UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MARVEL MARTINEZ, on behalf of himself and all others similarly situated, Plaintiff, v. AVANTUS, LLC and XACTUS, LLC, successor in interest to certain assets of AVANTUS, LLC, Defendants.	Civil Action No. 3:20-cv-01772-JCH

PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT AND FOR ORDER DIRECTING NOTICE

Plaintiff Marvel Martinez, through his undersigned counsel, moves the Court for preliminary approval of the Settlement Agreement and Release, attached to his concurrently filed Memorandum of Law as Appendix I, under Federal Rules of Civil Procedure 23(a) and 23(b)(3).

He also moves the Court for approval of the proposed class notice and notice plan, appointment of the settlement administrator, and scheduling of a final fairness hearing.

The support for this request is set forth in the concurrently filed Memorandum of Law. Defendants do not oppose the filing of this motion.

Dated: November 8, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on November 8, 2023, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, and that system will provide a notice of electronic filing to all parties of record in this matter.

/s/ James A. Francis
JAMES A. FRANCIS

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT AND FOR ORDER DIRECTING NOTICE

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In support of his Motion for Preliminary Approval of the Class Action Settlement, Approval and Direction of Class Notice, and Appointment of the Settlement Administrator, Named Plaintiff[1] Marvel Martinez, by Class Counsel, submits the following Memorandum of Law.

I. INTRODUCTION

In this class action matter, Plaintiff Marvel Martinez ("Martinez" or "Plaintiff") alleges that Defendants Avantus, LLC and Xactus, LLC, successor in interest to certain assets of Avantus, LLC (collectively, "Avantus" or "Defendants") violate the important protections in the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x, *et seq*., by improperly associating innocent consumers with terrorists, narcotics traffickers, money launderers, arms dealers, and other criminals subject to U.S. government sanctions. Plaintiff sought in his Complaint an award of actual, statutory and punitive damages for Plaintiff and the Class; an award of pre-judgment and post-judgment interest as provided by law; and an award of attorney's fees and costs.

On January 5, 2023, the Court granted Plaintiff's motion for class certification and certified a Class of consumers who were the subject of a report prepared using the same procedures used with respect to Plaintiff, and which included a record that had similarly mismatched personal identifiers. ECF 84. Since that time, the Parties have focused their efforts on identifying the full scope of the class from Defendants' records, and on discussing the possibility of a class wide settlement. These lengthy, contentious, and arms-length negotiations were successful, and Plaintiff now seeks the Court's approval of a $6,760,000.00 settlement that represents a strong result for Class members. Any member of the class who does not request exclusion will receive an

[1] Unless otherwise noted, definitions of capitalized terms are found in Section 1 of the Settlement Agreement, attached hereto as Appendix I.

automatic $100 payment without the need to take any action, and all class members have the opportunity to make a claim to receive a higher payment, expected to be in excess of $1,000.

This Settlement is fair, reasonable, and adequate and otherwise satisfies the requirements of Rule 23(a) and (b)(3) and the factors outlined in Rule 23(e)(2) and applicable Second Circuit law. The Court should find that the Settlement falls within the range of possible approval.

Plaintiff respectfully requests that the Court (1) grant preliminary approval of the Settlement Agreement; (2) appoint Plaintiff's attorneys as Class Counsel; (3) appoint Plaintiff as class representative; (4) appoint Continental DataLogix, LLC as the Settlement Administrator; (5) approve the Notice Plan for the Settlement described in the Settlement Agreement and its Exhibits; and (6) schedule a Final Approval Hearing.

II. HISTORY OF THE LITIGATION AND MEDIATION

A. Nature of the Case

This consumer class action brings a single claim under the federal Fair Credit Reporting Act ("FCRA") which requires that consumer reporting agencies follow "reasonable procedures to assure the maximum possible accuracy" of information included on reports. 15 U.S.C. § 1618e(b). The FCRA "seeks to promote 'fair and accurate credit reporting' and to protect consumer privacy. To achieve those goals, the [FCRA] regulates the consumer reporting agencies that compile and disseminate personal information about consumers." *TransUnion LLC v. Ramirez*, 594 U.S. ___, 141 S. Ct. 2190, 2200 (2021) (quoting 15 U.S.C. § 1681a).

Avantus operates as a consumer reporting agency by assembling and evaluating consumers' credit history and other public record information, and including this information on reports provided to third parties in connection with consumers' efforts to get mortgage financing. There is no question that Avantus's reports are covered by the FCRA.

There is also no question that records from the U.S. Department of Treasury's Office of Foreign Assets Control Specially Designated Nationals list, called the "OFAC List," are subject to the FCRA's accuracy requirement. Indeed, both the Third and Ninth Circuit Courts of Appeals have made clear that selling the "OFAC" records at issue here using only a name, and ignoring available dates of birth is a willful violation of the FCRA. *Cortez v. Trans Union, LLC*, 617 F.3d 688 (3d Cir. 2010); *Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1037 (9th Cir. 2020), *rev'd on other grounds by TransUnion LLC v. Ramirez*, 594 U.S. ___, 141 S. Ct. 2190, 2200 (2021).

Plaintiff here asserts that Avantus violated the FCRA's maximum possible accuracy requirement by including records from the OFAC List on reports to third parties that were matched to applicants using only first and last name, ignoring conflicting personal identifiers including dates of birth available on the face of the OFAC List.

B. This Litigation

Plaintiff filed his Complaint on November 25, 2020. ECF 1. Plaintiff's allegations stemmed from the sale of an Avantus report containing the OFAC record of a "Maria Icela Chavez Martinez," a Mexican drug trafficker with a date of birth more than 15 years removed from Plaintiff's date of birth. *Id.* at ¶¶ 33-42. Defendants filed their Answer on February 11, 2021. ECF 10.

Following the initial telephonic status conference, the Court issued a scheduling order, and the parties commenced discovery. ECF 35. Shortly thereafter on May 27, 2021 the Court stayed this matter pending the resolution by the Supreme Court of the appeal in *TransUnion v. Ramirez*. ECF 37. The stay lasted approximately one month, after the *Ramirez* decision was issued on June 26, 2021. *Id.*

The parties returned to discovery, exchanging multiple rounds of written discovery requests, and engaging in detailed meet and confer efforts concerning the sufficiency of the

responses, and supplementing where appropriate. The parties conducted depositions of Plaintiff and of his wife Diana Martinez, of fact witnesses with knowledge concerning Defendants' systems and practices and corporate testimony by Avantus through two corporate representatives. The parties took third party discovery including a deposition of the third party that obtained the consumer report about Plaintiff, and engaged in expert discovery including a deposition of Plaintiff's disclosed expert.

Armed with this evidence, Plaintiff moved for class certification on May 20, 2022. ECF 62. Plaintiff sought to certify a class of all U.S. persons "about whom Defendants sold a consumer report to a third party that included any OFAC record using its proprietary UltraAMPS OFAC product, during the period beginning July 6, 2020 and continuing through thirty (30) days before the date of notice to the class." *Id.* Following full briefing, the Court issued an order on January 5, 2023 granting the motion for class certification and certifying the following class of consumers:

> All persons residing in the United States and its Territories about whom Defendants sold a consumer report to a third party that included any OFAC record—where there is not a match between the date of birth, address, or social security number of the subject of the report and the corresponding person on the SDN list—using its proprietary UltraAMPS OFAC product, during the period beginning July 6, 2020, and continuing through thirty (30) days before the date of notice to the class.

ECF 84 at p. 14. On January 19, 2023, Avantus filed a petition for permission to appeal the class certification decision pursuant to Fed. R. Civ. P. 23(f) with the U.S. Court of Appeals for the Second Circuit. *See* No. 23-0081 at Doc. 1. Plaintiff opposed the petition. *Id.* at Doc. 10.

On February 2, 2023, the Parties jointly informed the Court that they were in the process of identifying the members of the certified class based upon Defendants' records and selecting a mediator to conduct settlement discussions. ECF 85. Upon an unopposed motion by Avantus, the

Second Circuit postponed its ruling on the 23(f) petition while the Parties discussed settlement. No. 23-0081 at Doc. 13, Doc. 17.

C. Negotiations Leading to the Settlement Agreement

On April 13, 2023, the parties met for a day-long mediation via videoconference with the assistance of Rodney Max of Upchurch Watson White & Max, an experienced mediator with substantial experience resolving FCRA class actions. In preparation for the mediation, counsel for Plaintiff Martinez invested a substantial amount of time reviewing Defendants' production of data on class member identification and preparing a comprehensive mediation statement, reviewing Defendants' mediation statement, and participating in pre-mediation meetings with the mediator and with Defendants' counsel. The case did not resolve on April 13, 2023, but the Parties agreed to continue their negotiations and conducted a second full day mediation on May 16, 2023, and a third on August 16, 2023.

At the third mediation session on August 16, 2023, the parties reached an agreement in principle including a signed term sheet, and therefore requested that the Court stay all deadlines in this matter while they memorialized their settlement and prepared preliminary approval papers. *See* ECF 97.

Having now completed that work, Plaintiff Martinez respectfully requests that this Court preliminary approve the attached Settlement Agreement, direct notice of the Settlement to the Settlement Class, and appoint a Settlement Administrator.

III. THE TERMS OF THE PROPOSED SETTLEMENT

A. Settlement Class Members

The Settlement Agreement resolves the claims of the proposed Settlement Class, defined as:

> All persons residing in the United States and its Territories about whom Defendants sold a consumer report to a third party that included any OFAC record where there is not a match between the date of birth, address, or social security number of the subject of the report and the corresponding person on the SDN list, using its proprietary UltraAMPS OFAC product, during the period beginning July 6, 2020 and ending February 28, 2023.

Agreement at § 1.10. The only change from the class definition certified by the Court is the February 28, 2023 end date, which reflects changes in Defendants' practices as a result of the Litigation, discussed below. According to the Parties' review of Defendants' records, there are 25,173 individuals who meet the definition. Agreement at § 3.2.

B. Practice Changes

As a direct result of the litigation, and reflecting an integral component of the relief provided to the Settlement Class through the Settlement, Defendants have confirmed that they have implemented changes to its practices for including reference to a record from the OFAC List on any consumer report it prepares and provides to a third party. Agreement at § 4. These changes are intended to prevent future misreporting about Settlement Class Members by ensuring that OFAC List records are matched to consumers using more than just a name.

C. Monetary Relief for Settlement Class Members

The Settlement Agreement also provides for substantial monetary benefits for all Settlement Class Members. The Agreement creates a Settlement Fund of six million seven hundred sixty thousand dollars ($6,760,000.00) that will be used to provide payments to Settlement Class Members, pay for the costs of notice and administration of the settlement, provide a service award to the Class Representative, and pay the agreed amount in attorneys' fees and costs if awarded by the Court. Agreement at § 5.

Each member of the Settlement Class will be entitled to an automatic payment of $100, without the need to submit a claim form. *Id.* at § 5.2. All Settlement Class Members will also

have the opportunity to submit a Claim Form attesting to damages incurred as a result of inaccurate reporting of an OFAC record on an Avantus report. *Id.* at §§ 10, 12. Settlement Class Members who submit a valid Claim Form will, instead of the $100 automatic payment, be entitled to receive a *pro rata* share of the Net Settlement Fund, which will include a reserve of over $2 million, plus the amount of any automatic payment checks that are not cashed. *Id.* The exact amount of payments to successful claimants will depend on the number of claims, but based upon consultation with the Settlement Administrator, Class Counsel expect each such payment to be over $1,000. Specifically, Class Counsel expect that the claims rate in the case to be approximately 10%, which is consistent with claims rates in other FCRA cases involving similar payment amounts.[2]

D. Settlement Class Release

The scope of the release here is narrowly tailored to the time period relevant to this matter, the harm identified, and the sums sought. Agreement at § 13.1. Settlement Class Members release only claims under FCRA section 1681e(b), and do not release any other claims they may have against Defendant unrelated to the subject matter of the Litigation, or for other FCRA causes of action such as any claim that Avantus failed to conduct a reasonable reinvestigation into a consumer's dispute regarding an OFAC record.

E. Settlement Administration and Notice Plan

The Settlement Agreement provides that the costs of the Notice Plan and administration of the Settlement are to be borne by the Settlement Fund. Agreement. at §§ 5.2(d), 6.10.

[2] *See Watson v. Checkr, Inc*., No. 3:19-cv-03396-EMC (ECF 75) (N.D. Cal. Sept. 20, 2021) (declaration of administrator in 2021 settlement of FCRA section 1681e(b) claim showing 8% claims rate); *Patel v. Trans Union, LLC*, 3:14-cv-00522- LB (ECF 159-1) (N.D. Cal. Feb. 22, 2018) (declaration of administrator in 2018 settlement of FCRA claims documenting 9% claims rate out of approximately 10,000 potential claimants); *Leo v. AppFolio*, No. 3:17-cv-05771-RJB, ECF 61 (W.D. Wash. May 20, 2019) (declaration of administrator in 2019 settlement of FCRA section 1681e(b) claim with similar structure, showing 1.3% claims rate out of over 250,000 potential claimants).

The proposed Notice Plan calls for direct, personal notice to each Class member, all of whom can be readily identified from Defendants' records, to apprise them of the benefits available under the Settlement Agreement and their rights under FED. R. CIV. P. 23 to opt out of the Class if they so choose. Agreement at § 7.5, Exhibit C. The Notice plan set forth in the Settlement Agreement satisfies the requirements of due process. *See infra* § VI.

F. Attorneys' Fees and Service Award for Representation of the Settlement Class

The Settlement Agreement provides for a payment to Class Counsel, subject to this Court's approval, of an award of attorneys' fees and litigation costs in an amount of up to one-third (1/3) of the Settlement Fund, namely two million two hundred fifty three thousand three hundred thirty three dollars and thirty three cents ($2,253,333.33). Agreement at § 5.2(c). As will be discussed in further detail in Class Counsel's Fee Petition, this is well within the range of what courts within the Second Circuit have approved for counsel fees in Rule 23(b)(3) settlement fund cases. *See, e.g.*, *Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, No. 06-cv-4270, 2009 WL 5851465, at *5 (S.D.N.Y. Mar. 31, 2009) (collecting cases awarding approximately 33%).

A one-third percentage-of-recovery award is consistent with various studies that have been performed over the decades: "[E]mpirical studies show that, regardless of whether the percentage method or the lodestar method is used, fee awards in the class actions average around one-third of the recovery." 4 *Newberg on Class Actions* § 14:6 (4th ed.). In fact, one decision that reviewed 289 class actions settlements found an "average attorney's fee percentage [of] 31.31%" and a median value "that turns out to be of one-third." *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 735 (E.D. Pa. 2001).[3]

[3] *See also Thomas v. FTS USA, LLC*, 2017 WL 1148283, at *5 (E.D. Va. Jan. 9, 2017) ("Yet another study finds that courts consistently award between 30% and 33% of the common fund.") (citing Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. of Empirical Legal Studies, 27, 31, 33 (2004)).

Further, the Settlement Agreement provides for a service award to Named Plaintiff Martinez of fifteen thousand dollars ($15,000) to Plaintiff Martinez, subject to the Court's approval, in recognition of his efforts in service to the Class and of the broader release he provides to Defendants. Agreement at §§ 5.2(b), 13.2. *See, e.g., Torres v Gristede's Operating Corp.*, 2010 WL 5507892, at *7 (S.D.N.Y. Dec. 21, 2010) (finding service awards of $15,000 to each named plaintiff reasonable).

IV. THE SETTLEMENT IS FAIR AND ADEQUATE

There is a "'strong judicial policy in favor of settlements, particularly in the class action context[.]'" *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (quoting *In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998)). As courts in this District have noted, "the Supreme Court has cautioned that, in reviewing a proposed settlement, courts should 'not decide the merits of the case or resolve unsettled legal questions.'" *In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.RD. 171, 174-75 (S.D.N.Y. 2014) (quoting *Carson v. Am. Brands, Inc.,* 450 U.S. 79, 88 n. 14 (1981)).

Once a proposed settlement is reached, a court must make a determination whether proposed terms of the agreement warrant preliminary approval. *In re Currency Conversion Fee Antitrust Litig.*, No. 01 MDL 1409, 2006 WL 3247396, at *5 (S.D.N.Y. Nov. 8, 2006) (acknowledging Rule 23(e) requires court to approve class action settlement). Preliminary approval is simply the first step in the settlement process, permitting notice to issue to the class and for class members to opt out of the settlement or object. *Clark v. Ecolab Inc.*, No. 07-civ-8623, 2009 WL 6615729, at *3 (S.D.N.Y. Nov. 27, 2009); *see also In re Nasdaq Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997). Subsequent to the notice period, the court will be in a position to evaluate settlement "with the benefit of the class members' input." *Clark*,

2009 WL 6615729, at *3*; see also Menkes v. Stotle-Nielsen S.A.*, 270 F.R.D. 80, 101 (D. Conn. 2010) ("Preliminary approval of class action settlement, in contrast to final approval, 'is at most a determination that there is what might be termed 'probable cause' to submit the proposal to class members and hold a full-scale hearing as to its fairness." (quoting *In re Traffic Executive Association-Eastern Railroads*, 627 F.2d 631, 632 (2d Cir. 1980))).

Fed. R. Civ. P. 23(e) governs a court's consideration of a proposed class action settlement, and states that grounds exist to give notice of a proposed class action settlement where the parties show that "the court will likely be able to (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B).

Following the 2018 amendments, Rule 23(e)(2) explicitly sets forth four factors for determining whether a settlement is fair, reasonable and adequate, and includes factors traditionally considered at preliminary approval in the Second Circuit and in this District: [4]

- the class representative and class counsel have adequately represented the class;
- the proposal was negotiated at arm's length;

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[4] In connection with final approval, the Court will ultimately be required to assess the following factors set forth in *City of Detroit v. Grinnell Corp.*:

> (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.

495 F.2d 448, 463 (2d Cir. 1974). On balance, based on information known at this time (some of which is highlighted herein) and as will be set forth in a subsequent motion for final approval of the settlement, the totality of the *Grinnell* factors will weigh in favor of granting final approval of the proposed Settlement. *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y. 2004) ("In finding that a settlement is fair, not every factor must weigh in favor of settlement, 'rather the court should consider the totality of these factors in light of the particular circumstances.'" (quoting *Thompson v. Metropolitan Life Ins. Co.,* 216 F.R.D. 55, 61 (S.D.N.Y. 2003))). However, a full analysis of these factors is appropriate at the final approval stage rather than prior to sending notice. *In re Platinum & Palladium Commodities Litig.*, No. 10-cv-3617, 2014 WL 3500655, at *12 (S.D.N.Y. July 15, 2014) (recognizing courts in Second Circuit "typically consider nine *Grinnell* factors at final approval stage.").

- 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 processing of class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; (iv) any agreement required to be identified under Rule 23(e)(3), and
- the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2). Consideration of these factors supports sending notice to the Settlement Class Members of the proposed settlement.

A. Plaintiff and Class Counsel Have Adequately Represented the Class

Under Second Circuit precedent, adequacy of representation is met if it appears that (1) a plaintiff's attorneys are "'qualified, experienced and generally able' to conduct the litigation" and (2) a plaintiff's interests are not antagonistic to those of the class he seeks to represent. *In re Drexel Burnham Lambert Group, Inc*., 960 F.2d 285, 291 (2d Cir. 1992) (citation omitted); *see also Marisol A. v. Giuliani*, 126 F.3d 372, 378 (2d Cir. 1997). "In the absence of proof to the contrary, courts presume that class counsel is competent and sufficiently experienced to prosecute vigorously the action on behalf of the class." *In re Methyl Tertiary Butyl Ether (MBTE) Prods. Liab. Litig.*, 241 F.R.D. 185, 199 n.99 (S.D.N.Y. 2007).

This Court has already found that Class Counsel are adequate representatives, confirming in the class certification order that Francis Mailman Soumilas and Sarah Poriss are "'qualified, experienced[,] and able to conduct the litigation.'" ECF 84 at p. 19 (quoting *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp*., 222 F.3d 52, 60 (2d Cir. 2000)). Accordingly, Plaintiff and Class Counsel have and will continue to adequately represent the Settlement Classes.

B. The Settlement Agreement Is the Result of Engaged, Arms-Length Negotiations Overseen by an Experienced Mediator.

A "'presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" *Wal-Mart Stores, Inc., v. Visa U.S.A.,* 396 F.3d 96, 116 (2d Cir. 2005) (citation omitted). Here, not only was the Settlement reached subsequent to complete discovery on the merits, but it was negotiated at arm's length by counsel with extensive experience in consumer protection class action litigation, who have a full understanding of the pros and cons of proceeding with the action in lieu of settlement at this juncture. *Gross v. Washington Mut. Bank, F.A.,* 2006 WL 318814, at *5 (E.D.N.Y. Feb. 9, 2006) ("The litigation has thus proceeded to a stage at which counsel have demonstrated a thorough understanding of the complexity of the issues and the strengths and weaknesses of their respective claims, defenses and strategies.").

Furthermore, the Parties engaged in private mediation before a well-respected mediator with substantial experience with the FCRA, Rodney Max, Esq. The Parties' use of a well-regarded mediator supports the presumption of fairness that the settlement was reached absent collusion. *See, e.g., D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) ("This Court has noted that a court-appointed mediator's involvement in pre-certification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure*"); In re Currency Conversion Fee Antitrust Litig*., 2006 WL 3247396, at *5 ("[mediator's] participation in the negotiations substantiates the parties' claim that the negotiations took place at arm's length."); *Clark,* 2009 WL 6615729, at *4 ("An experienced class action employment mediator . . . assisted the parties with the settlement negotiations and presided over a two-day mediation. This reinforces the non-collusive nature of the settlement.").

Accordingly, Plaintiff submits the Agreement was negotiated in good faith and free of collusion.

C. The Settlement Provides Substantial Relief for Settlement Class Members

The proposed Settlement provides a strong result for Settlement Class Members and is well within the range of what is reasonable. For the single claim asserted under section 1681e(b) of the FCRA, Plaintiff achieved a monetary settlement providing a guaranteed $100 payment for all class members, without the need to make a claim. Agreement § 5.2. The Agreement further provides all Settlement Class Members with the opportunity to obtain, instead of the automatic payment, a higher *pro rata* payment expected to be in excess of $1,000 by submitting a simple Claim Form attesting to damages. *Id.* §§ 10, 12. At this stage of litigation, these payments provide a substantial benefit to Class members.

This is an excellent result that compares favorably to other FCRA section 1681e(b) class action settlements for statutory damages. *See, e.g., Patel v. Trans Union, LLC*, No. 3:14-cv-0522-LB, ECF 167 at 9 (N.D. Cal. Mar. 11, 2018) (finally approving class action settlement in which class members received an automatic $400 payment and could submit a claim for an additional, *pro rata* share of a claims pool); *Leo v. AppFolio, Inc,* No. 3:17-cv-05771-RJB, ECF 62 at 7 (W.D. Wash. July 8, 2019) (anticipated $425 for successful claimants), *id*. at ECF 66 (W.D. Wash. July 18, 2019) (finally approving settlement); *McIntyre v. RealPage, Inc.*, No. 2:18-cv-03934-CFK, ECF 156 (E.D. Pa. Mar. 24, 2023) (finally approving settlement in which class members received automatic payments of approximately $300). These benefits are fair and reasonable in light of the risks of continued litigation, and method of distribution is effective here.[5]

[5] The final consideration set forth in the amended Rule 23(e)(2)(C)—the existence of any side agreements made in connection with the settlement—is not applicable here because no such agreements exist.

1. The Settlement Agreement Is a Preferable Alternative to the Risks Each Party Would Face Through Continued Litigation

Plaintiff and his counsel recognize the expense and length of time required to continue to litigate this case, including the time and expense associated with litigating this case through trial against Defendants and through possible appeals, could take several more years. *See In re Currency Conversion Fee Antitrust Litig*., 2006 WL 3247396, at *6 (determining settlement was within reasonable range where "the expense and delay of continued litigation could be substantial"). Such appeals are not hypothetical – before the settlement was reached, Defendants had already sought to appeal this Court's class certification, and other comparable litigation has endured multiple levels of review. *See, e.g. Ramirez v. Trans Union, LLC*, 2022 WL 17722395 (N.D. Cal. Dec. 15, 2022) (final approval of settlement in FCRA section 1681e(b) claim regarding OFAC records after ten years and Supreme Court appeal); *see RentGrow, Inc. v. Fernandez*, App. No. 22-146 (4th Cir. filed Mar. 24, 2022) (23(f) appeal of class certification decision in FCRA section 1681e(b) case regarding OFAC records accepted and pending). The proposed Settlement avoids the risks of such lengthy appeals.

Counsel has also taken into account the time already invested in this case. The Class Representative and his counsel believe that the settlement confers a substantial immediate benefit upon the Class. *In re Prudential Sec. Inc. Ltd. P'ships Litig*., 163 F.R.D. 200, 210 (S.D.N.Y. 1995) ("'Instead of the lengthy, costly, and uncertain course of further litigation, the settlement provides a significant and expeditious route to recover for the Class.'" (citation omitted)).

Plaintiff is confident that he would be able to defeat the arguments presented in Defendants' petition for permission to appeal the class certification decision pursuant to Rule 23(f), either through denial of the petition or on the merits. But Plaintiff would still face the task of proving liability on the merits of his claims, including the risks associated with a possible motion

for summary judgment, and the even greater risks, uncertainty, delay, and expense of trial. Even if Plaintiff succeeded in passing the liability hurdle, the parties would continue to battle over whether Plaintiff and other class members have sustained damages, and if so, the proper measure of those damages. The battles would be fought not only before and at trial, but also on appeal.

By contrast, the proposed Settlement provides significant monetary benefits to the Settlement Class without the risks set out above.

2. The Proposed Award of Attorney's Fees Is Fair and Reasonable

If the Court orders that notice be directed to the Settlement Class, Plaintiff's counsel will request that the Court award them attorneys' fees and cost of one-third of the Settlement Fund, $2,253,333.33. Agreement at § 5.2(c). This amount, was negotiated only after the substantive terms of the settlement were agreed upon.

As will be discussed in further detail in Class Counsel's Fee Petition, this is well within the range of what courts within the Second Circuit have approved for counsel fees in Rule 23(b)(3) settlement fund cases. *See, e.g.*, *Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, No. 06-cv-4270, 2009 WL 5851465, at *5 (S.D.N.Y. Mar. 31, 2009) (collecting cases awarding approximately 33%).

Prior to final approval, Class Counsel will file a separate motion for an award of attorneys' fees and costs, addressing in detail the facts and law supporting their fee request. Agreement § 2.4. Counsel will file this motion 10 days before the deadline to object to the settlement to provide Settlement Class Members with sufficient time to review the fee request. *Id.*

3. The Method of Providing Relief Will Be Effective

"[T]he effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims," is also a relevant factor in determining the adequacy of relief. Fed. R. Civ. P. 23(e)(2)(C)(ii). As set forth above, all Settlement Class

Members who do not opt out will receive an automatic cash payment, without the need to submit a claim or take any other action, so long as their notice is not returned as undeliverable after multiple attempts. Settlement Class Members will have an opportunity to update their contact information, including mailing address, with the Settlement Administrator in order to ensure that checks reach all class members.

Settlement Class Members will also have the opportunity to make a claim attesting to damages they experienced as a result of Defendants' reporting of an inaccurate OFAC record to a third party, such as denial of credit, reputational harm, or emotional distress. The proposed class notices are drafted with simple, clear language designed to effectively communicate Settlement Class Members' options and to maximize claims, and the Claim Form is straightforward and will be available to submit either in paper or online through the settlement website. Once damages are established through the submission of a valid Claim Form, all claimants will receive an equal *pro rata* amount.

4. The Settlement Treats All Settlement Class Members Fairly

The proposed Settlement Agreement here treats all class members fairly. "[T]he effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims," is also a relevant factor in determining the adequacy of relief. FED. R. CIV. P. 23(e)(2)(C)(ii). This element is satisfied here because all Settlement Class Members are treated equally: each has the opportunity to submit a Claim Form attesting to damages in order to receive a higher payment, and each will receive the same $100 automatic payment if they do not submit a claim and do not opt out. Furthermore, the method of processing class member claims is fair, equitable, and reasonable, since the Claim Form is a simple, clear, single-page form that simply requires an attestation by the Settlement Class Member that they incurred damages, without requiring any submission of documentation. *See* Exhibit C. The Claim

Form will be included with the Notice to all Settlement Class Members, and can be submitted online via the settlement website.

Further, funds remaining in the event Settlement Class Members do not cash their checks will be donated to a *cy pres* to be identified at final approval. Agreement § 5.2(g). This arrangement treats all class members fairly.

V. THE COURT CAN CERTIFY THE SETTLEMENT CLASS

Sending notice of the terms of the proposed Settlement is also justified because the Court will likely be able to certify the proposed Settlement Class for purposes of judgment on the proposal. Fed. R. Civ. P. 23(e)(1)(B)(ii). As discussed above, the sole modification to the class definition certified by the Court on contest was to provide an end date which reflects Defendants' practice changes. *See* Agreement at § 1.10. Therefore, the Court's determination that each of the elements of Rule 23(a) and Rule 23(b)(3) are met with respect to the Certified Class apply equally to the proposed Settlement Class here. The Settlement Class is numerous because it consists of over 25,000 members. Agreement § 3.2; ECF 84 at pp. 14-15; *see Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (numerosity presumed for class in excess of 40 members). The same common questions regarding whether Defendants' procedures were reasonable within the meaning of the FCRA, and whether its conduct was willful remain present. ECF 84 at pp. 16-17. Plaintiff's claims arise from the same course of events and turn on the same legal issues as all members of the Settlement Class – like him, each was the subject of a report prepared by Defendants using its proprietary UltraAMPS OFAC product and included an OFAC record for which the date of birth on the face of the OFAC record did not match the applicant's provided date of birth. ECF 84 at pp. 17-18. Plaintiff has fairly and adequately protected the interests of the Settlement Class, as have his counsel. ECF 84 at pp. 18-19; *supra* pp. 10-11.

VI. THE PROPOSED NOTICE PLAN SATISFIES RULE 23

Rule 23(e)(1) states that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by" a proposed settlement, voluntary dismissal, or compromise. Class members are entitled to the "best notice that is practicable under the circumstances" of any proposed settlement before it is finally approved by the Court. Fed. R. Civ. P. 23(c)(2)(B). The amendments to Rule 23(c)(2)(B) provide that "notice may be by one or more of the following: United States mail, electronic means, or other appropriate means." To comply with due process, notice must be "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997). The notice must state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3). Fed. R. Civ. P. 23(c)(2)(B).

The proposed notice plan here complies with these requirements. It provides for individual notice to be sent via U.S. mail to each member of the Settlement Class identified in Defendants' business records. The Settlement Administrator will update all of the mailing addresses provided from Defendants' records through the National Change of Address Database prior to sending notice. Agreement § 6.4(a).

The language of the proposed notice is plain and easily understood, providing neutral and objective information about the nature of the settlement. *See* Ex. C. The notice includes the definition of the Class, a statement of each Class Member's rights (including the right to opt-out

of the Settlement or object to it, and the deadline to do so), a statement of the consequences of remaining in the Settlement, an explanation of how members can exclude themselves from the Class or object to the Settlement, and methods for obtaining more information, including directions to log on to a dedicated Settlement Website. Agreement at Ex. C. It also explains that class members may enter an appearance through an attorney in connection with an objection. *Id.*

Plaintiff submits that the notice program outlined in the Settlement Agreements is the best practicable notice under the circumstances of this case, and will be highly effective.

VII. CONCLUSION

The Settlement provides a cash award to the approximately 25,000 consumers who were harmed by Defendants' reporting of OFAC record information using only a name. Like the Certified Class, the proposed Settlement Class satisfies the requirements of Rule 23(a) and (b), and the Notice Plan provides the "reasonable notice" required by Rule 23(e).

Accordingly, Named Plaintiff Martinez respectfully requests that the Court (1) grant preliminary approval of the Settlement Agreement; (2) appoint Continental DataLogix, LLC as the Settlement Administrator; (3) approve the Notice Plan for the Settlement described in the Settlement Agreement and its Exhibits; and (4) schedule a Final Approval Hearing.

Dated: November 8, 2023

Respectfully submitted,

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*admitted *pro hac vice*

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CERTIFICATE OF SERVICE

I hereby certify that, on November 8, 2023, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, and that system will provide a notice of electronic filing to all parties of record in this matter.

/s/ James A. Francis
JAMES A. FRANCIS