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

THERESA BARTLOW, *et al.*,

Plaintiffs,

v. **Case No.: 3:16cv572**

MEDICAL FACILITIES OF AMERICA, INC.,

Defendant.

PLAINTIFFS' MEMORANDUM IN SUPPORT OF CONSENT MOTION FOR ORDER OF PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, APPOINTING CLASS COUNSEL, DIRECTING NOTICE TO THE CLASS, AND SCHEDULING FINAL FAIRNESS HEARING

Plaintiffs Theresa Bartlow and Robert A. McBride, individually and on behalf of all other similarly situated individuals, with the consent of Defendant Medical Facilities of America, Inc., have moved for Preliminary Approval of the Class Action Settlement, for the reasons discussed in this memorandum in support of the motion. Plaintiffs seek an Order of Preliminary Approval, Directing Notice to the Class, and Scheduling a Final Fairness Hearing.

I. INTRODUCTION

This case presents a nationwide class action filed under the Fair Credit Reporting Act, 15 U.S.C. § 1681b(b)(3). ("FCRA"). Plaintiffs' Amended Class Complaint names Theresa Bartlow and Robert A. McBride as Plaintiffs, and Medical Facilities of America, Inc. ("MFA"), as Defendant. Plaintiffs assert class claims against Defendant based on its use of employment-purposed consumer reports in its hiring processes.

After engaging in discussions and negotiations, formal and informal discovery, and a thorough exploration of the Parties' claims and defenses, the Parties participated in a settlement conference before United States Magistrate Judge David J. Novak. Following this conference,

the Parties entered into a Stipulation of Settlement (the "Settlement Agreement") with the assistance of Magistrate Judge Novak, a copy of which is attached to the Motion as Exhibit 1. The Stipulation of Settlement proposes the settlement of all claims for the putative classes pleaded against Defendant in the Amended Class Complaint (Doc. 14.) Pursuant to Federal Rule of Civil Procedure 23, the Parties now seek preliminary approval of the proposed class action settlement. Specifically, the Parties request that the Court preliminarily and conditionally certify the proposed Class and the proposed class settlement by entering the proposed Order of Preliminary Approval of Class Action Settlement, a copy of which is attached to the Motion as Exhibit "2".[1]

A final motion and proposed order supporting the fairness of the proposed settlement will be submitted after members of the Class have received notice and have had an opportunity to object, comment or opt-out, and prior to the Court's Final Approval Hearing. For the reasons set forth in detail below, the proposed settlement is reasonable, fair, and adequate, and should be approved by the Court.

II. THE CLAIMS TO BE SETTLED

On July 7, 2016, Theresa Bartlow and Robert A. McBride filed an action styled *Theresa Bartlow and Robert A. McBride, on behalf of themselves and others similarly situated, v. Medical Facilities of America, Inc.,* in the United States District Court for the Eastern District of Virginia, alleging that Defendant failed to comply with several provisions of the federal Fair Credit Reporting Act ("FCRA"). (Doc. 1.) On September 2, 2016, Plaintiffs filed an Amended Complaint, withdrawing one of the two FCRA claims alleged in the Complaint. (Doc. 14.) The Parties were directed by the Court to participate in a settlement conference. They did so on December 7, 2016, before United States Magistrate Judge David J. Novak, and reached a

[1] All capitalized terms used herein have the meanings set forth in this memorandum or in the Stipulation of Settlement.

tentative agreement to settle the case. Subsequently, the Parties entered into the Settlement Agreement.

The settled claims relate to a specific section of the FCRA that governs the steps an employer must take when it decides to use the information in an employment-purposed consumer reports as a basis to deny employment. The FCRA, in 15 U.S.C. § 168lb(b)(3)(A) regulates the conduct of any person who uses a "consumer report" to take an adverse action against any employees or prospective employees as follows:

> Except as provided in subparagraph (B) [in cases of a consumer applying for a position over which the Secretary of Transportation may establish qualifications], in using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates –
>
> (i) a copy of the report; and
>
> (ii) a description in writing of the rights of the consumer under this subchapter, as prescribed by the Federal Trade Commission under section 1681 g(c)(3) of this title.

15 U.S.C. § 1681b(b)(3).

The purpose of §1681b(b)(3)(A) is to provide a prospective or current employee a sufficient amount of time to review the consumer report, correct any inaccuracies, to notify the prospective employer of these inaccuracies before an adverse action is taken and generally to discuss the report with the prospective employer. The Amended Complaint alleged that MFA, as part of its hiring process, found job applicants or employees ineligible for employment based in whole or in part on a consumer report, but failed to provide pre-adverse action notice to those applicants, together with a copy of the applicant's consumer report and a description of the applicant's rights as required by 15 U.S.C. § 1681b(b)(3).

The Parties identified 146 individuals who comprise this "Certain Pre-Adverse Action" Class.

Separately from the "Certain Pre-Adverse Action" Class, the Parties identified a second Class of individuals, the "Uncertain Pre-Adverse Action" Class that were also applicants for employment with MFA, were the subject of a consumer report by MFA, were denied an offer of employment, and did not receive a copy of the consumer report and a FCRA summary of rights at least five business days before the date the employment decision was adjudicated. However, as to this class, Defendant's business records do not evidence why they were denied employment and it is thus less certain for such individuals whether they were denied an offer of employment based on the contents of the consumer report or because of other factors in their application.

The Parties identified 92 individuals who comprise the "Uncertain Pre-Adverse Action" Class.

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 Classes) must establish actual damages. Statutory and punitive damages are *only* available where there is a finding of a willful violation. *Id.* Therefore, either the Classes 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.

The class claim, detailed above, asserts that Defendant negligently and willfully violated the FCRA and seek the recovery of statutory and punitive damages 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.*

Defendant denies that it violated the FCRA. Further, Defendant denies all claims of wrongdoing or liability against them arising from any of the conduct, statements, acts or omissions alleged in this litigation.

III. PLAINTIFFS' INVESTIGATION OF THE SETTLED CLAIMS.

Plaintiffs engaged in both written and informal discovery, and in discussions and negotiations with Defendant. Ex. 2, Declaration Leonard Bennett ("Bennett Decl.") ¶ 11. Plaintiffs thoroughly investigated the claims and discovery. As part of the discovery process, the Parties reviewed the criminal background reports obtained by subpoena from non-party third-party Apex Background Check, Inc. ("Apex"). As a result of discovery, Plaintiffs, together with Defendant, identified individuals for whom Defendant ordered consumer reports during the Class Period and thereafter made adverse employment decisions based on the contents of the consumer reports. Plaintiffs conducted a rigorous investigation of the claims, dismissing one claim when it was prudent to do so, demonstrating that it is now appropriate to advocate for the Settlement.

In this case, because of the modest number of consumers in the class, both sides were incentivized to avoid further expenditure of attorneys fees and other litigation resources.

IV. THE PROPOSED SETTLEMENT OF THE CLASS CLAIM.

A. The Classes.

1. Certain Pre-Adverse Action Class.

Under the Settlement Agreement, the Parties agreed to resolve the claims of the Class of persons defined as follows (the "Certain Pre-Adverse Action Class"):

> All natural persons residing in the United States, including territories and other political subdivisions of the United States, who from July 6, 2014 to the present: (a) were employees of or applicants for employment with MFA *et al*.; (b) were the subject of a consumer report used by MFA *et al*.; (c) were either terminated or denied an offer of employment based on the contents of the consumer report; and (d) did not receive from MFA *et al*. a copy of the consumer report and a FCRA summary of rights at least five (5) business days before the date that the employment decision was adjudicated. (Settlement Agreement (SA) § 2.1.)

The Impermissible Use Class is comprised of 146 individual members. Class size is a material term of the settlement.

2. Uncertain Pre-Adverse Action Class.

Also under the Settlement Agreement, the Parties agreed to resolve the claims of the Class of persons defined as follows (the "Uncertain Pre-Adverse Action Class"):

> All natural persons residing in the United States, including territories and other political subdivisions of the United States, who from July 6, 2014 to the present: (a) were applicants for employment with MFA et al.; (b) were the subject of a consumer report used by MFA et al.; (c) for whom it is uncertain whether they were denied an offer of employment based on the contents of the consumer report; and (d) did not receive from MFA et al. a copy of the consumer report and a FCRA summary of rights at least five business days before the date the employment decision was adjudicated. (SA § 2.1.)

The Adverse Action Class is comprised of 92 individual members. Class size is a material term of the Settlement.

B. The Consideration Provided To The Classes Under The Settlement Agreement.

Despite the liability and class certification arguments available to Defendant, Plaintiffs were able to negotiate a settlement structure that will pay real money to Class Members without imposing an arduous or difficult claims process.

The Settlement Agreement requires Defendant to pay $178,640.00 into a Settlement Fund for the benefit of the Classes, and it will thereby provide a cash payment of $640 to each Certain Pre-Adverse Action Class and $100 to each Uncertain Pre-Adverse Action Class. These amounts will be automatically paid to Class Members, and they will not need to submit any forms or

make claims against the fund to receive their portion. 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 Class Members will receive after the deduction of up a proposed Service Award of $3,000 for each Class Representative, $70,000 in attorneys' fees and costs.[2] The Fund will be unreduced by administration costs because the Defendant also agreed to separately pay class administration costs.

C. The Required Class Action Fairness Act Notice.

Defendant will cause notice of the proposed settlement to be served under the Class Action Fairness Act of 2005 ("CAFA"). 28 U.S.C. § 1715. The CAFA Notice will be sent to the Attorney General of the United States and to the attorneys general of all states and the District of Columbia and all U.S. territories, within ten days after the filing of the Settlement Agreement with the Court. To account for the deadlines under governing law, the Parties request that the Final Approval Hearing be scheduled no earlier than 90 days from the date of the mailing of the CAFA Notice.

D. Attorneys' Fees and Expenses; Service Award.

Class Counsel shall make an application for an award from the Settlement Funds for attorneys' fees, costs, and other expenses in an amount not to exceed $70,000. Defendant shall not oppose or object to this application. (SA § 2.4.1.)

Plaintiffs will also apply for a service award for their roles as Class Representatives to compensate them for their efforts on behalf of the class in prosecuting this case including retaining counsel, assisting in discovery, preparing for deposition, preparing to testify at trial,

[2] It should be noted that Plaintiff's attorneys fees sought are substantially below the lodestar even today actually incurred and is consistent with present Plaintiffs' counsel's consistent advocacy that an attorneys fees in a typical cash common fund settlement should be tied to the cash benefit obtained. This settlement remains true to that conviction.

and keeping abreast of the litigation. Defendant has agreed not to oppose the application for the service award, which will be sought in the amount of $3,000. (SA§ 2.4.1.)

E. The Release Of Claims.

In return for the substantial cash payment Class Members will receive, they will release all claims against Defendant, as follows:

> Upon the Effective Date, and in exchange for the relief described in this Settlement Agreement, Named Plaintiffs and each Settlement Class Member who did not validly opt out of the Settlement and each of their respective spouses, heirs, executors, trustees, guardians, wards, administrators, representatives, agents, attorneys, partners, successors, predecessors and assigns and all those acting or purporting to act on their behalf completely, finally and forever release and discharge the Released Entities of and from the Released Claims. Subject to the Court's approval, this Settlement Agreement shall bind all Settlement Class Members and all of the Released Claims shall be dismissed with prejudice and released as against the Released Parties, even if the Settlement Class Member never received actual notice of the Settlement prior to the Final Approval Hearing, or failed to negotiate the settlement check in the time required in 4.6. (SA § 3.1.)

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—remain because they cannot be asserted against employers like Defendant.

F. Notice and Exclusions.

Class Notice will be by direct, First-Class mail, and accomplished by a nationally known, third-party settlement administrator. Notices will be address-scrubbed and re-mailed if returned with an available alternate address.

Any Class Member who desires to be excluded from the class must send a written request for exclusion to the Class Administrator at the address provided on the Notice. The Class Member's Opt-Out request must contain the Class Member's original signature, current postal address and a specific statement that the Class Member wants to be excluded from the Classes.

Opt-Outs must postmarked no later than the deadline set by the Court in the Preliminary Approval Order. In no event shall persons who purport to opt out of the Class as a group, on an aggregate basis or as a class involving more than one Class Member be considered valid Opt-Outs. Requests for exclusion that do not comply with any of the foregoing requirement are invalid. Defendant will have the right to withdraw from the Settlement if more than 5% of the Class submits a valid request for exclusion.

V. ARGUMENT

A. The Requirements For Approval Of A Class Settlement.

There is 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) ("The 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. As the court in *Stone* 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.

749 F. Supp. at 1423 (quoting *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 313 (7th Cir. 1980)).

Rule 23 permits courts to preliminarily certify a class for purposes of effectuating a settlement of the case. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 793-94 (3rd Cir. 1995) (collecting cases and authority). A court may grant preliminary approval of a class action where the class proposed for settlement satisfies the four prerequisites of Rule 23(a) (*i.e.*, numerosity, commonality, typicality, and adequacy of representation), as well as one of the three subsections of Rule 23(b). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997). If the Court determines a settlement class should be

certified, the Court must then follow a three-step process prior to granting final approval of a proposed settlement. *Levell v. Monsanto Research Corp*., 191 F.R.D. 543 (S.D. Ohio 2000).

First, the Court must preliminarily approve the proposed settlement. *Id.* at 547. Second, members of the class must be given notice of the proposed settlement. *Id.* Third, a final fairness hearing must be held, after which the Court must decide whether the proposed settlement is fair, adequate, and reasonable to the class as a whole, and consistent with the public interest. *Id.* This protects the class members' procedural due process rights and enables the Court to fulfill its role as the guardian for the classes' interests. *Id.* 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). Additionally, "there is a strong initial presumption that the compromise is fair and reasonable." *Id.*

B. Consideration of the Rule 23(a) And Rule 23(b) Elements.

Rule 23 governs the certification of class actions. In considering a settlement at the preliminary approval stage, the first question for the Court is whether a settlement class satisfies the requirements set forth in Rule 23, and thus may be conditionally certified for settlement purposes. Under Rule 23(a), one or more members of a class may sue as representative parties on behalf of a class if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and/or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). In addition, Rule 23(c)(5) expressly authorizes the division of a class into subclasses, as the settlement proposes here. Subclasses are "each treated as a class under this rule" and therefore

must each meet the class certification requirements. Fed. R. Civ. P. 23(c)(5). Here, the Parties have reached a proposed agreement on behalf of the Settlement Class, which should be certified.

1. The Class Meets all Rule 23(a) Requirements.

a. Numerosity.

"There is no mechanical test for determining whether in a particular case the requirement of numerosity has been satisfied." *Kelly v. Norfolk & W. Ry. Co.*, 584 F.2d 34, 35 (4th Cir. 1978). In applying that rule, courts have consistently held that joinder is impracticable and numerosity is satisfied where the class is composed of hundreds of potential claimants; indeed, numerosity has been deemed sufficient as to classes with fewer than 50 members. *See, e.g., Cypress v. Newport News Gen. and Non-Sectarian Hosp. Ass'n,* 375 F.2d 648, 653 (4th Cir. 1967) (a class of 18 members met numerosity requirement); *Jeffreys v. Communic'n Workers of Am.,* 212 F.R.D. 320, 322 (E.D. Va. 2003) ("where the class numbers twenty-five or more, joinder is generally presumed to be impracticable").

Here, numerosity is not an issue. As detailed above, there are 146 members in the Certain Pre-Adverse Action Class and 92 members in the Uncertain Pre-Adverse Action Class. These numbers are sufficient to establish that joinder is impracticable.

b. Commonality.

Commonality requires that there be at least one question of law or fact common to the members of the class. *Jeffreys*, 212 F.R.D. at 322. And, "the fact that there are some factual variances in individual grievances among class members does not defeat commonality." *Morris v. Wachovia Secs., Inc.*, 223 F.R.D. 284, 292 (E.D. Va. 2004) (citations omitted).

Here, by definition, members of the Settlement Class share multiple questions of law and/or fact. The Settlement Class Members are alleged to be the subject of procedures whereby Defendant, in violation of the FCRA, did not provide consumers timely notice prior to taking an

adverse employment action based in whole or in part on a consumer report. The procedures at issue with respect to this claim are identical. The theories of liability as to all Settlement Class Members therefore arise from the same practices and present basic questions of law and fact common to all members of the Settlement Class. *See* Fed. R. Civ. P. 23(a).

c. Typicality.

In order for Rule 23's typicality requirement to be met, a named plaintiff "may proceed to represent the class only if the plaintiff establishes that his claims or defenses are 'typical of the claims or defenses of the class.'" *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2001) (citing FED. R. CIV. P. 23(a)(3)). Typicality is satisfied as long as the plaintiff's claim is not "so different from the claims of absent class members that their claims will not be advanced by plaintiff's proof of his own individual claim." *Id.* at 466-67.

Plaintiffs' claims arise from Defendant's practices concerning the use of consumer reports for employment purposes. As discussed in the previous section, these are the same claims advanced on behalf of the Settlement Class Members, and Plaintiffs are members of the settlement class. Plaintiffs' claims thus rest on the same legal and factual issues as those of the class members. That is the hallmark of typicality. *See Deiter*, 436 F.3d at 466 (citing Fed. R. Civ. P. 23(a)(3)).

d. Adequacy of Representation.

A representative plaintiff must be able to provide fair and adequate protection for the interests of the class. That protection involves an analysis of two factors: (a) the representative plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation; and (b) the representative plaintiff must not have interests antagonistic to those of the class. *See*, *e.g., Mitchell-Tracey v. United Gen. Title Ins.*, 237 F.R.D. 551, 558 (D. Md. 2006) (citing *Peoples v. Wendover Funding, Inc.*, 179 F.R.D. 492, 499 (D. Md. 1998)).

Plaintiffs fairly and adequately represent the interests of the Settlement Class. They have retained experienced attorneys to represent them. Plaintiffs' attorneys have substantial experience in both class action and FCRA litigation. Moreover, Plaintiffs have no interests antagonistic to the interests of the Settlement Class and is unaware of any actual or apparent conflicts of interest between Plaintiffs and the Settlement Class.

When Class Counsel negotiated the settlement in this case, they made it their first priority to achieve the best possible outcome for the Class. This Court has recognized the advantages that experienced counsel with an expertise in both the factual and legal issues in a case present to both the parties and to the docket. *See S.C. Nat'l Bank*, 139 F.R.D. at 339 (concluding fairness met where settlement discussions "were, at times, supervised by a magistrate judge and were hard fought and always adversarial," and those negotiations "were conducted by able counsel" with substantial experience in the area of securities law).

Class counsel have extensive collective experience in both consumer protection and class action litigation, having been involved in now numerous, large consumer class actions where they have been found to be suitable Class Counsel, particularly in this District. *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); *Cappetta 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); *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*, 3:11CV697; *White v. Experian,* 8:05-cv-01070(C.D.

Cal.); *Teagle v. LexisNexis Screening Solutions, Inc.* (formerly "Choicepoint"); *Berry v. LexisNexis Risk & Information Analytical Group*, 3:11cv754 (E.D. Va.).

2. The Class Likewise Satisfies the Rule 23(b)(3) Considerations.

The proposed settlement contemplates a class certification permitting opt-outs pursuant to Rule 23(b)(3). An action may be maintained as a class action if the four Rule 23(a) elements described above are satisfied, and in addition, "the Court finds that the questions of law or fact common to the members of the Class predominate over any questions affecting only individual members, and that a Class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

a. Predominance.

If the Settlement Class is to be certified under Rule 23(b)(3), the common issues of law and/or fact shared by the Settlement Class Members must "predominate" over individual issues. Rule 23(b)(3)'s predominance inquiry focuses on whether the proposed classes are "sufficiently cohesive to warrant adjudication by representation." *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 362 (4th Cir. 2004); *Lienhart v. Dryvit Sys., Inc.,* 255 F.3d 138, 142 (4th Cir. 2001). This criterion is normally satisfied when there is an essential, common factual link between all class members and the defendants for which the law provides a remedy. *Talbott*, 191 191 F.R.D. 99, 105 (W.D. Va. 2000) (citing *Halverson v. Convenient FoodMart, Inc.*, 69 F.R.D. 331 (N.D. Ill. 1974)). And, predominance exists where the resolution of class members' individual claims depends on examining common conduct by a defendant. *Jeffreys,* 212 F.R.D. at 323 (finding predominance because class members' claims were based on same acts by defendant and the determinative "question in each individual controversy" was common).

The predominance requirement is satisfied here because the essential factual and legal issues regarding the Settlement Class Members' claims are common, and relate to alleged

standardized procedures. *Talbott*, 191 F.R.D. at 105 ("Here, common questions predominate because of the standardized nature of [defendant's] conduct."). Nothing more is required to satisfy predominance.

b. Superiority.

Finally, the Court must determine whether a class action is superior to other methods for the fair and efficient adjudication of this controversy under Rule 23(b)(3). The factors to be considered here in determining the superiority of the class mechanism are: (1) the interest in controlling individual prosecutions; (2) the existence of other related litigation; (3) the desirability of concentrating the litigation in one forum; and (4) manageability.[3] *Hewlett v. Premier Salons Int'l, Inc.*, 185 F.R.D. 211, 220 (D. Md. 1997); *accord Newsome v. Up To Date Laundry, Inc.*, 219 F.R.D. 356, 365 (D. Md. 2004).

Efficiency is the primary focus in determining whether a class action is indeed the superior method of adjudicating the controversy. *Talbott*, 191 F.R.D. at 106. In examining these factors, it is proper for a court to consider the "inability of the poor or uninformed to enforce their rights, and the improbability that large numbers of class members would possess the initiative to litigate individually." *Haynes v. Logan Furniture Mart, Inc.,* 503 F.2d 1161, 1165 (7th Cir. 1974).

In *Jeffreys*, for instance, the court found that because "the facts and issues involved are identical for all class members, class members have little incentive and few resources to pursue litigation on their own, the class members are dispersed over several states, and there are few manageability concerns, the class action is the best method of resolving the matter." 212 F.R.D. at 323. The same is true here. Common issues predominate in the Settlement Class. Further, the

[3] A trial court may disregard management issues in certifying a settlement class, but the proposed class must still satisfy the other requirements of Rule 23. *Amchem*, 521 U.S. at 620. Therefore, this criterion is not material to the Court's analysis in this posture.

individual claims of the members of the Settlement Class are small, thus providing little incentive for individual litigation, and the members of the Settlement Class are dispersed across the country. *See also Amchem*, 521 U.S. at 617 ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.") (quoting *Mace v. Van Ru Credit Corp.,* 109 F.3d 338, 344 (7th Cir. 1997)).

A class action in this case is superior to other available methods for the fair and efficient adjudication of the case because a class resolution of the issues described above outweighs the difficulties in management of separate, individual claims and allows access to the courts for those who might not gain such access standing alone, particularly in light of the relatively small amount of the damage claims that would be available to individuals. Moreover, Rule 23(c) permits individual class members to opt-out and pursue their own actions separately if they believe they can recover more in an individual suit. Thus, both predominance and superiority are satisfied. Accordingly, the Court should conditionally certify the Settlement Class for settlement purposes.

C. The Settlement Is Appropriate For Preliminary Approval.

The primary concern for the Court in reviewing a proposed class settlement is to ensure that the rights of class members have received sufficient consideration in settlement negotiations. *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991). At the preliminary approval stage, the Court must make a determination as to the fairness, reasonableness, and adequacy of the settlement terms. *See* FED. R. CIV. P. 23(e)(2); *see also* Manual for Complex Litigation (Fourth) ("MCL"), § 21.632 (4th ed. 2004).

The Fourth Circuit has bifurcated this analysis into consideration of the fairness of settlement negotiations and the adequacy of the consideration to the class. *In re Jiffy Lube*, 927

F.2d at 158-59. However, at the preliminary approval stage, the Court need only find that the settlement is within "the range of possible approval." *Horton v. Merrill Lynch, Pierce, Fenner & Smith,* 855 F. Supp. 825, 827 (E.D.N.C. 1994) (citing *In Re Mid-Atlantic Toyota Antitrust Litigation,* 564 F. Supp. 1379, 1384 (D. Md. 1983)). This settlement warrants approval.

1. The Settlement Is Fair.

The Fourth Circuit has set forth the factors to be used in analyzing a class settlement for fairness: (1) the posture of the case when the proposed settlement was reached; (2) the extent of discovery conducted; (3) the circumstances surrounding the settlement negotiations; and (4) counsel's experience in the type of case at issue. *Jiffy Lube*, 927 F.2d at 158-59.

The proposed settlement in this case was reached after the Parties engaged in written discovery and independent review of the substance of that discovery. 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. Further, the Parties conducted arms'-length and thorough negotiations through their Counsel. Additionally, the settlement was reached with the assistance and guidance of a neutral United States Magistrate Judge. Courts have found that, where a settlement is the result of genuine arms'-length negotiations, there is a presumption that it is fair. *See*, *e.g.*, *City P'ship Co. v. Atlantic 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.

Additionally, Plaintiffs' counsel is highly experienced in consumer class action litigation, and they endorse the settlement as fair and adequate under the circumstances. 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.

2. The Settlement Terms Are Adequate And Reasonable.

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 In re Jiffy Lube*, 927 F.2d at 159.

While Class Counsel firmly believes in the merits of Plaintiffs' claims, demonstrating willfulness on the FCRA claims at issue is not 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 contested liability in all regards, but most especially for the fact issue for the jury to determine whether Defendant's violations of the FCRA were willful. Consequently, absent approval of the settlement, Plaintiffs would be put to challenging proof of the Defendant's willfulness in violating the statute. And if such a jury verdict were obtained – finding a willful violation – the recovery of statutory damages per class member would be in the permitted range of $100 to $1,000. 15 U.S.C. § 1681n(a). Against that "best day", the amounts negotiated and obtained in this settlement are spectacular.

If the Court grants preliminary approval, then the Class Members will receive notice carefully explaining the terms of the Settlement Agreement and informing them of their right to object or opt-out. Those Class Members who believe that their cases are even more valuable or who have actual damage claims in excess of these expected ranges can opt-out and litigate those

claims on an individual basis. While the degree of opposition to the Settlement Agreement cannot be known with certainty, the lack of any other competing class cases supports the strength of the settlement and the likelihood that it will stand. 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.

D. The Proposed Notice And Notice Plan Satisfy Rule 23.

Following preliminary approval, the Class Members must be given notice concerning the nature of the settlement and of their rights. Rule 23(e)(1) requires that: "The court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Rule 23(c)(2)(B) sets forth the contents of a notice to be sent to members of a Rule 23(b)(3) class:

> For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language: the nature of the action; the definition of the class certified; the class claims, issues, or defenses; that a class member may enter an appearance through an attorney if the member so desires; that the court will exclude from the class any member who requests exclusion; the time and manner for requesting exclusion; and the binding effect of a class judgment on members under Rule 23(c)(3).

The proposed Notice to the Settlement Class, which is attached to the Settlement Agreement, satisfies all of these requirements.

As set forth in the Settlement Agreement, to accomplish the contemplated class notice, the Settlement Administrator is already in possession of a list of the Class Members derived from Defendant's business records. The Settlement Administrator will oversee the administration of the settlement and the notification to Class Members. The Settlement Administrator will be responsible for using commercially reasonable means to update all the class member addresses, then for mailing the approved class action notices. Any returned mail will also get a second level of review for updating address and re-mailing. Apart from individual mailed notice, the Notice

Plan also provides that Class Members will have access to a telephone service which will answer questions concerning the settlement.

As the Manual for Complex Litigation recognizes, mail notice is the ideal method of informing class members of a class settlement where such members can be identified, while notice through an internet website is a supplemental means of providing notice. *See* MCL, § 21.311; *see also Henggeler v. Brumbaugh & Quandahl P.C., LLO*, 2013 U.S. Dist. LEXIS 155235, at *14–15 (D. Neb. Oct. 25, 2013) ("The court finds that the proposed notice is clearly designed to advise the class members of their rights. The Agreement provides for individual mailed notices to each of the class members. Individual notice is the best notice practicable.").

For these reasons, the proposed Notices and Notice Plan represent the "best notice that is practicable under the circumstances," and it therefore meets the notice requirements of Rule 23. Consequently, the Notices and Notice Plan should be approved by the Court.

VI. CONCLUSION

The Settlement is an excellent result considering the thorough nature of the litigation, the zealousness of the representation on both sides, and the mediation process supervised by Judge Novak. The terms of the Settlement, as well as the circumstances surrounding negotiations and its elimination of further costs caused by litigating this case through trial and appeal, satisfy the structures for preliminary approval.

WHEREFORE, Plaintiffs request that the Court issue an Order, substantially similar to the Proposed Order filed concurrently with this Motion, that: (1) grants preliminary approval to the Proposed Settlement; (2) approves of the Proposed Notice filed concurrently with this Motion; (3) orders that the Proposed Notice be mailed to Class Members; (4) approves the appointment of RSM, LLC as the Settlement Administrator; (5) and sets the date of the Final Fairness Hearing.

Respectfully Submitted,

Theresa Bartlow and Robert A. McBride, *on behalf of themselves and others similarly situated*,

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CERTIFICATE OF SERVICE

I certify that on the 23rd day of December 2016, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which sent notification of such filing to the following:

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