UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

TYRONE HENDERSON,
CHARLES TAYLOR, and
WILLIAM WILES,

Plaintiffs,

v. **Civil Action No. 3:12cv589-REP**

ACXIOM RISK MITIGATION, INC.,
ACXIOM CORPORATION, and
ACXIOM INFORMATION SECURITY SERVICES, INC.,

Defendants.

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT, FINALLY CERTIFYING CLASSES FOR PURPOSES OF SETTLEMENT, APPOINTING CLASS COUNSEL, AND DISMISSING CLAIMS WITH PREJUDICE

Plaintiffs, Tyrone Henderson, Charles Taylor, and William Wiles, with the consent of Defendants, Acxiom Risk Mitigation, Inc., Sterling Infosystems-Ohio, Inc., (formerly known as Acxiom Information Security Services, Inc.), and Acxiom Corporation (collectively, the "Parties"), through their respective attorneys of record, submit this Memorandum in support of their Motion for Final Approval of Class Settlement, Finally Certifying Classes for Purposes of Settlement, Appointing Class Counsel, and Dismissing Claims With Prejudice.

INTRODUCTION

This case finally resolves a putative nationwide class action alleging violations of multiple provisions of the Fair Credit Reporting Act ("FCRA"). Plaintiffs' Amended Class Action Complaint (Dkt. 78-1) names as Plaintiffs, Tyrone Henderson ("Henderson"), Charles

Taylor ("Taylor"), and William Wiles ("Wiles"). Acxiom Risk Mitigation, Inc., now known as Acxiom Identity Solutions, LLC ("ARM"), Acxiom Corporation, and Acxiom Information Security Services, Inc. ("AISS"), now known as Sterling Infosystems Ohio, Inc. ("Sterling-OH"), are joined as Defendants.

After a series of extensive arm's-length negotiations before a nationally known mediator (as well as directly between the Parties themselves) and a thorough exploration of the Parties' claims and defenses, the Parties entered into a Settlement Agreement (the "Agreement"). The Settlement Agreement proposes the settlement of all claims for the putative classes pleaded against Defendants in the Amended Complaint. The Parties presented the Agreement to the Court along with argument and authorities supporting the Court's preliminary approval of the Settlement on March 16, 2015. (Dkt. 91.) The Court raised questions about some minor aspects of the proposed Settlement at the hearing, including the precise terms of the notices, which the Parties addressed in subsequent filings. (*See* Dkts. 95, 96.) Satisfied with the Parties' responses to its concerns, the Court granted preliminary approval on April 21, 2015. (Dkt. 97.)

Pursuant to Federal Rule of Civil Procedure 23, the Parties now seek final approval of the proposed Settlement. The Classes have been given notice, and *very* few members have excluded themselves or objected to the Settlement's terms. In short, nothing has changed since the Court's grant of preliminary approval, making final approval appropriate and just. The Parties therefore request that the Court finally certify the proposed Classes and the Settlement by entering the proposed Final Order and Judgment, a copy of which is attached as Exhibit 1.[1]

For the reasons set forth in detail below and that will be presented to the Court at the Final Approval Hearing, the proposed Settlement remains reasonable, fair, and adequate, and it should be given final approved by the Court.

[1] All capitalized terms used herein have the meanings set forth in this Memorandum or in the Agreement.

CASE BACKGROUND

I. The Claims Against Defendants And The Preliminarily Certified Class And Sub-Class.

On August 16, 2012, Plaintiffs filed their initial Complaint in this Court. On January 29, 2015, Plaintiffs sought leave to file an Amended Complaint asserting claims for a class and subclass arising out of background screening activities performed on behalf of Plaintiffs' current or potential employers. (Dkt. 78.) On February 1, 2012, AISS was sold by Acxiom to third-party Sterling Infosystems, Inc., after which time AISS began operating as Sterling-OH. The class action claims that have been asserted address the employment background screening practices of AISS before February 1, 2012, as well as those of Sterling-OH from February 1, 2012 to May 1, 2013.

The "Settlement Class," as defined in the Court's Order Granting Preliminary Approval of Class Action Settlement (Dkt. 97) ("Order"), means all consumers for whom AISS or Sterling-OH issued a consumer report from August 16, 2007 through May 1, 2013: (a) that was requested by an employer or prospective employer for employment purposes and included public record information that could potentially have an adverse effect upon a consumer's ability to obtain employment; or (b) that the consumer disputed to AISS or Sterling-OH; or (c) that was requested by an employer or prospective employer that was or sought to become a vendor for Allstate Corporation. (*Id.* at 2.) The records of AISS and/or Sterling-OH indicate that the Settlement Class consists of approximately 461,925 separate consumers.

The Court also preliminarily certified a "Dispute Settlement Sub-Class," comprised of all consumers who are members of the Settlement Class and who also submitted a dispute to AISS or Sterling-OH from August 16, 2007 through May 1, 2013. (*Id.*) Defendants' records indicate this Sub-Class consists of approximately 21,537 consumers.

A. Count I – Claim Under 15 U.S.C. § 1681k(a).

15 U.S.C. § 1681k(a) sets forth procedures that CRAs must follow when reporting "items of information on consumers which are matters of public record and are likely to have an adverse effect upon a consumer's ability to obtain employment." *Id.* In particular, in such circumstances, a CRA shall:

> (1) at the time such public record information is reported to the user of such consumer report, notify the consumer of the fact that public record information is being reported by the consumer reporting agency, together with the name and address of the person to whom such information is being reported; or
>
> (2) maintain strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date. For purposes of this paragraph, items of public record relating to arrests, indictments, convictions, suits, tax liens, and outstanding judgments shall be considered up to date if the current public record status of the item at the time of the report is reported.

Id.

Plaintiffs allege that Defendants failed to mail them notice "at the time" Defendants furnished consumer reports to Plaintiffs' and Class Members' employers or prospective employers, claiming that such notices were instead sent in an untimely manner, in violation of Section 1681k(a).[2] (Dkt. 1 ¶¶ 31–35, 93–100.)

AISS, the entity that mailed the notices in question prior to February 1, 2012, contends that it did timely comply with the mailing requirements specified under Section 1681k(a)(1) and acted in accordance with industry standard practice. Sterling-OH, which mailed the notice after February 1, 2012, likewise contends that, during the time when it followed the procedure envisioned in Section 1681k(a)(1) (as opposed to maintaining "strict procedures" under Section 1681k(a)(2)), it also maintained a process to ensure the timely mailing of consumer notices. These opposing positions were a material divide between the Parties.

[2] The disjunctive alternative at Section 1681k(a)(2) is inapplicable to the type of consumer reporting furnished by Defendants; both database sellers instead of contemporaneous in-person screening companies.

B. Count II – Claim Under 15 U.S.C. § 1681i.

The FCRA, in 15 U.S.C. § 1681i, sets forth the reinvestigation requirements of CRAs upon receipt of a dispute from a consumer. In particular, Section 1681i provides:

> Subject to subsection (f) of this section, if the completeness or accuracy of any item of information contained in a consumer's file at a consumer reporting agency is disputed by the consumer and the consumer notifies the agency directly, or indirectly through a reseller, of such dispute, the agency shall, free of charge, conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate and record the current status of the disputed information, or delete the item from the file in accordance with paragraph (5), before the end of the 30-day period beginning on the date on which the agency receives the notice of the dispute from the consumer or reseller.

Id. Thus, the provision has substantive and procedural elements. It requires that a "reasonable" reinvestigation be conducted, and also that such reinvestigation generally be completed within 30 days of the receipt of the dispute. *Id.*

In Count II of the Complaint, Plaintiffs allege that Defendants failed to properly reinvestigate disputed information with the required 30-day period, in violation of 15 U.S.C. § 1681i. AISS contends that it resolved any disputes received from Plaintiffs within the prescribed 30-day period, and that its reinvestigation procedures were in all respects compliant with the FCRA. Sterling-OH likewise contends that its reinvestigation procedures fully complied with the requirements of the FCRA. This was also a material divide between the Parties.

C. Count III – Claim Under 15 U.S.C. § 1681b(a).

15 U.S.C. § 1681b(a) restricts the provision of consumer reports to those entities that have a "permissible purpose" to request and receive those reports. *Id.* Count III of the Complaint alleges that Defendants issued Plaintiff Wiles's consumer report to Allstate Corporation ("Allstate") without a permissible purpose to do so, in violation of Section 1681b(a). (Dkt. 1 ¶¶ 111–17.)

AISS contends that it did not provide a consumer report to Allstate, and instead provided a report to Plaintiff Wiles's then-employer, Service King Collision Repair, which AISS contends had a permissible, employment-related purpose to request the information as well as contractual authorization from Plaintiff Wiles to procure the report. AISS and Sterling-OH also contend that their processes ensured that they prepared consumer reports only for entities that had a permissible purpose to request and receive such information. This was a further, material divide between the Parties.

D. Willfulness Issues.

Liability under the FCRA is not strict and only arises upon a finding of negligence or willful failure to comply. 15 U.S.C. §§ 1681n & 1681o. Further, unless there is a finding of a willful noncompliance, Plaintiffs (and thus the Class) must establish they suffered actual damages. Statutory and punitive damages are *only* available where there is a finding of a willful violation. *See* 15 U.S.C. § 1681n(a). As such, either the Class must proceed on a uniform "actual damages" claim, or it must pursue statutory and punitive damages under the more challenging "willfulness" standard of Section 1681n. Plaintiffs here have chosen to pursue the latter course with respect to the class claims.

All three of the class claims detailed above assert that Defendants willfully violated the FCRA, and all five claims seek the recovery of statutory and punitive damages on that basis. In *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47, 69 (2007), the Supreme Court considered the standard for whether a defendant "willfully" violates the FCRA, including whether willfulness also includes "recklessness." *Id.* at 52. While it held that the former encompassed the latter, the Court also concluded that this willfulness standard is not met "unless the action is not only a violation [of the FCRA] under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a

reading that was merely careless." *Id.* at 69. To overcome this hurdle, it is the plaintiff's burden to prove that a defendant's attempts to comply with the FCRA were "objectively unreasonable." *Id.*

For the reasons set forth above, Defendants deny liability under the FCRA.[3] However, to the extent that any violations of the FCRA were found, Defendants further denied that any such violations were the result of willful misconduct, the proof of which was essential to the success of the class claims, including under the standards set forth in *Safeco*. Therefore, this was yet another material divide between the Parties with respect to all class claims.

II. Procedural History.

Plaintiffs filed their initial Complaint on August 16, 2012. On October 26, 2012, Defendants filed their Answers. At the same time, ARM and Acxiom Corp. moved to dismiss the Complaint on the basis that the Court lacked specific and general jurisdiction under both the Virginia long-arm statute and the requirements of Constitutional due process. (Dkt. 31.) Defendants also moved to transfer the case to the United States District Court for the Northern District of Ohio under 28 U.S.C. § 1404. (Dkt. 22.)

On February 13, 2013, by a Memorandum Order, the Court denied the motion to transfer. (Dkt. 41.) The Court also ruled that the motion to dismiss should be held in abeyance pending jurisdictional discovery since Plaintiffs had made a "substantial showing" of personal jurisdiction. (*Id.*) The Parties then agreed to the denial of the motion to dismiss so that the case could proceed in discovery.

The Court's February 13, 2013 Order further required the Parties to develop a scheduling proposal to handle both the merits and class certification aspects of the case. On March 25, 2012, the Parties attended the Rule 16(b) initial pretrial conference. A consent phasing Order was

[3] Likewise, Defendants deny that the case is capable of class certification, if contested. Even apart from contested issues of liability and willfulness, therefore, the Parties would have engaged in a protracted legal battle over whether the case was capable of certification in the first instance.

entered on April 4, 2013. (Dkt. 44.) The Order provided that the motion to dismiss was denied without further discovery, and it set deadlines for Phase I discovery to focus on class certification and liability issues posed by the Plaintiffs' claims, with Phase II focusing on any remaining issues, such as damages. (*See id.*)

On April 24, 2013, the Parties served their Rule 26(a)(1) disclosures, which included an extensive identification of witnesses, as well as the production of thousands pages of documents relating to the issues in dispute in Phase I. On June 21, 2013, Plaintiffs served extensive requests for production and interrogatories on all of the Defendants. That discovery was followed by a production of documents and information by Defendants with respect to issues relating to both merits and class certification, including in response to specific written requests for information that had been served by Plaintiffs' Counsel.

Additionally, after this substantial exchange of information Plaintiffs sought and obtained discovery of Defendants' employee witnesses; both formally and informally. Plaintiffs requested that certain Acxiom Corporation individuals be made available for witness interviews with both Plaintiffs' counsel and one of Plaintiffs' three retained expert witnesses, Mr. Reed Simpson. (Ex. 2, Declaration of Leonard Bennett ("Bennett Decl.") ¶ 3.) The requested Acxiom Corp. witness was then interviewed by Plaintiffs and Mr. Simpson on July 8, 2013 on various class certification topics and produced documents. (*Id.*)

Also, in October 2013, Plaintiffs obtained the Rule 30(b)(1) depositions of individuals at Acxiom Corp. and Sterling who were knowledgeable about the relevant processes of those companies, as well individuals who were knowledgeable about the contractual relationship between those parties and Sterling Infosystems, Inc., the parent company of Sterling-OH. (*Id.* ¶ 4.) Those individuals were made available and their depositions taken in Little Rock, Arkansas and in New York, New York. (*Id.*) Over the next six months, and as detailed below, the Parties

continued to negotiate regularly regarding the information and discovery sought in the case and to confer regarding the facts of the case, the merits of their respective positions, and the related prospects for settlement. (*Id.*)

III. The Lengthy And Contentious Mediation Of The Dispute.

The Parties explored the possibility of settlement in this matter while simultaneously conducting their targeted discovery. The Parties also filed regular, Court-Ordered "Status Updates" on the progress of those discussions and discovery. (*See, e.g.*, Dkt. 60.) A brief summary of that discovery and eventual settlement process follows.

On June 28, 2013, counsel for the Parties convened in Washington, D.C. to discuss the case and the possibility of settlement. (Ex. 2, Bennett Decl. ¶ 7.) The Parties discussed their respective positions, with Plaintiff's Counsel making a formal PowerPoint settlement presentation. (*Id*.)

After the first meeting in Washington, D.C., the Parties scheduled and attended a formal mediation. That mediation occurred on November 5–6, 2013 in Oakland, California at the office of Randall Wulff, Esq., a nationally recognized mediator with Wulff, Quinby, Sochynsky. (*Id.* ¶ 8.) That meditation was attended by counsel for all the Parties, including Defendants' General Counsel, and representatives from several of Defendants' insurers. (*Id*.)

At that mediation, the Parties discussed their respective positions and issues relating to class certification, and made substantial progress towards potentially reaching a resolution, although they did not reach a settlement agreement. (*Id.* ¶ 9.) Per the suggestion of Mr. Wulff and the agreement of the Parties, after the November 2013 mediation, counsel for Defendants and their respective insurers attended a meeting in New York City on December 15, 2013, to discuss issues related to settlement. (*Id*.) That meeting was likewise productive, but still did not result in an agreed-upon settlement.

Thereafter, counsel for the Parties and their insurers, as well as their associated business representatives, attended a second two-day mediation session with Mr. Wulff on January 9–10, 2014 in Oakland, California. (*Id.* ¶ 10.) At that mediation session, the Parties made further progress towards resolving their dispute, again discussing the case, their claims, and available defenses. (*Id*.) On January 23, 2014, the Parties attended a conference call with Mr. Wulff to discuss the potential resolution of this case and associated scheduling issues. (*Id.* ¶ 11.) On February 17, 2014, counsel for Plaintiffs and Defendants met at the offices of Troutman Sanders, LLP in Richmond, Virginia for another lengthy settlement conference and discussion about the case. (*Id*.)

Finally, on March 25, 2014, the Parties attended an additional mediation session with Mr. Wulff, again in Oakland. (*Id.* ¶ 12.) At that session, the Parties came even closer to settlement. And, after further discussing their claims and settlement until mid-April 2014, including through the continued involvement and supervision of Mr. Wulff, the Parties reached a proposed settlement. (*Id*.)

IV. The Proposed Settlement Of The Class Claims.

Plaintiffs and Defendants arrived at the proposed settlement in this case after: (1) review of thousands of pages of documents and information produced by Defendants; (2) retention of numerous experts by Plaintiffs and Defendants; and (3) interviews with and depositions of multiple fact witnesses. The Parties also conducted arm's-length, contentious, lengthy, and complicated negotiations (with the participation of Defendants' insurance carriers) that included the four mediation sessions described above and numerous additional sessions involving counsel for the Parties, either with or without the mediator. The Parties also split the substantial cost of the multi-day mediation process. After months of mediation and discussion, and the Plaintiffs'

investment of no less than $200,000 in out-of-pocket pre-settlement costs, the Parties reached the Agreement they presented to the Court in March.

A. The Settlement Class And Sub-Class.

Under the Settlement Agreement and the Court's Order, the following Settlement Class was granted preliminary, settlement-only certification:

> 1. The "Settlement Class" means all consumers for whom AISS or Sterling-OH issued a consumer report from August 16, 2007 through May 1, 2013: (a) that was requested by an employer or prospective employer for employment purposes and included public record information that could potentially have an adverse effect upon a consumer's ability to obtain employment; or (b) that the consumer disputed to AISS or Sterling-OH; or (c) that was requested by an employer or prospective employer that was or sought to become a vendor for Allstate Corporation.
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> 2. The "Dispute Settlement Sub-Class" means all consumers who are members of the Settlement Class and who also submitted a dispute to AISS or Sterling-OH from August 16, 2007 through May 1, 2013.

(Dkt. 97 ¶ 2.)[4] For preliminary settlement purposes, the Court appointed Plaintiffs Henderson, Taylor, and Wiles as the Class Representatives, and Plaintiffs' Counsel consisting of Consumer Litigation Associates, P.C., Francis & Mailman, Caddell & Chapman, and The Law Office of Dale W. Pittman, P.C., as Class Counsel. (*Id.* ¶ 3.)

B. The Relief To The Settlement Class Under The Settlement Agreement.

The Settlement Agreement requires Defendants to jointly pay $20.80 million into a Settlement Fund for the benefit of the Settlement Class (Dkt. 95-1 ¶ 8.1.1), and it therefore provides a substantial monetary recovery for the Settlement Class. That amount will be broken down into two sub-funds: a statutory damages fund and an actual damages fund.

[4] Using records provided by Defendants, the Settlement Administrator confirmed that there are 438,096 members of the Settlement Class and 21,531 members of the Dispute Settlement Sub-Class. (Dkt. 102-1 ¶ 4.)

First, a $13,265,691.25 statutory damages fund will be allocated for the payment of statutory damages to all Class Members. (*Id.* ¶ 8.1.2.)[5] Further, to account for defenses relating to the statute of limitations, the Parties agreed that each class member whose claim accrued within two years of the filing of this action will be entitled to a *pro rata* recovery in a ratio of 3:1 relative to any consumer whose claim would have accrued between five to three years prior to the filing of this action.[6] (Ex. 2, Bennett Decl. ¶ 14.) Using these ratios, on a *pro rata* basis, each consumer whose statutory damages claim accrued within the two years prior to the filing of this action will receive $35.25, and each class member whose statutory damages claim accrued within the five to three year period prior to the filing of this action will receive $11.75.

Such per-consumer payments are well within the range of finally-approved FCRA settlements, including those recently approved within this Division. *See, e.g., Ryals v. HireRight Solutions, Inc.*, 3:09cv625 (E.D. Va. 2013) ($15, $24, and $82.50 per consumer payments, depending on the date of the accrual of the FCRA claim); *Pitt v. K-Mart Corp, et al.*, 3:11cv697 (E.D. Va. 2013) ($29.50 payment for those class members with claims accruing five to three years before the filing of the action, and a $59 payment to those class members whose claims had accrued within two years prior to the filing of the Complaint); *Anderson, et al. v. Signix, Inc.*, 3:08cv570 (E.D. Va. 2010) ($54 per consumer payment); *Beverly, v. ChoicePoint, Inc.*, 3:07cv541 (E.D. Va. 2009) ($24 per consumer payment); *see also Pietras v. Sentry Ins. Co.*, 513 F. Supp. 2d 983 (N.D. Ill. 2007) (approving awards of $20 and $30); *Hogan, et al. v. PMI Mortgage Ins. Co.*, 3:05-cv-03851 (N.D. Ill. (approving award of $22.50).These amounts will be

[5] The total of this Fund comes after deductions for Plaintiff's proposed award of attorneys' fees of 30% of the Settlement Fund and the agreed-upon $747,939 cost of settlement administration expenses, both of which are subject to Court approval. (Dkt. 95-1 ¶ 8.1.2.)

[6] This difference reflects the FCRA's "hybrid" limitations period, which provides: "An action to enforce any liability created under this title may be brought . . . not later than the earlier of – (1) 2 years after the date of discovery by the plaintiff of the violation that is the basis for such liability; or (2) 5 years after the date on which the violation that is the basis for such liability occurs." 15 U.S.C. § 1681p. That is why claims accruing more than two years before the filing of the Complaint in this case are being compensated at a lower level.

paid to Class Members automatically, without them having to take any action like filing a claim for their proceeds. (*Id.* ¶ 15.)

Second, the Parties have negotiated the creation of a separate actual damages fund in the amount of $546,369.75 for the payment of actual damages to certain members of the Dispute Settlement Sub-Class who submit a Valid Claim. (Dkt. 95-1 ¶ 8.1.2.) If a Dispute Settlement Sub-Class member asserts that he or she has suffered provable actual damages, the consumer may submit a claim for such actual damages to the Settlement Administrator. (*Id.* ¶¶ 6.1.1–6.2.4.) The process will require the class member to submit such claim under oath. (*Id.* ¶ 6.1.3.) And, it requires that the submission include at least a basic, brief description as to how the subject consumer report was inaccurate and caused tangible harm. (*Id.*) Each valid claim will be paid *per capita* from the actual damages fund and will be in lieu of a statutory damages payment, and are individually capped at $5,000. (*Id.* ¶¶ 6.1.3, 8.1.2.) The Settlement Agreement also redirects the payments that are not cashed by statutory damages class members out of the common fund (those receiving a mailed check without an actual damages claim) revert into the actual damages claim fund. (*Id.* ¶ 8.7.1) With the exception of the Actual Damages Claims Settlement Class, the Settlement Agreement does not require any Settlement Class Members to submit any claim forms. (Ex. 2, Bennett Decl. ¶ 15.)

As of July 15, 2015, the Settlement Administrator has received 1,210 actual damages claims, which are currently being processed for compliance with the terms of the Preliminary Approval Order. From experience in other settlements, Class Counsel is aware that despite every effort to contact class members, alert them of the terms of the settlement and what steps to take (if any) to obtain their benefits, and provide those benefits to them through as simple a process as possible, funds will still remain unclaimed. In this case, Settlement Class Members will not have to take any steps to receive their $11.75 or $35.25 payments due them under the Settlement. (Ex.

2, Bennett Decl. ¶ 15.) Nevertheless, Class Counsel anticipates that 25% of the $13,265,691.25 Settlement Fund, $3,316,422.81, will not be claimed by Class Members. (*Id.* ¶ 16.) But rather than being donated to a *cy pres* recipient, that money will first pour over into the actual damages fund, dramatically increasing the funds available to the 1,210 actual damages claimants.

Before the addition of unclaimed funds, the 1,210 actual damages claimants will receive $451.54. (*Id.* ¶ 17.) Assuming the addition of $3,316,442.81 in pour-over funds, making the total available $3,862,792.56, those same Class Members will receive $3,192.39. (*Id.*) It is unlikely that these funds will go unclaimed, as these Class Members have taken the extra step of filing a claim against the actual damages fund, meaning that they are certainly aware of what they may receive and will be alert for their benefit checks arriving in their mail. Considering that these Class Members may receive as much as $3,100 for a minimal showing of actual damages, this recovery stands as an outstanding result. (*Id.*)

C. The Required Class Action Fairness Act Notice.

Defendants have caused notice of the proposed settlement to be served under the Class Action Fairness Act of 2005 ("CAFA"). 28 U.S.C. § 1715. The CAFA Notice was served on February 13, 2015, via certified mail to the Attorney General of the United States and to the attorneys general of all states and the District of Columbia. (Ex. 3, Declaration of American Legal Claim Services, LLC ("ALCS Decl.") ¶¶ 3–4.) In compliance with CAFA's requirements, such mailing was accomplished more than 120 days before the July 29, 2015 Final Approval Hearing. (*See id.*)

D. The Notice Plan Was Carried Out Precisely As The Court Instructed.

1. The mail Notice reached nearly 95% of Class Members

As part of the preliminary approval process, the Court approved two form notices to be sent by direct mail to Class Members. (Dkt. 97 ¶ 10.) To effectuate the notice plan, the Court appointed American Legal Claim Services, LLC, as the Settlement Administrator. (*Id.* ¶ 7.)

As set forth in the Settlement Agreement, Defendants created the lists of consumers to whom notice should be sent through Sterling-OH's business records. (Dkt. 95-1 ¶ 4.1; Dkt. 102-1 ¶ 3.) Sterling-OH used commercially reasonable methods to update the addresses of individuals on that list to their most current state. (Dkt. 95-1 ¶ 4.1.) Three lists of records, totaling 314,806, 123,290, and 21,531 that comprised, respectively, the two divisions within the Settlement Class and the Dispute Settlement Sub-Class were then provided to American Legal, which updated the list of 459,627 Class Members' addresses and revealed 27,884 addresses to be not deliverable based on U.S. Postal Service Standards. (*Id.* ¶ 5.) After subjecting those addresses to additional updating, American Legal determined that it was unable to locate valid addresses for 8,343 Class Members. (*Id.* ¶ 6.) After updating the entire list against the National Change of Address Database, American Legal then completed the initial mailing of Notices to the 451,284 Class Members for which it had valid addresses. (*Id.* ¶ 8–9.)

Of those mailed Notices, 123,528 were returned undeliverable as addressed. (*Id.* ¶ 9.) American Legal then used a location service to update the addresses of those Class Members whose notices were returned, and was able to update and remail 108,544 Notices. (*Id.*) As of July 6, 2015, American Legal received 14,984 Notices returned as undeliverable and not re-mailed to better addresses, and 2,173 for which the mail forwarding orders had expired. (*Id.*) All told, the mail Notice was unable to reach 23,327 Class Members, meaning that 94.9% of the Class was presumably reached by mail. (*Id.* ¶ 10.)

2. Class Members availed themselves of the additional settlement-related services American Legal provided

In addition to the mailed Notice, American Legal also created and maintained a website, www.armclassaction.com, dedicated to the Settlement. (*Id.* ¶ 11.) The website included key documents related to the case and settlement, available in Spanish as well as English, and a feature by which Class Members could update their contact information and file their actual damages claim online. (*Id.*)

American Legal also established a dedicated toll-free telephone number to answer Class Members questions with either automatic prompts or live conversation. (*Id.* ¶ 12.) As of July 6, 2015, American Legal received 10,138 calls regarding the Settlement. (*Id.*)

E. Attorneys' Fees And Expenses; Service Awards.

To best represent the Classes' interests, the Parties exclusively focused on achieving a settlement and did not negotiate or even address the issue of attorneys' fees and expenses (or service awards) before reaching agreement on all material settlement terms. (Ex. 2, Bennett Decl. ¶ 13.) Accordingly, the Settlement Agreement provides that:

> No later than fourteen (14) days before the Final Approval Hearing, Settlement Class Counsel shall file an application or applications to the Court for reimbursement of Attorneys' Fees and costs from the Settlement Fund, not to exceed thirty percent (30%) of the total Settlement Fund. The application or applications shall be noticed to be heard at the Final Fairness Hearing. Defendants do not and will not oppose such a request. To the extent the Court approves an award of Attorneys' Fees in an amount less than the above amounts, the difference will remain in the Settlement Fund.
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> The application or applications for Attorneys' Fees, and any and all matters related thereto, shall not be considered part of the Settlement Agreement, and shall be considered by the Court separately from the Court's consideration of the fairness, reasonableness and adequacy of the Settlement. Plaintiffs and Settlement Class Counsel agree that this Settlement Agreement is not conditional on the Court's approval of Attorneys' Fees in the requested amount or in any amount whatsoever. The Court's ruling on the application or applications for such fees shall not operate to terminate or cancel the Settlement.

(Dkt. 95-1 ¶¶ 8.3.1, 8.3.2.)

Plaintiffs' Counsel has also applied for service awards for Class Representatives to compensate them for their efforts in prosecuting this case including retaining counsel, assisting in discovery, and keeping abreast of the litigation. (Dkt. 103.) Defendants have agreed not to oppose the application for the service awards, which will be sought in the amount of $5,000 for each class representative. (Dkt. 95-1 ¶ 8.4.) Plaintiffs have applied for awards of attorneys' fees and Service Awards in a separate filing. (Dkt. 103.)

F. *Cy pres* Award.

To the extent there are funds remaining in the Settlement Fund after all checks have been mailed to Class Members who did not opt-out of the Settlement and the time period to cash the distributed checks has expired, and after the disbursements have been made from the actual damages portion of the Settlement Fund, any remaining Settlement Funds of any type shall be distributed to a *cy pres* beneficiary selected by the Parties, subject to Court approval. (Dkt. 95-1 ¶ 8.10.) Pursuant to their Agreement, the Parties ask that the Court approve the Central Virginia Legal Aid Society, the National Consumer Law Center, and Public Justice as the potential *cy pres* award recipients.[7]

ARGUMENT AND AUTHORITIES

In its Order, the Court conditionally certified the Class and Sub-Class, finding they met Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy of representation. (Dkt. 97 ¶ 4.) The Court further concluded that the Class and Sub-Class met Rule 23(b)(3)'s predominance and superiority requirements, and that the settlement was fair, reasonable, and adequate. (*Id.* ¶¶ 4–5.) Because nothing has changed since the Court's grant of preliminary approval, final settlement approval is appropriate here.

[7] The Parties suggest these as "potential recipients" because they do not, at this time, know the amount of money that will remain to be donated, meaning three recipients may be too many. Based on the settlement structure, it will likely be a very small amount. That said, they commit to donating at least some funds to CVLAS and will consider the NCLC and Public Justice as recipients in the unlikely event that a large amount goes unclaimed.

I. The Settlement Remains Fair, Reasonable, And Adequate, And the Court Should Finally Approve It.

A. The Fourth Circuit's Standards For Class Action Settlement Approval.

There is a strong and long-standing judicial policy within this Circuit favoring resolution of litigation before trial. *See 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 *South Carolina National 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 imposes 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)). Rule of Civil Procedure 23(e) requires that the Court evaluate and approve any class action settlement. FED. R. CIV. P. 23(e). Rule 23(e) thus 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). Second, the Court must determine that the settlement "is fair, reasonable, and adequate." FED R. CIV. P. 23(e)(1)(C).

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). Additionally, "there is a strong initial presumption that the compromise is fair and reasonable." *Id.* (quoting *S.C. Nat'l Bank*, 139 F.R.D. at 339).

B. The Class Was Given The Best Notice Practicable Under The Circumstances.

Due process requires reasonable notice to Rule 23(b)(3) class members. *In re Serzone Prods. Liability Litig.*, 231 F.R.D. 221, 231 (S.D. W. Va. 2005). The notice must inform class members: (1) of their opportunity to opt out of the class; (2) that the judgment will bind all class members who do not opt out; and (3) that any member who does not opt out may appear through counsel at the final fairness hearing. FED. R. CIV. P. 23(c)(2)(B). Rather than perfect notice, the Rule requires simply that notice 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). This requirement is satisfied with a mailing of the notice to each class member by first class mail. *Domonoske v. Bank of Am., N.A.*, 790 F. Supp. 2d 466, 472 (W.D. Va. 2011).

In its Order granting preliminary approval, the Court found that the proposed Mail Notice plan met the requirements of due process and constituted the best notice practicable under the circumstances. (Dkt. 67 ¶ 10.) The Parties submitted sample notice letters, which the Court likewise approved. (*Id.*) As set forth above, American Legal mailed the Notice to 451,284 Class Members after taking several steps to verify and update addresses. (*See supra*, Section IV.D.) Once completed, the notice process reached 94.9% of Class Members (*see* Dkt. 102-1 ¶ 10), satisfying due process. *See In re Serzone Prods. Liability Litig.*, 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) (approving settlement with class notice of approximately 85% delivery); *see also In re Zurn Pex Plumbing Prods. Liability Litig.*, No. 08-MDL-1958 ADM/AJB, 2013 WL 716088, at *8–9 (D. Minn. Feb. 27, 2013) (granting final approval where notice plan, including direct mail portion, reached at least 80.6% of potential class members). As of July 6, 2015 (seven days after

the opt-out and objection deadline of June 29, 2015), 189 Class Members have timely requested exclusion. (Dkt. 102-1 ¶ 13.) The Notice plainly meets Rule 23(b)(3)'s requirements.

C. The Required CAFA Notices Have Been Sent, With No Governmental Entity Objecting To Or Otherwise Commenting On The Settlement.

As required by the Settlement Agreement, Defendants also served notice of this settlement on the relevant state and federal authorities as required by CAFA, 28 U.S.C. §1715. (Ex. 3, ALCS Decl. ¶¶ 3–4.) None of these agencies or states objected to the Settlement. (*Id.* ¶ 6.) One of the most important mechanisms under CAFA for ensuring the fairness of class action settlements is the requirement that settling Defendants provide notice of a proposed settlement to interested federal and state governmental authorities. 28 U.S.C. § 1715. As CAFA recognized, such entities would be uniquely positioned to provide a court with educated and reasoned opinions about a proposed settlement.

Here, not a single governmental entity has made any objection to the proposed settlement. That silence in fact speaks volumes. *See, e.g.*, *IUE-CWA v. Gen. Motors Corp.*, 238 F.R.D. 583, 590 (E.D. Mich. 2006) (granting final approval to proposed class action settlement and noting that "GM issued notice to the appropriate federal and state attorneys general pursuant to [CAFA.] None submitted an objection."); *Access Now, Inc. v. Claire's Stores, Inc.*, No. 00-14017-CIV, 2002 WL 1162422, at *7 (S.D. Fla. May 7, 2002) ("The Court notes that in several recent Title III of the ADA class actions in this district which were similarly noticed, the Department of Justice and several state attorneys general filed objections. This has not been the case in this matter. The fact that no objections have been filed strongly favors approval of the settlement."). The absence of such informed and unbiased commentary further supports finally approving the Settlement.

D. Analysis of the *Jiffy Lube* Factors Shows the Settlement is Fair and Reasonable and Should Be Finally Approved.

The "fairness" analysis of a settlement ensures that "the settlement was reached as a result of good-faith bargaining at arm's length, without collusion." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 159 (4th Cir. 1991). A settlement is entitled to a presumption of reasonableness where, as here, it is the result of arm's-length negotiations between competent counsel. *Lomascolo v. Parsons Brinckerhoff, Inc.*, No. 1:08CV1310 (AJT/JFA), 2009 WL 3094955, at *10 (E.D. Va. Sept. 28, 2009); *S.C. Nat'l Bank*, 139 F.R.D. at 339; *see also United States v. State of Or.*, 913 F.2d 576, 581 (9th Cir. 1990) (recognizing that where a court is satisfied that the decree was the product of good faith, arm's-length negotiations, a negotiated decree is presumptively valid and the objecting party "has a heavy burden of demonstrating that the decree is unreasonable").

"Once the court has given preliminary approval, an agreement is presumptively reasonable, and an individual who objects has a heavy burden of demonstrating that the settlement is unreasonable." *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 293 (W.D. Tex. 2007); *Mayborg v. City of St. Bernard*, 1:04-CV-00249, 2007 WL 3047235, at *3 (S.D. Ohio Oct. 18, 2007) ("With such preliminary approval, the settlement is presumptively reasonable, and an individual who objects has a heavy burden of proving the settlement is unreasonable."); *Moore v. United States*, 63 Fed. Cl. 781, 784 (Fed. Cl. 2005) (same); *New England Health Care Employees Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 631 (W.D. Ky. 2006), *aff'd sub nom. Fidel v. Farley*, 534 F.3d 508 (6th Cir. 2008) ("Preliminary approval gives rise to a presumption that the settlement is fair, reasonable and adequate. Objectors, therefore, have the burden of persuading this Court that the proposed settlement is unreasonable.").

The Court's primary concern in the fairness analysis is confirming that the rights of absent class members received sufficient consideration in the settlement negotiations. *Jiffy Lube*,

927 F.2d at 158. The factors that the Court should consider in the fairness determination include "(1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area of class action litigation." *Id.* at 159; *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 254 (E.D. Va. 2009). The Court should conduct its analysis in light of the "overriding public interest in favor of settlement, particularly in class action suits." *Lomascolo*, 2009 WL 3094955, at *10 (quoting *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)). In addition, "[t]here is a 'strong presumption in favor of finding a settlement fair' that must be kept in mind in considering the various factors to be reviewed in making the determination of whether a settlement is fair, adequate and reasonable." *Id.* Here, because the Settlement was reached after multiple, contentious, arm's-length negotiations and is an excellent result for the Class, the Court should confirm the fairness decision it reached on preliminary approval of the Settlement.

1. The settlement was reached at an appropriate time in the case's lifecycle and is supported by more than adequate discovery.

The proposed Settlement in this case was reached only after the occurrence of several significant events, each of which independently supports the conclusion that the posture of the action was such that the Settlement is fair. The Parties thoroughly researched and briefed two key motions by Defendants, one to transfer and one to dismiss. (Dkts. 22, 27.) The Court granted neither Motion, permitting the Parties to engage in significant discovery.

Over the course of the case, Plaintiff served multiple interrogatories and requests for production on all Defendants, resulting in the production of thousands of pages of documents that Plaintiffs reviewed. (Ex. 2, Bennett Decl. ¶ 5.) In return, Plaintiffs produced more than 650 pages of their own, which permitted the Defendants a reciprocal review of information. (*Id.*) This written discovery led to the retention and consultation with numerous experts, both to assist with litigation strategy as well as to guide further discovery and delve into the true strengths of

Plaintiffs' claims. (*Id.*) For example, one of Plaintiff's experts, Reed Simpson, conducted an extensive interview with an Acxiom Corporation information technology employee to learn more about the way in which Acxiom stores its information. (*Id.* ¶ 3.) This conference, which was attended by Counsel for both sides, informed Plaintiffs as to the extent which information may be available to support their claims as well as their motion for class certification. (*Id.*)

Other information exchanged during discovery yielded additional insight into the merits of Plaintiffs' claims and the likelihood they could certify their proposed classes. Plaintiffs deposed a fact witness from Acxiom Corporation in Little Rock, Arkansas and a witness from Sterling New York, New York. (*Id.* ¶ 4.) Plaintiffs also propounded specific, pointed formal and informal inquiries to Defendants regarding the bases for Plaintiffs' claims and the composition of the Class, further supporting the Parties negotiating positions and litigation strategies. (*Id.* ¶ 6.) In short, this action has been vigorously litigated by the Parties and sufficient discovery obtained by both sides to assess the strength of their respective claims and defenses. The Court should conclude that these factors favor granting its final approval of the Settlement.

2. The settlement was reached after lengthy, contentious negotiations over multiple meetings.

One critical consideration in the fairness analysis is the fact that this litigation has spanned three years and involved multiple settlement discussions with all necessary parties. As noted above, the Settlement is supported by written discovery between the Parties, production of documents, interviews of an Acxiom Corporation witness by Plaintiffs' expert, and depositions of an Acxiom Corporation witnesses in Arkansas and a Sterling witness in New York. (Ex. 2, Bennett Decl. ¶¶ 4–6.) This wealth of information greatly informed the Parties' settlement strategies, permitting them to have fruitful discussions over several months. (*Id.* ¶ 6.)

The Parties convened face-to-face settlement discussions six times in Washington, D.C.; Oakland, California; New York City; and Richmond, meeting for eight days total. (*Id.* ¶¶ 7–12.)

Over the five days in which they met in Oakland, the Parties were assisted and supervised by Randy Wulff, Esq., one of the most respected and sought-after mediators in the country. (*Id.*) Mr. Wulff also assisted the Parties with their discussions by phone, and the Parties convened numerous phone calls to discuss settlement without Mr. Wulff as well. (*Id.*) Thus, while the Settlement may have come at a relatively early procedural stage, it was the result of significant investigation and presentation of the Parties' litigation positions throughout contentious and time-consuming settlement discussions. *See In re Microstrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 664 (E.D. Va. 2001) (approving of proposed settlement despite the fact that it was reached "early" in litigation).

Because these arm's-length negotiations raise the presumption that the Settlement is fair, *Lomascolo*, 2009 WL 3094955, at *10, and there is nothing in the record to rebut that presumption, the Court should conclude that this factor favors Settlement approval. *See S.C. 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); *see also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 117 (2d Cir. 2005) (affirming district court's conclusion of no collusion where litigation spanned nearly a decade and was accompanied by "impassioned settlement negotiations"); *Weiss v. Regal Collections*, Civ. No. 01CV881-DMC, 2006 WL 2038493, at *2 (D.N.J. July 19, 2006) (grating final approval of settlement "reached after extensive arms-length negotiations between the parties, with the active participation and assistance of" magistrate judge).

3. Class Counsel has extensive experience in FCRA litigation and recommends that the Settlement be approved.

Class Counsel has served as lead or co-lead counsel in numerous FCRA class actions, and brings a wealth of experience to the case. (Dkts. 84-7, 84-8); *see S.C. Nat'l Bank*, 139 F.R.D.

at 339 (concluding fairness met where negotiations "were conducted by able counsel" with substantial experience in the area of securities law). Leonard Bennett, Matthew Erausquin, and Susan Rotkis of Consumer Litigation Associates, P.C., 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 appointed Class Counsel. *See, e.g.*, *Soutter v. Equifax Info. Servs., LLC*, No. 3:10CV107, 2011 WL 1226025, at *10 (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."); *Williams v. Lexis-Nexis Risk Mgmt.*, No. 3:06CV241 (E.D. Va. 2008) (co-representing plaintiffs with Caddell & Chapman); *Beverly v. Wal-Mart*, No. 3:07CV469 (E.D. Va. 2007); *Capetta v. GC Servs., Inc*., No. 3:02CV288 (E.D. Va.); *Ryals v. HireRight Sols. Inc.*, No. 3:09CV625 (E.D. Va.); *Daily v. NCO*, No. 3:09CV031 (E.D. Va. 2011); *Conley v. First Tenn.*, No. 1:10CV1247-TSE (E.D. Va.); *Lengrand v. Wellpoint*, No. 3:11CV333-HEH (E.D. Va.). The same is true of Dale Pittman, who frequently co-counsels with Consumer Litigation Associates, P.C. and has been appointed as class counsel by this Court in multiple prior FCRA actions.

Caddell & Chapman's current docket includes more than twenty national class actions, including those brought under the FCRA, at various stages of litigation. (Dkt. 84-8 ¶¶ 12–13.) In each case, Caddell & Chapman has either been appointed Lead or Co-Lead Counsel, or will seek appointment to such a lead role at the appropriate time. (*Id*.) In this District, apart from the *Williams* case referenced in the preceding paragraph, Caddell & Chapman is co-litigating this case and *Berry v. LexisNexis Risk & Information Analytics Group, Inc., et al.*, No. 3:11-cv-00754-JRS (E.D. Va.), along with Consumer Litigation Associates and Francis & Mailman. (*Id*.)

Francis & Mailman concentrates its practice in consumer protection litigation, with two of the firm's primary practice concentrations being fair credit reporting litigation and consumer class actions, such as the instant matter. (Dkt. 104-4 ¶ 2.) The firm of Francis & Mailman, P.C. has been found to be well-qualified to represent FCRA consumer classes by courts in many districts, has been certified as class counsel on over thirty (30) occasions, and its work product has been commended by various federal courts.[8] (*Id.* ¶ 4.) Because of its experience, the firm has been appointed class counsel over objection and competing counsel's challenge in interim appointment litigation.[9]

Each of these firms alone brings substantial FCRA experience to the table. Combined, there can simply be no finer group of attorneys to litigate, negotiate, and resolve FCRA cases with national implications like this one. Each firm wholeheartedly endorses the Settlement as fair, and the Court should conclude likewise. *See Strang v. JHM Mortgage Sec. Ltd. P'ship*, 890 F. Supp. 499, 501–02 (E.D. Va. 1995) (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").

E. The *Jiffy Lube* Adequacy Factors Likewise Favor Final Approval.

The Fourth Circuit in *Jiffy Lube* instructs the Court to also determine whether the proposed class settlement is substantively "adequate." That analysis is guided by evaluating: (1)

[8] *See, e.g., Patel v. Trans Union, LLC*, C.A. 3:14-CV-00522-LB, 2015 WL 3945411 (N.D. Cal. June 26, 2015) (find that firm has "extensive experience" and has represented consumer classes in many cases in many districts"); *Barel v. Bank of America*, 255 F.R.D. 393, 398-99 (E.D. Pa. 2009) (finding Francis & Mailman, P.C. "to be competent, experienced and well-qualified to prosecute class actions" and noting that class counsel "have done an excellent job in representing the class in the instant litigation.")

[9] *See, e.g., White v. Experian Info. Solutions*, No. 05-01070, 2014 WL 1716154, at *13, 19, 22 (C.D. Cal. May 1, 2014) (finding Francis & Mailman "FCRA specialists" and appointing firm and its team as interim class counsel over objections from competing group because their team's "credentials and experience [we]re significantly stronger in class action and FCRA litigation."); *Berry v. LexisNexis Risk & Information Analytics Group, Inc.*, No. 3:11-cv-754, 2014 WL 4403524, *11 (E.D. Va. Sept. 5, 2014) (finding Francis & Mailman, P.C. and its team adequate class counsel in contested objection).

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.

1. Plaintiffs' claims are heavily disputed and would encounter substantial defenses.

Although Plaintiffs believe strongly in their case, they also appreciate the litigation risk presented by Defendants' defenses. (Ex. 2, Bennett Decl. ¶ 18.) Defendants were prepared to contest, among other things, the merits of Plaintiffs' claims, class certification and willfulness as to Plaintiffs' class claims, with victories on any point effectively disposing of the case and/or ruining the possibility of classwide resolution. (*Id*.) Regarding class certification, given that success is by no means guaranteed, Plaintiffs were always mindful that this case could end up without classwide relief. (*Id*.) As to willfulness, under the FCRA, liability can be established either upon a showing of negligent or willful noncompliance. 15 U.S.C. §§ 1681n, 1681o. If negligent noncompliance is proven, a consumer may recover actual damages. In the case of willful noncompliance, a consumer may also recover statutory and punitive damages. *Id.* § 1681n. On their class claims, Plaintiffs alleged willfulness here and sought statutory and punitive damages, requiring evidence that Defendants were at least reckless in violating the FCRA. *Dreher v. Experian Info. Solutions, Inc.*, No. 3:11-CV-00624-JAG, 2013 WL 2389878, at *3–4 (E.D. Va. May 30, 2013).

Defendants' litigation positions, particularly with regard to merits issues and willfulness, were always topics of substantial discussion during the Parties' mediation sessions. (Ex. 2, Bennett Decl. ¶ 19.) Defendants frequently shared details of what would be their arguments, permitting Plaintiffs an unfiltered view of what they would face should settlement negotiations

falter. (*Id*.) Without the Settlement, all Parties would have continued the long, expensive process of dispositive motion practice, the litigation and interlocutory appeal of class certification, and a trial on the merits (assuming Plaintiffs' success on dispositive and class-certification motions) followed, no doubt, by an equally contentious appeal. At any point in this process, of course, Defendants might have prevailed, leaving the Class with nothing.

While Plaintiffs' side is staffed with preeminent FCRA litigators, Defendants hired counsel of equal strength and experience. David Anthony, Alan Wingfield, and Timothy St. George of Troutman Sanders, counsel Acxiom and ARM, have litigated many FCRA cases before the Court and against Plaintiffs' Counsel. Sterling-OH retained Charles Seyfarth and Megan Starace Ben'Ary of LeClair Ryan, who are FCRA litigators with substantial class-action experience and expertise.

While Plaintiffs believed that Defendants' interpretation of the FCRA in light of their procedures for compliance was incorrect, Defendants have substantial counterarguments to Plaintiffs' claims both on the merits and regarding class certification, and Plaintiffs could not be certain of the outcome of an offensive motion by Defendants or their own motion for class certification. (*Id.* ¶ 20.) Considering the strengths and weaknesses of Plaintiffs' claims and the substantive defenses, Plaintiffs concluded that Settlement was appropriate to secure substantial relief for the Class while avoiding the risk of a defense victory. (*Id*.); *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*, 148 F. Supp. 2d at 667 (discussing the potential risks of continued litigation and noting "the old adage, 'a bird in hand is worth two in the bush' applies with particular force in this case"). "'When the parties' attorneys are experienced and knowledgeable about the facts and claims, their representations to the court that the settlement provides class relief which is fair, reasonable and adequate should be given significant weight.'" *Deem v. Ames True Temper, Inc.*, No. 6:10-CV-01339, 2013 WL 2285972, at *2 (S.D. W. Va. May 23, 2013) (quoting *Rolland v. Cellucci*, 191 F.R.D. 3, 10 (D. Mass. 2000)).

Given the risks to both sides and the possibility that the Plaintiffs might not prevail on motions by Defendants or their own, the Settlement is fair and adequate under the *Jiffy Lube* factors. The Settlement provides genuine, substantial monetary relief, without the need for Class Members to take any action. And where Class Members can substantiate claims for actual damages (under a particularly low threshold), they stand to be repaid as much as $5,000 for their harm. This factor weighs strongly in favor of the adequacy of the Settlement.

2. Continuing this litigation would result in significant additional burdens on the Parties and the Court.

If this Settlement is not approved, the alternative will be protracted litigation. Defendants still have dispositive motions they will be able to file on the merits and issues of willfulness, and they of course would vigorously oppose Plaintiffs' motion for class certification. Assuming Plaintiffs could prevail on those motions, additional substantial litigation would then be necessary for Plaintiffs to defeat the inevitable attempt at an interlocutory appeal of class certification and to prepare for trial. (Ex. 2, Bennett Decl. ¶ 21.)

As shown by their persistence in conducting settlement discussions in multiple face-to-face mediations and informal meetings, not to mention phone calls over a substantial period of

time, Plaintiffs' Counsel is intent on staying the course and achieving the best possible result for the Class including, if necessary, a trial on the merits. (*Id*. ¶ 22.) But Plaintiffs' Counsel also appreciates the cost and delay associated with continued litigation and the advantages of immediate relief. (*Id*.) There is no guarantee that a successful result would provide greater relief than the cash awards that Class Members will receive here. (*Id.*) This factor therefore weighs in favor of finding the Settlement to be adequate.

3. Possible collection risk and risk of remittitur also favor settlement.

In addition, even if Plaintiffs were to prevail on their statutory and punitive damage claims on behalf of a class numbering more than four hundred thousand people, and receive a judgment for $40 to $400 million on a finding of willfulness, they might find themselves in a position where they could not collect such a large judgment from Defendants or, even if they could, the judgment would be subject to remittitur. *See Murray v. GMAC Mortgage Corp*., 434 F.3d 948, 954 (7th Cir. 2006) ("An award that would be unconstitutionally excessive may be reduced . . . .") The $20.8 million agreed-upon common fund and actual damages fund, on the other hand, provide certain relief to Class Members now, eliminating all risk of insolvency or remittitur. This factor therefore supports further favors approval of the settlement. *Deem*, 2013 WL 2285972, at *3.

4. Class Member reaction favors approval of the Settlement.

As noted above, of the 459,627 members of the Class only six objected to the Settlement and only 189 Class Members have validly opted out. (Dkt. 102-1 ¶¶ 13–14.) These numbers provide convincing evidence that the Class Members are satisfied with the cash payments they will receive as a result of the Settlement. *Cf. Pettway v. Am. Cast Iron Pipe Co.*, 72 F.2d 315 (11th Cir. 1983) (approving settlement where five percent of class objected); *Borcea v. Carnival Corp.*, 238 F.R.D. 664, 671 (S.D. Fla. 2006) (approving settlement where only 0.02% of the

class submitted objections); *Lipuma v. Am. Express*, 406 F. Supp. 2d at 1309–10 (approving settlement with 41 objections in class of approximately 8.8 million); *see also Cotton*, 559 F.2d at 1331 ("a settlement can be fair notwithstanding a large number of class members who oppose it").

Courts have routinely held that where only a small fraction of Class objects, particularly where, as here, no governmental authorities have objected after duly receiving CAFA notice and only an infinitesimal percentage of the class has opted out, class members' reaction supports settlement approval. *See Domonoske*, 790 F. Supp. 2d at 474 (holding that 59 objections out of 3 million class members and .04% opting out "supports the adequacy of the settlement"); *The Mills Corp.*, 265 F.R.D. at 257 ("[A]n absence of objections and a small number of opt-outs weighs significantly in favor of the settlement's adequacy."); *Brunson v. Louisiana-Pacific Corp.*, 818 F. Supp. 2d 922, 927 (D.S.C. 2011) (holding that a lack of objections "indicates that the Settlement is fair, adequate and reasonable"); *Kay Co. v. Equitable Prod. Co.*, 749 F. Supp. 2d 455, 468 (S.D. W. Va. 2010) ("[I]n this case the very low incidence of objections, especially in light of the success of the direct notification of class members, serves to demonstrate the bulk of the Class Members' satisfaction with the settlement result, and also shows their implicit approval of its terms, including the attorneys' fee provision."); *see also Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118–19 (3d Cir. 1990) (concluding 29 objections out of 281 member class "strongly favors settlement"); *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987) (approving settlement where thirty-six percent objected); *Laskey v. Int'l Union*, 638 F.2d 954, 957 (6th Cir. 1981) (concluding court should consider, as part of the evaluation of the settlement, the fact that 7 out of 109 class members, including the named plaintiffs, objected to the proposed settlement); *In re Beef Industry Antitrust Litig.*, 607 F.2d 167, 180 (5th Cir. 1979) (approving settlement where 2.5 percent of 54,808 notified class members opted out and three objections filed); *Bryan*

v. Pittsburgh Plate Glass Co. (PPG Indus., Inc.), 494 F.2d 799, 803 (3d Cir. 1974) (approving settlement where 20 percent opted out or objected); *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 175 (S.D.N.Y. 2000) ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.") (citations omitted); *Marisol A. ex rel. Forbes v. Giuliani*, 185 F.R.D. 152, 162 (S.D.N.Y. 1999) ("The Court views the small number of comments from a plaintiff class of over 100,000 children as evidence of the Settlement Agreements' fairness, reasonableness and adequacy."); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 624 (N.D. Cal. 1979) (finding "persuasive" the fact that 84% of the class has filed no opposition); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 624 (N.D. Cal. 1979) (approving settlement despite sixteen percent objection rate). In short, where the class as a whole supports a settlement, it should be approved. The Court should therefore conclude that the minimal number of objections and requests for exclusion indicates Class Member support for the Settlement, and approve the Settlement as fair and adequate.

F. None Of The Six Objections Warrants Overturning Preliminary Approval Or Denying Final Approval.

Providing notice allows Class Members not only the opportunity to exclude themselves from a Rule 23(b)(3) settlement, it also permits them to voice objections to the settlement's terms. Here, of the more than 460,000 Settlement Class Members, only six—Louis Varca, Ashley Nash, Antonio Lockhart, Sharon Ellerby, Jeffery Vaughn, and Daniel Blackmon—objected in any way to the Settlement. Copies of these objections have been previously filed with the Court. (*See* Dkt. 101-1.) The Court should overrule all of them, however, as none is sufficient grounds to prevent the Court's grant of final approval.

1. Mr. Varca's objection.

Raising several overlapping points, the thrust of Mr. Varca's objection is that he has been subject to many employment-purposed background reports over the years, but he was not

notified of such reports being obtained. (Dkt. 101-1 at 3 ¶ D.)[10] Mr. Varca also complains that the Court-approved Notice for this case does not specify "when and how these defendants violated [his] rights with regard to the FCRA." (*Id.* at 4 ¶ E–F, H, K.) He further comments that he has lost many employment opportunities over the years, and it is difficult for him to learn details about these losses of employment because of a lack of notice from employers. (*Id.* at 4 ¶ G, I.)

In an effort to address his questions, Class Counsel Mr. Francis spoke to Mr. Varca on various occasions and was able to confirm that his questions pertained to employment applications unrelated to the instant litigation. (Ex. 4, Declaration of James A. Francis ¶¶ 2–4.) Mr. Francis provided Mr. Varca with additional documentation and information regarding the facts surrounding his inclusion as a Class member in the instant litigation. (*Id.* ¶ 5.) As a result of those discussions and the additional information provided, Mr. Varca communicated to Mr. Francis that his questions had been adequately addressed and that he considered his objection withdrawn. (*Id*. ¶¶ 6–7.) As such, in the event that the Mr. Varca does not file anything additional with the Court, the Court should consider this objection withdrawn and/or overrule it as moot.

2. Ms. Nash's objection.

Ms. Nash objects to the giving up of rights and benefits should she remain part of the Class, and that the amount Class Members will receive is inadequate. (Dkt. 101-1 at 7.) She further states that she cannot afford a lawyer should she choose to opt out. (*Id.*) These challenges are insufficient for the Court to find the Settlement unfair or inadequate.

As explained above, the Settlement is unquestionably fair, reasonable, and adequate in its treatment of Class Members. It provides genuine cash relief to those allegedly harmed by

[10] For Document 101-1, Plaintiffs cite to page the numbers contained in the header affixed by the Clerk on filing.

Defendants' conduct, and even permits a large recovery—up to $5,000—for a very rudimentary showing of harm from the reporting of inaccurate information. Courts generally reject objections stating that Class Members should receive larger payments, as Ms. Nash suggests, because settlements are compromises, with neither side achieving the very best it could with a victory at trial. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998) ("Settlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion."); *In re TD Ameritrade Account Holder Litig.*, No. C 07-2852 SBA, 2011 WL 4079226, at *9 (N.D. Cal. Sept. 13, 2011) (approving settlement despite some accountholders not receiving any payment); *In re Serzone Prods. Liability Litig.*, 231 F.R.D. 221, 233 (S.D. W. Va. 2005) (approving settlement over objection that certain class members should receive greater compensation). Ms. Nash's general suggestion that the Settlement could be better, without more, is no ground for the Court to conclude that the Settlement is anything other than fair, reasonable, and adequate.

3. Mr. Lockhart's and Ms. Ellerby's objections.

Mr. Lockhart and Ms. Ellerby both object to the settlement because they were denied employment, apparently due to the contents of background reports about them. (Dkt. 101-1 at 9, 13.) Neither, however, claims that their reports were inaccurate or that they were improperly denied employment. Mr. Lockhart includes with his objection a page from an "US ONESEARCH" report evidently generated by LexisNexis that contains a felony conviction, which is not germane to this action, as it was not prepared by AISS or Sterling-OH. Ms. Ellerby includes medical records indicating maladies employers are to apparently know about should they hire her, but no background report from any company. (*Id.* at 11, 14–15.) In any event, as employers may have justifiably considered these attachments in denying Mr. Lockhart and Ms. Ellerby employment, there is likely little that any change to the Settlement would do to assist

them in their future employment pursuits. Also, neither Mr. Lockhart nor Ms. Ellerby opted out of the settlement, as they were entitled to do. Nevertheless, in light of the relief the Settlement provides to hundreds of thousands of consumers, the mere denial of employment for two Class Members fails to show that the Settlement is somehow unfair or inadequate. The Court should therefore overrule these objections.

4. Mr. Vaughn's objection.

Mr. Vaughn argues generally against the Settlement, apparently claiming that: (1) attorneys' fees should be paid separately by Defendants rather than from the common fund; (2) the Notice fails to mention compensatory, declaratory, nominal, and punitive damages when discussing the $5,000 potential of actual damages; (3) the Defendants have committed serious civil and criminal violations likely to be repeated; and (4) there should be a $20.8 million actual damages fund in addition to the $20.8 million statutory damages fund. (*Id.* at 17–18.)

None of Mr. Vaughn's points warrant denying final approval to the Settlement. As to attorneys' fees, paying them as a percentage of the common fund is a typical and nonremarkable feature of class action jurisprudence because it prevents unjust enrichment to those who benefit from a settlement. *Kirven v. Cent. States Health & Life Co. of Omaha*, No. CA 3:11-2149-MBS, 2015 WL 1314086, at *11 (D.S.C. Mar. 23, 2015) ("Under the common fund doctrine, where a group of individuals receives a benefit from litigation without directly contributing to its costs, the group would be unjustly enriched unless each member is required to contribute a portion of the benefits to compensate the attorneys responsible for creating the common fund."). Similarly, the fact that the Parties did not negotiate another $20.8 million for the actual damages fund does not indicate collusion or unfairness—it simply indicates that there was a limit to the money Defendants would pay short of outright litigation and a final judgment in Plaintiffs' favor in

excess of $20.8 million. As noted above, an objector's wish for a more generous settlement is no reason to conclude that an agreement is somehow unfair or inadequate.

Moreover, the Parties' arrival at the $5,000 cap on recovery for actual damages is simply an aspect of the compromise to which they agreed. It is not, standing alone, any indication of malfeasance in the settlement process, and Mr. Vaughn does not suggest—let alone make even a basic showing—that the settlement negotiations were anything other than adversarial and contentious. He again provides no basis for rejecting the Settlement.

Finally, the fact that the Defendants were alleged to have committed violations of the FCRA supports approving the Settlement rather than rejecting it, as the Settlement provides relief to more than 400,000 consumers. At least on some level, the Defendants acknowledge that there is a possibility that Plaintiffs might have been successful if litigation continued, so they engaged in multiple rounds of settlement talks that eventually led to a $20.8 million settlement that also provides excellent relief for consumers' actual damages. The Parties have made a more than adequate showing of the Settlement's fairness to Class Members, and Mr. Vaughn's points do nothing to undermine that conclusion. The Court should overrule his objections.

5. Mr. Blackmon's objection.

Similar to Mr. Lockhart and Ms. Ellerby, Mr. Blackmon complains about not obtaining employment due to the contents of an AISS report about him. (Dkt. 101-1 at 25.) Because Mr. Blackmon claims the report was inaccurate, he alleges that he suffered $100,000 in damages due to Wal-Mart's rejection of him for employment. (*Id.*) Correct or not, Mr. Blackmon's individual situation is no reason for the Court to conclude that the Settlement is somehow inadequate.

As the Class Notice clearly explains, individuals such as Mr. Blackmon have the option to exclude themselves from the Class and pursue individual lawsuits should they choose. (*See* Dkts. 96-1, 96-2.) Mr. Blackmon's decision not to exclude himself or consult with a lawyer and

to instead object should have no influence on the Court's fairness analysis, as a lone Class Member's possible misunderstanding of the options presented in the Notice do not show that the Settlement is in any way unfair or inadequate. There were multiple avenues for Mr. Blackmon to have questions about the Settlement answered, but he seems to have opted instead to object and ask that the Court award him $100,000 for the injuries a report supposedly caused. Like the other objections, Mr. Blackmon presents the Court with no means to conclude that the Settlement is somehow unfair or inadequate. The Court should therefore overrule Mr. Blackmon's objection and approve the Settlement.

CONCLUSION

The Settlement is an excellent result considering the contentiousness of the litigation and the length mediation process. Each Class Member is entitled to a cash recovery as a result of the Settlement, regardless of whether they were aware that Defendants' conduct potentially violated the FCRA or whether they suffered actual harm. And those that can attest that they did suffer actual harm stand to receive substantial payments, up to $5,000. The terms of the Settlement, as well as the circumstances surrounding negotiations and its elimination of further costs caused by litigating this case through trial and appeal, meet the standards for final approval.

WHEREFORE, Plaintiffs request that the Court for an Order, substantially similar to the Proposed Order filed concurrently with this Motion, that: (1) grants final approval to the Proposed Settlement; (2) finally certifies the Class for settlement purposes only; (3) appoints Settlement Class Counsel and the Named Plaintiffs as Class Representatives; and (4) dismisses the Class's claims with prejudice.

July 17, 2015

TYRONE HENDERSON, WILLIAM WILES, and CHARLES TAYLOR

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of July 2015, I filed a true and correct copy of the foregoing on the Court's Electronic Case Filing System, which will send a notice of electronic filing to all counsel of record, including:

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