STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	ELEVENTH JUDICIAL CIRCUIT
	)	
GEORGE BOSKIE, HADEL TOMA and TERRY KELLER,	)	CASE NO. 2019CP3200824
	)	
Plaintiffs,	)	**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, COSTS, AND CLASS REPRESENTATIVE SERVICE AWARDS**
	)	
v.	)	
	)	
BACKGROUNDCHECKS.COM, LLC	)	
	)	
Defendant.	)	
	)	

INTRODUCTION

The Settlement in this case will result in industry-changing relief for two Settlement Classes. Specifically, Defendant Backgroundchecks.com will make significant changes to its business model and will require its customers, to do the same. The Injunction that Defendant has agreed to enter into as a part of the Injunctive Relief Settlement provides enormous benefits to consumers and will improve the accuracy and completeness of the consumer reports issued by Defendant's customers.[1] Inaccurate background checks can cause consumers to lose job or housing opportunities. Dr. Stan Smith, an economist, conservatively values the Injunction as having an aggregate value in the hundreds of millions of dollars if not billions of dollars. (Declaration of Dr. Stan Smith ("Smith Decl.")). Importantly, in exchange for this extensive relief, Injunctive Relief Class Members are not releasing any claims for actual damages. The HomeAdvisor Settlement also provides meaningful relief, providing for a common fund of $834,675 with expected monetary payments of approximately $95 for over 5,300 Class Members. This recovery is substantial and exceeds recoveries in similar cases.

[1] Unless otherwise defined, all capitalized terms used in this Motion have the same meaning as in the parties' Settlement Agreement ("Settlement") that was attached as Ex. A to the Declaration of E. Michelle Drake submitted with Plaintiffs' motion for preliminary approval.

For their efforts in achieving this landmark relief for millions of consumers, Plaintiffs George Boskie, Hadel Toma, and Terry Keller ("Plaintiffs") and Class Counsel move the Court for an Order approving the following payments: (1) the stipulated $2,100,000 in attorneys' fees to Class Counsel in connection with the Injunctive Relief Class; (2) one-third ($278,225) of the common fund provided to the HomeAdvisor Class for attorneys' fees; (3) reimbursement of one-half Class Counsel's out-of-pocket costs expended in litigating this matter ($11,279.50) to be deducted from the HomeAdvisor Settlement common fund; (4) settlement administration expenses of up to $29,000 for administration of the HomeAdvisor Settlement and to be deducted from the HomeAdvisor Settlement common fund; and (5) Class Representative Service Awards to Plaintiffs Boskie, Toma, and Keller in the amount of $3,500 each with Plaintiff Boskie's award to be deducted from the HomeAdvisor Settlement common fund. Pursuant to the Settlement Agreement and the Preliminary Approval Order, this motion is being filed 14 days in advance of the deadline to object to the Settlement and will be posted upon filing to the Settlement websites

BACKGROUND

I. THE SETTLEMENT PROVIDES SIGNIFICANT RELIEF TO MILLIONS OF CLASS MEMBERS.

As described in greater detail in Plaintiffs' preliminary approval papers, the Settlement here provides two Settlement Classes with meaningful and substantial relief.

First, the Injunctive Relief Settlement will completely overhaul how Defendant operates its business. Defendant is one of the leading criminal record data providers to consumer reporting agencies that provide criminal background checks to employers and landlords. Defendant's customers are referred to as "Downstream CRAs" in the settlement documents because they are consumer reporting agencies ("CRAs") who buy data from Defendant and then use that data to prepare reports to sell to end-users or other CRAs. Defendant has consistently maintained that it

is not a CRA and has no obligation whatsoever to comply with the FCRA. The Injunctive Relief Settlement will make Defendant subject to an Injunction which introduces certain aspects of compliance with the FCRA for Defendant and the Downstream CRAs.[2] First, Defendant must obtain a certification from its Downstream CRA customers regarding what the Downstream CRA is going to do with the data provided by Defendant. (Injunction, Art. 2.) This certification will include information about both the way in which the data will ultimately be used, as well as the extent to which the Downstream CRA is going to perform further verification and/or compliance filtering on the data provided by Defendant. *Id.* Depending on the certification provided, Defendant will implement different procedures with respect to the data that it provides to the Downstream CRAs, thereby ensuring that either Defendant or the Downstream CRA has assumed responsibility for performing tasks to ensure that the data is accurate, up to date, and not obsolete before it is provided to an end-user.

On one end of the spectrum, a Downstream CRAs may certify that it will take all the steps necessary to comply with the FCRA—such as making sure that the data matches the subject of the search, making sure the data matches the up-to-date public record, and making sure that the data is not too old to be presented on a consumer report. Downstream CRAs who make these certifications will be provided with the most expansive set of data from Defendant's database searches. (Injunction Art. 2, § 3.1 ("Research and Notify") & Art. 5.) On the other end of the spectrum, some Downstream CRAs who do not agree to take further steps to verify the data received will receive only data that has gone through the same matching updating and obsolescence filtering procedures that Defendant employs when Defendant provides a report directly to an end-user. (Injunction Art. 2, § 3.10 ("Restrict") & Art. 5.) And there are various options in between

[2] The Injunction is attached to the Settlement as Exhibit G.

these two ends of the spectrum. Defendant has provided extensive information regarding the processes and procedures that apply to Defendant's reports that are provided to end users and the data that it will be providing to Downstream CRAs under the various certification regimes in the Injunction.

The Injunction will improve the accuracy and completeness of consumer reports issued by Downstream CRAs and will also help ensure that data which is too old to be included on a consumer report is not published to end-users. The Injunction provides an enormous benefit to consumers because inaccurate consumer reports can have devastating consequences, including job loss and loss of housing opportunities. The Injunctive Relief will benefit both consumers who do not have criminal records and consumers who do have criminal records.

Dr. Stan Smith is a widely respected economist who has significant experience valuing damages and settlement relief in FCRA cases. According to Dr. Smith, the value of the Injunction is easily in the hundreds of millions of dollars. (Smith Decl. ¶ 45.) For people who have criminal records, Dr. Smith has identified several ways that the settlement will produce tangible economic value. First, many individuals have criminal records that, absent the Settlement, may not have been updated to reflect reduced charges or post-conviction relief, such as expungement. For these individuals, Dr. Smith estimates the value of the Injunction at over one hundred million dollars in potentially avoided lost wages. (*Id.* ¶ 35.) Dr. Smith notes that the Injunction will prevent consumers from incurring costs associated with unnecessarily failed rental applications. (*Id.* ¶ 42.) The Injunction will also save consumers time in having to dispute inaccurate records. (*Id.* ¶ 39.) The Injunction further provides significant relief for people without criminal records, because it helps ensure that they will not have criminal records misattributed to them. Based on the prevalence of background screening in employment and using conservative assumptions, Dr.

Smith estimates that the potential lost earnings saved by the Injunction for people who do not have criminal records are easily worth hundreds of millions of dollars. (*Id.* ¶ 41.) For all of this valuable relief, Injunctive Relief Class Members are not giving up any claims against Defendant for actual damages related to any inaccurate reporting. Those claims are preserved.

The HomeAdvisor Settlement is a monetary settlement. The HomeAdvisor Class alleged that reports that Defendant provided to HomeAdvisor (an end-user as opposed to a Downstream CRA) contained dismissed charges that were too old to be reporting under the FCRA. The approximately 5,300 HomeAdvisor Settlement Class Members will each receive approximately $95 if the requested fees, costs, and service awards are granted.

II. CLASS COUNSEL'S EFFORTS TO PROCURE THE SETTLEMENT.

Class Counsel have seen the devastating effects of inaccurate background checks first-hand. They have been fighting for reform in the background check industry for years and believe that the Settlement provides enormous benefits to consumers. Given Defendant's position as a leader in its industry, Class Counsel hopes that the Injunction will serve as a template for industry-wide reform.

As set forth in the Declaration of E. Michelle Drake filed with this motion ("Drake Decl."), Class Counsel are experienced FCRA litigators. E. Michelle Drake and John Albanese from Berger Montague have worked extensively on FCRA class actions, in particular class actions involving the criminal background check industry. (Drake Decl. ¶¶ 10, 18.) Class Counsel have litigated over 40 FCRA class actions, and routinely speak nationally on the FCRA and class action litigation. (*Id.* ¶ 8, 18.) Berger Montague monitors every new FCRA case that is filed in court on a daily basis, tracks every FCRA class action case, and reads every FCRA opinion issued anywhere in the country. (*Id.* ¶ 13.) Ryan Hancock of Willig, Williams & Davidson is similarly qualified to represent the Class. Mr. Hancock frequently represents clients in background check related

litigation and has been a long-time advocate for criminal justice reform. (*Id.* ¶¶ 19-20.) In total, Class Counsel have spent years and tens of thousands of hours gaining knowledge and expertise in background check litigation and the background check industry more generally. This vast experience is not evident from the time specifically billed to this case, but played an important role in obtaining the Settlement.

Class Counsel took this case on a contingent basis with no guarantee of recovery. (Drake Decl. ¶ 14.) Class Counsel have worked on this matter for three years without compensation or reimbursement for their time and out-of-pocket expenses. In the event that Class Counsel did not successfully resolve this matter (and as described below, this case was risky), Class Counsel would have been paid nothing.

Although the parties settled this case in the pre-trial stage, Class Counsel have invested a substantial amount of time (over 700 hours to date) and resources investigating and litigating this action, including $22,559.00 in out-of-pocket costs. (Drake Decl. ¶ 17.) Many of the tasks performed by Class Counsel are not evident based solely on a review of the dockets in this matter, as much of the litigation took place outside of the courtroom. Tasks performed by Class Counsel thus far include: (1) investigating the claims; (2) researching and drafting the initial complaint, the first amended complaint, and the complaint bringing the action before this Court; (3) responding and arguing Defendant's motion to transfer; (4) propounding discovery and reviewing defendant's responses; (5) responding to Defendant's discovery requests; (6) numerous meet and confers regarding discovery responses; (7) engaging in numerous and lengthy settlement discussions including attending mediation and preparing a robust mediation statement; (9) engaging in months of subsequent settlement negotiations with Defendant, in particular the scope of the Injunction;

(10) drafting the Settlement Agreement; (11) researching and drafting the preliminary approval brief; and (12) overseeing administration of the Settlement. (Drake Decl. ¶ 12.)

Moreover, Class Counsel's work is not complete after Settlement approval. Class Counsel will have continued involvement in the implementation of the Injunction including involvement in the certification and auditing process. (Injunction Art. 6.).

III. THE CLASS REPRESENTATIVES' PARTICIPATION IN THE CASE.

All three Class Representatives played a valuable role in bringing this litigation to a successful conclusion. As set forth in their attached declarations, the Class Representatives: (1) assisted with Class Counsel's investigation of the facts; (2) reviewed the complaint prior to filing; (3) provided documents to Counsel relating to their experiences with inaccurate background checks; (4) responded to written discovery requests from Defendant; (5) consulted with Class Counsel during the course of settlement negotiations; (6) reviewed and approved the Settlement Agreement; and (7) communicated regularly with Counsel and provided input and answers to questions whenever needed.[3] By participating in this case, the Class Representatives have publicized their criminal histories, which in Class Counsel's experience, many consumers are unwilling to do. The Class Representatives have also executed individual general releases for claims against Defendant that are broader than the releases for Class members. (Settlement §§ 4.8.2; 5.5.2 & Ex. F.) The Settlement's allowance for service payments of up to $3,500 reflects the Class Representatives' initiative in pursuing the action, the risks associated with attaching their names to this litigation, the time they have invested in the case, and consideration for the general releases they are providing.

[3] *See generally* Declaration of George Boskie ("Boskie Decl."); Declaration of Terry Keller ("Keller Decl."); Declaration of Hadel Toma ("Toma Decl.").

IV. ATTORNEYS' FEES, COSTS, AND CLASS REPRESENTATIVE SERVICE AWARDS PROVIDED BY THE SETTLEMENT AGREEMENT.

For the Injunctive Relief Settlement, the Settlement Agreement provides that Class Counsel may petition the Court for attorneys' fees in an amount not to exceed $2,100,000. (Settlement § 5.5.1.) Class Counsel may also petition the Court for a $3,500 service awards for each named Plaintiff. (*Id.* § 5.5.2.) For the HomeAdvisor Class Settlement, the Settlement Agreement provides that Class Counsel may request attorneys' fees in an amount not to exceed one-third of the value of the Settlement Fund and for an additional amount to reimburse out-of-pocket expenses. The Settlement provides that third party settlement administration costs associated with the Homeadvisor Settlement may be deducted from the Homeadvisor Settlement Fund. (*Id.* §§ 4.4.2, 4.8.1.) In connection with the Homeadvisor Settlement, Class Counsel may also petition the Court for a $3,500 service award for Plaintiff Boskie, but in no event shall Plaintiff Boskie's combined service award for his service in connection with the Injunctive Relief Settlement and the HomeAdvisor Settlement exceed $3,500. (*Id.* § 4.8.2.)

ARGUMENT

I. THE COURT SHOULD APPROVE THE REQUESTED ATTORNEYS' FEES.

As provided in the Settlement Agreement, Class Counsel move the Court for an Order approving the following payments: (1) the stipulated $2,100,000 in attorneys' fees to Class Counsel in connection with the Injunctive Relief Class; (2) one-third ($278,225) of the common fund provided by the HomeAdvisor Settlement for attorneys' fees; (3) reimbursement of one-half Class Counsel's out-of-pocket costs expended in litigating this matter and that are attributable to both Classes ($11,279.50) to be deducted from the HomeAdvisor Settlement Fund; (4) settlement administration expenses of up to $29,000 for third-party settlement administration of the HomeAdvisor Settlement; and (5) Class Representative Service Awards to Plaintiffs Boskie,

Toma, and Keller in the amount of $3,500 each, with Plaintiff Boskie's award to be deducted from the HomeAdvisor Settlement Fund.

Given the unquestioned value of the Settlement, the benefit to consumers, and the efforts of Class Counsel and the Class Representatives, the requested amounts are reasonable and should be approved. Class Counsel invested significant time and resources in this case, while facing a significant possibility of no recovery whatsoever. Due in no small part to their skill, experience, and past success litigating similar claims, Class Counsel were able to efficiently resolve this case and achieve a settlement that provides groundbreaking relief to members of the Injunctive Relief Class and significant monetary relief to the members of the HomeAdvisor Class. The parties' ability to reach the Settlement now demonstrates Class Counsel's efficient use of resources and recognizes the risks and expenses of litigation and trial, as well as the substantial benefits of the Settlement. The requested payments should be approved.

II. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE AND MERIT APPROVAL.

SCRCP 23 does not provide a standard for determining attorneys' fees in a class action settlement, thus it is appropriate to look at federal law. *See Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991) ("Since our Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure.") (citing H. Lightsey & J. Flanagan, *South Carolina Civil Procedure* (2d ed. 1985)). Fed. R .Civ. P. 23(h) provides that "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." In determining a reasonable fee in a class action, courts generally use two different methods, the "the "percentage of the fund" method or the "lodestar" method. *In re Microstrategy, Inc.*, 172 F. Supp. 2d 778, 786 (E.D. Va. 2001). Ultimately, the determination of

a reasonable fee is in the discretion of the court. *Kay Co. v. Equitable Prod. Co.*, 749 F. Supp. 2d 455, 463 (S.D.W. Va. 2010). "With either method, the goal is to make sure that counsel is fairly compensated." *Brown v. Transurban USA, Inc.*, 318 F.R.D. 560, 575 (E.D. Va. 2016). "When awarding attorney's fees in a class action, a court must make sure that counsel is fairly compensated for the amount of work done as well as for the results achieved." *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993).

The "most critical factor in determining the reasonableness of a fee award is the degree of success obtained." *Carroll v. Wolpoff & Abramson*, 53 F.3d 626, 629 (4th Cir. 1995) (citations and quotations omitted). In determining the reasonableness of attorneys' fees, the South Carolina Supreme Court has instructed courts to consider following six factors: "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services." *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997). In federal cases analyzing class action fees, courts have looked to "(1) the results obtained for the class, (2) the quality, skill, and efficiency of the attorneys involved, (3) the complexity and duration of the case, (4) the risk of nonpayment, (5) awards in similar cases, (6) objections, and (7) public policy." *DeWitt v. Darlington Cty., S.C.*, No. 4:11-CV-00740-RBH, 2013 WL 6408371, at *7 (D.S.C. Dec. 6, 2013) (internal quotations omitted). Under these standards, both the requested fees for the Injunctive Relief Class and the HomeAdvisor Class are reasonable and should be approved.

A. The Stipulated Attorneys' Fees for the Injunctive Relief Class Are Reasonable Considering the Value of Injunctive Relief.

1. *The Injunctive Relief Provides Enormous Benefits.*

The value of the Injunctive Relief provided by the Settlement is hard to overstate. Class Counsel have achieved a complete overhaul of how Defendant provides criminal record information to Downstream CRAs. Given Defendant's prominent role in the industry, this overhaul will result in more accurate and up to date background checks and increase FCRA compliance nationwide. Criminal background checks are becoming increasingly prevalent in both the employment and housing markets. As a result, fewer consumers will lose job or rental opportunities due to inaccurate background checks. As set forth by Dr. Smith, even using very conservative estimates, the value of the injunctive relief in this case is comfortably in the hundreds of millions of dollars, if not billions of dollars. (Smith Decl. ¶¶ 25-45.)

For all the benefits of the Injunction, consumers are not releasing any claims for actual damages. If an inaccurate background check causes a lost job or apartment due to Defendant's provision of information to a Downstream CRA, the consumer may still sue Defendant for those damages.

This far-reaching and immensely valuable Injunctive Relief could have only been achieved in the settlement context as most courts have found that the FCRA does not provide for injunctive relief. *See Walker v. Trans-Union LLC*, No. 1:11CV1110, 2013 WL 664405, at *2 (M.D.N.C. Feb. 22, 2013). This result is nothing short of extraordinary, and is a testament to Class Counsel's expertise in the area, skill, credibility, and dedication to protecting consumers' rights.

2. *There Were Substantial Risks To Recovery.*

Class Counsel achieved this result despite significant hurdles to recovery. FCRA cases are risky cases where recovery is far from guaranteed. To recover the statutory damages of $100 to

$1,000 sought by Plaintiffs under 15 U.S.C. § 1681n, Plaintiffs would have had to prove that Defendant not only violated the statute, but did so willfully. Defendant was prepared to vigorously challenge this element of plaintiffs' claim, and to prevail, plaintiffs would have had to show not only that their interpretation of the FCRA was correct, but that Defendant's interpretation of the statute was objectively unreasonable. *See Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 69 (2007). Willfulness is a high standard, and one on which FCRA plaintiffs can lose, even after a successful verdict at trial. *See Smith v. LexisNexis Screening Sols., Inc.*, 837 F.3d 604, 611 (6th Cir. 2016) (reversing jury verdict, holding that consumer reporting agency's conduct did not constitute a willful violation of the FCRA); *see also Domonoske v. Bank of Am.*, 790 F. Supp. 2d 466, 476 (W.D. Va. 2011) ("[G]iven the difficulties of proving willfulness or even negligence with actual damages [under the FCRA], there was a substantial risk of nonpayment."); *Chakejian v. Equifax Info. Servs., LLC*, 275 F.R.D. 201, 212 (E.D. Pa. 2011) (proving willfulness in FCRA case is "a high hurdle to clear," and weighs in favor of settlement approval).

If forced to litigate the issue, Defendant would have relied on a Federal Trade Commission ("FTC") opinion letter dated June 9, 1998, wherein the FTC found that individuals who search court records and provide them to consumer reporting agencies are agents of the CRA and are not CRAs themselves.[4] This is a significant finding insofar as this letter describes Defendant's role. If the Court had found that this letter applies to Defendant's business model, then Plaintiffs may have lost. Second, Defendant would have relied on the Consumer Financial Protection Bureau's ("CFPB") Report from December 2012, entitled "Key Dimensions and Processes in the U.S. Credit Reporting System." In that report, the CFPB reviewed how the three credit reporting agencies

[4] Available at https://www.ftc.gov/policy/advisory-opinions/advisory-opinion-leblanc-06-09-98.

obtain public record data (usually civil judgments, bankruptcies and tax liens).[5] In describing the vendor for that data (LexisNexis Risk Data Retrieval Services LLC), the CFPB did not refer to the vendor as a CRA. Rather, the CFPB viewed the vendor as a source for public records. Defendant would have argued that this discussion supported Defendant's conclusion that is it not a CRA when it provides data to a consumer reporting agency. Again, had the Court agreed, Plaintiffs would have lost and the Class would have received nothing. Third, Defendant would have contended that the law around which entities are "consumer reporting agencies" is undeveloped and that therefore any violation could not have been willful.

Recent appellate decisions finding that other entities were not covered by the FCRA also demonstrate the substantial risk that the Court may have found that Defendants' activity was not covered by the FCRA. *See Kidd v. Thomson Reuters Corp.*, 925 F.3d 99, 109 (2d Cir. 2019) (holding that defendant did not violate FCRA because reports produced by defendant's subscription-based internet platform were not "consumer reports"); *Zabriskie v. Fed. Nat'l Mortg. Ass'n*, 912 F.3d 1192, 1195 (9th Cir. 2019) (holding that defendant did not violate FCRA because reports produced by defendant's proprietary software were not "consumer reports").

3. *Class Counsel Is Highly Skilled and Took This Case on a Contingent Basis.*

The skill and efficiency of attorneys is evidenced by their reputations as well as their experience in the area of law. Courts recognize that "prosecution and management of a complex national class action requires unique legal skills and abilities." *Edmonds v. United States*, 658 F. Supp. 1126, 1137 (D.S.C. 1987).

Class Counsel's qualifications are set forth in the Declaration of E. Michelle Drake, and clearly illustrate that Class Counsel have the requisite experience and skill that was necessary to

[5] Available at files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf.

handle this matter. (Drake Decl. ¶¶ 4-11, 18-23 & Exs. A & B.) Class Counsel are highly skilled in handling complex litigation and have extensive experience litigating consumer and employment class actions, and FCRA litigation in particular. (*Id.*) They have been recognized by courts and other institutions for their proficiency, expertise, and professionalism. FCRA class action practice is highly specialized, especially cases involving criminal background checks. Berger Montague is one of a handful of law firms across the country that has a significant practice involving the litigation of FCRA class actions. Likewise, Ryan Hancock has vast experience in advocating for those criminal records, and has won important victories for consumers attempting to re-enter the job market. (*Id.* ¶¶ 19-20.) Dave Maxfield is also an experienced consumer advocate who has secured numerous significant recoveries for consumers. (*Id.* ¶ 21.) This experience not only demonstrates that Class Counsel's skill level supports the requested fee, but also positioned the Class for a strong settlement in this case. Less skilled or less experienced counsel could not have achieved the result obtained here.

Likewise, Defendant is represented by skilled counsel from Troutman Sanders, one of the top defense firms in the country. The lawyers representing Defendant have extensive experience defending FCRA class actions. *See, e.g.* https://www.troutman.com/cindy_hanson/. The fact that Class Counsel achieved the successful result here "in the face of vigorous opposition by . . . some of the nation's leading law firms" supports a finding that representation provided was of high quality and supports the fees requested. *See In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004). Accordingly, the professional standing of counsel on both sides weighs in favor of the requested fees award.

Further, Class Counsel took this case on a contingency fee basis with absolutely no guarantee of recovery. Class Counsel invested time and resources in this matter and made this

investment without any compensation to date. At all times, this case carried a very real possibility of an unsuccessful outcome and Class Counsel receiving no fees of any kind. This factor weighs in favor of the requested fees. *See Condon v. State*, 354 S.C. 634, 643, 583 S.E.2d 430, 434 (2003) (risk of not earning any fees at all weighed in favor of finding fees reasonable); *see also Muhammad v. Nat'l City Mortg., Inc.*, 2008 WL 5377783, at *8 (S.D. W.Va. Dec. 19, 2008) ("counsel bore a substantial risk of nonpayment. . . the outcome of the case was hardly a foregone conclusion, but nonetheless counsel accepted representation of the plaintiff and the class on a contingent fee basis, fronting the costs of litigation. In so doing, counsel have achieved a quite satisfactory settlement result.").

4. *The Public Interest Supports the Requested Fee.*

The FCRA's important consumer privacy protections would go unremedied but for fee awards and the class action mechanism. *See Perry v. FleetBoston Fin. Corp.*, 229 F.R.D. 105, 123 (E.D. Pa. 2005) (stating about FCRA class action, "the type of litigation undertaken by class counsel here, which addresses important consumer concerns that would likely be ignored without such class action lawsuits, must be encouraged."); *White v. E-Loan, Inc.*, No. C05-02080SI, 2006 WL 2411420, at *9 (N.D. Cal. Aug. 18, 2006) ("W]ithout class actions, there is unlikely to be any meaningful enforcement of the FCRA by consumers whose rights have been violated.").

Because individual recoveries under the FCRA are generally low, it is often not worth it for individual consumers to bring claims. *See Yohay v. City of Alexandria Employees Credit Union, Inc.*, 827 F.2d 967, 974 (4th Cir. 1987) ("[T]here will rarely be extensive damages in an FCRA action."). Due to the high potential for little or no recovery, many attorneys simply refuse to take on consumer cases, and thus, "attorneys who practice consumer law are often attorneys of last resort." *See* Gary M. Victor, *Recent Attorney Fee Cases and Their Potential Effects on the*

Calculation of Attorney Fees in Consumer Protection Cases, 78 MICH. B.J. 278, 280 (Mar. 1999). To ensure qualified and talented attorneys continue to take on these important cases, courts should compensate them appropriately for the numerous risks involved. *Jones v. Dominion Res. Servs., Inc.*, 601 F. Supp. 2d 756, 765 (S.D. W. Va. 2009) ("[P]ublic policy generally favors attorneys' fees that will induce attorneys to act and protect individuals who may not be able to act for themselves.")

5. *The Stipulated Fee Is Reasonable.*

The Parties negotiated a stipulated fee to compensate Class Counsel for the Injunctive Relief Class only after all other materials terms of the Settlement were negotiated. Defendant has agreed to pay the stipulated fee. Because the Injunctive Relief Class Members are not receiving monetary payments, any reduction in the fee will not inure to the benefit of the Class. It will simply remain with the Defendant. As the Fourth Circuit has recently explained in another FCRA injunctive relief settlement, a stipulated fee negotiated at arms-length with an experienced mediator warrants approval:

> Other features of this case further diminish any concern about the fee award and, accordingly, any need for heightened scrutiny by the district court. Because class counsel's fee is to be paid entirely by Lexis, it does not reduce the (b)(2) Class's recovery. *Cf. Cook v. Niedert*, 142 F.3d 1004, 1011 (7th Cir.1998) (when attorneys' fee reduces amount of common fund, court must carefully scrutinize fee application). Nor, of course, will it require the expenditure of taxpayer funds, which might warrant additional scrutiny. *Cf. Perdue v. Kenny A.*, 559 U.S. 542, 559 (2010) (limiting the use of multipliers in lodestar-based fee awards against the government under fee-shifting statutes). Finally, the parties did not even begin to negotiate class counsel's fee until after the substantive terms of the Agreement were finalized, making it far less likely that counsel could have traded off the interests of class members to advance their own ends.

Berry v. Schulman, 807 F.3d 600, 618 n.10 (4th Cir. 2015)

While the settlement is not a common fund settlement, courts evaluating common fund settlement consistently take into account the value of non-monetary relief in determining a

reasonable fee. *Fleisher v. Phoenix Life Ins. Co.*, No. 11-CV-8405 (CM), 2015 WL 10847814, at *15 (S.D.N.Y. Sept. 9, 2015) ("In calculating the overall settlement value for purposes of the 'percentage of the recovery' approach, Courts include the value of both the monetary and non-monetary benefits conferred on the Class.") (collecting authority). Here, given the value of the Injunction, Class Counsel's fee request represents only a very small percentage of the overall value to the Class.

Here, due to their expertise and respect in the field of FCRA litigation, Class Counsel were able to quickly pinpoint the core issues in the case and reach a groundbreaking resolution that will help millions of consumers. One persistent criticism of the lodestar method which measures fees by time spent is that it discourages early settlement and encourages lawyers to churn time just to build up lodestar. *See Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1268 (D.C. Cir. 1993) (noting that under lodestar method "there is a strong incentive against early settlement since attorneys will earn more the longer a litigation lasts"). "[T]o overly emphasize the amount of hours spent on a contingency fee case would penalize counsel for obtaining an early settlement and would distort the value of the attorneys' services." *Rawa v. Monsanto Co.*, No. 18-2346, --- F.3d ----, 2019 WL 3916537, at *5 (8th Cir. Aug. 20, 2019) (internal quotation omitted). Class Counsel could have easily spent thousands of hours litigating this matter for the sake of generating lodestar, but the ultimate result and the relief provided to Class Members would have been no different. Rather than run up their bills, Class Counsel recognized that this Settlement provides the best and most efficient relief to the Class, and opted to focus their efforts of Settlement.

That being said, Class Counsel have expended over 700 hours on litigating and settling this matter. The parties engaged in substantial written discovery, document exchanges, preparation for mediation, and spent many hours negotiating the Injunctive Relief. Class Counsel will also have

continuing obligations in the implementation of the Injunction along with monitoring compliance with the Injunction. These hours, of course, do not include the thousands of hours that Class Counsel has spent becoming experts in FCRA litigation and the criminal background check industry. The overall lodestar value of Settlement Class Counsel's time is $376,199.48. (Drake Decl. ¶¶ 14-22.).[6]

The request lodestar multiplier of 5.58 is in line with those approved in other settlements.[7] *Rawa*, 2019 WL 3916537, at * 5 (approving 5.3 multiplier); *New Eng. Carpenters Health Benefits Fund v. First Databank*, No. 05-cv-11148, 2009 WL 2408560, at *2 (D. Mass. Aug. 3, 2009) (8.3 multiplier); *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.*, No. 03-cv- 04578, 2005 WL 1213926, at *18 (E.D. Pa. May 19, 2005) (15.6 multiplier); *Weiss v. Mercedes-Benz of No. Am., Inc.*, 899 F. Supp. 1297 (D.N.J. 1995) (9.3 multiplier); *In re Cardinal Health*, 528 F. Supp. 2d 752, 767-68 (S.D. Ohio 2007) (multiplier of 5.9 in lodestar crosscheck); *In re Fernald Litig.*, No. C-1-85- 149, 1989 WL 267038, at *5 (S.D. Ohio Sept. 29, 1989) (multiplier of 5 in lodestar crosscheck).

In all respects, the stipulated fee for the Injunctive Relief Settlement is reasonable and should be approved.

B. The Fees Requested for HomeAdvisor Class Settlement Are Reasonable.

For many of the same reasons stated above, the Court should also approve Class Counsel's request for one-third of HomeAdvisor Settlement Fund. Because the HomeAdvisor Settlement

[6] Settlement Class Counsel's hours and rates are summarized in the Declaration of E. Michelle Drake submitted with this motion. *See In re Diet Drugs*, 582 F.3d 524, 541 n.35 (3d Cir. 2009) (noting that "courts may rely on summaries submitted by the attorneys and need not review actual billing records" in evaluating reasonable of attorneys' fees in class action settlement). If requested, Settlement Class Counsel can provide hourly time entries for the Court's review.

[7] If the fees from the HomeAdvisor Class are included, the requested multiplier is 6.32.

creates a common fund, the analysis is more straightforward. "[A] litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). South Carolina courts recognize the common fund doctrine. "The common fund doctrine allows a court in its equitable jurisdiction to award reasonable attorneys' fees to a party who, at his own expense, successfully maintains a suit for the creation, recovery, preservation, or increase of a common fund or common property." *Layman v. State*, 376 S.C. 434, 452, 658 S.E.2d 320, 329 (2008). "Attorneys' fees awarded pursuant to the common fund doctrine come directly out of the common fund created or preserved. . . The justification for awarding attorneys' fees in this manner is based on the principle that one who preserves or protects a common fund works for others as well as for himself, and the others so benefited should bear their just share of the expenses." *Id.* (internal quotations omitted).

To determine the amount of fees that should be awarded from the common fund, the percentage-of-the fund method is the preferred calculation. *Edmonds*, 658 F. Supp. at 1144. This method is preferable in class action settlements in particular as it most accurately reflects the results achieved, promotes efficiency, and reflects the realities of the private marketplace, where contingent fee attorneys are routinely compensated based on a percentage of recovery. *See id.* ("sound policy considerations support the use of percentage-based fees in common fund cases. Where a very large fund is potentially at stake . . . the percentage of recovery approach encourages class counsel to push the settlement fund demanded to the limits."); *Layman*, 376 S.C. at 452 ("when awarding fees to be paid from a common fund, courts often use the common fund itself as a measure of the litigation's success. These courts consequently base an award of attorneys' fees on a percentage of the common fund created.") (internal quotation omitted). Where, as is the case

here, the attorneys requesting fees from the common fund are responsible for making the fund possible in the first place, and there is a "principle of representation or agency as in a class suit," it is appropriate to charge the attorneys' fees to the fund. *Blake v. Cannon*, 312 S.C. 135, 139, 439 S.E.2d 302, 304 (1993) (citing cases).

The monetary recovery for the HomeAdvisor Class is substantial. The gross value of the Settlement is $834,765. Plaintiff Boskie sought statutory damages under the FCRA, which provides for damages of between $100 and $1,000 for each willful violation. 15 U.S.C. § 1681n(a)(1). As set forth above, willfulness is a high standard and presents a significant bar to recovery. The FCRA itself does not provide any guidance to the courts in choosing the appropriate recovery for a statutory violation, *see* 15 U.S.C. § 1681n(a)(1), but in determining the amount of statutory damages to impose pursuant to the FCRA, courts have looked to "the importance, and hence the value, of the rights and protections" at issue in the case. *Ashby v. Farmers Ins. Co. of Or.*, 592 F. Supp. 2d 1307, 1318 (D. Or. 2008); *accord In re Farmers Ins. Co., Inc. FCRA Litig.*, 741 F. Supp. 2d 1211, 1224 (W.D. Okla. 2010). A recovery of a substantial percentage of the likely award if the case had proceeded all the way through final judgment is an adequate result. *See Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 833 (E.D.N.C. 1994).

Here, should the Court approve the requested attorneys' fees, costs, administration expenses, and Named Plaintiff award, each Settlement Class Member who does not opt-out will automatically receive approximately $95, which exceeds or parallels settlements for similar violations. *See, e.g.*, *Ernst v. Sterling Infosystems, Inc.* No. 12-cv-8794, ECF No. 237 (S.D.N.Y. Oct. 13, 2015) (final approval of settlement that provided payments of $42 to $61 per class member for reporting obsolete information); *Haley v. TalentWise, Inc.*, No. 13-cv-01915, ECF No. 88 (W.D. Wash. June 16, 2015) (final approval of settlement that paid class members approximately

$50 for claims based on reporting outdated charges); *see also In re Toys r Us-Delaware, Inc. FACTA Litig.*, 295 F.R.D. 438, 453-4 (C.D. Cal. 2014) ("Viewed from the perspective of each class member, had the class member sued Toys individually and proved that it acted wil[l]fully, he or she could have recovered between $100 and $1,000 in statutory damages . . . A $5 or $30 award, therefore, represents 5% to 30% of the recovery that might have been obtained. This is not a *de minimis* amount . . . the court finds that the amount of the settlement weighs in favor of approval.")

Like with the Injunctive Relief Class, there were substantial barriers to recovery. Defendant would have argued that its alleged violations were not willful and thus statutory damages were not recoverable. Moreover, had the case continued, to succeed on his claim, Plaintiff would have had to survive contested class certification motion practice, summary judgment motion practice, trial, post-trial motion practice, and appeal. Each of these stages presents significant litigation risk. And even if the case were successful, the factfinder could award only $100 per Class Member which is only $5 more than the expected payouts here.

The requested amount of one-third of the fund is well in line with that awarded in common fee cases. "Fees of one-third or more of the total recovery have been awarded by courts in the common fund context." *Littlejohn v. State*, 2002 WL 34454074 (S.C. Com. Pl. Apr. 23, 2002) (collecting cases). Further, in circumstances such as this, where Class Counsel's efforts were performed on a contingency fee basis, and a substantial common fund is the result of those efforts, attorneys' fees ranging from 25-40% are commonly awarded. *Id.*; *Muhammad*, 2008 WL 5377783, at *8 (recognizing the "presumptive reasonableness of an attorneys' fee equal to one-third of a recovery."). Moreover, in FCRA cases, courts nationwide frequently award attorneys' fees amounting to one-third of the common fund. *See, e.g., Johnson v. Midwest Logistics Sys., Ltd.*,

No. 11-cv-1061, 2013 WL 2295880, at *6 (S.D. Ohio May 24, 2013); *Flores v. Express Servs., Inc.*, No. 14-cv-03298, 2017 WL 1177098 (E.D. Pa. Mar. 30, 2017); *Smith v. Res-Care, Inc.*, No. 13-cv-5211, 2015 WL 6479658, at *8 (S.D. W.Va. Oct. 27, 2015); *Serrano v. Sterling Testing Sys., Inc.*, 711 F. Supp. 2d 402, 421 (E.D. Pa. 2010). The requested fees should be approved.

III. CLASS COUNSEL'S REQUESTED OUT-OF-POCKET COSTS ARE REASONABLE AND SHOULD BE REIMBURSED.

Class Counsel also seeks reimbursement of half of their documented, out-of-pocket, expenses incurred in litigating and settling this matter from the HomeAdvisor Settlement Fund totaling $11,279.50. "Costs that are reasonable in nature and amount, may be reimbursed from the common fund." *Reed v. Big Water Resort, LLC*, No. 2:14-CV-01583-DCN, 2016 WL 7438449, at *12 (D.S.C. May 26, 2016) (internal quotations omitted). "Examples of costs that have been charged include necessary travel, depositions and transcripts, computer research, postage, court costs, and photocopying." *Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, 689 (D. Md. 2013).

Class Counsel incurred $22,559.00 in reasonable and necessary expenses in this matter, and Class Counsel seeks reimbursement for half that amount from the HomeAdvisor Class Settlement as the costs were incurred equally for the benefit of the two classes. (Drake Decl, Exs. C, D.) Class Counsel are not seeking any costs related solely to the Injunctive Relief Class, including expert fees. The requested costs include, among other things, travel, mediation expenses, court reporter expenses, printing, FedEx, postage, and online research expenses. (*Id.*) These costs are reasonable and should be reimbursed.

IV. THIRD PARTY SETTLEMENT ADMINISTRATION EXPENSES SHOULD BE REIMBURSED FROM THE HOMEADVISOR FUND.

"The[] costs of paying the claims administrator, processing the claims, providing notice to the class, and generally administering the settlement is typically deducted from the settlement fund." *Newberg on Class Actions* § 12.20 (5th ed.); *see also McDaniels v. Westlake Servs., LLC*, 2014 WL 556288, at *15 (D. Md. Feb. 7, 2014) (awarding costs of notice and administration to claims administrator); *Singleton*, 976 F. Supp. 2d at 690 (D. Md. 2013) (same). JND Legal Administration has been serving as the Settlement Administrator for the Homeadvisor Class and its costs are not expected to exceed $29,000 related to the administration HomeAdvisor Settlement.[8] These costs include those for mailing notice to the Class, establishing and maintaining the Settlement Website and toll-free telephone support, responding to Class Member inquiries, and should final approval be granted, issuing and mailing payments to the Class Members. These expenses are necessarily incurred and should be paid from the common fund.

V. THE REQUESTED CLASS REPRESENTATIVE SERVICE AWARDS ARE REASONABLE.

"Serving as a class representative is a burdensome task and it is true that without class representatives, the entire class would receive nothing." *Savani v. URS Professional Solutions, LLC*, 121 F. Supp. 3d 564, 578 (D.S.C. 2015). As set forth in their declarations, Plaintiffs have been actively involved in litigation. All three named Plaintiffs have provided counsel with relevant documents, responded to written discovery, stayed abreast of developments and settlement negotiations, and evaluated the Settlement Agreement. They understand what it means to be a class representative and have put the interests of the Class first in making all decisions related to litigation and settlement. By filing this suit, Plaintiffs also publicized their criminal offense

[8] Notice costs for the Injunctive Settlement were paid separately by Defendant.

records. Plaintiffs have also provided Defendant with a general release of claims that is far broader than the limited class releases.

The amounts requested as service payments to the Class Representatives, $3,500, are modest and smaller than other approved in FCRA cases around the country. *See Johnson*, 2013 WL 2295880, at *5 (awarding $12,500 incentive award, which represented 2.7% of the common fund in FCRA case); *Chakejian*, 275 F.R.D. at 220 (approving $15,000 incentive award in FCRA case); *Edwards v. Horizon Staffing, Inc.*, No. 13-cv-3002, 2015 WL 13283397, at *11 (N.D. Ga. Jan. 2, 2015) (approving $5,000 incentive award from common fund of $300,000 in FCRA case); *Berry v. Schulman*, 807 F.3d 600, 614 (4th Cir. 2015) (approving incentive award of $5,000 in FCRA case resulting in injunctive relief). The requested service payments should be approved.

CONCLUSION

Based on the foregoing, the Court should approve 1) the stipulated $2,100,000 in attorneys' fees to Class Counsel in connection with the Injunctive Relief Class; (2) one-third ($278,225) of the common fund provided by HomeAdvisor Settlement for attorneys' fees; (3) reimbursement of one-half Class Counsel's out-of-pocket costs expended in litigating this matter ($11,279.50) to be deducted from the HomeAdvisor common fund; (4) settlement administration expenses of up to $29,000 for administration of the HomeAdvisor Settlement and to be deducted from the common fund; and (5) Class Representative Service Awards to Plaintiffs Boskie, Toma, and Keller in the amount of $3,500.00 each with Plaintiff Boskie's award to be deducted from the HomeAdvisor Settlement common fund.

Respectfully submitted August 26, 2019.

s/ Dave Maxfield

Dave Maxfield (Fed. ID 6293)
DAVE MAXFIELD, ATTORNEY, LLC
P.O. Box 11865

Columbia, SC 29211
Telephone: (803) 509-6800
Facsimile: (855) 299-1656
dave@consumerlawsc.com

E. Michelle Drake (MN Bar No. 0387366)
John G. Albanese (MN Bar No. 0395882)
BERGER MONTAGUE PC
43 S.E. Main Street, Suite 505
Minneapolis, MN 55414
Telephone: (612) 594-5999
Facsimile: (612) 584-4470
emdrake@bm.net
jalbanese@bm.net

Ryan Allen Hancock (PA Bar No. 92590)
WILLIG, WILLIAMS & DAVIDSON
1845 Walnut Street, 24th Floor
Philadelphia, PA 19103
Telephone: (215) 656-3679
rhancock@wwdlaw.com

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2019, I filed a copy of the foregoing document with the Clerk of Court using the CM/ECF system, which will automatically send notice of such filing to all counsel of record.

s/ Dave Maxfield
Dave Maxfield