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

CORTEZ CODY, Individually And On Behalf Of All Others,	)	
Plaintiffs,	)	
	)	Case No.: 15-04009-CV-NKL
vs.	)	
	)	**JURY TRIAL DEMANDED**
INDUSTRIAL STAFFING SERVICES, INC.	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM IN SUPPORT OF JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Plaintiff, along with Defendant Industrial Staffing Services Inc., ("Industrial Staffing"), seek an Order (a copy of which will be emailed to the Court's Clerk): (1) preliminarily approving the class-wide Joint Stipulation of Settlement negotiated by the parties; (2) conditionally certifying this case as a class action for settlement purposes only and certifying a settlement class (hereafter, the "Disclosure Class") as defined in the Joint Stipulation of Settlement; (3) designating Plaintiff as the representative of the Disclosure Class and his attorneys as Class Counsel; (4) approving the form and manner of class notice; (5) setting a date for a final fairness hearing; and (6) preliminarily enjoining all members of the Disclosure Class from commencing, prosecuting, or maintaining any claim which has been or may have been asserted in, or encompassed by, this Action.

In support of preliminary approval, this memorandum describes Plaintiff's claims, the Defendant's principal defenses, and the proceedings leading up to the proposed settlement of this case. This memorandum also summarizes the principal provisions of the parties' Joint

Stipulation of Settlement, and demonstrates that the substantive and procedural requirements have been satisfied both for preliminary approval of the proposed settlement under Rule 23(e) and conditional certification of the Disclosure Class under Rule 23(b)(3).

I. CASE BACKGROUND, SUMMARY OF PRINCIPAL CLAIMS AND DEFENSES, AND SUMMARY OF JOINT STIPULATION OF SETTLEMENT TERMS

This case arises out of Industrial Staffing's procurement and use of criminal background check reports between December 29, 2012, and May 28, 2015, (the "Class Period"). Plaintiff alleges, on behalf of himself and a class of persons similarly situated, that Industrial Staffing violated the FCRA during the Class Period by: (1) taking adverse actions against job applicants based on consumer reports without affording the class members the opportunity to dispute the accuracy of the adverse information contained in the reports; and (2) violating the disclosure and authorization provisions of the FCRA. Industrial Staffing denies that it has violated the FCRA in any way and asserts that it could defeat class certification.

A. Procedural Background

Plaintiff filed this lawsuit on December 29, 2014, in the Circuit Court of Cole County, Missouri. On January 26, 2015, Industrial Staffing removed the case to the United States District Court for the Western District of Missouri. The parties exchanged formal discovery and additional informal discovery in an attempt to facilitate a successful mediation.

The parties participated in a day-long mediation before Magistrate Judge Matt J. Whitworth, conducted at the U.S. District Courthouse in Jefferson City, Missouri, on June 8, 2015. In preparation for the mediation session, the parties submitted to the mediator their confidential mediation memoranda. After a full day of intense arm's-length negotiations, the

parties reached an agreement on the terms of class settlement. The parties believe they were fully and adequately informed of all facts necessary to evaluate the case for settlement.

B. The Parties' Principal Claims and Defenses

1. Plaintiff's Disclosure and Authorization Claims

Plaintiff alleges in his complaint that the disclosure and authorization form Industrial Staffing provided to Plaintiff and other job applicants improperly contained extraneous information, which Plaintiff contends made the form violative of Sections 1681b(b)(2)(A)(i)-(ii). Plaintiff contends that these alleged violations were also willful, thereby permitting the recovery of statutory damages.

2. Plaintiff's Adverse Action Claims.

Plaintiff also alleges in his complaint that Industrial Staffing did not fully comply with the FCRA because he was refused employment by one of Industrial Staffing's customers, Land O'Lakes, as a result of information contained in a consumer report, and because the necessary actions and disclosures were not made to Plaintiff prior to or after that adverse action. Based upon information exchanged by the parties, Plaintiff does not believe that his adverse action claim is viable.

3. Industrial Staffing's Principal Defenses

In addition to denying liability on all asserted claims, Industrial Staffing contends that the Plaintiff and the putative class members suffered no injury or actual damages as a result of the background check process. Industrial Staffing also contends that it complied with the FCRA and that, in any event, it did not willfully violate the FCRA, and therefore Plaintiff is not entitled to recover any statutory damages either. Industrial Staffing denies that it took any adverse action against Plaintiff or that there are any other persons similarly situated to

Plaintiff. Industrial Staffing also denies that this case can or should be litigated as a class action.

C. Principal Terms Of The Joint Stipulation of Settlement

Under the parties' Joint Stipulation of Settlement, Industrial Staffing has agreed, for purposes of settlement only, to the certification of the Disclosure Class under Rule 23(b)(3), defined as "All employees or prospective employees of Defendant in the United States who were the subject of a consumer report that was sought by Defendant between December 29, 2012, and May 28, 2015, and who executed any one of the FCRA disclosure forms attached to the Joint Stipulation of Settlement. Any person who previously settled or released all of the claims covered by this settlement, or any person who previously was paid or received awards through civil or administrative actions for all of the claims covered by this settlement, or any person who excludes him/herself from the Disclosure Class after receiving notice of the settlement shall not be a member of the Disclosure Class. Members of either class are referred to hereinafter as "Disclosure Class members."

Industrial Staffing will make available to the Disclosure Class members a total fund of $175,000.00 ("Total Settlement Payment") to settle the claims of all members of the Disclosure Class, inclusive of: (a) all individual payments to the Plaintiff and all Disclosure Class members; (b) attorneys' fees of $57,750.00 (33%) plus costs; (c) an enhancement payment to the Plaintiff of $6,000.00, or such other amount as the Court may approve; and (d) the costs of the Settlement Administrator, which should not exceed $26,000.

All Disclosure Class members will be mailed a settlement check. The amount to be paid to each Disclosure Class member is calculated as follows: the $175,000.000 Total Settlement Payment will be subject to deductions for the court-approved amounts for

attorneys' fees and costs, the enhancement payment to the Plaintiff, and the cost for settlement administration, and the remaining amount after the deductions will be divided among the Disclosure Class Members according to the formula described below. All members of the Disclosure Class will receive an estimated[1] payment of $17.09.

All Disclosure Class members will be sent settlement checks and will have 180 days to cash them. Any uncashed settlement checks will revert to the Total Settlement Payment and the amount of the uncashed checks will revert to Industrial Staffing after the expiration of the 180-day period within which Disclosure Class members must cash their settlement checks. Checks that are undeliverable after one skip trace shall revert to the following *cy pres* fund: US Committee for Refugees and Immigrants**.**

As part of the settlement, Plaintiff will provide Industrial Staffing with a general release of claims. The other Disclosure Class members (except for any who opt out of the settlement) will "release and discharge Industrial Staffing and its former and present parents, subsidiaries, insurers, and affiliated corporations, and their officers, directors, employees, partners, shareholders and agents, and any other successors, assigns, or legal representatives ("Released Parties") from any and all claims, causes of action, or liabilities based on or arising out of the allegations in the Action or which could arise out of the allegations in the Complaint, under any federal, state, or local statutory or common law, including but not limited to all claims under the FCRA (the "Released Claims")." as set forth in Paragraph 9 of the Joint Stipulation of Settlement.

II. THE PROPOSED SETTLEMENT SHOULD BE PRELIMINARILY APPROVED, AND NOTICE OF ITS TERMS PROVIDED TO THE CLASS,

[1] These estimates are based on the estimated cost of the Settlement Administrator, and are subject to change to the extent that the costs of the Settlement Administrator differ from the estimated amount.

BECAUSE THE PROPOSED SETTLEMENT FALLS WELL WITHIN THE RANGE OF POSSIBLE APPROVAL AND THE PROPOSED DISCLOSURE CLASS IS CERTIFIABLE UNDER RULE 23(b)(3).

"Compromises of disputed claims are favored by the courts." *Williams v. First Nat'l. Bank,* 216 U.S. 582, 595 (1910); *Lidell by Lidell v. Bd. of Educ.*, 126 F.3d 1049, 1056 n.9 (8th Cir. 1997) ("The general principle that the law favors settlement agreements has been recognized for over 100 years"). Rule 23(e) of the Federal Rules of Civil Procedures provides that the Court must approve any settlement of a class action. In a class action, the "district court acts as a fiduciary, serving as a guardian of the rights of absent class members." *In re: Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir. 2005); *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975). The ultimate determination as to whether a proposed class action settlement warrants approval resides in the Court's discretion. *Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414, 424-25 (1968). As discussed more fully below, the Joint Stipulation of Settlement is well within the range of reasonable settlements and preliminary approval is warranted.

A. The Standards and Procedures for Preliminary Approval Under Rule 23

District court review of a proposed class action settlement is a two-step process. The first step is a preliminary, pre-notification determination as to whether the proposed settlement is "within the range of possible approval." *Armstrong v. Bd. of Sch. Dirs. of City of Milwaukee,* 616 F.2d 305, 314 (7th Cir. 1980). The first hearing merely requires the Court to make a "preliminary fairness review." *Manual for Complex Litigation* § 21.633 (4th ed. 2004).

In determining whether preliminary approval is warranted, the issue before the Court is whether the proposed settlement is fair, reasonable, and adequate, so that notice of the proposed settlement should be given to class members, and a hearing scheduled to consider

final approval. *See Wireless Tel.*, 396 F.3d at 932. The Court is not required at this point to make a final determination:

> The judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing.

Manual for Complex Litigation § 21.632, at 321. If the Court preliminarily determines that the proposed settlement is fair, reasonable, and adequate, then notice may be sent. *Id.* at 320-21. There is a presumption that a proposed class action settlement is fair and reasonable when it is the result of arms-length negotiations. *See In re Charter Commun's., Inc.*, 2005 U.S. Dist. LEXIS 14772, at * 16 (E.D. Mo. Jun. 30, 2005).

Following preliminary approval, Rule 23(e) of the Federal Rules of Civil Procedure provides the mechanism for settling a class action including, as here, through classes certified for settlement purposes only. These include the requirements that the court "direct notice in a reasonable manner to all class members who would be bound by the proposal"; that "[a]ny class member may object to the proposal"; and that the court may grant final approval of the settlement "only after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e); s*ee also Amchem Prods. v. Windsor,* 521 U.S. 591, 617 (1997).

B. The Settlement is Fair, Reasonable, and Adequate

The Eighth Circuit applies a four-factor test to determine whether a class action settlement is fair, reasonable, and adequate, which assesses:

1. the merits of the plaintiff's case;
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. "The most important consideration in deciding whether a settlement is fair, reasonable, and adequate is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." *Id.* (*quoting Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1150 (8th Cir. 1999)). The Joint Stipulation of Settlement satisfies these factors.

1. Merits of Plaintiff's Case Balanced by the Terms of the Settlement

The strength of Plaintiff's case balanced against the amount offered in settlement favors a finding that the proposed settlement is fair, reasonable, and adequate. "'[I]n any case there is a range of reasonableness with respect to a settlement.'" *In re Michael Milken and Assocs. Sec. Litig.,* 150 F.R.D. 57, 66 (S.D.N.Y. 1993) (quoting *Newman v. Stein,* 464 F.2d 689, 693 (2d Cir. 1972) (Friendly, J)). Thus, the temptation to conduct a full trial on the merits must be resisted. *See Gruinin*, 513 F.2d at 123-24 ("neither the trial court in approving the settlement nor this Court in reviewing the approval have the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute."). As one court has explained:

> It is not necessary, nor expected, that Plaintiff obtain through settlement all that would have been realized through a victorious trial. It is the intrinsic nature of a settlement that no party will completely fulfill its absolute goals, *Fox v. Glickman Corp.*, 253 F. Supp. 1005, 1012 (S.D.N.Y. 1968), but rather that, after considering all the relevant circumstances, it is resolved by all involved that it is in their best interests to terminate the litigation on the basis of a fair and reasonable compromise.

Stull v. Baker, 410 F. Supp. 1326, 1332 (S.D.N.Y. 1976).

While Plaintiff believes that his disclosure claims are meritorious, he recognizes that Industrial Staffing has asserted and/or could assert substantial legal and factual defenses to

liability on both claims. On the disclosure claim, the Parties acknowledge that there is a split in case authority at the district court level and no appellate decision on the issue. On the adverse action claim, Industrial Staffing contends that it undertook no adverse action against Plaintiff, and affirmatively advocated for Plaintiff's placement as a temporary worker at Land O'Lakes, Industrial Staffing's customer. Industrial Staffing also contends that Plaintiff is the only employee that it has not been able to secure placement with a Customer based upon information contained in a background check report. In addition to its defenses to liability, Industrial Staffing contends that, even if it could be found to have violated the FCRA, any such violation was purely technical and not willful. Industrial Staffing's "no willfulness" defense is significant to the settlement analysis, because if Industrial Staffing were to establish at summary judgment or at trial that any FCRA violations were merely negligent and not willful, Plaintiff and the class would recover nothing.

The Joint Stipulation of Settlement, by contrast, provides an immediate and definite monetary award to all claimants. "'[I]n any case there is a range of reasonableness with respect to a settlement.'" *In re Michael Milken and Assocs. Sec. Litig.,* 150 F.R.D. 57, 66 (S.D.N.Y. 1993) (quoting *Newman v. Stein,* 464 F.2d 689, 693 (2d Cir. 1972) (Friendly, J)). The monetary relief provided in the proposed Settlement places it, taken as a whole, easily within "the range of possible approval."

Accordingly, the Parties and their counsel believe that the proposed settlement is fair, reasonable, and adequate when balanced against the strength and weaknesses of each side's case.

2. Defendant's Financial Conditions

Industrial Staffing can afford to pay the settlement amount. *See, e.g., Wireless Tel.*, 396

F.3d at 933 (summarily assessing this factor in one sentence by stating that the defendant could afford to pay the settlement).

3. The Complexity And Expense Of Further Litigation

The time and cost of further litigation in this case also favors settlement. *See Charter Commun's.*, 2005 U.S. Dist. LEXIS at *26 ("The possible length and complexity of further litigation is a relevant consideration to the trial court in determining whether a class action settlement agreement should be affirmed."). With continued litigation, motion practice and appeals, this case could easily continue for years. Continued litigation would require extensive written discovery and depositions of both fact and expert witnesses. Further, additional motions related to class certification, discovery, and summary judgment also would be inevitable. A trial in this case would require an extraordinary amount of time, energy, and resources, and the appeals process would delay any judgment obtained at trial. When balanced against the time and cost associated with continued litigation, the immediate recovery provided for with this settlement favors a determination that the settlement is fair, reasonable, and adequate. *Wireless Tel.*, 396 F.3d at 933 (finding this factor satisfied where the "case had yet to complete discovery, much less the inevitable appeals that would have been necessary before a final resolution").

4. The Amount of Opposition to the Settlement

Plaintiff's attorneys are not aware of any class member who intends to oppose the settlement. *See Mehling v. New York Life Ins. Co.*, 248 F.R.D. 455 (E.D. Pa. 2008) (finding that the absence of any objections weighed in favor of approving a class action settlement); *Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 853 (E.D. La. 2007) ("The absence or small number of objections may provide a helpful indication that the settlement is fair,

reasonable, and adequate."); *Retsky Family Ltd. Partns. v. Price Waterhouse LLP*, Case No. 97 C 7694, 2001 U.S. Dist. LEXIS 20397, at *4-5 (N.D. Ill. Dec. 10, 2001) ("The absence of objection to a proposed class settlement is evidence that the settlement is fair, reasonable and adequate"). Plaintiff and his counsel believe that this settlement is fair, equitable, and reasonable to all members of the putative classes. After receiving preliminary approval from this Court, the Settlement Administrator will send a settlement check and Notice , to be jointly agreed upon by the parties and approved by this Court, to the Class Members which describes how to object to the settlement. A further in-depth inquiry into this element may be conducted by the parties and this Court after assessing the response of the class to that notice.

C. Conditional Certification Of The Disclosure Class Is Appropriate.

Settlement Classes "afford considerable economies to both the litigants and the judiciary and [are] also fully consistent with the flexibility integral to Rule 23," *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 794 (3d Cir. 1995), and they have become "a stock device" for resolving major multi-plaintiff litigation. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 618 (1997). The proposed Disclosure Class in this case fully satisfies the criteria set forth in Rules 23(a) and 23(b)(3).

1. The Requirements of Rule 23(a) are Satisfied.

In determining whether to certify a class in the context of Rule 23(e), "the Court must consider whether the proposed settlement meets the requirements under Rule 23." *Charter Commun's.*, 2005 U.S. Dist. LEXIS at *35. Rule 23(a) of the Federal Rules of Civil Procedure sets out four requirements for a class action:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or

> defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

For purposes of settlement, all four elements are satisfied. Numerosity is satisfied because there are approximately 4,693 members in the Disclosure Class. Commonality is established by the common issues of law and fact in the case. As to typicality, the claims of Plaintiff and of the Disclosure Class members "arise from the same practice or course of conduct . . . and . . . are based on the same legal theory." *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992). Finally, the requirement of "adequacy" is satisfied: there are no disabling conflicts between Plaintiff and the class, there are no issues of allocation between present and "future" claimants, and Class Counsel are experienced and accomplished in class litigation.

2. The Requirements Of Rule 23(b)(3) Are Satisfied

The proposed Disclosure Class meets the requirements of Rule 23(b)(3), under which a class action may be maintained if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem,* 521 U. S. at 623. Although Rule 23(b)(3) requires that common issues of law and fact predominate, it does not require that there be an absence of any individual issues. *In re Sugar Industry Antitrust Litig.,* 73 F.RD. 322, 344 (E.D. Pa. 1976). The Court must find that "the group for which certification is sought seeks to remedy a common legal grievance." *Hochschuler* v. *G.D. Searle & Co.,* 82 F.R.D. 339 (N.D.

Ill. 1978); *Dietrich,* 192 F.R.D. 119 (in determining whether common issues of fact predominate, "a court's inquiry is directed primarily toward whether the issue of liability is common to members of the class"). Rule 23(b)(3) does not require that all questions of law or fact be common. *See In re Telectronics Pacing Sys.,* 172 F.RD. 271, 287-88 (S.D. Ohio 1997). In this regard, courts generally focus on the liability issues and if these issues are common to the class, common questions are held to predominate over individual questions. *See id.* For purposes of the proposed settlement, common questions of law and fact predominate.

The Rule 23(b)(3) "superiority" requirement is also met because this settlement will resolve this pending litigation against Defendant in a single, consolidated proceeding—obviating the need for multiple, parallel lawsuits. The individual prosecutions of claims by approximately 4,693 Disclosure Class members would not be feasible given the relatively small size of Disclosure Class members' individual damages claims. *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.").[2] Moreover, the settlement provides class members with an ability to obtain prompt, predictable and certain relief, whereas individualized litigation carries with it great uncertainty, risk, and costs, and provides no guarantee that the injured plaintiff will obtain necessary and timely relief at the conclusion of the litigation process.

3. The Proposed Form And Manner Of Class Notices Are Appropriate And Satisfy Due Process.

The proposed Class Notice (attached to the Joint Stipulation of Settlement) is based on the model form recommended by the Federal Judicial Center. The proposed Notices

[2] Because the Court is asked to consider the propriety of class certification for settlement purposes only, the Court "need not inquire whether the case, if tried, would present intractable management problems." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

inform Disclosure Class members in plain English, of the following: (a) the claims in this case and the claims that Disclosure Class members will forfeit if they participate in the Settlement; (b) the material terms of the proposed Settlement; (c) Disclosure Class members' rights under the proposed settlement; (d) how to get money from the settlement; (e) the amounts that will be requested in attorney's fees and for the incentive payment to Plaintiff Plaintiff; and (f) the answers to questions commonly asked by class members about class actions and the process by which a Court considers approval of a proposed class action settlement.

Under the terms of the Joint Stipulation of Settlement, subject to preliminary approval by the Court, the Settlement Administrator will send the Class Notice to each Disclosure Class member by first-class mail. The manner and form of proposed notice fully complies with the requirements of Due Process and Rule 23.

Accordingly, in the settlement posture in which the case now stands, the matter is appropriate and should be conditionally certified for settlement purposes.

III. PLAINTIFF'S APPLICATION FOR FEES AND EXPENSES SHOULD BE APPROVED.

This section of the Motion is being presented to the Court by Plaintiff. Plaintiff and his counsel set forth the following authority to support the amount sought in the Joint Stipulation of Settlement for attorneys' fees, expenses, and costs, which were negotiated as part of the settlement in this matter. Defendant Industrial Staffing has agreed not to contest the requested amount of thirty-three percent (33%) for payment of attorneys' fees (including future attorneys' fees) and out-of-pocket costs and expenses. Ultimate authority to decide the appropriate fee rests with the Court, as reflected in the Joint Stipulation of Settlement.

Agreed fees are part-and-parcel of nearly all class settlements because both plaintiff and

defendant desire finality. The Supreme Court has acknowledged and supported this reality by holding that "[a] request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee." *Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983) (discussing fee awards in the context of a fee-shifting statute). Absent evidence of collusion between the parties (which does not exist here), a court should be willing to accept Counsel's proposal regarding fees to be paid. Because the percentage sought under the JointStipulation of Settlement is reasonable and within the fee range approved by courts in similar litigation, it should be approved here.

A. The Percentage-of-the-Common Fund Approach Is Favored by the Courts.

The parties in this FCRA class matter have agreed upon establishing a common fund to be made available for payment to all eligible members of the Disclosure Class. Attorneys' fees are awarded to Class Counsel under the common benefit doctrine. *Hall v. Cole,* 412 U.S. 1, 5, 36 L. Ed. 2d 702, 93 S. Ct. 1943 (1973).) When a settlement yields a common fund for class members, fees must be paid from the recovery. *Boeing Co. v. VanGemert*, 444 U.S. 472, 481, 62 L.Ed. 2d 676, 100 S. Ct. 745 (1980). As courts have routinely recognized, using a percent of the fund approach most closely aligns the interests of the lawyers with the class, since the more recovered for the class, the more the attorneys stand to be paid. *See Johnston v. Comerica Mortgage Co.*, 83 F. 3d 241, 244 (8th Cir. 1996) (court stated that percent of common fund approach preferred method in FLSA collective action matter and was critical of the lodestar approach used by district court for paying fees); *see also In re BankAmerica Corp. Secs. Litig.*, 228 F. Supp. 2d 1061, 1064 (E.D. Mo. 2002); *Stoneridege Inv. Partners LLC v. Charter Communs., Inc. (In re Charter Communs., Inc.)*, 2005 U.S. Dist. LEXIS 14772, 40-42 (D. Mo. 2005).

The Supreme Court has instructed that courts, acting in their fiduciary role in the process, should evaluate the reasonableness of a fee based on a percentage of the fund created for the class. *Blum v. Stenson*, 465 U.S. 886, 900 n. 16 (1984) ("[A] reasonable fee is based on a percentage of the fund bestowed on the class."). Other circuits likewise express "a preference for the percentage of the fund method" in class actions. *Rosenbaum v. MacAllister*, 64 F.3d at 1439 1445 (10th Cir. 1995); *see also In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 333 (3rd Cir. 1998) ("[t]he percentage-of-recovery method is generallyfavored in cases involving a common fund"); *Swedish Hospital Corp v. Shalala,* 1 F.3d 1261, 1272 (D.C. Cir. 1993) (concluding that "a percentage-of-the-fund method is the appropriate mechanism for determining the attorney fee award in common fund cases"); *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991) ("we believe that the percentage of the fund approach is the better reasoned in a common fund case").

The common fund doctrine "rests on the perception that persons who obtain the benefit of a lawsuit without contribution to its costs are unjustly enriched at the successful litigant's expense." *Brown v. Phillips Petroleum Company*, 838 F.2d 451, 455 (10th Cir. 1988) (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)). Therefore, the percentage award results "in a sharing of the fees among those benefited by the litigation." *Brown*, 838 F.2d at 454. The percentage of the fund method is preferred because, among other things, it rewards prompt and efficient resolution of class litigation, while strict application of the alternative "lodestar" methodology encourages inefficiency and resistance to prompt settlement. *See Swedish Hospital Corp. v. Shalala,* 1 F.3d 1261, 1268 (D.C. Cir. 1993). In addition, "a percentage of the fund approach more accurately reflects the economics of litigation practice … and most closely approximates the manner in which attorneys are compensated in the marketplace for these types

of cases." *Id.* at 1269 (citations omitted).

The percentage of the fund approach also has substantial benefits for litigants because it "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Wal-Mart Stores, Inc. v. Visa U.S.A.,Inc.*, 396 F.3d 96, 120 (2d. Cir. 2005) (emphasis added) (quoting *In re Lloyd's Am. Trust Fund Litig.*, No. 96-Civ.-262-RWS, 2002 WL 31663577, at *25 (S.D.N.Y Nov. 26, 2002)). Thus, awards based on a percentage of the fund "incentivizes lawyers to maximize the Class recovery. . . ." *In re Broadwing, Inc. ERISA Litigation*, 252 F.R.D. 369, 381 (S.D. Ohio 2006); *see also* Silber and Goodrich, *Common Funds and Common Problems: Fee Objections and Class Counsel's Response*, 17 Rev. Litig. 525, 534 (Summer 1998) ("Hence, under the percentage approach, the class members and the class Counsel have the same interest – maximizing the recovery of the class."); *Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998) (the percentage of the fund is "a method of more closely aligning the lawyer's interests with those of his client by giving him a stake in a successful outcome."); *Prudential Ins. Co.*, 148 F.3d at 333 (the percentage of the fund approach "rewards counsel for success and penalizes it for failure."). The same incentive does not exist under the so called "lodestar" approach because the lodestar amount increases with proportion to the number of hours class counsel expends, not with the size of the recovery. *Swedish Hosp.*, 1 F.3d at 1268 (under the lodestar approach "attorneys are given incentive to spend as many hours as possible").

Indeed, the Eighth Circuit recognized the deficiencies of using the lodestar approach compared to percentage of the common fund approach:

> The Task Force discussed some of the ***deficiencies of the lodestar process*** particularly as it applies to a fund case. ***First***, calculation of the lodestar increases the workload of an already over-taxed judicial system. ***Second***, the elements of the lodestar process are

> insufficiently objective and produce results that are far from homogenous. ***Third***, the lodestar process creates a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law. ***Fourth***, the lodestar is subject to manipulation by judges who prefer to calibrate fees in terms of percentages of the settlement fund or the amounts recovered by the plaintiffs or of an overall dollar amount. ***Fifth***, although designed to curb certain abuses, the lodestar approach has led to others. ***Sixth***, the lodestar creates a disincentive for the early settlement of cases. The report in this area added ". . . there appears to be a conscious, or perhaps, unconscious, desire to keep the litigation alive despite a reasonable prospect of settlement, to maximize the number of hours to be included in computing the lodestar." ***Seventh***, the lodestar does not provide the district court with enough flexibility to reward or deter lawyers so that desirable objectives, such as early settlement, will be fostered. ***Eighth***, the lodestar process works to the particular disadvantage of the public interest bar. ***Ninth***, despite the apparent simplicity of the lodestar formulation, considerable confusion and lack of predictability remain in its administration.

Johnston v. Comerica Mortg. Corp., 83 F.3d 241, 245, n. 8 (8th Cir. 1996)

(emphasis added).

B. The Sought Fee Award Is Reasonable Under the *Johnson* Factors.

Regarding the percentage sought, courts have concluded that the district court should consider the 12 factors articulated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). The *Johnson* factors include: (1) the time and labor required; (2) the novelty and difficulty of the question presented by the case; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment by the attorneys due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) any time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the

client; and (12) awards in similar cases. *Id.* As demonstrated below, the 33% sought by Plaintiff qualifies under these factors and is consistent with numerous fee awards in class and collective action settlements.

1. The Amount Involved and the Results Obtained (Factor 8):

The Joint Stipulation of Settlement provides for a substantial recovery by the class in the form of a Total Settlement Payment of up to $175,000, as described in the Joint Stipulation of Settlement. Of this amount, Plaintiff's Counsel is seeking 33% for fees and future attorney fees involved in the administration of this settlement. In light of the legal and factual complexities of this case, not the least of which involves establishing willfulness by the Defendant, there is no doubt that this is a very favorable settlement. The settlement payments are available to Disclosure Class members without the uncertainty of trial and are being delivered through this settlement rather than after years of litigation. This fact alone qualifies the result of this settlement as excellent under any reasonable assessment.

In addition, the release provided by the Disclosure Class members is a limited release, not a general release. Class members, other than Plaintiff (who will execute a general release as part of the consideration for his proposed incentive award), will release only those claims arising out of Industrial Staffing's procurement of a consumer report. The narrow nature of the release exemplifies the favorable results achieved for the FCRA class. *See Ramah Navajo Chapter*, 50 F.Supp.2d at 1103-04 (noting that the limited, rather than general, nature of the release as further evidence of an exceptional result in favor of class members).

2. Awards in Similar Cases (Factor 12):

Based on historical awards of attorneys' fees in similar class and collective action settlements in Missouri and Kansas, the percentage of the fund requested – 33% – is

presumptively reasonable. In such similar settlements, Counsel has had attorneys' fees approved at rates of 33% of the settlement fund. *Simons v Aegis Communications Group, LLC*, Case No: 2:14-cv-04012-NKL (W.D.MO January 15, 2015); *Nicolet v. Butterball LLC*, Case No: 2:13-cv- 04138-NKL (W.D.MO August 11, 2014); *Roberts v. Dawn Food Products* Case no.: 11- 00018AGF (E.D. Mo. April 5, 2013) (order approving attorneys' fees at 33% plus expenses); *Whinery v. Steel Ventures, LLC.,* Case no.: 12-0093 (W.D. Mo. Nov. 6, 2012) (order approving attorneys' fees at 33%); *Busler et al. v. Enersys Energy Products Inc., et al.,* Case no.: 09-0159 (W.D.MO. April 6, 2010) (order approving attorneys' fees and expenses at 33%); *Barnwell, et al. v. Corrections Corp. of America,* Case no.: 08-2151 (D.Kan. February 12, 2009) (order approving attorneys' fees and expenses at 33%); *Braun v Superior Industries International Inc*., Case no. 09-2560 (D.Kan. July 28, 2011) (order approving attorneys' fees and expenses at 33%); and *Loyd v. Ace Logistics, L.L.C. et al,* Case no.: 08-00188 (W.D.Mo. Aug. 9, 2011) (order approving attorneys' fees at 33%). The amount sought here is consistent with Counsel's prior experiences and is supported by established case law.

Courts are in agreement that attorneys' fees in the 30%+ range of the settlement fund in class action cases are reasonable. *See, Hamilton, et al. v. ATX Services Inc.,* Case no: 08-0030-SOW (W.D.Mo. May 6, 2008) (Order under seal approving attorneys' fees and expenses at 34%); *Morak, et al. v. CitiMortgage, Inc.,* Case no.: 07-1535 (E.D.Mo. September 26, 2008) (order under seal approving attorneys' fees and expenses at 33%), *Staton v. Cavo Communications, Inc.,* Case no.: 08-0273 (E.D.Mo. January 14, 2009) (order under seal approving attorneys' fees and expenses at 33%); *Horn, et al. Principal Financial Group, Inc. & Principal Residential Mortgage, Inc.,* 05-CV-2032-KHV (D.Kan. Dec. 2, 2005) (awarding 30% of settlement fund made available to eligible plaintiffs), *Qualls v. Sanofi-aventis U.S. LLC,*

Case no.: 06-0435-CV-W-SOW (W.D.Mo. Dec. 4, 2006) (awarding Counsel 30% of settlement fund made available to eligible plaintiffs); *Frank v. Eastman Kodak Co.,* 228 F.R.D. 174 (W.D.N.Y. 2005) (approving fee award of 38.26% of total settlement fund in Rule 23 action case); *Kedrick v. ABC Television Appliance Rental*, 1999 WL 1027050 (N.D. W.Va. 1999) (approving 30% fee award of common fund in Rule 23 class action case). Other districts reveal that a 23%-50% fee request is reasonable under common fund employment class actions. *In Vaszlavik v. Storage Tech Corp*., 2000 U.S. Dist. LEXIS 21140, 4-5 (D.Colo. 2000), the court addressed an ADEA and ERISA class action. The court approved a 30% contingency fee be paid against the common fund. The court stated "fees for class action settlements generally range from 20%-50%." *Id.* (quoting *Maywalt v. Parker and Parsley Petroleum Co.,* 963 F. Supp. 310 (S.D.N.Y. 1997); citing *In re Rio Hair Naturalizer Prods. Liab. Litig.,* 1996 U.S. Dist. LEXIS 20440, 1996 WL 780512, p. *14 (E.D. Mich. 1996); *In re Combustion, Inc.,* 968 F. Supp. 1116, 1132). In *Carlson v. C.H. Robinson Worldwide, Inc.,* 2006 U.S. Dist. LEXIS 67108, 19-20 (D.Minn. 2006), the court addressed fees in a sex harassment class action. It allowed a percentage of the total fund at 35.5%. In *Lucas v. Kmart Corp.*, 2006 U.S. Dist. LEXIS 51420 (D.Colo. 2006), the court was faced with an attorneys' fee issue in an ADA class. There, the court allowed a contingent fee against the common fund for fees at 30%.

All of the above case law clearly supports Counsel's request in this matter for 33% of the common fund to be approved by this Court for fees and future fees involved in the administration of this settlement.

3. Preclusion of Other Work by the Attorney Due to this Case (Factor 4):

Attorneys Jason Brown and Jayson Watkins are the only attorneys employed by Brown and Associates LLC. Plaintiff's counsel consciously decided to embark upon litigating a class

action matter that involved a large number of class members. The Defendant is a substantial corporation that expressed a willingness to fully litigate this case, if necessary. Plaintiff's counsel took significant risk deciding to pursue this class matter given the potential outcome if the case were litigated to its end. Plaintiff's counsel takes all cases under the assumption that lengthy litigation will result. In turn, this involves a large assumption of risk to their respective practices. In this case, the litigation resolved in under one year. It could have taken many years, involved dozens of depositions, substantial motion practice, travel, additional expert witness costs, and costly document production by the Defendant. The out-of-pocket expenses alone could easily have exceeded $100,000.00.

The time requirements on Plaintiff's counsel, given counsel's limited resources, would have required counsel in essence to sacrifice a large portion of their practices in the pursuit of one case. Yet, this was a risk counsel was willing to take when pursuing this matter. For these reasons, Plaintiff's counsel rejected the acceptance of other cases during this time frame due to the existing and expected demands of this litigation.

4. The Customary Fee and Whether it is Fixed or Contingent (Factors 5 and 6):

The customary fee in these types of cases is a fee contingent upon a successful outcome. *See, Ramah Navajo Chapter*, 50 F.Supp.2d at 1104. In prosecuting its labor and employment matters, Brown & Associates, LLC enters into contingent fee agreements providing for a percentage of the recovery (usually between 33%-40%). This is due to the fact that the individuals represented are not able to pay any attorneys' fees, expenses, or costs. In turn, counsel's firm fronts all out-of-pocket expenses in litigation. If unsuccessful, counsel is not paid any fees and usually not reimbursed any expenses. As previously noted, counsel's firm

embarked in litigating this case whereby the expenses alone could easily exceed $100,000.00. Therefore, the risk taken was enormous in that, if unsuccessful in the litigation, the firm would not only have lost all its advanced costs, but would not have received any attorney fee income for a number of years. In this case, Counsel and the Plaintiff entered into a contingent fee agreement calling for Counsel to receive fees in the amount of 40% of a common fund, if any, obtained by settlement. The requested fees are thus 7% less than provided for in the contingent fee agreement, which further evidences the reasonableness of the requested fee award.

5. Novelty/Difficulty of Issues & Undesirability of the Case (Factors 2 and 10):

FCRA claims typically involve complex mixed questions of fact and law -- *e.g.*, what constitutes "willfulness," the interplay of arguably inconsistent provisions, and arguments as to whether injury and damages were actually suffered. Given the dearth of guidance and what has, in certain circumstances, been held to be less than pellucid statutory text, Plaintiff's Counsel undertook significant risk pursuing this matter.

FCRA class litigation is very difficult to pursue. The main reason is the lack of court decisions and the conflicting opinions that are present. Additionally, while the FTC has provided advisory opinions on the FCRA, those opinions are over a decade old and courts have given different degrees of deference to the opinions. Also, as discussed above, the parties vigorously disagree on the law as to what may and may not be included within the disclosure form. Given the split in the case law, the outcome of Defendant's expected summary judgment motion was uncertain and, in the view of Plaintiff's Counsel, these issues would have likely had to be resolved at trial. In addition, the ability to establish that the actions of the Defendant were willful makes such claims very burdensome. These types of class claims are considered the most difficult when pursuing certification status.

6. Skill Required and Attorneys' Experience, Reputation and Ability (Factors 3 and 9):

Large scale class actions are complicated and time-consuming matters. Very few firms in the nation are actively litigating FCRA claims. Any attorney undertaking such a case must be prepared to make a tremendous investment of time, energy, and financial resources. Due to the contingent nature of this work, such attorneys must be prepared to make this investment with the very real possibility of an unsuccessful outcome yielding no recovery or fee award of any kind, especially if the defendant haws defenses to the willfulness requirement. Such risks are outside the scope of most attorneys and firms. Plaintiff's counsel has the skill, experience, and ability to litigate these types of claims.

Plaintiff's counsel Jason Brown of Brown & Associates, LLC has had nearly fifteen years of experience as an attorney with the vast majority of the last six years dealing with employment matters including FLSA collective action cases and FCRA class actions. Mr. Brown is currently litigating or assisting in multiple FLSA and FCRA class actions. Additionally, counsel was actively involved in settlement of the MDL litigation titled Bank of America Wage and Hour Employment Practices Litigation, Case No.: 2:10-md-02138-JWL-KGS, a highly complex and involved case for unpaid compensation pursuant to the Fair Labor Standards Act and California and Washington laws. Counsel is also a member of the Kansas City chapter of the National Employment Attorneys Association and a member of the National Employment Attorneys Association. The ability and skill of the Plaintiff's Counsel in this matter played a part in reaching this fair and reasonable settlement.

Plaintiff's Counsel Jayson Watkins of Brown & Associates, LLC has had nearly seven years experience as an attorney with the vast majority of the last six years dealing with employment matters including FLSA collective action cases and FCRA class actions. Mr.

Watkins is currently litigating or assisting in multiple FLSA and FCRA class actions. Mr. Watkins prior experience as a county prosecutor provided him with ample trial and motion practice. Counsel is also a member of the Kansas City chapter of the National Employment Attorneys Association and a member of the National Association of Consumer Advocates. The ability and skill of the Plaintiff's Counsel in this matter played a part in reaching this fair and reasonable settlement.

7. Time and Labor Required (Factor 1):

In common fund cases it is appropriate to give ***less*** weight to the "time required" factor, particularly in comparison to the quality of the settlement delivered by class Counsel – the "results obtained" factor. "Indeed, 'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'" *Farrar v. Hobby,* 506 U.S. 103, 114, (1992); *Ramah Navajo Chapter v. Babbitt*, 50 F.Supp.2d 1091, 1104 (D.N.M. 1999) ("In the contingency fee context the marketplace would value the services by the results obtained, not by the hours required to achieve them. Therefore, the lodestar analysis . . . either as the primary means of setting the award or as a check on the reasonableness of a proposed percentage-would not provide an accurate gauge by which to judge the award."). "While time is a factor, it should be stressed that it is only of relative importance." *Blank v. Talley Indus., Inc.* 390 F. Supp. 1, 5 (S.D.N.Y. 1975) (awarding fees under lodestar approach).

Regardless, Plaintiff's Counsel has invested a substantial amount of time in this matter, including propounding discovery, reviewing documents, filing an amended complaint, engaging in numerous phone conferences with Defendant's counsel, and preparing for and participating in a hard-fought mediation.

In addition, there are many more hours of work yet to be performed by counsel in this

case including the supervision of the notice and payment administration. It should be expected that a certain percent of the class will contact counsel regarding the content of the notice along with other questions. Plaintiff's counsel will also have to work with the Settlement Administrator to process this settlement. This is Plaintiff's counsel only opportunity to be paid for these future services. Plaintiff's counsel cannot come back again and ask for more fees for this future work.

CONCLUSION

Because the parties' Joint Stipulation of Settlement fully comports with the requirements set out in Rules 23(a) and 23(b)(3), and is fair and reasonable, the Court should grant preliminary approval of the agreement and enter the proposed administrative order.

Respectfully submitted,

C. Jason Brown

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