IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LASANDRA HILLSON,
STEVEN BOHLER, and
ASHLEY SCHMIDT,
individually and as representatives of the class,

Plaintiffs,

v.

KELLY SERVICES, INC.,

Defendant.

Case No. 2:15-cv-10803-LJM-APP
Honorable Laurie J. Michelson
Magistrate Judge Anthony P. Patti

PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY SETTLEMENT APPROVAL

Pursuant to Fed. R. Civ. P. 23, Plaintiffs LaSandra Hillson, Steven Bohler, and Ashley Schmidt ("Named Plaintiffs"), by and through their counsel, hereby respectfully move the Court for an Order granting Named Plaintiffs' Motion for Preliminary Settlement Approval and (1) certifying the Settlement Class for settlement purposes, (2) appointing Named Plaintiffs' counsel as Class Counsel, (3) appointing Named Plaintiffs as Class Representatives, (4) approving the Postcard Notice and Claim Form and Adjudicated Ineligible Postcard Notice and Claim Form for distribution, and (5) scheduling a final approval hearing.

Defendant Kelly Services, Inc. ("Kelly" or "Defendant") does not oppose this Motion.

MEMORANDUM IN SUPPORT

STATEMENT OF ISSUES PRESENTED

Whether the Parties' Settlement should receive preliminary approval from the Court, whether the Settlement Class should be certified for settlement purposes, whether Named Plaintiffs' counsel should be appointed as Class Counsel, whether Named Plaintiffs should be appointed as Class Representatives and whether the Postcard Notice and Claim Form and Adjudicated Ineligible Postcard Notice and Claim Form should be approved for distribution to the Settlement class.

AUTHORITY FOR RELIEF SOUGHT

Federal Rule of Civil Procedure 23(e).

INTRODUCTION

Named Plaintiffs LaSandra Hillson, Steven Bohler, and Ashley Schmidt, individually and on behalf of the Settlement Class,[1] seek preliminary approval of a proposed settlement of the Named Plaintiffs' claims against Defendant for alleged violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* ("FCRA"). The Settlement Agreement between Named Plaintiffs and Defendant (collectively, the "Parties"), if approved, will resolve all claims of the Named Plaintiffs and the members of the Settlement Class ("Settlement Class" or "Settlement Class Members") in exchange for substantial monetary and non-monetary benefits. Indeed, if approved, this Settlement will represent one of the largest classes to obtain recoveries for alleged violations of the FCRA's stand-alone disclosure requirement, 15 U.S.C. § 1681b(b)(2).

The proposed Settlement of this action is the product of extensive arms-length negotiations by experienced and informed class action lawyers and warrants preliminary approval, as the terms are "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Accordingly, the Named Plaintiffs request that the Court: (1)

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

preliminarily approve the proposed Settlement, (2) certify the Settlement Class for settlement purposes only, (3) appoint Named Plaintiffs as Class Representatives, (4) appoint Named Plaintiffs' counsel as Class Counsel, (5) direct notice to be distributed to the Settlement Class, and (6) schedule a final approval hearing.

BACKGROUND

I. PROCEDURAL HISTORY.

On July 18, 2014, Named Plaintiffs filed their class action complaint against Defendant in the United States District Court for the Northern District of California. (N.D. Cal. ECF No. 1.) On August 19, 2014, the Named Plaintiffs filed a First Amended Complaint ("FAC"), clarifying their allegations. (N.D. Cal. ECF No. 10.) Defendant answered the FAC on October 14, 2014. (N.D. Cal. ECF No. 35.)

The Parties agreed to attend an early mediation with third party neutral Hon. Layn Phillips of Phillips ADR on February 23, 2015. (Drake Decl. ¶ 3.) Prior to attending mediation, the Parties exchanged informal discovery and detailed mediation briefs. (*Id.*) The mediation was ultimately unsuccessful and the Parties returned to litigation. (*Id.*)

Following the February 2015 mediation, the Parties stipulated to transfer the case to this Court due to a forum selection clause contained in documents that

certain Named Plaintiffs had signed. (N.D. Cal. ECF Nos. 50, 52.) The Parties began to engage in formal discovery, with both sides responding to written discovery and producing documents. (Drake Decl. ¶ 4.)

On May 22, 2015, Defendant moved to stay litigation pending the United States Supreme Court's decision in *Spokeo, Inc. v. Robins*, No. 13-1339. (ECF No. 18.) The Court granted Defendant's motion on July 15, 2015. (ECF No. 29.) Despite the stay, the Parties determined that a second mediation would be beneficial, and agreed to attend mediation with third party neutral retired federal judge Wayne R. Andersen of JAMS on January 7, 2016. (Drake Decl. ¶ 5.) The Parties again exchanged detailed and lengthy mediation briefs beforehand. (*Id.* ¶ 6.) At the mediation, the Parties were able to agree to a settlement in principle, and after subsequent negotiations that were extensive and facilitated by retired Judge Andersen, they executed a memorandum of understanding and ultimately, the final Settlement Agreement. (*Id.* ¶ 7.)

II. SUMMARY OF THE NAMED PLAINTIFFS' SETTLED CLAIMS.

The claim in this case relates to the disclosure Defendant provided to applicants and employees before procuring background checks on them. The FCRA requires that entities that are procuring a consumer report (i.e., a background check) for employment purposes provide applicants and employees

with written notice that such a report may be obtained for employment purposes. 15 U.S.C. § 1681b(b)(2)(A)(i). This notice must be made "in a document that consists solely of the disclosure." *Id.* Some courts have found that this requirement, commonly called the "stand-alone disclosure" requirement, is violated if the disclosure contains extraneous language, such as a provision purporting to release the employer from liability. *See, e.g.*, *Singleton v. Domino's Pizza, LLC*, 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. 08-1730, 2013 WL 6231606, at *10 (W.D. Pa. Dec. 2, 2013) (granting summary judgment against the defendant-employer and stating that disclosure with liability waiver was "facially contrary to the statute at hand, and all of the administrative guidance"); *cf. E.E.O.C. v. Video Only, Inc.*, No. 06-1362, 2008 WL 2433841, at *11 (D. Or. June 11, 2008) (granting summary judgment against the defendant-employer that made disclosure "as part of its job application, which is not a document consisting solely of the disclosure").

In this case, the Named Plaintiffs alleged that Defendant violated the stand-alone disclosure requirement by providing its applicants and employees with a

disclosure containing a liability release and other extraneous information prior to procuring background checks on them. (*See* FAC.) Defendant denies any liability for these claims, but to avoid the further costs and burdens of litigation, the Parties have agreed to settle. The proposed Settlement Class consists of the approximately 221,216 individuals whom Defendant has identified as (1) having an initial hire date at Kelly during the period of time when Kelly was providing new applicants with a disclosure form that contained a liability release, and (2) upon whom Defendant procured a consumer report during the period from July 18, 2012 through January 23, 2014 — the date on which Defendant completed the removal of the liability release from its disclosure. (Drake Decl., Ex. 1 ¶ 38.) Of the 221,216 Settlement Class Members, Defendant's records show that approximately 39,692 were "Adjudicated Ineligible," meaning that Defendant's electronic data management system shows those Settlement Class Members as having a background check result of anything other than "favorable." (*Id.* ¶¶ 13, 38.)

The Settlement Class Members who do not opt out will release all claims arising out of or relating directly or indirectly to the facts alleged or which could have been alleged in the FAC. (*Id.* ¶¶ 64, 65.)

III. THE SETTLEMENT AGREEMENT.

A. Overview of Terms.

In consideration for the release of the Settlement Class Members' claims, Defendant has agreed to provide significant monetary and non-monetary relief.

First, Defendant will pay $6,749,000 to the Settlement Class as part of a common settlement fund. (*Id.* ¶ 45.) In no circumstance will any portion of this fund revert to the Defendant. After any Court-approved deductions for attorneys' fees, expenses, and Class Representative service awards, the entire remaining fund will be distributed *pro rata* to all Settlement Class Members who timely return properly completed Claim Forms and Adjudicated Ineligible Claim Forms. (*Id.* ¶¶ 46-49.) Individuals who were Adjudicated Ineligible will receive an allocation which is three (3) times that of Settlement Class Members who were not. (*Id.* ¶ 46.)

Should any funds remain after the close of the check negotiation period, the Parties' Agreement contemplates a redistribution of the remaining funds to those Settlement Class Members who cashed their original settlement checks. The redistribution will be in proportion to the original distribution, less any settlement administration expenses associated with the redistribution. (*Id.* ¶ 50.) The redistribution will be implemented if each check in the redistribution would be for at least $10. (*Id.*) Otherwise, the funds will be donated to the Parties' designated *Cy Pres* Recipient, Flint STRIVE. (*Id.*) Flint STRIVE is a national, non-profit

organization which works to assist individuals with job training and skills development. (*Id.* ¶ 25.) The *cy pres* funds would be allocated such that 50% are allocated to national efforts and 50% to efforts in Flint, Michigan. (*Id.*)

Second, Defendant has agreed not to include a liability release on its FCRA disclosure form for a period of five (5) years, unless or until there is a material change in the law indicating that such liability waivers in a FCRA disclosure form are lawful in every jurisdiction in which Defendant operates. (*Id.* ¶ 42.)

Third, the Settlement provides Settlement Class Members with the opportunity to receive a free copy of any consumer report procured on them by Defendant. Any required forms and instructions to request the free copy will be posted on the Settlement Website, hosted by Class Counsel. (*Id.* ¶ 54(e).) Because many Settlement Class Members may be unaware of what was included in their consumer reports, and because many consumer reports contain errors or omissions[2], this service will allow Settlement Class Members to learn what is

[2] A recent Federal Trade Commission ("FTC") survey found that up to 26% of credit reports from the "Big Three" credit reporting agencies (TransUnion, Experian, and Equifax) contain potential material errors. U.S. Fed. Trade Comm'n, Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003, i (Dec. 2012), *available at* www.ftc.gov/os/2013/02/130211factareport.pdf. The problem is especially acute in criminal background screening. These companies disseminate millions of

being reported about them and to correct any errors, improving their future employment prospects. Defendant will also have a temporary toll-free call center set up to respond to requests for consumer reports during the notice period, and for a period of no less than eight (8) months following the Effective Date of the Settlement. (*Id.* ¶ 55.)

Fourth, Defendant has agreed to designate a dedicated "Consumer Reports Information Operator," who will be responsible for timely responding to inquiries, on a nationwide basis, to provide information about how Settlement Class Members, and/or Defendant's temporary employees, can procure any consumer reports procured by Defendant about them. (*Id.* ¶ 43.) This position, or a substantially similar role, will continue for a period of three (3) years, unless or

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criminal records from a number of sources with data from county, state, and federal sources. Unlike traditional credit reporting, which is dominated by the Big Three, because there are hundreds of criminal background-check companies from which to obtain a criminal background check, it is nearly impossible for a consumer to verify that his or her criminal background check will be accurate in advance of the report being furnished to an employer. Persis S. Yu & Sharon M. Dietrich, *Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses*, Nat'l Consumer Law Ctr., 15-20 (Apr. 2012), *available at* http://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf. One background check company, for example, advertises access to its database of more than 500 million criminal records from more than 1,000 different sources. Backgroundchecks.com, About Us, www.backgroundchecks.com/info.mvc/about-us (last visited May 9, 2016).

until there is a material change in the law. (*Id.*)

After soliciting bids from a number of administrators, the Parties have jointly selected Epiq Systems, an independent third party, to serve as the Settlement Administrator. The Settlement Administrator will handle mailing notice, claims processing, mailing settlement payments, and other administrative tasks.

B. Form of Notice.

The Parties have agreed to the forms of notice attached to the Settlement Agreement as Exhibits A, C, and E. This notice program meets the requirements of Fed. R. Civ. P. 23(c)(2)(B).

Pursuant to the Agreement, all Settlement Class Members will be sent a Postcard Notice and Claim Form. There will be two versions of this notice: one for Settlement Class Members who were Adjudicated Ineligible and one for Settlement Class Members who were not. (Drake Decl., Ex. 1 at Exs. A & C.) Both the Postcard Notice and Claim Form and the Adjudicated Ineligible Postcard Notice and Claim Form will inform Settlement Class Members of basic information about the Settlement, and include a claim form which can be detached, completed, and returned. (*Id*.) Further, the Postcard Notice and Adjudicated Ineligible Postcard Notice will inform Settlement Class Members how to obtain

additional information about the Settlement, including the URL for the Settlement Website and a toll-free telephone number to contact the Settlement Administrator. (*Id.*) For those Settlement Class Members not Adjudicated Ineligible, the Postcard Notice they will receive will direct them to the Settlement Website to learn how to contest that designation and potentially receive an increased settlement allocation. (*Id.*)

The Postcard Notice and Claim Form and Adjudicated Ineligible Postcard Notice and Claim Form will be mailed via first class U.S. mail, to each Settlement Class Member's last known address as updated by the U.S. Postal Service's National Change of Address System and any other appropriate proprietary software the Settlement Administrator utilizes. (Drake Decl., Ex. 1 ¶ 53.) Should any notice be returned as undeliverable or returned with a forwarding address, the Administrator shall promptly re-mail to the forwarding address, or if none, will utilize its databases to find a new address and re-mail, if possible. (*Id.*)

The Claim Forms Settlement Class Members will be required to return will require the Settlement Class Member to certify he or she is properly included in the Settlement Class by simply signing and dating the Form. (Drake Decl., Ex. 1 at Exs. A & C.) The Form, as noted above, will be attached to the Postcard Notice and Adjudicated Ineligible Postcard Notice and can simply be detached and put

back in the mail to the Administrator, as it will be return-addressed with postage pre-paid. (*Id.*) Settlement Class Members will also be able to complete and submit a Claim Form online through the Settlement Website. (Drake Decl., Ex. 1 ¶ 57.)

The Settlement Website will also contain the Long Form Notice (Exhibit E), copies of relevant pleadings (the FAC, the Settlement Agreement, and copies of any orders issued by the Court in connection with the Settlement), will inform Settlement Class Members of the ability to request a free copy of any consumer report procured by Defendant and provide any necessary forms to do so, will have the capability for Settlement Class Members to submit change-of-address information, and will be updated on a regular basis throughout the settlement process. (*Id.* ¶ 54.) The Settlement Administrator will also maintain a toll-free telephone number for questions related to the Settlement. (*Id.* ¶ 56.)

These extensive efforts to provide notice to the Settlement Class are "the best notice that is practicable under the circumstances." Fed. R. Civ. P 23(c)(2)(B). Working in conjunction with the Settlement Administrator, Defendant will comply 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 appropriate state officials for each state in which a Named Plaintiff or Settlement

Class Member resides, and to the U.S. Attorney General for each such state.

C. Adjudicated Ineligible Certifications.

Defendant maintains records of the results of its applicants' and employees' background screens. In Defendant's database, a background screen coded as "favorable" will not negatively impact an individual's eligibility for placement. (Drake Decl., Ex. 1 at Ex. D ¶¶ 16-17.) All Settlement Class Members whose results are not listed as "favorable" in Defendant's records are viewed as having been Adjudicated Ineligible for purposes of this Settlement. (*Id.*) In the event Settlement Class Members disagree with Defendant's records of their adjudication status, Settlement Class Members will have the opportunity to certify that they received an "unfavorable" result and, thus, that they should receive the increased settlement allocation. (Drake Decl., Ex. 1 ¶ 60.) They will be informed of this opportunity on the Postcard Notice, and detailed instructions related to the same will be available on the Settlement Website. A Settlement Class Member who wishes to so certify must mail a letter to the Settlement Administrator, certifying that he or she was in fact terminated or not hired or placed with Defendant or one of Defendant's customers, and had an unfavorable background check. (*Id.*) The Settlement Class Member will need to include the basis of his or her knowledge and submit any supporting documentation. The certification must be submitted by

the same deadline as the Claim Forms. (*Id.*) If the certification is timely, the Settlement Class Member will be presumptively considered Adjudicated Ineligible for purpose of settlement payment allocations. (*Id.*)

Defendant will be able to challenge any certifications of Adjudicated Ineligible status. In order to do so, Defendant will notify Class Counsel and the Settlement Administrator, after which the Settlement Administrator will send the agreed upon "Challenge Letter" (Exhibit B), and a pre-paid return envelope, to the Settlement Class Member via first class U.S. mail (and email if possible). (Drake Decl., Ex. 1 ¶ 61.) The Settlement Class Member will have fourteen (14) days to submit a response to the Challenge Letter, including any documentation or information requested in the Challenge Letter. (*Id.*) If, after receiving the submission, Defendant still challenges the certification, the challenge will be brought before the Parties' mediator, the retired Judge Wayne Andersen, to determine a resolution which will bind all parties. (*Id.*)

D. Opt-Outs and Objections.

The Postcard Notice and the Adjudicated Ineligible Postcard Notice will also inform all Settlement Class Members of their right to opt out of or object to the Settlement and of the associated deadlines. (Drake Decl., Ex. 1 at Exs. A & C.) Settlement Class Members who choose to opt out must send a written notice to the

Settlement Administrator stating the individual's name and address and desire to opt out of the Settlement. (Drake Decl., Ex. 1 ¶ 58.) To object, a Settlement Class Members must file a statement of objection with the Clerk of Court and mail a copy to the Settlement Administrator. (*Id.* ¶ 59.) The statement must state the case name and number; list the class member's name, address, phone, and email information; state the basis and explanation of the objection; be signed by the Settlement Class Member; and state whether the Settlement Class Member intends to appear at the final approval hearing, with or without counsel. (*Id.*)

E. Attorneys' Fees, Costs, and Named Plaintiff Service Awards.

The Settlement Agreement contemplates Class Counsel petitioning the Court for attorneys' fees in an amount not to exceed one-third of the settlement fund, as well as documented, customary costs incurred by Class Counsel. (*Id.* ¶ 48.) Class Counsel may also petition the Court for $2,500 in service payments for each Named Plaintiff. (*Id.* ¶ 47.) Any approved awards will be deducted from the settlement fund prior to distribution to the Settlement Class Members. (*Id.* ¶¶ 32, 46.) Class Counsel will formally petition the Court for these amounts fourteen (14) days prior to the Opt-Out Deadline and will post a copy of the motion papers on the Settlement Website so that Settlement Class Members are able to review them prior to the deadline to opt out or object to the Settlement. (*Id.* ¶ 72.) Neither

final approval, nor the size of the settlement fund, are contingent upon the full amount of any requested fees or service awards being approved.

ARGUMENT

Class action settlements must be approved by the court after a hearing is held and the court finds that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Before a final approval hearing may be held, the court must "preliminarily approve the proposed settlement," and "members of the class must be given notice." *Tenn. Ass'n of Health Maint. Orgs., Inc. v. Grier*, 262 F.3d 559, 565 (6th Cir. 2001) (citing *Williams v. Vukovich*, 720 F.2d 909, 920-21 (6th Cir. 1983)); *see also* Fed. R. Civ. P. 23(e)(1). Preliminary approval is meant to "ascertain whether there is any reason to notify the class members of the proposed settlement," in order to allow class members the opportunity to opt out and/or object to the settlement, after which the court may proceed to the final approval hearing. *In re Packaged Ice Antitrust Litig.*, No. 08-md-1952, 2010 WL 3070161, at *4-5 (E.D. Mich. Aug. 2, 2010).

For the reasons set forth below, the Court should: (1) preliminarily approve the Parties' proposed Settlement, (2) certify the Settlement Class for settlement purposes only, (3) approve the class notices for distribution, (4) appoint Named Plaintiffs as Class Representatives and Named Plaintiffs' counsel as Class Counsel,

and (5) set a date for the final approval hearing.

I. THE SETTLEMENT TERMS ARE FAIR, REASONABLE, AND ADEQUATE.

There is a strong "federal policy favoring settlement of class actions." *Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 632 (6th Cir. 2007). A settlement should thus be preliminarily approved as long as it "is not the product of fraud or overreaching by, or collusion between, the negotiating parties and . . . the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Clark Equip. Co. v. Int'l Union, Allied Indus. Workers of Am.*, 803 F.2d 878, 880 (6th Cir. 1986) (quoting *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982) (internal quotation marks omitted)).

In determining whether a proposed settlement agreement is "fair, reasonable, and adequate" so as to warrant final approval under Fed. R. Civ. P. 23(e)(2), a court may consider several 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." *Gen. Motors*, 497 F.3d at 631. For purposes of preliminary approval, a court may, but is not bound to, consider the

final approval factors, as applicable. *See Kizer v. Summit Partners, L.P.*, No. 11-cv-38, 2012 WL 1598066, at *8 (E.D. Tenn. May 7, 2012). In the event a court finds that the settlement falls within the range of possible approval, notice is issued and a final approval hearing scheduled.

Under these factors, the Parties' Settlement should be preliminarily approved.

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

As laid out *supra*, the Parties engaged in informal and formal discovery, briefed Defendant's motion to stay, exchanged detailed mediation briefs, and attended two separate mediation sessions with two different third-party neutrals before this Settlement was reached. These circumstances entitle the Settlement in this case to the presumption of fairness. *See Mangone v. First USA Bank*, 206 F.R.D. 222, 226 (S.D. Ill. 2001) (listing cases and noting that arms-length negotiations conducted by competent counsel leads to a presumption of fairness of a settlement); *Bert v. AK Steel Corp.*, No. 02-467, 2008 WL 4693747, at *2 (S.D. Ohio Oct. 23, 2008) ("The 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 Inter-Op Hip Prosthesis Liab.*

Litig., 204 F.R.D. 330, 351 (N.D. Ohio 2001) ("[W]hen a settlement is the result of extensive negotiations by experienced counsel, the Court should presume it is fair.") (citing *Williams*, 720 F.2d at 923). Additionally, attorneys' fees and service payments for the Class Representatives were not discussed or negotiated until all other material settlement terms had been agreed upon, eliminating the possibility of a trade-off between compensation for the Settlement Class and compensation for Class Counsel or the Named Plaintiffs. (Drake Decl., Ex. 1 ¶¶ 47-48.)

Furthermore, the Parties here are represented by counsel who have significant experience in class action litigation and settlements, and in FCRA cases in particular. (*See* Part II.A.4, *infra*.) The judgment of the Named Plaintiffs and Class Counsel is entitled to deference. *See Thacker v. Chesapeake Appalachia, L.L.C.*, 695 F. Supp. 2d 521, 532-33 (E.D. Ky. 2010) ("[I]n 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."), *aff'd sub nom. Poplar Creek Dev. Co. v. Chesapeake Appalachia, L.L.C.*, 636 F.3d 235 (6th Cir. 2011); *see also, e.g., Int'l Union, United Auto., Aerospace, & Agr. Impl. Workers of Am. v. Ford Motor Co.*, No. 07-14845, 2008 WL 4104329, *26 (E.D. Mich. Aug. 29, 2008) ("The endorsement of the parties' counsel is entitled to significant weight,

and supports the fairness of the class settlement.").

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

1. Recovery for the Class Is Substantial.

The Settlement is impressive when considering the range of possible recoveries for the Settlement Class, Defendant's potential defenses, and the number of procedural hurdles between the Named Plaintiffs and a final judgment. The Named Plaintiffs filed this case seeking statutory damages under the FCRA, which provides for damages of between $100 and $1,000 for each willful violation. 15 U.S.C. § 1681n(a)(1). The Named Plaintiffs did not seek actual damages.[3]

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 v. Farmers Ins. Co. of Or.*, 592 F. Supp. 2d

[3] 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 Defendant 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 Settlement Class suffered actual damages based upon the wording of Defendant's forms.

1307, 1318 (D. Or. 2008); *accord In re Farmers Ins. Co., Inc., FCRA Litig.*, 741 F. Supp. 2d 1211, 1224 (W.D. Ok. 2010). In this case, while the Named Plaintiffs view the right to a stand-alone disclosure as important, the violation in this case is not the sort of violation which includes aggravating factors to justify an award at the $1,000 level. While the exact amount each Settlement Class Member will recover in this case is unknown until the Parties know the number of Claim Forms filed, and the resolution of any additional Adjudicated Ineligible certifications, the gross settlement amount of a $6,749,000 is substantial, and those filing claims are likely to recover a considerable portion of what they could have recovered in litigation. A recovery of a substantial percentage of the likely award if this case had proceeded all the way through final judgment is a significant result. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 n.2 (2d Cir. 1974) ("[T]here 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).

Counsel for both sides in this matter have litigated numerous class action cases involving employment-related claims brought under the FCRA. Class Counsel routinely tracks Fair Credit Reporting Act litigation around the country by

monitoring PACER filings. To Class Counsel's knowledge, in gross terms, when compared to other class settlements of claims under 15 U.S.C. § 1681b(b)(2)(A)(i), this Settlement is the third largest. It is surpassed only by *Knights v. Publix Super Markets*, No. 3:14-cv-00720, ECF No. 72 (E.D. Tenn. Nov. 12, 2014) ($6.8 million settlement) and *Manuel v. Wells Fargo*, No. 3:14-cv-238, ECF No. 118 (E.D. Va. Dec. 17, 2015) (preliminarily approving gross settlement of $12 million, with approximately $8.5 million allocated to settlement of stand-alone disclosure claims).

The Settlement is also substantial in terms of the per class member recovery achieved. In this case, the gross per class member recovery is approximately $30.50. This settlement amount is well in line with that achieved in settlements that have been approved in cases raising similar claims under § 1681b(b)(2) after the Supreme Court agreed to hear *Spokeo*. *See Aceves v. Autozone Inc.*, No. 5:14-cv-2032, ECF No. 41 (C.D. Cal. Mar. 25, 2016) (preliminary approval motion pending in settlement with gross recovery of $20 per class member in the disclosure class); *Bailes v. Lineage Logistics, LLC*, No. 2:15-cv-2457, ECF No. 23 (D. Kan. Feb. 19, 2016) (preliminary approval motion pending in settlement with gross recovery of $43 per class member); *Foltz v. Guitar Center Stores, Inc.*, No. 2:14-cv-04308, ECF No. 41 (W.D. Mo. July 10, 2015) (granting preliminary

approval of settlement with gross recovery per class member of $35); *Johnson v. AT&T Services, Inc.*, No. 4:14-cv-00453, ECF No. 54 (E.D. Mo. Aug. 19, 2015) (granting preliminary approval of settlement with gross recovery per class member of $35); *Landrum v. Acadian Ambulance Serv., Inc.*, No. 14-cv-1467, ECF No. 37 (S.D. Tex. Nov. 5, 2015) (approving disclosure settlement of $10 person); *Manuel v. Wells Fargo Bank, N.A.*, No. 3:14-cv-238, ECF No. 118 (E.D. Va. Dec. 17, 2015) (granting preliminary approval of settlement with gross recovery per disclosure class member of $35); *Patrick v. Interstate Management Co., LLC*, No. 8:15-cv-1252, ECF No. 42 (M.D. Fla. Jan. 14, 2016) (granting preliminary approval of settlement with gross recovery per disclosure class member of $16.40); *Thomas v. Fresh Direct, LLC*, No. 1:14-cv-5101, ECF No. 30 (E.D.N.Y. Aug. 13, 2015) (granting preliminary approval of settlement in which some class members will receive $150, and some will receive $20); *Walker v. McClane/Midwest, Inc.*, No. 2:14-CV-04315, ECF No. 26 (W.D. Mo. July 20, 2015) (granting preliminary approval of settlement in which disclosure class members will recover $24). The ratio between the amounts awarded to Settlement Class Members who were Adjudicated Ineligible and those who were not is also in line with other similar settlements. *See, e.g., Hunter v. First Transit, Inc.*, No. 09-cv-6178, ECF No. 79

(N.D. Ill. Sept. 9, 2011) (approving settlement which allocated higher payouts to individuals who were not hired based on their background reports).

While the gross per person class recovery amounts compare favorably to other settlements, in this case Settlement Class Members will be required to file Claim Forms in order to receive a payment. Because the claims rate will be less than 100%, Settlement Class Members can reasonably expect to receive more than the amount that they would receive if the money was distributed to all Settlement Class Members without a claims process. By way of example, if the Settlement achieves a 15% claims rate, Settlement Class Members who file Claim Forms can expect to receive a net per person recovery of approximately $90, with those who were Adjudicated Ineligible receiving $272.[4]

The requirement that Settlement Class Members return Claim Forms is appropriate and, in this case, necessary. The claims process in this case was designed to be as claimant-friendly as possible, is not onerous, and presents no meaningful bar to the making of a claim. While Defendant is in possession of contact information for all Settlement Class Members, Defendant is an employer of temporary workers and had only minimal contact with many of the Settlement

[4] These numbers assume the Court grants Class Counsel's fees, costs, and service awards request.

Class Members. The class period begins nearly four years ago. In this circumstance, the use of a claim form makes sense because it helps to ensure that Settlement Class Members who are sent checks will actually receive and cash them. Claim forms are commonly used to distribute settlement proceeds in class actions, and are routinely approved. *See, e.g.*, *Shames v. Hertz Corp*., 2012 WL 5392159, at *9 (S.D. Cal. Nov. 5, 2012) ("[C]lass action settlements often include this [claims] process, and courts routinely approve claims[-]made settlements."). FCRA class settlements, particularly those involving circumstances where class members' contact with the defendant was somewhat impersonal or truncated, also frequently involve claims processes, and such settlements are routinely approved. *See, e.g.*, *Holman v. Experian*, No. 11-cv-180, ECF No. 243-1 (N.D. Cal. Mar. 27, 2014) (FCRA settlement requiring class members to submit a claim in order to receive a payment); *Jackson v. Metscheck, Inc.*, No. 11-cv-2735, ECF No. 46 (N.D. Ga. Dec. 31, 2012) (same); *Hunter v. First Transit, Inc.*, No. 09-cv-6178, ECF No. 79 (N.D. Ill. Sept. 9, 2011) (same). The use of claim forms here ensures that administration of the Settlement will be cost-effective and that recovery for participating Settlement Class Members will be substantial.

Taken all together, the gross recovery, the per class member recovery, and the method of distributing the settlement proceeds are all fair and reasonable and

warrant preliminary settlement approval. *See In Re Toys R Us-Delaware, Inc.--Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 453-54 (C.D. Cal. 2014) ("Viewed from the perspective of each class member, had the class member sued Toys individually and proved that it acted wil[l]fully, he or she could have recovered between $100 and $1,000 in statutory damages. . . . A $5 or $30 award, therefore, represents 5% to 30% of the recovery that might have been obtained. This is not a *de minimis* amount. Given the likelihood that plaintiffs would have been unable to prove actual damages and the risk that they would have been unable to prove willfulness and recover any damages at all, the court finds that the amount of the settlement weighs in favor of approval.") (granting final approval to claims-made settlement for statutory damages under the FCRA).

The non-monetary benefits of the Settlement are also significant. Most importantly, the Settlement protects Settlement Class Members from the potential risk that their case will be adversely impacted by a ruling in *Spokeo*. In the unlikely event that the Supreme Court's decision in *Spokeo* would ever be construed to deprive this Court of subject matter jurisdiction (which the Parties agree is not the case in light of the Supreme Court's decision on May 16, 2016), the Settlement Agreement provides that the Settlement shall be presented in a state court of competent jurisdiction. (Drake Decl., Ex. 1 ¶ 77.)

Defendant has agreed to directly address the issue with its disclosure form that is the nexus of this case by no longer including a liability release on the disclosure form for a period of five (5) years. In addition, Class Counsel and Defendant will be assisting individuals in obtaining copies of the consumer reports obtained by Defendant, both through the Consumer Reports Information Operator and through the Settlement Website and "call center." As noted above, this is a valuable service which will allow Settlement Class Members to learn what is being reported about them, correct errors, and potentially improve employment prospects. Even standing alone, this prospective relief is a very positive outcome of this litigation, especially considering that it is far from settled law whether injunctive relief is available under the FCRA in adversarial litigation. *Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 709 (6th Cir. 2009) (noting that "the answer to th[is] question is far from self-evident").

2. Plaintiffs Face Significant Risks in the Absence of Settlement.

The impressive nature of this recovery comes into even sharper focus when the risks of further litigation are considered. The Named Plaintiffs had yet to survive class certification or summary judgment. While the Named Plaintiffs are confident that these obstacles could have been overcome, each of these phases of litigation presents serious risks, which the Settlement allows the Named 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, Named Plaintiffs also faced the specific risk in this case of Defendant's defenses to willfulness. 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. 15 U.S.C. §§ 1681n(a)(1), 1681o(a)(1). Because the Named Plaintiffs did not allege any actual damages, in order to recover anything in this case, the Named Plaintiffs would have to prove not only that Defendant violated the FCRA, but that it did so willfully. The Named Plaintiffs expect that if the matter were litigated, Defendant would contest the question of willfulness vigorously and the Named Plaintiffs acknowledge that the law on this issue is not clear. The Named Plaintiffs believe that Defendant's arguments could be overcome, but they do present serious obstacles to recovery, which weighs in favor of settlement approval. *Chakejian v. Equifax Info. Servs., LLC*, 275 F.R.D. 201, 212 (E.D. Pa. 2011) (that proving willfulness in FCRA case was "a high hurdle to clear," was a factor weighing in favor of settlement approval); *Reibstein v. Rite Aid Corp.*, 761 F. Supp. 2d 241,

253 (E.D. Pa. 2011) (that willfulness presented "considerable — albeit not insurmountable — risks" weighs in favor of settlement approval).

Moreover, the Settlement in this case was negotiated in the shadow of the Supreme Court's consideration of *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. April 27, 2015), and a stay was imposed on this litigation pending the result. The question in *Spokeo* was "[w]hether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute." *See* Questions Presented, *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. April 27, 2015), *available at* www.supremecourt.gov/qp/13-01339qp.pdf. A defendant-friendly result in *Spokeo* could have significantly impacted this lawsuit, and, in the worst case scenario, potentially could have prevented the Settlement Class from receiving any recovery at all. (*See* ECF No. 29 (order staying case, noting that "*Spokeo* has the high potential to be completely dispositive of the instant case" (footnoted omitted)).) Notably, the Settlement completely insulates Settlement Class Members from the risks posed by *Spokeo*, ensuring that no matter whether this Court retains jurisdiction or not, Settlement Class Members will recover because the Settlement requires that it be presented in state court if it cannot be presented in federal court.

(Drake Decl., Ex. 1 ¶ 77.) Given the Supreme Court's ruling in *Spokeo* on May 16, 2016, the Parties believe that this Court retains jurisdiction over this litigation.

II. CERTIFICATION OF THE SETTLEMENT CLASS IS APPROPRIATE.

The Parties request that the Court certify the Settlement Class under Fed. R. Civ. P. 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 Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). The proposed Settlement Class here meets the prerequisites for certification under Rule 23(a) and (b)(3), and classes are routinely certified for settlement purposes for claims of this sort. *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); *Knights*, No. 3:14-cv-00720, ECF No. 72; *Bell v. US Xpress, Inc.*, No. 1:11-cv-00181, ECF No. 59 (E.D. Tenn. April 7, 2014); *Hunter*, No. 1:09-cv-06178, ECF No. 55; *Ellis v. Swift Transp. Co. of Ariz., LLC*, No. 3:13-cv-00473, ECF No. 39 (E.D. Va. May 21, 2014); *Fernandez v. Home Depot U.S.A., Inc.*, No. 8:13-cv-00648, ECF No. 48 (C.D. Cal.

July 16, 2015).

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 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. 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." The Rule does not set a specific threshold, 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 Settlement Class Members is over 220,000, easily satisfying numerosity.

2. The Settlement 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 Am. Mfg., Inc.*, 370 F.3d 565, 570 (6th Cir. 2004) (internal quotations and alterations omitted). 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 numerous other cases in which it was alleged that the defendant used a noncompliant disclosure to obtain background checks on job applicants. *See, e.g. 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 675 (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, 396-97 (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, 299 (N.D. Ill. 2005) (same); *Walker v. Calusa Investments, LLC*, 244 F.R.D. 502, 507 (S.D. Ind. 2007) (same); *Kudlicki v. Capital One Auto Fin., Inc.*, 241 F.R.D. 603, 606 (N.D. Ill. 2006) (same); *Serrano v. Sterling Testing Sys., Inc.*, 711 F. Supp. 2d 402, 411 (E.D. Pa. 2010) (finding commonality and certifying FCRA class when defendant-consumer reporting agency's consumer reports all contained the same illegal outdated information); *Campos v. ChoicePoint, Inc.*, 237 F.R.D. 478, 485 (N.D. Ga. 2006) (finding commonality and certifying FCRA class when defendant consistently and as a matter of policy failed to provide full file disclosures to consumers upon request); *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*, 256 F.R.D. at 498 (same); *Gillespie v. Equifax Info. Servs., LLC*, No. 05-138, 2008 WL 4614327, at *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.*, No. 06-cv-241, 2007 WL 2439463, at *1-2, 4 (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).

Because the core question in this case is whether Defendant's form document violated the FCRA, commonality has been established.

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." *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 561 (6th Cir. 2007) (quoting *In Re Am. Med. Sys., Inc.*, 75 F.3d at 1082). The Sixth Circuit has described the typicality requirement as follows: "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, the Named Plaintiffs' claims are identical to the claim of every other member of the Settlement Class, and are based on the same legal theory. When every member of the Settlement Class, including the Named Plaintiffs, suffered the same FCRA violation based upon being presented with the same

language during the job application process, it is manifestly clear that the Named Plaintiffs' claims are typical. Claims of this sort are routinely found to be typical. *See Reardon*, 2011 WL 1628041, at *6 ("[P]laintiff 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."); *Beattie*, 511 F.3d at 561 (finding typicality satisfied when class representatives and all class members' claims arose from the same allegedly deceptive billing practice); *Carroll v. United Compucred Collections, Inc.*, No. 1-99-0152, 2002 WL 31936511, at *14 (M.D. Tenn. Nov. 15, 2002), *report and recommendation adopted in relevant part*, 2003 WL 1903266 (M.D. Tenn. Mar. 31, 2003), *aff'd*, 399 F.3d 620 (6th Cir. 2005) (recommending certification and finding typicality met when all class members received the same mailing, allegedly in violation of the Fair Debt Collection Practices Act); *Murray v. E*Trade Fin. Corp.*, 240 F.R.D. at 397 (typicality met when representative's claim based on same alleged standard conduct and same legal theory as other class members'); *Murray v. New Cingular Wireless Servs., Inc.*, 232 F.R.D. at 299 (same); *Walker*, 244 F.R.D. at 507-08 (same); *Kudlicki*, 241 F.R.D. at 606-07 (same).

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 the plaintiffs and whether there is any antagonism between the interests of the plaintiffs and other members of the class they seek to represent." *Cross v. Nat'l Trust Life Ins. Co.*, 553 F.2d 1026, 1031 (6th Cir. 1977). Both requirements are met in this case.

The Named Plaintiffs have been actively engaged in this case. All of them have stayed abreast of developments in the case and settlement negotiations, and evaluated the Settlement Agreement. (Drake Decl. ¶ 8.) They all understand what it means to be a class representative and have put the interests of the Settlement Class first in making all decisions related to the case. (*Id.*) Further, none of the Named Plaintiffs have any conflicts of interest that would compromise their representation of the Settlement Class. (*Id.*)

Lead counsel from Berger & Montague ("Berger") is highly experienced in

complex class action litigation and consumer litigation in general. (Drake Decl., Ex. 2.) Berger was founded in 1970, and has been concentrated on representing plaintiffs in complex class actions ever since. (*Id*.) The firm has been recognized by courts for its skill and experience in handling major complex litigation. (*Id.*) Berger has been recognized by the National Law Journal in 11 of the last 15 years for its "Hot List" of top plaintiffs' oriented litigation firms in the nation. (*Id.*) Lead counsel from Berger, E. Michelle Drake is a well-respected member of the Plaintiffs' consumer class action bar. Ms. Drake is a member of the Board of the National Association of Consumer Advocates, sits on the Partners' Council of the National Consumer Law Center, and is the Treasurer for the Minnesota State Bar Association Consumer Litigation Section Council. Ms. Drake authored a book chapter on the laws that govern background checks in the employment context. *See* "Financial and Criminal Background Checks," *Job Applicant Screening: A Practice Guide*, Minnesota Continuing Legal Education Publication (May 2014). Ms. Drake is currently serving as lead counsel in over 30 active FCRA class action cases nationwide. (*Id.*)

Over the course of its forty-two year history, Nichols Kaster, PLLP ("Nichols Kaster") has developed a sterling reputation in the legal community for representing employees, including in employment-related FCRA cases.

(Declaration of Anna P. Prakash ¶ 5, Ex. 1.) The firm has been lead or co-counsel on hundreds of class and collective actions and frequently achieves class certification in both litigation and settlement contexts. (*Id.*) At present, the firm has more than thirty attorneys dedicated to protecting and advancing plaintiffs' rights, four of whom work almost exclusively on class-wide consumer litigation. (*Id.*) In fact, the firm has initiated more than 140 consumer cases in the last six years, and is currently prosecuting numerous class actions on behalf of consumers across the country. (*Id.* ¶ 5.) Notably, the firm has achieved numerous successes for clients involving claims that are nearly identical to those in the instant action, and more than half a dozen of the firm's active cases involve alleged violations of the FCRA's stand-alone disclosure provision, 15 U.S.C. § 1681b(b)(2). (*Id.*) Since joining the firm in 2009, lead counsel from Nichols Kaster, Anna P. Prakash, has worked almost exclusively on class and collective actions under various consumer-protection and employment laws, including the FCRA, and is currently one of the co-leaders of the firm's national consumer class action team and consumer origination group. (*Id.* ¶ 4.)

Lyngklip & Associates Consumer Law Center, PLC ("Lyngklip") has been dedicated to representing consumers for the last twenty years. (*See* Declaration of Qualifications of Ian B. Lyngklip.) Ian Lyngklip has been recognized for his work

by the National Association of Consumer Advocates and other associations, and has been invited to speak on consumer issues before the Federal Trade Commission and the Consumer Financial Protection Bureau due to his expertise. (*See generally id.*)

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 also meets the predominance and superiority requirements 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 here. *See Reardon*, 2011 WL 1628041, at *7-8 (finding predominance and superiority in very similar FCRA case).

1. Common Questions of Law or Fact Predominate.

When considering predominance, the core issue is "whether 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 "[a]t the heart of the litigation." *Powers v. Hamilton Cnty. Pub. Defender Comm'n*, 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, there are three class-wide issues that predominate over any individual concerns. First, and most important, is the question of whether Defendant's disclosure form constituted an appropriate stand-alone disclosure pursuant to the FCRA. Because each Settlement Class Member received the same disclosure, 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. *See Singleton*, 976 F. Supp. 2d at 677 (finding predominance in similar circumstances).

Second, the willfulness of Defendant's conduct presents a critical common question. The ability 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 gave the same disclosure form to every member of the

Settlement Class, the answer to the question of whether Defendant's violation was willful can be determined on a class-wide basis. *See 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 this case were litigated, the amount of damages could also be determined on a class-wide basis. Because the Named Plaintiffs sought statutory and punitive damages, no individual analysis of damages would be required. *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952-3 (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*, 592 F. Supp. 2d at 1318; *In Re Farmers Ins. Co., Inc., FCRA Litig.*, 741 F. Supp. 2d at 1224. Consideration of this factor requires no individual analysis.

2. A Class Action is the Superior Vehicle for Adjudication.

To be certified, a class action must be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Again, in the settlement context, the court need not address manageability. *Amchem*, 521 U.S. at 620. Courts in this Circuit 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, but involve a modest amount of damages, 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 678 (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 v. E*Trade Fin. Corp.*, 240 F.R.D. at 400; *Walker*, 244 F.R.D. at 511; *Kudlicki*, 241 F.R.D. at 608; *Serrano*, 711 F. Supp. 2d at 412-13.

III. THE COURT SHOULD APPROVE DISSEMINATION OF THE CLASS NOTICES.

Attached to the Settlement Agreement, the Parties have submitted their proposed notices: Postcard Notice and Adjudicated Ineligible Postcard Notice to be sent to all Settlement Class Members by first class mail, and Long Form Notice to be posted on the Settlement Website. (Drake Decl., Ex. 1 at Exs. A, C, E.) These proposed notices include all of the information required by Fed. R. Civ. P. 23(c)(2)(B). The Postcard Notice and Adjudicated Ineligible Postcard Notice

inform Settlement Class Members of the terms of the Settlement and their rights and deadlines in which to exercise them, and include a detachable, postage pre-paid Claim Form. The Long Form Notice, which will be posted on the Settlement Website, and to which the Postcard Notice and Adjudicated Ineligible Postcard Notice provide a link, contains details about the definition of the Settlement Class, the proposed Class Counsel, the size of the settlement fund, the methodology for submitting a Claim Form, opting out, objecting, the potential size of Class Counsel's request for attorneys' fees, costs, and Class Representative service payments, and the date and location of the final approval hearing. Further, the Long Form Notice is modeled after the Federal Judicial Center's class action model notice. *See* www.fjc.gov. The notices certainly are "'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Gen. Motors*, 497 F.3d at 629 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)); *see* Fed. R. Civ. P. 23(e)(1).

CONCLUSION

Based on the foregoing, the Court should grant the Named Plaintiffs' Motion and enter the preliminary approval order.

Respectfully submitted,

Dated: June 8, 2016

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document was served upon all counsel of record in the above-captioned matter on June 8, 2016 via the CM/ECF system.

Dated: June 8, 2016

/s/E. Michelle Drake
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