UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SHAUNDRENIKA ROBRINZINE and AARON ABEL, individually and as representatives of the class,

Plaintiffs,

v.

BIG LOTS STORES, INC.,

Defendant.

Case No. 1:15-cv-07239
Hon. Amy J. St. Eve

MEMORANDUM IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

INTRODUCTION

On February 1, 2017, the Court granted Plaintiffs' unopposed motion for preliminary approval of the class action settlement. *ECF No. 152.* Notice was then sent to the 29,758 members of the Settlement Class, and the reaction has been overwhelmingly positive.[1] There have been no objections to the settlement and only seven opt-outs (less than 0.003%). In light of this positive reaction from the Settlement Class, the substantial monetary relief afforded under the settlement, and the delay, costs, and significant risks that would be associated with continuing the litigation, Plaintiffs respectfully request the Court grant final approval of the settlement. Big Lots does not oppose the relief requested in this motion.

BACKGROUND

The history of this litigation and settlement, and the claims involved, are set forth in detail in the Plaintiffs' preliminary approval papers, and in Plaintiffs' motion for attorneys' fees,

[1] Unless otherwise explicitly defined herein, all capitalized terms have the same meanings as those set forth in the Parties' Settlement Agreement.

which are incorporated herein, and therefore will be only briefly summarized here. *See ECF Nos. 148, 156.*

I. Summary of Procedural History and Settled Claims.

Plaintiffs Robrinzine and Abel have asserted causes of action against Defendant Big Lots Stores, Inc. ("Defendant" or "Big Lots") for alleged violations of the Fair Credit Reporting Act ("FCRA"), relating to Big Lots' procurement of consumer reports for employment purposes. Plaintiffs allege that Big Lots violated the FCRA's "standalone disclosure" requirement[2] by providing applicants with a disclosure containing extraneous information, including a liability release, before procuring their consumer reports. *ECF No. 16*. Big Lots denies any liability for these claims and denies that it acted unlawfully.

Plaintiffs originally initiated separate cases against Big Lots, but the matters were consolidated on January 5, 2016. *ECF No. 42*. Prior to consolidation, Big Lots moved to dismiss Robrinzine's complaint under Rule 12(b)(6). *ECF No. 25*. The Court denied the motion on January 19, 2016. *See ECF No. 45*. Big Lots then moved to stay this matter, which the Court denied on February 11, 2016. *ECF No. 62*.

After participating in two settlement conferences with Magistrate Judge Susan E. Cox on September 22, 2016, and October 28, 2016, the Parties agreed to settlement terms proposed by Judge Cox, conditioned upon the negotiation and execution of a final agreement approved by the Court and the negotiation and execution of a final written settlement agreement between Big

[2] *See* 15 U.S.C. § 1681b(b)(2)(A)(i) (requiring that an employer provide applicants with written notice that it will procure a background check "in a document that consists solely of the disclosure").

Lots and its former background check vendor, Sterling Infosystems, Inc. ("Sterling").[3] *See ECF Nos. 131, 132, 134, 136.* The Parties subsequently negotiated and executed the Settlement Agreement, which is attached to the *Declaration of Brock J. Specht* ("*Specht Decl.*") as Exhibit 1 (the "Settlement Agreement")[4], and Big Lots and Sterling negotiated and executed a separate settlement agreement. The Court preliminarily approved the settlement on February 1, 2017, and Plaintiffs now move the Court for final approval.

II. Summary of Settlement Terms.

In its Order Preliminarily Approving Settlement, this Court conditionally certified the following class for settlement purposes:

> All Big Lots job applicants (1) who received FCRA disclosure and authorization forms through Sterling's online portal, and (2) on whom Big Lots subsequently procured through Sterling a consumer report for employment purposes, between July 20, 2013 and July 9, 2015.

ECF No. 152 at 1. This Settlement Class initially consisted of 29,758 individuals. *See Affidavit of Kelly Kratz ("Kratz Aff.")* ¶ *5.* Because seven class members have requested exclusion, the final count is 29,751. *Id.* ¶ *12.*

Under the terms of the Settlement Agreement, Defendant will create a common fund for Settlement Class Members of $1.1 million. *Settlement Agreement* ¶ *23.* In addition, Defendant will also pay all costs of settlement administration separate from the $1.1 million common fund. *Id.* ¶ *24.* As a result, the per-person share of each Settlement Class Member in the common fund

[3] Sterling is a third-party vendor hired by Big Lots to operate an online portal that, among other things, disseminated FCRA disclosure and authorization forms to job applicants. *Settlement Agreement* ¶¶ *11, 19.*

[4] The Settlement Agreement was previously filed with the Court in conjunction with the preliminary approval motion and docketed at *ECF No. 149-1.* That copy of the Settlement Agreement was signed by all parties except Plaintiff Aaron Abel, who had agreed to the material terms of the Settlement Agreement but had not been able to return his signature page in time for filing. *See ECF No. 148 at 2-3 n.4.* The copy of the Settlement Agreement filed with this memorandum includes Mr. Abel's executed signature page.

will be approximately $36.97. *Specht Decl. ¶ 5.* After reduction for requested attorneys' fees and litigation expenses and Class Representative incentive awards, the Plaintiffs anticipate that each of the 29,751 Settlement Class Members will receive a net payment of approximately $24.21. *Id.* In exchange, Settlement Class Members who have not excluded themselves will release all claims arising out of or directly or indirectly related to the facts alleged in this Action, including but not limited to all claims under 15 U.S.C. § 1681b(b)(2)(A) and any parallel state or common law claims. *Settlement Agreement ¶¶ 31-32.*

The settlement is "claims paid," meaning that Settlement Class Members will not have to submit claim forms to receive a share of the settlement fund; rather, all Settlement Class Members who have not excluded themselves will receive checks after final approval. *Settlement Agreement ¶ 26(c).* To the extent any money remains in the fund after Settlement Class Members have had 180 days to cash their settlement checks, Big Lots shall be entitled to seek reimbursement from the remaining funds for costs associated with settlement administration paid by Big Lots. *Id. ¶ 26(d).*[5] Following that, the Settlement Agreement provides for a donation to a *cy pres* recipient. *Settlement Agreement ¶ 26(e).* The Parties have designated Consumers Union, a longstanding and respected nonprofit organization dedicated to consumer advocacy, as the *cy pres* recipient. *Id.* With the limited exception of reimbursement for actual administrative costs, no portion of the settlement fund will revert to the Defendant. *Settlement Agreement ¶ 26(d).*

III. Class Notice and Class Reaction.

On March 15, 2017, the Settlement Administrator sent direct notice of the settlement to members of the Settlement Class. *Kratz Aff. ¶¶ 7-8.*[6] The Settlement Administrator also

[5] The total cost of settlement administration is estimated to be $58,363. *Kratz Aff. ¶ 17.*

[6] The Notice program was extremely effective; more than 99% of the Settlement Class successfully received Notice of the Settlement. *Kratz Aff. ¶ 11.*

established and maintained a Settlement Website and toll-free telephone support. *Id.* ¶ *14-15*. On behalf of Defendant, the Settlement Administrator also complied with the notice requirements of the Class Action Fairness Act of 2005, 28 U.S.C. § 1715(b), by providing notice of the settlement to the appropriate public officials. *Id.* ¶¶ *3-4.*

The Settlement Class members' response to the settlement has been overwhelmingly positive. There have been **no objections**, and only seven Class Members have requested exclusion. *Id.* ¶ *12.*

ARGUMENT

The courts favor compromise and settlement of class action lawsuits. *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996); *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 312-13 (7th Cir. 1980). When reviewing a proposed settlement, the court must determine whether the settlement is "fair, reasonable, and adequate." *Armstrong*, 616 F.2d at 313. At final approval, the court may consider several factors: (1) the strength of plaintiff's case compared to the amount of the settlement; (2) the complexity, length, and expense of further litigation; (3) the amount of opposition to the settlement; (4) the opinion of competent counsel; and (5) the stage of the proceedings and the amount of discovery taken at the time of the settlement. *E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985) (internal quotations omitted).

As explained below, these factors weigh in favor of finding the Parties' settlement to be fair, reasonable, and adequate, and the Court should (1) grant final approval of the settlement, (2) dismiss Plaintiffs' and the Settlement Class Members' claims with prejudice, and (3) approve the settlement payments for distribution to the Settlement Class.

I. The Amount of the Settlement Appropriately Reflects the Strength of Plaintiffs' Case, and the Costs and Risks of Further Litigation.

The first two factors—the amount of the settlement in light of the strength of the plaintiff's case and the complexity, length, and expense of further litigation—are closely related. *Armstrong*, 616 F.2d at 322. Together, these factors weigh the benefits of the settlement, including the avoidance of further risk and expense, against the range of outcomes for plaintiffs after litigating the suit to completion. *See Synfuel Tech., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006). Both factors support approval of the settlement in this case.

Plaintiffs filed this case seeking statutory damages for themselves and on behalf of other job applicants under the FCRA, which provides for damages of between $100 and $1000 for each willful violation. 15 U.S.C. § 1681n(a)(1). While Plaintiffs view the right to receive a standalone disclosure before being subjected to a background check by a prospective employer as important, they acknowledge that the facts of this case do not include the sort of aggravating factors likely to justify an award over the minimum statutory amount of $100 per violation.[7] A gross recovery of $36.97, or roughly 37% of the likely award if this case had proceeded all the way through final judgment, is more than fair and reasonable. *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). Indeed, in this jurisdiction settlements of stand-alone disclosure claims involving payments as low as $11.25 per class member have been approved. *See Hunter v. First Transit, Inc.*, No. 1:09-cv-06178, ECF No. 79 (N.D. Ill. Sept. 9, 2011)

[7] Indeed, it is likely that if this case were to proceed, Defendant would be able to introduce evidence of mitigating factors, including an advice-of-counsel defense, that would tend to diminish the Plaintiffs' potential recovery. *See ECF No. 148 at 3.*

(granting final approval of settlement); *see also Hunter v. First Transit, Inc.*, No. 1:09-cv-06178, ECF No. 54, at 17 (N.D. Ill. Mar. 3, 2011) (minimum recovery of $11.25 per person for members of disclosure class).

Here, a payment of more than three times the per-person recovery in *Hunter* is an excellent recovery for the class, especially in light of the risks of moving forward. An FCRA plaintiff can recover statutory damages only where the defendant has acted willfully. *See* 15 U.S.C. §§ 1681n(a)(1). Plaintiffs expect that if the matter were litigated, Defendant would vigorously contest the question of willfulness. And because "the question of whether an employer acted willfully or negligently is understood to be a question of fact for the jury," *Miller v. Johnson & Johnson*, 80 F.Supp.3d 1284, 1296 (M.D. Fla. 2015) (quotation omitted), Plaintiffs would face the risks, expense, and delay associated with taking the case to trial in order to realize a monetary recovery. As this Court has observed, "[a] dollar recovered today is worth more than a dollar recovered in the future.... Were the proposed settlement class members required to await the outcome of a trial and inevitable appeal, however, they would not receive benefits for many years, if indeed they received any at all." *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F.Supp.2d 935, 961 (N.D. Ill. 2011) (quoting *Reynolds v. Beneficial Nat'l Bank,* 288 F.3d 277, 284 (7th Cir.2002)).

Viewed in the context of the litigation risks faced, as well as the substantial delay, fees, and costs that Settlement Class Members would have experienced in order to receive proceeds from a post-trial 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.

II. The Positive Reaction of the Class Supports Final Approval.

Of the 29,758 Settlement Class Members, only seven opted out and *no one* objected. *Kratz Aff.* ¶¶ *5, 12-13.* The lack of opposition to the settlement weighs heavily in favor of final approval. *In re AT&T Mobility*, 789 F.Supp.2d at 965 (collecting cases). Thus, Class Members' reaction to the settlement has been overwhelmingly favorable, and this factor supports final approval.

III. Counsel Endorses the Settlement.

Both sides here were represented by competent, experienced counsel. All counsel involved have endorsed the settlement, which is entitled to deference. *See Armstrong*, 616 F.2d at 325 ("[T]he court is entitled to rely heavily on the opinion of competent counsel."); *Isby*, 75 F.3d at 1200 (noting that the court was entitled to give "consideration to the opinion of competent counsel that the settlement was fair, reasonable and adequate"); *Anderson v. Torrington Co.*, 755 F. Supp. 834, 846 (N.D. Ind. 1991) ("In considering a proposed settlement, a district court may rely heavily on the opinion of competent counsel.") (citing cases). Both sides zealously pressed their positions throughout litigation and through the arms-length settlement negotiations. Notably, the settlement is not conditioned upon payment of service awards to the Named Plaintiffs or an award of fees and costs to Class Counsel, thus demonstrating Counsel's determination to place the Class's interests first. *Settlement Agreement* ¶ 34. Should the Court decline to approve any requested payment, or reduce such payment, the settlement shall still be effective. *Id.*

The Court may rely heavily on the considered judgment of counsel for the Parties that this settlement is a fair, reasonable, and adequate resolution of Plaintiffs' and Class Members' claims.

IV. The Stage of Proceedings at the Time of Settlement Supports Approval.

The timing of the settlement here supports a finding of fairness. The Parties had engaged in sufficient discovery and motion practice to determine the merits of Plaintiffs' claims and Defendant's defenses and to gain a thorough understanding of the factual and legal issues and the likelihood of success. Specifically, before the settlement was reached, the Parties engaged in informal and formal discovery, briefed Defendant's motion to dismiss and motion to stay, exchanged detailed mediation briefs, and attended two mediation sessions with Magistrate Judge Cox. A "presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Zolkos v. Scriptfleet, Inc.*, 2014 WL 7011819, at *1 (N.D. Ill. Dec. 12, 2014) (citation and quotation marks omitted)

Moreover, the active participation of Magistrate Judge Cox as a neutral mediator further supports a finding of fairness as to this settlement.[8] *See Fritzinger v. Angie's List, Inc.*, No. 1:12-cv-01118, 2014 WL 4680898, at *3 (S.D. Ind. Sept. 22, 2014) (finding the fact settlement was reached after mediation weighed in favor of approval); *Great Neck Capital Appreciation Inv. P'Ship, L.P. v. PricewaterhouseCoopers, L.L.P.*, 212 F.R.D. 400, 410 (E.D. Wis. 2002) (finding settlement is entitled to "strong presumption of fairness" when it results from arms-length negotiations between counsel and involved an experienced mediator); *McKinnie v. JP Morgan Chase Bank*, 678 F. Supp. 2d 806, 812 (E.D. Wis. 2009) (concluding that arms-length negotiations facilitated by a neutral mediator supports a finding of fairness).

[8] Indeed, the material terms of the Settlement were initially proposed by Magistrate Judge Cox after conducting two separate mediation sessions with the Parties and gaining a thorough understanding of the strengths and weaknesses of this case. *See Settlement Agreement* ¶ *2.*

V. The Settlement Class Is Appropriately Certified[9]

Class certification is appropriate if (1) the class is sufficiently numerous to make joinder of all parties impracticable, (2) there are common questions of law and fact, (3) the claim of the named plaintiff is typical of the claims of the class, and (4) the named plaintiff will fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(a). In addition, a plaintiff must show that common questions of law and fact predominate over individualized questions, and that the class action is superior to other available methods for adjudication of the controversy. Fed. R. Civ. P. 23(b).

In its Order Preliminarily Approving Settlement (*ECF No. 152*), this Court conditionally certified the Settlement Class defined in the Settlement Agreement. For the reasons set forth more fully in the Memorandum in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of the Proposed Settlement, all of the Rule's requirements are met, and the Settlement Class was properly conditionally certified for settlement purposes. *See ECF No. 148 at 10-20.* Rather than restate those reasons here, Plaintiffs refer the Court to the preliminary approval memorandum and respectfully request that the Court certify the Settlement Class for purposes of a final approval of the settlement of this matter.

CONCLUSION

In sum, the settlement is fair, reasonable, and adequate, and the Court should (1) grant final approval of the settlement; (2) certify the Settlement Class; (3) approve the settlement payments for distribution to the Settlement Class; (4) dismiss Plaintiffs' and the Settlement Class

[9] Pursuant to the terms of the Settlement Agreement, Big Lots does not oppose certification of the Settlement Class for settlement purposes only. *Settlement Agreement* ¶ *49.* Big Lots denies that a Rule 23 class may be properly certified other than for purposes of this settlement and nothing in the Settlement Agreement or this memorandum shall prevent Big Lots from opposing certification or seeking decertification of a certified class if the Court does not issue a Final Approval Order and Judgment or if that Order is not upheld on appeal. *Id.*

Members' claims with prejudice; and (5) retain jurisdiction over the implementation and enforcement of the Settlement Agreement.

Respectfully submitted,

Dated: June 1, 2017

/s/ Brock J. Specht

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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all Counsel of Record.

Date: June 1, 2017

/s/Brock J. Specht
Brock J. Specht