IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

JEFFREY SCOTT RIDENOUR and
AMIN HALEM,
individually and on behalf
of all others similarly situated,

Plaintiffs,

v. **Civil No. 2:15-cv-41-MSD-DEM**

MULTI-COLOR CORPORATION,
and
STERLING INFOSYSTEMS, INC.,

Defendants.

PLAINTIFFS' MEMORANDUM IN SUPPORT OF CONSENT MOTION FOR ORDER OF FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND DISMISSAL OF CLAIMS WITH PREJUDICE

Plaintiffs Jeffrey Scott Ridenour and Amin Halem (collectively "Plaintiffs"), individually and on behalf of all other similarly situated individuals, with the consent of Defendant Sterling InfoSystems, Inc., ("Sterling"), have moved for Final Approval of the Class Action Settlement, for the reasons discussed in this Memorandum in support of their Motion. Plaintiffs seek an Order of Final Approval, dismissal of claims with prejudice. The Classes have received notice, and only a small percentage have objected or excluded themselves. The opt-in claim rate was as expected in negotiations. In short, little has changed since Court's grant of preliminary approval, confirming that the Settlement is fair, reasonable, and adequate and therefore warrants final approval.

I. INTRODUCTION

This case presents a nationwide class action filed under the Fair Credit Reporting Act, 15 U.S.C. § 1681k(a). ("FCRA"). Plaintiffs' Second Amended Class Complaint names Jeffrey Scott Ridenour and Amin Halem as Plaintiffs, and Sterling, as Defendant. Plaintiffs assert a class

claim against Defendant based on the consumer reports furnished by Defendant to prospective employers without providing notice to the Plaintiffs.

After arm's-length settlement discussions, formal discovery, the briefing of and decisions on dispositive and discovery motions, the Parties entered into a Stipulation of Settlement (the "Settlement Agreement"). The Settlement Agreement addresses the claims advanced by Plaintiffs, individually and on behalf of other similarly situated individuals, against Defendant Sterling InfoSystems, Inc.[1]

The Court considered the Consent Motion for Preliminary Approval of Class Action Settlement, finding that the Parties demonstrated that preliminary approval to be appropriate. (Docs. 172, 173.) Simultaneously, the Court identified several issues relating to the proposed notices, and directed that the Parties consider whether revisions were necessary to ensure that class members received notices that fairly, accurately, and clearly informed them of their rights in the case. (Doc. 172.) The Parties conferred regarding the issues raised by the Court, and made numerous changes to the notices. Thereafter, pursuant to the Preliminary Approval Order, entered on February 15, 2017, the Parties initiated the Notice Plan. (Doc. 173.)

The Settlement Administrator notified the 170,502 consumers included in the Settlement Classes in a Court-approved mailing, reaching almost 95% of consumers. (Ex. 1, Declaration of Steven Platt ("Platt Decl.") ¶ 8.) In addition, potential Class Members had access to a settlement website, toll-free phone number providing answers to Settlement Class Member questions, and *direct access* to Class Counsel. Having evaluated the Settlement Agreement, 7,248 individuals in the Virginia Opt-In Class opted in (or just over 5.4%), while only 46 individuals in the

[1] The Settlement Agreement does not address the claims by Plaintiff Ridenour, individually and on behalf of others similarly situated, against Multi-Color Corporation. Those claims were resolved in a separate Settlement Agreement, of which the Court granted Final Approval on January 13, 2017 (Doc. 164), nor does it address the individual claims against Defendant Sterling under § 1681e(b), which would only be negotiated after the class claim is resolved in order to avoid any actual or perceived *quid pro quo*.

Automatic Payment Class opted-out (or .12%) and only 16 individuals from either Class objected (or .04% of the Class Members).

Pursuant to Federal Rule of Civil Procedure 23, the Parties seek final approval of the proposed class action settlement. Specifically, the Parties request that the Court finally certify the proposed Classes and the proposed Class Settlement,[2] and dismiss the claims with prejudice. Having carefully overseen preliminary approval of the Settlement, the Court's role now is to determine whether the Settlement comports with Rule 23(e)(1)(C), which permits a court to approve a settlement "only after a hearing and on finding that it is fair, reasonable, and adequate." The Fourth Circuit has established what has become known as the *Jiffy Lube* standard to guide courts in this fairness analysis. *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158–59 (4th Cir. 1991). There are two parts to the Rule 23(e) consideration: (1) reasonableness and adequacy of the settlement—whether the Class recovery is adequate versus what the Class gives up;[3] and (2) fairness—the process question as to how the settlement came about.[4]

The Settlement remains an excellent result for the Classes. Class Counsel negotiated its structure with three unwavering objectives: First, the focus of this cash settlement should be

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

[3] The "adequacy" aspect considers: "(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 defendant and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement." *Jiffy Lube*, 927 F.2d at 158–59.

[4] These "fairness" considerations 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 securities class action litigation." *Jiffy Lube*, 927 F.2d at 158–59.

upon the incompleteness of class member employment reports.[5] Second, every class member who actually gave something up (i.e., a release) had to be compensated. A "claims fund" designed to release everyone's claims though paying only a few would be improper. And third, the core FCRA claim under § 1681e(b) otherwise available as a remedy for more substantial individualized damages would not be released. Class Counsel was successful as to each of these objectives.

The Settlement sends cash payments to every participating Settlement Class Member, utilizing a two-tiered approach. For those who previously contested the content of their background report (the Automatic Payment Class) with a resulting amendment to the disputed information, the cash payments will be automatic, with no claims process required.[6] For the Virginia Opt-In Class, comprised of consumers whose background reports contained at least one criminal record, but had not previously contested the accuracy of the information in the report, those individuals were required to simply submit a clam form certifying that their background report was incomplete or not up to date. Again, the claim form was simple, and did not require that the participating class member prove the inaccurate information. Finally, none of the Settlement Fund reverts to the Defendant, except to reimburse the Defendant for the cost of claim administration. Otherwise, any funds remaining in the Settlement Fund will be distributed as *cy pres*. In exchange, Class Members provide only a narrow release, and specifically retain their right to bring individual suits against Sterling for inaccuracies within their reports. And this result was obtained with questions remaining as to Defendant's willfulness, a necessary proof for

[5] Section 1681k(a)(2) penalizes a CRA that fails to "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."

[6] Consumers whose information was not properly corrected after dispute are not class members and those retain all of their FCRA claims, including under § 1681i(a) (failure to reasonably investigate a dispute).

the recovery of any damages. Given this outcome, and the overall positive reaction by the Class Members, the Settlement is "reasonable and adequate." FED. R. CIV. P. 23(e)(1)(C).

The Settlement also occurred after arm's-length discussions and is supported by not only formal discovery and motions practice, but a thorough exploration of the Parties' claims and defenses. The Settlement resolves claims for the putative class pleaded against Sterling in the Second Amended Class Action Complaint. There was absolutely no coercion and Class Counsel was more than equipped to litigate aggressively and effectively on behalf of the Class. Thus, the Settlement is "fair, reasonable, and adequate." FED. R. CIV. P. 23(e)(2).

II. THE COURT'S GRANT OF PRELIMINARY APPROVAL.

The case background, nature of Plaintiffs' claims, Settlement structure, and class certification analysis are detailed in Plaintiffs' Memorandum in Support of their Motion for Preliminary Approval. (Docs. 167, 168.)

A. Plaintiffs' Claims And Defendant's Willfulness.

The claims subject to the Settlement were pleaded in Plaintiffs' Second Amended Class Action Complaint (Doc. 128), which alleges that Defendant violated the FCRA by: (1) obtaining consumer reports in the employment context without making a proper disclosure to consumers of its intent to do so. 15 U.S.C. §§ 1681b(b)(2). Defendant denies all of Plaintiffs' claims and further denies any wrongdoing, any liability to Class Members, and that class treatment is appropriate outside the settlement context.

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 actual damages. Statutory and punitive damages are *only* available where there is a finding of a willful violation. *See id.* 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 sought the latter, and have settled their and the Class' claims 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.*

Because of perceived difficulties for Plaintiffs to show willfulness, Defendant denies liability under the FCRA.[7] However, to the extent that any violations of the FCRA were found, Defendant further denies that any such violations were the result of willful misconduct.

Additionally, since the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), the law regarding the question as to whether a consumer who was denied a notice right has constitutional standing just on that basis is in flux.[8] Here, the settling class members all suffered tangible injury—the furnishing of an incomplete or inaccurate background check. However, had the full class as led proceeded, there remaining a risk as to standing.

[7] Likewise, Defendant denies that the case was capable of Rule 23 certification.

[8] *See, e.g.*, *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337 (4th Cir. 2017) (holding a consumer lacks standing to bring a FCRA claim demanding more information from a CRA where he has not shown that such information was material).

B. The Lengthy Litigation of the Dispute.

This case has proceeded in the typical way for a nationwide, complex case. Months before the case was filed, Class Counsel began investigating and researching the pending claims against the Defendant. (Ex. 2, Declaration of Leonard A. Bennett ("Bennett Decl.") ¶ 19.) On January 29, 2015, Jeffrey S. Ridenour filed this action. (Doc. 1.) The Parties engaged in motions practice and discovery, with Sterling responding substantively to several rounds of written discovery. (Ex. 2, Bennett Decl. ¶ 19.) Both Defendants asked the Court to stay the case pending the Supreme Court's decision in *Spokeo, Inc. v. Robins*, and the Court denied both motions as moot after full briefing and the handing down of the *Spokeo* opinion in May 2016. (ECF Doc. 91.) Plaintiffs' multiple rounds of formal discovery requests and rulings from the subsequent Motion to Strike Objections and Compel Discovery and Depositions (Doc. 92) and opposition to Sterling's Motion to Retain Confidential Designations (Doc. 96) yielded a more than substantial document production from Sterling. (Ex. 2, Bennett Decl. ¶ 19.) Those documents include information relating to members of the Settlement Classes, Sterling's policies and procedures as well as documents particular to Plaintiffs. Plaintiffs retained an expert to assist with ascertaining the class form the Sterling databases and took multiple depositions of key employees of Sterling, who were located in multiple states outside Virginia. In light of the discovery accomplished, the Parties began to negotiate the present resolution. The Parties retained one of the nations premier mediators and over multiple sessions in Boston finally reached the terms supported here. Thereafter, the Parties notified the Court that they had reached a settlement of the class claims and presented the basic terms of the settlement to the Court. (*Id*.)

III. THE SETTLEMENT OF THE CLASS CLAIMS.

A. The Settlement Classes.

Under the Settlement Agreement, the Parties agreed to resolve the claims of the Class of persons defined and certified by the Court as follows (the "Settlement Classes"):

The "Automatic Payment Class"

The "Automatic Payment Class" consists of:

> All natural persons residing in the United States (including all territories and other political subdivisions of the United States) (i) who were the subject of a consumer report sold by Defendant on any platform of Defendant to a third party from January 29, 2013 through October 31, 2016, (ii) whose report contained a Criminal Record, (iii) who then directly or indirectly disputed such Criminal Record contained in their consumer report with Defendant, and (iv) whose dispute resulted in an amendment to the Criminal Record of their report.

There are 36,002 Automatic Payment Class Members.

The "Virginia Opt In Class"

The "Virginia Opt In Class" consists of:

> All natural persons (i) who were the subject of a consumer report sold by Defendant on any platform of Defendant except ESIQ to a third party from February 15, 2010 through October 31, 2016, (ii) who had a primary residential address in the Commonwealth of Virginia that was provided to Defendant in requesting such report, (iii) whose consumer reports contained at least one Criminal Record, (iv) who affirmatively opt in and complete a claim form certifying that their consumer report(s) was/were incomplete or not up to date; and (v) where no notice was sent under 15 U.S.C. § 1681k(a)(1).

There are 134,500 individual consumers who comprise the Virginia Opt In Class.

B. The Consideration Provided To The Classes.

This case was thoroughly litigated, with Plaintiffs facing substantial merits defenses to willfulness. Nevertheless, Plaintiffs were able to negotiate a settlement structure paying real money to Class Members without imposing an arduous or difficult claims process. For the Automatic Payment Class, comprised of individuals who had previously disputed the accuracy of their report, checks will arrive automatically, without Class Members having to do anything. For

Virginia residents, who were the subject of a background report containing a criminal record, a simple opt-in process was used, in order to include those individuals who certified that their background report was incomplete or not up to date. Thus, the Settlement was structured to pay automatically those consumers with known claims, while allowing those consumers who may have claims to opt in to the Settlement.

Defendant will pay Five Million Nine Hundred Thousand Dollars ($5,900,000) to settle the claims of the Classes, as well as $200,000 towards the cost of notice and settlement administration. The Settlement provides a substantial monetary net benefit of approximately $87.62 to each participating Settlement Class Member.[9] In addition to avoiding any claims process obstacle for the Automatic Payment Class, and a simple one-page claim form for the Virginia Opt-in Class, Class Members will receive these payments without having to prove any harm whatsoever, or make the more-difficult showing of willfulness. Additionally, Virginia Opt-In Class Members were only required to certify that their report contained incomplete or outdated information, and were not required to submit documentation or other claim forms proving the inaccuracy. And these payments will be the full amount Class Members will receive after the deduction of proposed Service Awards; attorneys' fees and costs; and any class administration costs above $200,000.

Importantly, unlike a typical "out-out" settlement, here Virginia opt-in class consumers were not presumed within the class; they had to affirmatively join the class. Thus while in a conventional settlement, the Court is asked to infer class member support by a lack of objection—by silence—here every individual that claimed in actually voluntarily joined the class.

[9] The individual payout to Class Members may change slightly as a result of the actual cost of class administration (costs above $200,000 will be paid from the Settlement Fund). If additional funds remain in the Class Fund, due to undeliverable or uncashed checks, the Defendant will be reimbursed for the cost of notice and administration, and then distributed to a *cy pres* recipient.

C. The Notice Process Is Complete As The Court Has Instructed And Under The Governing Law.

In its Preliminary Approval decision and concurrent ruling, the Court approved the form and content of the Class Notice, but ordered that the Parties revise, or at least consider revising, certain language within the notices. The Parties made each of the revisions suggested by the Court in its Order dated February 15, 2017. (Doc. 172; *see also* Ex. 1, Platt Decl., Ex. A, B.) The Court also ordered the Settlement Administrator to send mail notice packets to all Class Members. To facilitate this process, the Parties engaged the nationally known settlement administrator American Legal Claim Services, LLC ("ALCS"). ALCS was tasked not only with printing, processing, and mailing the notices, but also with updating addresses on Class Members whose notices were returned undeliverable. (Ex. 1, Platt Decl. ¶ 2.) ALCS is experienced in administering large class settlements, especially complex class settlements. Class Counsel supervised and had input into all actions taken by the Settlement Administrator to date.

Class Notice in this context is a well-established process. An experienced administrator like ALCS is critical to the success of the mailed-notice program from the beginning when the class list is provided by the Defendant. In this case, the Settlement Administrator received the Class lists from Defendant, analyzed the list and removed a total of 32,596 duplicative records. (*Id*. ¶¶ 3, 4.) ALCS then processed the list through the National Change of Address Database if any Class Member addresses proved stale. (*Id.* ¶ 6.) Total Class Solutions mailed the Court-approved Settlement Class Notices via first class U.S. Mail to all 36,002 Automatic Payment Class Members and all 134,500 potential Virginia Opt-In Class Members. (*Id*. ¶¶ 3, 4.)

After the initial mailing, the Postal Service returned 37,813 Class notices as undeliverable and without forwarding addresses, and ALCS performed a skip trace search to attempt to update the addresses for those Class Members. (*Id.* ¶ 7.) After this update, ALCS obtained new addresses for and re-mailed 37,433 of those Class Members' notices. (*Id*.) Following attempts to

obtain valid addresses from the most commonly used sources, 8,872 Class Members' notices remain undeliverable. (*Id*.) All told, ALCS estimates that it successfully mailed notice to 161,630 Class Members, a reach of 94.8 percent. (*Id.*)

In addition to the mailed notices, ALCS established a Settlement Website, available in both English and Spanish. Class Members could access key documents, request their Sterling Background Reports online, and, for the Virginia Opt-In Class, submit their Opt-In request online. (Ex. 1 ¶ 9.) ALCS also established a dedicated toll-free number to provide answers to Class Member questions, including an option to speak with a live agent (*Id*. ¶ 10.) Finally, Class Counsel's contact information and telephone number were included in the notice materials, and Class Counsel received and handled hundreds of direct, live calls from Class Members. (Ex. 2, Bennett Decl. ¶ 25.)

The mailed notice process was certainly the best available given the circumstances of this case, including the length of time the case was litigated and the fact that the Administrator assisted in developing the address list using a commercially available database. (*Id*.) While it is almost always difficult to obtain current addresses and identification information on Class Members, especially when a consumer may be facing difficulty finding employment, the Parties and Administrator were able to minimize that problem. A 94.8% successful-mail-delivery rate is commendable—and much better than the typical 20% undeliverable rate ordinary obtained (and approved by the Court).[10]

[10] In fact, the 80% target to which Counsel ordinary aspires and the Court typically considers is already well above the "reasonable notice" thresholds used in other venues. *See Alberton v. Commn'w Land Title Ins. Co.*, No. 06-3755, 2008 WL 1849774, at *3 (E.D. Pa. Apr. 25, 2008) (finding as sufficient direct notice projected to reach 70% of class plus publication in newspapers and Internet); *Grunewald v. Kasperbauer*, 235 F.R.D. 599, 609 (E.D. Pa. 2006) (approving of direct mail to 55% of class and publication in three newspapers and Internet).

D. Class Members Overwhelmingly Support The Settlement, And There Are No Governmental Objectors.

The Settlement is an excellent result for the Class. Indeed, the fact that there were only 46 Opt-Out requests from the Automatic Payment Class and 16 objections[11] speaks volumes. Thus, less than 1% (.15%) of the 43,204 participating Class Members have expressed any dissatisfaction with the Settlement, with that percentage even lower by comparison to the total number of consumers noticed. Whether the Court considers the thousands of class members who neither objected nor opted out, the 5,099 who affirmatively telephoned the administrator or class counsel 13,940 that visited the website (Ex. 1, Platt Decl. ¶¶ 9–10), or the many more who joined the Virginia class, the collective voice of the Class is overwhelmingly positive. Courts have held that such minute numbers of objectors signals class wide approval of the settlement's terms and thus supports a finding of adequacy. *Manuel v. Wells Fargo Bank, Nat'l Ass'n*, No. 3:14-cv-238(DJN), 2016 WL 1070819, at *4 (E.D. Va. Mar. 15, 2016) (noting the "lack of opposition strongly supports a finding of adequacy" where the lone objector withdrew his objection); *In re Microstrategy, Inc. Sec. Litig.*, 150 F. Supp. 2d 896, 906 (E.D. Va. 2001) (finding lack of objections supported the settlement); *Strang v. JHM Mortg. Sec. Ltd. P'ship*, 890 F. Supp. 499, 502 (E.D. Va. 1995) (same).

Finally, Defendant has confirmed that it served the required Class Action Fairness Act notices on the state and federal attorneys general on February 10, 2017. Defendant received no substantive comments, questions, or objections in response.

[11] (*See* Docs. 177–96.) In total, 20 objections were filed with the Court, but thereafter, four individuals withdrew their objections. (Doc. 177 (Stehlik); Doc. 181 (Richardson); Doc. 191 (Wiggins); Doc. 194 (Donaldson).) Class Counsel spoke with each of these four individuals, and each stated they wished to withdraw their objection because they did not understand that they may have individual claims. All but Ms. Wiggins followed up with an email confirming they wished to withdraw their objection.

It has been Class Counsel's experience that nearly every case, regardless of size, will draw some sort of objection or complaint from class members. As with any Class Action, Class Counsel balanced the desire to address the claims of many, while adequately and fairly compensating those who were most significantly harmed by Sterling's actions. In this case, Class Counsel balanced this tension by structuring a Class Settlement that addressed and compensated the broadest class of individuals harmed by Sterling's actions, while preserving for future litigation the claims of individuals with more significant, and individualized, harm. While Class Counsel is of course cognizant that opinions from Class Members matter and none are to be lightly dismissed, here the objections do not speak to the substance of the settlement. Still, the objections raise points that should be addressed so that the Court has an ample record by which to make its final fairness decision.

1. Objections Based upon Inaccurate Information Causing Loss of Employment Opportunities.

Twelve of the sixteen objections fall into this category and echo a similar complaint: that "Sterling's inaccuracy of my records affected my employment." (Doc. 178.)[12] Review of these objections demonstrates that the basis for the objections is not the adequacy or the fairness of the Settlement itself, but a misunderstanding of the Release of Claims. (*See, e.g.*, Doc. 179 ("Due to the inaccuracy and incorrect investigation performed by Sterling I lost a position opportunity more than 3 years ago that would have resulted in $30,000.00 more annual gross income."); Doc. 186 ("Due to the incorrect information provided on my background check for an employer caused me [to] lose a great opportunity."); Doc. 192 ("Sterling gave an inaccurate criminal background report to a potential employer . . . [a]s a result, I was passed over for the job, became unemployed AND unemployable . . .").) Each of these individuals expresses their belief that the

[12] Class Counsel would characterize the following objections as falling within this category: Docs. 178, 179, 184, 185, 186, 187, 188, 189, 190, 192, 193, 195.

loss of employment opportunities is not fairly compensated by a payment of less than $100. Class Counsel agrees with the objectors that the cash award would *not* fairly compensate a consumer for an inaccuracy that resulted in the loss of an employment opportunity. But as described below, and for this very concern, Class Counsel demanded and obtained language such that the Release of Claims expressly excludes the very claims that the objectors seek to assert against Sterling: individual claims for a violation of 15 U.S.C. § 1681e(b). Thus, if the harm suffered by each of the above objectors was actionable before the Class Settlement, it remains untouched after the settlement. In short, each of these objectors may have individual claims against Sterling, a right that was not hampered by the Settlement. They remain exactly in the position faced by the named Plaintiffs—they are free to prosecute their claims under § 1681e(b).

Given the objectors' misunderstanding, Class Counsel contacted each objector, in order to inform the objector that he/she may have individual claims excluded by the Release of Claims. (Ex. 2, Bennett Decl. ¶ 26.) That contact resulted in four objectors withdrawing their objections, but the number was limited by the fact that almost half of the objectors included no telephone number on their objection. Class Counsel sent a letter explaining the Release of Claims, and offering to answer any questions to those objectors that we were unable to contact by telephone. In short, these objections do not speak to the substance of the Settlement and thus identify no basis for the Court to reject the Settlement.

Regardless, even if the objections were correct in their concern of greater individual harm and the class member's ambition to prosecute their claim, for Virginia opt-in class members, the objectors could simply not join the class, and for Automatic payment class members, the consumer could fully opt-out.[13]

[13] *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 432 (4th Cir. 2003) ("Rule 23(c)(2) permits members of a class maintained under section (b)(3) to opt out of the class, providing an option for those Plaintiffs who wish to pursue claims against TPCM requiring more individualized inquiry. Thus, rhetoric aside, Plaintiffs with only direct claims are not being '[j]amm[ed],' 'sacrificed' or 'caught' in any class action against their will.") (citation omitted); *Soutter*

2. Other, Non-Specific Objections.

The remaining four objections raise general and non-specific issues. For example, objector Breedlove summarizes several of the key elements of the settlement agreement, followed by the statement: "I object." (Doc. 180.) Objector Levingston states only "I lost a lot of job opportunities." (Doc. 182.) Objector Noble appears to be a "sovereign citizen," and although he does not use the word object in his letter, states that he will accept "200,000 (U.S. DOLLARS) by Check For unknowingly, and unintentionally using [his] DECEASED ESTATE as a tool for profit." (Doc. 183.) And finally, objector Allen states "I object to the settlement because of the hardship it caused." (Doc. 196.)

Class Counsel certainly sympathizes with consumers who suffer financial hardship as a result of background checks. The claims brought in this case were designed to demand more transparency and notice for consumers in the employment process. And, the Settlement is designed to compensate class members for the harm caused by Sterling. To the extent that objectors Levingston and Allen suffered individual damages due to the actions or inactions of Sterling or other CRAs or employers in the employment process, the Settlement does not limit their ability to bring an individual suit. In short, their objections identify no basis for the Court to reject the Settlement.

E. The Release Of Claims.

In return for the substantial cash payment Class Members will receive, they will release all claims against Defendant, except individual claims for a violation of 15 U.S.C. § 1681e(b), as follows:

> Upon the Effective Date, each member of the Automatic Payment Class who has not validly opted out of the Settlement shall be deemed to have, and by operation of the Judgment shall have, fully, finally, and forever released, relinquished and discharged all Released Claims against Defendant and the Released Persons. This

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v. Equifax Info. Servs., LLC, 307 F.R.D. 183, 213 (E.D. Va. 2015) ("[A]ny putative class members who wish to litigate actual damages retain the right to opt-out pursuant to Rule 23(c)(2).").

> release specifically excludes each Class Member's individual claim that he or she may have against Defendant for any violation of 15 U.S.C. § 1681e(b).
>
> Upon the Effective Date, each member of the Virginia Opt In Class shall be deemed to have, and by operation of the Judgment shall have, fully, finally, and forever released, relinquished and discharged all Released Claims against Defendant and the Released Persons. This release specifically excludes each Class Member's individual claim that he or she may have against the Defendant for any violation of 15 U.S.C. § 1681e(b).

(Doc. 167-1 § 3.)

No unrelated third parties are included in the release. This means that any FCRA claims that are typically tied to violations by an employer, such as those for failure to provide pre-adverse action notice to a prospective employee, survive because they must be asserted against the employers, rather than Sterling, a credit reporting agencies.[14]

IV. LITTLE HAS CHANGED SINCE PRELIMINARY APPROVAL, GIVING THE COURT NO CAUSE TO OVERTURN THAT DECISION.

A. The Standards For Approval Of Class Action Settlements.

Settlement by compromise is part of a strong judicial policy within this Circuit favoring resolution of litigation prior to trial. *See, e.g.*, *S.C. Nat'l Bank v. Stone*, 749 F. Supp. 1419, 1423 (D.S.C. 1990) (noting "[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 appeal 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.

[14] Although this case also involved Multi-Color Corporation, most of the Sterling Class Members are not members of both settlements, because Sterling provided their information to a different employer. Thus, claims against all employers, other than MCC, remain.

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

To safeguard the interests of the absent class members, all class settlements and the corresponding later dismissal of the case require court approval. FED. R. CIV. P. 23(e)(1)(A). Rule 23(e) imposes two basic requirements before 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).

Federal jurisprudence strongly favors resolution of class actions through settlement. *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 59 F. Supp. 2d 1021, 1029 (N.D. Cal. 1999); *see* ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 11.41 (4th ed. 2002) ("The compromise of complex litigation is encouraged by the courts and favored by public policy."). Rule 23 requires Court review of the resolution of a class action such as this one. Specifically, the Rule provides that "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." FED. R. CIV. P. 23(e). Court approval is required to ensure that the parties gave adequate consideration to the rights of absent class members during settlement negotiations. *Henley v. FMC Corp*., 207 F. Supp. 2d 489, 492 (S.D. W. Va. 2002) (citing *In re Jiffy Lube Sec. Litig*., 927 F.2d 155, 158 (4th Cir. 1991)).

Despite the policy favoring settlement, in a class action, a court may approve a settlement only after a hearing and upon a finding that it is "fair, reasonable, and adequate." FED. R. CIV. P. 23(e)(2). Approval of a class action settlement is committed to the "sound discretion of the district courts to appraise the reasonableness of particular class-action settlements on a case-by-case basis, in light of the relevant circumstances." *In re MicroStrategy, Inc. Sec. Litig*., 148 F.

Supp. 2d 654, 663 (E.D. Va. 2001). However, "there is a strong initial presumption that the compromise is fair and reasonable." *Id.* (quoting *S.C. Nat'l Bank*, 139 F.R.D. at 339).

In determining whether a given settlement is reasonable, the court should avoid transforming the hearing on the settlement into a trial on the merits regarding the strengths and weaknesses of each side of the case. *Flinn v. F.M.C. Corp.*, 528 F.2d 1169, 1172–73 (4th Cir. 1975). Ultimately, the approval of a proposed settlement agreement is in the sound discretion of the Court. *Strang v. JHM Mortgage Sec. Ltd. P'ship*, 890 F. Supp. 499, 501 (E.D. Va. 1995) (citing *Jiffy Lube*, 927 F.2d at 158).

B. The Notice To Class Members Met The Requirements Of Due Process.

In a settlement class maintained under Rule 23(b)(3), the class notice must meet the requirements of both Federal Rules of Civil Procedure 23(c)(2) and 23(e). Rule 23(e) specifies that class actions may not be settled without court approval and notice to class members. FED. R. CIV. P. 23(e). Rule 23(c)(2) requires that notice to the class be "the best practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." FED. R. CIV. P. 23(c). The Rule also requires that the notice inform potential class members that (1) they have an opportunity to opt out; (2) the judgment will bind all class members who do not opt out; (3) and any member who does not opt out may appear through counsel. *Id.* The Court must consider the mode of dissemination and the content of the notice to assess whether such notice was sufficient. *See* Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION § 21.312 (4th 2004).

The class list was compiled by Defendant and with the assistance of the Administrator and Class Counsel, reasonable measures were taken to locate updated addresses for the Class Members. As this Court has held, "[w]hat amounts to reasonable efforts under the circumstances is for the Court to determine after examining the available information and possible

identification methods . . . 'In every case, reasonableness is a function of [the] anticipated results, costs, and amount involved.'" *Fisher v. Va. Elec. & Power Co*., 217 F.R.D. 201, 227 (E.D. Va. 2003) (citations omitted). The Supreme Court has concluded that direct notice satisfies due process, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812–13 (1985), and as addressed above, other courts—including this Court and others within the Fourth Circuit—have approved mailed-notice programs that reached a much smaller percentage of class members than this class notice reached. *See In re Serzone*, 231 F.R.D. 221, 236 (S.D. W. Va. 2005) (approving notice program where direct mail portion was estimated to have reached 80% of class members); *Martin v. United Auto Credit Corp.*, No. 3:05-cv-00143 (E.D. Va. Aug. 29, 2006) (granting final approval where class notice had approximately 85% delivery).

The Parties' efforts to provide Class Members with notice of the Settlement makes it clear that such notice was the best available notice under the circumstances given: (a) the available information; (b) the possible identification methods; (c) the number of Class Members; and (d) the amount of the Settlement. The Parties have complied fully with the Court's Preliminary Approval Order, and have taken reasonable steps to ensure that the Class Members were notified—in the best and most direct manner possible—of the Settlement's terms and significant benefits.

C. An Analysis Of The *Jiffy Lube* Factors Confirms That The Settlement Is Fair And Reasonable.

The next phase of the Court's determination of compliance with Rule 23(e)(2) typically requires a two-part analysis, referred to in this Circuit as the *Jiffy Lube* factors. The Court must determine whether the settlement is "fair and reasonable," and then whether the settlement is "adequate." The approval of a proposed settlement agreement is in the sound discretion of the Court. *In re Jiffy Lube Sec. Litig*., 927 F.2d at 158.

The first step in the *Jiffy Lube* analysis is an analysis of the fairness of the settlement. The fairness factors are critical to the protection of the class members from unscrupulous class counsel and relate to whether there has been arm's-length bargaining. *See In re Mid-Atlantic Toyota Antitrust Litig*., 564 F. Supp. 1379, 1383 (D. Md. 1983); *S.C. Nat'l Bank*, 139 F.R.D. at 339. The Court must consider four factors: (i) the posture of the case at the time of settlement; (ii) the extent of discovery that has been conducted; (iii) the circumstances surrounding the negotiations; and (iv) the experience of counsel. *Jiffy Lube*, 927 F.2d at 158–59; *see also In re Microstrategy, Inc.*, 148 F. Supp. 2d at 663–64; *Strang*, 890 F. Supp. at 501. A proposed class action settlement is considered presumptively fair where there is no evidence of collusion and the parties, through capable counsel, have engaged in arm's-length negotiations. *See S.C. Nat'l Bank*, 139 F.R.D. at 339. As described below, the settlement reached in this case is clearly fair and each of the *Jiffy Lube* factors are satisfied.

The determination of the appropriate time at which to settle a case is one that is entrusted to experienced class counsel. It can be difficult to detour from a litigation track (and meeting the various burdens of proof) to a mindset that considers that every case—no matter how conceivably strong it may seem—will always have an element of risk. Settlement is the only outcome that allows both sides to be assured of a certain ending to the litigation, alleviating both the risk and cost inherent in further litigation to both sides, as well as the additional burden on the Court's already-strapped resources. This case was no exception, and in fair consideration of the strengths and weaknesses of the case, Plaintiffs' Counsel felt that settlement was appropriate at this juncture because of the result for the Class weighed against the risk that the Class would lose altogether. *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 *W. Va. v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 740 (S.D.N.Y. 1970)); *In re Microstrategy*, 148 F. Supp. 2d at 667.

The proposed Settlement in this case was reached only after the following events, each of which independently supports the conclusion that the posture of the action and the discovery conducted is such that the proposed settlement is fair:

- Significant and thorough written discovery and depositions on both class and merits issues;
- Substantive and contested briefing, including on motions to dismiss, motions to stay, motion to compel, and motion to retain confidential designations; and
- Briefing as a result of *Spokeo*, one of the first opportunities of any set of counsel to brief the issue.

(Ex. 2, Bennett Decl. ¶ 21.) Taken as a whole, there is little doubt that the decision to settle was as informed as it possibly could have been. This action has been appropriately litigated by the Parties and sufficient discovery has been obtained by both Plaintiffs and Defendant to assess the strength of their respective claims and defenses. (*Id.* ¶ 24.)

Further, the Parties have conducted arm's-length and contentious negotiations. Courts have presumed settlements reached in that context to be fair. *See*, *e.g.*, *City P'ship Co. v. Atl. Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996). Consequently, the circumstances surrounding the Parties' settlement negotiations support a finding that the settlement is fair.

Class Counsel in this case are all highly-skilled and experienced consumer protection attorneys who have successfully litigated individual and class cases on behalf of consumers, and they endorse the settlement as fair and adequate under the circumstances. (Ex. 2, Bennett Decl. ¶

27.) Courts recognize that the opinion of experienced and informed counsel in favor of settlement should be afforded substantial consideration in determining whether a class settlement is fair and adequate. *See*, *e.g.*, *In re MicroStrategy*, 148 F. Supp. 2d at 665.

Moreover, there are advantages not only to the Parties, but also to the Court when opposing counsel are already experts on the legal and factual issues in a case and in a field of practice. *See S.C. Nat'l Bank*, 139 F.R.D. at 339 (concluding fairness met where settlement discussions "were hard fought and always adversarial," and those negotiations "were conducted by able counsel" with substantial experience in the area of the subject law). Experienced counsel negotiated the Settlement, making it their first priority bringing the best benefit possible to their clients and, therefore, to the Class. (Ex. 2, Bennett Decl. ¶ 22.) This Court and many others have found the undersigned and other Consumer Litigation Associates attorneys along with the attorneys at Kelly & Crandall, PLC and Francis & Mailman, P.C. to be qualified and adequate to represent a consumer class.[15] (Ex. 2, Bennett Decl. ¶ 22; Ex. 3, Declaration of Kristi C. Kelly ("Kelly Decl.") ¶ 9.)

Counsel's collective experience and expertise, together with discovery sufficient to aid Counsel and the Court in evaluating Plaintiffs' claims and Defendant's rebuttals, further point to the conclusion that the Settlement was the product of arm's-length negotiation by experienced counsel and thus warrants final approval. *See Jiffy Lube*, 927 F.2d at 159; *see also Strang v. JHM Mortgage Sec. Ltd. P'ship*, 890 F. Supp. 499, 501–02 (E.D. Va. 1995) (concluding requirement

[15] *See, e.g.*, *Manuel*, 2015 WL 4994549, at *15 (finding same set of Class 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"); *see also Soutter v. Equifax Info. Servs., LLC*, 3:10-cv-107, 2011 WL 1226025 (E.D. Va. Mar. 30, 2011) ("[T]he Court finds that Soutter's counsel is qualified, experienced, and able to conduct this litigation. Counsel is experienced in class action work, as well as consumer protection issues, and has been approved by this Court and others as class counsel in numerous cases."); *Williams v. Lexis-Nexis Risk Mgt.*, No. 3:06-cv-241, 2007 WL 2439463, at *5 n.7 (E.D. Va. Aug. 23, 2007) (concluding that Class Counsel was adequate).

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").[16]

D. The Remaining *Jiffy Lube* Factors Confirm The Settlement Terms Are Adequate.

In an analysis of the adequacy of a proposed settlement, the relevant factors to be considered may include: (1) the relative strength of the plaintiff's case on the merits; (2) any difficulties of proof or strong defenses the plaintiff would likely encounter if the case were to go to trial; (3) the expected duration and expense of additional litigation; (4) the solvency of the defendant and the probability of recovery on a litigated judgment; (5) the degree of opposition to the proposed settlement; (6) the posture of the case at the time settlement was proposed; (7) the extent of discovery that had been conducted; (8) the circumstances surrounding the settlement negotiations; and (9) the experience of counsel in the substantive area and class action litigation. *See Jiffy Lube*, 927 F.2d at 159.

While Plaintiffs' Counsel firmly believes in the merits of Plaintiffs' claims, demonstrating liability on the FCRA claims at issue is not at all a certainty. As noted above, 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 and 1681o. Defendant of course contested liability in all regards, having dug-in its heels for protracted litigation. Further, unless there is a finding of a willful noncompliance, Plaintiffs (and thus the Class) must establish actual damages. Consequently, absent approval of the Settlement, Plaintiffs would be put to challenging proofs, including as to Defendant's willfulness, and all Parties face the prospect of continued litigation through the completion of a trial and, thereafter, by an appeal. (Ex. 2, Bennett Decl. ¶ 23.)

[16] *See* Exs. 4 and 5, Declarations of additional Co-Counsel setting out their qualifications to serve as Class Counsel as well as hourly rates, hours spent, and attorneys' fees and costs incurred in this litigation.

It is convincing that despite the successful delivery of over 161,635 total notices, only 17 Class Members have objected and only 46 have opted out. "Such a lack of opposition to the partial settlement strongly supports a finding of adequacy, for '[t]he attitude of the members of the Class, as expressed directly or by failure to object, after notice to the settlement is a proper consideration for the trial court.'" *In re Microstrategy*, 148 F. Supp. 2d at 668 (quoting *Flinn v. FMC Corp*., 528 F.2d 1169, 1173 (4th Cir. 1975)). As the Court has previously explained, "[b]ecause 'the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy.' The lack here of any objections to the settlement and the small number of class members choosing to opt-out of the case strongly compel a finding of adequacy" *Id*. (citing *Sala v. Nat'l R.R. Passenger Corp*., 721 F. Supp. 80, 83 (E.D. Pa. 1989). "The small number of objections necessarily must be evaluated relative to the size of this Class of over 1.0 million members. In litigation involving a large class it would be 'extremely unusual' not to encounter objections." *In re NASDAQ Mkt.-Makers Antitrust Litig*., 187 F.R.D. 465, 478-79 (S.D.N.Y. 1998) (citing *In re Anthracite Coal Antitrust Litig*., 79 F.R.D. 707, 712–13 (M.D. Pa. 1978), *aff'd in part*, 612 F.2d 571 and 612 F.2d 576 (3d Cir.1979)). Where "[t]he parties objecting to the settlements are both qualitatively and quantitatively insignificant," their objections may be disregarded. *In re Corrugated Container Antitrust Litig*., 659 F.2d 1322, 1327 (5th Cir. 1981), *cert. denied sub nom. CFS Continental, Inc. v. Adams Extract Co*., 456 U.S. 998 (1982). Courts recognize that where the class as a whole supports a settlement, it should be approved.[17] Indeed, even a small majority of support creates a presumption in favor of approval.

[17] *See*, *e.g*., *In re Beef Industry Antitrust Litig*., 607 F.2d 167, 180 (5th Cir. 1979; *Laskey v. Int'l Union*, 638 F.2d 954 (6th Cir. 1981) (small number of objectors demonstrates fairness of a settlement); *Shlensky v. Dorsey*, 574 F.2d 131 (3rd Cir. 1978) (same); *Bryan v. Pittsburgh Plate Glass Co*., 494 F.2d 799, 803 (3d Cir.) (approving settlement where 20 percent opted out or objected); *Grant v. Bethlehem Steel Corp*., 823 F.2d 20 (2d Cir. 1987) (approving settlement with thirty-six objecting); *Boyd v. Bechtel Corp*., 485 F. Supp. 610, 624 (N.D. Cal. 1979) (granting approval where sixteen percent objected).

See Reed v. Gen'l Motors Corp., 703 F.2d 170, 174 (5th Cir. 1983) (approving class action settlement where more than 40 percent of class objected or opted out); *Cotton v. Hinton*, 559 F.2d 1326, 1333 (5th Cir. 1977) (nearly 50 percent opted out or objected; settlement nevertheless approved).

If the Court finally approves the Settlement, then the Class Members will receive genuine, cash relief without the need to show any harm whatsoever or that Defendant's conduct meets the standards for willfulness. Class Members who have been additionally harmed due to an inaccuracy in their Sterling report can remain in the Class, and bring individual suits. The absence of any significant opposition to the Settlement, coupled with the lack of any other competing class cases supports the strength of the Settlement. For these reasons, the opinion of all Counsel involved is that the terms of the Settlement Agreement represent a fair, reasonable, and adequate resolution of the claims alleged. The Court should conclude likewise.

V. CONCLUSION.

The Settlement is an excellent result considering the contentiousness of the litigation and the lengthy litigation process. The terms of the Settlement, as well as the circumstances surrounding negotiations and its elimination of further costs caused by litigating this case through the completion of trial and appeal, satisfy the strictures for final approval.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on the 5th day of July 2017, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which sent notification of such filing to all counsel of record.

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