UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Joshua Saylor, *individually and on behalf of all others similarly situated,*	:	
Plaintiff,	:	
v.	:	Civil Action No. 1:22-cv-00053-AJT-IDD
RealPage, Inc.	:	
Defendant.	:	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Plaintiff Joshua Saylor ("Plaintiff" or "Class Representative") submits this memorandum in support of his Motion for Final Approval of Class Action Settlement. The settlement, which the parties reached following litigation, extensive discovery, and fulsome arms' length negotiations between experienced counsel, provides significant relief to the Settlement Class and resolves the claims asserted that Defendant RealPage, Inc. ("Defendant") violated the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681e(b). The settlement meets, and exceeds, the criteria for final approval of a class action settlement, providing monetary relief in the form of a $9,731,570 common fund established by Defendant from which all Settlement Class Members will receive an automatic payment, as well as important non-monetary relief in the form of significant practice changes by Defendant to its procedures relating to the reporting of sex offender records.

This Court has preliminarily found the settlement to be "fair, reasonable, and adequate." (ECF No. 91.) Notice has been sent been to the Class and there is only one procedurally improper objection and there are three opt-outs. (Settlement Administrator Declaration, ECF

No. 103-1 ("Admin. Decl.") ¶¶ 17, 18.) All members of the Settlement Class will receive an automatic payment. In addition, Class Members were given the opportunity to submit Claim Forms to receive an additional settlement payment from the fund if they experienced a loss or delay in obtaining housing due to the report at issue. 415 Claim Forms were received from Settlement Class Members, which when combined with the Settlement Class Members Who Disputed (*see* § II.B.i below), results in 5,511 Class Members in line to receive an additional settlement payment. (*Id*. ¶ 14.)[1] If the settlement is approved as requested, Settlement Class Members who receive only the automatic payment will receive approximately $399 and the Settlement Class Members set to receive the enhanced payment will receive $798.

Plaintiff now respectfully requests the Court grant final approval of the settlement and (1) enter the Final Approval Order and the (2) Consent Injunctive Relief Order. Defendant does not oppose the relief sought by this Motion.

BACKGROUND

I. Procedural History

Plaintiff filed his initial complaint in the United States District Court for the District of New Jersey on June 14, 2019, alleging that Defendant had violated 15 U.S.C. § 1681e(b), by failing to follow reasonable procedures to assure maximum possible accuracy in its reporting of sex offender registry records. Plaintiff alleged his claims on behalf of himself and a class of similarly situated individuals where Defendant had reported a sex offender registry record where the offender had a different date of birth than the subject of the report. Defendant answered the complaint on July 23, 2019, and the parties commenced discovery.

[1] An additional number of claim forms were received from individuals not on the Class List. The parties believe this is due to a third party website posting about the settlement's benefits, and the Administrator has sent letters to each of these individuals to notify them their claims are not being accepted, and giving an opportunity for the individuals to provide documentation to support accepting the claim. (Admin. Decl. ¶ 15.)

Discovery was extensive. Defendant produced and Plaintiff reviewed thousands of documents. Plaintiff issued many subpoenas issued to agencies that maintain sex offender registry. Plaintiff deposed three representatives of Defendant. Plaintiff was deposed, and Plaintiff's landlord was deposed. Notably, Defendant produced a data sample of over 2,800 records. Plaintiff's counsel analyzed the records, comparing the information Defendant reported to available public records related to the sex offender record reported. Discovery ultimately revealed that for 12 jurisdictions, the publicly available registry records on which Defendant relied to label people as sex offenders did not contain full dates of birth. Instead those jurisdictions' sex offender registries provided only a year of birth or age. For these jurisdictions, Defendant's methodology was to calculate a one or two year range for the offender's date of birth and then use that range, among other factors (such as the offender's name), to determine whether a registry record belonged to the consumer. Despite the fact that many courthouses and other repositories for criminal records (as opposed to sex offender registries) make full dates of birth available, Defendant did not cross-check the sex offender registries with public records relating to the criminal conviction which preceded the sex offender registration requirement. Nor did Defendant use any geographic limitations on registry matching.

Plaintiff maintains that for sex offender records matched based on a range of possible dates of birth, Defendant should have further limited its reported records by address history, and/or use of underlying criminal records to gather additional date of birth information. Defendant has maintained throughout litigation that its procedures were reasonable and that any alleged violation of the FCRA was not willful.

On January 6, 2021, the parties engaged in a full day mediation with third party neutral Lou Peterson of Hillis Clark Martin & Peterson. The mediation involved another action as well, *Brown v. RP On-Site, LLC*, No. 20-cv-482 (E.D. Va.). *Brown* involved one of Defendant's

affiliates, and asserted allegations related to procedures used to associate sex offender registry records with individual consumers. A second mediation, involving only the instant matter, was held on March 24, 2021, again with Mr. Peterson.

These mediations did not initially result in a settlement, and the parties requested the Court (at the time, the District of New Jersey) to reinstate a schedule for further litigation. The parties continued settlement negotiations, at arms' length, between counsel. Ultimately, the parties were able to reach a resolution and executed the Settlement Agreement in January 2022. Due to similarities in the injunctive relief order contemplated in the parties' Settlement Agreement, and that entered in the *Brown* matter, the parties agreed to bring this settlement before this Court to ensure consistent application. On January 18, 2022, the case was transferred from the District of New Jersey to this Court, and on February 2, 2022, Plaintiff filed the motion for preliminary approval of the settlement (ECF No. 87), which the Court granted on February 7, 2022 (ECF No. 91).

II. Settlement Terms

A. The Settlement Class

The Settlement Class is defined as:

> All persons residing in the United States of America (including its territories and Puerto Rico) who from June 14, 2017 through March 2, 2021, were the subject of a report sold by RealPage that included a record from a sex offender registry, with the sex offender registry record on the report having matched the subject of the report based on a date of birth range, where further manual review shows that the date of birth of the individual in the sex offender registry differs from the date of birth of the applicant who was the subject of the report.

(ECF No. 91 ¶ 1.)

Class membership was determined based on a detailed public record review conducted by Class Counsel. On January 19, 2022, Defendant provided an "Initial Class List" to Class Counsel. This "Initial Class List" included data from 11,779 consumer reports. The subject of

each report was a potential class member. The Initial Class List included personally identifying information (including dates of birth) for the consumers who were the subjects of the reports, housing application information from the consumer supplied during the application process, and the sex offender registry and criminal record information Defendant had included on the reports. (ECF No. 102-1 ¶ 8.) Class Counsel then used a combination of records requests, subpoenas, and online research to gather an extensive amount of additional data. This data included more information relating to the sex offender registry record reported as well as records relating to the underlying criminal offenses that caused the sex offender to be placed on the registry in the first instance because those criminal records often provided more personally identifying information. (*Id.* ¶ 9.) Class Counsel searched thousands of records from state online sex offender registries, the national sex offender registry, state repositories of criminal record information (including court records, department of correction records, and state police records). (*Id.* ¶ 10.) Class Counsel issued over 26 subpoenas related to records from 13 states, and obtained over 1,300 criminal history checks from the Georgia Bureau of Investigation and over 100 from the Indiana State Police. (*Id.*)

To conduct this work, Class Counsel assembled a team of experienced attorneys (*id.* ¶¶ 11-12), who assisted in gathering records and compared the consumer records on the Initial Class List with the additional public record information gathered. For each consumer, the team catalogued and compared date of birth information for the consumer-applicant against date of birth information for the individual on the sex offender registry with whom Defendant had matched the consumer-applicant. (*Id.*) The team of reviewers audited one another's findings to ensure accuracy. (*Id.*) Class Counsel then de-duplicated the Initial Class List (some individuals were the subject of more than one report) using unique record identifiers. Once the review and deduplication processes were complete, Class Counsel created the "Responsive Class List." The

Responsive Class List contained only those consumer-applicants who Class Counsel determined were *not* the sex offender to whom Defendant had matched them based on partial date of birth information. (*Id.*)

With the Initial Class List, Defendant had included a notation of whether a given consumer-applicant had disputed information on their report with Defendant and also whether Defendant had suppressed the record from future reporting in response to the consumer's dispute. (*Id.* ¶ 13.) In the Responsive Class List, those notations were carried over as the indicator that the given consumer-applicant was in the "Settlement Class Member Who Disputed" category of the Settlement Class. (*Id.*) Class Counsel reviewed produced dispute records to ensure those individuals were included in the Responsive Class List with appropriate indicator. (*Id.*) On April 12, 2022, Class Counsel produced the Responsive Class List to Defendant. After deduplication, that list consisted of 10,180 individuals. Class Counsel also produced to Defendant all the thousands of pages of underlying public record documentation Class Counsel had relied upon in determining who from the Initial Class List should be included on the Responsive Class List. (*Id.* ¶ 14.) Defendant agreed to Class Counsel's Responsive Class List without objection.

B. Relief Provided

i. Monetary Benefits

Defendant will pay $9,731,570 as a settlement fund. (Settlement Agreement (ECF No. 88-1, Ex. 1) ¶ 2.25.) Class Counsel have requested an award of attorneys' fees in the amount of one-third of the fund, as well as out-of-pocket expenses, and a service award for Plaintiff, to be paid from the settlement fund. (ECF No. 101.) Additionally, the Settlement Administrator's expenses are contemplated to be reimbursed from the fund as well. (Settlement Agreement

¶ 2.28.) After these deductions, the remaining funds ("Net Settlement Fund") will be distributed so that all Settlement Class Members will receive an automatic payment.

Settlement Class Members who disputed the sex offender registry record on their report with Defendant ("Settlement Class Members Who Disputed" (*id.* ¶ 2.21)), or who attested that the report issued by Defendant led to a delay or loss of a housing opportunity ("Claiming Settlement Class Members" (*id.* ¶ 2.4)) will receive twice as much as Settlement Class Members who did not fall into either category. (*Id.* ¶ 4.3.2.) Of the 10,180 unique Settlement Class Members on the final Class List for notice, 5,333 had a record on their report "suppressed" by Defendant, suggesting that a dispute was made. Additionally, 415 Claim Forms were received from Settlement Class Members. (Admin. Decl. ¶ 14.) After accounting for overlap between the two groups, there are 5,511 combined Settlement Class Members Who Disputed and Claiming Settlement Class Members. (*Id.*) Each of these 5,511 Class Members is estimated to receive approximately $798, should the Court approve the requested deductions for fees, costs, and service award. The remaining Settlement Class Members who are not Settlement Class Members Who Disputed or Claiming Settlement Class Members are thus estimated to receive approximately $399. The FCRA provides for $100-$1000 in statutory damages for willful violations. Thus, the payment amounts here represent a substantial portion of the damages that may be recoverable at trial.

ii. Injunctive Relief

In addition to providing for monetary relief, the settlement also provides for meaningful injunctive relief. (Settlement Agreement at Ex. B.) As described in the parties' proposed consent injunctive relief order, Defendant will agree to limit its reporting of sex offender registry records to those that correspond to states where the consumer has a current or previous known address (which may also include states that encompass surrounding metropolitan areas in some

instances), or where the property at issue is located. Defendant routinely obtains address history information from other consumer reporting agencies in connection with preparing its reports and has agreed to use that address history information, when it obtains it, to limit the jurisdictions from which sex offender registry records can be reported. In Plaintiff's case, such a limitation would have prevented the Indiana sex offender registry record from appearing on his report because Plaintiff had never lived in Indiana. Defendant's Senior Directors, Vice Presidents, and Senior Vice Presidents who actively manage RealPage's Screening Product will also undergo additional FCRA training for the next five years related to sex offender registry records. These changes will provide benefits to not only the Settlement Class Members but to everyone who is the subject of a tenant screening report issued by Defendant going forward.

In exchange for the monetary benefits and injunctive relief, Settlement Class Members release all claims that were brought or could have been brought in the litigation. (Settlement Agreement ¶ 4.4.1.)

III. Notice to the Class

On June 1, 2022, the Settlement Administrator mailed notice via U.S. mail to the last known mailing addresses, as updated by the U.S. Postal Service's National Change of Address System and any other appropriate databases the Settlement Administrator utilizes, to 10,156 Settlement Class Members. The Settlement Administrator also emailed notice to 6,590 Class members for whom Defendant's had records of email addresses. (Admin. Decl. ¶¶ 7, 8.) On June 15, 2022, the Administrator mailed to seven more Class Members after locating valid mailing addresses. (*Id.* ¶ 7.) After accounting for Class Members without valid contact information, and after attempts to remail undeliverable mail notices, the Settlement Administrator successfully sent notice to 9,789 Settlement Class Members, or 96.2% of the Settlement Class. (*Id.* ¶ 12.)

The distributed Notices were in the form approved by the Court (ECF No. 91), and contained detailed information about the settlement, including Settlement Class Members' rights and the deadlines by which to exercise them, and the date and time of the Final Approval Hearing. The notices directed the Settlement Class Members to the Settlement Website, established by the Settlement Administrator prior to notice distribution, for additional information, and enclosed a Claim Form. (Admin. Decl. Exs. A, B.) The Settlement Website included the Complaint, the Settlement Agreement, Motion for Preliminary Approval, Preliminary Approval Order, the Notice in English and Spanish, and the Claim Form in English and Spanish. (*Id.* ¶ 13.) The Website also included a section for important dates, frequently asked questions, and allowed Settlement Class Members to file Claim Forms online and update their contact information. (*Id.*) These components of notice together provided the Settlement Class with comprehensive information regarding the settlement's terms, Class Members' rights and deadlines, claims that would be released should they not exclude themselves, and gave notice of the Final Approval Hearing.

Additionally, Defendant complied with the notice requirements of the Class Action Fairness Act, 28 U.S.C. § 1715. (*Id.* ¶ 5.)

Further, on July 18, 2022, Plaintiff filed the Motion for Attorneys' Fees, Costs, and Class Representative Service Award (ECF No. 101), which the Administrator posted to the Settlement Website within 24 hours of filing for Class Members to review. (Admin. Decl. ¶ 13.)

There has been one objection, and have been only three requests for exclusion, received from the Settlement Class. (*Id.* ¶¶ 17, 18.) The objection was mailed to the Settlement Administrator but there is no indication that it was also sent to the Clerk of the Court as required by the Order Preliminarily Approving Settlement and Directing Notice to Class. (Admin. Decl. Ex. D.)

ARGUMENT

I. Legal Standard

"Settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strains such litigation imposes upon already scarce judicial resources." *S.C. Nat. Bank v. Stone*, 749 F. Supp. 1419, 1423 (D.S.C. 1990). Rule 23 of the Federal Rules of Civil Procedure requires a court to approve a class-action settlement. *Brown v. Transurban USA, Inc.*, 318 F.R.D. 560, 571 (E.D. Va. 2016). "First, the Court considers the fairness of the settlement, and then turns to its adequacy." *In re Genworth Fin. Sec. Litig.*, 210 F. Supp. 3d 837, 839 (E.D. Va. 2016). Ultimately, the Court has discretion over approval of the proposed settlement. *Strang v. JHM Mortg. Sec. Ltd. P'ship*, 890 F. Supp. 499, 501 (E.D. Va. 1995) (citing *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991)).

II. The Settlement Satisfies the Criteria for Final Approval

Rule 23(e) of the Federal Rules of Civil Procedure obliges parties to seek approval from the district court of class action settlements. If the settlement proposal would bind all class members, a court may only approve the settlement proposal after it holds a hearing and finds that the settlement proposal is fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(2).

In determining whether a settlement is fair, reasonable, and adequate, the court must consider whether:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any

agreement required to be identified under Rule 23(e)(3);[2] and

(D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2). The current version of Fed. R. Civ. P. 23(e) went into effect in 2018 and the "the goal of this amendment is not to displace any factor" previously articulated by courts in considering settlement approval but to "to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Fed. R. Civ. P. 23 adv. comm. nn. (2018)

Courts in the Fourth Circuit apply the two-step *Jiffy Lube* test which examines the fairness and adequacy of the settlement. *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 254 (E.D. Va. 2009); *see also In re Jiffy Lube Sec. Litig.*, 927 F.2d at 158–59. The Fourth Circuit has held that the *Jiffy Lube* standards "almost completely overlap with the new Rule 23(e)(2) factors, rendering the analysis the same." *See Herrera v. Charlotte School of Law, LLC*, 818 Fed. App'x 165, 176 n.4 (4th Cir. 2020) (citing *In re Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg., Sales Practices & Prods. Liab. Litig.*, 952 F.3d 471, 474 n.8 (4th Cir. 2020)).

The "fairness" inquiry ensures "that the settlement was reached as a result of good-faith bargaining at arm's length, without collusion, on the basis of (1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel." *Id.* at 159. Adequacy is assessed through "(1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement." *Id*.

[2] There are no such agreements here.

As detailed below, each of the factors weighs in favor of final approval of the settlement here. The settlement is the result of good-faith, informed, arms' length negotiations between experienced counsel, and was reached only after adversarial litigation and extensive discovery had been conducted. Any settlement requires the parties to balance the merits of the claims and defenses asserted and the attendant risks of continued litigation and delay. Plaintiff believes his claims were meritorious. But Defendant denies liability and has demonstrated its willingness to litigate vigorously. Should litigation continue, there would be briefing and a decision on class certification, which likely would be appealed by the losing party, motions for summary judgment, and trial. Any potential recovery for the Settlement Class Members would be significantly delayed and at risk of being diminished. Thus, the benefits of the settlement, significant in their own right, and given that they would be provided to Settlement Class Members now, as well as the on-point injunctive relief, far outweigh the uncertainties of continued litigation.

A. The Settlement is Fair

As noted above, when evaluating the fairness of a settlement, the Court must evaluate the (1) the posture of the case at the time the settlement was proposed; (2) the extent of discovery conducted; (3) the circumstances surrounding the negotiations; and (4) the experience of counsel. *In re Jiffy Lube*, 927 F.2d at 159; *see also* Fed. R. Civ. P. 23(e)(2)(A) and (B). These factors allow the Court to determine that there was no possible collusion between the settling parties and that they were fully informed about the case when negotiating the settlement terms. *Brown*, 318 F.R.D. at 571–72. Here, the parties completed extensive discovery before the settlement, including significant written discovery, over a dozen third party subpoenas, the production of thousands of documents, multiple depositions, including the Plaintiff's, three of Defendant's employees, and Plaintiff's landlord, as well as production and analysis of a detailed data sample.

(ECF No. 88 at 3-6.) At the time of settlement, fact discovery was nearly complete, Plaintiff had retained an expert in anticipation of expert discovery and was gearing up to file a class certification motion. This advanced posture also supports the settlement's approval.

"The third *Jiffy Lube* fairness factor seeks to 'ensure that counsel entered into settlement negotiations on behalf of their clients after becoming fully informed of all pertinent factual and legal issues in the case.'" *In re Genworth Fin. Sec. Litig.*, 210 F. Supp. 3d at 840 (quoting *In re Mills Corp Sec. Litig.*, 265 F.R.D. at 255). "Courts look to the number of meetings between the parties to discuss settlement, the quality of those negotiations, and the duration of time over which negotiations took place." *Id.* (citing *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 665 (E.D. Va. 2001)). In this case, the settlement negotiations involved both formal and informal discussions. The parties participated in two all-day mediation sessions under third party neutral Lou Peterson's supervision. The parties continued arms' length negotiations between counsel, while also moving the litigation forward, which ultimately led to the settlement here. Under the settlement, substantial relief is provided for the Settlement Class Members, and when compared against the potential litigation risks, the proposed settlement is fair and appropriate for approval. *See S.C. Nat'l Bank*, 139 F.R.D. at 339 (concluding fairness met where "discovery was largely completed as to all issues and parties," settlement discussions "were hard fought and always adversarial," and those negotiations "were conducted by able counsel" with substantial experience).

"The final *Jiffy Lube* 'fairness' factor looks to the experience of class counsel in this particular field of law." *In re Genworth Fin. Sec. Litig.*, 210 F. Supp. 3d at 841 (quoting *In re Mills*, 265 F.R.D. at 255). Class Counsel have extensive experience and a long record of success litigating complex class actions, particularly those under the FCRA. *See generally* ECF No. 88-1; *see also Thomas v. Equifax Info. Services, LLC*, No. 18-cv-684 (E.D. Va.) (appointed

settlement class counsel in groundbreaking public records related FCRA settlement); *Clark v. Experian Info. Sols., Inc.*, No. 16-cv-32 (E.D. Va.) (same); *Clark, Anderson v. Trans Union, LLC*, No. 15-cv-391 (E.D. Va.) (same); *Singleton v. Domino's Pizza, LLC*, No. 11-cv-1823 (D. Md.) ("[plaintiffs' counsel] are qualified, experienced, and competent, as evidenced by their background in litigating class-action cases involving FCRA violations."). Class Counsel endorse the settlement as fair and adequate. Given Class Counsel's experience in this area, their endorsement should be afforded substantial consideration in a settlement's fairness. *See Jiffy Lube*, 927 F.2d at 159; *see also Strang*, 890 F. Supp. at 501–02 (concluding requirement met where "plaintiffs' counsel, with their wealth of experience and knowledge in the securities class action area, engaged in sufficiently extended and detailed settlement negotiations to secure a favorable settlement for the Class"). Defense counsel from Troutman Pepper also have vast experience in FCRA cases. *See, e.g.*, https://www.troutman.com/professionals/david-m-gettings.html; https://www.troutman.com/professionals/mary-kate-kamka.html.

B. The Settlement is Adequate & Reasonable

When considering adequacy, the Court is to "'weigh the likelihood of the plaintiffs' recovery on the merits against the amount offered in the settlement.'" *In re Genworth Fin. Sec. Litig.*, 210 F. Supp. 3d at 841 (quoting *In re: NeuStar, Inc. Secs. Litig.*, 2015 WL 5674798, *11 (E.D. Va. Sept. 23, 2015)). In assessing adequacy, the Court can consider: (1) the relative strength of the plaintiff's case on the merits; (2) any difficulties of proof or strong defenses the plaintiff would likely encounter if the case were to go to trial; (3) the expected duration and expense of additional litigation; (4) the solvency of the defendant and the probability of recovery on a litigated judgment; (5) the degree of opposition to the proposed settlement; (6) the posture of the case at the time settlement was proposed; (7) the extent of discovery that had been

conducted; (8) the circumstances surrounding the settlement negotiations; and (9) the experience of counsel in the substantive area and class action litigation. *See Jiffy Lube*, 927 F.2d at 159.

Here, the settlement provides an excellent result for the Settlement Class. Under the FCRA, if the case were to go to trial, Class Members would only be able to recover statutory damages between $100 and $1,000 and potentially punitive damages. *See* 15 U.S.C. § 1681n. On a gross basis, the relief per Class Member here is $955, and on a net basis, Class Members will receive either $399 or $798, depending on whether the Class Member disputed or attested that they experienced a delay or loss of a housing opportunity as a result of the report. This monetary relief alone compares very favorably against other FCRA settlements. *See*, *e.g.*, *Brown v. On-Site*, No. 20-cv-482, ECF No. 82 (E.D. Va.) (case alleging similar §1681e(b) claims against a related entity of Defendant's where net automatic payments were approximately $473); *Patel v. Trans Union, LLC*, No. 14-522, 2018 WL 1258194, *1 (N.D. Cal. Mar. 11, 2018) (settlement of inaccurate reporting claims, similar class size, provided for automatic payments of $400); *Feliciano v. CoreLogic SafeRent, LLC*, No. 17-5507 (S.D.N.Y.) (settlement of inaccurate reporting claims, providing $450 each for 1,921 class members); *Brown v. Corelogic*, No. 3:20-cv-363 (E.D. Va.) (settlement of $8,250,000 for approximately 8,250 class members).

Each Settlement Class Member will receive an automatic payment. Settlement Class Members who disputed a record, or who attest on a sworn claim form that the report caused them a delay in obtaining housing, will also receive an additional amount. After the Claims Period passes and final approval, the net settlement fund will be divided up so that those Class Members who disputed or made claims will receive twice as much as those entitled to just the automatic payment. The automatic payment amount will then be distributed to everyone. The settlement payments will have a check cashing deadline of 60 days. Any uncashed checks waterfall into the claims payment fund which will then be distributed evenly to those Class Members who made

claims or disputed. Of the 10,180 Settlement Class Members, the Settlement Administrator currently estimates that 5,511 will be entitled to the enhanced payments. Assuming that the requested attorneys' fees, costs, Plaintiff's service award are granted, after the costs of administration are subtracted, and based on the current number of claims, it is estimated the net automatic payment amount will be approximately $399. Thus, assuming all checks are cashed, all Settlement Class Members will receive $399 and those that disputed or made a claim will receive a total of $798. This is a significant and meaningful recovery in a FCRA class action.

In addition, the settlement provides injunctive relief directly related to the claims at issue, which will prevent the Class from suffering future harm. Most courts have held that injunctive relief is not available under the FCRA to private litigants, and therefore this relief likely could have *only* been obtained in the settlement context. *See Alston v. Equifax Info. Servs., LLC*, No. 13-1230, 2014 WL 6388169, at *3 (D. Md. Nov. 13, 2014) (noting that "vast majority of district courts, including in this district and within the Fourth Circuit" have held that injunctive relief is unavailable for private litigants).

The recovery is especially impressive in light of the risks of recovery. While Plaintiff believed his claims were strong, there was a risk in proceeding to trial in this case. Defendant denied liability for Plaintiff's claims throughout the litigation and raised a number of defenses, including that the case was not appropriate for class certification and that Plaintiff could not establish that any violations of the FCRA were willful. While Plaintiff believed that he would overcome both of these arguments, they were conceivably viable defenses. Indeed, Defendant has previously successfully fought class certification in other FCRA cases. *See, e.g., Kelly v. RealPage, Inc.*, No. 2:19-CV-01706-JDW, 2020 WL 7479620, at *1 (E.D. Pa. Dec. 18, 2020) (denying class certification in a case involving Defendant). Willfulness poses a similarly significant hurdle to recovery. *See Smith v. LexisNexis Screening Sols., Inc.*, 837 F.3d 604, 611

(6th Cir. 2016) (reversing jury verdict, holding that consumer reporting agency's conduct did not constitute a willful violation of the FCRA); *see also Domonoske v. Bank of America, N.A.*, 790 F. Supp. 2d 466, 476 (W.D. Va. 2011) ("[G]iven the difficulties of proving willfulness or even negligence with actual damages [under the FCRA], there was a substantial risk of nonpayment.").

Moreover, the parties would likely have appealed any adverse decision on the future dispositive motions, including class certification, which would have significantly increased the duration and expense of the case. Given that the Settlement Class Members were renters at the time of Defendant's inaccurate reporting, and thus have likely moved several times since their applications that triggered the reports, this delay would have made it harder to locate and notify class members. The settlement eliminates all of these risks and cuts the burden on all parties.

Additionally, there has been only one objection and only three opt outs from over 10,000 Settlement Class Members. "Such a lack of opposition . . . strongly supports a finding of adequacy, for '[t]he attitude of the members of the Class, as expressed directly or by failure to object, after notice to the settlement is a proper consideration for the trial court.'" *In re MicroStrategy*, 148 F. Supp. 2d at 668 (quoting *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975)). As the Court has explained, "[b]ecause 'the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy.' The lack here of any objections to the settlement and the small number of class members choosing to opt-out of the class strongly compel a finding of adequacy." *Id.* (citing *Sala v. Nat'l R.R. Passenger Corp.*, 721 F. Supp. 80, 83 (E.D. Pa. 1989)). Courts recognize that where the class supports a settlement, it should be approved.[3] Indeed, even a small majority of support creates a

[3] *See, e.g.*, *In re Beef Industry Antitrust Litig.*, 607 F.2d 167, 180 (5th Cir. 1979); *Laskey v. Int'l Union*, 638 F.2d 954 (6th Cir. 1981) (finding few objectors proves fairness of a settlement);

presumption in favor of approval. *See Reed v. Gen'l Motors Corp.*, 703 F.2d 170, 174 (5th Cir. 1983) (approving class action settlement where more than 40 percent of class objected or opted out); *Cotton v. Hinton*, 559 F.2d 1326, 1333 (5th Cir. 1977) (nearly 50 percent opted out or objected; settlement still approved).

The lone objection does not appear to have been mailed to or filed with the Court as required by the as required by the Order Preliminarily Approving Settlement and Directing Notice to Class. (ECF No. 91 ¶ 13.) Moreover, the objector's complaint is about the amount of the settlement and states that he would not settle for "even [$]300,000." (Admin. Decl. Ex. D.) These "concerns, however strongly held, were apparently not widespread." *1988 Tr. for Allen Child. Dated 8/8/88 v. Banner Life Ins. Co*., 28 F.4th 513, 527 (4th Cir. 2022). Moreover, had this Class Member wished to obtain a greater recovery for himself, he had the option to opt out and pursue greater damages on his own. A sole class member's desire to receive a payment that is 300 times the allowable amount of statutory damages should not hold hostage the remaining class members' ability to recover. *See Murray v. GMAC Mortg. Corp*., 434 F.3d 948, 953 (7th Cir. 2006) ("When a few class members' injuries prove to be substantial, they may opt out and litigate independently.") Other than the amount of payment, the objector does not raise any other issues regarding the settlement. As such the objection should be overruled. *See In re: Lumber Liquidators Chinese-Manufactured Flooring Prod. Mktg., Sales Pracs. & Prod. Liab. Litig*., 952 F.3d 471, 485–86 (4th Cir. 2020) (rejecting adequacy objection where "only 94 of the 178,859 class members who responded to the class-action settlement notice opted out of the settlement (about 0.05%), and 12 class members objected thereto (about 0.006%)"); *see also Flinn v. FMC*

Shlensky v. Dorsey, 574 F.2d 131 (3rd Cir. 1978) (same); *Bryan v. Pittsburgh Plate Glass Co. (PPG Indus., Inc.)*, 494 F.2d 799, 803 (3d Cir. 1974) (approving settlement where 20 percent opted out or objected); *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20 (2d Cir. 1987) (approving settlement with 36 objecting); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 624 (N.D. Cal. 1979) (granting approval where 16% objected).

Corp., 528 F.2d 1169, 1174 (4th Cir. 1975) (affirming approval of class action settlement where 5 of 253 class members objected thereto).

C. The Proposed Method of Distribution to the Class is Appropriate

Federal Rule of Civil Procedure 23(e)(2)(C) additionally provides that the Court consider the effectiveness of any proposed method of distributing relief to the class, including the method of processing class member claims; the terms of any proposed award of attorneys' fees, including the timing of payment; any agreement required to be identified under Rule 23(e)(3), and whether the proposal treats class members equitably relative to each other. Fed. R. Civ. P. 23(e)(2)(D). Here, these considerations are easily satisfied. First, for all Settlement Class Members, there was no required claim form to receive an automatic payment, instead an optional claims process if the Class Member attested to the statement that Defendant's report had caused a loss or delay in obtaining the sought-after housing, to obtain additional monetary consideration. The Settlement Administrator will mail checks for the automatic payments directly to all Settlement Class Members, less the three opt outs, upon final approval, with those Class Members Who Disputed and those Claiming Settlement Class Members receiving their additional payment amounts following the negotiation period of the first payments. (Settlement Agreement ¶ 5.3.1.) Second, the requested attorneys' fees are contemplated to be distributed at the same time as Class Members' automatic payments. (*Id*.) Plaintiff filed the Motion for Attorneys' Fees, Costs, and Class Representative Service Award (ECF No. 101) fourteen (14) days prior to the deadline for Class Members to object to the settlement and the Administrator posted the Motion papers on the Settlement Website within 24 hours of its filing for Class Members to review. No objections were received to these requested amounts. (Admin. Decl. ¶¶ 13, 18.)

Finally, the settlement treats the Settlement Class Members equitably – all Settlement Class Members receive an equal automatic payment, and those who have made an additional showing – either through their successful dispute with Defendant at or around the time of the inaccurate report, or by submitting a Claim Form attesting to the loss or delay in obtaining sought-after housing due to Defendant's report – receive an additional amount in acknowledgement. This kind of bifurcated payment structure is common in FCRA settlements. *See*, *e.g.*, *Ryals v. Strategic Screening Sols., Inc.*, No. 14-cv-643 (E.D. Va.) (approving FCRA settlement where some class members received $35 and others $11,000); *Thomas v. Backgroundchecks.com*, No. 13-cv-29 (E.D. Va.) (approving FCRA settlement with provision for class members to receive additional payments if assert that background check caused certain harms); *Henderson v. Acxiom Risk Mitig., Inc.*, No. 12-cv-589 (approving FCRA settlement where all class members received $35.25 and those who disputed and/or submitted claims received up to $8,000). Moreover, all Settlement Class Members had an equal opportunity to make that additional showing – all were sent the Claim Form and instructions, no additional documentation was required.

The settlement is fair, reasonable, and adequate under all relevant factors, and the Court should grant final approval.

III. Notice Satisfies Due Process

Federal Rule of Civil Procedure 23(c)(2) requires that notice to the class be "the best practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c). The Rule also requires that the notice inform potential class members that: (1) they have a chance to opt out; (2) the judgment will bind all class members who do not opt out; (3) and any member who does not opt out may appear through counsel. *Id.* In assessing the sufficiency of the notice, the Court should consider

both the method of delivery and the notice's content. *See* Federal Judicial Center, *Manual for Complex Litigation* § 21.312 (4th ed. 2004).

In this case, Settlement Class Members were identified and vetted through a fulsome manual review of Defendant's records against public records. (*See* ECF No. 102-1 ¶¶ 8-14.) The Settlement Administrator then updated address information provided by the records to make sure the class notice reached as many class members as possible. (Admin. Decl. ¶ 6.) This process led to the notice reaching 96.2% of Class Members through direct notice via email and mail. This was the best available notice given: (a) the available information (records of rental applications from up to five years in the past); (b) the possible identification methods (manually reviewed against public records to confirm class membership); and (c) the number of Class Members (over 10,000).

As this Court has held, "[w]hat amounts to reasonable efforts under the circumstances is for the Court to determine after examining the available information and possible identification methods . . . 'In every case, reasonableness is a function of [the] anticipated results, costs, and amount involved.'" *Fisher v. Va. Elec. & Power Co.*, 217 F.R.D. 201, 227 (E.D. Va. 2003) (citations omitted). Courts—including this Court and others within the Fourth Circuit—have approved notice programs with a much smaller delivery rate. *See In re Serzone*, 231 F.R.D. 221, 236 (S.D. W. Va. 2005) (approving notice program where direct mail portion was estimated to have reached 80% of class members); *Martin v. United Auto Credit Corp.*, No. 3:05cv00143 (E.D. Va. Aug. 29, 2006) (granting final approval where class notice had approximately 85% delivery).

IV. The Requests for Attorneys' Fees, Costs, Class Representative Service Award, and Settlement Administration Expenses, to be Paid from the Fund Should be Approved

On July 18, 2022, Plaintiff filed the Motion for Attorneys' Fees, Costs, and Class Representative Service Award (ECF No. 101), requesting one-third of the Settlement Fund as

attorneys' fees, reimbursement of out-of-pocket costs in an amount not to exceed $97,483.90, and $7,500 to the Class Representative as a Service Award, to be approved to be deducted from the Settlement Fund. The Motion papers were promptly posted to the Settlement Website and there have been no objections to the requested amounts. (Admin. Decl. ¶¶ 13, 18.)

Further, the Settlement Agreement contemplates the Settlement Administrator's expenses be paid from the Settlement Fund as well. Continental DataLogix, the appointed Settlement Administrator, estimates those expenses to not exceed $110,000 through the end of administration (*i.e.*, through payments to Class Members, and the passing of the negotiation period for those payments). If there are issues obtaining Social Security Numbers for Settlement Class Members from the Defendant for purposes of payment issuance, it is possible that the expenses could exceed $110,000. In such an instance, Plaintiff will apprise the Court and seek permission to deduct the extra expenses from the Settlement Fund as appropriate. The Administrator's expenses to date have included de-duplication and address updates on the Class List, preparation and sending of email and mail notice to the Settlement Class, implementation and maintenance of the Settlement Website, tracking of opt outs, contact information updates, and Claim Form receipts, conducting remailings of notices as appropriate, and preparing and sending the letters to the individuals who submitted Claim Forms that were not on the Class List. Should final approval be granted, the Administrator will incur additional expenses for the establishment of the Settlement Fund, preparation and mailing of payments to Class Members, tracking of check cashing and reissuing as necessary, and the issuance and mailing of tax forms as appropriate. Settlement Class Members were notified through notice that the Administrator's expenses would be sought to be reimbursed from the common fund, and no objections have been received to date to the contemplated request. It is appropriate to approve these expenses' reimbursement. *Newberg on Class Actions* § 12.20 (5th ed.) ("[t]he[] costs of paying the claims

administrator…is typically deducted from the settlement fund."); *see also Daniels v. Westlake Servs., LLC*, No. 11-1837, 2014 WL 556288, *15 (D. Md. Feb. 7, 2014); *Singleton*, 976 F. Supp. 2d at 690.

These requests should be granted.

CONCLUSION

Based on the foregoing, the Court should grant final approval of the parties' settlement and enter the Final Approval Order and the Injunctive Relief Order.

Date: August 15, 2022

Respectfully submitted,
PLAINTIFF

By: */s/ Kristi C. Kelly*

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