IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JENEEN BROWN, as an individual and as a representative of the classes, Plaintiff, v. DELHAIZE AMERICA, LLC, and FOOD LION, LLC,, Defendants.	**Case No. 1:14-CV-00195** **PLAINTIFF'S MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

In this putative class action alleging violations of the Fair Credit Reporting Act ("FCRA"), the parties have reached a settlement of all claims. This settlement was reached following two days of mediation with a respected mediator, and provides for payments to approximately 59,351 class members. The payments will be made to two separate classes: 1) a class that allegedly failed to receive the required "stand-alone disclosure" that the Defendants were going to conduct an employment related background check; and 2) a class that allegedly failed to receive the required notice before adverse employment action was taken based on the background check. Members of these classes will receive a gross amount of $48 and $96 respectively, which is consistent with FCRA class action settlements that have been approved by other federal courts. The settlement is fair and reasonable, and should be granted preliminary approval.

BACKGROUND

I. SUMMARY OF CLAIMS AND PROCEDURAL HISTORY.

Plaintiff Jeneen Brown ("Plaintiff") is a resident of Beaufort, South Carolina. Defendant Delhaize America, LLC is the parent company to Defendant Food Lion, Bottom Dollar Food, Hannaford, Harvey's Supermarket, and Sweetbay, which are supermarket chains that do business throughout the United States. On March 7, 2014, Plaintiff filed a Class Action Complaint against Food Lion, Delhaize and SingleSource Services Corporation ("SingleSource"), which asserted class-wide claims under the FCRA. All three Defendants moved to dismiss the Complaint, and Plaintiff then filed a First Amended Complaint ("FAC") that removed SingleSource as a defendant. The FAC asserted that when Plaintiff applied for a position at Food Lion, it failed to disclose to her, in a document that consisted solely of the disclosure, that it would obtain a background check on her. Plaintiff alleged that this failure violated the FCRA's requirement that employers provide a "clear and conspicuous disclosure" that "a consumer report may be obtained for employment purposes." *See* 15 U.S.C. § 1681b(b)(2). This is commonly known as the "stand-alone disclosure" requirement. *See* FAC, ¶¶ 18-19.

The FAC also asserted that Food Lion failed to provide Plaintiff with the required "pre-adverse action notice" before it terminated her employment based on the erroneous background report it obtained. The FCRA requires that "before taking any adverse action based" on a consumer report, an employer must provide a copy of the report and a

summary of the consumer's rights under the FCRA. 15 U.S.C. § 1681b(b)(3). This is commonly known as the "pre-adverse action notice" or "PAAN" requirement. The FAC alleged that Defendants took adverse employment action against employees based on background checks without providing the required PAAN. *See* FAC, ¶¶ 67-76.

Defendants moved to dismiss the FAC, arguing that Brown's report is not subject to the FCRA because it falls into one of the limited categories of communications that are excluded from the definition of a consumer report. *See* 15 U.S.C. § 1681a(y). The parties fully briefed the motion, and a hearing for the motion to dismiss was set for December 17, 2014, but then was continued to give the parties time to mediate. Before the mediation, Plaintiff served document requests and interrogatories. Declaration of E. Michelle Drake ("Drake Dec."), ¶ 3. In response, Defendants produced documents showing the job application forms at each of Delhaize's subsidiaries as well as the policies and procedures regarding pre-adverse action notice. *Id*. ¶ 4.

The forms produced by Defendants demonstrated that the subsidiaries generally used the same forms throughout the class period. *Id*. at 5. While not every form was identical, each form included some information or terms and conditions that were extraneous to the disclosure and authorization.[1] In addition, Defendants provided substantive answers to the interrogatories, which set forth Defendants' polices regarding background checks and adverse employment action based on the checks. *Id*. These

[1] The one exception is the form used by Delhaize subsidiary Hannaford. Accordingly, the Improper Disclosure Class does not include Hannaford job applicants or employees.

interrogatory answers also indicated that, as Delhaize generally set policy and procedure relating to taking adverse employment action based on the background checks, the subsidiaries generally followed uniform policies. *Id*.

The parties mediated on February 4 and 5 with Nancy F. Lesser, a respected mediator and arbitrator who is a member of the National Academy of Distinguished Neutrals. *Id.* ¶ 6. The parties negotiated the case on a common fund basis, meaning that the settlement amounts the parties were exchanging were inclusive of all attorneys' fees, incentive awards, and administrative expenses. *Id*., ¶ 7. The parties did not, however, negotiate any terms relating to attorneys' fees or the amount of any incentive award for the Named Plaintiff until after all terms related to the size of the common settlement fund, and the class definitions, were agreed upon. *Id*. At all times, Plaintiff's Counsel communicated their willingness to petition the Court for their fees, even over an objection from Defendant. *Id*. The material terms of the settlement were reduced to a terms sheet signed on February 5, 2015 and the Settlement Agreement was finally executed on February 18, 2015 and filed with the Court. ECF No. 62.

II. SUMMARY OF SETTLEMENT TERMS.

The proposed Settlement Classes are Delhaize subsidiary employees and job applicants (1) on whom Delhaize subsidiaries have procured a background check ("Improper Disclosure Class"), or (2) had adverse action taken against them on the basis of a background check ("Pre-Adverse Action Notice Class"). Drake Decl., Ex. 1 ¶ 26.

Defendants will create a common fund for Class Members consisting of $2,990,000. *Id.* ¶ 29. The Class Members will not be required to take any action, such as filing a claim form, to receive a portion of the funds. *Id.* ¶ 32(c). The parties believe that there are approximately 56,842 class members in the Inadequate Disclosure Class and 2,509 class members in the Pre-Adverse Action Notice Class. *Id.* ¶ 26.

The settlement provides that the payment to members of the Pre-Adverse Action Notice Class shall be twice the payment to members of the Improper Disclosure Class. Accordingly, the settlement provides for a gross recovery of approximately $48 for each member of the Improper Disclosure Class and approximately $96 for each member of the Pre-Adverse Action Notice Class. If the requested amounts are granted for attorneys' fees, administrative expenses, and a Class Representative service award, the parties anticipate that each Improper Disclosure Class Member will receive a payment of approximately $31 and each Pre-Adverse Action Notice Class Member will receive $61. In addition, Defendants acknowledge in the Settlement Agreement that shortly after the initiation of this litigation, they engaged in a review of their background check forms and procedures, which review is ongoing. *Id*., ¶ 30. Defendants agreed to provide Plaintiff's Counsel with any revised forms that it drafts as a result of this ongoing review.

If the Court grants preliminary approval to the settlement, the Settlement Administrator will send Settlement Class Members notice via first class mail. Drake Decl., Ex. 1 ¶ 22 & Ex. B. The postcard notice will be mailed to each individual

Settlement Class Member at the last known available address, as updated by the U.S. Postal Service's database of verifiable mailing addresses and the National Change of Address Database. Drake Decl., Ex. 1 ¶ 44. The notice will inform Class Members about the nature of the action and settlement, and will give Class Members the option to "opt out" of the settlement. *Id.* ¶ 48. The notice will direct Settlement Class Members to the Settlement Website, which will contain the operative pleadings and will allow Class Members to submit questions to Class Counsel and will provide a toll-free telephone number staffed by Plaintiff's Counsel. *Id*. ¶ 45.

The Settlement Agreement provides that Class Members who choose to opt out or object to the settlement may do so within seventy-five days of the notice mailing date. *Id*. ¶ 48. Settlement Class Members may send opt-out requests to Class Counsel. *Id*. Class Members who wish to object to the Settlement Agreement may file a written statement of objection with the Clerk of Court, and mail the same to Counsel.

The Settlement Agreement also provides that Plaintiff's Counsel's fees and service award for the Named Plaintiff are to come out of the fund, subject to the Court's approval. *Id*. ¶ 32. Counsel is authorized to petition for up to one-third of the fund as attorneys' fees, for costs, and for an award for Plaintiff Brown for up to $2,000. *Id*. Neither settlement approval nor the size of the settlement fund are contingent upon the full amount of any requested fees or class representative service award being approved.

Should the Court ultimately grant final approval, all Class Members who did not opt out of the settlement will be sent their *pro rata* distribution of the settlement funds in the form of a check. *Id.* ¶ 32(c). If any money remains in the fund after these distributions and after Class Members have had 120 days to cash their settlement checks, such monies shall either be redistributed to Class Members who cashed their initial checks, or if such a redistribution is impractical, shall be paid as a *cy pres* donation to Public Justice, a non-profit that advocates for consumer rights, subject to Court approval. *Id*. ¶ 32(e). Under no circumstance will any amount revert to Defendants.

ARGUMENT

There is a strong policy within this Circuit favoring resolution of litigation prior to trial. *See Crandell v. U.S.*, 703 F.2d 74, 75 (4th Cir. 1983) ("Public policy, of course, favors private settlement of disputes."); *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."). This is particularly true in class actions, which typically involve complex disputes, and where settlement "minimizes the litigation expenses of both parties and also reduces the strains such litigation imposes upon already scarce judicial resources." *S.C. Nat'l Bank*, 749 F. Supp. at 1423 (quoting *Armstrong v. Bd. of School Directors*, 616 F.2d 305, 313 (7th Cir. 1980) (internal quotation marks omitted)).

I. CERTIFICATION OF THE SETTLEMENT CLASSES IS APPROPRIATE.

Fed. R. Civ. P. 23 allows courts to certify a class or classes conditionally or provisionally to effectuate a settlement. *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 793-94 (3d Cir. 1995). To certify a class, the court must find that the prerequisites of Rule 23(a) are met, and that the case falls within at least one of the categories listed in Rule 23(b). The same standards generally apply where certification is sought for settlement purposes only, although issues of manageability at trial are not relevant. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). If a court determines that a settlement class should be provisionally certified, the court first determines whether to preliminarily approve the proposed settlement and find that notification to the settlement classes is appropriate, and then, at a later date, conducts a final fairness hearing at which all interested parties may be heard, after which the court decides whether the proposed settlement is fair, adequate, and reasonable. *See Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 828 (E.D.N.C. 1994). Ultimately, approval of a class settlement is committed to the discretion of the district court. *See In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991).

Because FCRA claims involving proper disclosures and pre-adverse action notices generally involve standardized forms and processes, courts have found that the Rule 23 requirements are easily met, even where class certification is contested. *Reardon v. ClosetMaid Corp.*, No. CIV.A. 08-1730, 2011 WL 1628041 (W.D. Penn. Apr. 27, 2011) (granting contested motion to certify class on stand-alone disclosure claim where

disclosure contained a liability release); *Milbourne v. JRK Residential Am., LLC*, No. 3:12CV861, 2014 WL 5529731 (E.D. Va. Oct. 31, 2014) (same). This action is no different.

A. The Rule 23(a) Requirements Are Met.

Under Rule 23(a), one or more persons 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 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.

Numerosity is easily satisfied here as Defendants' records indicate that there are more than 50,000 persons in the Improper Disclosure Class, and more than 2,000 individuals in the Pre-Adverse Action Class, which are far too many individuals for joinder to be practicable.

Commonality is also satisfied. "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury," and that their common complaint "is capable of classwide resolution…." *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011). "[T]he fact that there are some factual variances in individual grievances among class members does not defeat commonality." *Morrisv. Wachovia Secs., Inc.*, 223 F.R.D. 284, 292 (E.D. Va. 2004) (citations omitted).

Here, there are several questions that tie Class Members together. For the Improper Disclosure Class, all Class Members share the question of whether Defendants willfully violated the FCRA by not providing the required stand-alone disclosure before procuring a background check. For the Pre-Adverse Action Notice Class, all Class Members share the question of whether Defendants willfully violated the FCRA by failing to give Class Members a copy of their report and a summary of their rights before taking adverse action. These are common questions of law and fact that may be resolved on a classwide basis.

Similarly, a class meets the typicality requirement where the claims of the class members are "fairly encompassed by the class representative's claims." *Stanley v. Cent. Garden & Pet Corp.,* 891 F. Supp. 2d 757, 770 (D. Md. 2012). 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. In this case, Plaintiff's claims are factually and legally typical of the claims of every other Class Member, and are based upon the same legal theories. Class Members will either have not received a stand-alone disclosure or will have not received a copy of their report and summary of rights before adverse action was taken against them. Thus, Plaintiff's claims are typical of the Classes' claims.

The Named Plaintiff and Class Counsel are also adequate representatives. "Adequate representation requires a finding that the purported class representative and its

attorney are capable of pursuing the litigation and that neither has a conflict of interest with other class members." *Johnson v. Pozen Inc.*, No. 1:07CV599, 2008 WL 474334, at *2 (M.D.N.C. Feb. 15, 2008). In other words, "a plaintiff's interests must not be opposed to those of other class members and the plaintiffs' attorneys must be qualified, experienced, and able to conduct the litigation." *Stanley*, 891 F. Supp. 2d at 770.

First, Plaintiff Brown has been actively engaged in this case. She understands what it means to be a class representative and will and has put the interests of the Classes first in making all decisions related to this case. Drake Decl. ¶ 8. Plaintiff Brown provided documents to Counsel to aid in the investigation and drafting of the Complaint, reviewed the Complaint before filing, and has been in consistent contact with counsel throughout the case, including participating in phone calls with Counsel during the mediation process. *Id*. ¶ 9.

Second, proposed Class Counsel is highly experienced in complex class action litigation and consumer litigation in general. *See* Drake Decl., Ex. 2, Firm Resume. Nichols Kaster was founded in 1974, and has deep roots in representing employees, including in employment related cases, which this Court has recognized. *Id.*; *see also Latham v. Branch Banking & Trust Co.*, No. 1:12-CV-00007, 2014 WL 464236, at *2 (M.D.N.C. Jan. 14, 2014) (Schroeder, J.) (noting "skill and experience" of Nichols Kaster in wage-and-hour cases). Nichols Kaster is currently lead or co-counsel in many class or collective actions in state and federal courts across the country. *Id*. In a recent opinion

certifying a FCRA class for settlement purposes, and approving Nichols Kaster as class counsel, Chief Judge Chasanow of the United States District Court for the District of Maryland found that the "attorneys at Nichols Kaster, PLLP are qualified, experienced, and competent, as evidenced by their background in litigating class-action cases involving FCRA violations." *Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, 677 (D. Md. 2013); *see also Regalado v. Ryder Integrated Logistics, Inc.*, 2:12-cv-05737 (C.D. Cal. Nov. 7, 2013) (ECF No. 76) (approving class settlement in FCRA case with Nichols Kaster, PLLP as class counsel); *Knights v. Publix Super Markets, Inc.*, No. 14-cv-720 (M.D. Tenn. Apr. 17, 2014) (ECF No. 72) (same); *Avila v. NOW Health Group, Inc.* No. 14-cv-1551 (N.D. Ill. Sept. 22, 2014) (ECF No. 99) (same); *Haley v. Talentwise, Inc.*, No. 12-cv-1915 (W.D. Wash. Jan. 20, 2015) (ECF No. 78) (appointing Nichols Kaster class counsel and preliminarily approving class settlement in FCRA case); *Ernst v. Dish Network, LLC*, 1:12-cv-08794, (S.D.N.Y. July 23, 2013) (ECF No. 39) (appointing Nichols Kaster interim class counsel).

B. The Rule 23(b)(3) Requirements Are Met.

The Settlement contemplates provisional class certification under Rule 23(b)(3). If the elements of Rule 23(a) are satisfied, then a class action may be certified so long as the court finds that certain other requirements under Rule 23(b)(3) are met: (1) questions of law or fact common to class members predominate over any questions affecting only

individual members, and (2) a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(3).

First, the "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. If the Settlement Classes are 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. 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 v. GC Services P'ship,* 191 F.R.D. 99, 105 (W.D. Va. 2000).

The predominance requirement is satisfied here because the essential factual and legal issues regarding the Settlement Class Members' claims are common, and relate to standardized forms and procedures. *See Talbott*, 191 F.R.D. at 105 ("Here, common questions predominate because of the standardized nature of [defendant's] conduct.").

To be certified, a class action must also 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. 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. *Milbourne 2*014 WL 5529731, at *13-14

(holding class action is superior in FCRA case alleging disclosure and pre-adverse action notice violations); *Reardon*, 2011 WL 1628041, at *8 (W.D. Pa. Apr. 27, 2011) (same).

II. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED.

The primary concern for the court in reviewing a proposed class settlement is to ensure that class members have received sufficient consideration in settlement negotiations. *Jiffy Lube*, 927 F.2d at 158. At the preliminary approval stage, the court must render a determination as to the fairness, adequacy, and reasonableness of the settlement terms. *Id*.; Fed. R. Civ. P. 23(e)(2). As explained in detail below, the Fourth Circuit has set forth a multi-factor analysis for determining whether a settlement is "fair" and "adequate." *Jiffy Lube*, 927 F.2d at 158-59. Ultimately, to approve a settlement as "fair" and "adequate," the court must be satisfied that the proposed settlement is "within the range of possible approval." *Horton*, 855 F. Supp. at 827 (citing *In Re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1384 (D. Md. 1983) (internal quotation marks omitted)).

A class settlement is fair if it "was reached as a result of good faith bargaining at arm's length, without collusion." *Jiffy Lube*, 927 F.2d at 159. In the Fourth Circuit, courts should consider the following factors when analyzing a proposed class settlement for fairness: (1) the posture of the case when the proposed settlement was reached; (2) the extent of discovery that had been conducted; (3) the circumstances surrounding the negotiations; and (4) the experience of counsel in the type of case at issue. *Id*. at 158-59.

In this case, the proposed settlement was reached only after contentious motion practice by the parties, discovery, and arm's-length settlement negotiations between experienced counsel. *See Whitaker v. Navy Fed. Credit Union*, Civ No. RDB 09-cv-2288, 2010 WL 3928616, at *3 (D. Md. Oct. 4, 2010) (settlement was fair where parties had briefed motions to dismiss and conducted investigations in the context of settlement negotiations). Defendants also provided confirmatory discovery in the form of sworn interrogatory answers and responses to discovery requests after mediation and prior to the signing of the Settlement Agreement, the purpose of which was to confirm, in binding and sworn documents, the representations on which Plaintiff relied during mediation. Drake Decl. ¶ 10. The parties' settlement negotiations were adversarial, and took place over a day and a half with the aid of an experienced third-party mediator. Finally, Plaintiff's Counsel are experienced in class action litigation, including matters concerning employment disputes, consumer protection, and the FCRA.

In assessing the adequacy of a proposed settlement, the court should also consider: (1) the relative strength of plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement. *Jiffy Lube*, 927 F.2d at 159.

The first and second factors "compel the Court to examine how much the class sacrifices in settling a potentially strong case in light of how much the class gains in avoiding the uncertainty of a potentially difficult case." *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 256 (E.D. Va. 2009). In the present case, Defendants vigorously contest whether their background screening process is even subject to the FCRA, there is no controlling case law on the issue, and the parties have invoked competing authority supporting their respective positions. *See, e.g.*, *Martin v. First Advantage Background Serv. Corp.*, 877 F. Supp. 2d 754, 758–60 (D. Minn. 2012) (reasoning that background check may not be a consumer report because employer required applicants to meet employer's written screening requirements); *Freckleton v. Target Corp.*, No. CIV. WDQ-14-0807, 2015 WL 165293, at *6 (D. Md. Jan. 12, 2015) (finding that routine background report was not a "communication *in connection with* an investigation" under 15 U.S.C. § 1681a(y)"). Plaintiff therefore faces uncertainty as to her ultimate likelihood of success in proving that Class Members' background checks were covered by the FCRA.

Even if Defendants' motion to dismiss were denied, there was no guarantee that Plaintiff would be victorious on the underlying liability issues. For example, the issue of whether a disclosure form containing a liability release violates the FCRA has divided courts within this Circuit. *Compare Singleton v. Domino's Pizza, LLC*, No. 11-cv-1823, 2012 WL 245965, at *9 (D. Md. Jan. 25, 2012) ("[B]oth the statutory text and FTC advisory opinions indicate that an employer violates the FCRA by including a liability

release in a disclosure document."),*with Smith v. Waverly Partners,* No. 3:10–CV–00028, 2012 WL 3645324, at *5–6 (W.D.N.C. Aug. 23, 2012) (finding liability waiver to not be "not so great a distraction as to discount the effectiveness of the disclosure").

Furthermore, 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 she does not allege any actual damages, Plaintiff must show not only that Defendants violated the FCRA, but that they did so willfully. Plaintiff expects that if this matter were litigated, Defendants would hotly contest the question of willfulness by arguing, *inter alia*, that Defendants' interpretation of its statutory obligations was objectively reasonable. *See Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 69 (2007). Given the inherently factual nature of a willfulness determination, the outcome of Plaintiff's claims cannot be certain. *See Domonoske v. Bank of Am.*, 790 F. Supp. 2d 466, 474 (W.D. Va. 2011) (approving final settlement in the FCRA context and observing that "proof of willfulness seems an onerous task with a highly uncertain outcome"); *Smith v. HireRight Solutions, Inc.*, 711 F. Supp. 2d 426, 434 (E.D. Pa. 2010) ("whether an act was done with knowing or reckless disregard for another's rights remains a fact-intensive question").

Plaintiff also faced serious risks that the legal landscape would shift dramatically during the pendency of this litigation. In cases of this type, where Plaintiff seeks only

statutory damages, defendants have often argued that Article III standing is lacking. This argument has been rejected by a number of courts, including the Sixth Circuit. *Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702 (6th Cir. 2009); *Robins v. Spokeo, Inc.*, 742 F.3d 409 (9th Cir. 2014). The defendants in the Ninth Circuit *Spokeo* case, however, have petitioned for certiorari to the Supreme Court, and the Supreme Court has shown interest in the case, asking the Solicitor General to file a brief – an action which is often a precursor to the granting of certiorari.[2] Given the Supreme Court's apparent interest in this issue, and the potentially devastating effect an adverse ruling would have on this litigation, resolving this matter quickly and efficiently was in the Plaintiff's best interest. The third factor, which weighs the proposed settlement in light of the time and expense of further litigation, is "based on a sound policy of conserving the resources of the Court and the certainty that unnecessary and unwarranted expenditure of resources and time benefits all parties." *Mills Corp.*, 265 F.R.D. at 256 (internal quotation marks and alterations omitted). Absent settlement in this case, multiple stages of litigation remain that would be time-consuming and costly. To date, the parties have litigated a motion to dismiss and, at the very least, will need to engage in further fact, and possibly expert, discovery, as well as brief class certification and summary judgment before getting to

[2] *See* U.S. Supreme Court Invites Solicitor General's Views On Whether Certiorari Should Be Granted In Case Involving Standing To Recover Statutory Damages Absent Any Actual Damages, available at http://www.cfpbmonitor.com/2014/10/07/u-s-supreme-court-invites-solicitor-generals-views-on-whether-certiorari-should-be-granted-in-case-involving-standing-to-recover-statutory-damages-absent-any-actual-damages/, last accessed February 23, 2015.

trial. Moreover, the fourth and fifth factors are neutral, as Defendants are solvent and there has been no objection to the proposed settlement at this date.

Finally, the settlement is reasonable. There is a "strong initial presumption that the compromise is fair and reasonable." *Mills Corp.*, 265 F.R.D. at 258 (internal quotation marks omitted). The settlement provides recovery which is well in line with settlements that have received preliminary approval in similar circumstances. On a gross basis, the settlement provides for $48 per Inadequate Disclosure Class Member and $96 per Pre-Adverse Action Notice Class Member. If requested attorneys' fees, costs, and the service award are granted, this amount will be approximately $61 per Pre-Adverse Action Notice Class Member and $31 per Inadequate Disclosure Class Member. Given that the settlement provides immediate relief and avoids the risks attendant in litigation, this represents a reasonable settlement discount where statutory damages are capped at between $100 and $1,000 per violation, and the per class member recoveries in this settlement are well in line with per class member settlement amounts in similar cases under the FCRA. *See, e.g. Townsend v. Sterling Jewelers Inc.*, No. 1:13-cv-3903, Plaintiff's Motion for Final Approval of Class Action Settlement (N.D. Ill. August 15, 2014) (ECF No. 54) (requesting approval of pre-adverse action class claim where class members who submitted a claim form would receive $50) and *Townsend*, Minute Entry Approving Settlement (N.D. Ill. Sept. 15, 2014) (ECF No. 58); *Marcum v. Dolgencorp, Inc.*, No. 12-cv-108, Memorandum in Support of Joint Motion For Preliminary Approval

of Settlement, (E.D. Va. Oct. 15, 2014) (seeking approval for settlement of inadequate disclosure claim with payments to class members of $53) and *Marcum*, Order of Preliminary Approval of Class Action Settlement (E.D. Va. Oct. 16, 2014) (ECF No. 78) (approving settlement); *Beverly v. Wal-Mart Stores, Inc.*, No. 3:07cv469, Order Granting Final Approval (E.D. Va. May 1, 2009) (ECF No. 39) (approving PAAN settlement providing for $54 gross amount per class member); *Simons v. Aegis Communications Group*, No. 2:14-cv-04012, Order Granting Preliminary Approval (W.D. Mo. Oct. 15, 2014) (ECF No. 29) (preliminarily approving improper disclosure settlement with payment of $35 per class member); *Knights v. Publix Super Markets, Inc.*, Civil Action No. 3:14-cv-00720, Memorandum in Support of Motion for Final Settlement Approval (M.D. Tenn. Oct. 27, 2014) (ECF No. 64) (moving for final approval, which was granted, of FCRA settlement with $75 gross recovery to improper disclosure class).

Viewed in the context of the litigation risks faced, as well as the substantial delay, fees, and costs that Class Members would incur to litigate this matter trough trial, this settlement provides substantial monetary and prospective relief and is in the best interests of the Named Plaintiff and the Settlement Class Members.

CONCLUSION

For the reasons set forth above, the parties respectfully request that the Court: (1) certify the Settlement Classes for settlement purposes; (2) appoint Plaintiff's Counsel as Class Counsel; (3) appoint Named Plaintiff as Representative for the Classes; (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 100 days after the date of the Preliminary Approval Order so that the CAFA notice period may first run.

Date: March 2, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system and have verified that such filing will be sent electronically using the CM/ECF system to all counsel of record for Defendants.

Dated: March 2, 2015

s/ Daniel Bryden
Daniel Bryden