UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE

ERIN KNIGHTS and TRESCA PRATER, individually and as representatives of the class,

Plaintiffs,

v.

PUBLIX SUPER MARKETS, INC.

Defendant.

Civil Action No.3:14-cv-00720

District Judge: Hon. Todd J. Campbell
Magistrate Judge: Hon. Juliet Griffin

MEMORANDUM IN SUPPORT OF JOINT MOTION FOR PRELIMINARY APPROVAL OF THE PROPOSED SETTLEMENT

INTRODUCTION

Named Plaintiffs Erin Knights and Tresca Prater ("Plaintiffs"), individually and on behalf of the Settlement Class,[1] jointly with Defendant Publix Super Markets, Inc. ("Defendant" or "Publix"), seek preliminary approval of a proposed settlement of the Plaintiffs' claims related to alleged violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* ("FCRA") in relation to Publix's use of criminal background checks for employment purposes. The Settlement Agreement between Plaintiffs and Defendant (collectively, the "parties"), if approved, will resolve all claims of the Plaintiffs and all members of the Class for Defendant's agreement to pay $75.00 per class member into a common settlement fund. With the Class estimated at 90,837 members, the size of the fund is fairly estimated at $6,812,775.

The proposed settlement of this action is the product of hard-fought and lengthy arms-length negotiations by experienced and informed counsel and warrants preliminary approval, as

[1] Unless otherwise explicitly defined herein, all terms have the same meanings as those set forth in the Class Action Settlement Agreement, attached to the Declaration of E. Michelle Drake ("Drake Decl.") as Exhibit 1.

the terms are "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Accordingly, the parties request that the Court: (1) preliminarily approve the proposed settlement; (2) appoint Plaintiffs Knights and Prater as Class Representatives; (3) certify the Settlement Class for purposes of settlement only; (4) appoint Interim Class Counsel as Class Counsel; (5) direct Notice to be distributed to the Class; and (6) schedule a final fairness hearing.

BACKGROUND

I. THE PARTIES ENGAGED IN LITIGATION, INFORMAL DISCOVERY, AND MEDIATION BEFORE REACHING THIS SETTLEMENT.

A. Procedural History

Despite this matter's relatively brief history, prior to the settlement, this case was actively litigated. On March 12, 2014, Plaintiff Knights filed her Class Action Complaint against Publix. ECF No. 1. On behalf of herself and the proposed class, Plaintiff Knights sought statutory damages of between $100 and $1000 per violation, plus attorneys' fees, costs, and all other available relief. *Id.* Mere days after the filing of the complaint, Plaintiff filed a fully briefed motion for class certification. ECF Nos. 11-16. This motion was not a mere placeholder, but was accompanied by an 18-page memorandum in support, as well as a number of declarations and exhibits.

After Plaintiff's motion for class certification was filed, the parties agreed to stay this case pending mediation. *See* ECF Nos. 29, 30, 33. As part of the agreement to mediate, Defendant agreed not to oppose Plaintiff's motion for appointment of interim class counsel. *See* ECF Nos. 26, 26-1. This Court appointed Nichols Kaster, PLLP, and, in particular, E. Michelle Drake and Joseph C. Hashmall, as interim lead class counsel; Hardin & Hughes, LLP, and, in particular, David A. Hughes, and Fried & Bonder, LLC, and, in particular C. Andrew Head, as interim liaison, and Doug Janney as local, class counsel, and stayed the case pending mediation.

See ECF Nos. 27, 33.

Before the case was stayed for mediation, Plaintiff had served Defendant with her first round of discovery requests, including requests for production, requests for admission and interrogatories. Drake Decl. ¶ 3. Due to the stay, Defendant never formally responded to these discovery requests, but as part of a mutually agreed-upon and robust pre-mediation disclosure process, Defendant responded to multiple written questions from Plaintiff, and in response to informal document requests, produced to Plaintiff over 1,800 pages of responsive and relevant documents and data. Id. ¶ 4. Defendant's pre-mediation disclosures provided Plaintiff with all the information required for Interim Class Counsel to meaningfully evaluate the claims and defenses and to intelligently negotiate a resolution to this case at mediation. Id. ¶ 5.

Additionally, on June 20, 2014, Plaintiff filed an uncontested motion to amend, which adjusted the class definition to be consistent with the definition agreed upon in mediation, and added Plaintiff Prater to the proceedings. ECF No. 38. Plaintiff Prater is a former Publix employee whose claims are identical to those of Plaintiff Knights. Her participation in the case had not previously been public for strategic reasons, but she had been involved in the case, assisting counsel with their investigation and staying apprised of case and mediation developments. This Court granted the motion to amend. ECF No. 40.

B. Summary of Plaintiffs' Settled Claims Against Defendant

All the settled claims relate to the disclosures regarding background checks that Defendant procures on job applicants for retail positions. As expressed in the First Amended Complaint, ECF No. 41, the FCRA requires employers who are procuring a privately run background check upon applicants or employees provide those applicants or employees with written notice that such a report may be obtained for employment purposes. This notice must be

made "in a document that consists solely of the disclosure." 15 U.S.C. § 1681b(b)(2)(A)(i). This requirement, commonly called the "stand-alone disclosure" requirement, is violated if the disclosure contains extraneous language, and if the disclosure contains a liability release. *See Singleton v. Domino's Pizza*, No. 11-1823, 2012 WL 245965 at *8 (D. Md. Jan. 25, 2012), ("Had Congress intended for employers to include additional information in these documents, it could easily have included language to that effect in the statute. It did not do so, however, and its 'silence is controlling.'"); *Reardon v. Closetmaid Corp.*, No. 2:-8-cv-01730, 2013 WL 6231606 at *10-11 (W.D. Pa. Dec. 2, 2013) (FCRA disclosure with liability waiver was "facially contrary to the statute at hand, and all of the administrative guidance") (granting summary judgment against the defendant employer); *E.E.O.C. v. Video Only, Inc.*, No. CIV. 06-1362-KI, 2008 WL 2433841 at *11 (D. Or. June 11, 2008) (granting summary judgment against the defendant-employer who made disclosure "as part of its job application which is not a document consisting solely of the disclosure").

Plaintiffs alleged that Defendant had violated the stand-alone disclosure requirement by providing its retail applicants and employees with a disclosure containing a liability release, and obtaining privately run background reports about them. ECF No. 41.

Defendant denies any liability for these claims. But to avoid the further costs and burdens of litigation, the parties have agreed to settle those claims. The proposed settlement class consists of the approximately 90,837 persons who Publix has identified in available records as (1) having been provided with Publix's disclosure form, and (2) upon whom Defendant obtained a background report for employment purposes in the period from March 12, 2012 through May 13, 2014, the date that Defendant ceased using the authorization form at issue. Drake Decl. at 7; Ex. 1, Ex. A ¶¶ 1, 2. The Settlement Class members will release all claims

arising out of or directly or indirectly related to the facts alleged, or which could have been alleged, in the First Amended Complaint, including but not limited to all claims under 15 U.S.C. § 1681b(b)(2)(A) and any parallel state or common law claims. Ex. 1 ¶¶ 37-40.

C. Settlement Negotiations

The parties agreed that mediation would take place on June 16 and 17, 2014, and be conducted by Joan S. Morrow, an exceptionally experienced and well-respected mediator. Prior to mediation, the parties exchanged mediation briefs setting forth the parties' respective views on the relevant facts and law. These briefs were also shared with the mediator. In addition, at the mediator's suggestion, Plaintiffs provided Defendant with an additional letter brief, addressing in more detail certain legal issues raised by Defendant in Defendant's opening brief.

After the conclusion of pre-mediation disclosures and briefing, the mediation went forward as scheduled. After two days of vigorous, arms-length negotiations, the parties reached an agreement as to the material terms of a settlement. While the parties negotiated the case on a common fund basis, the parties did not negotiate any terms relating to attorneys' fees for class counsel or incentive awards for the Named Plaintiffs until after all terms related to the size of the common settlement fund, the class definition, and the scope of the release were agreed upon. Drake Decl, ¶ 6. The material terms of the settlement were reduced to a terms sheet signed on June 17, 2014. In negotiations over subsequent weeks, a full settlement agreement was reached, which is attached to the Declaration of E. Michelle Drake as Ex. 1.

II. THE PARTIES' SETTLEMENT AGREEMENT

A. Overview of Terms and Settlement Administration

In consideration for the release of the Settlement Class members' claims, Publix has agreed, first, to revise its FCRA Disclosure and Authorization Notice to ensure that it complies

with 15 U.S.C. § 1681b(b)(2). The benefit of this non-monetary relief is substantial both for Settlement Class Members and future applicants for employment. Second, Publix will create a common fund for class members consisting of $75.00 per class member. Ex. 1 ¶ 27. After reduction for requested attorneys' fees, expenses, and Class Representative incentive awards, the parties anticipate that each Settlement Class member will receive a payment of approximately $48.[2] With the Class estimated at 90,837 members, the size of the fund is estimated at $6,812,775. The settlement is "claims paid," meaning that Class members will not have to submit claim forms to receive a share of the settlement fund; rather, all Class members who do not opt out will simply receive checks after final approval. Id., ¶ 30(c). If settlement checks are not cashed, the Settlement Agreement provides for a donation to a *cy pres* recipient. Id., ¶ 30(d). With the limited exception of expense reimbursements, discussed below, no portion of the settlement fund will revert to the Defendant. Id.

The parties have agreed to jointly administer the settlement, avoiding the use of a third-party administrator for any tasks other than the mailing of notice and the mailing of the checks. Defendant will be entitled to deduct some of its costs, such as postage costs for mailing of payments, from the settlement fund, but will not be permitted to bill the fund for employee time spent administering the settlement. Id., ¶ 36. Class Counsel will take care of all other administrative tasks associated with settlement administration, including maintaining and updating a database containing contact information for Settlement Class members, maintaining an interactive settlement website which Settlement Class members can access in order to learn

[2] Pursuant to ¶ 35 of the Settlement Agreement, Class Counsel may apply for up to one-third of the Settlement Fund as attorneys' fees, and may, in addition, also seek reimbursement for out of pocket expenses. Class Representative incentive awards are also to be paid from the fund, as are certain expenses associated settlement administration.

more about the settlement, obtaining and staffing a toll-free number Settlement Class members can call with questions about the settlement, and responding to all inquiries which pertain to the issuance or negotiation of settlement checks after final settlement approval.

In anticipation of preliminary settlement approval, Publix has already provided Class Counsel with a confidential list of all class members and their last known addresses, and Class Counsel has updated the list using the National Change of Address database and other address updating processes. Drake Decl. ¶¶ 7-9. The parties have also contracted with a third party mailer who will mail Notice to all Settlement Class members by first class mail. When, as here, class members and their addresses can be ascertained, notification by mail is the best notice practicable and meets the due process requirements of Rule 23(c). *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, (1985); *Trollinger v. Tyson Foods, Inc.*, 4:02-CV-23, 2007 WL 4260817 (E.D. Tenn. Dec. 3, 2007) ("Class members are more likely to fully consider a class notice received through first-class mail, which is the norm for distribution.").

Class Counsel has also drafted and will establish a Settlement Website which will provide details and information about the settlement to Settlement Class Members. Ex. 1, ¶ 43. The Settlement Website will be hosted at a URL to be decided by the parties. The Website will include hyperlinks which allow access to the operative complaint, the Settlement Agreement, the Notice and this Motion and all memoranda and exhibits submitted in support thereof. The Settlement Website will also contain a "long form" settlement notice which provides detailed information about the settlement terms in plain language and is accompanied by plain-language FAQs. *See* Ex. 1 at Ex. E. The Settlement Website also provides Settlement Class members with the opportunity to submit new addresses and to submit written questions or inquiries about the settlement to Class Counsel. When available, the Settlement Website will be updated to

include copies of the Preliminary Approval Order, Class Counsel's Motion for Attorney Fees, Expenses, and Class Representative Incentive Awards, and any further orders issued by the Court, including the Final Approval Order.

The Settlement Agreement provides that Class members who choose to opt out or object to the settlement may do so within 60 days of the Notice mailing date. Ex. 1, ¶ 46. If the Court grants final approval of the settlement, Publix will transfer the full amount of the settlement fund to the Settlement Administrator and Class Counsel within five (5) business days of the Effective Date. Id., ¶ 33. Settlement checks will be mailed to all Class members within fifteen (15) business days of the Effective Date. Id., ¶ 34. To the extent any money remains in the fund after these distributions and after Class members have had 180 days to cash their settlement checks, such monies shall be paid as a *cy pres* donation to Feeding America, subject to Court approval. Id., ¶ 30(d). No portion of the settlement fund will, at any time, revert to Defendant.

B. Form of Notice to Settlement Class Members

The parties have agreed to the form of class Notice attached as Exhibit D to the Settlement Agreement, subject to the Court's approval. The Notice will be mailed, by first class mail, to each individual Settlement Class member at the last known available address in Publix's database, as updated by the National Change of Address Database. Drake Decl. ¶¶ 7-9. The parties believe this is "the best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). The Mail Notice shall be fitted to appear on two double-sided pages and contains details about the definition of the Class, the proposed Class Counsel, the size of the settlement fund, the approximate size of the payment to which each Class member will be entitled, the methodology for opting out of the settlement, the attorneys' fees and expenses and incentive awards that are available pursuant to the Settlement Agreement, and the date and location of the

final approval hearing. It also directs Class members to the Settlement Website.

Publix will also comply with the notice requirements of the Class Action Fairness Act of 2005, 28 U.S.C. § 1715(b), by providing notice of this proposed settlement to appropriate State officials for each State in which a Named Plaintiff or Settlement Class Member resides and upon the U.S. Attorney General for each such State. Ex. 1, ¶ 49.

C. Opt-Out Right

The parties propose that the Settlement Class be certified pursuant to Fed. R. Civ. P. 23(b)(3). Settlement Class members may send opt-out requests to the address contained in the Notice, and Class Counsel will maintain that address. Ex. 1, ¶ 46. The deadline for class members to opt out of the settlement will be 60 days after the date notices are mailed. Id.

D. Right to Object

Class members who wish to object to the Settlement Agreement must file a written statement of objection with the Clerk of Court, and mail the same (with the requisite postmark) to Class Counsel and Defense Counsel no later than the objections deadline. Id., ¶ 47. The Notice of Objection must state: a) the case name and number; b) the basis for the objection; c) the name, address, telephone number, and email address of the Settlement Class member making the objection; d) a statement of whether the Settlement Class member intends to appear at the Final Approval Hearing, either with or without counsel; and e) be personally signed by the Settlement Class member. Settlement Class members who fail to make objections in the manner specified above shall be deemed to have waived any objections and shall be foreclosed from making any objection (whether by appeal or otherwise) to the Settlement Agreement. Id.

E. Attorneys' Fees, Expenses, and Service Award

The Settlement Agreement states that Class Counsel's fees and service awards for the

Named Plaintiffs are to come out of the fund, subject to Court approval. Ex. 1 ¶ 35. Counsel is authorized to petition for up to one-third of the fund as attorneys' fees, and Plaintiffs for up to $1,000 each. Id. Class Counsel will formally make this request prior to final approval, and at least seven (7) days prior to the date on which objections and opt-outs are due. Neither settlement approval nor the size of the settlement fund are contingent upon the full amount of any requested fees or class representative service awards being approved. Id.

ARGUMENT

Federal courts favor the voluntary resolution of litigation through settlement, particularly in the class action context. *See White, et al. v. Nat'l Football League, et al.*, 822 F. Supp. 1389, 1416 (D. Minn. 1993) (citing *Armstrong v. Board of Sch. Directors*, 616 F.2d 305, 312-13 (7th Cir. 1980)). The Sixth Circuit has recognized that the law encourages class action settlements. *Franks v. Kroger Co.*, 649 F.2d 1216, 1224 (6th Cir. 1981) on reh'g, 670 F.2d 71 (6th Cir. 1982); *see also Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999) ("strong public policy favors [settlement] agreements, and courts should approach them with a presumption in their favor.").

These considerations apply here. For the reasons set forth below, the Court should: (1) certify the Settlement Class for settlement purposes only; (2) appoint Named Plaintiffs Knights and Prater as Class Representatives and Interim Class Counsel as Class Counsel; (3) preliminarily approve the parties' proposed settlement; and (4) approve the Class Notice for distribution, setting a date for the Final Approval hearing.

I. CERTIFICATION OF THE SETTLEMENT CLASS IS APPROPRIATE.

The parties request that the Court certify the Settlement Class under Federal Rule of Civil Procedure 23 for settlement purposes only. Even a class certified for settlement purposes must

satisfy the requirements for class certification pursuant to Rule 23, though the Court "need not inquire whether the case, if tried, would present intractable management problems, *see* Fed. R. Civ. P. 23(b)(3)(D), for the proposal is that there be no trial." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997). The proposed Settlement Class here meets the prerequisites for certification under Rule 23(a) and 23(b)(3). *See Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665 (D. Md. 2013) (granting class certification for settlement purposes in case alleging, *inter alia*, that employer failed to provide required stand-alone disclosure prior to procuring consumer reports).

A. The Prerequisites of Rule 23(a) Are Met.

Under Rule 23(a), a class may be certified only when (1) the class is so numerous that joinder of all members impracticable; (2) there are questions of law 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. The proposed Settlement Class meets these requirements.

1. The Proposed Settlement Class Meets the Numerosity Requirement.

Fed. R. Civ. P. 23(a)(1) requires a proposed class be "so numerous that joinder of all members is impracticable." This Rule does not provide a specific numerical threshold which must be reached, but rather "requires examination of the specific facts of each case and imposes no absolute limitations. When class size reaches substantial proportions, however, the impracticability requirement is usually satisfied by the numbers alone." *Rosiles-Perez v. Superior Forestry Serv., Inc.*, 250 F.R.D. 332, 338 (M.D. Tenn. 2008) (quoting *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996) (internal quotations and citations omitted)). Here, the number of class members is approximately 90,837, easily satisfying the numerosity

requirement.

2. The Class Shares Common Questions of Law and Fact.

A proposed class satisfies the "commonality" requirement when "it is unlikely that differences in the factual background of each claim will affect the outcome of the legal issue." *Bacon v. Honda of America Mfg., Inc.*, 370 F.3d 565, 570 (6th Cir. 2004). Plaintiffs do not have to show that there are multiple legal or factual issues common to the class; rather, the existence of one common issue is sufficient. *Rosiles-Perez*, 250 F.R.D. at 339.

Commonality has been found in two virtually identical cases in which it was alleged an employer used a non-compliant disclosure to obtain background checks on job applicants. *Reardon*, 2011 WL 1628041, at *6 ("Here, there are numerous questions of law or fact common to the class. These include, but are not limited to, whether the forms used by [defendant] to obtain consent to procure a consumer report from the class member violated the FCRA."); *Singleton*, 976 F. Supp. 2d at 674 (finding common question of "whether [defendant] violated the FCRA by using [a form] to obtain consent from prospective and/or current employees to procure consumer reports for employment purposes, which […] was allegedly not a 'stand-alone document' and included a liability release").

FCRA classes are frequently certified in cases in which common documents or forms have been provided to class members, or when a defendant's uniform policies and procedures impacted class members in the same way. *See, e.g. Murray v. E*Trade Fin. Corp.*, 240 F.R.D. 392, 396 (N.D. Ill. 2006) (finding commonality and certifying FCRA class when all class members received the same mailer); *Murray v. New Cingular Wireless Servs., Inc.*, 232 F.R.D. 295 (N.D. Ill. 2005) (same); *Walker v. Calusa Investments, LLC*, 244 F.R.D. 502 (S.D. Ind. 2007) (same); *Kudlicki v. Capital One Auto Fin., Inc.*, 241 F.R.D. 603 (N.D. Ill. 2006) (same);

Serrano v. Sterling Testing Sys., Inc., 711 F. Supp. 2d 402 (E.D. Pa. 2010) (finding commonality and certifying FCRA class when defendant consumer reporting agency's consumer reports all contained the same illegal statement regarding outdated information); *Campos v. ChoicePoint, Inc.*, 237 F.R.D. 478, 485 (N.D. Ga. 2006) (finding commonality and certifying FCRA class when defendant consumer reporting agency consistently and as a matter of policy failed to provide full file disclosures to consumers who requested them); *Summerfield v. Equifax Info. Servs. LLC*, 264 F.R.D. 133, 139 (D.N.J. 2009) (finding commonality and certifying FCRA class when consumer reporting agency sent allegedly misleading form letter to consumers who disputed information on their reports); *Chakejian v. Equifax Info. Servs. LLC*, 256 F.R.D. 492 (E.D. Pa. 2009) (same); *Gillespie v. Equifax Info. Servs., LLC*, 05 C 138, 2008 WL 4614327, *4 (N.D. Ill. Oct. 15, 2008) (finding commonality and certifying FCRA class when consumer reporting agency's standard procedure allegedly caused inaccurate reporting); *Williams v. LexisNexis Risk Mgmt. Inc.*, CIV A 306CV241, 2007 WL 2439463 (E.D. Va. Aug. 23, 2007) (finding commonality and certifying FCRA class when claim revolved around consumer reporting agency's procedures for notifying class members that adverse public record information about them was being reported).

3. The Named Plaintiffs' Claims Are Typical.

A claim is typical if "it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *Rosiles-Perez*, 250 F.R.D. at 341 (quoting *In re Am. Med. Sys., Inc.*, 75 F.3d at 1082); *see Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 561 (6th Cir. 2007). The Sixth Circuit has described the typicality requirement in the following manner: "as goes the claim of the named plaintiff, so go the claims of the class." *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th

Cir. 1998).

In this case, Plaintiffs' claims are identical to the claim of every other Class member, and are based upon the same legal theory. When every member of the Class, including Plaintiffs, suffered the same FCRA violation based upon being presented with the same language during the job application process, it is manifestly clear that Plaintiffs' claims are typical. Claims of this sort are routinely found typical. *See Beattie*, 511 F.3d at 561 (finding typicality satisfied when question of whether defendant's billing forms were deceptive was common to class representative and all class members); *Reardon*, 2011 WL 1628041 at *6 ("plaintiff has satisfied her burden to show that her interests are in alignment with the absent class members. Simply put, plaintiff executed what she alleges were legally infirm disclosures, which [defendant] used to obtain a consumer report on her.….Plaintiff seeks to represent a class of individuals who also executed allegedly legally infirm disclosures."); *Carroll v. United Compucred Collections, Inc.*, 1-99-0152, 2002 WL 31936511 (M.D. Tenn. Nov. 15, 2002), *report and recommendation adopted in relevant part*, 1:99-0152, 2003 WL 1903266 (M.D. Tenn. Mar. 31, 2003), *aff'd*, 399 F.3d 620 (6th Cir. 2005) (recommending certification when all class members received the same mailing, allegedly in violation of the Fair Debt Collection Practices Act); *Murray*, 240 F.R.D. at 397; *Murray*, 232 F.R.D. at 299; *Walker v. Calusa Investments LLC*, 244 F.R.D. 502, 507-508 (S.D. Ind. 2007); *Kudlicki v. Capital One Auto Finance, Inc.*, 241 F.R.D. 603, 606-607 (N.D. Ill. 2006).

4. The Class Representatives' Interests Are Aligned with Those of the Settlement Class, and the Class Representatives Will Vigorously Represent the Class Through Qualified Counsel.

Courts in the Sixth Circuit consider two criteria for determining adequacy of a class representative: (1) the representative must share common interests with unnamed class members,

and (2) it must be apparent that the class representative will vigorously represent those common interests through qualified counsel. *Rosiles-Perez*, 250 F.R.D. at 342; *In re Am. Med. Sys.*, 75 F.3d at 1083. This requirement "tests the experience and ability of counsel for plaintiffs and whether there is any antagonism between the interests of the plaintiffs and other members of the class they seek to represent." *Id.*; *Senter v. General Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976). Both requirements are met in this case.

First, Named Plaintiffs Knights and Prater have both been actively engaged in this case. They understands what it means to be a class representative and will put the interests of the class first in making all decisions related to this case. Knights Dec. ¶ 3; Prater Dec ¶ 3. Plaintiff Knights provided documents to counsel to aid in the investigation and drafting of the Complaint, reviewed the Complaint prior to filing, and has been in consistent contact with counsel, including before, during and after the mediation of this matter. Knights Dec. ¶¶ 5-7. Plaintiff Prater met with counsel in person prior to the filing of the Amended Complaint, reviewed the Complaint in this matter, provided counsel with documents to aid in their investigation, and was in contact with counsel both before and after the mediation in this matter. Prater Dec. ¶¶ 5-7. Further, the proposed class representatives have no conflicts of interest that would compromise their representation of the class. Knights Dec. ¶ 3; Prater Dec ¶ 3.

Second, Interim Class Counsel is highly experienced in complex class action litigation and consumer litigation in general. *See* Ex. 2, Firm Resume. In the memorandum in support of the motion to appoint interim class counsel, Plaintiffs have spelled out counsel's qualifications, experience and efforts to advance the interests of the class in this litigation. ECF No. 26-1 at 5-8. In granting that motion, this Court has already held that Interim Class Counsel is qualified to represent the Class, and it should do so again in this context. *See* EECF No. 27.

In sum, the numerosity, commonality, typicality, and adequacy requirements of Rule 23(a)(1)–(4) are met here.

B. The Prerequisites of Rule 23(b) Are Met.

The Settlement Class's claims also meet the predominance and superiority prerequisites of Fed. R. Civ. P. 23(b)(3). In evaluating this prong, the court may consider class members' interests in prosecuting their claims individually, the extent and nature of litigation thus far, and the desirability of concentrating the litigation in the particular forum. Fed. R. Civ. P. 23(b)(3)(A)–(C). In the context of a class-wide settlement, the court need not consider whether the case, if tried, would present difficult management problems. *Amchem*, 521 U.S. at 620. Those requirements are met in this case. *See Reardon*, 2011 WL 1628041 at *7 (finding commonality and superiority met in very similar FCRA case).

1. Common Questions of Law or Fact Predominate.

When considering predominance, the core issue is "whether the proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. Put differently, the focus of the predominance inquiry is whether class-wide questions are "at the heart of the litigation." *Powers v. Hamilton County Public Defender Comm.*, 501 F.3d 592, 619 (6th Cir. 2007). The Sixth Circuit has affirmed findings of predominance when "plaintiffs have raised common allegations which would likely allow the court to determine liability … for the class as a whole." *Olden v. LaFarge Corp.*, 383 F.3d 495, 508 (6th Cir. 2004).

In this case, four class-wide issues predominate over any individual concerns. First and most important is the question of whether the text of Defendant's standard job application constitutes an appropriate stand-alone disclosure pursuant to the FCRA. Because each Class member saw the same application language, a determination of this question will completely

obviate the need for an examination of any individual issues relative to individual Class members. The predominance requirement is therefore met. *Singleton*, 976 F Supp. 2d at 677 (finding predominance).

Second, the willfulness of Defendant's violation presents a critical common question. The ability of class members to obtain statutory damages is contingent upon a finding that Defendant's violation was willful. 15 U.S.C. § 1681n(a)(1). Because Defendant is a single entity, which displayed the same application language to every member of the Class, the answer to the question of whether Defendant's violation was willful can be determined on a class-wide basis. *Chakejian*, 256 F.R.D. at 500 ("Thus, the inquiry is to [defendant's] state of mind in implementing its policies and procedures, not on the customer's particular interaction with the CRA…. To prove willfulness here, a consumer-by-consumer inquiry is not necessary.").

Third, if litigated, Defendant's affirmative defense could be addressed on a class-wide basis. Defendant has made clear to Plaintiffs that, if this case were litigated, it would pursue a defense based upon the advice of counsel. This defense is discussed in greater detail *infra*, but, in general, this defense would assert that, because Defendant relied upon the advice of outside counsel in drafting its application documents, it could not be found to have willfully violated the law. While Plaintiffs do not agree on the merits of this defense, those merits could certainly be litigated on a class-wide basis, and, thus, provides another issue which predominates over any individualized concerns.

Fourth, if this case were litigated, the amount of damages could also be determined on a class wide basis. Because Plaintiffs sought statutory and punitive damages, no individual analysis of damages would be required. *See Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952-53 (7th Cir. 2006). In determining the amount of statutory damages to impose pursuant to the

FCRA, courts have looked to "the importance, and hence the value, of the rights and protections" at issue in the case. *Ashby v. Farmers Ins. Co. of Oregon*, 592 F. Supp. 2d 1307, 1318 (D. Or. 2008); *In re Farmers Ins. Co., Inc., FCRA Litig.*, 741 F. Supp. 2d 1211, 1224 (W.D. Okla. 2010). Consideration of this factor requires no individual analysis. Thus, virtually every aspect of this case can be determined on a class wide basis, and the predominance requirement is met.

2. A Class Action Is the Superior Vehicle for Adjudication**.**

To be certified, a class action must be "superior to other available method for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Again, in the settlement context, the Court need not address the manageability requirements of Rule 23(b)(3)(D). *Amchem*, 521 U.S. at 620. Courts in this District have found that the superiority requirement is met when "common issues will only have to be heard and decided once, thereby promoting judicial efficiency [and s]eparate actions would run the risk of inconsistent judgments." *Rosiles-Perez*, 250 F.R.D. at 348. In a matter such as this, where the claims of all Class members are identical and are based on the same common core of facts, it is clear that adjudicating this matter as a class action will achieve economies of time, effort, and expense, and promote uniformity of results. *Singleton*, 976 F. Supp. 2d at 677 (finding class action superior and certification for settlement purposes justified "particularly in light of the relatively modest amount of statutory damages available under the FCRA"); *see also Murray*, 240 F.R.D. at 400; *Walker*, 244 F.R.D. at 511; *Kudlicki*, 241 F.R.D. at 608-609; *Serrano*,711 F. Supp. 2d at 412-13.

II. THE SETTLEMENT TERMS ARE FAIR, REASONABLE, AND ADEQUATE AS SET FORTH UNDER RULE 23(e).

Fed. R. Civ. P. 23(e) requires judicial approval for the compromise of claims brought on a class basis. The Sixth Circuit follows a three-step process for approving class action settlements: there must be preliminary approval of the proposed settlement; the class members

must be provided notice of the proposed settlement; and, after a hearing, there must be final approval of the settlement. *Kizer v. Summit Partners, L.P.*, 1:11-CV-38, 2012 WL 1598066, *7 (E.D. Tenn. May 7, 2012) (*citing Brotherton v. Cleveland*, 141 F. Supp. 2d 894, 903 (S.D. Ohio 2001); *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983)). The standard for approval is "whether the proposed settlement is fair, adequate, and reasonable under the circumstances, and whether the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than pursued." *Id.* (quotation omitted). A court should base preliminary approval of a proposed settlement agreement "upon its familiarity with the issues and evidence of the case as well as the arms-length nature of the negotiations prior to the settlement." *Id.* (quotation omitted). The Court should also determine that the settlement is not illegal or collusive. *Id.* (*citing Brotherton*, 141 F. Supp. 2d at 903; *Vukovich*, 720 F.2d at 921; *In re Dun*, 130 F.R.D. at 369).

After preliminary approval has been granted, and after the class has been provided with notice, but before granting final approval to the settlement, the court should then consider the following factors:

> (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest.

Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. Gen. Motors Corp., 497 F.3d 615, 631 (6th Cir. 2007). For purposes of granting preliminary approval, a court may, but is not bound to, consider the final approval factors, as applicable. *See Kizer*, 2012 WL 1598066, at *8. In the event the court finds that the settlement falls within the range of possible approval, notice is issued and a fairness hearing is scheduled.

For the reasons set forth below, the proposed settlement meets the requirements of Fed. R. Civ. P. 23(e) and should be preliminarily approved.

A. The Proposed Settlement Is Presumptively Valid Because It Was Reached After Exchange of Substantial Information, Motion Practice, and Arms-Length Negotiations Between Experienced Counsel.

The settlement in this case is entitled to the presumption of fairness based upon the circumstances in which it was reached. As recounted above, mediation did not occur until after the case had been filed and Plaintiff had filed a fully-briefed motion for class certification. *See* "Background" *supra*. After the parties agreed to mediation, they engaged in a robust exchange of informal discovery, which ensured that both sides were well apprised of the facts. The parties also exchanged substantial mediation briefs, which laid out the both sides' views of both the facts and the law.

The settlement negotiations were conducted over two days, at arms-length with the assistance of Joan Morrow, an experienced and well-respected mediator.[3] The circumstances under which this settlement was reached entitle it to a presumption of fairness. *See Mangone v. First USA Bank*, 206 F.R.D. 222, 226 (S.D. Ill. 2001) (arms-length negotiations conducted by competent counsel constitute prima facie evidence of fair settlements); *Bert v. AK Steel Corp.*, 2008 WL 4693747 (S.D. Ohio Oct. 23, 2008) ("[t]he participation of an independent mediator in settlement negotiations virtually insures that the negotiations were conducted at arm's length and without collusion between the parties."); *In re Zurn Pex Plumbing Products Liab. Litig.*, 2013 WL 716088, at *6 (D. Minn. 2013) ("Settlement agreements are presumptively valid, particularly where a settlement has been negotiated at arm's length, discovery is sufficient, [and] the

[3] For more regarding Ms. Morrow's experience and qualifications, see http://www.joanmorrow.com/Biography.htm.

settlement proponents are experienced in similar matters . . . .") (*citing Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1*, 921 F.2d 1371, 1391 (8th Cir. 1990)) (quotations omitted). Additionally, attorneys' fees and awards for class representatives were not discussed or negotiated until all other material terms of the settlement has been agreed upon, eliminating the possibility of a trade-off between compensation for the class and compensation for counsel and the class representatives. Drake Decl. ¶ 6.

Furthermore, when, as here, the parties are represented by counsel who have significant experience in class-action litigation and settlements and in FCRA cases, and no evidence of collusion or bad faith exists, the judgment of the litigants and their counsel concerning the adequacy of the settlement is entitled to deference. *Thacker v. Chesapeake Appalachia, L.L.C.*, 695 F. Supp. 2d 521, 532-33 (E.D. Ky. 2010) *aff'd sub nom. Poplar Creek Dev. Co. v. Chesapeake Appalachia, L.L.C.*, 636 F.3d 235 (6th Cir. 2011) ("in deciding whether a proposed settlement warrants approval, the informed and reasoned judgment of plaintiffs' counsel and their weighing of the relative risks and benefits of protracted litigation are entitled to great deference"); *see, e.g., UAW v. Ford Motor Co.*, 2008 WL 4104329 at *26 (E.D. Mich. August 29, 2008) ("[t]he endorsement of the parties' counsel is entitled to significant weight, and supports the fairness of the class settlement."); *see also Stewart v. Rubin*, 948 F. Supp. 1077, 1087 (D.D.C. 1996) (the trial court "should defer to the judgment of experienced counsel who have competently evaluated the strength of the proof"); *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1178 (8th Cir. 1995).

B. The Settlement Is Well Within the Range of Approval.

The settlement in this case is impressive when considering the range of possible recoveries for the Class, the Defendant's affirmative defenses, and the number of procedural

hurdles between Plaintiffs and a final judgment. Plaintiffs filed this case seeking statutory damages under the FRCA, which provides for damages of between $100 and $1000 for each willful violation. 15 U.S.C. §§ 1681n(a)(1). Plaintiffs did not seek actual damages. To recover actual damages under the FCRA, damages must be caused by the FCRA violation itself, not merely by the report associated with the violation. *See Bach v. First Union Nat. Bank*, 149 F. App'x 354, 361 (6th Cir. 2005) (evaluating "causal link" between violation and damages). There is no indication that Publix ever enforced or sought to enforce the liability waiver in its disclosure form. Nor is there any indication, or any plausible scenario, in which members of the Class suffered actual damages based upon the wording of Defendant's application forms.

If Plaintiffs were to prevail at trial, each Class member's recovery would likely be much closer to $100 than $1000. The FCRA itself does not provide any guidance to courts in choosing the appropriate recovery for a statutory violation, *see* 15 U.S.C. §§ 1681n(a)(1), but in determining the amount of statutory damages to impose pursuant to the FCRA, courts have looked to "the importance, and hence the value, of the rights and protections" at issue in the case. *Ashby*, 592 F. Supp. 2d at 1318; *In re Farmers Ins. Co., Inc., FCRA Litig.*, 741 F. Supp. 2d at 1224. In this case, while Plaintiffs view the right to a stand-alone disclosure as important, this is not the sort of violation which includes aggravating factors to justify an award over the minimum amount of $100. A recovery of 75% of the likely award if this case had proceeded all the way through final judgment is an excellent recovery for the class. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 n. 2 (2d Cir. 1974) ("there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery") *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). This recovery is all the more impressive because it will be

distributed on a claims-paid basis, meaning that all Class members who do not opt out will automatically receive a check, without having to submit a claim form or take any action.

The impressive nature of this recovery comes into even sharper focus when the risks of further litigation are considered. Because this case settled not long after filing, Plaintiffs had yet to survive a motion to dismiss, class certification or summary judgment. Plaintiffs were confident that these obstacles could have been overcome, but each of these phases of litigation presents serious risks, which the settlement allows Plaintiffs to avoid. *See, e.g. In re Painewebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997) ("Litigation inherently involves risks.").

In addition to the generalized uncertainty surrounding all litigation, Plaintiffs in this case faced more specific risks, specifically, Defendant's advice-of-counsel defense. The FCRA is not a strict liability statute. *Dalton v. Capital Associated Indus*., 257 F.3d 409, 417 (4th Cir. 2001). A FCRA plaintiff can recover only where the defendant has acted negligently or willfully, and where the defendant's violation was at most negligent, recovery is limited to actual damages. *See* 15 U.S.C. §§ 1681n(a)(1), 1681o(a)(1). Because they do not allege any actual damages, in order to recover anything, Plaintiffs would have had to prove not only that Publix violated the FCRA, but that it did so willfully. Plaintiffs expect that if the matter were litigated, Defendant would vigorously contest the question of willfulness, and would have presented evidence that it adopted the forms at issue in this case after consultation with outside counsel and vendors.

Defendant's advice-of-counsel affirmative defense presented a serious barrier to liability in this matter. In the pre-mediation disclosures, Defendant shared with Plaintiffs documents indicating that: (1) Defendant's outside counsel had, in 1999, recommended that Publix adopt a disclosure form with a liability release; (2) in 2007, Publix showed the form at issue in this case

to numerous consumer reporting agencies, including one who showed the form to its outside counsel; and (3) none of the consumer reporting agencies raised any concerns about the lawfulness of the forms. *See* Ex. 1, Ex. A. ¶¶ 4-5. These facts pose a serious challenge in establishing that Publix's alleged violations were willful or reckless.

Plaintiffs believe that this defense could have been overcome based on some discrepancies between the language recommended by Publix's counsel and the form eventually adopted, as well as what Plaintiffs would contend was Publix's unreasonable reliance on the advice of counsel of its vendor (as opposed to its own counsel). But the fact of the matter is that the presence of Defendant's affirmative defense means that establishing liability in this case was not assured. Most likely, each side would have had sufficient facts and evidence to proceed to a jury trial on the question of willfulness, the outcome of which would have been uncertain. What would have been certain, however, is that any monetary recovery on behalf of the Class would have been delayed considerably by the need to conduct data and deposition-intensive adversarial discovery, the need to brief and argue various motions, including discovery motions, a motion for class certification, and summary judgment motions, and ultimately trial. In a case of this size, where Defendant's potential liability began at $9 million, plus attorneys' fees and expenses, an appeal would have been likely, and would have likely caused further delay in the recovery and additional fees and costs to the Named Plaintiffs and the Settlement Class Members.

Viewed in the context of the litigation risks faced, as well as the substantial delay, fees, and costs that Class members would have experienced in order to receive proceeds from an adversarially-obtained judgment, not to mention the effort required, this settlement is in the best interests of the Named Plaintiffs and the Settlement Class Members, and should be approved.

III. THE COURT SHOULD APPROVE DISSEMINATION OF THE PROPOSED CLASS NOTICE.

With this motion, Plaintiffs have provided two forms of proposed class notice: one to be sent to all Class members by first class mail, and one to be posted on the Settlement Website. Ex 1., Exhibits D and E. These proposed notices include all of the information required by Fed. R. Civ. P. 23(c)(2)(B). The Mail Notice contains details about the definition of the Class, the proposed Class Counsel, the size of the settlement fund, the approximate size of the payment to which each Class member will be entitled, the methodology for opting out of the settlement, the potential size of Plaintiffs' request for attorneys' fees, expenses, and class representative incentive awards, and the date and location of the final approval hearing. The long form notice to be posted on the Settlement Website is based on the model notice promulgated by the Federal Judicial Center.[4] The notices exceed the requirements of Rule 23, and should be approved.

CONCLUSION

For the reasons set forth above, the parties respectfully request that the Court: (1) certify the Settlement Class for settlement purposes; (2) appoint Plaintiffs' Counsel as Class Counsel; (3) appoint Named Plaintiffs Knights and Prater as Class Representatives; (4) preliminarily approve the parties' settlement; (5) approve the class Notice for distribution; and (6) schedule a Final Fairness Hearing for a date as soon as possible, but no sooner than 90 days after the date of the Preliminary Approval Order so that the CAFA-notice period may first run. Counsel for the parties are glad to appear before the Court to address any questions if the Court so wishes.

Dated: July 25, 2014

[4] *Compare* Ex. 1, Exhibit E *with* http://www.fjc.gov/public/pdf.nsf/lookup/ClaAct04.pdf/$file/ClaAct04.pdf.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was filed with the Court via the CM/ECF system which will send Notice to all counsel of record.

Date: July 25, 2014

/s/E. Michelle Drake
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