UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

RALPH GAMBLES, THOMAS MERCK and ELSIE COMPO, individually and as representatives of the Classes, Plaintiffs, v. STERLING INFOSYSTEMS, INC., Defendant.	NO. 1:15-cv-09746-PAE

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR CLASS COUNSEL FEES AND CLASS REPRESENTATIVE SERVICE PAYMENT

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I. INTRODUCTION

Class Counsel[1] and Class Representative Ralph Gambles ("Plaintiff") submit this memorandum of law in support of their Motion for Class Counsel Fees and Class Representative Service Payment in connection with the Settlement with Sterling Infosystems, Inc. ("Sterling"). In light of the impressive settlement achieved for the Class, the risks involved in the case, and the amount and quality of work performed by Class Counsel, the amounts requested are reasonable and should be awarded. As noted in the preliminary approval brief, to Class Counsel's knowledge, this Settlement represents the largest outdated information settlement ever involving only a single consumer reporting agency. Declaration of E. Michelle Drake in Support of Plaintiff's Motion for Award of Attorneys' Fees, Costs, and Service Award for Class Representative ("Drake Decl.") ¶ 9.[2] Not only is the Settlement impressive on a gross basis, it also results in a per-class member recovery comparable to, or better than, settlements of outdated information claims involving much more traditional forms of outdated information, such as information related to criminal charges which did not result in a conviction. Achieving parity with the results in cases alleging more traditional claims represents a remarkable achievement given the less traditional nature of the claims alleged here. Class Counsel is not aware of any other advanced class actions which have challenged the inclusion of outdated and prejudicial address information in consumer reports. Drake Decl. ¶ 9.

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[1] Capitalized terms are defined in the Settlement Agreement ("SA"). (ECF No. 180-2).

[2] At a total of $36 million, *Hernandez, et al. v. Experian Information Solutions, Inc., et al.*, No. 05-CV-1070 (C.D. Cal), which involved reporting outdated bankruptcy information, is larger, but that case included all three national consumer reporting agencies—TransUnion, Equifax, and Experian. The instant case appears to represent the largest such settlement with a single defendant.

Class Counsel took this case on a contingent fee basis and have spent almost five years actively litigating this case without any guarantee of payment. Given those risks, and the extraordinary result achieved, the requested Class Counsel Fees (one-third of the settlement amount plus $566,660.52 in expenses, which includes $259,698 in settlement administration expenses) should be approved. These requests are reasonable both as a percentage of the fund achieved and when compared with Class Counsel's lodestar. The requested fees are also consistent with those routinely awarded by federal courts for settlements of this size. The requested Class Representative Service Payment of $7,500 for Class Representative Gambles is also appropriate in light of his investment of time and energy in this litigation.

II. RELEVANT FACTS

The litigation and settlement negotiations history of this matter, and the terms of the Settlement, are set out at length in Plaintiff's Motion for Preliminary Approval of Class Action Settlement, and that background is incorporated here by reference. (*See* ECF No. 180 at 2-8.) This section will focus on the efforts of Class Counsel and Class Representative Gambles to achieve the result in this case.

The Parties have vigorously litigated this matter since late 2015. Drake Decl. ¶ 4. After Class Counsel diligently investigated the facts of the case, on December 14, 2015, Plaintiff Gambles, for himself and a proposed class, filed this Action alleging that Sterling, a background screening company, violated certain provisions of the FCRA by reporting information about "high risk" addresses older than seven years from the date of the consumer report, reporting duplicative address information, and reporting inaccurate address information. The Complaint alleged that these violations were willful and entitled Plaintiff Gambles and the proposed classes to statutory damages, punitive damages, attorneys' fees, and costs. ECF No. 1.

Defendant moved to dismiss pursuant to Rule 12(b)(1) contending that this Court lacked subject matter jurisdiction over the Action because of an alleged lack of concrete harm to Plaintiff. ECF No. 39. After briefing and oral argument, Sterling's motion was denied on February 13, 2017. ECF No. 72 at 18 (the effect of Sterling's reporting, "the SAC claims, was to falsely portray Gambles as shiftless, unstable and itinerant, and thus ill fit for business employment."). A related complaint filed by Thomas Merck, titled *Merck v. Sterling Infosystems-Ohio*, Inc., 17-cv-2033, was consolidated with this matter. On April 12, 2017, Class Counsel filed the First Consolidated Class Action Complaint. ECF No. 83-1, which added Elsie Compo as a Plaintiff.[3]

During years of post-motion-to-dismiss litigation, Class Counsel thoroughly developed the factual basis for the claims in this case. The Parties exchanged multiple rounds of written discovery requests. Class Counsel engaged in third-party discovery, seeking and obtaining documents from the source of the address information contained in the reports. Drake Decl. ¶¶ 5, 10. Given the nature of Defendant's business and Plaintiff's claims, discovery was ESI-intensive. The Parties engaged in exhaustive negotiations about the methodology for data production, as well as about the use and selection of search terms. Discovery ultimately yielded more than 100 spreadsheets and data files, and thousands of pages of documents, which Class Counsel reviewed. *Id*. ¶¶ 6, 7, 10. Defendant also produced a comprehensive export of its database, containing specified data fields from millions of reports Defendant issued during the class period. The Parties each hired multiple experts and produced multiple expert reports. The experts offered competing quantitative analyses of Defendant's data as well as competing opinions on the real-world impact (or, according

[3]As was noted in the preliminary approval brief, Merck and Compo settled their claims individually, and are not members of the Settlement Class. ECF No. 180 at 20-21.

to Defendant, the lack thereof) of Defendant's reporting practices. The Parties took numerous depositions, including fact depositions, two 30(b)(6) depositions, and three expert depositions. Class Representative Gambles was deposed. At the time of settlement, two of Plaintiff's three experts had produced reports, but had not yet been deposed. Both of Defendant's experts had been deposed, but Class Counsel expected that Defendant would offer subsequent rebuttal experts. *Id*. ¶ 7.

At the time of settlement, Class Counsel was fully prepared to move for class certification. Drake Decl. ¶ 10. Class Counsel had also retained a jury expert, conducted extensive jury focus groups, and was preparing the litigate this matter to trial. *Id*.

Settlement efforts were contentious and protracted. This matter was only resolved after two arm's-length mediations with experienced mediators, as well as numerous telephonic conferences, written exchanges, and ongoing conversations between counsel. Drake Decl. ¶ 8. Prior to each mediation, the Parties exchanged extensive formal mediation briefs containing their views of the merits of the case. *Id*. The Parties first attempted to resolve this matter in a mediation on June 10, 2019. Despite the diligent efforts of both sides and the mediator, a resolution was not reached, and the Parties returned to litigation. *Id*. The Parties reconvened for a second mediation on December 17, 2019, with mediator Nancy Lesser. *Id*. As a result of the second mediation, the Parties reached an agreement in principle to resolve the Action. Thereafter, the agreement was completed and memorialized in the Settlement Agreement. *Id*. The Parties resolved all terms related to relief for the Class before addressing Class Counsel Fees and the Class Representative Service Payment. *Id.*

The Parties agreed to settle the claims advanced on behalf of the class described in the Complaint as the Outdated Adverse Information Class. The Class Representative's expert parsed Defendant's data to identify the 200,423 individuals who comprise the Class. Drake Decl. ¶ 8. The

members of the Settlement Class will divide *pro rata* a Gross Settlement Amount of $15,000,000. SA ¶ 1.21. All Class Members will receive a payment without having to submit a claim form. *Id.* ¶ 5.2. Although the precise amount of each claimant's award cannot be determined until the court rules on this motion, if all amounts requested for attorneys' fees, costs, and class representative service payment are approved, Class Counsel estimates that each claimant will receive slightly more than $45. Drake Decl. ¶ 19. The $15 million Gross Settlement Amount is inclusive of Class Counsel Fees and expenses, any Class Representative Service Payment, and Administrative Costs, all of which are subject to Court approval. SA ¶¶ 5.1; 8.2-8.4.

Under the Settlement, Class Counsel may seek up to one-third of the Gross Settlement Amount plus reimbursement for reasonable out of pocket expenses as Class Counsel Fees, and Plaintiff Gambles may seek a Class Representative Service Payment of up to $7,500. SA ¶ 8.4. Both requests are made in this motion, well in advance of the final approval hearing, and will be posted on the Settlement Website so that Class Members will have the opportunity to review them prior to the end of the Objection and Exclusion Period. Drake Decl. ¶ 18.

All told, between litigation and settlement efforts, Class Counsel have expended over 2600 hours on this matter to date, and have yet to receive payment of any kind. Class Counsel will also expend additional time and expense after the filing of this motion, including drafting final approval papers, participating in the final approval hearing, responding to any objections, and supervising the administration of the Settlement and distribution of the Settlement Payments to Class Members.

III. CLASS COUNSEL'S ATTORNEYS' FEES AND COSTS SHOULD BE APPROVED

Class Counsel request that the Court approve their request for attorneys' fees of $5,000,000, which is one-third of the Gross Settlement Amount, and litigation costs of $566,660.52, which includes $259,698 in settlement administration expenses.

A. The percentage of the fund method should be applied here.

It is black letter law that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980). The Second Circuit has authorized district courts to employ a percentage-of-the-fund method when awarding fees in common fund cases. *See Goldberger v. Integrated Res., Inc*., 209 F.3d 43, 47 (2d Cir. 2000). The percentage method is the trend because it "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (internal citation and quotation omitted). In considering the reasonableness of such an award, the Court must also consider the following "*Goldberger*" factors: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . .; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Goldberger*, 209 F.3d at 50 (omission in original). In addition, the Second Circuit encourages courts to cross-check the percentage fee against counsel's lodestar. *Id*. Under the *Goldberger* factors, as confirmed by a lodestar crosscheck, Class Counsel's requested fees and expenses are reasonable.

B. Class Counsel Expended Extensive Time and Resources on Behalf of Plaintiff and the Class.

Over five years, Class Counsel has spent over 2690 hours on this matter, for a total lodestar

of over $1,363,005.65 to date. Class Counsel's detailed time records are attached to the Declarations of E. Michelle Drake, Beth E. Terrell, and David Seligman, as are timekeeper summaries. Counsel's efforts included, but are not limited to, (1) investigating the facts of the case and drafting the complaint, (2) briefing and arguing the motion to dismiss, (3) investigating the claims of the additional plaintiffs, drafting amended and consolidated complaints including those claims, (4) conducting written discovery and document review, (5) deposing fact witnesses, including two Rule 30(b)(6) depositions, (6) reviewing Defendant's expert reports, and deposing both of Defendant's experts, (7) working with Plaintiff's expert on his report, and defending his deposition, (8) defending Plaintiff's deposition, (9) engaging in exhaustive database discovery, including extensive meet and confers, exchanging and reviewing propose database queries, reviewing data samples and the ultimate data production, and coordinating with Plaintiff's expert and opposing counsel on all of these issues, (10) conducting a jury focus group to impartially evaluate the strength and appeal of Plaintiffs' claims, (11) preparing to move for class certification, (12) drafting two mediation briefs, and attending two mediations, (12) drafting, negotiating and revising the settlement agreement and supporting documents, such as the proposed class notice, (13) soliciting bids and selecting a settlement administrator, (14) moving for preliminary settlement approval, (15) coordinating notice and other logistical details with the administrator, including the settlement website, and (16) drafting this motion. Still to be done, and not included in the count of hours listed above, are the final approval motion and hearing, responding to any class member objections or inquiries, and supervision of the administrator's distribution of the settlement fund. All of this represents an extraordinary commitment to a case where recovery was never certain. Because of these efforts and the size of the Gross Settlement Amount, this factor supports the requested fee award.

i. The Litigation Was Complex.

The second *Goldberger* factor, which addresses "the magnitude and complexities of the litigation," also supports approval of the requested fee. *Goldberger*, 209 F.3d at 50. "Class actions "have a well-deserved reputation as being most complex." *See Meredith Corp. v. SESAC, LLC*, No. 09 Civ. 9177, 2015 WL 728026, at *16 (S.D.N.Y. Feb. 19, 2015). This class action litigation, involving the esoteric Fair Credit Reporting Act, was remarkably complex for a myriad of reasons. *Narog v. Certegy Check Servs. Inc.*, 759 F. Supp. 2d 1189, 1194-95 (N.D. Cal. 2011) ("The FCRA is not merely a complex statutory scheme, but one that has been said to contain almost incomprehensibly complex provisions and esoteric strictures.") (internal citations and quotations omitted)).

First, the data analysis was complicated. Millions of records were produced, and Class Counsel was charged with analyzing those records and coming up with algorithmic methods for identifying class members, for demonstrating that class members were similarly situated to one another, and for demonstrating that class members' claims were all meritorious.

This task was not as simple as it might seem at first blush. Defendant's data is structured for use in its business, not for purposes of allowing Class Counsel to identify class members and analyze their information. Class Counsel had to become personally familiar with the data and consult with a data expert at every step of the litigation, from negotiating the scope of the data to be produced to negotiating the structure and format of the data produced, to supervising the analysis of the data itself.

Second, throughout the litigation, Defendant denied that anyone had been harmed by the inclusion of this outdated address information in a consumer report. Defendant offered testimony from specific customers about their methods for using (or not using) and evaluating high-risk

address information, and intended to argue that such data did not impact the hiring process. Defendant also argued that the disclaimers in its reports stopped its customers from relying on the challenged data.

There was no road map for challenging Defendant's assertions, particularly on a class-wide basis. In order to rebut Defendant's arguments, Class Counsel closely analyzed data related to Defendant's pre-adverse action notices (notices sent when an adverse employment action is taken), as well as documents Defendant produced regarding its clients' criteria for grading reports. Plaintiff also hired an expert who conducted a survey of human resource professionals in order to demonstrate and quantify the negative impact of the inclusion of this kind of information in consumer reports, and to analyze the purported impact of Defendant's disclaimer.

If the litigation had not settled, Class Counsel would have faced additional obstacles as Defendant continued to mount a vigorous defense, including a trial that would require substantial fact and expert testimony, and possible appeals thereafter. *Fleisher v. Phoenix Life Ins. Co.*, No. 11-CV-8405 (CM), 2015 WL 10847814, at *20 (S.D.N.Y. Sept. 9, 2015) (awarding fees of one-third of cash component of settlement due, in part, to the complexity of issues that required expert analysis).

ii. Class Counsel Undertook Considerable Risk in Taking the Case on a Contingent Fee Basis.

The risk of the litigation is "perhaps the foremost factor in establishing the proper fee." *Banyai v. Mazur*, No. 00 Civ. 9806, 2008 WL 5110912, at *4 (S.D.N.Y. Dec. 2, 2008). "A lawyer whose compensation is contingent on services can be expected to receive more than she would receive if she were charging an hourly rate." *Id.* (citing *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981)). Class Counsel prosecuted this matter on a purely contingent basis, agreeing to advance all necessary expenses and to receive a fee only if there was a recovery. *See* Drake Decl.

¶ 3. Class Counsel have invested considerable time and money prosecuting this action; their out-of-pocket costs are over $500,000. *See* Drake Decl. ¶ 13. Class Counsel diligently reviewed Defendant's records and records subpoenaed from third parties; pursued extensive expert discovery to identify class members; deposed key witnesses; and engaged in motions practice. *See* Drake Decl. ¶¶ 7, 10. "Despite the most vigorous and competent of efforts," their success was "never guaranteed." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2d Cir. 1974). Five years have passed since this case was filed, and Class Counsel has, as yet, received no payment for their work on the claims in this case.

Moreover, this litigation presented numerous risks to Plaintiff's recovery, and from the inception of litigation forward, Plaintiff's path was fraught with numerous legal challenges, each of which presented a risk of no recovery.

1. Article III Standing

First, Defendant argued that Plaintiff lacked standing to pursue his claims in federal court because Plaintiff sought only statutory damages, and thus purportedly was not harmed. ECF No. 52. The Court rejected this argument at the pleading stage, but Defendant intended to re-raise the issue at subsequent stages of the litigation. *See Gambles v. Sterling Infosystems, Inc.*, 234 F. Supp.3d. 510, 516 (S.D.N.Y. 2017) (noting that Plaintiff's burden of proof would be elevated in each successive stages of the litigation).

Plaintiff is confident that he could have established a reasonable risk of harm at summary judgment and at trial. As the Court noted in denying the motion to dismiss, Plaintiff alleged that Defendant's address reporting portrayed them as "shiftless, unstable and itinerant, and thus ill fit for business employment." 234 F. Supp. 3d at 523. These statements, the Court concluded, may not have "cost Gambles the job for which he applied," but, as pleaded, "certainly presented 'a

material risk of harm' to him." *Id.* at 524. Plaintiff believes that nothing uncovered in discovery would have changed the Court's view regarding the risk of harm to him from Defendant's reporting; but if the Court were to reach a different conclusion, it would end the litigation.

2. Statutory Coverage

Second, Defendant would likely have argued that the challenged information did not constitute part of a consumer report at all, and was therefore outside the purview of the FCRA. In particular, Defendant asserts that address information is not "consumer report" information under the FCRA, and thus not subject to either Section 1681e(b) or Section 1681c. This position is based on the definition of "consumer report" in 15 U.S.C. § 1681a(d), which requires that the data in consumer reports be "used or expected to be used or collected in whole or in part for the purposes of serving as a factor in establishing the consumer's eligibility for … employment purposes." Sterling contends that, because it put disclaimers in its reports advising customers not to use address information in making employment decisions, the address section was not used or expected to be used in evaluating job applicants' suitability for employment and that such data therefore did not count as a "consumer report." *See, e.g., Williams-Steele v. Trans Union*, No. 12 CIV. 0310 GBD JCF, 2015 WL 576707, at*3 (S.D.N.Y. Feb. 10, 2015), *aff'd sub nom. Williams-Steele v. TransUnion*, 642 F. App'x 72 (2d Cir. 2016) (holding, in circumstances that Plaintiffs assert are distinguishable, certain address data is not governed by the FCRA).

Plaintiff argues that the inclusion of the "high risk" information in the report can only be explained by Defendant's knowledge and intention that employers rely on the information, which Plaintiff would have established through the use of expert testimony. Further, Plaintiff maintains that the entire document clearly qualified as a consumer report (because it contained criminal background information, and was intended to be used to evaluate an individual for employment),

and therefore all information in the document must comply with the FCRA.

Plaintiff was confident in the strength of his arguments on this issue, but if he failed to prevail on this point, he would have recovered nothing for himself or the Class.

3. Willfulness

Plaintiff also faced risks in proving that Defendant's conduct was willful. Under 15 U.S.C. § 1681n(a), statutory damages are only available for willful violations of the FCRA. *See Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007) (defining the willfulness standard). The difficulties of proving willfulness when no prior cases had been brought regarding outdated address information presented substantial risk. *See Domonske 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."); *Chakejian v. Equifax Info. Servs., LLC*, 275 F.R.D. 201, 219 (E.D. Pa. 2011) ("Plaintiffs in this [FCRA] case would have to prove willfulness at trial. Because of the risk that they may not be able to do so . . . substantial attorney's fees should be awarded with settlement approval."). Defendant was likely to make two specific challenges to willfulness.

a. Harm Allegedly Required to Establish Willfulness

Defendant, who contends Plaintiff was never harmed, would have argued that Plaintiff cannot prove willfulness, which requires showing that Defendant ignored a "risk of harm." Defendant's position is based on its interpretation of the Supreme Court's decision in *Safeco*, which defined a willful violation of the statute as one that is knowing or reckless, and went on to describe reckless as "an unjustifiably high risk of harm that is either known or so obvious that it should be known". 551 U.S. at 68 (quotation omitted). Thus, Defendant would have argued that without harm to the Plaintiff, there could be no willful violation.

Plaintiff is adamant both that he was subject to a risk of harm, as discussed above, and that Defendant misreads *Safeco*. The *Safeco* Court discussed a knowing or reckless violation of the statute in the context of risk of breaking the law, not with respect to risk of harm to an individual consumer. Indeed, that is how the *Safeco* Court used the term later in the opinion:

> Thus, a company subject to FCRA does not act in reckless disregard of it unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless.

551 U.S. at 69. Plaintiff is confident in his reading of *Safeco*, but a loss on this point would have completely foreclosed recovery.

b. Willfulness with Respect to Statutory Coverage

Finally, Defendant would have argued that its interpretation of the scope of the FCRA, and its belief that address data was not covered by the FCRA (discussed in Section Two above) was sufficiently reasonable to render any violation not willful. Plaintiff would have argued (1) that Defendant's interpretation was not reasonable and (2) that Defendant's statutory interpretation was a post-hoc justification for its conduct; that in order for a reasonable interpretation of the FCRA to defeat willfulness, there must be some contemporaneous evidence of that interpretation, and that such evidence is absent here.

A loss on any of the above issues would have resulted in Class Members recovering nothing at trial, as all three issues present risks to any recovery at all. Of course, if Class Members recovered nothing, Class Counsel would have received no fee.

Despite numerous factors which contributed to the risk of nonpayment, Class Counsel vigorously litigated the claims, and advanced all costs of litigation, for five years. "Assuming significant risks warrants a substantial fee because '[n]o one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who

in advance had agreed to pay for his services, regardless of success.'" *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 351 (S.D.N.Y. 2014) (quoting *City of Detroit* 495 F.2d at 470, *abrogated by Goldberger v. Integrated Res., Inc.*, 209 F.3d at 43).

4. Post-Judgment Risk

If Plaintiff could overcome these hurdles to liability and succeed in bringing the case to verdict, Defendant would likely appeal, which "could seriously and adversely affect the scope of an ultimate recovery, if not the recovery itself." *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 748 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986); *see also Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979) (reversing $87 million judgment after trial). Moreover, Plaintiff still would have to collect on any judgment after succeeding on appeal. Thus, there was substantial risk that any victory at trial would be hollow, leaving class members with nothing.

For these reasons, this factor also supports Class Counsel's attorneys' fee request.

C. Class Counsel Provided High Quality Representation.

"The critical element in determining the appropriate fee to be awarded class counsel out of a common fund is the result obtained for the Class through the efforts of such counsel." *Maley v. Del Global Techs. Corp.*, 186 F.Supp.2d 358, 373 (S.D.N.Y. 2002). Class Counsel have demonstrated skill and experience in resolving this case. Berger Montague PC ("BMPC") has abundant experience litigating FCRA class action cases. *See* Drake Decl., Exhibit D. Indeed, a large portion of Counsel's current practice is concentrated on representing consumers in class action suits, many of which assert claims under the FCRA. *Id.* Further, BMPC may be the only national class multi-practice-area law firm with a vibrant FCRA practice. BMPC reviews all FCRA cases filed in federal court daily to identify trends and avenues of litigation. The undersigned counsel from BMPC has been involved in numerous major FCRA class cases, including most recently working with numerous other firms to oversee the litigation and settlement of 48 separate

class action lawsuits filed by 17 different law firms against the "Big Three" consumer reporting agencies—Experian, Equifax, and TransUnion—based upon how they reported civil public records ("The Big 3 Public Records Class Actions"). Millions of consumers were represented. *See Thomas, et al. v. Equifax Info. Svcs., LLC*, No. 18-cv-00684 (E.D. Va.); *Anderson, et al. v. TransUnion, LLC*, No. 16-cv-00558 (E.D. Va.); *Clark v. Experian Info. Solutions, Inc.*, No. 16-cv-00032 (E.D. Va.).

Terrell Marshall also has extensive consumer class action experience, having represented scores of classes and recovered hundreds of millions of dollars for consumers. Declaration of Beth E. Terrell in Support of Plaintiff's Motion for Class Counsel Fees and Class Representative Service Payment ("Terrell Decl.") ¶ 2. Terrell Marshall's experience includes class actions brought under FCRA that alleged inaccurate reporting violations and failure to provide required disclosures prior to procuring criminal background reports. *Id.* ¶ 4. Terrell Marshall has also represented consumers in multiple multi-state and nationwide class actions involving automated collection calls, spam text messages, and prerecorded solicitation calls, as well as consumers who purchased defective products. *Id.*

Founded in 2014, Towards Justice is a non-profit law firm based in Denver, Colorado dedicated to defending the human and civil rights of workers and consumers through strategic policy advocacy and impact litigation. Declaration of David Seligman in Support of Plaintiff's Motion for Attorneys' Fees, Costs, and Named Plaintiff Service Awards ("Seligman Decl.") ¶ 4. Towards Justice's impact litigation focuses on attacking systemic injustices in the labor market, with a particular focus on cases that address structural and systemic racism and impediments to worker bargaining power. *Id.* ¶ 5. Additionally, Towards Justice has established a robust outreach,

intake, and referral program that evaluates the potential legal claims of low-wage workers and low-income consumers across the country, with a focus on the Mountain West. *Id*. ¶ 6.

Class Counsel invested significant time and resources into litigating this case. *See supra*. And they efficiently applied their skills and experience to obtain excellent relief for the Class. Each Class Member will receive a *pro rata* share of the Gross Settlement Amount that will be allocated to Class Members after settlement expenses are deducted. If the Court grants the requested attorneys' fees, litigation expenses, and Class Representative Payment, Class Counsel estimate that each Class Member will receive slightly more than $45. Drake Decl. ¶ 19.

Further, Class Counsel attained success "in the face of tenacious opposition by a highly capable adversary." *Hart v. RCI Hosp. Holdings, Inc*., No. 09 CIV. 3043 PAE, 2015 WL 5577713, at *16 (Engelmayer, J.). Class Counsel opposed a large, international corporation represented by sophisticated attorneys. Defendant's counsel, Reed Smith, is a highly reputable firm with significant experience defending class actions. The challenge of litigating against such formidable opposing counsel only serves to highlight the victory that Class Counsel has achieved by obtaining a groundbreaking settlement for the Class.

Thus, this factor also weighs in favor of granting the requested fees.

D. The Requested Fees are Reasonable in Relation to the Settlement.

Class Counsel's request for one-third of the fund is "fair and reasonable in relation to the recovery and compares favorably to fee awards in other risky common fund cases in this Circuit and elsewhere." *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 149 (S.D.N.Y. 2010). Class Counsel's efforts resulted in a non-reversionary common fund of $15,000,000. This is an extraordinary result, and, to Counsel's knowledge, represents the largest outdated information settlement ever involving only a single consumer reporting agency. Based upon the large gross amount recovered for the Class and the per-class-member recoveries, this Settlement represents a truly exemplary result for

the Class. Despite the numerous risks that continued litigation would have presented, and despite the lack of on-point precedent establishing the viability of Plaintiff's address-based claims, the amount of the recovery is substantial, when considered on both a gross basis and a per Class Member basis.

The estimated per person net settlement amount of $45 parallels that achieved in settlements involving more traditional claims with more clear-cut harms. The net recovery of $45 per person parallels recoveries in cases involving consumer reporting agencies reporting criminal charges that were subsequently dismissed. *See King v. Gen. Info. Servs.*, No. 10-cv-6850, ECF No. 124 (E.D. Pa. Nov. 4, 2014) (approving §1681c settlement that provides approximately $50 for 53,705 Class Members in a case involving reporting outdated criminal information after deductions); *Howell v. Checkr, Inc.*, No. 3:17-cv-04305-SK (N.D. Cal.) (approving §1681c settlement of $46.44 per person *before* deductions for attorneys fees for 96,040 Class Members involving reporting of non-criminal traffic violation information in the criminal section of background reports, and where many class members were required to file a claim to obtain relief); *Haley v. TalentWise, Inc.*, No. 2:13-cv-01915-MJP, ECF No. 88 (approving settlement which paid Class Members approximately $50 for claims based on reporting outdated criminal charges).

Achieving parity with cases involving disclosure of *criminal* records is a significant achievement in this case because the criminal records cases involved *none* of the risks that were present here. The statutory prohibition on reporting non-conviction records is much clearer than the catch-all prohibition on reporting "adverse information" more generally. *Compare* 15 U.S.C. § 1681c(a)(2) *with* § 1681c(a)(5). Criminal records information in a consumer report, unlike address information, has never been held not to be subject to the FCRA. And, there are a significant number of opinions and settlements supporting the idea that including outdated criminal records

in a consumer report is illegal. Achieving parallel results on behalf of a large class in the face of numerous additional hurdles is a noteworthy result, and should be rewarded.

In light of the result achieved, Class Counsel's request for one-third of the fund is more than justified. The requested fee is comfortably within the range that is typically awarded in this Circuit for cases of this size. *SESAC*, 2015 WL 728026, at *14 (Engelmayer, J.) (noting "in numerous common fund cases, fees have been awarded that represent one-third of the settlement fund" and collecting cases); *Hart*, No. 09 CIV. 3043 PAE, 2015 WL 5577713, at *17 (Engelmayer, J.) (approving request for 32.9% of settlement fund); *Spicer v. Pier Sixty LLC*, No. 08 Civ. 10240, 2012 WL 4364503, at *4 (S.D.N.Y. Sept. 14, 2012) (Engelmayer, J.) ("Class Counsel's request for one-third of the settlement fund is also consistent with the trend in this Circuit."); *Johnson v. Brennan*, 2011 WL 4357376, at *19 (S.D.N.Y. Sept. 16, 2011) (internal quotations omitted) ("A fee of 33% of the Settlement Fund is reasonable and consistent with the norms of class litigation in this circuit."); *Suarez v. Rosa Mexicano Brands Inc.*, No. 16 Civ. 5464 (GWG), 2018 WL 1801319 (S.D.N.Y. April 13, 2018) (approving one-third of $3.6 million settlement fund); *Zorrilla v. Carlson Rests., Inc.*, No. 14 Civ. 2740 (AT), 2018 WL 1737139 (S.D.N.Y. April 9, 2018) (approving one-third of $19.1 million settlement fund).

Thus, this factor also weighs in favor of Class Counsel's requested fees.

E. Public Policy Supports the Requested Fees.

Public policy considerations also weigh in favor of granting Class Counsel's requested fees. In rendering awards of attorneys' fees, "the Second Circuit and courts in this district also have taken into account the social and economic value of class actions, and the need to encourage experienced and able counsel to undertake such litigation." *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 399 (1999). When individuals' damages are small, "it [is] less likely that, without the benefit of class representation, they would be willing to incur the financial costs and hardships

of separate litigations, which would certainly exceed their recoveries manifold." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 181 (W.D.N.Y. 2005). It is therefore appropriate to compensate Class Counsel for their work in this case in order to ensure there is an appropriate incentive for attorneys to bring these kinds of cases. Attorneys' fees awards are a means of "providing lawyers with sufficient incentive to bring common fund cases that serve the public interest." *Goldberger*, 209 F.3d at 51. Class action litigation is inherently a risky venture for plaintiff's lawyers. *See* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 707 (1986) (plaintiffs' firms "face unique organizational problems . . . occasioned by the prospect of 'shirking' and 'case stealing.'"); Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1285-86 (2012) ("[T]ightening class certification standards means more risk and less reward for plaintiffs' lawyers.").

Ensuring an appropriate incentive for attorneys to bring class action cases is particularly important for cases enforcing rights created by the FCRA. Given that individual recoveries under the FCRA are generally low, it is often not worth it for individual consumers to bring claims. *See Yohay v. City of Alexandria Employees Credit Union, Inc.*, 827 F.2d 967, 974 (4th Cir. 1987) ("[T]here will rarely be extensive damages in an FCRA action."); *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948 (7th Cir. 2006) ("[T]he potential recovery [in FCRA lawsuits] is too slight to support individual suits…."). Accordingly, class actions are one of the only feasible means of meaningfully enforcing the FCRA's provisions. This is especially true of the FCRA provision at issue here, which prohibits the inclusion of adverse information over seven years old on reports. By definition, the potential plaintiffs in this kind of a case will be people with adverse information in their past, a fact which many would prefer not to publicize further by filing a lawsuit. In the context of this

case, not only is the potential for a low recovery a likely bar to individual claims, the nature of the claims themselves also serves as a deterrent to individual litigation. These kinds of barriers to individual litigation require that attorneys' fees provide an incentive to bring these claims.

The public policy behind the provisions of the FCRA at issue also warrants creating incentives to litigate these kinds of claims. Up to 92% of employers subject their candidates to some form of background screening. EEOC, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Discrimination* at 6 (Apr. 25, 2012). Making sure that such reports do not contain outdated adverse information is important, both because it ensures compliance with the FCRA, but also because it achieves the important societal goal of allowing people with old adverse information on their record to achieve a "clean slate" and successfully obtain employment. Accordingly, this Settlement will help achieve important public policy goals.

Thus, public policy and the important consumer rights at stake justify a risk enhancement to the attorneys' fees. Absent private lawsuits to enforce these rights, companies will have no incentive to incur the expenses associated with compliance.

F. The Lodestar Cross Check Further Supports an Award to Class Counsel of One-Third of the Gross Settlement Amount.

The Second Circuit has encouraged courts to conduct a lodestar cross-check when assessing the reasonableness of a percentage fee award. *Goldberger*, 209 F.3d at 50. When the lodestar method is used as a "cross-check," the district court need not exhaustively scrutinize counsel's hours. *Id*. In performing a lodestar cross-check, courts multiply hours reasonably expended against hourly rates prevailing in the community. *Id.* at 47; *see also Luciano v. Olsten Corp*., 109 F.3d 111, 115 (2d Cir.1997) ("[t]he lodestar figure should be in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill,

experience, and reputation") (internal quotations omitted). The lodestar cross-check confirms the reasonableness of the requested fee.

Here, the rates charged by Class Counsel fall within the range of prevailing rates in this district. *See, e.g.*, *In re Hi-Crush Partners L.P. Sec. Litig.*, No. 12-CIV-8557 CM, 2014 WL 7323417, at *14 (S.D.N.Y. Dec. 19, 2014) (approving billing rates ranging from $425 to $825 per hour for attorneys); *Williamsburg Fair Hous. Comm. v. N.Y. City Hous. Auth.*, No. 76 CIV. 2125 (RWS), 2005 WL 736146, at *12 (S.D.N.Y. Mar. 31, 2005), *opinion amended on reconsideration*, No. 76 CIV.2125 RWS, 2005 WL 2175998 (S.D.N.Y. Sept. 9, 2005) (observing that "a recent billing survey made by the National Law Journal shows that senior partners in New York City charge as much as $750 per hour and junior partners charge as much as $490 per hour").

"Under the lodestar method of fee computation, a multiplier is typically applied to the lodestar." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004). "The multiplier represents the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors." *Id.* (citing *Goldberger*, 209 F.3d at 47). Class Counsel's request for one-third of the Gross Settlement Amount, which is approximately 3.6 times the "lodestar," is reasonable in light of the risks they faced and the excellent result achieved for the Class. Class Counsel spent approximately 2690 hours litigating and settling this matter. *See* Drake Decl. ¶ 12, Terrell Decl. ¶ 13. Moreover, it is likely that the multiplier will diminish as Class Counsel spends additional time working on this case, including preparing for and attending the final fairness hearing, answering Class Member questions, and working with the Settlement Administrator.

Finally, the multiplier Class Counsel seek is in line with what is often approved in this District and Circuit. *See Spicer v. Pier Sixty LLC*, No. 08 CIV. 10240 PAE, 2012 WL 4364503, at

*4 (S.D.N.Y. Sept. 14, 2012) (Engelmayer, J.) (approving a fee that was "3.36 multiplier of the lodestar, which is well within the range of reasonableness." (citing *Agofonova v. Nobu Corp.*, 07–cv–6926, at 6 (S.D.N.Y. Feb. 6, 2009) (stating that "the award of one-third the gross fund value is a 4.34 lodestar multiplier and is perfectly within the range that is acceptable"); *In re Telik, Inc. Sec. Litig.*, 576 F.Supp.2d 570, 590 (S.D.N.Y.2008) ("In contingent litigation, lodestar multiples of over 4 are routinely awarded by courts[.]"); *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05–cv–10240, 2007 U.S. Dist. LEXIS 57918, at *56 n. 7, 2007 WL 2230177 (S.D.N.Y. July 27, 2007) ("Lodestar multipliers of nearly 5 have been deemed "common" by courts in this District.")); *see also In re Colgate-Palmolive*, 36 F. Supp. 3d at 353 (approving fee with multiplier of 5.); *Monserrate v. Tequipment, Inc.*, No. 11 CV 6090 RML, 2012 WL 5830557, at *4 (E.D.N.Y. Nov. 16, 2012) (approving 4.34 multiplier); *Maley v. Del Global Techs. Corp.*, 186 F.Supp.2d 358, 371 (S.D.N.Y. 2002) (multiplier of 4.65); *In re NASDAQ MarketMakers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y.1998) (multiplier of 3.97); *Roberts v. Texaco, Inc.*,979 F.Supp. 185, 197 (S.D.N.Y.1997) (multiplier of 5.5); *In re RJR Nabisco, Inc. Sec. Litig.*, No. 88 CV 7905, 1992 WL 210138, at *5 (S.D.N.Y. Aug.24, 1992) (multiplier of 6); *In re Credit Default Swaps Antitrust Litig.*, 2016 U.S. Dist. LEXIS 54587, at *54, 2016 WL 1629349 (S.D.N.Y. Apr. 25, 2016) (lodestar multiplier "of just over 6"); *Athale v. Sinotech Energy Ltd.*, 2013 U.S. Dist. LEXIS 199696, 2013 WL 11310685 (S.D.N.Y. Sept. 4, 2013) (20% fee award with 5.65 multiplier); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013) ("Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers"); *In re WorldCom, Inc. Sec. Litig.*, 388 F.Supp.2d 319 (S.D.N.Y. 2005) (4.0 multiplier); *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 134-35 (D.N.J. 2002) (4.3 multiplier); *Maley v. Del Global*

Techs. Corp., 186 F.Supp.2d 358, 371 (S.D.N.Y. 2002) (33.3% fee, resulting in "modest multiplier of 4.65").

For all of these reasons, Plaintiff requests that the Court award Class Counsel Fees in the amount of $5,000,000.

G. Class Counsel's Costs are Reasonable.

"It is well established that counsel who obtain a common settlement fund for a class are entitled to the reimbursement of expenses that they advance to a class." *SESAC*, 2015 WL 728026, at *17; *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, No. 05 Civ. 10240, 2007 WL 2230177, at *18 (S.D.N.Y. July 27, 2007) ("Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course.") (internal citation omitted).

To date, Class Counsel has incurred $566,660.52 in out-of-pocket costs directly related to this matter. Drake Decl. ¶ 13; Terrell Decl. ¶20; Seligman Decl. ¶ 11. These costs include, among other things, filing fees, court reporter costs, messenger costs, postage, copies, legal research, expert and jury focus group fees, mediator expenses, and travel for mediations, depositions and court conferences. (Drake Decl., Exhibit 4; Terrell Decl., Exhibit B; Seligman Decl., Exhibit 3) These costs were all reasonably incurred to benefit the Class, and should be reimbursed to Class Counsel. *See SESAC*, 2015 WL 728026, at *17 (awarding costs of $4,225,012); *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695CM, 2007 WL 4115808, at *10 (S.D.N.Y. Nov. 7, 2007). In addition, the Angeion Group, who this Court appointed as Settlement Administrator, reasonably expects to incur $259,698 in costs by the end of the settlement administration process. This amount is in line with the industry, as Angeion was chosen after a competitive bidding process. Drake Dec. at ¶ 24. Thus, the total costs requested of $566,660.52 are reasonable.

IV. THE REQUEST FOR A CLASS REPRESENTATIVE SERVICEPAYMENTIS REASONABLE AND SHOULD BE GRANTED

Class Counsel request a $7,500 Class Representative Service Payment to compensate Plaintiff Ralph Gambles for his efforts and personal time spent assisting in the litigation and settlement of the case. Service awards are "common in class action cases and are important to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by the plaintiff." *Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, No. 06-4270 (PAC), 2009 WL 5851465 (S.D.N.Y. Mar. 31, 2009) (citing *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 200-1 (S.D.N.Y.) 1997)).

Mr. Gambles' services were instrumental to the prosecution of this action. He met in person with counsel prior to and during the litigation, provided documents to Class Counsel to aid in the investigation and drafting of the Complaint, reviewed the Complaint prior to filing, participated in written discovery, sat for a deposition, and stayed abreast of settlement negotiations. He has been in consistent contact with Class Counsel over the five years that this case has been litigated. Drake Dec. ¶ 15, Declaration of Ralph Gambles, ECF No. 180-7 ("Gambles Decl.") ¶¶ 4-10. He reviewed, approved of, and signed the Settlement Agreement. Drake Dec. ¶ 15; Gambles Dec. ¶ 12. In addition, Mr. Gambles undertook significant risk by attaching his name and reputation to this litigation, litigation which potential employers will be able to learn about and which, because it reveals the existence of some criminal history, may affect his future job prospects. ECF No 85-2; *See Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 187-88 (W.D.N.Y. 2005) (awarding recognition payment in suit against employer, noting "[a]lthough this Court has no reason to believe that Kodak has or will take retaliatory action towards either Frank or any of the plaintiffs in this case, the fear of adverse consequences or lost opportunities cannot be dismissed as insincere

or unfounded."). Nevertheless, Mr. Gambles remained committed to advancing the Settlement Class' interests, through litigation and settlement.

Service payments in the amount of $7,500 are well within the range awarded by courts in this circuit. *See, e.g.,Hart v. RCI Hosp. Holdings, Inc*., No. 09 CIV. 3043 PAE, 2015 WL 5577713, at *19 (S.D.N.Y. Sept. 22, 2015) (Engelmayer, J.) (approving $15,000 service payments to class representatives who "risked stigma and invited unwanted scrutiny"); *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 166 (S.D.N.Y. 2011) (Engelmayer, J.) (approving awards of between $10,000 and $5,400 to named plaintiffs who "devoted substantial effort and time to this case, including reviewing filings, producing documents, and travelling to be deposed"); *Godson v. Eltman, Eltman, & Cooper, P.C.*, 328 F.R.D. 35, 60 (W.D.N.Y. 2018) ($10,000 to named plaintiff in a consumer class action); *Raniere v. Citigroup Inc*., 310 F.R.D. 211, 220 (S.D.N.Y. 2015) (approving $20,000, $15,000, and $7,500 awards to named plaintiffs); *Norflet ex rel. Norflet v. John Hancock Life Ins. Co.*, 658 F. Supp. 2d 350, 354 (D. Conn. 2009) (approving award of $20,000 to named plaintiff).

Under these circumstances, the request to award the Class Representative $7,500 for his service is appropriate.

V. CONCLUSION

Based on the foregoing, the Court should award Class Counsel Fees of $5,000,000, which is equal to one-third of the Gross Settlement Amount, costs in the amount of $566,660.52, which includes Angeion Group's expected administration costs of $259,698, and a Class Representative Service Payment to Mr. Gambles in the amount of $7,500.

RESPECTFULLY SUBMITTED AND DATED this 22nd day of July, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all ECF-Registered parties. The parties may access this filing through the CM/ECF system.

/s/ E. Michelle Drake
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