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 UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

On May 29, 2020, the Court granted preliminary approval of the proposed settlement of this action. (ECF No. 183.) The Court found on a preliminary basis that the terms of the Settlement are "fair, reasonable, and adequate." (*Id*.) The Settlement provides impressive monetary relief for the Class. The response from the Settlement Class Members confirms that the Settlement is fair and should be approved – out of 200,423 Class Members, only 34 have opted out and none have objected. This strongly supports the conclusion that the Settlement is fair, reasonable, and adequate.

Accordingly, Plaintiff (Ralph) Michael Gambles ("Plaintiff"), individually and on behalf of the Settlement Class, respectfully requests that the Court enter the accompanying order granting final approval of the proposed Settlement Agreement with Defendant Sterling Infosystems, Inc., ("Defendant" or "Sterling") which fully resolves this class action brought under the Fair Credit Reporting Act ("FCRA"). Sterling does not oppose the relief sought in this motion.

The Settlement will end a nearly five-year-old lawsuit challenging Sterling's inclusion of addresses older than seven years and marked as "high risk" in employment screening reports. The Settlement resolves the claims of over 200,000 Settlement Class Members in exchange for Sterling's payment of $15,000,000 into a non-reversionary settlement fund. All Class Members will receive an automatic payment without need to file a claim. The Settlement represents a substantial recovery for the Class and is the result of years of hard-fought litigation followed by

extensive arms' length negotiations by experienced and informed counsel. Its terms are fair, reasonable, and adequate, and it warrants final approval pursuant to Fed. R. Civ. P. 23(e)(2).[1]

II. RELEVANT FACTS

A. Procedural History

The substance and history of this class action is recounted in detail in Plaintiff's preliminary approval and fee petition papers and will be only briefly summarized here. (*See* ECF Nos. 180, 190). The settled claims relate to background checks that Sterling produced on applicants for employment. The FCRA generally prohibits CRAs from including adverse information in a consumer report that is older than seven years from the date of the report. 15 U.S.C. § 1681(c).

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 Plaintiffs and the proposed classes to statutory damages, punitive damages, attorneys' fees, and costs. (ECF No. 1).

Sterling moved to dismiss pursuant to Rule 12(b)(1) contending that the district court lacked subject matter jurisdiction over the action because of an alleged lack of concrete harm to Plaintiffs. (ECF No. 39). This motion was denied on February 13, 2017. *Gambles v. Sterling Infosystems, Inc.*, 234 F. Supp.3d. 510 (S.D.N.Y. 2017) (the effect of Defendant's reporting, "the SAC claims, was to falsely portray Gambles as shiftless, unstable and itinerant, and thus ill fit for

[1] Pursuant to this Court's emergency individual rules and practices in light of COVID-19, the parties request that any hearing on this motion be held telephonically or via videoconference.

business employment.") However, the Court noted that it could revisit this determination at a later time. *Id.* at 516 (noting that Plaintiff's burden of proof would be elevated in each successive stage of the litigation). 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 Plaintiffs filed the First Consolidated Class Action Complaint (ECF No. 83-1), which added Elsie Compo as a named Plaintiff.[2]

B. Discovery

During years of litigation, the Parties thoroughly investigated the claims in this case. The Parties exchanged multiple rounds of written discovery requests. Plaintiffs engaged in third-party discovery, seeking and obtaining documents from the source of the address information contained in the reports. Declaration of E. Michelle Drake ("Drake Decl.") ¶¶ 4, 9. Given the nature of Defendant's business and Plaintiffs' 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. *Id*. ¶¶ 6, 9. Sterling also produced a comprehensive database export to Plaintiffs, containing specified data fields from millions of reports Sterling issued during the class period. The Parties each hired multiple experts and produced multiple expert reports. The experts offered competing quantitative analyses of the data produced by Sterling as well as competing opinions on the real-world impact (or, according to Sterling, the lack thereof) of its reporting practices. The Parties took numerous depositions, including fact depositions, two 30(b)(6) depositions, and three expert depositions. Plaintiff Gambles was deposed. At the time of

[2] 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).

settlement two of Plaintiffs' three experts had produced reports, but had not yet been deposed. Both of Sterling's experts had been deposed, but Plaintiffs expected that it would offer subsequent rebuttal experts. *Id*.

At the time of settlement, discovery had progressed to a point where all Parties had a full view of the facts of the case, and the strengths and weaknesses of their respective positions. *See Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01 Civ. 11814 (MP), 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004) (finding that the threshold for sufficient discovery having been conducted was "easily met" by the fact that the parties "reviewed and analyzed enormous numbers of documents produced by the Settling Defendants and others, and retained and consulted with expert witnesses in damages and forensic accounting").

C. Mediation and Settlement

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 Plaintiffs and Defendant. Drake Decl. ¶ 7. 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 with Rod Max of Upchurch Watson White & Max Mediation Group on June 10, 2019. Despite the diligent efforts of both sides and the mediator, a resolution was not reached, and the Parties returned to adversarial litigation. *Id*.

The Parties reconvened for a second mediation on December 17, 2019, with mediator Nancy Lesser, a well-respected mediator with over 20 years of experience. Drake Decl. ¶ 7. As a result of the second mediation, the Parties reached an agreement in principle to settle. Thereafter, the agreement was completed and memorialized in the Settlement Agreement filed at ECF No. 180-2. The Parties resolved all terms related to relief for the Class before addressing Class Counsel

Fees and the Class Representative Service Payment. *Id.*

D. The Consumer Financial Protection Bureau's Stipulated Judgment with Sterling

On November 22, 2019, over four years after Plaintiffs had advanced their case, and in between the Parties' two mediations, the Consumer Financial Protection Bureau (CFPB) filed a proposed stipulated judgment with Sterling. That settlement covered a variety of purported problems with Sterling's reports and focused primarily on the accuracy of Sterling's reporting of criminal records, an issue not presented in this case. Pursuant to the terms of the stipulated judgment, Sterling was required to pay $6 million in monetary relief to consumers to whom it misattributed a criminal record, plus a $2.5 million civil money penalty to the CFPB. *Bureau of Consumer Financial Protection v. Sterling Infosystems, Inc.*, No. 1:19-cv-10824 (S.D.N.Y.). Pursuant to the terms of the CFPB's settlement, Sterling also agreed to stop including high risk indicators on its reports for a period of five years. *Id.* at ¶ 6(e). However, the CFPB's stipulated judgment provides no monetary relief to members of the Settlement Class for the violations addressed in this case; people who had "high risk" address information included in their reports received no money as a result of the CFPB's settlement, and their claims were not released. The *only* people entitled to financial relief under the CFPB's order are 7,100 individuals to whom Sterling inaccurately attributed criminal records.

E. Overview of Settlement Terms

1. Proposed Nationwide Settlement Class

The Parties have agreed to settle the claims advanced on behalf of the class described in the Complaint as the Outdated Adverse Information Class. The Settlement Agreement defines the Settlement Class as:

> the list prepared by Class Counsel on or about March 30, 2020 that identifies the names and addresses of the 200,423 unique individuals who, according to Class Counsel, and based on data provided by Defendant, are members of the Outdated

> Adverse Information Class, because they fall within the following definition: (i) All natural persons about whom Defendant prepared a background report from December 14, 2013 and continuing through December 19, 2019; and (ii) Whose background report contains a social security trace which includes at least one address where both the "first" and "last" seen dates antedate the report by more than seven years; and (iii) Where at least one of the addresses in (ii) includes a "high risk" indicator.

Settlement Agreement ("SA") ¶ 1.8. Plaintiffs' expert, Jonathon Jaffe parsed Sterling's data to identify the 200,423 individuals who comprise the Class. Drake Decl. ¶ 7.

2. Substantial and Automatic Monetary Relief

The members of the Settlement Class will divide *pro rata* a Gross Settlement Amount of $15,000,000. SA ¶ 1.21. All Settlement Class Members will receive a payment without having to submit a claim form. *Id.* ¶ 5.2. The Gross Settlement Amount is subject to Court-approved deductions for the costs of settlement administration, attorneys' fees and costs, and the Class Representative Service Payment. *Id.* ¶ 5.1. After these amounts are deducted, the entirety of the funds will be paid to Settlement Class Members. *Id.* ¶ 5.2. Although the precise amount of each Settlement Class Member's award cannot be determined until the Court rules on the requested attorneys' fees, expenses, Class Representative Service Payment, and until the administrative expenses are finalized, if the amounts requested are approved, Class Counsel estimates that each Settlement Class Member will receive approximately $45. Drake Decl. ¶ 10. Only if Settlement Class Members fail to cash their settlement checks will funds be distributed to a *cy pres* recipient. SA ¶ 8.5.3. The Parties propose that the *cy pres* funds be provided to the Salvation Army and the Center for Employment Opportunities. Both organizations support people seeking employment.[3]

[3] In class cases, *cy pres* recipients must "reasonably approximate the interest of the class" *In re Citigroup Inc. Sec. Litig.*, 199 F. Supp. 3d 845, 849 (S.D.N.Y. 2016) (quotation omitted). The Salvation Army works on a wide variety of poverty and disaster relief programs. One of the focuses of its work is providing job training to improve individuals' employment prospects. *See*

Id. No Settlement funds will revert to Sterling. *Id.* ¶ 4.3.

3. Limited Release of Claims

In exchange for the monetary and prospective relief outlined above, the Settlement Class Members will release their claims. SA ¶ 9. The release applies only to claims that were or could have been asserted in this Action against Sterling and the Released Parties. *Id.* ¶ 9.2. The claims asserted on behalf of putative classes other than the Settlement Class will be dismissed without prejudice, without any payment by Sterling, and without any award of fees or costs to Class Counsel. *Id.* ¶ 12.8. All individual claims made on behalf of Elsie Compo and Thomas Merck have been resolved by separate individual settlement agreements. *Id.*

4. Attorneys' Fees, Costs, and Class Representative Service Payment

The $15 million settlement fund is inclusive of Class Counsel's 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. Plaintiff filed the motion for Class Counsel Fees and Class Representative Service Payment (ECF Nos. 189-93) well in advance of the deadline for Settlement Class Members to opt out or object. The motion papers were promptly posted on the Settlement Website so that Settlement Class Members had the opportunity to review them prior to the end of the Objection and Exclusion Period. Declaration of Ryan Chumley ("Chumley Decl.") ¶ 10. No objections were received to the request for Class Counsel Fees or Class Representative Service Payment. Chumley Decl. ¶ 13.

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https://www.salvationarmyusa.org/. The Center for Employment Opportunities works on reentry and job placement for individuals with criminal records. *See* https://ceoworks.org/. Both are appropriate *cy pres* recipients since all class members were applying for employment during the class period.

5. Class Notice, Opt-outs, and Objections

On June 12, 2020, the Court-approved Settlement Administrator, the Angeion Group, mailed the court-approved postcard notice to the Settlement Class Members in accordance with the procedures outlined in the Settlement Agreement. Chumley Decl. ¶ 7. On the same date, Angeion also activated the Settlement Website, www.addressclassaction.com, and a toll-free telephone line for Settlement Class Members with questions. *Id.* ¶¶ 10, 11. The Settlement Website included the long form notice approved by the Court, as well as the Settlement Agreement and other relevant documents. As of the end of the Objection and Exclusion Period, the Settlement Administrator has received only 34 opt-outs, and zero objections. *Id.* ¶¶ 12, 13.

The Settlement Administrator also ensured compliance with the notice requirements of the Class Action Fairness Act of 2005, 28 U.S.C. § 1715(b), providing notice of the proposed settlement to the appropriate officials. *Id.* ¶ 4.

III. LEGAL STANDARD

Federal courts strongly favor and encourage settlements, particularly in class actions and other complex matters, where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (observing that there is a "strong judicial policy in favor of settlements, particularly in the class action context") (quoting *In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998)) (internal quotation marks omitted). Because the rights of people who are not named parties in the case are affected, Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval of any settlement agreement that will bind absent Class Members. After notice of the proposed settlement has been sent and a hearing has been held to consider the fairness and adequacy of the proposed settlement, the court considers whether the settlement warrants final court approval. *Id.*

In considering final approval, the Court should determine whether the Settlement is "fair, reasonable, and adequate" after considering 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); and
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2); *Christine Asia Co. v. Yun Ma*, No. 115MD02631CMSDA, 2019 WL 5257534, at *9 (S.D.N.Y. Oct. 16, 2019). These Rule 23 factors are often considered in tandem with the overlapping "*Grinnell*" factors, which are:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). This motion follows the structure of the Rule 23 factors, but also addresses the reaction of the class to notice of the Settlement.

On final approval, the Court must also consider whether the class can be certified for the purpose of settlement. *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 692 (S.D.N.Y. 2019). The class certifications factors were addressed at length in the preliminary approval papers (ECF No 180 at 22-27), and the Court has held that those factors are satisfied (ECF No. 183, ¶ 2-

3), so that issue will not be further addressed in this brief.

IV. ARGUMENT

A. Sufficient Notice was Provided to the Class

For class action settlement notice to meet the requirements of due process and Rule 23, notice need only be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); see also *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985). Here, notice was provided by mail, Settlement Class Members could get more information about the Settlement online, and also had the opportunity to call a toll-free line for more information about the Settlement. Notices returned as undeliverable were re-mailed to a forwarding address, and if no forwarding address was available, a skip trace was performed, a new address located, and the notice re-mailed. Chumley Dec. ¶ 9. Through this process, virtually all notices were delivered. *Id.* Such a comprehensive notice program should be approved. *See Phillips Petroleum*, 472 U.S. at 812.

B. The Settlement Warrants Final Approval

The Settlement warrants final approval. The Gross Settlement Amount of $15 million is a substantial achievement and, so far as Class Counsel is aware, represents the largest settlement of any FCRA case alleging reporting of outdated information by a single consumer reporting agency. Drake Decl. ¶ 8.[4] Not only is the Settlement impressive on a gross basis, it also results in a per-

[4] 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. This case appears to represent the largest such settlement with a single defendant.

class member recovery which is 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 relative novelty of the claims involved 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. *Id*. Indeed, Plaintiffs in this case were *four years* ahead of the Consumer Financial Protection Bureau. The Bureau achieved no monetary relief for class members related to the inclusion of high risk address information in consumer reports, instead collecting a $2.5 million civil penalty for itself, and advancing monetary claims only on behalf of a smaller group of 7,100 consumers with more traditional FCRA claims.

1. The Reaction of The Class Weighs in Favor of Final Approval

"It is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *Tiro v. Pub. House Investments, LLC*, No. 11 CIV. 7679 CM, 2013 WL 4830949, at *7 (S.D.N.Y. Sept. 10, 2013) (quoting *Maley v. Del Global Tech. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002)). The presence of "relatively few" requests for exclusion supports a settlement. *Id.* at *7.

Of the over 200,423 Settlement class members, only 34 opted out and *none* objected.[5] Chumley Decl. ¶ 12. The 34 opt-outs represent only .0169% of the class. These very small numbers

[5] One opt-out also purported to object to the Settlement. Chumley Dec. ¶ 13, Ex. D. However, as the sender herself acknowledges in her letter, the Settlement does not allow class members to both opt out and object. SA ¶ 7.3.3. Pursuant to the Settlement, the letter should be viewed as an opt-out and not an objection. *Id.* If, however, the Court is inclined to view the letter as an objection, it should be overruled, because it does not present a coherent objection to approval of the Settlement.

weigh in favor of final approval. *See Chakejian v. Equifax Info. Servs., LLC*, 275 F.R.D. 201, 212 (E.D. Pa. 2011) ("Seven opt outs and two objectors in a class of nearly forty thousand represents a small number that weighs in favor of this [FCRA] settlement."); *Wright v. Stern*, 553 F. Supp. 2d 337, 344-45 (S.D.N.Y. 2008) (approving settlement where 13 out of 3,500 class members objected and 3 opted out); *Tiro*, 2013 WL 4830949, at *7 (approving settlement where less than 1% of the class requested exclusion); *Henry v. Little Mint, Inc.*, No. 12 CIV 3996 CM, 2014 WL 2199427, at *2-4 (S.D.N.Y. May 23, 2014) (same); *Chavarria v. New York Airport Serv., LLC*, 875 F. Supp. 2d 164, 173 (E.D.N.Y. 2012) (approving settlement where less than 2% of class requested exclusion).

2. *The Class Representative and Class Counsel Have Adequately Represented the Class*

In considering this Rule 23(e)(2) factor, the Court should consider whether:

> Determination of adequacy typically entails inquiry as to whether: (1) plaintiff's interests are antagonistic to the interest of other members of the class and (2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation.

In re GSE Bonds, 414 F. Supp. 3d at 692 (quotations omitted). That requirement is met here.

First, Class Counsel is highly experienced in complex class action litigation and FCRA class action litigation in general. The details of Class Counsel's qualifications were discussed at length in the Motion for Class Counsel Fees and Class Representative Service Payment, and Class Counsel's resumes were attached to that document. ECF No. 190 at 14-16; ECF Nos. 191-93.

Second, Plaintiff Gambles has been actively engaged in this case. He understands what it means to be a Class Representative and has and will continue to put the interests of the Class first

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The sender of the letter's name has been redacted from the public docket, but that information will be provided to the Court upon request.

in making all decisions related to this case. Declaration of Ralph Michael Gambles in Support of Preliminary Approval (ECF No. 180-7, "Gambles Decl.") ¶ 11. Plaintiff Gambles met in person with Class Counsel prior to and during the litigation, provided documents to aid in the investigation and drafting of the Complaint, reviewed the Complaint prior to filing, participated in several rounds of 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. *Id.* ¶¶ 4-10. He has reviewed, approves of and signed the Settlement Agreement. *Id.* ¶ 12.

"The Second Circuit has held that the adequacy requirement is satisfied with respect to the lead plaintiff in this kind of consumer case unless 'plaintiff's interests are antagonistic to the interest of other members of the class.'" *Zyburo v. NCSPlus, Inc.*, 44 F. Supp. 3d 500, 503 (S.D.N.Y. 2014) (quoting *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009)). Here, Plaintiff Gambles' interests in this litigation are aligned with those of the Settlement Class. Plaintiff Gambles has no conflicts of interest that would compromise his representation of the Settlement Class. Gambles Decl. ¶ 11.

3. The Settlement Agreement was Negotiated at Arm's Length

Rule 23(e)(2)(B) requires "procedural fairness, as evidenced by the fact that the proposal was negotiated at arms length." *In re GSE Bonds*, 414 F. Supp. 3d at 693 (quoting Fed. R. Civ. P. 23(e)(2)(B)). A class settlement reached through arm's-length negotiations between experienced, capable counsel knowledgeable in complex class litigation enjoys a presumption of fairness. *Id.*; *see also In re PaineWebber Ltd., P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997). A mediator's involvement in settlement negotiations helps demonstrate fairness. *In re GSE Bonds*, 414 F. Supp. 3d at 693.

The presumption of fairness applies here. This matter was litigated for over four years prior

to the Settlement. *See infra* at § I.A - B. The parties mediated this matter—twice—at arm's-length, with both negotiations facilitated by experienced mediators. *See infra* at § I.B. Further, as is discussed at more length *supra* at § IV.A.4, counsel for both sides are knowledgeable and experienced at consumer class actions, particularly FCRA class actions.

4. The Relief Provided for the Settlement Class is Adequate

a. The recovery achieved is substantial in light of the risks involved in continued litigation.

The gross value of the Settlement is $15,000,000, rendering it one of the largest FCRA settlements ever, and the largest ever with a single consumer reporting agency involving reporting of outdated information on consumer reports. Settlement Class Members will receive payment automatically, without need to file a claim form. On a per person basis, the Settlement is comparable to, or exceeds, relief awarded in other cases brought under the same section of the FCRA, even though many of those other cases involved more straightforward claims involving less risk.

The adequacy of the amount offered in settlement must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987). Moreover, the Court need only determine whether the Settlement falls within a "range of reasonableness." *In re PaineWebber Ltd., P'ships Litig.*, 171 F.R.D. at 125 (quotation and internal marks omitted). In assessing a proposed settlement, the Court should balance the benefits afforded the class, including the immediacy and certainty of a recovery, against the continuing risks of litigation. Fed. R. Civ. P. 23(e)(2)(C)(i); *see also Grinnell*, 495 F.2d at 463.

Plaintiffs in this litigation faced several significant obstacles to recovery. These risks were discussed in both the preliminary approval brief and the fee petition, and those discussions are incorporated here. ECF Nos. 180 at 14-17; 190 at 8-14.

Despite the numerous risks that continued litigation would have presented, the amount of the recovery is substantial, when considered on both a gross basis and a per Class Member basis. The estimated net per person settlement amount of $45[6] parallels that achieved in settlements involving more traditional claims with more clear-cut harms. *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 net 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 approximately $55 per person net, 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 about 15,000 class members approximately $50 each, net, for claims based on reporting outdated criminal charges).

b. Continued litigation would be time-consuming and expensive.

Rule 23 also calls for consideration of the costs and delay of trial and appeal. Fed. R. Civ. P. 23(e)(2)(C)(i). "The expense and possible duration of the litigation are major factors to be considered in evaluating the reasonableness of [a] settlement." *Milstein v. Huck*, 600 F. Supp. 254, 267 (E.D.N.Y. 1984). Substantial work remains in this matter to prepare for trial if the Settlement is not approved.

[6] This is the amount class members are estimated to receive if the pending Motion for Class Counsel Fees and Class Representative Service Payment (ECF No. 190) is granted.

Continued litigation would result in complex, costly, and lengthy proceedings before this Court and likely the Second Circuit, which would significantly delay any relief to Class Members or might result in no relief to Class Members at all. In order to prosecute their claims to a final judgment, Plaintiffs would have to engage in class certification motion practice, summary judgment motion practice, prepare for trial, and present evidence during a jury trial.

Even if Plaintiffs recover a larger judgment after a trial, the additional delay through trial, post-trial motions, and the appellate process could deny the Settlement Class Members any recovery for years, further reducing its value. *Hicks v. Morgan Stanley & Co.*, No. 01 Civ. 10071 (RJH), 2005 WL 2757792, at *6 (S.D.N.Y. Oct. 24, 2005) ("Further litigation would necessarily involve further costs [and] justice may be best served with a fair settlement today as opposed to an uncertain future settlement or trial of the action."); *Strougo v. Bassini*, 258 F. Supp. 2d 254, 257 (S.D.N.Y. 2003) ("even if a shareholder or class member was willing to assume all the risks of pursuing the actions through further litigation…the passage of time would introduce yet more risks…and would, in light of the time value of money, make future recoveries less valuable than this current recovery").

Avoiding the risks and expense associated with further litigation and locking in substantial recoveries for the Settlement Class Members was the correct course to take.

c. The proposed settlement will effectively distribute relief to the class.

Rule 23(e)(2)(C)(ii) requires courts to examine "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." "A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding." 2018 Advisory Note. *In re GSE Bonds*, 414 F. Supp. 3d at 694. The Settlement involves an automatic, *pro rata* distribution of Individual Settlement Payments to Settlement Class Members. SA ¶ 5.2. Even in cases involving claimants

with different interests, "[c]ourts frequently approve plans involving pro rata distribution." *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05MD1720MKBJO, 2019 WL 6875472, at *20 (E.D.N.Y. Dec. 16, 2019) (addressing 23(e)(2)(C)(ii) for a plan that provided for pro rata division by claimants). Here, the distribution is even more effective than the typical case because the distribution is automatic, so there is no need to file a claim, and it is equally divided to each person about whom a subject report was issued. SA ¶ 5.2.

d. The Class Counsel fees are reasonable and fair.

The Settlement is not contingent upon approval of attorneys' fees or any incentive award to the named Plaintiff. The Court will separately and independently determine the appropriate amount of fees, costs, and expenses to award to Class Counsel and the appropriate amount of any Class Representative Service Payment. Class Counsel's fee and cost petition was posted on the Settlement Website for Settlement Class Members to review prior to the opt out and objection deadline. Class Counsel's request to receive one-third of the Gross Settlement Amount plus reasonable costs is a typical fee award in the Second Circuit. *See, e.g., Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d, 96, 121 (2d Cir. 2005); *McDaniel v. County of Schnectady*, 595 F.3d 411, 417 (2d Cir. 2010) (stating that the "trend in this Circuit is toward the percentage method"); *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). Class Counsel's fees will be paid on the same timeline as payments to Settlement Class Members. SA ¶¶ 8.3.1, 8.5.1.

In addition, Plaintiff Gambles has requested a Class Representative Service Payment in the amount of $7,500, which is subject to Court approval. The proposed Service Payment compensates Plaintiff for his time and effort, the risks he undertook in prosecuting the case, and the actions he

took for the benefit of the Settlement Class. The requested award is well within the range of approval, particularly given the level of participation required of Plaintiff Gambles, and the risk he undertook in publicizing his individual circumstances in order to achieve a recovery for the Settlement Class. *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); *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).

e. The resolution of Plaintiffs Merck and Compo's claims does not affect the fairness of the proposed settlement.

Separate from the Settlement, two named Plaintiffs have separately settled their individual claims with Sterling. Thomas Merck filed suit against Sterling in Ohio state court, and it was subsequently removed, transferred, and—because of the similar claims involving violations of FCRA—consolidated with this action for pre-trial purposes. ECF 84. The First Consolidated Class Action Complaint that followed the Court's order on consolidation added Merck as well as Elsie Compo as a co-plaintiff. ECF 85. Compo brought two claims under Colorado law, but did not join the claim brought concerning outdated address information that is the subject of this Settlement. ECF 85. Prior to the settlement of the outdated address information, and based on separate conversations of counsel, Merck and Compo agreed to settle their individual claims with Sterling. Drake Decl. ¶ 11.

The settlement of Merck and Compo's claims was separately negotiated, involve distinct claims that are not being certified for settlement purposes, and does not diminish the fund allocated for settlement of the outdated information class. *Id*. These individual settlements therefore have no effect on the negotiation or settlement of the outdated address information class claim. Separate settlements with individual claimants are common. *See, e.g.*, *Hochstadt v. Bos. Sci. Corp.*, 708 F.

Supp. 2d 95, 100 (D. Mass. 2010) (approving settlement in which two individual plaintiffs separately settled their claims). So long as the circumstances do not suggest a conflict of interest, the separate resolution of these claims do not affect the fairness of the proposed settlement. *Id*. at 100 n.7 (noting that the separate settlements "will not affect the amount being paid under the proposed class settlement" and that they do "not derogate from or otherwise adversely affect the proposed Class Settlement before me.").

There is no conflict of interest here. In this case, Compo did not join the claim that is the subject of this Settlement and also raised separate claims not joined by Gambles or Merck. Merck filed his own separate action which was consolidated with this matter for pre-trial purposes, and raised several claims that are not the subject of this Settlement. Accordingly, the separate settlements do not raise any concern about inequitable treatment or conflicts of interest.

5. The Settlement Treats Class Members Equitably Relative to Each Other.

The Settlement treats all Settlement Class Members identically, as each will receive an equal *pro rata* share of the Gross Settlement Amount. This compensates them for injuries that are also substantively identical, since the FCRA provides for statutory damages for violations. *See* 15 U.S.C. § 1681n ("[A]ny actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000"). There is no evidence that any members of the Settlement Class would seek to prove actual damages in lieu of accepting statutory damages. To the extent that any class members would prefer to seek actual damages, the opt-out procedure protects them from inequitable treatment. *See Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952–53 (7th Cir. 2006) ("When a few class members' injuries prove to be substantial, they may opt out and litigate independently. Only when all or almost all of the claims are likely to be large enough to justify individual litigation is it wise to reject class treatment altogether."); *In re Farmers Ins.*

Co., Inc., FCRA Litig., No. CIV-03-158-F, 2006 WL 1042450, at *7 (W.D. Okla. Apr. 13, 2006) ("Here, as stated, there is nothing before the court to show that there are class members with actual damages in excess of the requested statutory damages. If a few class members' injuries are substantial, they may opt out and litigate independently."). Accordingly, the injuries here are suitable for class treatment and this Settlement treats the Class Members equitably. For all these reasons, the proposed Settlement treats all proposed Settlement Class Members equally and fairly, and there are no deficiencies preventing final approval.

V. CONCLUSION

The proposed Settlement represents the culmination of nearly five years of hard-fought litigation. It represents a substantial achievement for the Settlement Class, both on a gross basis and on a per-class member basis, particularly when considered in light of the risks of continued litigation. For all of the above reasons, the proposed Settlement is fair, reasonable, and adequate and should be approved in all respects.

RESPECTFULLY SUBMITTED AND DATED this 26th day of August, 2020.

BERGER MONTAGUE PC

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CERTIFICATE OF SERVICE

I hereby certify that on August 26, 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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