FILED

JAN 14 2004

LARRY W. PROPES, CLERK
COLUMBIA, S.C.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF SOUTH CAROLINA**
**ANDERSON DIVISION**

| | | |
|---|---|---|
| Franklin E. Clark, on behalf of himself and all others similarly situated,<br><br>Plaintiffs,<br><br>vs.<br><br>Experian Information Solutions, Inc.,<br><br>Defendant. | ) | C/A No. 8:00-1217-22<br><br>**ORDER APPROVING SETTLEMENT** |

## INTRODUCTION

This class action is one of three related class actions which arose out of the dissemination of consumer credit reports that allegedly contain inaccurate information in violation of the Fair Credit Reporting Act (FCRA), 15 U.S.C. § § 1681 *et seq.*[1] The parties entered into a Stipulation of Settlement[2] in January 2003. Because Rule 23 of the Federal Rules of Civil Procedure requires that class action settlements be approved by the court, a preliminary approval hearing was held on March 18, 2003. During that hearing and thereafter by court order, class identification methodology and notice procedures were established by the parties and the court. In addition, a fairness hearing was scheduled for September 23, 2003.

---

[1] This case was consolidated for purposes of pretrial proceedings with *Clark, et. al v. Equifax, Inc., et al.*, C/A No. 8:00-1218-22, and *Clark, et. al., v. Trans Union Corporation, et al.*, C/A No. 8:00-1219-22. Although mediations were conducted separately, the consolidated treatment was continued for purposes of approval of the proposed settlements which were all ultimately approved under essentially the same terms.

[2] Terms or phrases which are capitalized in this order are defined either in the Stipulations of Settlement or this order or both. The terms "Stipulations of Settlement" and "Original Stipulation" are defined below at n. 3.



AO 72A
(Rev.8/82)

339

The court did not approve the Original Stipulation during the September 23 hearing. Nonetheless, the court determined that the settlement could be approved if specific concerns were addressed. The court also established a procedure that allowed for, but did not require, modification of the Original Stipulation. The parties have since submitted proposed modifications to the Stipulation of Settlement, and again seek court approval in accordance with Rule 23. For the reasons set forth below, the settlement terms as presented in the Second Modified Stipulation of Settlement are approved.[3]

## BACKGROUND

This case began in the late 1990's when the named Plaintiffs became aware that their credit records from Defendant, Experian Information Solutions, Inc. (hereinafter "Experian"), contained references to bankruptcy filings despite the fact that they had never personally filed for bankruptcy.[4] These bankruptcy references did not appear in the "public filings" sections of the records (which would have referred to Plaintiffs' own filings) but in relation to specific accounts which Plaintiffs

Cmc #2

[3] The court utilizes the term "Stipulations of Settlement" to refer generically to the collective submissions of proposed settlement terms. The term "Original Stipulation" refers to the initial Stipulation of Settlement submitted to the court prior to the March 18, 2003 hearing. The term "Second Modified Stipulation" refers to the final version of the various proposed Stipulations of Settlement. The Second Modified Stipulation contains both the changes as proposed in the First Modified Stipulation filed November 7, 2003 (then denominated only "Modified Stipulation," and the additional modifications reflected in the December 9, 2003 filing denominated: "Notice of Agreement to Amend Modified Stipulations." The collective final modifications are reflected in the Second Modified Stipulation of Settlement filed December 19, 2003 and redlined comparison (comparing Original Stipulation to Second Modified Stipulation) filed December 30, 2003.

[4] Two of these class actions are pursued by a single named Plaintiff, Franklin E. Clark. One is pursued by both Mr. Clark and Latanjala Denise Miller. For ease of reference, the court will refer to the "Plaintiffs" when referring to all three cases.



AO 72A
(Rev.8/82)

shared in some manner with an individual who had filed for bankruptcy (hereinafter "co-obligor").[5] The reference did not expressly state that the bankruptcy at issue was that of the co-obligor.

Plaintiffs allege that Defendant's practice of reporting the accounts as "In Bankruptcy" (at least without clarifying that the account was "In Bankruptcy of Another Person"), violates the FCRA's "maximum possible accuracy" standard. 15 U.S.C. § 1681 (e)(b). Defendant denies that the inclusion of the reference on specific lines is inaccurate or misleading.

The initial class action complaint was filed in this case on April 20, 2000. The named Plaintiffs also filed virtually identical claims against two other credit reporting entities on the same date. The Honorable Margaret B. Seymour, then presiding, consolidated the three related actions for pretrial management purposes.[6] That consolidation has been continued through the approval of the present settlement.[7]

CMC #3

On August 9, 2000, Plaintiffs sought class certification. Their request was denied on March 9, 2001. *See* Order (enter March 9, 2001). Thereafter, Plaintiffs sought and were granted leave to amend their complaint.

On July 30, 2001, Plaintiffs filed an amended complaint. The parties also conducted additional discovery. Plaintiffs filed a new motion for class certification on March 6, 2002. On June

---

[5] For ease of reference, the court has referred to the relationship between a Class Member and the individual in bankruptcy as that of co-obligor. Such a relationship might arise as a result of being holders of a joint account, or from co-signing on or guaranteeing a debt. The Class is, however, broader, reaching individuals who are merely authorized users on the account of the debtor in bankruptcy. This distinction is, however, irrelevant for purposes of this order.

[6] This action was initially assigned to Judge Seymour, who presided over the action until shortly before the September 23, 2003 fairness hearing. At that time, this action and the two related actions were reassigned to the author of this opinion.

[7] While the cases were consolidated for pretrial management purposes, including approval of the proposed settlements, the court is entering separate orders approving the settlement in each action.



AO 72A
(Rev.8/82)

26, 2002, Judge Seymour conditionally granted the motion for class certification.[8]

Defendant subsequently petitioned the Fourth Circuit for permission to file an interlocutory appeal challenging the decision granting conditional class certification. *See* Fed. R. Civ. P. 23(f). That petition was denied. *See* Order of the Court of Appeals for the Fourth Circuit, CA No. 02-205 (October 21, 2002).

After the Fourth Circuit declined immediate review of the class certification decision, Judge Seymour directed the parties in this action and the two related cases to mediate. *See* Order to Conduct Mediation (entered October 31, 2002). Mediation was conducted separately in each of the three related cases. After further post-mediation negotiations, the parties entered into a separate Stipulation of Settlement in each action (hereinafter "Original Stipulation" – *see supra* n.3).[9] The Original Stipulation provided three forms of relief: (1) a change in the way Defendant will report the bankruptcy of another on the credit report of co-obligors or authorized users; (2) specified limited remedies should Defendant violate the agreement in the future; and (3) one free Consumer Disclosure[10] from Defendant for each Class Member. *See* Original Stipulation at ¶¶ 18-21.

On March 18, 2003, Judge Seymour held a preliminary fairness hearing and made a determination that the Original Stipulation appeared to be fair. The following day, she entered the

---

[8] The ultimate class definition is, however, as set forth in the Consent Order Redefining Class and Preliminarily Approving Settlement and Preliminary Injunction (Order entered March 19, 2003), which is discussed below. *See infra* Discussion § I (Final Approval of Class).

[9] While the mediations were separate, the terms of the Original Stipulation ultimately reached were virtually identical in each case.

[10] There are different forms of credit reports and disclosures. As used herein and in the various Stipulations of Settlement, the term "Consumer Disclosure" refers to a report given directly to a consumer as contemplated by 15 U.S.C. § 1681g. The term "Credit Report," as used in this order and the Stipulations of Settlement, refers to the type disclosure covered by 15 U.S.C. § 1681a(d) *when that report is given to someone other than the consumer.*



AO 72A
(Rev.8/82)

Consent Order Redefining Class and Preliminarily Approving Settlement and Preliminary Injunction which defined the class as follows:

a. The "Class Period" shall be, and as used herein means, the period commencing April 20, 1998, and continuing until [July 31, 2003].

b. The Class for the above-styled class action is and shall be comprised of each individual who is a consumer (i) who at any time during the Class Period was the subject of a Credit Report issued by [Experian Information Solutions, Inc., (Experian),] during the Class Period, and (ii) who had not filed bankruptcy during the ten year period preceding the issuance of the Credit Report or during the Class Period, and (iii) whose Credit Report so issued contained all of the following:

(1) The entry "bankruptcy," "Chapter 7," "Chapter 13," "debt adjustment plan," or words of identical meaning in a Joint Account tradeline;

(2) No notation explicitly stating that the bankruptcy information pertains to a bankruptcy filing of another Person/Entity who was not the subject of the Credit Report; [and]

(3) An indication that the Credit Report was distributed to a Person/Entity other than the consumer who was the subject of the Credit Report.

c. Specifically excluded is any individual who himself or herself declared bankruptcy at any time during the Class Period or for whom Experian's records otherwise indicate that bankruptcy should be reflected for the consumer who is the subject of the Credit Report. . . .

d. Also excluded from the Class is any individual who has an individual lawsuit against Experian relating to the Released Claims, as defined in the Stipulation, pending prior to [March 19, 2003].

e. The court will exclude from the class any person who meets the foregoing criteria but who validly and timely requests exclusion from the Class in accordance with [the procedures set forth in the published and mailed notices].

CMC #5



AO 72A
(Rev.8/82)

Order entered March 19, 2003.[11] That same order established the procedures to be followed to identify Class Members.

Through a subsequent order entered in July 2003, Judge Seymour established procedures for identifying and notifying Class Members of the existence and allegations of this lawsuit, the terms of the Original Stipulation, and the right of each Class Member to opt-out of the action or to object to the settlement. The court also approved a notice[12] proposed by the parties and issued an Order to facilitate: (1) the form, substance and timing of mailed notice; (2) the form, substance and timing of publication notice; (3) the procedures for excluding oneself from the class and objecting to the settlement;[13] (4) a deadline for Class Members to opt out of the class or be bound by the provisions of the settlement (an "Election Day"); and (5) a date-certain for the formal fairness hearing. *See* Supplemental Notice Order (entered July 3, 2003).

Defendant then undertook the required steps to identify Class Members (*i.e.* compile a class list) using methodology previously approved by the court. After a final class list was compiled, Defendant began the notification process as approved by the court. *See infra* Discussion § II

---

[11] The Class definition set forth in the March 19, 2003 order left several matters open, including the closing date for the class period. It also included at least one preliminary finding unnecessary to the definition itself. The definition as stated above deletes the statement of preliminary finding and inserts appropriate dates where the March 19, 2003 order referred to specific events (including the entry date of that consent order). It is otherwise the same as stated in the March 19, 2003 order.

[12] A single consolidated notice of all three related actions was utilized.

[13] There are a variety of different types of class actions which vary as to whether and how persons can join or exclude themselves from the class. The present action is an "opt-out" class action, meaning that persons who fall within the class definitions are class members if they do not comply with the procedures for excluding themselves from the class. *See generally,* Fed. R. Civ. P. 23(c)(2).



AO 72A
(Rev.8/82)

(discussing proof of compliance with March 19, 2003 Consent Order Re-defining Class).

Court records reflect that 249 individuals filed objections to the Original Stipulation (hereinafter referred to collectively as "Objectors").[14] A total of fifteen objection memoranda were also filed. Likewise, a number of attorneys filed appearances on behalf of persons objecting to the Original Stipulation.[15] Objectors also filed discovery motions before the hearing, however, these motions were denied temporarily, with leave granted to renew the discovery request if a specific need for discovery was shown at the fairness hearing.

This court conducted a fairness hearing beginning on September 23, 2003, as scheduled in the class notices.[16] The hearing continued through September 24, 2003. Objectors presented argument and testimony, and vigorously cross-examined witnesses offered in support of approval of the settlements. The court also heard from two individual Objectors who were not represented by counsel, although one of the two (Wheelahan) was, herself, an attorney.

Cuc #7

At the conclusion of the hearing, the court determined that the presentation of evidence in

---

[14] Only objections were filed with the court. Opt-outs were sent to the Garden City Group at FCRA Claims Administrator, P.O. Box 9000 #6129, Merrick, NY 11566-9000.

[15] Because of the number of attorneys who filed notices of appearance, the court appointed Michael Caddell, counsel for objector Denise Wilcox, to serve as a liaison between the court and attorneys filing notices of appearance as well as one pro se Objector who is also an attorney. The court will refer to this group collectively as "Objectors." At the September 23, 2003 hearing, all Objectors opposed approval of the settlements as then presented.

The Objectors have since divided into three groupings, the first two of which oppose approval of the Second Modified Stipulation of Settlement: Gary Murphy and Jeannie Zupan (represented by Edward W. Cochran, Esquire); and Dawn Wheelahan, Esquire (appearing pro se). These three Objectors will be referred to hereafter collectively as the "MZW Objectors." All remaining Objectors support approval of the Second Modified Stipulation of Settlement. These Objectors are referred to herein as "Coordinated Objectors."

[16] The case was reassigned from Judge Seymour to the undersigned on September 18, 2003 due to Judge Seymour's non-availability for the September 23, 2003 fairness hearing and the impracticality of rescheduling a hearing for which over 4,000,000 notices had already been sent.



AO 72A
(Rev.8/82)

support of the settlements of the three actions, including this one, was deficient in several respects, most notably as to whether the court-approved class identification and notification procedures had been fully implemented. The court also found the evidence inadequate as to how one of the alternative solutions allowed by the Original Stipulation would be implemented and the degree to which it would benefit Class Members over current procedures. In addition, the court determined that there were several substantive deficiencies in the terms set forth in the settlement documents. Ultimately, the court noted that the Original Stipulation could likely be amended to correct these deficiencies. The court did not, however, require such amendment.[17]

While the court expressed concerns with certain details of the Original Stipulation, it declined to adopt a number of Objectors' more significant claims of inadequacy. Most critically, the court disagreed with Objectors' contention that the general nature of the relief (prospective only), was necessarily inadequate to support the release of claims for prior damages. The court also expressed misgivings about Objectors' challenges to the general adequacy of remedies for future violations of the Original Stipulation.[18] Nonetheless, the court found certain deficiencies in the procedural aspects of the remedial provisions for future remedies.

The court also found it doubtful that the alternative "fix" allowed by the Original Stipulation, retaining references to "bankruptcy" but clarifying that it refers to the "bankruptcy of another,"

---

[17] While the court noted these deficiencies in order to allow the proponents of the settlements to correct them, it did not and cannot require that a settlement be modified. *See generally* Manual for Complex Litigation, Third at 240 (Federal Judicial Center 1995).

[18] The remedial provisions at issue impose both procedural and substantive limits on the remedies which class members might obtain for any future violations of the Stipulation of Settlement. At the same time, they provide the benefit that class members would not be required to prove that the actions violated federal law, only that they violated the terms of the Stipulation (which is, itself, a compromise of disputed issues of law). Under these circumstances, an agreement to remedies that are more limited than those provided for statutory violations is not unreasonable.



AO 72A
(Rev.8/82)

would violate the FCRA.[19] In addition, the court rejected Objectors' arguments that the class notice was defective in form and substance.

The court did not foreclose the possibility of approving stipulations similar in terms to the ones then proposed. The court, instead, established a procedure that allowed for modification of each Original Stipulation to address the court's concerns. *See* Order (entered October 2, 2002). The court set January 12, 2004, as the date for a second fairness hearing if modified stipulations were submitted to the court. The court also granted some of the Coordinated Objectors' limited discovery requests. As such, some limited discovery was exchanged among Defendant, Class Counsel,[20] and the Objectors.

On November 7, 2003, First Modified Stipulations[21] were filed with the court in this and the two related actions. Thereafter, memoranda were submitted regarding whether additional individualized notice was necessary in light of the changes in the settlement terms. By Order entered December 8, 2003, the court held that further individualized notice was not required because, among other things, prior notice and procedures for informing class members of the material settlement

---

[19] At the time of the September 23, 2003 fairness hearing, only one of the Defendants in the three consolidated actions indicated an intent to rely on this alternative. Nonetheless, the Original Stipulation would have allowed any of the three to adopt this procedure.

[20] Except where otherwise indicated, the court uses the term "Class Counsel" to refer to all attorneys representing the named Plaintiffs or Class. The term is more narrowly defined in the various Stipulations of Settlement.

[21] At time of filing, this document was referred to only as "Modified Stipulation." The court will, however, use the term "First Modified Stipulation" to distinguish this document from the Second Modified Stipulation.



AO 72A
(Rev.8/82)

terms comported with due process.[22] The court also addressed other administrative matters in preparation for the January 12, 2004, fairness hearing.

Three objections to the First Modified Stipulation were submitted: one on behalf of the Coordinated Objectors; and two on behalf of the MZW Objectors.[23] The MZW Objectors incorporated most or all of their prior objections, as well as adding others.[24] The first group (Coordinated Objectors), in contrast, indicated that they were in agreement with many of the changes and were working to obtain agreement to a few further revisions which, if accepted, would resolve their objections. Such later modifications were submitted and the Coordinated Objectors then joined in supporting approval of the settlement of these class actions under the terms set forth in the Second Modified Stipulation of Settlement.

CMC #10

**STANDARD**

Judicial approval of class action settlements is intended to insure that the rights of absent class members are adequately protected. *See Amchem Products, Inc., v. Winsor,* 521 U.S. 591, 621 (1997). As the Fourth Circuit Court of Appeals has noted, "[t]he primary concern addressed by Rule 23(e) is the protection of class members whose rights may not have been given adequate

---

[22] Rule 23(e) of the Federal Rules of Civil Procedure requires the district court to direct the form of notice of settlement. The form of notice "need only satisfy the 'broad "reasonableness" standards imposed by due process.'" *Petrovic v. Amoco Oil Co.,* 200 F.3d 1140, 1153 (8th Cir. 1999)(quoting *Grunin v. International House of Pancakes,* 513 F.2d 114, 122 (8th Cir. 1975)). This notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Petrovic,* 200 F.3d at 1153 (quoting *Mullane v. Central Hanover Bank & Trust, Co.,* 339 U.S. 306,314 (1950)).

[23] *See supra* n. 15.

[24] The specifics of these objections will be discussed, as appropriate, in subsequent sections of this order.



AO 72A
(Rev.8/82)

consideration during the settlement negotiations." *In re Jiffy Lube Securities Litigation,* 927 F.2d 155, 158 (4th Cir. 1991) (further stating: "If the proposed settlement is intended to preclude further litigation by absent persons, due process requires that their interests be adequately represented.")

Court review of class action settlement is generally considered a two-step process. First, the court will hold a "preliminary pre-notification hearing to determine whether the proposed hearing is 'within the range of possible approval'". *Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 855 F. Supp. 825, 827 (E.D.N.C. 1994). Second, the court will hold a final fairness hearing either approving or disapproving the settlement.

In conducting the fairness hearing, the court considers both fairness and adequacy. The fairness inquiry seeks to determine whether "the settlement was reached as a result of good-faith bargaining at arm's length, without collusion." *In re Jiffy Lube,* 927 F.2d at 159. To make this determination, the court considers: "(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 the [substantive] area [and] class action litigation." *Id.*

The adequacy inquiry, by contrast, considers the more substantive aspects of the settlement, including:

> (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.

*Id.*



AO 72A
(Rev.8/82)

## DISCUSSION

## I. FINAL APPROVAL OF CLASS

This court adopts and incorporates the findings in the order entered June 6, 2002 (conditionally certifying the class),[25] as modified by the consent order entered March 19, 2003 (redefining the class and addressing notice issues) as the final determination of this court on class certification issues, with the following final definition serving as the class definition:

a. The Class shall be comprised of each individual who is a consumer (i) who was the subject of a Credit Report issued by Experian Information Solutions, Inc. ("Experian"), at any time between and including April 20, 1998 and July 31, 2003, and (ii) who had not filed bankruptcy during the ten year period preceding the issuance of the Credit Report or during the period commencing April 20, 1998 and ending July 31, 2003, and (iii) whose Credit Report so issued contained all of the following:

   1. The entry "bankruptcy," "Chapter 7," "Chapter 13," "debt adjustment plan," or words of identical meaning in a Joint Account tradeline;

   2. No notation explicitly stating that the bankruptcy information pertains to a bankruptcy filing of another Person/Entity who was not the subject of the Credit Report; and

   3. An indication that the Credit Report was distributed to a Person/Entity other than the consumer who was the subject of the Credit Report.

b. Specifically excluded is any individual who himself or herself declared bankruptcy at any time during the Class Period or for whom Experian's records otherwise indicate that bankruptcy should be reflected for the consumer who is the subject of the Credit Report.

c. Also excluded from the Class is any individual who has an individual lawsuit against Experian relating to the Released Claims, as defined in the Stipulation, pending prior to March 19, 2003.

---

[25] Judge Seymour's June 6, 2002 order, in turn, incorporates certain findings from the March 19, 2001 order denying class certification. Those portions of the March 19, 2001 order are, likewise, incorporated herein.



AO 72A
(Rev.8/82)

d. Also excluded is any person who meets the foregoing criteria but who validly and timely requested exclusion from the Class in accordance with procedures set forth in the earlier orders of this court and the published and mailed notices.

e. All capitalized terms in this definition shall have the meaning set forth in the Second Modified Stipulation of Settlement.

## II. NOTICE

The court's previously expressed concern as to adequacy of proof of notice has been satisfied by the submissions addressed in this section.[26] As to the process of identifying Class Members, each Defendant submitted declarations from their respective representatives responsible for generating the class list in accordance with the court's order. *See* Declarations of Stockdale, Jennings and Najera (filed December 19, 2003). The Defendants also submitted the Declaration of Leisa Johnson, Project Manager for Axiom Corporation, the entity responsible for removing duplicate names from each Defendant's class list and compiling a combined "final class list" (*i.e*, the de-duplication process). *See* Declaration of Liesa Johnson (filed December 19, 2003). Ultimately, the collective list contained 4,064,289 entries. The actual number of potential Class Members would be lower given that doubts were resolved in favor of leaving unclear duplicates on the final list.[27]

CMC #13

---

[26] The court has considered the collective submissions of all three Defendants in this section for two reasons. First, the notice process was undertaken jointly, with each Defendant in the three related actions adding to the list of potential Class Members and then submitting the combined lists to third parties to remove duplications and send a single combined notice. Second, the various affidavits and declarations on which the court relies in this section were all submitted in all three actions.

[27] As explained in Ms. Johnson's declaration, Axiom received a total of over 6.6 million consumer records from all three Defendants. It then went through a deduplication process which was designed to resolve doubt in favor of leaving unclear duplicates on the final list. A total of 4,064,289 consumer records were preserved on the final list for notice mailings. Based on Ms. Johnson's declaration and additional information obtained during the January 12, 2004 hearing, it appears that



AO 72A
(Rev.8/82)

On the issue of distribution of the notices, Defendants submitted the declaration of Nizar Zayed, Director of Client Development for Freedom Graphics Inc., the entity responsible for mailing individual notice to persons on the final class list. *See* Declaration of Zayed (filed December 19, 2003). This declaration described when and how notices were mailed to each of the over four million entries on the final class list. In addition, it offers receipts for proof of mailing.

On the issue of publication notice, Defendants submitted the declaration of Tiffany George, Principal Consultant for Rust Consulting, the entity responsible for executing publication notice in accordance with the court's order. *See* George Declaration (filed Dec. 19, 2003). That declaration outlined how and when publication notice was executed.

The Parties also submitted the declaration of Gerardy Carrenard, Project Manager with the Garden City Group, the entity responsible for receiving undeliverable notices (notices that were returned to sender) and opt-out forms. *See* Declaration of Carrenard (entered Oct. 15, 2003). That declaration states that 873,900 notices were returned as undeliverable and 3,718 opt-outs were received.[28] While the number of returned notices may, at first blush, appear large it seems likely that the number is primarily explained by the decision to err on the side of inclusion of duplicates in the final class list.[29]

---

half or more of the entries on the final "deduplicated" list may still have been duplicates for a variety of reasons including having a single debtor listed with multiple addresses.

[28] Documentation submitted at the January 12, 2004 hearing modified the originally reported number of opt-outs (3,342) to the somewhat higher number reflected in the text (3,718). This documentation also reflects that an additional 51 opt-out forms were received which were deemed not to be timely. Future handling and maintenance of the opt-out forms and lists will be addressed in a separate order.

[29] For example if two records were retained for a given debtor on the list used for sending notices, one using an older and one a newer address, the notice sent to the older address would likely



AO 72A
(Rev.8/82)

Collectively, the above referenced submissions establish that all requirements of the notice related orders have been satisfied. *See* Orders entered March 19, 2003, and July 16, 2003. No objections have been raised to the adequacy of the proof of notice.

## III. FINDINGS AS TO FAIRNESS AND ADEQUACY OF SETTLEMENT

### A. Fairness

The "fairness" prong of the settlement approval process requires the court to determine whether "the settlement was reached as a result of good-faith bargaining at arm's length, without collusion." *In re Jiffy Lube,* 927 F.2d at 159. To make this determination, the court considers: "(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 the [substantive] area [and] class action litigation." *Id.* For the reasons set forth below, the court concludes that the fairness prong is satisfied.

Case #15

As to the first and third factors, it is clear from the docket and the court's review of the pleadings,[30] that this matter was hard fought from its initiation through contentious class certification proceedings. It is also clear that settlement resulted only after court-ordered mediation. The court's observation of the September 23, 2003 hearing and study of the subsequent submissions, likewise, demonstrate the presence of good faith, arm's length negotiations continuing well beyond the initial fairness hearing.

The court also provided for discovery related to this issue. Specifically, the court required disclosure to counsel for Objectors of all communications Class Counsel had exchanged with

---

be returned as undeliverable. This would be no indication that the debtor did not receive the other mailed notice.

[30] This matter was initially assigned to another judge. The undersigned has, therefore, examined the earlier filings in making this determination.



AO 72A
(Rev.8/82)

defense counsel, including electronic communications, to the extent those communications related to settlement negotiations. *See* Order entered October 2, 2003 at 11. As no Objector has offered any evidence relating to these communications, the court must assume that nothing in this discovery would support a finding that the settlement negotiations were in any way collusive.

The court, therefore, concludes that "the posture of the case at the time [the initial] settlement was proposed" (and subsequent modifications entered), as well as the "circumstances surrounding the negotiations," demonstrate that "the settlement was reached as a result of good-faith bargaining at arm's length, without collusion." *In re Jiffy Lube,* 927 F.2d at 159. Thus, the first and third factors support a finding of fairness.

As to the second factor, the court concludes that the subject matter of the action, which is primarily a legal dispute as to what may properly be included in a Credit Report, does not necessarily require significant substantive discovery. That is, the nature of Defendant's practice was not so much in dispute as was its legality. In any case, the court required disclosure to the Objectors of the discovery that had been conducted. The only subsequent objections directed to this issue fail to convince the court that further merits discovery was necessary to adequately evaluate the case prior to settlement.[31]

In addressing the fourth factor, the court has considered that Class Counsel have substantial litigation experience and, collectively, have significant federal court litigation experience. Moreover,

---

[31] Objector Wheelahan includes a cursory reference to the "lack of any meaningful discovery or litigation pertaining to the merits of the claims" in her more recent objections. Wheelahan Objections at 19 (filed December 3, 2003). She does not, however, specify what discovery she believes should have been completed. Wheelahan offered no further specification when the court raised this issue during the January 12, 2004 hearing. Instead, she stated that her discovery concern related only to the attorneys' fee request. Thus, the court concludes that there is no evidence that Class Counsel failed to conduct adequate discovery prior to negotiating the present settlement terms.



AO 72A
(Rev.8/82)

while some of the Objectors challenge the adequacy of the settlement (discussed *infra*), none have directed the court to any legal authority which Class Counsel might have missed or ignored in advancing this action or which would likely have benefitted the Class had it been considered. Thus, there is no reason to believe that Class Counsel did not conduct sufficient legal research and study.

### B. Adequacy

#### 1. *Jiffy Lube* Factors

The "adequacy" prong of the settlement approval process requires the court to consider the more substantive aspects of the settlement, including:

> (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.

CMC #17

As to the first and second factors, it is significant that the propriety of Defendant's prior practice remains subject to significant legal debate.[32] Thus, the settlement eliminates a genuine risk of a legal ruling foreclosing any relief to any Class Member.

In addition, assuming they succeeded in proving that the complained-of practice violated the law, Class Members would still face significant challenges in proving actual damages (as opposed to a potential entitlement to penalties). A Class Member claiming injury from dissemination of a report containing the complained-of bankruptcy reference would likely need to show all of the

---

[32] It is not, in other words, clear that including a reference to the bankruptcy of another is necessarily misleading. A knowledgeable person reading a full credit report might well know exactly what such a reference means when included as to one tradeline but not reflected in the public records section or other credit lines.



AO 72A
(Rev.8/82)

following in order to prove actual damages: (1) that the allegedly misleading bankruptcy reference was *actually* misunderstood by the recipient of the Credit Report; (2) that an injury, such as denial of credit, resulted from this misunderstanding, rather than from some other negative information which might be contained in the credit report; and (3) that the problem could not have been resolved by reasonable actions by the Class Member (including inquiring as to the reasons for the adverse action and providing more accurate information or seeking alternative financing). In short, whether proceeding individually or collectively,[33] the Class Members would have faced difficulties in proving any actual damages claims.[34]

In addition, no Objector has presented the court with any legal authority imposing either a penalty or awarding damages where the *sole* alleged wrong was inclusion of the type bankruptcy reference at issue in this action. Class Counsel and Defendant have, by contrast, directed the court

CMC #18

---

[33] These difficulties also point to challenges which the parties and court would have faced in resolving damages claims had this class action proceeded to trial. Such challenges do not, however, preclude class treatment. *See generally* Newberg On Class Actions, 3rd § 3.16 ("If differences in amounts of individual damages would make a class action improper, a class action for damages would never be possible, because variations in amount of damages among class members are inevitable unless they happen to be factually identical, which is not required under Rule 23. The existence of a class action provision for damages actions itself indicates that the drafters of the rule contemplated certification for classes raising common questions of liability issues, even where the amounts of damages claimed varied among class members.").

[34] It is also notable that the only credit record offered by the Objectors during the September 23, 2003 hearing was the record of one individual who had exemplary credit but for a single bankruptcy reference on one credit line. No evidence was, however, offered that this individual suffered actual damages as a result of the reference. Neither was there any evidence offered as to whether her credit record was typical or atypical of the Class. In any case, this individual had excluded herself from the Class. Her record does not, therefore, represent the record of even a single remaining class member.



AO 72A
(Rev.8/82)

to case law suggesting a contrary result in jurisdictions which have addressed similar issues.[35]

The above discussion demonstrates that, while the issues remain undecided, the Class faced significant challenges in proving both liability and damages (first and second *Jiffy Lube* factors). At the least, further litigation would be lengthy and expensive (third *Jiffy Lube* factor).

In regard to the fifth factor, the court notes that only a very small percentage of potential Class Members either opted out of inclusion in the Class or objected to the Original Stipulation.[36]

---

[35] *See* Class Counsel's Omnibus Reply filed December 12, 2003 at 3 *citing Dickens v. Trans Union Corp.*, 18 Fed. Appx. 315 (6th Cir. 2001) (§ 1681e(b) claim held insufficient as a matter of law because credit report accurately described plaintiff's role as a co-signer for a loan that was later charged off as bad debt and plaintiff offered nothing other than speculation that "Bankruptcy" notation was misleading); *Heupel v. Trans Union LLC,* 193 F. Supp. 2d 1234, 1240-41 (N.D. Ala. 2002) ("This court concludes that a credit reporting agency should be entitled to summary judgment if it reports factually correct information. Therefore, [Defendant's] report of the [subject account] as a Chapter 13 Wage Earner account is accurate within the meaning of section 1681e(b) and can provide plaintiff no basis for relief."); *Todd v. Associated Credit Bureau Services, Inc.*, 451 F. Supp. 447, 449 (E.D. Pa. 1977) ("Because the report is not inaccurate, I must conclude . . . that the Todd's can not sustain their causes of action."), *aff'd* 578 F.2d 1376 (3rd Cir. 1978).

As expressed in the same memorandum, Class Counsel hoped, despite this case law, to succeed based on the "maximum accuracy" standard set forth in *Koropoulos v. Credit Bureau, Inc.*, 734 F.2d 37 (D.C. Cir. 1984) in which the court stated: "[W]e do not agree with the district court that section 1681e(b) makes a credit reporting agency liable for damages only if the report contains statements that are technically untrue. Congress did not limit the Act's mandate to reasonable procedures to assure only technical accuracy; to the contrary, the Act requires reasonable procedures to assure 'maximum possible accuracy.'" Class Counsel also relied on the Fourth Circuit's somewhat similar statement of the standard in *Dalton v. Capital Assoc. Indus., Inc.*, 257 F.3d 409, 415 (4th Cir. 2001) in which the court stated that: "A report is inaccurate when it is 'patently incorrect' or when it is 'misleading in such a way and to such an extent that it can be expected to [have an] adverse . . . effect." *See* Class Counsel's Omnibus Reply at 3.

[36] Only 3,718 individuals opted out according to Garden City Group's final compilation. This represents slightly more than one tenth of one percent (.1%) of the persons who presumably received notices assuming that all 3,190,389 delivered notices went to different individuals (4,064,289 notices mailed less 873,900 returned as undeliverable). The number would be closer to two tenths of one percent (.2%) assuming that the actual number of persons receiving notices was closer to 2,000,000 (after elimination of all duplications).

A total of 249 individuals filed objections. Of these, 18 were represented by counsel and one is an attorney proceeding pro se. All of these 19 objectors have, either alone or together with other



AO 72A
(Rev.8/82)

The number of Class Members who have expressly objected to the First or Second Modified Stipulations is even smaller (consisting only of Murphy, Zupan and Wheelahan), as the majority of the original Objectors who were represented by counsel now support approval of the settlement and only one unrepresented Objector (Wheelahan) has voiced any concern with the proposed modifications.[37] Notably, the court has received no requests for opt-out or new objections based on modifications to the Original Stipulations. This is despite entry of an order on December 8, 2003, which allowed Class Members to seek late exclusion from the Class if they deemed the proposed modifications to the Original Stipulation to be detrimental.

Thus, the court finds that the first, second, third and fifth factors favor approval of the settlement. The court has also considered but given little weight to the fourth *Jiffy Lube* factor: Defendant's ability to pay such judgments as could be rendered against it were this action to proceed to trial. This factor is either neutral or slightly favors settlement.[38] Given the conclusions as to the other four *Jiffy Lube* factors, the court finds the settlement to be adequate even without consideration of the fourth factor.

CMC #20

---

objectors, filed briefs or had counsel appear to present their objections. However, at the time of the hearing, only two of the objectors represented by counsel and the one pro se attorney-objector actively opposed the final settlement.

[37] While it is arguable that any remaining unrepresented objectors have waived any objection to the settlement as modified, the court will assume for present purposes that they remain opposed to any settlement.

[38] While Defendant is solvent, the court presumes that even a small per-person award for so large a class could have a significant negative impact on its financial status. It is not, however, clear that the potential negative impact would so adversely affect Defendant as to limit its ability to pay the awards.



AO 72A
(Rev.8/82)

### 2. Substantive adequacy based on objections

In addition to the *Jiffy Lube* factors, the court has considered the specific concerns raised by the MZW Objectors as to the substantive adequacy of the settlement. For the reasons set forth below, the court confirms its preliminary findings rejecting a number of the specific objections to the proposed settlement, which objections have been reasserted by the MZW Objectors.[39] The court further finds that the areas of concern identified by the court at the conclusion of the September fairness hearing have been adequately addressed by the Second Modified Stipulation.

#### a) Confirmation of Preliminary Findings.

As suggested in the court's preliminary oral rulings on September 24, 2003 and in the Order entered October 2, 2003, the court now rejects Objectors' more significant claims of inadequacy. Most critically, the court rejects the MZW Objectors' argument that the general nature of the relief (prospective only), is necessarily inadequate to support the release of claims for prior damages. The court also finds that the provision of free Consumer Disclosures has value to each Class Member, particularly in that it facilitates their ability to confirm that the complained-of reference has been removed.[40] The court, likewise, rejects the MZW Objectors' challenge to the general adequacy of

CMC #21

---

[39] After the First Modified Stipulation was filed, the MZW Objectors filed objections in which they acknowledged some improvements but renewed their prior objections in most respects. Two of these Objectors, Murphy and Zupan, filed an additional objection memorandum after the parties filed the additional proposed modifications which ultimately became part of the Second Modified Stipulation. This supplemental memorandum did not, however, address the additional modifications. Rather, it expounded on one of the Objectors' earliest arguments: that the imposition of limited remedies for future violations was improper. The Coordinated Objectors have, by contrast, filed memoranda supporting the settlement as proposed in the Second Modified Stipulation.

[40] Prior to and during the September 23, 2003 hearing, some of the Objectors suggested that pending federal legislation would make this right of no value as the pending legislation would grant a similar right. The bill in question has since been signed into law as the Fair and Accurate Credit Transactions Act of 2003, 117 Stat. 1952 (2003) ("FACT"). While FACT does grant the right to an



AO 72A
(Rev.8/82)

remedies for future violations of the Second Modified Stipulation.[41]

The court also rejects all notice related arguments for the reasons set forth preliminarily in the October 2, 2003 order (as to the substance of the notices) and as set forth below regarding compliance with the court ordered notice procedures. In this regard, the court incorporates all prior orders regarding notice and finds that the procedures set forth therein are adequate.

The court finds nothing in the attorneys' fees provisions of the Original or either set of Modified Stipulations to suggest any fatal flaw in the process leading to or substance of the proposed settlements. Beyond the cap imposed by the various Stipulations of Settlement, the fees that may be awarded remain subject to judicial review and approval separate from the present proceeding. *See infra* § VI (Further Proceedings).

Cuc #22

**b. Findings as to Previously Identified Areas of Concern**

After hearing from proponents and opponents of the Original Stipulation through their written submissions and through two days of oral argument during the initial fairness hearing, the

---

annual report, the implementation provisions suggest that it will require at least 12 months before the right will be a reality. This is because FACT allows six months for the adoption of implementing regulations and another six months to begin implementation, with the further likelihood of staggered implementing dates to avoid overwhelming the system. *See* FACT § 211 (a)(2) & (d) (to be codified at 15 U.S.C. § 1681j & Notes thereto). Thus, this settlement effectively gives the Class Members an extra (one year earlier) report from Defendant.

[41] The remedial provisions at issue impose both procedural and substantive limits on the remedies which Class Members might obtain for future violations of the Second Modified Stipulation. *See* Second Modified Stipulation ¶ 18 (operative provisions) and ¶ 20 (remedial provisions). At the same time, they provide a very significant benefit in that Class Members need not prove that the actions at issue violate federal or any other law. That is, Defendant concedes for purposes of these enforcement provisions that it will not contest that a breach of paragraph 18 is a violation of the FCRA. Further, while some remedies are limited, including the right to seek punitive damages or damages for emotional distress, other remedies are expanded, including providing a simple mechanism for seeking a penalty and the *option* of proceeding in arbitration if seeking actual damages. Under these circumstances, an agreement to remedies that are more limited than those provided for statutory violations is neither unreasonable nor improper.



AO 72A
(Rev.8/82)

court expressed its concerns as follows:

1. Remedial provisions for future violations of the Stipulations of Settlement may not be procedurally adequate to serve the intended purposes of the settlements:

   a. the provisions of paragraph 20(a) of the of Settlement (relating to the $500 strict liability penalty), may present difficulties of proof as consumers may have difficulty obtaining a "credit report" as that term is defined in the Stipulations of Settlement;

   b. the provisions of paragraph 20(b) of the Stipulations of Settlement (relating to arbitration of actual damages claims for less than $75,000), are unclear as to how the arbitration would be commenced, who would pay fees, and whether the class member would have the assistance of counsel (available payment of attorneys fees);

   c. the provisions for selection of an arbitrator under paragraph 20(b) also present concerns as the single arbitrator is to be selected by the Defendant;

2. The adequacy of the fix proposed by Equifax (and allowed to any Defendant under their respective Stipulations of Settlement), has not been established;

3. The scope of the claims released is not sufficiently clear. (Potential for confusion is created by the failure to include an express description of the claims released in the Stipulations of Settlement. Instead, each Stipulation of Settlement simply refers back to the corresponding complaint);

4. Compliance with the court's directives regarding identification and notification of the class was not established, although a detailed proffer of evidence was made.

Order entered October 2, 2003 at 10-11. These concerns are addressed below.

**i. Remedial provisions for future violations of the Stipulation of Settlement.**

**Provisions presenting possible difficulties of proof (¶ 20(a)).** The Original Stipulation required Class Members who claimed an "Event for Remedy"[42] to submit a claim with an attached

[42] The term "Event for Remedy" is defined as the dissemination of a Credit Report to a third party which violates the provisions of Paragraph 18. Second Modified Stipulation ¶ 20. Paragraph



AO 72A
(Rev.8/82)

"Credit Report" in order to obtain a $500 strict liability penalty. *See* Original Stipulation ¶ 20.a. The requirement to attach a Credit Report was potentially problematic as a Credit Report is, by definition, a document given to someone other than the debtor. *See* Original Stipulation at ¶ 10 (defining Credit Report as having "the same meaning as provided for "consumer report" in 15 U.S.C. § 1681a(d) but *is limited to a report disseminated to a third party*"– emphasis added).

The Second Modified Stipulation resolves this concern by providing three alternative means by which a Class Member might prove that an Event for Remedy occurred. Specifically, the Second Modified Stipulation allows a Class Member to produce the original or a copy of any of the following as proof of his or her claim: "(1) the Credit Report involved; or (2) [the Defendant's] Consumer Disclosure reflecting both information that would, if disseminated, violate Paragraph 18 and the issuance of the Credit Report involved; or (3) an adverse action letter that specifies as a reason for the adverse action that the Class Member's Credit Report referenced the bankruptcy of another, expressly including the 'of another' aspect." *See* Second Modified Stipulation ¶ 20.a.

CMC #24

In addition to the above changes, this penalty provision has been modified to simplify submission of a claim by deleting the notarization requirement. A specific procedure has also been added to allow a Class Member to challenge any denial of a claim for penalties submitted under this section.[43] The court finds these changes to be beneficial to the Class as they further effectuate the original intent of this remedial section of the Stipulations of Settlement.

---

18, in turn, contains the substance of the prospective relief granted by these settlements, which, under the terms of the Second Modified Stipulation, will ultimately preclude any reference to bankruptcy on a given debtor's Credit Report unless it is the bankruptcy of that debtor.

[43] This is to be accomplished through a demand for arbitration under subparagraph 20.b. Under this provision, the Class Member need not prove any damages but must attach proof that the claim was properly submitted. Second Modified Stipulation ¶ 20.a.



AO 72A
(Rev.8/82)

**Provisions regarding arbitration.** The Second Modified Stipulation also addresses the court's two areas of concern regarding arbitration. The court's first area of concern related to the failure of the arbitration section to clearly address the following procedural matters: (1) how the arbitration would be commenced; (2) who would pay fees; and (3) whether the Class Member could receive payment of attorneys' fees. The second area of concern was more substantive, involving Defendant's control over the selection of the arbitrator and the failure to specify the source from which arbitrators would be selected.

The Second Modified Stipulation resolves these concerns by establishing clear and specific instructions for invoking and conducting arbitration. For example, the Second Modified Stipulation provides that arbitration is commenced by the Class Member "submitting a written claim and demand for arbitration, which specifies the Event for Remedy and the damages sought." An address is provided for the written demand. The Second Modified Stipulation also expressly provides that the costs of the arbitration are to be borne by Defendant. Defendant is afforded an opportunity to avoid arbitration by paying "the amount claimed plus agreed-upon reasonable counsel fees." If the Defendant does not make such payment, it must file the claim for arbitration with the American Arbitration Association ("AAA") within 30 days of receipt. The specific rules to be applied, the AAA's Supplementary Procedures for Consumer Related Disputes, are also specified as is the nature of the Class Member's proof of liability: that an Event for Remedy occurred, not that the Event for Remedy contravened existing law.

The Second Modified Stipulation's arbitration provisions also specify that the Class Member may retain and be represented by counsel and may, through the arbitrator, seek payment of counsel's fees up to $12,000. Provisions were also added balancing the discovery to be *automatically* allowed



AO 72A
(Rev.8/82)

from the Class Member (deposition and production of relevant documents) with discovery to be *automatically* allowed from the Defendant ("production of [Defendant's] relevant documents pertaining to the Class Member").[44] Finally, the Second Modified Stipulation expressly provides for entry of "[j]udgment upon the award rendered by the arbitrator . . . in any court having jurisdiction."

As noted in the preceding section of this order, the Second Modified Stipulation also expands the purposes for which arbitration may be invoked. The original subject matter covered only claims for damages of up to $75,000. The newly added subject matter covers claims that a Defendant has failed to pay the penalty provided for in Paragraph 20.a. The above procedures apply to either type of claim.

The collective modifications addressed above satisfy the court's concerns with the procedural aspects of the arbitration provisions of Paragraph 20.b. To the extent any other objection relates to this aspect of the settlement, the court finds the objection to be insufficient to warrant rejection of the proposed settlement.

CmC #26

**Additional Modifications not Suggested by the Court.** The court did not identify any concerns regarding the adequacy of the judicial damages remedy provided under paragraph 20.c. of the Original Stipulation. Nonetheless, additional changes were made to this paragraph in the Second Modified Stipulation. The court finds these changes to be either neutral or beneficial to the Class for the reasons set forth below.

---

[44] The Original Stipulation included a provision for "such other depositions and document discovery as either party may fairly need." This provision remains in paragraph 20.b. of the Second Modified Stipulation. The change found in the Second Modified Stipulation does not, therefore, necessarily make available discovery which would not otherwise have been available. Nonetheless, by making the discovery from Defendant automatic, the change removes the risk of delay or denial of this discovery.



AO 72A
(Rev.8/82)

Among other things, the changes to paragraph 20.c. clarify that a Class Member need only prove that an Event for Remedy occurred, not that the Event was a violation of the relevant law, in order to prove a claim for damages. Language has also been added to clarify that the remedies available under this section include "any right to recover costs and attorney's fees" which would normally be available under the FCRA. The court views these wording changes as clarifications of the intended benefit of this section.

A more significant change expands the application of this section. The Original Stipulation made the judicial remedies available only to: "Class Members seeking in excess of $75,000 for an Event for Remedy." Under the Second Modified Stipulation, these remedial provisions apply to "Class Members seeking damages for an Event for Remedy, who have not elected to proceed under subparagraph a or b above." This is a more significant change as it extends the option of judicial resolution of claims for damages to all claims allegedly resulting in economic damages.[45]

Case #27

**Specific Objections.** Two objections to the remedial sections require comment. First, the court rejects the reasserted arguments of the MZW Objectors, that the imposition of the limitations on remedies impairs future claimants' due process rights. This objection fails first because the persons whose rights are being "limited" consist only of persons who are Class Members, not other persons not before this court. Thus, by declining to opt-out of the Class, these Class Members have

---

[45] In their memorandum filed December 15, 2003, Class Counsel state that this change is only a clarification of the intent of this remedial provision as stated in the First Modified Stipulation. *See* Class Counsel's Memorandum at 6 ("This is a clarification of, rather than a change to, the Modified Stipulation. As is apparent from the modifications that were made in the Modified Stipulation, it was the intent of the Plaintiffs and Defendants to make arbitration voluntary, rather than mandatory."). Regardless of the intent of any changes in the First Modified Stipulation, the availability of optional damages remedies is first made clear by the Second Modified Stipulation.



AO 72A
(Rev.8/82)

elected to accept any limitations on future remedies.[46] Further, the remedies at issue are remedies for violations of the Stipulations of Settlement, which resolve, by compromise, whether the specific act at issue is violative of the law. The Stipulations do not limit remedies for any other alleged inaccuracies in the Class Members' Credit Reports. Under these circumstances, the court finds no difficulty with the limitations on future claims.

The court also rejects Objector Wheelahan's argument that the Class Representatives are inadequate to represent the Class as to limitations on future remedies. Wheelahan bases this argument on the lack of evidence that the Class Representatives will have a future claim. Of course, there is no showing that *any* Class Member will have a future claim. What is important is that the Class Representatives have a similar *risk* of having such a claim as other Class Members. Thus, the Class Representatives are similarly situated to other Class Members and may properly represent them in this regard.

Cmte #28

**ii. Adequacy of the alternative fix allowing inclusion of bankruptcy reference if clarified as "of another."**

As noted in the Order entered October 2, 2003, the Original Stipulation allowed Defendant to retain the references to bankruptcy so long as it included qualifying language to indicate that the bankruptcy was "of another."[47] Most or all of the Objectors argued that elimination of the reference

---

[46] It is of particular note that these Class Members had available the proposed Original Stipulation terms at the time they elected not to opt out. While the terms of the settlement have changed somewhat since that time, those changes have all been beneficial to the Class, particular iin regard to the limitations on remedies.

[47] At the time of the September 23, 2003 hearing, Defendants in two of the three related actions had implemented procedures which eliminated the reference to bankruptcy altogether. Experian fell within this group. Defendants in the third action, Equifax, Inc., and Equifax Credit Information Services, Inc., (collectively "Equifax"), opted to retain the bankruptcy reference together with clarifying language. While only Equifax initially adopted this "fix," this option remained open



AO 72A
(Rev.8/82)

altogether was not only their preferred prospective relief, but that any other modification of Defendant's prior practice in the reporting of the bankruptcy of another was inadequate. They, therefore, challenged the Original Stipulation to the extent it allowed Defendant to continue the use of a reference to bankruptcy, albeit qualified as "of another." While the court made no findings as to whether this alternative satisfied the applicable standards, it did find the record inadequate to resolve the issue.

Under the terms of the Second Modified Stipulation, Defendant shall, no later than May 31, 2004, permanently cease making reference to the bankruptcy of a third party, with or without qualification. The court finds the delay to be necessary to allow implementation of this modification by Defendants in a related action (Equifax). *See supra* n. 47. As to the Defendant in the present action (Experian), the delay has no practical effect.[48] As this change results in Defendant ultimately and permanently adopting the procedure preferred by all of the Objectors and as this procedure will, if properly implemented, eliminate the complained-of bankruptcy reference in its entirety, the court finds this modification to moot the court's prior statement of concerns with the fix which allowed for the reporting of a Joint Account holder's bankruptcy if clarified as the bankruptcy "of another."[49]

CMC #29

**iii. Clarity of Release Language.**

The court's previously expressed concern regarding the release language contained in the Original Stipulation was that the language was not sufficiently specific to fully identify the claims

---

to all Defendants under the terms of the Original Stipulations.

[48] There is no suggestion that Experian will modify its already implemented procedures in the interim. Thus, in practice, the delay date affects only Equifax, a Defendant in another action.

[49] As noted above, the court did not find this alternative "fix" to be inadequate. Rather, the court found *the record* inadequate to make such a determination. The present resolution eliminates the need for further findings as to adequacy of the previously proposed solution.



AO 72A
(Rev.8/82)

being released. This was because the relevant language in the Original Stipulation released Defendant from claims "based on any of the matters asserted in the Complaint." A Class Member would, therefore, have to refer to another, rather lengthy document to discern what claims were being released. The reliance on the lengthy complaint also left room for interpretation as to the scope of the releases.

By contrast, the language in the Second Modified Stipulation releases Defendant from claims "based on or related in any manner to [Defendant's] issuance of a Credit Report or Consumer Disclosure reporting or disclosing an account as in bankruptcy if the account was in bankruptcy as a result of the bankruptcy filing of a person other than the consumer who was the subject of the report or disclosure." Modified Stipulation ¶ 41. This language is clear, specific, and self contained. It, therefore, resolves the court's concerns regarding specificity of the release.

CMC #30

**iv. Compliance with Notification Directives.**

The court's earlier concerns as to the adequacy of proof of notice are addressed and resolved above.

**v. Other Modifications.**

Additional changes have been made in the Second Modified Stipulation most of which are non-substantive changes reflecting what has occurred since the entering of the Original Stipulation or are otherwise necessary to conform the document to the changes discussed above. The only other changes are either neutral or beneficial to the Class. These changes include: amendment of the remedial provisions of the Second Modified Stipulation (found in ¶ 20) to facilitate notification of Defendant of any alleged Event for Remedy (defined in ¶18); modification of the forms used to report violations to be more easily understood;[50] and amendment of the provisions allowing for relief

[50] For instance, the reference to reporting a "violation of Paragraph 18" is modified to describe the substance of the violation, eliminating the need to refer back to another document.

from the terms of the Second Modified Stipulation in the event of a change in the law.

The first of these changes requires Defendant to accept notice of an alleged Event for Remedy by phone and regular mail, as well as by *either* email *or* facsimile or both. The Second Modified Stipulation further provides that the relevant addresses and numbers shall be made available on Class Counsel's website. *See infra* § V (Maintenance of Website). The court finds that these changes adequately address and, therefore, resolve the objections related to the ease with which a Class Member might advise Defendant of the occurrence of an Event for Remedy.[51]

The last of these three areas of modification (Second Modified Stipulation at ¶ 23) deals with the steps necessary before Defendant may modify its procedures, in derogation of the terms of the settlement, in the event of a change in the law. Defendant is now required to petition the court for permission to change its procedures in the event it believes a change in the case law or regulations *prohibits* actions *required* by the Second Modified Stipulation. Similarly, Defendant must petition the court before changing its procedures based on a change in case law which Defendant maintains *allows* actions *prohibited* by the Second Modified Stipulation. Defendant may only seek modification based on such permissive changes (changes which allow what is otherwise prohibited),

CMC #31

---

Specifically, the language now refers to dissemination of a report "to someone, other than me, that contained on a Joint Account a reference to bankruptcy, but no bankruptcy was referenced in the public-records section . . . and it is not otherwise proper that bankruptcy should be reflected for me." Modified Stipulation, Exhibit B at ¶ 4. The form is also modified to include an additional basis for a claimant believing they are a Class Member: that they were "included in the mailing of the class notice." Modified Stipulation, Exhibit B at ¶ 5.

[51] As noted in various objection memoranda, the ability to provide notice is important because the remedial provisions of the Second Modified Stipulation impose limits on a Class Member's ability to seek relief for what might otherwise be multiple Events for Remedy occurring in a short time frame. These limits are, obviously, intended to prevent a Class Member from learning of an error and intentionally taking action to increase the available penalties or potential actual damages. The fairness of the limitations is, therefore, largely dependent on the Class Member's ability to give the required notice.

if the change is based on a regulatory change or on a decision of the Fourth Circuit Court of Appeals or United States Supreme Court. Statutory changes, by contrast, still allow Defendant to change its practices without further court order.[52] The modifications also require Defendant to give such notice as the court may require to Class Counsel and Objectors' counsel if seeking judicial relief based on a change in regulations or case law.

## IV. CONCLUSION AS TO FAIRNESS AND ADEQUACY

For the reasons set forth above, the court finds the settlement, as expressed in the Second Modified Stipulation of Settlement, to be fair and adequate. The court, therefore, approves the settlement of this class action.

## V. MAINTENANCE OF WEBSITE

Certain remedies herein are dependent, at least in part, on Class Counsel's maintenance of a website. In order to insure that these duties are carried out for the life of the agreement, the court, by this order, imposes primary responsibility for maintenance of the website on William Linwood Mullin, Jr., Esquire. Secondary responsibility, in the event Mr. Mullin is unable or unwilling to maintain the site shall fall on William Douglas Smith, Esquire. These attorneys shall be responsible for insuring that the website is maintained in a manner that effectuates the settlement and facilitates Class Members' ability to receive the full advantage of the settlement until further order of this court.

## VI. FURTHER PROCEEDINGS

The above rulings do not address the issue of Attorneys' Fees and Expenses. *See* Second Modified Stipulation ¶ 29. To resolve this remaining issue, the court establishes the following two-stage procedure. Any prior limitations on discussion of fees and related matters are lifted.

---

[52] As discussed in the hearing, this right to change practices based on a change in the statutory law without seeking prior court approval carries with it the risk of liability in the event a court later determines that Defendant misinterpreted the effect of the statutory change.

A. **First Stage -- approval of total fee award.**

1. No later than **January 30, 2004,** all persons claiming an entitlement to Attorneys' Fees and Expenses shall submit time, cost and expense record summaries,[53] along with such affidavits and memoranda in support of the amount of the Attorneys' Fee and Expense award which they believe to be either an appropriate *total* award to all counsel, or, alternatively, the amount the submitting attorneys believe should be awarded to them. To the extent possible, Class Counsel and Objectors are encouraged to make a joint submission as to a total fee, cost and expense award.

2. Any opposition to the *total* amount sought shall be filed no later than **February 9, 2004**.

3. No reply is required. However, any reply shall be filed by **February 13, 2004.**

**B. Second Stage – Allocation of Fee Award.**

1. Class Counsel and Objectors' Counsel shall be allowed **no more than thirty days** following entry of the order setting a total Attorneys' Fee and Expense award to seek to resolve the issue of allocation of this award. At or before

---

[53] The time record and cost and expense summaries should set forth the total hours spent by each time keeper (with identification as to their role, *e.g.*, attorney or paralegal) broken down into three time periods: (1) before approval of class certification; (2) from class certification through the September 23-24 settlement approval hearing; (3) time between September 23, 2003 and January 13, 2003; and (4) time spent thereafter, including in preparation of the fee requests. In addition, counsel shall file their time records. If counsel believe that any portion of their time records contain privileged material, they may petition the court for permission to file a redacted version of the documents. Prior to seeking permission to make such a filing, counsel shall consult with any other counsel having an interest in the matter and shall contact the court by conference call to obtain further instructions.



AO 72A
(Rev.8/82)

the conclusion of that time, counsel shall file a document setting forth the terms of their agreement or advising the court that they have not been able to reach an agreement.

2. In the event that no agreement is reached, Counsel shall file briefs within **fourteen days** after filing notice of the lack of agreement setting forth their positions as to how the award of Attorneys' Fees and Expenses should be allocated.

3. Opposing briefs shall be filed within **fourteen days** after filing of the initial briefs.

**CONCLUSION**

For the reasons set forth above, the court confirms as final the certification of the Class as defined herein, approves the settlement, and provides for further proceedings as set forth above. The court will defer entry of final judgment until it has decided the remaining issues relating to Attorneys' Fees and Expenses. Other procedural matters discussed during the January 12, 2004 hearing will be addressed by separate order.

**IT IS SO ORDERED.**

Cameron McGowan Currie

CAMERON MCGOWAN CURRIE
UNITED STATES DISTRICT JUDGE

January 14, 2004
Columbia, South Carolina

O:\Civil Orders\Orders.00\00-fcra-- Jan 14 Order approving settlement-- Experian.wpd

AO 72A
(Rev.8/82)