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,

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

v.

MULTI-COLOR CORPORATION,

and

STERLING INFOSYSTEMS, INC.,

Defendants.

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

Plaintiff Jeffrey Scott Ridenour, individually and on behalf of all other similarly situated individuals, with the consent of Defendant Multi-Color Corporation ("MCC"), has moved for Final Approval of the Class Action Settlement, for the reasons discussed in this Memorandum in support of his Motion. Plaintiff seeks an Order of Final Approval and dismissal of claims with prejudice. Class members have received notice, and none have objected to the Settlement, and only two have excluded themselves. In short, nothing 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. § 1681b(b)(2). ("FCRA"). Plaintiff's Class Complaint names Jeffrey Scott Ridenour as Plaintiff, and Multi-Color Corporation, as Defendant. Plaintiff asserts a class claim against Defendant based on its use of employment-purposed consumer reports in its hiring processes.

After arms'-length settlement discussions, formal discovery, and the briefing of and decisions on motions, the Parties entered into a Stipulation of Settlement (the "Settlement Agreement"). The Settlement Agreement addresses the claims advanced by Mr. Ridenour, individually and on behalf of other similarly situated, against Defendant Multi-Color Corporation.[1] The Court considered the Consent Motion for Preliminary Approval of Class Action Settlement, finding that the Parties made a strong showing in support of preliminary approval. (ECF Doc. 144.) The Court identified several issues on which it sought clarification or modification. (*Id*.) The Parties addressed the issues raised by the Court, and filed a Supplemental Motion for Preliminary Approval of Class Action Settlement. (ECF Doc. 145.) The Court granted preliminary approval of the Settlement on September 15, 2016. (ECF Doc. 147.)

The Settlement Administrator notified the 750 consumers included in the Settlement Class in a Court-approved mailing. (Ex. 1, Declaration of Roger Young ("Young Decl.") ¶ 2.) Pursuant to Federal Rule of Civil Procedure 23, the Parties are now seeking final approval of the proposed class action settlement. Specifically, the Parties request that the Court finally certify the proposed Class and the proposed Class Settlement,[2] and dismiss the claims with prejudice.

---

[1] The Settlement Agreement does not address the claims by Plaintiffs Ridenour and Amin Halem, individually and on behalf of others similarly situated, against Defendant Sterling Infosystems, Inc.

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

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]

First, the Settlement remains an excellent result for the Class. The Settlement sends automatic cash payments to every Settlement Class Member without them having to do anything. No claim process is required, and none of the fund reverts to the Defendant. In exchange, Class Members provide only a narrow release. And this result was obtained with questions remaining as to Defendant's willfulness, a necessary proof for the recovery of any damages. There are now no objections to the Settlement, and only two Class Members have opted out. Thus, the Settlement is "reasonable and adequate." FED. R. CIV. P. 23(e)(1)(C).

Second, the Settlement occurred after arms'-length discussions and is supported by not only formal discovery, but a thorough exploration of the Parties' claims and defenses. The Settlement resolves all claims for the putative class pleaded against MCC in the Second Amended Class Action Complaint. There was absolutely no coercion and Class Counsel was

[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.

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 Plaintiff's claims, Settlement structure, and class certification analysis are detailed in Plaintiff's Memorandums in Support of their Motion for Preliminary Approval. (ECF Docs. 139, 146.)

A. Plaintiff's Claims And Defendant's Willfulness.

The claims subject to the Settlement were pleaded in Plaintiff's Second Amended Class Action Complaint (ECF Doc. 128), which alleges that Defendant violated the FCRA by: (1) obtaining consumer reports in the employment context without making a lawful disclosure to consumers of its intent to do so. 15 U.S.C. §§ 1681b(b)(2). Defendant denies all of Plaintiff's 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 attaches 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, Plaintiff (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. Plaintiff here seeks the latter, and has settled his 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 Plaintiff to show willfulness, Defendant denies liability under the FCRA.[5] 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.

B. The Lengthy Litigation of the Dispute.

This case has proceeded in the typical way for a nationwide, complex case. Several months before the case was filed, Class Counsel began investigating and researching the pending claims against the Defendant. (ECF Doc. 157-1, Declaration of Leonard A. Bennett ("Bennett Decl.") ¶ 4.) On January 29, 2015, Mr. Ridenour filed this action. (ECF Doc. 1.) The Parties engaged in motions practice and discovery, with MCC responding substantively to written discovery. (Bennett Decl. ¶ 4.) 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. (ECF Doc. 91.) Plaintiff's formal requests yielded a more than substantial document production from MCC. (Bennett Decl. ¶ 5.) Those documents include information relating to members of the Settlement Class as well as documents particular to the Plaintiff. In light of the discovery accomplished, the Parties began to negotiate the present resolution. 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*.)

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

III. THE SETTLEMENT OF THE CLASS CLAIM.

A. The Settlement Class.

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 Class"):

> All natural persons residing in the United States (including all territories and other political subdivisions of the United States), (a) who were employees of MCC or who applied for an employment position with MCC between January 29, 2013 and July 28, 2016 (b) as part of this application process (c) MCC procured or caused to be procured a consumer report for employment purposes (d) using a written disclosure provided to it by Sterling (e) which the Named Plaintiff alleges was not the "clear and conspicuous disclosure . . . in a document that consists solely of the disclosure that a consumer report may be obtained for employment purposes" in violation of the Fair Credit Reporting Act disclosure and authorization requirements at l5 U.S.C. § 1681b(b)(2).

The Settlement Class is comprised of 750 individual members.

B. The Consideration Provided To The Class.

This case was thoroughly litigated, with Plaintiff facing substantial merits defenses to willfulness. Nevertheless, Plaintiff was able to negotiate a settlement structure paying real money to Class Members without imposing an arduous or difficult claims process. Checks will arrive automatically, without Class Members having to do anything.

Defendant will pay Three Hundred Fifty-Five Thousand Dollars ($355,000) to settle the claims of the Class. The Settlement provides a substantial monetary net benefit of approximately $312 to each Settlement Class Member.[6] In addition to the lack of any claims process at all, Class Members will receive these payments without having to prove any harm whatsoever, or make the more-difficult showing of willfulness. And these payments will be the full amount

[6] The individual payout to Class Members may change slightly as a result of the actual cost of class administration (capped at $5,500), the deliverable rate (which should be close to the 97% successful-mail-delivery rate for Class Notice), and the rate at which Class Members cash their initial checks. If additional funds remain in the Class Funds, they will be distributed pro-rata to Class Members in a second payout.

Class Members will receive after the deduction of proposed Service Award of $5,000 for the Class Representative; $109,835 in attorneys' fees and costs; and $5,500 in class administration costs.

C. The Notice Process Was Completed As The Court Instructed And Under Governing Law.

In its Preliminary Approval decision and subsequent rulings, the Court approved the form and content of the Class Notice and 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 Total Class Solutions, LLC ("Total Class Solutions"). (ECF Doc. 148 ¶ 6.) Total Class Solutions 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, Young Decl. ¶ 2.) Total Class Solutions 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 fairly well-established process. An experienced administrator like Total Class Solutions 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, which were then processed through the National Change of Address Database if any Class Member addresses proved stale. (*Id.* ¶ 2.) Total Class Solutions mailed the Court-approved Settlement Class Notices via first class U.S. Mail to all 750 Settlement Class Members. (*Id*.)

After the initial mailing, the Postal Service returned 28 Class notices as undeliverable and without forwarding addresses, and Total Class Solutions performed a skip trace search to attempt to update the addresses for those Class Members. (*Id.* ¶ 3.) After this update, Total Class Solutions obtained new addresses for and re-mailed 4 of those Class Members' notices. (*Id*.)

Following attempts to obtain valid addresses from the most commonly used sources, 24 Class Members' notices remain undeliverable. (*Id*.) All told, Total Class Solutions estimates that it successfully mailed notice to 726 Class Members, a reach of 97 percent. (*Id.*) Class Counsel's contact information and telephone number were included in the notice materials, and Class Counsel received and handled direct, live calls from Class Members. (Ex. 2, Bennett Decl. ¶ 7.)

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 97% successful-mail-delivery rate is remarkable— and much better than presented by a typical 20% undeliverable rate ordinarilly obtained and approved.[7]

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

Class Member reaction to the Settlement confirms that it is adequate. There are no objections, and two Class Members have validly opted-out of the Settlement. (ECF Docs. 151, 154.) While Counsel is of course cognizant that opinions from Class Members matter and none are to be lightly dismissed, here there has been no Class Member opposition to the Settlement.

[7] 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).

Likewise, Defendant has confirmed that it served the required Class Action Fairness Act notices on the state and federal attorneys general on September 21, 2016. Defendant received no substantive comments, questions, or objections in response.

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. There are none in this case. Presumably, even the large industry of professional objectors did not conclude that there was a valid basis to challenge the Settlement.

E. The Release Of Claims and Distribution.

In return for the substantial cash payment Class Members will receive, they will release a narrow set of claims against Defendant:

> all claims set forth in the Action, including unknown claims, demands, rights, liabilities, and causes of action under federal or state law, whether based on statutory or common law, whether class or individual in nature, known or unknown, concealed or hidden, and that were asserted or could have been asserted in the Action and that related to the use of consumer reports by Defendant in its hiring process.

(ECF Doc. 139-1 ¶ 1.18.)

No unrelated third parties are included in the release. This means that any FCRA claims that are typically tied to quantifiable, actual damages—like those for inaccuracy of reporting or failure to conduct a reasonable investigation of a dispute—survive because they must be asserted against credit reporting agencies, not employers like Defendant.

Settlement Checks that are returned, undeliverable, or remain uncashed for sixty (60) days from the date upon which they were mailed to Class Members will have no legal or monetary effect. After expiration of the sixty-day period after settlement checks are mailed to Class Members, any sums represented by uncashed settlement checks will revert to the Settlement Fund to be distributed to an approved *cy pres* beneficiary. The Settlement Agreement provides for *cy pres* to be distributed to the Consumer Alliance of Virginia. The Consumer

Alliance of Virginia is an appropriate *cy pres* beneficiary. It is a Virginia-based non-profit organization that works to invest in communities and organizations that provide resources and education to low and moderate income consumers to create a more equitable marketplace to work to provide a state where all people have equal access to a fair marketplace. There exists a close nexus between the work of the Consumer Alliance of Virginia and relief to the class because the use of employment-purposed consumer reports impacts consumer job-seekers in every aspect of their lives. Most importantly, class members' access to employment is directly served by the variety of services provided by the Consumer Alliance of Virginia.

IV. THE COURT SHOULD FINALLY APPROVE THE SETTLEMENT.

A. Nothing Has Changed Since Preliminary Approval, Giving The Court No Cause To Overturn That Decision.

1. 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.

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).

2. 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. 3:05cv00143 (E.D. Va. Aug. 29, 2006) (granting final approval where class notice had approximately 85% delivery). In fact, almost every case in which present Class Counsel has sought and obtained approval have presented a lower rate of deliverables than in this case.

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. *Shutts*, 472 U.S. at 812–13.

3. 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, which are known 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 v. JHM Mortg. Sec. Ltd. P'ship*, 890 F. Supp. 499, 501 (E.D. Va. 1995). 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 is 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 focused on an upcoming trial (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 as the case was presented to the jury, Plaintiff's 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 discovery on both class and merits issues;
- Substantive and contested briefing, including on a motion to stay; 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. ¶ 8.) 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 Plaintiff and Defendant to assess the strength of their respective claims and defenses. (*Id.* ¶ 9.)

Further, the Parties have conducted arms'-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. ¶ 9.) 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. ¶ 6.) This Court and many others have found the attorneys of Consumer Litigation Associates, Francis & Mailman, and Kelly & Crandall, all to be qualified and adequate to represent a consumer class.[8]

Counsel's collective experience and expertise, together with discovery sufficient to aid Counsel and the Court in evaluating Plaintiff's 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 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").

[8] *See, e.g.*, *Manuel v. Wells Fargo Nat'l Ass'n*, No. 3:14CV238, 2015 WL 4994549, at *15 (E.D. Va. Aug. 19, 2015) (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*, 3:10CV107, 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. 3:06CV241 (E.D. Va. 2008).

4. 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 Plaintiff's Counsel firmly believes in the merits of Plaintiff's 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, Plaintiff (and thus the Class) must establish actual damages. Consequently, absent approval of the Settlement, Plaintiff 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. ¶ 10.)

It is convincing that despite the successful delivery of over 726 total notices, no Class Members have objected and only two 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." *See 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)." *In re NASDAQ Mkt*.*-Makers Antitrust Litig*., 187 F.R.D. 465, 478-79 (S.D.N.Y. 1998). 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.[9] Indeed, even a small majority of support creates a presumption in favor of approval. *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).

[9] *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*. *(PPG Indus*., *Inc*.*)*, 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).

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 believing their cases are even more valuable or who have actual damage claims in excess of these expected awards have had the opportunity to opt-out and pursue those claims on an individual basis. Only two have done so, further supporting the conclusion that the Settlement is adequate. 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.

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,

Jeffrey S. Ridenour, *on behalf of himself and others similarly situated*,

By:_____/s/_____
Leonard A. Bennett, Esq., VSB #37523
Susan M. Rotkis, Esq., VSB #40693
Craig C. Marchiando, Esq., VSB #89736
CONSUMER LITIGATION ASSOCIATES, P.C.
763 J. Clyde Morris Blvd, Suite 1A
Newport News, VA 23601
Telephone: (757) 930-3660
Facsimile: (757) 930-3662
Email: lenbennett@clalegal.com

srotkis@clalegal.com
craig@clalegal.com

Kristi C. Kelly, Esq.
Andrew J. Guzzo, Esq.
KELLY & CRANDALL, PLC
4084 University Drive, Suite 202A
Fairfax, VA 22030
Direct: 703-424-7576
Fax: 703-591-0167
Email: kkelly@kellyandcrandall.com
aguzzo@kellyandcrandall.com

James A. Francis (*pro hac vice*)
David A. Searles (*pro hac vice*)
FRANCIS & MAILMAN PC
Land Title Building
100 S. Broad Street, 19th Floor
Philadelphia, PA 19110
Tel: (215) 735-8600
Fax: (215) 940-8000
dsearles@consumerlawfirm.com
jfrancis@consumerlawfirm.com

Counsel for Plaintiff and the Class

CERTIFICATE OF SERVICE

I certify that on the 2nd day of January 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.

/s/

Leonard A. Bennett, VSB #37523
CONSUMER LITIGATION ASSOCIATES, P.C.
763 J. Clyde Morris Blvd., Suite 1-A
Newport News, VA 23601
Telephone: (757) 930-3660
Facsimile: (757) 930-3662
Email: lenbennett@clalegal.com