IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

TYRONE B. HENDERSON, SR., *et al.*, on behalf of themselves and others similarly situated, **Plaintiffs,** **v.** **FIRST ADVANTAGE BACKGROUND SERVICES, CORP.** **Defendant.**	**Civil Action No. 3:14-CV-00221**

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT, APPLICATION FOR SERVICE AWARD TO THE CLASS REPRESENTATIVE, AND APPLICATION FOR AWARD OF ATTORNEYS' FEES

Plaintiffs Terrell Manuel and Dawn M. Rosales (hereinafter referred to as "Plaintiffs" or "Class Representatives"), on behalf of themselves and the Class, respectfully submit this memorandum in support of final approval of the class settlement reached in this case and apply for a service award for their roles in prosecuting this action. Class counsel also apply for an award of attorneys' fees for the successful result now before this Court for final approval.

I. INTRODUCTION

The Court has preliminarily approved settlement (the "Settlement") of this nationwide class action filed under the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* ("FCRA"), between Terrell Manuel and Dawn M. Rosales on behalf of the Class and First Advantage Background Services, Corp.. ("First Advantage"), the Defendant. (Doc. 90.) The Settlement resolves the claims of a class of consumers under 15 U.S.C. § 1681i.

The Court's job at this posture is to determine whether a class action settlement comports with Fed. R. Civ. P. 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. *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[1]; and (2) fairness—the process question as to how the settlement came about.[2]

First, the Settlement represents a substantial cash resolution for the Class. In fact, at $ 500.00 each, this settlement represents the higher end of per-class member recoveries in FCRA class action settlements. The settlement sends automatic cash payments to ***every*** Settlement Class member. No claim process is required and none of this fund reverts[3] to the Defendant. In exchange, class members provide only a narrow release. Not a single person has objected to the Settlement, and thus it is "Reasonable and Adequate." Fed. R. Civ. P. 23(e)(1)(C).

Second, the Settlement occurred near the very end of litigation. The posture at settlement is itself evidence of the arms-length and non-collusive nature of the settlement. The settlement was reached after more than one and a half years of litigation – after discovery was closed and

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[1] The "adequacy" element 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 defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158-59 (4th Cir. 1991).

[2] 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." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158-59 (4th Cir. 1991).

[3] The settlement allows for the Defendant to be reimbursed for settlement administration expenses, but no reversion of funds.

under the supervision of a United States Magistrate Judge. (Doc. 78.) There is no question that negotiations were at arm's-length. In fact, even after reaching settlement, the Parties continued to negotiate and litigate its terms. Class Counsel was more than equipped to litigate aggressively and effectively on behalf of the Class. Thus the Settlement is "Fair." Fed. R. Civ. P. 23(e)(1)(C).

II. THE COURT GRANTS PRELIMINARY APPROVAL

The class certification analysis, case background, nature of Plaintiff's claims and Settlement structure are detailed in the Plaintiffs' Memorandum in Support of Motion for Preliminary Approval. (Docs. 79-80.)

A. The Claims and "Willfulness" Defense.

Plaintiffs filed this class action against First Advantage asserting both individual and class claims under the FCRA. (*See* Third Am. Class Action Compl.)(Doc. 58). Plaintiffs brought individual claims under 15 U.S.C. §§ 1681c, 1681g, 1681i, and 1681e(b). As a result of arms-length negotiation, and only after the close of discovery, the Plaintiffs and First Advantage have agreed to separately and unconditionally resolve the individual claims as set forth in the Agreement.

The Class Representatives alleged that First Advantage violated 15 U.S.C. § 1681i(a)(1) by failing to conduct a timely investigation after receiving a consumer dispute. Plaintiffs White, Manuel, and Rosales also alleged that First Advantage violated 15 U.S.C. § 1681k(a)(1) by failing to provide the proper FCRA disclosures to applicants for employment and current employees prior to furnishing a consumer report containing adverse public record information. Finally, Plaintiffs White, Manuel, and Rosales alleged that First Advantage violated 15 U.S.C. § 1681g by failing to provide consumers with all information contained in their consumer files upon request. The Parties have agreed to settle only the class claim brought under 15 U.S.C. § 1681i and to dismiss without prejudice the class claims brought under 15 U.S.C. §§ 1681k and 1681g.

First Advantage denies liability in this case and, in fact, has contested both the factual allegations and statements of law. The Settlement Agreement itself includes a statement of Defendant's denial. But the Plaintiffs' challenge was greater than merely proving that Defendant violated the law. Instead, Plaintiffs alleged a "willful" violation of the FCRA, requiring proof that First Advantage's violation was committed either knowingly or recklessly. 15 U.S.C. § 1681n; *see generally Safeco Ins. Co. v. Burr*, 551 U.S. 47 (2007). First Advantage argued that even if its understanding of the law was incorrect, it was not unreasonably – and not willfully – so.

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. 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 willful violation. A class must proceed either on a uniform "actual damages" claim, or it must pursue statutory damages under the more challenging "willfulness" standard of Section 1681n. Actual damages for a delayed notice claims such as in this case would not realistically exceed the value of the $100 to $1,000 statutory damages provided as an alternate remedy. The Plaintiff's primary obstacle remained – proving that First Advantage's FCRA violations were "willful." Thus, Plaintiff had yet to convince either the Court or a jury to find such liability.

B. Litigation History

Relevant to the "fairness" of the proposed settlement is the degree of litigation that has occurred and the knowledge obtained by Class Counsel prior to negotiating or mediation. There is little doubt that the Settlement occurred only after nearly all litigation was complete, after all substantive discovery was obtained and through the efforts of informed and knowledgeable Class Counsel.

This case has been zealously litigated, with much of the contest taking place among counsel and off the pages of the docket sheet. The parties engaged in aggressive discovery, including written discovery, party fact witness and corporate depositions, as well as third-party discovery. The Plaintiff amended the Complaint three times. The scheduling order was modified. The parties brought several discovery disputes for resolution by the court. The Plaintiffs filed a motion for class certification and the Defendant filed a motion for summary judgment.

Meanwhile, counsel were in frequent contact throughout the litigation of this matter, in meeting and conferring, in conducting depositions, and in raising and resolving some of their discovery disputes without the assistance of the court. Throughout the case, counsel kept the channels of communication open to settlement discussions.

C. Settlement Negotiations

In June of 2015, the Parties appeared for the Magistrate Judge-supervised settlement conference. Even then, it was not clear that any compromise could be reached. At the same time that the Parties were attempting to mediate the case, they were also formulating their pre-trial and trial strategies.

Through the in-person settlement conference, the Parties reached an agreement to dismiss certain of the class claims, settling individual claims separately, and compromising on the § 1681i claims through the date of the settlement. The settlement conference took place over the course of a day, with each side making significant concessions, and continued over the phone with the assistance of Judge Novak. Through the settlement conference process and subsequent communications, the Parties entered an agreement to settle the class claims.

D. Preliminary Certification of Fed. R. Civ. P. 23(b)(3) Settlement Class

The court has preliminarily certified a FED. R. CIV. P. 23(b)(3) class:

> All persons residing in the United States (including all territories and other political subdivisions of the United States) who First Advantage's records show, (a)

> contacted First Advantage to make a dispute within the two years that preceded the filing of this action and prior to July 1, 2014, (b) for which First Advantage refused to start an investigation because the consumer had not provided a copy of a government-issued ID and completed First Advantage's specific dispute form and/or otherwise took longer than 30 days to complete and respond to the dispute from the date of last contact from the consumer.

Agreement § 2.2. At the time the case was settled, First Advantage believed that the class size was approximately 750 individual class members. Class size was not only a material term of the Settlement, it was an important factor in determining the per-class-member recovery amount of $500 each. After the court entered the preliminary approval order, the Defendant revised its class size dramatically – by 300 people – an delivered a class list of 450 individuals to the Settlement Administrator. Class counsel believed that this was a serious alteration in one of the material terms of the settlement and sought court permission to evaluate the Defendant's creation and delivery of the class list. (Doc. 91-92.) After the issues of the class list were resolved, the Class Notice was mailed to everyone on the list. At the end of the mail notice program, the results indicated that approximately 26% of the class notices were undeliverable. (Doc. 101-102.) After meeting and conferring, counsel for both Parties sought permission to remail the class notices, which the court granted.

The court preliminarily approved, and the Parties now seek final approval of the appointment of Terrell Manuel and Dawn M. Rosales as Class Representatives on behalf of the Class Members and the appointment of Leonard A. Bennett, Susan M. Rotkis, Matthew J. Erausquin, Casey S. Nash, Matthew A. Dooley, Anthony R. Pecora, Christopher Colt North, and William L. Downing as counsel for the Class Members ("Class Counsel").

4. The Consideration Provided to The Settlement Class Under the Settlement Agreement

The Consideration provided in the Settlement is very simple: $ 500.00 to each class member, for a total of $225,000.00 that must be paid by First Advantage upon the effective date.

First Advantage has advanced all the costs associated with Settlement Administration separate from the Settlement Fund. The individual class member recovery in this case won't be reduced by the cost to administer the Settlement. If the Settlement is approved, checks will be sent to every class member distributing every penny of the Settlement Fund.

5. The Notice Process is Complete

In accordance with the Court's Preliminary Approval Order, a national class administration company, McGaldrey LLP (now RSM US LLP) to accomplish printing, mailing, and processing the notices for the settlement. (Dec. of Risa Neiman, Ex. 1). The Administrator was chosen after a request for proposal process. McGladrey is experienced in administering large class settlements, especially complex class settlements. All actions taken by the Administrator to date have been under the direct supervision of Class Counsel and Defendant's counsel.

Class Notice is a fairly well-established process. An experienced administrator such as McGladrey 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 Administrator received data files from First Advantage, which were then processed through the National Change of Address database. *Id*. ¶ 2. On October 30, 2015, McGladrey mailed the Court-approved Settlement Class Notice via first class U.S. Mail to 450 Class members.

In this mailing process, the Post Office returned 107 Settlement Class Notices as undeliverable, only three with forwarding addresses. Class counsel believed it was in the best interest of the class to extend the notice period and remail the notices to the Class members for whom the Administrator was able to identify an updated address. *Id*. ¶ 5-6. The Administrator was able to locate 85 updated addresses. *Id*. ¶ 6. As of March 4, 2016, only 32 Settlement Class notices (or approximately 7 % of the Settlement Class) have remained undeliverable. *Id*. ¶ 8.

In addition to this mailed notice process, McGaldrey established a website

(www.Hendersonfa.com), an email inbox, and a toll-free phone line to provide Class Members additional information on the proposed Settlement. *Id*. ¶ 4; Ex. A.

The mailed notice process was certainly the best available given the factors of this case. 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 this problem in this case. A 93 % successful mail delivery rate is very good even with such a small class size, and much better than the typical 20% undeliverable rate ordinarily obtained (and approved by the Court). (In fact, the "80%" target to which present counsel ordinary aspires and the Court typically considers is already well above the "reasonable notice" thresholds used in other venues. *Alberton v. Commn'w Land Title Ins. Co.,* No. 06–3755, 2008 WL 1849774, at *3 (E.D. Pa. Apr. 25, 2008) (direct notice projected to reach 70% of class plus publication in newspapers and Internet was sufficient); *Grunewald v. Kasperbauer,* 235 F.R.D. 599, 609 (E.D. Pa. 2006) (direct mail to 55% of class and publication in three newspapers and Internet was sufficient)).

6. Class Member Reaction

Unquestionably, the settlement is an excellent result for the Class. Indeed, the fact that there were no objections and no opt-outs is a factor that strongly militates in favor of finding the notice program and Settlement a success. This settlement is and was seen as a resounding success by and for the Class Members themselves.

III. ARGUMENT

A. The Proposed Settlement is Fair, Reasonable, and Adequate and Should Be Approved.

1. The Standard for Judicial 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) ("[t]he voluntary resolution of litigation through settlement is strongly favored by the courts") (citing *Williams v. First Nat'l Bank,* 216 U.S. 582 (1910)). Settlement spares the litigants the uncertainty, delay and expense of a trial and appeals while simultaneously reducing the burden on judicial resources. *Id*. at 1423 (quoting *Armstrong v. Bd. of Sch. Dirs.,* 616 F.2d 305, 313 (7th Cir. 1980)).

In order to safeguard the interests of the absent class members, all class settlements and the corresponding later dismissal of the case, requires court approval. Fed. R. Civ. P. 23(e)(1)(A). The process for that approval is governed by Rule 23(e), which 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." The parties address each of these requirements.

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). 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)). "There is a strong initial presumption that the compromise is fair and reasonable." *S. Carolina Nat'l Bank v. Stone*, 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).

2. The Notice to the Class Members was Reasonable

The class notice must meet the requirements of both Rule 23(c)(2) and 23(e). Rule 23(e) specifies that "[n]o class action may be "dismissed or compromised without [court] approval,' preceded by notice to class members." Rule 23(c)(2) requires that notice to the class must be "the best practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." The Rules also require 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). In this case, the court-approved class notice fulfills these requirements. (Nieman Decl., Ex. A).

The class list was compiled by First Advantage updated twice by the Administrator using the National Change of Address Database and Accurint. As this Court 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 the class notice reached in this case. *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.*, 3:05cv00143 (E.D. Va. Aug. 29, 2006) (Final Order approving class notice with approximately 85% delivery).

The Parties' efforts to provide class members with notice of the settlement makes in 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 excellent benefits.

3. An Analysis of the *Jiffy Lube* Factors Demonstrates that the Settlement is Fair and Reasonable

The next phase of the Court's determination of compliance with Rule 23(e)(1)(c) typically requires a two-part analysis, often referred to 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 is a determination as to 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. Carolina Nat'l Bank v. Stone*, 139 F.R.D. 335, 339 (D.S.C. 1991). 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. *In re Jiffy Lube Sec. Litig.*, 927 F.2d at 158-59; *see also In re Microstrategy, Inc. Sec. Litig.*, 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. Carolina 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 Parties agreed to settle only after conducting extensive merits-related and class discovery. During and after the discovery period, the Parties conducted extensive and substantive settlement talks, both on the phone and in person. There were numerous contacts among counsel leading up to and following the settlement conference, including preparation of detailed settlement statements and later negotiations of the specific terms to implement the settlement. It was not possible to settle the case at an earlier posture –discovery and motions practice was necessary to bring the Parties to a posture where they were each willing to compromise and where they each had a grasp of the facts and law of the case.

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, including the FCRA. Defendant's retained and international law firm with over 850 attorneys, Seyfarth Shaw, which assigned not less than six of its most experienced financial services and class action litigators to the case. 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. Carolina 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 in Plaintiffs' cases, to the Class. (Decl. of Leonard A. Bennett)(Ex. 2).[4]

Counsel's collective experience and expertise, together with discovery sufficient to aid Counsel and the Court in evaluating Plaintiffs' claims and Defendants' defenses, 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 In re 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 fairness requirement met where "plaintiffs' counsel, with their wealth of experience and knowledge in the securities-class action area, engaged in sufficiently extended and detailed settlement negotiations to secure a favorable settlement for the Class").

4. An Analysis of the *Jiffy Lube* Factors Demonstrates that the Settlement is Adequate

The Court must also determine whether the proposed class settlement is substantively "adequate," the second prong of the *Jiffy Lube* analysis. The Fourth Circuit's decision in *Jiffy Lube*

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[4] *See e.g. 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."); *See also Williams v. Lexis-Nexis Risk Mgt.*, No. 3:06CV241 (E.D.Va. 2008); *Beverly v. Wal-Mart*, No. 3:07Cv469 (E.D.Va. 2007); *Capetta v. GC Servs., Inc.,* No. 3:02cv288 (E.D. Va.); *Ryals v. HireRight Sols. Inc.,* No. 3:09CV625 (E.D.Va.), *Daily v. NCO,* No. 3:09CV031 (E.D.Va. 2011); *Conley v. First Tennessee,* No. 1:10CV1247-TSE (E.D.Va.)*; Lengrand v. Wellpoint,* No. 3:11CV333-HEH (E.D.Va.); *Henderson v. Verifications Inc.,* No. 3:11CV514-REP (E.D.Va. 2013); *Pitt v. K-Mart Corp.*, No. 3:11CV697 (E.D. Va. May 24, 2013); *James v. Experian Info. Sols.*, No. 3:12CV902 (E.D.Va. Oct. 29, 2014) (approving in open court class counsel's hourly rates as reasonable and finding "that class counsel are experience and qualified."); *Manuel v. Wittstadt*, Civ. No. 3:12CV450 (E.D. Va. 2013); *Shami v. Middle East Broadcast Network*, No. 1:13CV467-CMH (E.D.Va. April 30, 2014); *Roe v. Intellicorp, Inc.,* No. 1:12CV2288-JG (N.D.Oh. June 5, 2014); *Reardon v. ClosetMaid, Inc*., No. 2:08CV1730 (W.D.Pa. June 13, 2014); *Goodrow v. Freidman Freidman & MacFadyen*, No. 3:11CV20 (E.D.Va. June 4, 2014); *Berry v LexisNexis Risk & Info. Analytic Sols., Inc., No.* 3:11CV274 (E.D.Va. Sept. 5, 2104); *Edwards v. Horizon Staffing, Inc.,* No. 1:13cv3002 (N.D.Ga. Jan. 2, 2015); *Marcum v. Dolgencorp,* 3:12CV108 (E.D.Va.); *Kelly v. Nationstar,* 3:13CV311 (E.D.Va.); *Wyatt v. SunTrust Bank*, 3:13CV662 (E.D. Va.).

teaches that the adequacy inquiry is guided by evaluating: (1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement. *In re Jiffy Lube,* 927 F.2d at 159. Plaintiffs at all times believed that this case was very strong in several regards, including being able to establish basic FCRA liability and that the named Plaintiffs were typical not only of the Class but also of consumers seeking employment requiring a consumer report. However, the Defendant was prepared at all times to contest merits liability and class certification and the whether it was even required to send a FCRA notice as it argued in its motion for summary judgment. As discussed above, the Plaintiff would be required to produce adequate evidence for a jury to find First Advantage *willfully* violated the FCRA. Without the certainty afforded both sides in the approval of the class settlement, all parties would have proceeded with a jury trial on the merits – based on a statutory language claim - likely followed by appeal.

The determination of when it is appropriate to settle a case is one that is entrusted to experienced class counsel. 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. Plaintiffs' counsel felt that settlement was appropriate at this juncture because of the cash recovery for the Class and the risk involved in proceeding. *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'"); *In re Microstrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d at 667.

It is convincing that despite the successful delivery of 93% of the class notices, no class members have objected or 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.' *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975)." *In re Microstrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d at 668. 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 partial 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). Courts recognize that where the class as a whole supports a settlement, it should be approved. 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). Considering all these factors, the Settlement is adequate under the *Jiffy Lube* standard.

B. The Court Should Approve the Request for an Award of Service Payment to Mr. Manuel and Ms. Rosales, Attorneys Fees and Reimbursement of Expenses

1. The Court Should Award Service Payment to the Class Representative

The Court should also approve service award for the named Plaintiffs in the amount of $5,000.00, which awards will be paid from attorneys' fees and not the Settlement Fund. Plaintiffs found competent counsel to represent them, authorized the filing of the complaint. They took an active role in the case, participated in answering discovery and testifying in depositions. They understood their role as class representatives and were answerable to counsel in prosecuting the case. Such awards in this amount and range are reasonable and have been regularly approved by

judges in the Eastern District of Virginia.[5] Particularly in light of historical incentive awards both within and outside this District, the service awards sought are appropriate. *See e.g. Staton v. Boeing Co.*, 327 F.3d 938, 976-77 (9th Cir. 2003); *In re Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998). 4 Newberg on Class Actions § 11:38 (4th ed.). A service award was not part of the Settlement Agreement, but is within the discretion of the court to award and appropriate in this case.

2. The Requested Attorneys' Fee is appropriate in this case.

After complete relief for the Class was settled, the Parties agreed to a fixed amount of $100,000.00 as a reasonable fee that the Defendant would not oppose. However, at the time the Settlement Fund and the attorneys' fees were negotiated and agreed, the class size was estimated to be 750 individuals. It was only after preliminary approval that the true size of the class was determined to be 450 individuals, thus reducing the Settlement Fund from approximately $375,000.00 to $225,000.00. The $100,000.00 agreed by the Parties was far less than the lodestar amount incurred by Class Counsel, but aligned with the percentage of the fund recovery Class Counsel consistently requests in class actions where they are successful in obtaining a recovery for the class. In accord with this philosophy and jurisprudence, Class Counsel seeks approval of

[5] *See e.g. Beverly v. Wal-Mart Stores, Inc.*, No. 3:07cv469; *Williams v. Lexis Nexis Risk Mgmt.*, No. 3:06cv241; *Cappetta v. GC Servs. LP*, No. 3:08cv288-JRS (E.D. Va. April 27, 2011); *Makson v. Portfolio Recovery Assoc., Inc.*, No. 3:07cv982-HEH (E.D. Va. Feb. 9, 2009); *Daily v. NCO,* No. 3:09CV31-JAG*; Conley v. First Tennessee,* No. 1:10CV1247-TSE*; Lengrand v. Wellpoint,* No. 3:11Cv333-HEH; *Henderson v. Verifications Inc.,* No. 3:11CV514-REP (E.D.Va. 2013); *Pitt v. K-Mart Corp.*, No. 3:11CV697 (E.D. Va. May 24, 2013); *James v. Experian Info. Sols.*, No. 3:12CV902 (E.D.Va. Oct. 29, 2014); *Manuel v. Wittstadt*, Civ. No. 3:12CV450 (E.D. Va. 2013); *Shami v. Middle East Broadcast Network*, No. 1:13CV467-CMH (E.D.Va. April 30, 2014); *Goodrow v. Freidman Freidman & MacFadyen*, No. 3:11CV20 (E.D.Va. June 4, 2014); *Berry v LexisNexis Risk & Info. Analytic Sols., Inc., No.* 3:11CV274 (E.D.Va. Sept. 5, 2104); *Marcum v. Dolgencorp,* 3:12CV108 (E.D.Va.); *Kelly v. Nationstar,* 3:13CV311 (E.D.Va.); *Wyatt v. SunTrust Bank*, 3:13CV662 (E.D. Va.).

attorneys fees in the amount of $75,000.00, which represents one-third of the gross recovery that was ultimately obtained for the class.

The Supreme Court has consistently calculated attorneys' fees in common funds cases on a percentage-of-the-fund basis. *See Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 165-67 (1939); *Boeing Co. v. van Gemert*, 444 U.S. 472, 478-79 (1980); *Blum v. Stenson*, 465 U.S. 886, 900 n. 16 (1984); *see also* Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 242 (Oct. 8, 1985) (noting that fee awards in common funds cases have historically been computed based on a percentage of the fund). The Supreme Court has never adopted the lodestar method over the percentage of recovery method in a common fund case, even when lower federal courts began using the lodestar approach in the 1970's. *See Shaw v. Toshiba Am. Info. Sys., Inc.* 91 F. Supp. 2d 942, 943 (E.D. Tex. 2000); *see also Manual for Complex Litigation* § 24.121 at 210.

Since *Blum*, virtually every Circuit Court of Appeals has joined the Supreme Court in affirmatively endorsing the percentage of recovery method as an appropriate method for determining an amount of attorneys' fees in common fund cases. *See In re GMC*, 55 F.3d 768, 821-22 (3rd Cir. 1995); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047-50 (9th Cir. 2002); *In re Thirteen Appeals Arising out of the San Juan DuPont Plaza Hotel Fire Litig.*, 56 F.3d 295 (1st Cir. 1995); *Gottlieb v. Barry*, 43 F.3d 474, 487 (10th Cir. 1994); *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 515-16 (6th Cir. 1993); *Camden I. Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991); *Swedish Hosp. Corp v. Shalala*, 1 F.3d 1261, 1268-70 (D.C. Cir. 1993); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 49 (2nd Cir. 2000).

In the Fourth Circuit, attorneys' fees in common fund cases such as this one are almost universally awarded on a percentage-of-the-recovery basis. *Smith v. Krispy Kreme Doughnut Corp.*, No. 1:05cv00187, 2007 WL 119157, at *1 (M.D.N.C. Jan 10, 2007); *see DeLoach v. Philip*

Morris Cos., No. 00-1235, 2003 WL 23094907, at *3 (M.D.N.C. Dec. 19, 2003) (citing, with approval for this same proposition, *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 215 (D. Me. 2003)); *see also Strang v. JHM Mortg. Sec. Ltd. P'ship*, 890 F. Supp. 499, 502 (E.D. Va. 1995) (explaining "[a]lthough the Fourth Circuit has not yet ruled on this issue, the current trend among the courts of appeal favors the use of a percentage method to calculate an award of attorneys' fees in common fund cases.").

The Fourth Circuit has not established a benchmark for fee awards in common funds cases, but district courts within the Fourth Circuit have noted that most fee awards range from 25 percent to 40 percent of the settlement fund.[6] It is with this range in mind that Class Counsel requests and amount that represents one-third of the class recovery. Percentage-fee awards are exactly what the name suggests – class counsel fees are determined as a percentage of the total settlement fund. This Court has recognized the importance of incentivizing experienced class counsel to take on risky cases. *See, e.g., In re Microstrategy, Inc. Sec. Litig.*, 172 F. Supp. 2d at 788. In fact, a comprehensive study of attorneys' fees in class action cases notes "a remarkable uniformity in awards between roughly 30% to 33% of the settlement amount." Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. of Empirical Legal Studies 27, 31, 33 (2004). This holds true even in instances where the class recovery runs into the hundreds of millions of dollars. *See e.g., In re Thirteen Appeals Arising Out of San Juan Dupont*

[6] Indeed, "empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in the class actions average around one-third of the recovery." 4 Newberg on Class Actions § 14:6 (4th ed.); *see also In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 735 (E.D. Pa. 2001)(review of 289 class action settlements demonstrates "average attorney's fees percentage [of] 31.31%" with a median value that "turns out to be one-third."). In an analysis of such historic patterns, Silber and Goodrich explained that empirical evidence doesn't necessarily establish what a court should do in any given case, but it does provide guidance to the court in determining whether a fee is reasonable. Reagan W. Silber & Frank E. Goodrick, *Common Funds and Common Problems: Fee Objections and Class Counsel's Response,* 17 Rev. Litig. 525, 545-46 (1998).

Plaza Hotel Fire Litig., 56 F.3d at 295 (approving award of thirty percent of $220 million); *In re Combustion, Inc.*, 968 F. Supp. 1116, 1136 (W.D. La. 1997) (awarding thirty-six percent of $125 million). *In re Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (approving award of 36% of $3.5 million settlement fund); *Gwozdzinnsky v. Sandler Assoc.*, No. 97-7314, 1998 WL 50368, 159 F.3d 1346 (2d Cir. 1998) (table) (affirming district court's award of 25% of $1 million common fund) (unpublished); *In re Educ. Testing Serv.*, 447 F. Supp. 2d 612, 631 (E.D. La. 2006)(concluding the customary fee award for class actions "is between 22% and 27%"); *In re CMS Energy ERISA Litig.*, No. 02-72834, 2006 WL 2109499, at *1 (E.D. Mich. June 27, 2006) (awarding fee of 28.5% of $28 million settlement fund); *In re Xcel Energy, Inc.*, 364 F. Supp. 2d 980, 995 (D. Minn. 2005) (awarding 25% of $80 million settlement fund); *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 262 (S.D.N.Y. 2003) (granting attorneys fees in amount of 33 1/3% of $1.5 million settlement fund); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002) (awarding 33.3% of $3.8 million settlement fund); *Kidrick v. ABC Television & Appliance Rental*, No. 3:97cv69, 1999 WL 1027050, at *1-2 (N.D. W. Va. May 12, 1999) (awarding 30.6% of approximately $400,000 settlement fund, noting that "[a]n award of fees in the range of 30% of the fund has been held to be reasonable. . . . Fees as high as 50% of the fund have been awarded.") (internal citations omitted).

In every case that Class Counsel agrees to take on, they live by the result that they obtain for the class members. In this case, where they bore the risk of the litigation entirely and advanced significant funds in furtherance of the litigation, Class Counsel submits that fee equal to one-third of the cash recovered for the class is reasonable. Class Counsel in this case has consistently taken the position in all cases that the attorneys fee should be based on a percentage of the recovery obtained for the class. This has been true even in cases where the result is an objectively small fee such as in *Mayfield v. Memberstrust Credit Union*, 3:07cv506 (E.D. Va. Nov. 7, 2008), where the

class size was so small that counsel's fee ended up being $8,300.00, well below the actual time counsel had invested in the case. Indeed, in *Conley v. First Tennessee*, 1:10cv1247 (E.D.Va.), counsel took the same consistent position with respect to a class of 350 consumers and resulted in recovery of an approved fee of only $20,000.00. (Docket No. 37). The same is true in another case, *Lengrand v. Wellpoint*, No. 3:11Cv333-HEH (Docket No. 42), counsel requested only 20% of the class recovery, $8,550.00, where the class size was very small. In each case, the standards of Rule 23 demand that Class Counsel represent the interest of the class with the same attention, zeal and competence whether the class is in the millions such as *Ryals v. HireRight Solutions*, or is less than a hundred as in *Lengrand v. Wellpoint*.[7]

3. Excess funds should offset administration costs and cy pres.

The Parties agreed that any excess funds remaining after the stale date on uncashed checks should be used first to reimburse the Defendant for administration costs, and then to cy pres as agreed by the parties to the Virginia Health Care Foundation.

IV. CONCLUSION

In summary, the Parties have reached a settlement in this case that provides genuine relief to the class members. In addition, the terms of the Settlement as well as the circumstances surrounding negotiations and its elimination of further costs caused by litigation this case through trial and appeal satisfy the Fourth Circuit's strictures for final approval. The Plaintiff respectfully

[7] While a cross-check against lodestar is not procedurally useful in circumstances such as these where the percentage of fee is to be measured against an unconditional cash fund, it bears noting that in this case Class Counsel has also incurred substantial real time and expense. The case has been in full litigation for a year and a half. Numerous motions – merits, discovery and procedural – were filed, briefed and argued. Numerous depositions were taken and defended. There were 102 docket entries, not including unnumbered entries, in this case so far. The Court should also know that the work has never stopped and will continue for months to come until all checks have cleared and the excess, if any, of the settlement fund is disbursed.

moves the Court to grant his motion for final approval of this settlement and award the service payment and attorneys' fees as requested herein.

Respectfully submitted,

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***on behalf of themselves and all others similarly situated*,**

By /s/
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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 2016, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of electronic filing (NEF) to the following:

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