 5, 2104); *Henderson, et al. v. Backgroundchecks.com*, No. 3:13cv29 (E.D. Va.); *Henderson v. Corelogic National Background Data, LLC*, 3:10-cv-97 (E.D. Va.); *Roe v. Intellicorp, Inc.*, No. 1:12CV2288-JG (N.D. Ohio June 5, 2014). Accordingly, Class Counsel entered the case prepared and able to learn FirstPoint's process and oppose its litigation positions. And most critically here—to assess the settlement leverages and value of class member claims.

Courts in this Circuit and elsewhere have noted Class Counsel's experience in both class action litigation and FCRA litigation. They have extensive collective experience in both consumer protection and class action litigation, having been involved in numerous, large consumer class actions where they have been found to be adequate class counsel. *See, e.g., Berry v. Schulman*, 807 F.3d 600, 614, 618 (4th Cir. 2015); *Soutter v. Equifax Info. Servs., LLC*, 3:10CV107, 2011 WL 1226025 (E.D. Va. Mar. 30, 2011) ("[T]he Court finds that Soutter's counsel is qualified, experienced, and able to conduct this litigation. Counsel is experienced in class action work, as well as consumer protection issues, and has been approved by this Court and others as class counsel in numerous cases."); *Manuel v. Wells Fargo Bank, Nat. Ass'n,* No. 3:14CV238, 2015 WL 4994549, at *15 (E.D. Va. Aug. 19, 2015) (same); *James v. Experian Info. Solutions*, No. 3:12CV902 (E.D. Va. Oct. 29, 2014) (approving in open court class counsel's hourly rates as reasonable and finding "that class counsel are experience and qualified."); *see also* Declaration of Matthew J. Erausquin, ¶ 11 (attached as Exhibit "3").

There are advantages to the parties and to the docket when opposing counsel are already

experts on the legal and factual issues in a case and in a field of practice. *See S. Carolina Nat'l Bank*, 139 F.R.D. at 339 (concluding fairness met where settlement discussions "were, at times, supervised by a magistrate judge and were hard fought and always adversarial," and those negotiations "were conducted by able counsel" with substantial experience in the area of securities law). Experienced counsel negotiated the Settlement, making it their first priority to bring the best benefit possible to their clients, and in Plaintiffs' cases, to the classes.

4. An analysis of the Jiffy Lube factors demonstrates that the settlement is adequate.

The Court must also determine whether the proposed class settlement is substantively "adequate," the second prong of the *Jiffy Lube* analysis. The Fourth Circuit's decision in *Jiffy Lube* held that the adequacy inquiry is guided by evaluating: (1) the relative strength of the plaintiffs' case on the merits; (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial; (3) the anticipated duration and expense of additional litigation; (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment; and (5) the degree of opposition to the settlement. *In re Jiffy Lube*, 927 F.2d at 159. As described below, the settlement reached in this case is clearly adequate and each of the *Jiffy Lube* adequacy factors are satisfied.

i. The relative strength of the Plaintiff's case on the merits

The Plaintiff has, at all times, believed that this case was very strong in several regards, including being able to establish basic FCRA liability and that FirstPoint's FCRA violations were willful. However, the Defendant was prepared at all times to contest both assertions. Under the FCRA, liability can be established either upon a showing of negligent or willful noncompliance. 15 U.S.C. §§ 1681n & 1681o. However, only in the case of willful noncompliance may a consumer recover statutory damages. Thus, the Class would have had to prove not only the violation itself,

but that same was committed willfully. *See Berry v. Schulman*, 807 F.3d 600, 615 (4th Cir. 2015). In light of this substantial risk, the guaranteed class recovery of amounts that are within the range of statutory damages ($100-$1,000) is excellent.

ii. The existence of any difficulties of proof or strong defenses

Litigation and negotiations in this case were contentious as each side zealously represented the interests of their respective clients. FirstPoint retained Seyfarth Shaw, and its nationally respected FCRA litigation team to defend the case. This defense team regularly represent national defendants opposite Class Counsel, and are experienced FCRA class action litigators. There are a range of viable FCRA-specific defenses that are typically raised—standing in a 'no actual damages' case; the alleged lack of uniformity of a consumer-reporting agency's procedures; variances in class member willfulness proofs. This defense team is informed as to each of these.

The determination of when it is appropriate to settle a case is one that is entrusted to experienced class counsel. But every case—no matter how conceivably strong it may seem—will always have an element of risk at its core. This is particularly true for a highly technical set of statutory claims under the FCRA. Settlement is the only outcome that allows both sides to be assured of a certain ending to the litigation, alleviating both the risk and cost inherent in further litigation to both sides, as well as the additional burden on the Court. This case was no exception, and in fair consideration of the strengths and weaknesses (as well as with significant involvement by the mediator), Plaintiff's counsel felt that settlement was appropriate at this juncture because of the excellent result for the class based on the allegations in the Amended Complaint. *See Cardiology Assocs., P.C. v. Nat'l Intergroup, Inc.,* No. 85CV4038, 1987 WL 7030, at *2 (S.D.N.Y. Feb. 13, 1987) (concluding that because continued prosecution of the action would have been expensive and time-consuming, and would have involved substantial risks, "it [was] not

unreasonable for the plaintiff class to take a 'bird in the hand'"); *Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. 540, 547 (D. Colo. 1989) (noting that "[i]t has been held prudent to take 'a bird in the hand instead of a prospective flock in the bush'" in weighing the value of an immediate recovery against "the mere possibility of future relief after protracted and expensive litigation") (quoting *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 740 (D.W.V. 1970)); *In re Microstrategy, Inc.*, 148 F. Supp. 2d at 667.

iii. Anticipated duration and expense of additional litigation

Had this case not settled at this posture, the cost and expensive of litigation would have skyrocketed. The Parties would have incurred significant costs completing written discovery, conducting depositions, and likely preparing for trial. The cost of trial preparation for each party would have been very high—easily in the tens of thousands of dollars. The Settlement avoids the increased cost of litigation to both sides, as well as the burden of a class action trial on this Court's docket, while still providing considerable benefits to the Classes. This factor weighs in favor of the adequacy of the Settlement.

iv. Solvency of the Defendant

FirstPoint is solvent. However, it is a smaller player in the background-check industry and had only modest insurance. It could pay a judgment, but the amount available to resolve the case at a later stage would go down rather than up as significant additional attorney's fees and expenses would have drained the available settlement resources deeper in the case.

v. Degree of opposition to the Settlement

Despite mailing 36,019 total notices, only five class members have objected and eleven opted out. "Such a lack of opposition to the partial settlement strongly supports a finding of adequacy, for '[t]he attitude of the members of the Class, as expressed directly or by failure to

object, after notice to the settlement is a proper consideration for the trial court.' *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975)." *In re Microstrategy*, 148 F. Supp. 2d at 668. Courts recognize that where the class as a whole supports a settlement, it should be approved. *See, e.g., In re Beef Industry Antitrust Litig.*, 607 F.2d 167, 180 (5th Cir. 1979), *cert. denied sub nom. Iowa Beef Processors, Inc. v. Meat Price Investigators Ass'n*, 452 U.S. 905 (1981); *Laskey v. Int'l Union*, 638 F.2d 954 (6th Cir. 1981) (small number of objectors demonstrates fairness of a settlement); *Shlensky v. Dorsey*, 574 F.2d 131 (3rd Cir. 1978) (same); *Bryan v. Pittsburgh Plate Glass Co. (PPG Indus., Inc.)*, 494 F.2d 799, 803 (3d Cir.) (20 percent opted out or objected; settlement approved), *cert. denied sub nom. Abate v. Pittsburgh Plate Glass Co.*, 419 U.S. 900, (1974); *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20 (2d Cir. 1987) (thirty-six percent; settlement approved); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 624 (N.D. Cal. 1979) (sixteen percent; settlement approved). The overwhelming support from the class members for this Settlement indicates that it is adequate and should be approved.

B. The Court should approve the request for Ms. Oliver's service award and for attorney's fees and expenses.

1. The Court should grant Plaintiff's motion for a service award.

Courts generally recognize that "service awards reward representative plaintiffs' work in support of the class, as well as their promotion of the public interest." *Deem*, 2013 WL 2285972, at *6 (citing *Jones*, 601 F. Supp. 2d at 767). *Berry v. Schulman*, 807 F.3d 600, 613 (4th Cir. 2015). Plaintiff requests, and the Defendant does not oppose, a service award for Ms. Oliver in the amount of $2,500 for her service as Class Representative. This award is to be deducted from the attorney's fees and costs ceiling and will not further reduce the benefits available to the Class Members. In this case, Plaintiff agreed to serve as the Class Representative in this lawsuit after Class Counsel explained to her the responsibilities required of an individual serving in this role. She understands

the basic theories of this lawsuit, has kept abreast of the case's status, reviewed documents provided to her by Counsel, and discussed with Counsel aspects of the case, discovery issues, and settlement negotiations. This Court has recognized that such awards are common. *Smith v. Krispy Kreme Doughnut Corp.*, No. 1:05CV00187, 2007 WL 119157, at *4 (M.D.N.C. Jan. 10, 2007) (approving a $15,000 service award to the class representative in a class action lawsuit) (citing *In re S. Ohio Corr. Facility*, 175 F.R.D. 270, 272 (S.D. Ohio 1997); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)).

2. The requested attorney's fee of thirty-three percent of the settlement fund is squarely within the range of approval.

The Supreme Court has consistently calculated attorney's fees in common fund cases on a percentage-of-the-fund basis. *See Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 165-67 (1939); *Boeing Co. v. van Gemert*, 444 U.S. 472, 478-79 (1980); *Blum v. Stenson*, 465 U.S. 886, 900 n. 16 (1984); *see also* Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 242 (Oct. 8, 1985) (noting that fee awards in common funds cases have historically been computed based on a percentage of the fund). The Supreme Court has never adopted the lodestar method over the percentage-of-recovery method in a common fund case, even when some lower federal courts began using the lodestar approach in the 1970's. *See Shaw v. Toshiba Am. Info. Sys., Inc.* 91 F. Supp. 2d 942, 943 (E.D. Tex. 2000); *see also Manual for Complex Litigation* § 24.121 at 210.,

In the Fourth Circuit, attorney's fees in common fund cases such as this one are almost universally awarded on a percentage-of-the-recovery basis. *Krispy Kreme Doughnut Corp.*, 2007 WL 119157, at *1; *see DeLoach v. Philip Morris Cos.*, No. 00-1235, 2003 WL 23094907, at *3 (M.D.N.C. Dec. 19, 2003) (citing, with approval for this same proposition, *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 215 (D. Me. 2003)); *see also Strang,*

890 F. Supp. at 502 (explaining "[a]lthough the Fourth Circuit has not yet ruled on this issue, the current trend among the courts of appeal favors the use of a percentage method to calculate an award of attorneys' fees in common fund cases.").

The Fourth Circuit has not established a benchmark for fee awards in common funds cases, but district courts within the Fourth Circuit have noted that most fee awards range from 25 percent to 40 percent of the settlement fund. In fact, a comprehensive study of attorney's fees in class action cases notes "a remarkable uniformity in awards between roughly 30% to 33% of the settlement amount." Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. of Empirical Legal Studies 27, 31, 33 (2004).

In this case, the Defendant agreed not to oppose Class Counsel's fee request in the total percentage of 33% of each of the Settlement Funds. As with any class case that they agree to take on, Plaintiff's counsel live by the result that they obtain for the class members. In this case, where they bore the risk of the litigation entirely and advanced significant funds in furtherance of the litigation, Class Counsel submits that fee of 33% of the cash recovered for the classes is reasonable. Class Counsel has consistently taken the position in all cases that the attorney's fee should be based on a percentage of the recovery obtained for the class. They do not attempt to attribute value to "making the world a better place" or based on the future expected value to the class members of the Defendant's change in its procedures. Class Counsel's fee is and should be determined by the amount of cash that moves from the Defendant's control to the Class Members. This has been true even in cases where the result is an objectively small fee such as in *Mayfield v. Memberstrust Credit Union*, 3:07cv506 (E.D. Va. Nov. 7, 2008), where the class size was so small that counsel's fee ended up being $8,300.00, less than 1/10 of the actual time counsel had invested in the case. Indeed, in *Conley v. First Tennessee*, 1:10cv1247 (E.D. Va.), counsel took the same consistent

position with respect to a class of 350 consumer and resulted in recovery of an approved fee of only $20,000.00. (Dkt. No. 37). The same is true in another case, *Lengrand v. Wellpoint*, No. 3:11Cv333-HEH (Dkt. No. 42), counsel requested only 20% of the class recovery, $8,550.00, where the class size was very small. In each case, the standards of Rule 23 demand that Class Counsel represent the interest of the classes with the same attention, zeal and competence whether the class is in the hundreds of thousands or is less than a hundred.

This symmetry of incentives between counsel and the class motivates Class Counsel to maximize class cash benefit to the largest degree possible. In this case, Class Counsel assumed the entire risk of the litigation, staffing the case with experienced attorneys, spending significant time to investigate the case prior to filing, engaging in informal discovery, vigorously litigating the case in an out of state venue. Finally - with persistence and after multiple phone and in-person conversations, the Parties were able to reach this settlement. Doing so required the litigation of a complex federal case while at the same time attempting to find the terms where the parties might find compromise. The fee has been earned because of the excellent outcome achieved by counsel on behalf of the Class. The risks taken should be compensated, as law recognizes, not only because of the outcome, but because of the substantial investment and risk incurred. Class Counsel requests a fee of 33% of the Settlement Funds. There is no doubt that the excellent outcome in this case for the Class was the result of risk-taking and really hard work by a group of skilled lawyers.

In this case, and in all cases in which Plaintiff's counsel will come before this Court, they submit that the proper measure of compensation should be driven by the benefit actually obtained for the class members. Under the circumstances of this case and the applicable law, the Court should award the requested fee of thirty-three percent of the Class A and Class B Settlement Funds, which totals $197,340.

3. A cross-check of time incurred by attorneys and paralegals provides support for the requested fee.

A cross-check is not required to determine the fairness of a fee when the percentage-of-recovery method is used. However, courts have, on occasion, requested information regarding an estimate of Class Counsel's lodestar as a cross-check in determining the percentage of the common fund that should be awarded. *Manual for Complex Litigation (Fourth)* § 21.724. Class Counsel have supplied an estimate of their lodestar and expenses, which are $175,925.00 in fees, and $12,039.98 in total expenses. Ex. 3, Erausquin Decl. ¶¶ 28-29. In this case, each class member will receive meaningful cash benefits from the Settlement. Plaintiff has already demonstrated that a fee percentage of one-third of the class recovery is appropriate. In fact, "empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in the class actions average around one-third of the recovery." 4 Newberg on Class Actions § 14:6 (4th ed.); *see also In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 735 (E.D. Pa. 2001)(review of 289 class action settlements demonstrates "average attorney's fees percentage [of] 31.31%" with a median value that "turns out to be one-third.").

When the court also looks at the attorneys and the hours they and their law firms expend on a given case, it may give additional support to an award of a fee. In this case, Class Counsel have provided an estimate of their billable time and expenses with their attached declaration, which total $175,925.00 in fees, and $12,039.98 in total expenses. Ex. 3, Erausquin Decl. ¶¶ 28-29. The time actually expended in this case for important tasks such as answering class members' questions and significant time spent conferring between counsel has never been recorded, as it has a tendency to be duplicative. Thus, even if the Court chose not to use the percentage-of-recovery method and awarded fees strictly by the hours spent (as in a contested posture), the current multiplier is 1.05.

The Fourth Circuit's decision in *In re Abrams & Abrams, P.A.*, guides the court's

assessment of a reasonable multiplier to compensate Plaintiff's counsel for shouldering the entire burden of accepting a complex case on contingency:

> The chief error in the district court's analysis was its failure to recognize the significance of the contingency fee in this case. The court obviously knew that a contingency fee was involved, but it did not give that fact the weight it was due in the decisional calculus. After quoting language from *Allen* stating that contingency agreements are subject to supervision by courts for reasonableness, 606 F.2d at 435, the court merely stated that it "must consider the other relevant *Barber* factors in order to determine the reasonableness of the contingency fee requested by Plaintiff's Counsel." *Pellegrin*, 598 F.Supp.2d at 728. It then proceeded to apply an hourly rate calculation based on dubious estimations of the applicable hours and rates with no further consideration of the relevance of the contingency fee agreement. *Id.* at 728–30. Fixing a lodestar fee in this contingency case was error and threatens to nullify the considerable advantages of contingency arrangements.

605 F.3d at 245. As the Fourth Circuit held, the lodestar alone is insufficient to account for the contingency nature of this case and the risk borne by Plaintiff and her counsel. Therefore, in the event that the Court did not choose to adopt the percentage-of-recovery method here, it could similarly approve the requested fee award by using a multiplier of 1.05. Such a multiplier is justified given the contingent nature of the case, the significant risk incurred, and the result achieved. It is also consistent with comparable multipliers approved as cross checks in other cases.[5] However, in this case, and in all cases in which Plaintiff's counsel will come before this Court, they submit that the proper measure of compensation should be driven by the benefit actually obtained for the class members.

CONCLUSION

In summary, the Parties have reached a settlement in this case that provides genuine relief to the class members. In addition, the terms of the Settlement as well as the circumstances

[5] Professor Miller reviewed cases where federal courts used a multiplier to determine whether a multiplier was reasonable, citing cases approving a range of multipliers from 2.5 to 19.6. *See Henderson v. Axciom Risk Mgt.*, Civ. No. 3:12CV589 (E.D. Va. 2014)(Doc. 104-1) (Miller Decl. ¶¶ 32-33).

surrounding negotiations and its elimination of further costs caused by litigation this case through trial and appeal satisfy the Fourth Circuit's strictures for final approval. The Plaintiff respectfully moves the Court to grant her motion for final approval of this settlement and award the service payment and attorney's fees and costs as requested herein.

Respectfully submitted,
DIANE OLIVER

/s/ Leonard A. Bennett

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of April, 2016, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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