IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS AT KANSAS CITY

ANDRE POWELL Individually And On Behalf Of All Others,	)	
Plaintiffs,	)	Case No.: 2:15-cv-09292-JWL-GEB
v.	)	
NX UTILITIES, LLC	)	
Defendant.	)	

DEFENDANT NX UTILITIES, LLC'S MEMORANDUM IN SUPPORT OF JOINT MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

I. INTRODUCTION

Plaintiff Andre Powell filed the above-referenced action on September 29, 2015, in which he asserted putative claims under the Fair Credit Reporting Act ("FCRA") 15 U.S.C.A. § 1681, *et seq.* against Defendant NX Utilities, LLC. Following the exchange of informal and written discovery and multiple rounds of extensive negotiations by the parties' counsel, the parties were able to reach a settlement agreement. Now, after conforming with the terms of that agreement, and with the Court's preliminary approval of that agreement, Defendant seeks Final Approval of the Class Action Settlement for the reasons more fully set forth herein.

II. BACKGROUND

Plaintiff applied for employment with Defendant NX Utilities, LLC, and was denied employment following the completion of Defendant's employment approval process. Plaintiff brought suit on behalf of himself and others similarly situated, alleging that NX Utilities, LLC's consumer report disclosures violated the FCRA, and that NX Utilities, LLC did not give Plaintiff reasonable time to address the content of his consumer report. Defendant denies that it violated the FCRA.

Within months after Plaintiff filed this action, counsel for the parties exchanged informal discovery in an attempt to facilitate settlement. The parties then scheduled mediation. Extensive negotiations between counsel for the named Plaintiff and Defendant followed. Shortly before the scheduled mediation was to take place, the parties reached a settlement agreement, the terms of which are memorialized in a Stipulation and Agreement of Settlement (the "Settlement") (ECF No. 20-3) entered into on May 4, 2016.

After reaching that agreement, the parties filed a Joint Motion for Preliminary Approval of Class Action Settlement. (ECF No. 20). In response, the Court issued a Preliminary Approval and Scheduling Order (ECF No. 21), conditionally certifying a class for settlement purposes (the "Class"), setting a final fairness hearing, appointing a Settlement Administrator, and detailing the Notice of Settlement requirements.

Consistent with the Court's Preliminary Approval and Scheduling Order, the following events have occurred:

- The Settlement Administrator sent a Notice of Proposed Class Settlement and Settlement Fairness Hearing ("Notice"), in a form approved by the Court, to 1,018 members of the Class. *See* ECF No. 25-2, ¶¶ 4-7.
- Following successive rounds of mailings, only 27 Notices, or 2.6% of the Class, were ultimately returned as undeliverable. *Id.* ¶ 8.
- 3 individuals, or 0.29% of the Class, requested exclusion from the Class (or "opted out"). *Id.* ¶ 9.
- No members of the Class have objected to the proposed Settlement. *Id.* ¶ 10.

While the Class members and the settling parties necessarily have different reasons for asking the Court to certify the Class and grant final approval of the Settlement, they all agree

that the Class meets the requirements for certification under Fed. R. Civ. P. 23(a) and (b)3, and that the Settlement is "fair, reasonable, and adequate," as required by Fed. R. Civ. P. 26(e)(2). Defendant respectfully requests the Court certify the Class and approve the Settlement.

III. THE SETTLEMENT TERMS

The terms of the Settlement are fully set forth in Stipulation and Agreement of Settlement (ECF No. 20-3); a general summary of the settlement terms follows.

- Defendant will make available to the Settlement Class members a total fund of $178,503.00 ("Total Settlement Payment") to settle the claims of all members of the Settlement Class, inclusive of: (a) all individual payments to Plaintiff and all Settlement Class Members; (b) attorneys' fees, expenses and court costs not to exceed $58,906.00; (c) an enhancement payment to Plaintiff not to exceed $5,000.00, or such other amount as the Court may approve; and (d) the costs of the Settlement Administrator, with this cost not to exceed $15,000.00.

- All Settlement Class members will be mailed a settlement check. The amount to be paid to each Settlement Class member is calculated as follows: the Total Settlement Payment will be subject to deductions for the court-approved amounts for attorneys' fees and costs, the enhancement payment to Plaintiff, and the cost for settlement administration. The remaining amount after the deductions will be divided among the Settlement Class Members according to the formula described in Paragraph 18 of the Joint Stipulation of Settlement.

- All Settlement Class Members will have 120 days to cash their respective settlement checks. Settlement checks that have not cleared within 120 days will revert to the Total Settlement Payment. The Settlement Administrator shall refund to Defendant any balance remaining in the Total Settlement Payment after 120 days.

- All settlement checks sent to Settlement Class Members shall include the following language on the back of the check: "By cashing or endorsing this check, I acknowledge that I am bound by the Stipulation and Agreement and Final Order in Case No. 15-cv-9292-JWL-GEB in the United States District Court for the District of Kansas."

- Subject to the approval of the Court, Plaintiff will receive an Incentive Award not to exceed $5,000. As part of the settlement terms, Plaintiff will provide a general release of all claims.

- Subject to the approval of the Court, Class Counsel seeks an award of attorneys' fees as agreed to in the Settlement Agreement in an amount of $58,906.00.

- Subject to the approval of the Court, the costs of the Settlement Administrator, Simpluris, will be paid from the Total Settlement Payment.

IV. ARGUMENT AND AUTHORITIES

When determining if a settlement is fair, reasonable, and adequate, in order to comply with Fed. R. Civ. P. 23, a court must consider:

> (1) whether the proposed settlement was fairly and honestly negotiated;
>
> (2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt;
>
> (3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and,
>
> (4) the judgment of the parties that the settlement is fair and reasonable;

Rutter & Wilbanks Corp. v. Shell Oil Co., 314 F.3d 1180, 1188 (10th Cir. 2002). The second and third factors are the factors that "weigh most heavily in the court's determination that the settlement is fair, reasonable, and adequate to the class members." *In re Sprint Corp. ERISA Litig.*, 443 F. Supp. 2d 1249, 1261 (D. Kan. 2006).

As applied to the facts and circumstances of this case, these factors demonstrate that the Settlement is fair, reasonable, and adequate, and the Court should grant the Joint Motion for Final Approval of Class Action Settlement.

A. The proposed Settlement was fairly and honestly negotiated.

This case has been vigorously litigated by both parties' respective counsel since filing. There has been no fraud or collusion involved in the settlement of this matter, no one has alleged anything untoward about the negotiations, and there is no indication that the settlement negotiations were anything but an arm's length negotiation by competent attorneys. *See Marcus v. State of Kansas, Dep't of Revenue*, 209 F. Supp. 2d 1179, 1182 (D. Kan. 2002) (holding that settlement was fair and honest where parties engaged in arm's length negotiations). In short,

there is nothing to even suggest that the Settlement was not fairly and honestly negotiated. As such, this factor weighs in favor of finding the Settlement to be fair, reasonable, and adequate.

B. Serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt.

Defense counsel carefully analyzed both the facts and law before engaging in settlement negotiations with Plaintiff. The parties engaged in a mutual exchange of documents related to the claims. Counsel reviewed the discovery, thoroughly analyzed similar claims made under the FCRA, and considered all available settlement information. The probability of success in any case involves a number of variables; likewise, there are varying factors that affect how the stage of a case influences the likelihood of a favorable settlement. FCRA cases are uniquely complex and time-consuming by nature. Given the combined litigation experience of all attorneys involved, all must recognize that the risks inherent in litigation are greater in this case, because of the complicated nature of these kinds of claims, as well as the fact that very few FCRA class action cases have been tried on the merits in our jurisdiction. *See Whitton v. Deffenbaugh Indus., Inc.*, No. 2:12-CV-02247-CM-KGG, 2016 WL 4493570, at *7 (D. Kan. Aug. 26, 2016) (finding this factor was in favor of settlement due to the "many challenges remain[ing] to a litigated resolution of the claims included in the settlement."). Thus, the ultimate outcome of this litigation is in serious doubt, weighing in favor of the Court finding the Settlement to be fair, reasonable, and adequate.

C. The value of immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation.

The Settlement is fair, reasonable, and adequate in light of the complexity and potential expense of further litigation. The immediate recovery that the Settlement provides is preferable to the mere possibility of recovering a different amount of money at some unknown point in the future, with the alternative being the possibility of no recovery whatsoever. *Nieberding v.*

Barrette Outdoor Living, Inc., 129 F. Supp. 3d 1236, 1246 (D. Kan. 2015) (finding that the value of immediate recovery outweighed the mere possibility of future relief, especially because it was early in litigation, and costly litigation would serve to potentially reduce the class members' recovery).

Defendant recognized the express and implicit costs, monetary and otherwise, involved in contesting the class action litigation presented in this case. Because of the economic reality of such litigation, it makes economic sense for Defendant to resolve and settle this matter. Thus, rather than engage in a protracted and expensive—for all involved—litigation, Defendant has agreed to fund a Total Settlement Payment to provide a settlement payment to each member of the Settlement Class. In sharp contrast to this immediate recovery, which is to the satisfaction of all parties, a continuation of this litigation is likely to lead to nothing but continued expense and effort. Further, the end result may still be settlement, but with potentially less recovery to Class members. As a result, this factor weighs in favor of approving the Settlement.

D. It is in the judgment of the parties that the Settlement is fair and reasonable.

Counsel for both parties have considerable experience litigating class action lawsuits, and their years of experience has led them to settle this lawsuit under the terms of the Settlement Agreement because they believe those terms to be fair, reasonable, and adequate. *See Hershey v. ExxonMobil Oil Corp.*, No. 07-1300-JTM, 2012 WL 5306260, at *2 (D. Kan. Oct. 26, 2012), *aff'd in part, dismissed in part*, 550 F. App'x 566 (10th Cir. 2013) (finding that judgment and experience of counsel who supported settlement weighed in favor of this factor). This is not a case that was settled for a pittance shortly after it was filed without meaningful adversarial discovery. Plaintiff filed this case more than one year ago, on September 29, 2015, and the parties have both exchanged discovery and engaged in meaningful negotiations since that time.

These facts attest to the fairness, reasonableness, and adequacy of the Settlement. Furthermore, the fact that no member of the Settlement Class has objected to the Settlement suggests that the Settlement is fair and equitable. *See* Salinas Decl. ¶10. Settlement class member support is not a required factor, but it is a factor that may be considered. *Hershey*, 2012 WL 5306260, at *3; *see also Williams v. Sprint/United Mgmt.*, No. CIV. 03-2200-JWL, 2007 WL 2694029 at *4 (D. Kan. Sept. 11, 2007) ("While the number of objectors is not controlling, a relatively small number of objectors can be taken as some indication that the class members as a group did not think the settlement was unfair.").

In the end, all parties believe the Settlement to be fair and reasonable, and there is nothing before the Court to indicate otherwise. Therefore, this final factor weighs in favor of approving the Settlement as fair and reasonable.

V. CONCLUSION

For the foregoing reasons, and for the reasons set forth in the parties' Joint Motion for Final Approval of Class Action Settlement, Defendant NX Utilities, LLC respectfully requests that this Court enter an Order approving the parties' Settlement and authorizing payment from the Settlement Fund as set forth in the Settlement Agreement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification of such filing to all registered attorneys.

/s/ *Brett A. Shanks*
Attorney for Defendant NX Utilities, LLC