UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

MARK WILLIAM THOMAS, *et al.*,

Plaintiffs,

v. Civil No. 3:18-cv-00684-MHL

EQUIFAX INFORMATION SERVICES, LLC,

Defendant.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, CONDITIONALLY CERTIFYING CLASS FOR PURPOSE OF SETTLEMENT, APPOINTING CLASS COUNSEL, DIRECTING NOTICE TO THE CLASS, AND SCHEDULING FINAL FAIRNESS HEARING

Pursuant to Federal Rule of Civil Procedure 23, Plaintiff MARK WILLIAM THOMAS, *on behalf of himself and anyone similarly situated*, by Counsel, moves the Court for preliminary approval of a class action settlement, conditionally certifying class for purpose of settlement, appointing class counsel, directing notice to the class, and scheduling the final fairness hearing. For the reasons below, the Court should grant these requests.

I. OVERVIEW.

The Court is by now very familiar with the claims addressed in this case and the (comparable) circumstances and structure of this proposed class action settlement. This case and the others we seek to settle allege that Equifax Information Services, Inc. ("Equifax") violated the Federal Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §1681e(b) by failing to accurately report the dispositions (satisfactions, vacaturs, dismissals and appeals) of the civil judgment and tax lien public records it furnished in consumer credit reports. The case follows previous approved settlements in *Clark v. Trans Union, LLC*, 3:15-cv-391 (E.D. Va.); *Clark v. Experian*

Information Solutions, Inc., 3:16-cv-32 (E.D. Va.)[1] and as to Virginia General District Court civil judgments, *Soutter v. Equifax Information Services, LLC*, 3:10-cv-107 (E.D. Va.).

This case was only recently filed. However, all Parties and those in other comparable matters are seeking approval and administration of this national settlement in this case and before the Court in order to retain as much uniformity as is practicable in the notice and administration of the three CRA settlements, including the proposed continued reliance on the intervention of the United States Magistrate Judge, and this Court, to insure the implementation of the settlement.

While the proposed Settlement will be entered on this case's docket, it is actually transacted to resolve at least eighteen cases between Equifax and numerous consumers and plaintiffs' law firms across the country.[2] The cases included in this nationwide class-action settlement each challenge an aspect of the manner in which Equifax reports public record information, including civil judgment and tax lien information. The majority of the cases allege that Equifax had a uniform policy of diligently collecting the initial entry of civil judgments and tax liens, but did not collect subsequent dispositions of those records with the same regularity or vigor. As a result, Plaintiffs allege that when Equifax sold a consumer report that contained public record information, it knew that the information could be inaccurate because the lien could have been satisfied, vacated, appealed, dismissed, or withdrawn since Equifax purchased the initial record. These cases allege that this conduct violates Section 1681e(b) of the FCRA, which requires consumer reporting agencies to maintain reasonable procedures to ensure that the information they publish is as accurate as possible. 15 U.S.C. § 1681e(b). As a result of this

[1] However, unlike the two cases, this case and settlement does not include or address any disclosure claim under 15 U.S.C. §1681g(a), as those claims have been previously resolved as to Equifax in *Jenkins v. Equifax Information Services, LLC*, 3:15-cv-443 (E.D. Va.).

[2] Settling Plaintiffs are listed in Exhibits A of the Settlement Agreement, which is attached as Exhibit 1 to the Motion for Preliminary Approval.

conduct, consumers with satisfied or otherwise resolved public records often had inaccurate Equifax consumer reports issued about them that erroneously showed an outstanding, unpaid public record.[3]

Litigation of these claims was not limited to Virginia. Counsel's team represents clients and filed cases throughout the United States including in New York, Minnesota, Florida, North Carolina, South Carolina, Vermont, Nevada, Hawaii, Tennessee, Arkansas, Washington, Pennsylvania, Kansas, California, Alabama, and Iowa.[4] At all times during the pendency of these cases, Equifax vigorously denied all claims asserted against it. Equifax argued that its procedures regarding the updating and reporting of public records did comply with § 1681e(b), and that its merits defense barred plaintiffs' claim.

During the pendency of this litigation, the Parties engaged in extensive settlement negotiations, including multiple mediations with a nationally respected mediator who had successfully handled other substantial FCRA class cases, Eric Green.[5] Given the success

[3] Additionally, some consumers have suffered the inclusion in their credit report of a judgment or lien that did not actually belong to them. The Settlement will address and provide remedy for these consumers as well.

[4] *De La Rosa v. Equifax Information Services, LLC*, 1:18-cv-00078 (S.D. N.Y.); *Foley v. Equifax Information Services, LLC*, 0:17-cv-04320 (D. Minn.); *Fryett v. Equifax Information Services, LLC*, 5:18-cv-00109 (E.D. N.C.); *Hajjaj v. Equifax Information Services, LLC*, 3:18-cv-01637 (D. S.C.); *Hotchkiss v. Equifax Information Services, LLC* , 5:18-cv-00060 (D. Vt.); *Inscho v. Equifax Information Services, LLC*, 2:18-cv-00790 (D. Nv.); *Jerman v. Equifax Information Services, LLC,* 1:17-cv-00602 (D. Hi.); *Jones v. Equifax Information Services, LLC*, 1:17-cv-01166 (W.D. Tenn.); *Justice v. Equifax Information Services, LLC*, 1:18-cv-00342 (M.D. N.C.); *Ledbetter v. Equifax Information Services, LLC*, 5:18-cv-05177 (W.D. Ak.); *Lemmon v. Equifax Information Services, LLC*, 2:17-cv-01464 (W.D. Wash.); *Lustig v. Equifax Information Services, LLC* , 2:17-cv-01175 (E.D. Pa.); *Morales v. Equifax Information Services, LLC*, 3:18-cv-01153 (N.D. Ca.); *Nyanjom v. Equifax Information Services, LLC*, 2:18-cv-02143 (D. Ks.); *Peters v. Equifax Information Services, LLC,* 2:17-cv-01274 (N.D. Al.); *Price v. Equifax Information Services, LLC,* 4:18-cv-00236 (S.D. Iowa); *Springer v. Equifax Info. Services, LLC*, 2:18-cv-02390 (E.D. Pa.).

[5] In the field of mediation, Professor Green is accepted as the founder and still-current giant in the field. His conventional qualifications are available on his firm's webpage, http://www.resolutionsllc.com/principals.htm last visited April 12, 2019, or that of the American

Plaintiffs' Counsel had in other litigation against Equifax's competitors, these settlement discussions were fruitful and resulted in the proposed settlement presented in this Motion. (Ex. 1, Declaration of Leonard Bennett ¶¶ 21, 22).

With the further assistance of Judge Novak, these negotiations and mediation sessions resulted in an agreement on the principal terms of the settlement, which later culminated in the Settlement Agreement now presented to the Court for approval. The Settlement finally resolves, on a national basis, all litigation based on Equifax's reporting of tax liens and civil judgments throughout the United States. The Settlement provides immediate relief through Equifax's agreement to cease reporting (1) civil judgment and (2) state and federal tax lien public records while also adding significant consumer protections to Equifax's credit-reporting procedures. For

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College of Civil Trial Mediators. http://www.acctm.org/egreen/ last visited April 12, 2019. Or nearly anywhere online, where he has been described as one of the two "best mediators in the country". https://www.bestpracticesconstructionlaw.com/2015/08/articles/best-practices/tony-piazza-and-eric-green-ask-the-experts-any-mediation-question/ last visited April 12, 2019. But maybe the most interesting description was as follows:

> Standing between two clashing Berber tribes high in the Rif mountains of northern Morocco, unable to comprehend their language but fully aware of their rifles, a man learns to negotiate quickly.
>
> So began the mediation career of Eric D. Green, who later helped bring the Microsoft antitrust case to a settlement and who was named on Friday to do the same in the lawsuits against Arthur Andersen.
>
> The impasse in Morocco was in 1969, and he was a young Peace Corps volunteer.
>
> …
>
> What he learned from that early experience, and what he now does, according to lawyers who have worked with him, sounds simple. He relentlessly and aggressively draws out what the parties in a mediation want and need, working all night if necessary.

https://www.nytimes.com/2002/03/24/us/for-a-master-mediator-just-another-tough-assignment.html last visited April 12, 2109.

those consumers whose consumer reports contained inaccurate or outdated information, the Settlement also creates an Alternate Dispute Resolution Program ("ADR Program") modeled upon the TransUnion settlement through which Equifax has agreed to the creation and imposition of a ***no-fault*** remedy for the recovery of significant money damages for any consumer injured by the inaccurate reporting of civil judgments or tax liens. That remedy will be in place for twenty-four months and is uncapped. Importantly, consumers and class members are not giving up any of their claims or damages. The only release for consumers who do not chose the no-fault ADR remedy[6] is that already built into a Rule 23(b)(2) settlement and defined in the Settlement as the release of only the remedy to repeat what was done here—prosecute these same claims using a class or mass action procedure.[7] Pursuant to Federal Rule of Civil Procedure 23, the Plaintiffs now seek preliminary approval of the proposed class action settlement. Specifically, the Plaintiffs request that the Court preliminarily certify the proposed Class and class settlement by entering the attached proposed Order of Preliminary Approval of Class Action Settlement (the "Preliminary Approval Order").

II. SETTLEMENT BACKGROUND.

This core of the Settlement does not differ greatly from the other public-records settlements over which this Court has presided and approved. As with the others, Plaintiffs' Counsel entered these settlement negotiations with several structural conditions that would remain "off the table" throughout this process. First, they would not agree to a release of damages unless the class received a cash settlement. Second, even if financial relief was not automatically provided, Counsel required that those consumers who were directly harmed by

[6] If a consumer engages the ADR reedy and elects to recover damages through that process, they would sign a conventional individual settlement agreement with a typical General Release.

[7] The class and mass action release is defined in the Settlement Agreement as "Released Claims."

Equifax's practice have an available recourse. And, of course, Equifax had to address and remedy the procedural processes that were the source of the claims asserted in these cases. (Ex. 1, Bennett Decl. ¶ ¶ 25, 26.)

All of these considerations needed to be weighed against the critical challenges presented here and in other cases. Equifax has all along maintained that it had a meritorious defense to Plaintiff's § 1681e(b) claim because it maintained reasonable procedures. And, regarding the nationwide litigation of a Section 1681e(b) claim, Equifax claimed that ascertaining and identifying class members may not have been possible in some jurisdictions based on how the records were maintained by individual courthouses. While Plaintiffs certainly did not then and do not now agree that these impediments would have been dispositive, they recognize from experience the difficulties in seeking and obtaining class certification and damage recoveries in such a case and with a national class. *See e.g. Soutter v. Equifax Info. Servs., LLC*, 498 F. App'x 260 (4th Cir. 2012).

There were also challenges from a settlement prospective. The putative class size is huge—potentially over 20 million persons. Direct notice—likely required for a Rule 23(b)(3) settlement—was commercially impossible. A meaningful, but indiscriminate cash settlement would also be impossible to accomplish. And even with the important injunctive relief Plaintiffs' Counsel demanded, Equifax would join Trans Union and Experian to become the third of the "Big 3" national CRAs to implement the changes—full and near immediate cessation of the reporting of previously obtained and systemically incomplete LexisNexis judgment and lien records. (Ex. 1, Bennett Decl. ¶29.)

Given these challenges, and how they are overcome, the proposed Settlement brings unquestionably significant and groundbreaking relief to every American consumer who may

have a civil judgment or lien in their Equifax credit report. These consumers obtain the relief in exchange for no individual release. This Settlement meaningfully addresses the challenged conduct such that the violations are significantly less likely to occur in the future. (Ex. 1, Bennett Decl. ¶27.)

Importantly, the Settlement also guarantees a substantial recovery to every consumer who can show he or she suffered some adverse action[8] as a result of Equifax's inaccurately reported judgment or lien. The remedy is in place through 2021 (or twenty-four months from Final Approval) and will be very heavily publicized independent of the Rule 23(c) settlement notice process. Consumers will receive a $1,500 payment for Equifax's inaccurate reporting, with a minimal showing of harm. They will have access to the assistance of counsel, be able to submit the ADR request for payment online and can decide to reject the payment and proceed to litigation of their individual claim if they so choose.

III. THE PROPOSED SETTLEMENT.

A. The Proposed Rule 23(b)(2) Settlement Class.

The Parties seek preliminary certification of the following Class under Federal Rule of Civil Procedure 23(b)(2):

> All consumers in the United States about whom, between June 28, 2015, and the date of preliminary approval of the Settlement, Equifax issued a Consumer Report to a third party that contained a CJ/TL Public Record but did not accurately reflect the Disposition of the CJ/TL Public Record or that incorrectly attributed a CJ/TL Public Record to a consumer when it belonged to a different consumer.

[8] The Settlement adopts the very broad definition of "adverse action" provided at 15 U.S.C. § 1681a(k), which includes, a denial or revocation of credit, insurance, employment, or other license or benefit, a change in the terms of an existing credit, insurance or employment arrangement, a refusal to grant such on substantially the terms requested, and any other action taken or determination that was made in connection with an application that was made by, or a transaction that was initiated by, any consumer, and adverse to the interests of the consumer.

(Ex. 2, Settlement Agmt. ¶ 2.36.) A "CJ/TL Public Record" means a publicly available record of a civil judgment, state tax lien or federal tax lien on file in a court or other government office, which is collected by Equifax or a vendor hired by Equifax, from the court or government office, and reported by Equifax in a Consumer Report as a public record item. Tradeline information (including without limitation a remark by a furnisher that an account has been included in bankruptcy) is not a "CJ/TL Public Record" for purposes of this Agreement. (*Id.* ¶ 2.10.)

B. The Substantive Settlement Terms.

The Parties settled the FCRA claims on an Injunctive Relief class basis pursuant to Rule 23(b)(2) ("Proposed Settlement") upon these basic terms:

1. Equifax will cease reporting civil judgment and state and federal tax lien information ("CJ/TL Public Records") for five years after the effective date but may, if certain criteria such as the presentation of a proposed new system to Class Counsel are met, begin reporting it the later of (1) December 31, 2019 or (2) eighteen months after the Effective Date of this Settlement or Equifax's declaration of its intent to propose a new system for gathering, updating, and reporting CJ/TL Public Records. (Ex. 2, Settlement Agmt. ¶ 4.4.) After Equifax declares its intent to resume reporting CJ/TL Public Records, it may only do so after providing Class Counsel with the details of its proposed new collection process, which must: (1) collect dispositions at least every sixty days; and (2) be "sufficiently standardized and rigorous to ensure the accuracy and completeness of the CJ/TL Public Records (including updates) obtained." (*Id.*) Equifax may also resume reporting CJ/TL Public Records if it brings its collection and reporting procedures in line with those used by Trans Union and Experian, so long as Equifax gives Class Counsel 30 days' written notice of its intent to do so. (*Id.*) Critically, Equifax will not report any of the old public record information currently in its system, which Plaintiffs have contended are

rife with inaccuracies based on Equifax's current collection methods. (*Id.* ¶ 4.1.) Any public records data reported after this Settlement will be required to meet the new standards outlined above, which should significantly reduce future inaccuracies in Equifax's public record reports.

2. Notably, this injunctive relief would not have been available under the FCRA had the Parties decided to proceed to trial—it is uniquely available through class settlement. In addition, these procedure changes obtained in this Settlement will immediately alleviate problems associated with the reporting of public records for all consumers, by immediately removing civil judgment and state and federal tax lien public records from Equifax consumer reports. Further, when Equifax ultimately returns to reporting these records, the change in procedures will ensure that Equifax has implemented systems to ensure the utmost accuracy of its public records. These changes will not only benefit Class Members but will also benefit millions of consumers who may have public records listed in their Equifax consumer report in the future.

3. All eligible consumers will also have the right to participate in the Alternate Dispute Resolution Program ("ADR Program"), which will provide a cash payment of $1,500 to consumers who submit a valid ADR Request. (Ex. 2, Settlement Agmt. ¶ 4.2.) The ADR Program, which will be run by a neutral, third-party administrator to be selected by Equifax with Class Counsel's consent to be fully paid for by Equifax, will be available to consumers to whom Equifax incorrectly attributed a public record (an Ownership Claim) or to whom Equifax incorrectly reported the status of a public record (an Updating Claim). As to both claims, Class Members will submit ADR Request via U.S. Mail, through an online portal, via email by Class Counsel, or any other agreed-upon, reasonable means. To receive a payment, Class Members need only submit their identifying information, a description of the public record, evidence of the

inaccuracy of the public record, and evidence or a written statement of an Adverse Action following publication of the inaccurate public record. All consumers who meet the requirements set forth in the Settlement Agreement are entitled to payment—*there is no cap on the amount of funds available to pay claims*. Only consumers who accept the payment will give a full, general release of all FCRA and comparable state-law claims related to the reporting of the public record. The ADR Program will be available for a period of twenty-four months but may be extended if necessary. Class Counsel will have full access to the communications and documents generated by or provided to the ADR Administrator. Equifax will pay for both the cost of the ADR Administrator, as well as individual payments to consumers. Critically, Class Members are not obligated to accept the ADR payment, and reserve all of their rights to bring individual claims against Equifax should they feel that the ADR payment does not adequately compensate them for the harm that they have suffered. In addition, the total amount of money that Equifax is obligated to pay as part of the ADR settlement is not capped, and class member payments will not be reduced by the number of claims that are submitted.

4. The Settlement does not release ***ANY*** individual claims. (Ex. 2, Settlement Agmt. ¶ 2.33.) In fact, the only limitation imposed is a bar on repeating another case with the same claims as a class action. *Compare Berry v. Schulman*, 807 F.3d 600, 604 (4th Cir. 2015) (affirming the Court's approval of a Rule 23(b)(2) settlement in which "the class members would release any statutory damages claims under the Act" in exchange for only injunctive relief).

5. The cost of Notice and Administration, the ADR Process, and Plaintiffs' Counsel's attorneys' fees will be paid separately by Equifax and will not reduce any benefits that the Class Members receive under the Settlement. (Ex. 2, Settlement Agmt. ¶¶ 5.1, 7.1.)

C. Notice Administrators.

Plaintiffs' counsel asks the Court to appoint third-party class action administrators Kinsella Media and Angeion (the "Notice Administrators"), to oversee the administration of the settlement and the notification to Class Members. (*Id.* ¶ 7.3.) All costs and expenses for the Notice Administrators, budgeted not to exceed $1,850,000, shall be paid directly by Equifax. (*Id.* ¶ 7.1.) Kinsella has very effectively run the primary notice process in both the Trans Union and Experian settlements and has adapted the process to incorporate the tools that were the most successful in in the initial Trans Union effort. The notice program in this case was designed by Dr. Shannon Wheatman of Kinsella. Dr. Wheatman is an unparalleled expert in her field. She has designed the notice plan for over 500 complex settlements (including the unique notice program in *Berry*, which was challenged before and approved by the Fourth Circuit) and helped design the Federal Judicial Standards notice guidelines for class action settlements. Dr. Wheatman has authored numerous publications evaluating the most effective methodologies for achieving effective notice in class action settlements and has been accepted as a testifying expert on class action notice in courts across the country. (Ex. 3, Declaration of Shannon Wheatman ¶¶ 8-12.)

As set forth in Dr. Wheatman's declaration, the notice plan in this case consists of a multi-media publication notice campaign. Angeion, the notice administrator that assisted in the Experian settlement, will also establish a Settlement Website and Toll-Free telephone number. Both Kinsella and Angeion are experienced in working in large national class action settlements, including settlements involving claims under the FCRA. (*See* Ex. 3, Wheatman Decl. ¶ 13); Ex. 4, Declaration of Steven Weisbrot) Uniquely however, Kinsella will again implement a state-of-the art publication campaign conducted after approval in order to inform consumers nationwide of the injunctive changes and the availability of the ADR payment program. Plaintiffs negotiated a Notice and administration budget that will allow approximately

$1,200,000 to be devoted to just such an effort, which will be conducted through modern paid-online media as well as press releases and an effort by the Notice Administrator (in conjunction with Plaintiffs' counsel) to educate over 600 public interest organizations, legal aid programs and government agencies of the availability of this new remedy.

D. Published Notice.

Class Members will receive publication notice, both before and after final settlement approval. Prior to final approval, Kinsella will use state-of-the art methods to ensure that class members receive information about the settlement. Such notice will be consistent with the requirements of applicable law, including both Rule 23(e) and due process. The notice plan was developed using a combination of demographic information and information about the readership and behavior of likely class members and will utilize a combination of print and online media to reach class members. The notice will achieve at least a 70% reach, with a 3.0 frequency (number of exposures per person) among adults over the age of eighteen. (Ex. 3, Wheatman Decl. ¶ 31.) The online portion of the notice alone will result in approximately 380 million gross impressions. (*Id.* at ¶ 28.)

After final approval, Kinsella will continue to ensure that class members are apprised of the availability of the ADR Program. Kinsella will continue to generate organic media coverage and to continue the publication campaign (including through print media, online media, paid search, and social media campaigns) so that class members are apprised of the availability of and positioned to take advantage of the ADR Program after final settlement approval.

Angeion will also develop and maintain an Internet website dedicated to the Settlement, on which it will post key information such the long-form notice attached hereto as Exhibit 3-3. (Ex. 2, Settlement Agmt. ¶ 7.2(a).) The Notice Administrators have also proposed a program of

published notice, including using the Internet and traditional publications. (*Id.*; ¶ 7.2(b); Ex. 3, Wheatman Decl. ¶¶ 23-34.) The Administrators will also utilize additional media, such as online media, paid search, social media campaigns or other technologies. (Ex. 2, Settlement Agmt. ¶ 7.2(c)., (Ex. 3, Wheatman Decl. ¶ 23-34.)) These additional forms of notices will be implemented as soon as is feasible after the Court's grant of preliminary approval.

Unlike the Transunion and Experian cases, the notice program in this case does not include a direct email component. However, Class Counsel anticipates that the spending on post-final approval media in this case will be approximately twenty percent higher than the amount spent on post-final approval media in the other cases. Further, many of the people who will be eligible to make claims in this case have already made claims in TransUnion and Experian, so Class Counsel can reach out to them and ensure they have notice regarding this settlement as well.

E. Targeted Notice to Consumer Advocates

In addition to the efforts of Kinsella, Class Counsel has also promised to devote their substantial resources to ensuring that their national network of consumer advocates is advised of the settlement and of the availability of the ADR Program. When consumers have problems with their credit reports, they reach out to a variety of people, including attorneys general, regulatory bodies, legal aid lawyers, consumer advocacy organizations, and the private consumer bar. Class Counsel believes that it is crucial these organizations to be apprised of the relief afforded by the settlement, and of the availability of the ADR Program. Class Counsel will ensure, through a jointly drafted announcement, that state and federal consumer protection agencies, attorneys general and military legal assistance contacts, appropriate consumer groups and organizations, including legal aid and other similar organizations, and private attorneys who focus on

representing consumers all receive notice of the ADR Program. Class Counsel, all of whom serve at the board-level of national and state consumer advocacy organizations, are uniquely positioned to ensure that these additional efforts to publicize the settlement will be effective. Class Counsel have all pledged to use their best efforts, including their personal and professional networks of consumer attorney associations and advocacy organizations to ensure that reputable consumer advocacy organizations and practitioners are apprised of the ADR Program. As part of this effort, Class Counsel has already compiled a list of over 630 organizations to whom notice will be sent and is working to add even more organizations to the list. The list includes several professional organizations, such as the National Association of Consumer Advocates and the National Consumer Law Center, which maintain active list-serves to enable their members to remain apprised of important legal developments. Class Counsel will ensure that these organizations' membership list-serves all receive notice of this settlement. Class Counsel also intends to personally provide notice regarding the settlement to the identified organizations. Further, Class Counsel has presented at national conferences for consumer lawyers about the public records cases, and will continue to discuss these settlements when they present to fellow members of public interest and consumer advocacy organizations.

F. Website, Toll-Free Number And Class Counsel Assistance.

Angeion shall also establish a Settlement Website containing information about the settlement, including a long-form notice in a format to be agreed by the parties. The settlement website shall also contain relevant pleadings and documents in the underlying litigation, including without limitation, the operative pleadings, the settlement agreement, and all documents filed with the court in support of preliminary approval, final approval and/or attorneys' fees and expenses. (Ex. 2, Settlement Agmt. ¶ 7.2(a).) The Settlement website shall

also provide full details regarding the injunctive relief. The website will be updated as the case advances and will remain online until completion of the eighteen-month ADR Program period.

Angeion shall also establish a toll-free number, which shall connect class members with an Interactive Voice Response (IVR) system with a script explaining the nature and details of the settlement. (*Id.* ¶ 7.2(d).) Individual questions or requests for assistance will be referred to Class Counsel. After final approval, the settlement webpage shall be updated contain an agreed upon statement that the settlement has achieved final approval and shall contain a link to the online portal where class members are able to submit claims pursuant to the ADR Program.

G. Class Counsel's Fees, Costs, and Expenses.

There are at least fifteen pending cases in different states, a large number of attorneys and law firms who have worked in those (and these) cases, and the need for Class Counsel to commit to continue work on behalf of the consumers in the Class in this case for many years longer without the ability to recover additional fees and costs.[9]

Plaintiffs and their Counsel will ask the Court to approve the attorneys' fees and service awards negotiated by the Parties and permitted in the Settlement Agreement. (Ex. 2, Settlement Agmt. ¶ 5.1.) Both of these subjects—fees and service awards—were addressed in mediation only after the Parties had reached an agreement as to the recovery for the Class. Plaintiffs demanded an amount over twice as large as ultimately agreed. Eventually, Equifax agreed to pay attorneys' fees at an agreed amount negotiated by mediator Eric Green. The fees here are substantially lower that in the recent Trans Union and Experian settlements as there is no §1681g(a) claim or one for Virginia GDC judgments, both previously settled as to Equifax.

Plaintiffs' Counsel's attorneys' fee request will include their efforts in obtaining the injunctive relief that the settlement provides, based in large part on the value of the relief to

[9] *See footnote 4, supra.*

consumer and the dynamic shift that it represents in the industry. As previously explained, the change in business practices negotiated by Plaintiffs and their counsel is substantial. The injunction affords far better substantive relief than the Court or a jury could compel following a complete victory on all of Plaintiffs' claims. The relief represents a major change in Equifax's practices, which will provide genuine relief to millions of American consumers. After an agreement was achieved on the substance of the injunctive relief, the Parties then began to negotiate reasonable attorneys' fees as compensation for that portion of the settlement, which is to be paid entirely by Equifax, without any reduction in Class Member benefits.

Importantly—critically, even—"[h]ere, class counsel's fee was negotiated by the parties, and the Agreement allowed for a total attorneys' fee award . . . to be paid entirely by" the defendant. *Berry*, 807 F.3d at 617. So there can simply be no argument that the fee award competes with or takes relief from Class Members. As the Fourth Circuit held in the comparable *Berry* settlement, "this case does not raise the kind of concerns that might call for an especially robust or detailed explanation of a fee award by a district court. There is no reason to worry here that 'the lawyers might [have] urge[d] a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees.' . . . [G]iven the size of the (b)(2) Class and the fragility of its legal position, there was never any realistic possibility of class-wide monetary relief; put bluntly, there is no reason to think that class counsel left money on the table in negotiating this Agreement." *Id*. at 618.

Finally, to finish the preview of Plaintiffs' Counsel's later argument and as described above, the fee sought was intended to compensate and reflect several things: (a) all of the work leading up to the filing of the Lawsuit (investigations, the huge effort to find and retain consumer clients, the preparation for the filing of numerous cases); (b) all of the work during the litigation

and mediation, through final approval; and (c) the huge amount of work that this settlement structure and class size will impose after approval. All of us know from experience that this class of millions will pose tremendous resource and logistical burdens on each of the firms involved. In this case, there will be millions of class members. And those class members will be facing a settlement structure that seeks to empower the class member to participate in the ADR Process. Class Counsel will not only assist individual class members in participating in the ADR Process but will also monitor the ADR Process to ensure that consumers are treated fairly. If the Court ultimately approves the stipulated fee, Plaintiffs' Counsel will receive a substantial fee, but not one outside of the multiples consistently approved by the Court and in this Circuit.

IV. ARGUMENT AND AUTHORITIES.

There is a strong judicial policy in favor of settlement, because they conserve scarce resources that would otherwise be devoted to protracted litigation. *See In re MicroStrategy, Inc. Sec. Litig.,* 148 F. Supp. 2d 654, 663 (E.D. Va. 2001); *see also Ehrheart v. Verizon Wireless,* 609 F.3d 590, 595 (3d Cir. 2010) (there is an "especially strong" presumption in favor of voluntary settlements in "class actions . . . where substantial judicial resources can be conserved by avoiding formal litigation."); *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977); *Van Bronkhorst v. Safeco Corp.,* 529 F.2d 943, 950 (9th Cir. 1976); 2 Alba Conte & Herbert Newberg, NEWBERG ON CLASS ACTIONS § 11.41 (4th ed. 2002) ("The compromise of complex litigation is encouraged by the courts and favored by public policy."). This includes the "strong initial presumption" in class action cases "that the compromise is fair and reasonable." *In re MicroStrategy*, 148 F. Supp. 2d at 663 (internal quotation marks omitted). Proposed settlements must, nevertheless, satisfy the requirements of Rule 23. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 592 (1997).

Rule 23 "states that '[a] class action may be maintained' if two conditions are met: The suit must satisfy the criteria set forth in subdivision (a) (i.e., numerosity, commonality, typicality, and adequacy of representation), and it also must fit into one of the three categories described in subdivision (b)." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.,* 599 U.S. 393, 398 (2010) (quoting Fed. R. Civ. P. 23). Here all of these elements are met, an important note in the difficult-to-certify Section 1681e(b) context. *See Soutter v. Equifax Info. Servs., LLC*, 307 F.R.D. 183 (E.D. Va. 2015) (certifying a contested class under 1681e(b)).

A. The Rule 23(a) Strictures Are Met.

1. Numerosity.

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." There is no set minimum number of potential class members that fulfills the numerosity requirement. *See Holsey v. Armour & Co.*, 743 F.2d 199, 217 (4th Cir. 1984). However, where the class numbers 25 or more, joinder is usually impracticable. *Cypress v. Newport News General & Nonsectarian Hosp. Ass'n,* 375 F.2d 648, 653 (4th Cir. 1967) (18 class members sufficient).

The numerosity requirement is easily met here. There are millions of class members, including the named Plaintiffs. Joinder of this many individuals is neither possible nor practical, so the first prong of the certification test has been met. *See Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 425 (4th Cir. 2003).

2. Commonality.

Rule 23(a)(2) requires that the court find that "there are questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). "Commonality is satisfied where there is one question of law or fact common to the class, and a class action will not be defeated solely

because of some factual variances in individual grievances." *Jeffreys v. Commc'ns Workers of Am., AFL-CIO*, 212 F.R.D. 320, 322 (E.D. Va. 2003). And the common issue must be such that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*. The standard is a liberal one that cannot be defeated by the mere existence of some factual variances in individual grievances among class members. *Jeffreys*, 212 F.R.D. at 322; *Mitchell-Tracey v. United Gen. Title Ins. Co.*, 237 F.R.D. 551, 557 (D. Md. 2006) (finding that factual differences among class members will not necessarily preclude certification "if the class members share the same legal theory.").

Here, by definition, Class Members share the same questions of law and fact. They are alleged to be the victims of policies and procedures whereby Equifax, in violation of the FCRA, failed to timely update public record information. The theories of liability as to all Settlement Class Members, therefore, arise from the same practices, that is, Equifax's practice of collecting and reporting public records on consumer reports. These theories of liability present basic questions that are common to all Settlement Class Members.

3. Typicality.

In the typicality analysis, "[a] class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Lienhart v. Dryvit Sys., Inc.,* 255 F.3d 138, 146 (4th Cir. 2001). "Nevertheless, the class representatives and the class members need not have identical factual and legal claims in all respects. The proposed class satisfies the typicality requirement if the class representatives assert claims that fairly encompass those of the entire class, even if not identical." *Fisher v. Va. Elec. & Power Co.,* 217 F.R.D. 201, 212 (E.D. Va. 2003). "The typicality requirement mandates that Plaintiffs show (1) that their interests are squarely aligned with the interests of the class members and

(2) that their claims arise from the same events and are premised on the same legal theories as the claims of the class members." *Jeffreys*, 212 F.R.D. at 322. Commonality and typicality tend to merge because both of them "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 n.5 (2011).

Here, Plaintiffs' claims arise from Equifax's failure to maintain reasonable procedures designed to ensure that its public record reporting was as accurate as possible. As discussed in the previous section, these are the same claims advanced on behalf of all of the Settlement Class Members, and Plaintiffs are Class Members. Plaintiff's claims thus rest on the same legal and factual issues as those of the Settlement Class Members. Consequently, in seeking to prove their claims, Plaintiffs will necessarily advance the claims of Settlement Class Members. This is the hallmark of typicality. *See Deiter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2001) (citing Rule 23(a)(3)).

4. Adequacy of Representation.

"Finally, under Rule 23(a)(4), the class representatives must adequately represent the interests of the class members, and legal counsel must be competent to litigate for the interests of the class." *Jeffreys,* 212 F.R.D. at 323. "Basic due process requires that the named plaintiffs possess undivided loyalties to absent class members." *Fisher*, 217 F.R.D. at 212 (citing *Broussard v. Meineke Disc. Muffler Shops,* 155 F.3d 331, 338 (4th Cir. 1998)).

The adequacy of representation requirement is met here. Plaintiffs understand and have accepted the obligations of a class representative, have adequately represented the interests of

the putative class, and have retained experienced counsel who have handled numerous consumer-protection class actions. Plaintiffs' lead counsel has effectively handled numerous consumer-protection and complex class actions, typically as lead or co-lead counsel. *See, e.g.*, *Clark v. Trans Union, LLC*, No. 3:15CV391, 2017 WL 814252, at *13 (E.D. Va. Mar. 1, 2017) ("This Court echoes the sentiments previously stated about Clark's counsel because they pertain here with equal vigor.") (citing *Manuel v. Wells Fargo Bank, Nat'l Ass'n*, No. 3:14cv238, 2016 WL 1070819, at *3 (E.D. Va. Mar. 15, 2016) ("[T]his Court would have difficulty overstating Class Counsel's experience in the area of FCRA class action litigation.")); Final Approval Hr'g Trans., *Campos-Carranza v. Credit Plus, Inc.*, Case No. 1:16-cv-120, at 5:3-7 (LMB/MSN) (E.D. Va. Feb. 17, 2017) ("I think this is an extremely, as I say, extremely fair, reasonable, and adequate settlement. Again, the claims -- and I think being generous on the time limit for the claims was also appropriate. So I have no difficulty in signing this order."); *Thomas v. FTS USA, LLC*, 312 F.R.D. 407, 420 (E.D. Va. 2016) ("the Court finds that Thomas'[s] counsel is qualified, experienced, and able to conduct this litigation so as to fully and adequately represent both classes. Counsel is experienced in class action work, as well as consumer protection issues, and has been approved by this Court and others as class counsel in numerous cases around the country."); *Ceccone v. Equifax Info. Servs. LLC*, No. 13-CV-1314 KBJ, 2016 WL 5107202, at *6 (D.D.C. Aug. 29, 2016) ("Given these qualifications, and in light of Class Counsel's conduct in court and throughout these proceeding, this Court concludes that Class Counsel is qualified to prosecute the interests of this class vigorously."); *Dreher v. Experian Info. Sols., Inc.*, No. 3:11-CV-00624-JAG, 2014 WL 2800766, at *2 (E.D. Va. June 19, 2014) ("Dreher's counsel is well-experienced in the arena of FCRA class action litigation."); Fairness Hr'g Tr., *Burke v. Seterus, Inc.*, 3:16-cv-785, at 9:19-22 (E.D. Va. 2017) ("Experience of counsel on both sides in this case

is extraordinary. Ms. Kelly and Ms. Nash and their colleagues are here in this court all the time with these kinds of cases and do a good job on them."); *James v. Experian Info. Sols., Inc.*, No. 3:12CV902 (E.D. Va. Oct. 29, 2014) (ruling on final approval in open court and finding "experience of counsel on both sides is at the top level of representation in cases of this sort and, indeed, perhaps beyond that"); *Soutter v. Equifax Info. Servs.*, *LLC*, 2011 U.S. Dist. LEXIS 34267, at *28 (E.D. Va. Mar. 30, 2011) (stating "the Court finds that Soutter's counsel is qualified, experienced, and able to conduct this litigation. Counsel is experienced in class action work, as well as consumer protection issues, and has been approved by this Court and others as Class Counsel in numerous cases."); (*see* Ex. 1, Bennett Decl. ¶¶ 9, 10; *see generally* Ex. 5 Drake Decl.; Ex. 6, Declaration of Kristi Kelly; Ex. 7, Declaration of James Francis; Ex. 8, Micah Adkins Declaration.)

Plaintiffs have no antagonistic or conflicting interests with the Class Members. Both Plaintiffs and the Class Members seek injunctive relief for Equifax's alleged unlawful actions. The Plaintiffs are members of the Settlement Class. Considering the identity of claims, there is no potential for conflicting interests in this action. And the proposed class representatives have been very active in these cases, submitting to depositions and extensive written discovery, attending multiple mediations and settlement conferences with Judge Novak and private mediator Eric Green and fulfilling all of the responsibilities of a Class Representative. (Ex. 1, Bennett Decl. ¶¶ 34, 35.) Accordingly, the Class is adequately represented to meet Rule 23's requirements.

B. The Rule 23(b)(2) Requirements Are Also Satisfied.

"In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)." *Amchem*, 521 U.S.

at 614. The Settlement provides for substantial injunctive relief, and therefore may appropriately be certified under Rule 23(b)(2), which requires a showing that the defendant "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief . . .with respect to the class as a whole." FED. R. CIV. P. 23(b)(2).

Parties seeking class certification under Rule 23(b)(2) must show that the defendant has "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief . . .with respect to the class as a whole." FED. R. CIV. P. 23(b)(2); *Thorn v. Jefferson-Pilot Life Ins. Co*., 445 F.3d 311, 329 (4th Cir. 2006) (alterations in original). More simply stated, Rule 23(b)(2) certification is proper "if members of the proposed class would benefit from the injunctive relief" *Cuming v. S.C. Lottery Comm'n*, No. 3:05-cv- 03608-MBS, 2008 WL 906705, at *6 (D.S.C. March 31, 2008) (citing *Thorn*, 445 F.3d at 331). In addition, any request for monetary relief by the class must be "incidental" to the injunctive relief before certification under Rule 23(b)(2) is appropriate. *Allison v. Citgo Petrol. Corp*., 151 F.3d 402, 415 (5th Cir. 1998); *Thorn*, 445 F.3d at 329 ("Rule 23(b)(2) does not 'cover cases where the primary claim is for damages but is only applicable where the relief sought is . . . predominantly injunctive or declaratory.'") The Class satisfies both of these requirements.

Plaintiffs alleged that Equifax failed to maintain reasonable procedures designed to ensure that its public records reporting was as accurate as possible. Instead, it reported public record information, including civil judgment and tax liens, despite knowing that the information would likely be inaccurate if a subsequent disposition—i.e., a satisfaction, appeal, vacatur, dismissal, or withdrawal—had occurred with respect to that record. The Settlement Agreement treats all Class Members alike in granting them the substantial benefits of the injunctive relief obtained in settlement, whereby Equifax will cease reporting public records for five years (where

other CRAs have agreed to three), and will institute new procedures, subject to approval by Class Counsel, when it does start reporting new records. The Settlement also provides Class Members with the option to participate in an ADR process to resolve any actual damages claims against Equifax for its reporting of inaccurate public record information. And unlike Trans Union and Experian, the ADR process will last for a period of 24 months.

Protecting Plaintiffs' interests in the proper reporting of their public record information as proscribed by the Settlement Agreement is analogous to the classic Rule 23(b)(2) cases in which "various actions in the civil-rights field" dealing with discrimination were certified as Rule 23(b)(2) class actions, so that classwide discrimination could be remedied with a classwide program of relief. *See* FED. R. CIV. P. 23 advisory committee's note. Such injunctive relief is a powerful, efficient, and effective way of protecting broad interests like the proper treatment of information when out-of-pocket monetary losses are sometimes difficult to prove based on the violation of such interests.

While Defendant maintains that it has always acted in compliance with the law, the fact that the Settlement modifies Defendant's conduct as to the class as a whole makes it appropriate for certification under Rule 23(b)(2). *Wal-Mart*, 564 U.S. at 360 ("The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'") (citation omitted). The injunctive relief provided for in the Settlement gives a direct benefit to the Class Members going forward because all public records, including accurate derogatory public records, will be removed from consumer's reports. And, when Equifax does begin to re-report public record information, the Settlement guarantees that the information reported will be more accurate.

The class also meets Rule 23(b)(2)'s second requirement—that the settlement not be a disguised Rule 23(b)(3) monetary relief settlement. The Settlement here creates an ADR Process, whereby Class Members may obtain monetary relief, but the Settlement itself does not pay or extract a release for monetary damages. Class Members would retain the right to seek individual relief absent the Settlement, so the ability to obtain individual relief is not affected. The Settlement simply creates a no-fault alternative by which consumers may prosecute and assert those rights and sets forth a set monetary payment structure that is voluntary for Class Members. But they lose nothing by choosing not to participate in the ADR process.

In sum, the class is properly certified pursuant to Rule 23(b)(2) because the predominating interests of the Class are addressed by injunctive relief and Plaintiffs' demand for the ADR Process assists, but does not bind, those Class Members who suffered actual damages.

C. The Settlement Is Fair, Reasonable, And Adequate, And Should Be Preliminarily Approved.

After the analysis of the Rule 23(a) and (b) elements, the Court must then decide whether the proposed settlement is fair, reasonable, and adequate. Although pretrial settlement of class actions is favored, "Rule 23(e) provides that 'a class action shall not be dismissed without the approval of the court." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991) (citations omitted). "To this end, 'the role of the Court reviewing the proposed settlement of a class action under Fed. R. Civ. P. 23(e) is to assure that the procedures followed meet the requirements of the Rule and . . . to examine the settlement for fairness and adequacy.'" *In re MicroStrategy*, 148 F. Supp. 2d at 663.

"[T]he Fourth Circuit [has] adopted a bifurcated analysis, separating the inquiry into a settlement's 'fairness' from the inquiry into a settlement's 'adequacy.'" *Id*. These safeguards ensure that "a proposed class has sufficient unity so that absent members can fairly be bound by

decisions of class representatives." *Amchem*, 521 U.S. at 621; *see also In re Jiffy Lube*, 927 F.2d at 158 ("The primary concern addressed by Rule 23(e) is the protection of class members who rights may not have been given adequate consideration during the settlement negotiations."). In this case, each set of factors weighs in favor of approving the Settlement.

1. The proposed Settlement is fair.

When evaluating the fairness of a settlement, the Court must evaluate the settlement against the following criteria: "(1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel." *In re Jiffy Lube*, 927 F.2d at 159. The fairness inquiry ensures that "the settlement was reached as a result of good-faith bargaining at arm's length, without collusion." *Id*. These factors point persuasively to the conclusion that the settlement here is fair.

The Settlement was reached after significant work was conducted in these cases. As discussed above, the Parties engaged in substantial third-party discovery and thoroughly investigated the facts and claims at issue. The Parties also engaged in extensive, good faith, arm's-length negotiations in numerous separate mediations supervised by an independent mediator as well as Judge Novak. A settlement was reached as a result of these mediations and subsequent discussions between the Parties.

Pursuant to the Settlement, the putative Class Members are guaranteed a substantial recovery with ground-breaking injunctive relief and access to a valuable ADR process that will pay them real money. The settlement is narrowly drawn to limit the release to only class action cases pertaining to Equifax's failure to report correct and up-to-date public records due to a subsequent disposition. No individual claims for statutory, punitive, or actual damages are

released and no other FCRA class claims are excluded.

Given the substantial relief obtained for Class Members, when contrasted against the risks associated with litigating this matter, the proposed settlement is fair and appropriate for approval. *See S.C. Nat'l Bank v. Stone*, 139 F.R.D. 335, 339 (D.S.C. 1991) (concluding fairness met where "discovery was largely completed as to all issues and parties," settlement discussions "were, at times, supervised by a magistrate judge and were hard fought and always adversarial," and those negotiations "were conducted by able counsel" with substantial experience in the area of securities law).

2. The Proposed Settlement is Adequate.

In assessing the adequacy of the Settlement, the Court should look to the following factors: "(1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement." *In re Jiffy Lube*, 927 F.2d at 159.

While it is too early to address the last factor, application of the other relevant factors confirms that the proposed settlement is adequate and should be preliminarily approved.

a. The relative strength of the Plaintiffs' case and the difficulty in proving liability.

As noted, Equifax has disputed Plaintiffs' claims since the inception of these cases and has raised a number of defenses to Plaintiffs' class claims. Given the Parties' arguments, the potential risks and expenses associated with continued prosecution of the Lawsuit, the likelihood of appeals, the certainty of delay, and the ultimate uncertainty of recovery through continued litigation, the proposed settlement is adequate. Additionally, the numerous other cases filed

across the country significantly increased Equifax's exposure. As the Court recently summarized in another FCRA settlement, "[g]iven these difficulties with the willfulness claim, the benefit of the substantial relief provided by the settlement without the risk of litigation demonstrates the adequacy of the Settlement Agreement." *Manuel v. Wells Fargo Bank, Nat'l Ass'n*, 3:14CV238(DJN), 2016 WL 1070819, at *4 (E.D. Va. Mar. 15, 2016).

b. The anticipated duration and expense of additional litigation.

Aside from the potential that either side will lose at trial or on appeal, the Parties anticipate incurring substantial additional costs in pursuing this litigation further. The level of additional costs would significantly increase as the Parties continue to litigate here and in other jurisdictions. Thus, the likelihood of substantial future costs favors approving the proposed Settlement.

Even more importantly, the long delay threatened by continued litigation, interlocutory appeal, and terminal appeal would prevent the changes to Equifax's reporting procedures that were the ultimate goal of the Plaintiffs' Counsel. Between now and the very end of a contested path, a million or more new consumer files will have suffered adverse credit actions due to inaccurate or stale public-record information.

c. The solvency of the Defendant and the likelihood of recovery.

Equifax is solvent and in theory could pay a class judgment in one or two of the pending cases. However, it was facing numerous lawsuits across the country, exposing it to significant liability. In addition, for a nationwide settlement, there was absolutely no path available for a meaningful cash settlement. For example, a payment of just $100 to 2.5 million people would require as much as $250 million—an amount that would require the liquidation of most of Equifax's salable hard assets. This factor weighs heavily in favor of approval of the unique and

"release-less" settlement structure before the Court.

D. The Proposed Class Notice Program Satisfies Due Process And Is Appropriate And Reasonable Under The Circumstances.

Rule 23(e)(1) requires that the court "direct notice is a reasonable manner to all class members who would be bound by the proposal." FED. R. CIV. P. 23(e)(1). For a class certified under Rule 23(b)(2) the court "*may* direct appropriate notice to the class." FED. R. CIV. P. 23(c)(2)(A) (emphasis added). In the context of a class settlement for a class certified under Rule 23(b)(2), the "best notice practicable" standard does not apply as it would for a settlement class certified under Rule 23(b)(3). FED. R. CIV. P. 23(c)(2)(B). Even though it is not required, the Settlement provides for a robust notice program that exceeds what is required for due process and would be appropriate even if this were a Rule 23(b)(3) settlement.

First, the Settlement provides for a direct notice program that requires Angeion to send direct email notice to 2 million likely Class Members. Angeion will also establish the Settlement Website and maintain toll-free phone number that will provide information regarding the settlement. As set forth in the declaration of Steven Weisbrot, Angeion has the experience and qualifications to administer the direct notice aspect of the Notice Program.

Kinsella has developed and will implement a multi-faceted publication notice program (*See* Ex. 3, Wheatman Decl.) As explained in detail in Dr. Wheatman's declaration, information regarding the settlement will be published in widely circulated magazines, such as People and National Geographic. (*Id.* ¶ 25.) As for online advertising, Kinsella will purchase 380 million gross impressions including online banner ads on Google, Facebook and Conversant, keyword advertisements on Google and Bing, and Facebook newsfeed advertising. (*Id.* ¶ 29.) This paid media program along with the direct notice program is designed to reach at least 70% of adults in the country over the age of 18 with expectation that each person will be exposed to information

regarding the settlement on average 3.0 times. (*Id.* ¶ 31.) Kinsella will also widely distribute a press release regarding the settlement to nearly 10,000 print, broadcast, and online media outlets. (*Id.* ¶ 34.) Moreover, after final approval, Kinsella and Class Counsel will engage in a publicity program to raise awareness about the ADR Program. (*Id.* ¶ 45.)

The Class Members also have the opportunity to object to the proposed Settlement. Any Class Member who intends to object to the fairness of this settlement must file a written objection with the Court after the Notice is mailed to the Class Members and provide a copy to Class Counsel and counsel for Defendant. The Class Members will be notified that they may enter an appearance through an attorney at their own expense if the member so desires.

The proposed notice is appropriate and complies with both Rule 23(c)(2)(A) and (e)(1). The notice contains all of the required Rule 23 information and properly advises the Class Members of their rights. The expected reach of 70% satisfies the benchmark set forth by the Federal Judicial Center,[10] and will allow Class Members to provide feedback regarding the settlement. Similar notice plans have been approved in Rule 23(b)(3) settlements under the higher "best notice practicable" standard. *See, e.g., Edwards v. Nat'l Milk Producers Fed'n*, No. 11-CV-04766-JSW, 2017 WL 3623734, at *4 (N.D. Cal. June 26, 2017) (noting that "notice plans estimated to reach a minimum of 70 percent are constitutional and comply with Rule 23" and approving notice plan that reached 75% of settlement class); *McCabe v. Six Continents Hotels, Inc.*, No. 12-CV-04818 NC, 2015 WL 3990915, at *11 (N.D. Cal. June 30, 2015) (approving notice program with 70% reach with a frequency of 1.6); *In re Bldg. Materials Corp. of Am. Asphalt Roofing Shingle Prod. Liab. Litig.*, No. 8:11-MN-02000-JMC, 2014 WL

[10] Fed. Judicial Ctr., Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide at 1, 3 (2010), available at https://www.fjc.gov/sites/default/files/2012/NotCheck.pdf.

12621614, at *6–7 (D.S.C. Oct. 15, 2014) (approving publication notice plan by Kinsella that would reach 80% of settlement class). The proposed method for notifying the Class Members thus satisfies both Rule 23 and due process and constitutes reasonable and appropriate notice under the circumstances.

V. CONCLUSION.

For the foregoing reasons, the Court should grant preliminary approval of the proposed Settlement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of April 2019, I have electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notice of electronic filing to all counsel of record:

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