UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

KEVIN D. MARTIN, on behalf of himself and all others similarly situated,	
Plaintiff	**Case No. 8:14-cv-03191-GJH**
v.	
FAIR COLLECTIONS & OUTSOURCING, INC.,	**CLASS ACTION**
Defendant	

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF
FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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TABLE OF CONTENTS

I. INTRODUCTION

Plaintiff Kevin Martin, on behalf of himself and a Class of persons similarly situated, through undersigned Class Counsel, submits this Memorandum in support of his Motion for Final Approval of Class Action Settlement in this class action case brought under the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq*. ("FCRA").

As set forth in the Settlement Agreement dated February 8, 2016 (Doc. No. 40-2) (the "Settlement Agreement" or "Agreement"),[1] and in the Notice to the Class, the proposed settlement is between the Plaintiff Class and Defendant Fair Collections & Outsourcing, Inc. ("FCO"). The Class is made up of employment applicants and employees of Defendant who, Plaintiff alleges, were not provided with the stand-alone disclosure and authorization for obtaining background reports for employment purposes, as required by the FCRA.

The Class is specifically defined as follows:

> All natural persons residing within the United States and its Territories regarding whom, between October 10, 2009 through and including October 10, 2014, the Defendant procured or caused to be procured a consumer report for employment purposes using a written disclosure containing language substantially similar in form to the Consent Form provided to Plaintiff Kevin D. Martin and attached to the Complaint as Exhibit A.

See Settlement Agreement (Doc. No. 40-2) at ¶ 1; *see also* April 19, 2016 Order Preliminarily Approving Class Action Settlement and Directing Notice to Class ("Preliminary Approval Order") (Doc. No. 43). The Class consists of 242 members.

The settlement benefits former, current, and future employees of FCO. It provides for both non-monetary and financial relief and represents an excellent result for the Class under all of the circumstances of the case. The Settlement Agreement is on file with the Court (Doc. No. 40-2),

[1] Unless otherwise defined herein, all capitalized terms herein have the same meaning as in the Settlement Agreement.

and the terms of that Agreement are detailed more fully in Part II, *infra*.

The Settlement Administrator made the initial notice mailing to Class members of the Agreement on May 6, 2016, in accordance with the Court's Preliminary Approval Order and FED. R. CIV. P. 23(e). The Settlement Administrator also established a website containing relevant documents relating to the settlement. *See* Affidavit of RSM US LLP in Connection With Notice by Mailing, Doc. 44 ("RSM Affidavit"). These notice mailings had a success rate of 95%. The Class has demonstrated its universal support of the proposed settlement – no Class members have objected to or opted out from the settlement. *See id*. at ¶¶ 6-7. Accordingly, and because the settlement is fair, adequate, and reasonable, Plaintiff respectfully requests that the Court grant final settlement approval.

II. HISTORY OF THE LITIGATION

A. Background

As the Court is aware, this settlement resolves a consumer class action lawsuit. Plaintiff alleges in the Complaint that after he was offered a job by Defendant FCO, he was inaccurately branded a felon by the consumer reporting company Sterling Infosystems, Inc. ("Sterling") in a background report sold to Defendant. The report was false -- Mr. Martin has never been arrested or convicted of a crime. However, based on the report, FCO revoked its job offer to Mr. Martin.

Plaintiff's Complaint asserted two Counts: Count I is his claim that the Consent Form the Defendant required him to sign as a condition of applying for employment was not the required stand-alone disclosure and hence violated section 1681b(b)(2) of the FCRA; and, Count II is his claim that Defendant violated section 1681b(b)(3) of the FCRA by failing to comply with its obligations to provide him with a copy of the background report and a summary of his FCRA rights before it revoked his job offer.

Following service of the Complaint, FCO filed a motion to dismiss Count I of the Complaint. The parties fully briefed the motion, and the Court, on June 30, 2015, denied the motion. *Martin v. Fair Collections & Outsourcing, Inc*., 2015 WL 4064970 (D. Md. June 30, 2015).

After extensive arm's-length negotiations overseen by a prominent private Maryland mediator, the Honorable Lawrence Rodowsky, (as well as subsequent negotiations directly between the parties themselves), and a thorough exploration of the claims and defenses, the parties entered into the Agreement, which settles the section 1681b(b)(2) claim for the putative class pled against Defendant in the Complaint at Count I.[2]

B. The Settlement

The Settlement Agreement achieves a superior result for the Class, and will result in substantial payments to Class members – with no claims process – if it is approved. The Settlement Agreement contains both equitable and monetary recovery for the Class.

First, the Agreement documents Defendant's acknowledgment that it has implemented changes to its business practices as a result of the Lawsuit, specifically the use of new disclosure forms in an effort to comply with section 1681b(b)(2) of the FCRA, as of October 10, 2014. Doc. 40-2, Settlement Agreement, § 2.5. This term benefits the Class as well as future applicants for employment with FCO, and remedies the unlawful practice that was the subject of the litigation.

Second, FCO has agreed to pay the sum of $450.00 to each Class Member to settle the section 1681b(b)(2) claim. Defendant has represented that the size of the Class is no more than 242 persons, and Plaintiff relied on that representation in entering into the Settlement Agreement.

[2] The class settlement does not include the section 1681b(b)(3) claim asserted under Count II of the Complaint. Plaintiff's individual claim under section 1681b(b)(3) was separately settled.

To make those payments to Class Members, Defendant shall create a Settlement Fund of $108,900. Settlement Agreement, § 2.6(a). There is no requirement to fill out and submit a claim form in order to be paid; each Class Member who does not opt out will automatically receive a check for $450.00.

Third, the scope of the release to which each Class Member would be bound is limited to any and all liability, causes of actions, and claims that were asserted in the Amended Complaint invoking only section 1681b(b)(2) of the FCRA. *Id.* § 4.1. The Settlement does not require the Class Members to release their claims for any other causes of action they may have against Defendant, including any claim relating to a violation of section 1681b(b)(3). Plaintiff, on behalf of himself only, will provide Defendants with a general release. *Id.* § 4.2.

Fourth, separate and apart from the amounts to be paid for the benefit of the Class, attorneys' fees and costs and the individual settlement and service award for the Class Representative, Defendant will pay all costs of settlement administration, including, but not limited to all fees, charges and other expenses associated with the establishment and maintenance of the account(s) to administer the Settlement Fund, up to $15,000. Any documented costs in excess of $15,000 shall be paid, first, by residual amounts in the Settlement Fund represented by checks that are not negotiated or are returned and remain undeliverable. If, after the checks that are not negotiated or are returned and remain undeliverable are applied, the balance of the final Settlement Administration Amount above $15,000 remains unsatisfied, Class Counsel shall be responsible, with nothing further being sought from Defendant.

The quality of this settlement is underscored by comparison to a recent class settlement of a section 1681b(b)(2) claim that involved the very same consent form as was utilized by FCO and challenged here. In *Jones v. Halstead Management Co.*, No. 14-3125 (S.D.N.Y. May 5, 2016) at

Doc. 155, the court approved a very similarly structured settlement, but one that paid each class member only $325 each. By contrast, the proposed payment of $450 to Class Members here emphasizes the fairness and reasonableness of this Settlement.

Importantly, the Settlement provides for a streamlined process for Class Members to obtain the relief to which they are entitled. All Class Members will automatically receive the non-cash remedies listed above, and checks will be mailed to Class Members without any further action on their part. There is no claims process. No portion of the Settlement Fund will revert to the FCO, even if some Class Members fail to cash checks – the entire Settlement Fund will be used for the benefit of the Class.

It is inevitable, however, that some amount may remain in the Settlement Fund after distribution – if, for example, Class Members do not cash their checks. Recognizing this possibility, the Settlement Agreement provides that any residual amount remaining in the Settlement Fund (to the extent not required to pay the above-referenced settlement administration costs in excess of $15,000) should be used to create a *cy pres* award to be paid to Maryland Legal Aid.

Thus, the settlement set forth in the Settlement Agreement, especially because it includes equitable, monetary, and *cy pres* remedies for the Class, is believed by Class Counsel to be fair, adequate, and reasonable. As a result, Class Counsel respectfully submit that the settlement is favorable for the Class.

Class Members have been notified of the terms of this settlement with great success. Defendant has hired the firm of RSM US LLP as Settlement Administrator. The parties agreed upon a form and manner of notice which this Court approved, and which was provided to Class Members as ordered by this Court to inform Class Members about the Agreement and their rights.

Specifically, RSM mailed 242 notices of the proposed settlement to Class Members, used an information broker, Accurint, to obtain updated addresses for Class Members whose notices were returned, and RSM then re-mailed notices to the updated addresses. This notice mailing had a 95% success rate. *See* RSM Affidavit, Doc. 44. The Notice (see Doc. No. 40-2 at p. 23) advised Class Members of the terms and procedures set forth in the Agreement, the benefits to be provided under the Settlement Agreement to the Class, the release to be given as part of the settlement, and of the amount of attorney's fees to be requested by Class Counsel. No Class Members have objected, and none have opted out. RSM Affidavit, ¶¶ 6-7.

The settlement provides an excellent result for the Class, and is the product of serious, informed, non-collusive negotiations. For the many reasons set forth in this Memorandum, Plaintiff respectfully requests final approval of the Settlement.

III. THE APPLICABLE LEGAL STANDARDS TO BE UTILIZED IN CONSIDERING THE APPROVAL OF CLASS ACTION SETTLEMENTS

Federal Rule of Civil Procedure 23 requires both that Class members be notified of a class action settlement, and that any class action settlement must be fair, adequate and reasonable. Both requirements are met in this case.

Regarding notice, Rule 23 states that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by" a proposed settlement. FED. R. CIV. P. 23(e)(1). This Court directed notice to the Class in the Preliminary Approval Order, and approved the form of notice to be sent. As set forth in Part II of this Memorandum, above, and in the RSM Affidavit, RSM effected notice to the Class with a 95% success rate. Under any standard, this notice regime was highly successful and meets the requirement that notice be directed in a "reasonable manner."

Second, the court may approve a settlement that would bind class members "only after a hearing and on finding that it is fair, reasonable, and adequate." FED. R. CIV. P. 23(e)(2). The

Court has scheduled a hearing for July 25, 2016 to consider whether the terms of the proposed settlement, as described above, are fair, reasonable and adequate.

A court should approve a settlement which is "fair, adequate, and reasonable" to the members of the class. *In re Jiffy Lube Securities Litigation*, 927 F.2d 155 (4th Cir. 1991) ("*Jiffy Lube*"); *Troncelliti v. Minolta Corporation*, 666 F. Supp. 750 (D. Md. 1987). In *Jiffy Lube*, the Fourth Circuit identified the factors relevant in determining the fairness and adequacy of settlement. The four factors for determining the "fairness" of a settlement are:

> (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.

927 F.2d at 159.

In turn, the five *Jiffy Lube* factors for determining the "adequacy" of a settlement are:

> (1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement.

As discussed in Part IV below, the application of the *Jiffy Lube* factors to the proposed settlement in this case demonstrates that it is fair, adequate, and reasonable.

While approval of a proposed class action settlement by a court is discretionary, *Flinn v. FMC Corp*., 528 F.2d 1169 (4th Cir. 1975), there is a "strong initial presumption that the compromise is fair and reasonable." *Rolland v. Cellucci*, 191 F.R.D. 3, 6 (D. Mass. 2000). The law favors settlement and "[i]t is indeed the preferred means of dispute resolution, particularly in complex class action litigation." *In re Washington Public Power Supply System Securities Litigation*, 720 F. Supp. 1379, 1387 (D. Ariz. 1989), *aff'd*, 955 F.2d 1268 (9th Cir. 1992). Courts therefore approve class settlements which are reasonable compared to the likely results of

litigation, *Shlensky v. Dorsey*, 574 F.2d 131, 147 (3d Cir. 1978), and which result from good faith, arms-length negotiations. *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982).

Settlements by their very nature involve the balancing of many uncertainties. In the final analysis, that is why litigation is settled. The "essence of a settlement is compromise. A just result is often no more than an arbitrary point between competing notions of reasonableness." *In Re Corrugated Container Antitrust Litigation*, 659 F.2d 1322, 1325 (5th Cir. 1981).

Here, counsel for both Plaintiff and FCO have had many years of combined experience in class action litigation. As a result, their judgment that the settlement is "fair, reasonable and adequate" is entitled to great weight. As stated by the court in *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977):

> In performing this balancing task, the trial court is entitled to rely upon the judgment of experienced counsel for the parties . . . [citation omitted]. Indeed, the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel.

See also Lake v. First Nationwide Bank, 900 F. Supp. 726, 732 (E.D. Pa. 1995) ("Significant weight should be attributed to the belief of experienced counsel that settlement is in the best interest of the class").

Recognizing that a settlement represents an exercise of informed judgment by the negotiating parties, courts have uniformly held that the function of the judge reviewing the settlement is not to resolve issues that the parties intentionally have left unresolved, nor to turn the settlement hearing into a trial or a rehearsal of the trial, nor to make dispositive conclusions on unsettled legal issues. *Flinn v. FMC Corp.*, 528 F.2d 1169, 1172-73 (4th Cir. 1975).

> [i]t is not necessary in order to determine whether an agreement of settlement and compromise shall be approved that the Court try the case which is before it for settlement. . . . Such procedure would emasculate the very purpose for which settlements are made. The court is only called upon to consider and weigh the nature

> of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 462 (2d Cir. 1974) (quoting *Young v. Katz*, 447 F.2d 431, 433 (5th Cir. 1971)) (*abrogated on other grounds, Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000)).

This case involves complicated issues and a trial could well be lengthy and costly to all parties. An appeal by either party would be likely. Such an appeal could result in a second trial and would result in a very long delay in any remedies to the Class, including any payments to Class members. Indeed, by the time the case would be finally resolved, even if resolved in favor of the Class, many customers will have moved without a forwarding address or died, and would, therefore, derive little or no benefit from the monetary and equitable relief which has been obtained. Avoidance of this unnecessary expenditure of time and resources clearly benefits all parties. *See In re General Motors Pick-Up Trust Fuel Tank Products Liab. Litig.*, 55 F.3d 768, 812 (3d Cir. 1995) (concluding that lengthy discovery and ardent opposition from the defendant with "a plethora of pretrial motions" were facts favoring settlement, which offers immediate benefits and avoids delay and expense).

As discussed above, the substantially similar settlement in *Jones v. Halstead Management Co*., No. 14-3125 (S.D.N.Y. May 6, 2016), provides support for approval here as a "peer group" settlement. The proposed Settlement before this Court, more financially remunerative to Class Members than the amounts received in *Jones*, provides substantial and meaningful relief to Class Members immediately, is the proverbial "bird in the hand" and far preferable to the uncertainty of a litigated judgment far in the future.

IV. THE SETTLEMENT IS FAIR AND ADEQUATE

Especially given the significant relief provided in the Settlement Agreement, and the

dangers inherent in proceeding with litigation, this settlement is amply justified as "fair and adequate" under the criteria set forth in *Jiffy Lube*.

A. The *Jiffy Lube* "Fairness" Factors All Support Approval of This Settlement

1. The First and Second *Jiffy Lube* Fairness Factors, the Posture of the Case and the Amount of Discovery Completed, Support Settlement Approval

The posture of this case and the information obtained by Class Counsel in the course of investigation and litigation support the approval of the settlement negotiated between the parties. This case is now approximately twenty-one months old, and the parties have engaged in hotly contested litigation including a fully briefed motion to dismiss resulting in a published opinion. This litigation has also included informal discovery, negotiations, a day of face-to-face mediation before a private mediator, the Honorable Lawrence Rodowsky, and multiple telephone conferences thereafter between counsel. The parties have litigated a substantial part of the merits of this case, and have conducted extensive research regarding the applicable law relating to the claims, defenses and class certification issues.

The Settlement Agreement avoids further time-consuming litigation, however, and allows the Class to receive substantial cash and non-cash benefits without undue difficulty or delay. The Class is far better served by the certainty and timeliness of recovery under the Agreement than by the significant risks and delay associated with continued litigation against Defendant. Accordingly, the first two *Jiffy Lube* fairness factors favor approval of the settlement.

2. The Third *Jiffy Lube* Fairness Factor, the Circumstances Surrounding Settlement Negotiations, Weighs in Favor of Settlement Approval

The third *Jiffy Lube* "fairness" factor, the circumstances surrounding the negotiations, also weighs heavily in favor of approval of this settlement. This settlement is the result of months of

negotiations. These negotiations were overseen with the extensive involvement and assistance of Judge Rodowsky, whose tireless efforts in mediation were essential to the resolution of this case. The settlement also involved arms-length negotiations between the parties both before and after face-to-face mediation. Given the stage of proceedings in this case, the contested litigation in this matter, the substantial settlement payments, and the equitable relief provided for the benefit of Class Members, it is clear that the Agreement is not a result of collusion, but rather a result of intensive mediation and arms-length negotiations. Accordingly, the circumstances surrounding the settlement negotiations in this case support settlement approval.

3. The Fourth *Jiffy Lube* Fairness Factor, the Experience of Counsel, Weighs in Favor of Settlement Approval

The fourth *Jiffy Lube* "fairness" factor, the experience of counsel, similarly supports approval of this settlement. Class Counsel are recognized nationally as leading and skillful practitioners in the field of complex class actions. *See* Declaration of David A. Searles in Support of Plaintiff's Motions for Final Approval of Class Action Settlement and for Award of Attorney's Fees and Expenses, filed contemporaneously herewith. The fact that reputable counsel competently and successfully represented Plaintiff and the Class undoubtedly played a role in bringing FCO to the settlement table and resolving this case, and indicates that the settlement is fair and adequate.

B. The "Adequacy" Factors Likewise Support Approval of This Settlement

1. The First and Second Adequacy Factors, the Strength of Plaintiff's Case on the Merits, and Any Difficulties Plaintiff is Likely to Encounter at Trial, Weigh in Favor of Settlement Approval

The first and second *Jiffy Lube* "adequacy" factors, the strength of the case on the merits, and any difficulties likely to be encountered at trial, weigh in favor of settlement approval.

Plaintiff believes that, at trial, he would prevail on his section 1681b(b)(2) claims against FCO and, through evidence, be able to prove that FCO's conduct willfully violated the FCRA as alleged in the Complaint.

Nevertheless, despite the strength of the case, many significant hurdles would have to be overcome before Plaintiff and the Class could establish their entitlement to relief. Despite Plaintiff's success to date in this case, FCO would undoubtedly contest Plaintiff's claims, including the claim (essential to recover statutory damages under the FCRA) that FCO's non-compliance with the FCRA was willful.[3] The Agreement in this case avoids these issues, provides the Class with the opportunity to benefit from significant equitable relief and recover substantial damages, and accomplishes an excellent result without the need for a full trial[4] of the issues. Additionally, if the case were to continue, Plaintiff and the Class would still need to prove at trial that FCO's affirmative defenses to Plaintiff's claims have no merit.

To state it simply, despite Plaintiff's confidence in his case, he recognizes that there is no certainty in litigation and that success in this case depends almost entirely on the Court's

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[3] 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.*

[4] *See Dennis v. Trans Union, LLC*, No. 14-2865, 2014 WL 5325231 (E.D. Pa. Oct. 20, 2014). The *Dennis* court reviewed the state of the law on alleging willfulness under the FCRA and observed that "[u]ltimately, whether an act was done with knowing or reckless disregard for another's rights remains a fact-intensive question'" citing *Whitfield v. Radian Guar., Inc.*, 501 F.3d 262, 271 (3d Cir. 2007), *vacated as moot*, 553 U.S. 1091 (2008). *See also, Dalton v. Capital Assoc. Indus., Inc.*, 257 F.3d 409, 418 (4th Cir. 2001) (summary judgment is "seldom appropriate" on whether a party possessed a particular state of mind).

interpretation of the controlling statutory language and the jury's determination of fact on the issue of willfulness. "It is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced." *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.) ("*Pfizer*"). In *Pfizer*, a notable consumer class action, Judge Wyatt offered the following example:

> In *Upson v. Otis*, 155 F.2d 606, 612 (2d Cir. 1946), approval of a settlement was reversed, the Court saying (at 612): "on the facts presented to the district judge, the liability of the individual defendants was indubitable and the amount of recovery beyond doubt greater than that offered in the settlement. Accordingly, it was an abuse of discretion to approve the settlement." The action was then tried and plaintiffs obtained a judgment, twice considered by the Court of Appeals (168 F.2d 649, 169 F.2d 148 (1948)). We are told, however, that "the ultimate recovery . . . turned out to be substantially less than the amount of the rejected compromise."

Id. at 743-44.

Events time and again have demonstrated the enormous risks of litigation. For example, a class action against the manufacturer of the drug Bendectin was originally settled. The Court of Appeals for the Sixth Circuit reversed approval of that settlement. *In re Bendectin Productions Liability Litigation*, 749 F.2d 300 (6th Cir. 1984). Thereupon, as reported in *The Wall Street Journal* (March 13, 1985), the plaintiffs tried the case and, by jury verdict, lost the millions of dollars for which they had originally bargained.

Plaintiff believes he and the Class have a strong case against FCO. As evident from the above discussion, however, it is by no means certain that Plaintiff and the Class would have obtained a result better than that achieved through the Agreement. In any event, such a result would have been achieved only after years of litigation and appeals. *See* Part III, above. At the present time, however, Plaintiff has secured a substantial settlement with FCO, which provides a significant cash recovery for Class Members, and includes non-cash relief which could not have

been obtained even through a litigated judgment in favor of the Class. Accordingly, the first and second adequacy factors favor approval of this settlement.

2. The Third Adequacy Factor, the Anticipated Duration and Expense of Additional Litigation, Weighs in Favor of Settlement Approval

The third *Jiffy Lube* "adequacy" factor, the anticipated duration and expense of additional litigation, also supports the proposed settlement. Although the trial of this case certainly would be manageable and would be superior to other means of adjudicating the controversy, the issue here is the extent to which the anticipated complexity and costs of proceeding to trial favor settlement.

Had this matter proceeded to trial, FCO would have attempted to present evidence to demonstrate that it had not willfully violated its statutory obligations to Plaintiff and the Class, as Plaintiff alleges. The expense of taking this case through trial would have been considerable. It would have required, among other things, a substantial amount of formal discovery, including depositions and likely third-party discovery, and extensive motions practice. Trial preparation would require great effort, both by the parties and the Court, and expense. Those expenses would likely have reduced any recovery obtained by the Class. As such, there is no certainty that Plaintiff would have achieved the maximum statutory damages recoverable had he prevailed on the merits. *Blandina v. Midland Funding, LLC*, No. 13-1179, 2016 WL 3101270, *5 (E.D. Pa. June 1, 2016).

Avoiding the delay and risk of protracted litigation is a primary reason for counsel to recommend and the court to approve a settlement. *Protective Committee for Indep. Stockholders of TMT Trailer Ferry v. Anderson*, 390 U.S. 414, 424 (1968) (judge must consider "the complexity, expense, and likely duration" of the litigation). Here that delay and risk would be substantial. Accordingly, the anticipated complexity, costs, and time necessary to try this case – in comparison

with the substantial cost and time savings achieved through the settlement proposed here – favors settlement approval.

3. The Fourth Adequacy Factor, the Solvency of Defendants and Likelihood of Recovery of a Litigated Judgment, Weighs in Favor of Settlement Approval

The fourth *Jiffy Lube* "adequacy" factor, the "solvency of the defendants and the likelihood of recovery on a litigated judgment," supports settlement approval. Even though Plaintiff is confident of prevailing at trial, such a litigated judgment would not be available to the Class until this case was fully litigated and all appeals exhausted. The availability of substantial cash and non-cash benefits now, as opposed to some point in the far-off future, is a major benefit of this settlement. Additionally, some of the benefits obtained through this settlement, such as FCO's acknowledgment that it has implemented changes to its business practices to utilize new disclosure forms in an effort to comply with section 1681b(b)(2) of the FCRA, could not have been recovered through a litigated judgment in this case.

For purposes of this settlement, the inquiry is not whether FCO could withstand a greater judgment; rather, assuming a favorable trial outcome, it is whether FCO would be subjected to a judgment substantially more favorable to Class members. The relief provided under the proposed settlement provides substantial monetary and equitable relief to Class members. While the FCRA's statutory damages provision[5] could result in greater relief than what is provided in the settlement, FCO takes a different view – and the Settlement Agreement represents a negotiated compromise between the parties' positions, which is the essence of any reasonable settlement. The settlement avoids any risk of not recovering a litigated judgment at all, which is extremely valuable

[5] Under the FCRA, a plaintiff who successfully proves willful conduct in a class action may obtain between $100 and $1,000 in statutory damages for each member of a class. 15 U.S.C. § 1681n(a)(1)(A).

to the Class, and instead provides Class members with substantial cash and non-cash benefits immediately. Accordingly, the likelihood of recovery of a litigated judgment weighs in favor of settlement approval in this case.

4. The Fifth Adequacy Factor, the Degree of Opposition to the Settlement, Weighs in Favor of Settlement Approval

The fifth *Jiffy Lube* "adequacy" factor, the "degree of opposition to the settlement," also counsels in favor of approving the settlement. The Class has reacted in an overwhelmingly favorable manner to the settlement in this case. In a class action with 242 Class members, where the notice to those Class members had a 95% success rate, there are **no** objections to the settlement and **no** opt-outs. The reason for this support of, and desire to be included in, the settlement is clear and apparent – a settlement that provides substantial equitable relief and cash recovery is a superior result for the Classes.

Where, as here, there is **unanimous** support of a proposed settlement by the beneficiaries (*i.e.*, the Class), it is persuasive evidence that the proposal is fair and reasonable. *See Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118-119 (3d Cir. 1990) ("only" 29 objections in 281 member class "strongly favors settlement"); *In Re Prudential Insurance Company of America Sales Litigation*, 148 F.3d 283, 318 (3d Cir. 1998) (affirming conclusion that class reaction was favorable where 19,000 policyholders out of 8 million opted out and 300 objected).

V. CONCLUSION

For the reasons set forth in this Memorandum, Plaintiff, on behalf of himself and the Class, requests that the Court approve the proposed Settlement Agreement as fair, reasonable, and adequate. Plaintiff is submitting with this memorandum a proposed form of Order, reviewed and approved by FCO, which comprehensively resolves this motion for final settlement approval. By separate motions, Plaintiff also seeks approval of the proposed *cy pres* awards, the individual

settlement and service award to the Class Representative, and an award of attorneys' fees and expenses.

Respectfully submitted,

DATED: July 8, 2016

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