

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

LISA HILL-GREEN, <i>on behalf of herself</i> <i>and all similarly situated individuals,</i>	:	
	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 3:19-cv-708 (MHL)
	:	
EXPERIAN INFORMATION	:	
SOLUTIONS, INC.,	:	
	:	
Defendant.	:	

**PLAINTIFF’S MEMORANDUM IN SUPPORT OF
MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

Ms. Hill-Green is seeking final approval of a class-action settlement that will resolve an important inaccuracy problem in Experian’s credit reports by providing significantly expanded injunctive relief under Fed. R. Civ. P. 23(b)(2) and paying Rule 23(b)(3) class members \$22,450,000 to compensate them for their actual damage claims.

The Court preliminarily approved the Settlement on September 29, 2022. ECF No. 129. The class notice process for both the Rule 23(b)(2) settlement and Rule 23(b)(3) settlement has been completed. Kinsella Media, the class administrator for the Rule 23(b)(2) settlement, conducted a publication notice program that resulted in around 208,204,833 gross impressions and reached roughly 75 percent of the Rule 23(b)(2) class members. ECF No. 135-1 ¶¶ 8–10. JND Legal Administration, LLC, the class administrator for the Rule 23(b)(3) settlement, sent the court-approved notice to the 568,659 Class Members by email or first-class mail. *See* ECF No. 135-2 ¶¶ 12-17. Class notice was delivered to 98% of Class Members, *id.*, only one of whom has objected to the Settlement, and the Settlement Administrator has only received five valid exclusion

requests.¹ Ex. 1, Supp. Decl. of Gretchen Eoff ¶¶ 13-14. Therefore, under Federal Rule of Civil Procedure 23, the parties request that the Court confirm its certification of the proposed Class, approve the proposed Class Settlement, award attorneys' fees, costs, and the Class Representative Service Awards, and dismiss the class claims with prejudice.

BACKGROUND

This litigation involves two class claims against Experian, both of which challenged Experian's Fraud Shield product. Ms. Hill-Green's first claim, brought under § 1681e(b), alleged that Experian lacked reasonable procedures to ensure that its Fraud Shield indicators that flagged consumers' home addresses as "high-risk" or "non-residential" were accurate. And Ms. Hill-Green's second claim, brought under § 1681c(a), alleged that Experian also lacked procedures to ensure that outdated business address information was removed from its system, meaning that if a consumer's address had ever been linked to a business, that notation remained in the system forever, even if the business were defunct.

As the Court is aware, there was a prior Rule 23(b)(2) settlement, which addressed a narrow set of issues regarding Experian's Fraud Shield product. The Court approved the settlement on April 27, 2022. ECF No. 112. That settlement, however, failed to resolve the entire litigation, and the case continued with respect to Ms. Hill-Green's claims for monetary damages.

Following that settlement, the Parties continued to litigate the case. This involved substantial discovery and mediation efforts, which have been detailed in Plaintiff's pending Motion for Attorney's Fees, Costs, and Class Representative Service Award. ECF No. 134 at 2-5. Ms. Hill-Green will not repeat all those details here, but will reiterate that following this Court's April 8, 2022 hearing, both sides were fully engaged and working with about a dozen lawyers

¹ Class members can still request exclusion from the Rule 23(b)(3) Class until February 13, 2023. Class counsel will provide the Court with an updated number at the Final Fairness Hearing.

between the two sides to simultaneously complete both the discovery and mediation goals necessary under the closing litigation window. Before reaching this Settlement, Experian produced over 500,000 pages of new discovery and tens of millions of consumer application data. Ms. Hill-Green's counsel reviewed the entire document production and worked closely with their expert to analyze the consumer data. Class Counsel also conducted depositions and significant third-party discovery. And simultaneously, both sides participated in significant mediation efforts supervised by Magistrate Judge Colombell. Along with these formal mediation efforts, there were dozens of informal discussions and conferences among counsel.

Both discovery and mediation were hard-fought and, at times, contentious. Experian was confident that it would ultimately prevail on the merits and would pursue the litigation past class certification and to the Fourth Circuit. It believed that its position was supported by the decision in *Price v. Experian Info. Solutions, Inc.*, 8:18-cv-340-DOC-SS (C.D. Cal) and that ultimately, Ms. Hill-Green's claims would fail because its Fraud Shield reporting fell outside the scope of the FCRA. Class Counsel, of course, disagreed. They argued that the claims here were materially distinguishable from *Price*. Ultimately, after significant mediation efforts, both Parties made substantial concessions that recognized the strengths and weaknesses of each side's position and resulted in the Settlement before this court for final approval. This Settlement, which provides significant injunctive and monetary relief, described below, resolves all remaining class claims and issues. Experian denies liability and that a class is appropriate for Rule 23 certification on the claims asserted here, but it does not oppose the certification of the Settlement Class for resolving this action.

CLASS ACTION SETTLEMENT

The Settlement encompasses two classes, two sets of consideration, and substantially different releases. The expanded Rule 23(b)(2) Settlement obtains substantial and far-reaching new

consideration. It provides extensive injunctive relief that goes beyond the original Rule 23(b)(2) Settlement in addressing Experian's use of "high risk" and "non-residential" Fraud Shield indicators, which will benefit millions of consumers without releasing class members' individual claims for actual or punitive damages. The second, the Rule 23(b)(3) Settlement, which includes 568,659 consumers who, for a release of all claims, are entitled to submit a claim for payment from a \$22,450,000 Settlement Fund.

A. The Rule 23(b)(2) Settlement provides significant, additional injunctive relief.

Ms. Hill-Green filed this case to address Experian's incorrect reporting of certain consumers' addresses as "high risk" or "non-residential." In the original Rule 23(b)(2) Settlement, she obtained significant injunctive relief that addressed many of these issues. That settlement required:

- Experian to reconfigure its update process for non-residential addresses so that Experian completely updated its address table each month.
- Experian to suppress or remove any address from the Non-Residential Address data that had not been updated or verified in the last six years.
- Experian to stop publishing certain Fraud Shield indicators altogether and reduce the number of codes that would return the Fraud Shield indicators still being used.
- Experian to revise the messaging and descriptions of some Fraud Shield indicators to be more detailed.

Those changes were significant and meaningful because they addressed many issues raised by Ms. Hill-Green's Complaint. But this expanded Rule 23(b)(2) Settlement goes even further. Because of the new settlement terms, Experian will be providing consumers with critical new information about how these Fraud Shield indicators work and what they mean—both on Experian's consumer education website and on the free credit reports (consumer disclosures) consumers obtain to review and dispute information in their credit file. ECF No. 127-1, Settlement Agreement at 4.3.1.a;

4.3.1.b. Empowering consumers with this information is significant because it will help consumers quickly identify and address any inaccuracies. Experian will also make it easier for consumers to ask about and dispute these Fraud Shield indicators and will tell consumers how to utilize this process directly on consumer disclosures. ECF No. 127-1, Settlement Agreement at 4.3.1.b; 4.3.1.c. Now, Experian will presume the consumer is correct when she makes a dispute, meaning that disputed Fraud Shield information will be presumptively removed from consumer credit reports. Ultimately, the injunctive relief addresses the specific alleged harm that Plaintiff suffered here and ensures that consumers are not prejudiced by similar inaccurate Fraud Shield reporting moving forward.

The Settlement Agreement defines the Rule 23(b)(2) Settlement Class Members as:

All consumers in the United States for whom Experian, within two years prior to the filing of the Complaint in this action and during its pendency, furnished a consumer report to a third party containing an inaccurate Fraud Shield Indicator No. 10, 11, 16, or 17 indicating that the consumer's address was either a high-risk or non-residential address.

ECF No. 127-1, Settlement Agreement at 2.33.² This class is estimated to include over ten million consumers, but the injunctive relief will benefit even more consumers. Class Counsel are not seeking any attorney's fees or service award for this added Rule 23(b)(2) Settlement, as they have already been paid for the previous Rule 23(b)(2) settlement.

B. Rule 23(b)(3) Class Members can seek payment from a \$22,450,000 Settlement Fund.

The Rule 23(b)(3) Settlement provides class members with the ability to submit a claim form to receive a pro rata payment from a \$22,450,000 Settlement Fund. There are two groups of consumers eligible to submit claims against the Settlement Fund. ECF No. 127-1, Settlement Agreement at 2.38.

² This is the same class certified in the existing Rule 23(b)(2) settlement.

The first group includes all consumers who, from July 1, 2018 to July 31, 2021, contacted Experian to ask about or dispute a non-residential or high-risk address indicator. There are 19,090 consumers in this group.

The second group is a group of consumers who appear on a list compiled by Plaintiff, Plaintiff's expert, and Experian. As discussed in Ms. Hill-Green's preliminary approval motion, the parties developed four criteria for selection of this group to capture as many consumers as possible who were likely harmed by Experian's reporting of high-risk or non-residential Fraud Shield indicators from July 1, 2018 to July 31, 2021. This list ultimately included 549,569 consumers.

There are, therefore, a total of 568,659 Rule 23(b)(3) Class Members. Each Rule 23(b)(3) class member is eligible for a pro rata payment from the Settlement Fund, net any award of attorneys' fees, costs, and expenses to Class Counsel approved by the Court. Agreement § 5.9. The claim forms (which are different for each group to minimize confusion) simply require Rule 23(b)(3) Class Members to check a box confirming, under penalty of perjury, that either: (1) the address listed on their notice—that is, the address Plaintiff's Expert matched to the Non-Residential Address Table—was in fact a residential address; or (2) for the Rule 23(b)(3) Class Members who contacted Experian to ask about or dispute a non-residential or high-risk address indicator, that they were harmed by a Fraud Shield indicator. Class members need not submit any proof or documents to support their claim or receive a payment. 80,080 class members submitted a valid claim form (a 14.08-percent claims rate), which means that if the Court awards the

requested attorney's fees and service awards, each these consumers will receive a payment of around \$187.70.³

The Settlement Agreement also gives Rule 23(b)(3) Class Members ample opportunity to cash their settlement checks. The Settlement Administrator will remain any uncashed checks to give class members a second opportunity to obtain their settlement payment. Any uncashed or undeliverable checks after this second mailing will be redistributed to the Rule 23(b)(3) Class Members who cashed their initial checks, so long as the amount of the second payment would be at least \$25.00. If there are not enough funds to mail a second payment to Rule 23(b)(3) Class Members, or if there are still funds remaining after the second payment, then any remaining money in the Settlement Fund will be paid in equal parts to the National Consumer Law Center and Public Justice *cy pres* award to support the protection of consumers relating to the claims alleged in the Litigation.

C. The notice process has been completed for each of the Classes.

In its Preliminary Approval decision, the Court approved the Notice and the Notice Plan for both the Rule 23(b)(2) and Rule 23(b)(3) Classes. ECF No. 129 ¶ 14.

Though a Rule 23(b)(2) settlement does not require notice to class members, here the Parties provided notice to the Rule 23(b)(2) Class Members anyway, at Experian's expense. The Court appointed Rust/Kinsella as the Rule 23(b)(2) Settlement Administrator, and Rust/Kinsella has completed the Notice Plan as ordered. This notice program included a paid media program that used print, digital, and social media. ECF No. 135-1 ¶ 5. For example, the Rule 23(b)(2)

³ Ms. Hill-Green's fee motion requested \$7,483,258.50 in attorney's fees and costs, which is one third of the Settlement Fund, as stated in the Class Notice. After filing the Motion, Class Counsel realized that this request was based on an incorrect fee calculation. Therefore, Class Counsel is seeking a lower amount attorney's fees and costs in the amount of \$7,408,500, which represents 33%, which is the amount in the Settlement Agreement.

publication notice appeared once in a national consumer magazine, TV Guide. *Id.* ¶ 6. Rust/Kinsella also placed banner advertisements on several websites, including Yahoo News, Politico, Investopedia, NPR, Good Housekeeping, Reader's Digest, Conversant, Facebook, and Google, between October 24, 2022 and December 5, 2022. *Id.* ¶¶ 7-8. This electronic advertising delivered 203,312,009 total gross impressions. *Id.* ¶ 8. Rust/Kinsella also used targeted media strategies, including third-party targeting to reach people who purchased services indicating someone was looking to protect, repair, or check one's credit (e.g., Experian, Equifax, Transunion, LifeLock, and Quizzle); and Facebook targeting to users who showed an interest in pages related to credit history, credit, credit solutions, credit counseling, credit karma, debits and credits, tax lien, and others. *Id.* ¶ 9. This added advertising led to an additional 4,892,824 gross impressions. Altogether, the Rule 23(b)(2) Notice Program, as implemented, reached about 75 percent of potential class members using a method that is consistent with many nationwide court-approved class action notice programs.

The Court's preliminary approval order also appointed JND Legal Administration as the Rule 23(b)(3) settlement administrator. ECF No. 129 ¶ 14. Consistent with the Court's Order, JND received the Rule 23(b)(3) class list from Defendant, analyzed the data, removed duplicates based on exact name and the consumer's unique Experian PIN, and then updated mailing address information using the National Change of Address database. ECF No. 135-2 ¶¶ 10-11. On November 14, 2022, JND emailed the class notice to 1,253,173 class member email addresses, which included multiple email addresses for some class members. *Id.* ¶ 12. Of these emails, 432,388 were returned as undeliverable. *Id.* ¶¶ 13-14.

On November 14, 2022, JND mailed class notices to all Rule 23(b)(3) Class Members, even if they had emailed them notice. *Id.* ¶ 15. As of February 3, 2023, the U.S. Postal Service had

returned 20 notices to JND with a forwarding address. JND promptly remailed them to the updated address. Ex. 1 ¶ 7. JND also received 26,674 returned notices as undeliverable without a forwarding address. *Id.* JND used a third-party service to obtain updated addresses these class members and was able to re-mail 14,059 notices. After JND's notification process, only 12,615 notices remain undelivered. *Id.* ¶ 8. Thus, JND presumably delivered notice to 98% of Class Members. *Id.* Along with the e-mailed and mailed notice, JND also emailed a reminder notice to 783,067 email addresses on January 3, 2023 and post card notices to 546,398 consumers on January 10, 2023. *Id.* ¶ 9. As of February 3, 2022, 99 percent of the reminder notices had been delivered to consumers. *Id.* ¶¶ 10-12. These reminder notices appear to have been highly effective, given that the claims rate on January 9, 2023 was just over six percent. It jumped to 14.08 percent by the time that the claims deadline closed on January 30, 2023.

JND also updated the settlement website for the prior Rule 23(b)(2) settlement website (www.fraudshieldsettlement.com) with information about the Rule 23(b)(3) Settlement. Through this website update, class members could view the relevant case documents, see answers to frequently asked questions, obtain contact information for the settlement administrator, and submit a claim form for the Rule 23(b)(3) settlement. ECF No. 132-5 ¶ 7. Since the update, 132,207 unique individuals have visited the website. Ex. 1 ¶ 4.

JND also established a toll-free line to provide callers with answers to frequently asked questions and the ability to speak to a live agent. Since then, JND has received 14,229 calls, including 2,916 calls connected to a live agent. *Id.* ¶ 6. The Settlement Administrator has also received and handled 14,085 email inquiries. *Id.* ¶ 5. Separately, Class Counsel's contact information was included in the class notice. *See, e.g.*, ECF No. 127-1, Ex. 5. As in prior settlements, Class Counsel received and also responded to thousands of emails and telephone calls

directly received from consumers. Along with answering routine questions about the settlement, Class Counsel continues to advise consumers of their rights dealing with inaccurate credit reports.

D. Class Members support the Settlement, and there are no governmental objectors.

As discussed below, there is one objection to the Settlement,⁴ and only five consumers have opted out of the Rule 23(b)(3) Settlement.⁵ Ex. 1 ¶¶ 13–14. JND served the required Class Action Fairness Act notices on the state and federal attorneys general on August 29, 2022. ECF No. 135-2 ¶ 4. None objected to the Settlement.

E. The Settlement Classes will each provide an appropriate release to Experian.

In exchange for the significant injunctive relief, Rule 23(b)(2) Class Members are only releasing their ability to bring a class claim against Experian under any state or federal laws for the reporting of Fraud Shield indicators stating that the consumer’s address was either a high-risk or non-residential address. They retain the right to bring any individual claims seeking their actual, statutory, or punitive damages, as well as their attorneys’ fees and costs. ECF No. 127-1, Settlement Agreement at 2.34; 4.5.

The Rule 23(b)(3) release is broader. In exchange for the \$22,450,000 Settlement Fund, Rule 23(b)(3) Class Members are releasing all claims that were brought in the litigation, could have been brought in the litigation, or relate to the “Covered Conduct” detailed in the Settlement Agreement. It does not include, however, any claims unrelated to the Covered Conduct or claims under 15 U.S.C. § 1681i or for allegations of inaccuracy other than regarding the Covered Conduct. The Rule 23(b)(3) Settlement Class Released Claims include claims for actual damages, statutory

⁴ This objection largely fails to challenge any substantive aspect of the settlement and instead raises several complaints that fall outside the scope of this settlement, including against non-party credit reporting agencies and furnishers. Ms. Hill-Green will respond to this objection in a separate filing.

⁵ This number may increase slightly, as class members can still request exclusion from the Rule 23(b)(3) Class until February 13, 2023.

damages, punitive damages, attorneys' fees, and all relief of any kind including claims asserted on a class, mass, or collective action basis and claims asserted on an individual, non-representative basis. ECF No. 127-1, Settlement 2.43; 5.10.

ARGUMENT

A. The notice program satisfied the requirements of Rule 23(c)(2)(B).

1. *The Rule 23(b)(2) Settlement Class*

Federal Rule of Civil Procedure 23(e)(1) requires that the court "direct notice in a reasonable manner to all class members who would be bound by the proposal." For a class certified under Rule 23(b)(2), however, the court "*may* direct appropriate notice to the class." Fed. R. Civ. P. 23(c)(2)(A) (emphasis added). Thus, in the context of a settlement class certified under Federal Rule of Civil Procedure 23(b)(2), as here, the "best notice practicable" standard does not apply. Fed. R. Civ. P. 23(c)(2)(B). The Settlement, nonetheless, provided for a robust notice program that exceeded what is required for due process.

As noted above, the Rule 23(b)(2) Settlement Administrator used a robust media campaign that reached around 75 percent of the class. ECF No. 135-1 ¶ 10. This digital campaign used print and digital media, as discussed above, and resulted in 203,312,009 total gross impressions. *Id.* ¶ 8. There was also a settlement website for the Rule 23(b)(2) Settlement Class that contained the relevant documents, deadlines, and a contact page where Class Members could reach out to ask questions about the settlement. The Rule 23(b)(2) Class Members could also object to the settlement by submitting a written objection.

The notice program also complied with both Rule 23(c)(2)(A) and (e)(1). The Settlement Website's Internet Notice, and the Publication Notice contained all required Rule 23 information and properly advised the Settlement Class Members of their rights in plain language, and were designed to follow the principles embodied in the Federal Judicial Center's "model notices." As

this Court knows, notice here was discretionary, and the Parties could have elected to request that the Court allow them to forgo notice altogether. Instead, the Parties chose to exceed the baseline legal requirements, implementing a notice plans much like those have been approved in *Rule 23(b)(3)* settlements under the far more stringent “best notice practicable” standard that is applied when notice is *mandatory*. See, e.g., *Clark v. Experian Info. Sols.*, No. 3:16-cv-32 (E.D. Va.); *Brown v. Experian Info. Sols.*, No. 3:16-cv-670 (E.D. Va.); *Clark v. Trans Union LLC*, No. 3:15-cv-391 (E.D. Va.); *Anderson v. Trans Union LLC*, No. 3:16-cv-558 (E.D. Va.); *Thomas v. Equifax Info. Servs., LLC*, No. 3:18-cv-684 (E.D. Va.); *Berry v. LexisNexis*, No. 3:11-cv-754 (E.D. Va.); see also, e.g., *Edwards v. Nat’l Milk Producers Fed’n*, No. 11-04766, 2017 WL 3623734, at *4 (N.D. Cal. June 26, 2017) (“notice plans estimated to reach a minimum of 70 percent are constitutional and comply with Rule 23” and approving notice plan that reached 75% of settlement class); *McCabe v. Six Continents Hotels, Inc.*, No. 12-04818, 2015 WL 3990915, at *11 (N.D. Cal. June 30, 2015) (approving notice program with 70% reach with a frequency of 1.6).

The methods used to notify the Rule 23(b)(2) Class Members thus satisfied both Rule 23 and due process and constitutes reasonable and appropriate notice under the circumstances.

2. *The Rule 23(b)(3) Settlement Class*

Rule 23(c)(2) requires that notice to the Rule 23(b)(3) class be “the best practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” Fed. R. Civ. P. 23(c). The Rule also requires that the notice inform potential class members that: (1) they are able to opt out; (2) the judgment will bind all class members who do not opt out; (3) and any member who does not opt out may appear through counsel. *Id.* In assessing the sufficiency of the notice, the Court must consider both the method of delivery and

the notice's content. *See* Federal Judicial Center, *Manual for Complex Litigation* § 21.312 (4th 2004).

In this case, Class Members were easily identified from Experian's database, which contained the class members' names and addresses. JND updated the address information to make sure the class notice reached as many class members as possible and also used third-party services to locate email addresses for as many class members as possible. ECF No. 135-2 ¶¶ 10-12. As this Court has held, "[w]hat amounts to reasonable efforts under the circumstances is for the Court to determine after examining the available information and possible identification methods . . . 'In every case, reasonableness is a function of [the] anticipated results, costs, and amount involved.'" *Fisher v. Va. Elec. & Power Co.*, 217 F.R.D. 201, 227 (E.D. Va. 2003) (citations omitted). Courts—including this Court and others within the Fourth Circuit—have approved notice programs with a much smaller delivery rate. *See In re Serzone*, 231 F.R.D. 221, 236 (S.D. W. Va. 2005) (approving notice program where direct mail portion was estimated to have reached 80% of class members); *Martin v. United Auto Credit Corp.*, No. 3:05-cv-143 (E.D. Va. Aug. 29, 2006) (granting final approval where class notice had around 85% delivery).

Here, the Rule 23(b)(3) class notice reached 98% of class members. It was also followed up with reminder notices by both mail and email, which doubled the claims rate in the last month that the claims process was open. This was the best available notice given: (a) the available information; (b) the possible identification methods; (c) the number of Class Members; and (d) the amount of the Settlement. The parties have fully complied with the Court's Preliminary Approval Order's notice requirements and have achieved a highly successful notice program.

B. The Settlement Satisfies the Requirements of Rule 23(e)(2).

"Rule 23(e) of the Federal Rules of Civil Procedure obliges parties to seek approval from the district court before settling a class-action lawsuit." *In re: Lumber Liquidators Chinese-*

Manufactured Flooring Prod. Mktg., Sales Pracs. & Prod. Liab. Litig., 952 F.3d 471, 483 (4th Cir. 2020) (citing Fed. R. Civ. P. 23(e)). When a court “reviews a proposed class-action settlement, it acts as a fiduciary for the class.” *1988 Tr. for Allen Child. Dated 8/8/88 v. Banner Life Ins. Co.*, 28 F.4th 513, 525 (4th Cir. 2022). “In fulfilling this role, the district court must conclude that a proposed settlement is ‘fair, reasonable, and adequate,’” which are the three requirements established by Rule 23(e)(2) of the Federal Rules of Civil Procedure. *Id.* (citing Fed. R. Civ. P. 23(e)(2)). “In determining whether a settlement is fair, reasonable, and adequate,” Rule 23(e)(2) requires the court to consider:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm’s length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorneys’ fees, including timing of payments; and

(iv) any agreement required to be identified under Rule 23(e)(3);

(D) the proposal treats class members equitably relative to each other.

Galloway v. Williams, 2020 WL 7482191, at *4 (E.D. Va. 2020) (quoting Fed. R. Civ. P. 23(e)(2)). In making this assessment, district courts are provided with “considerable deference” because “the court ‘is exposed to the litigants, and their strategies, position[s], and proofs, and is

on the firing line and can evaluate the action accordingly.” *Lumber Liquidators*, 952 F.3d at 484 (quoting *Joel A. v. Giuliani*, 218 F.3d 132, 139 (2d Cir. 2000)).⁶

I. Plaintiffs and Class Counsel Have Adequately Represented the Class.

Rule 23(e)(2)’s first factor examines whether “the class representatives and class counsel have adequately represented the class.” Fed. R. Civ. P. 23(e)(2)(A). This assessment is “redundant of the requirements of Rule 23(a)(4) and Rule 23(g), respectively.” *In re Flint Water Cases*, 571 F. Supp. 3d 746, 780 (E.D. Mich. 2021) (quoting Albert Conte & Herbert Newberg, *Newberg on Class Actions* § 13:48 (5th ed. June 2021 update)). Rule 23’s adequacy requirements are met if: “(1) the named plaintiff[s] [have] interests common with, and not antagonistic to, the Class’ interests; and (2) the plaintiff[s]’ attorney is qualified, experienced and generally able to conduct the litigation.” *Gibbs v. Stinson*, 2021 WL 4812451, at *16 (E.D. Va. Oct. 14, 2021) (quoting *Milbourne v. JRK Residential Am., LLC*, 2014 WL 5529731, at *8 (E.D. Va. Oct. 31, 2014)).

This first factor is easily satisfied. Ms. Hill-Green’s interests are fully aligned with the putative class members because they are all the victims of the same policies and procedures for Experian’s Fraud Shield reporting. *See, e.g., Stinson*, 2021 WL 4812451, at *16 (finding that the plaintiffs were adequate in a comparable case because they had “no interests antagonistic to the class’s interest” and shared “identical interest of establishing Defendants’ liability based on the same questions of law and fact”); *Williams v. Big Picture Loans, LLC*, 339 F.R.D. 46, 59 (E.D. Va. 2021) (finding that the plaintiffs were adequate in a comparable case because the “Plaintiffs’

⁶ On December 1, 2018, “Rule 23(e)(2) was amended to specify factors for assessing the ‘fairness, reasonableness, and adequacy’ of a class-action settlement.” *Lumber Liquidators*, 952 F.3d at 484, n. 8. Prior to this, the Fourth Circuit developed and applied its “own multifactor standards” for fairness and adequacy. *See, e.g., See In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 159 (4th Cir. 1991). Because the Fourth Circuit’s prior considerations “almost completely overlap with the new Rule 23(e)(2) factors,” *Lumber Liquidators*, 952 F.3d at 484, n. 8, decisions prior to the amendment to Rule 23(e)(2) continue to be relevant.

interests are in line with those of the broader classes”); *MacDonald v. Cashcall, Inc.*, 333 F.R.D. 331, 345 (D.N.J. 2019) (“There is nothing in the record to suggest that either proposed class representative has a claim or interest antagonistic to the remainder of the class: both MacDonald and Spearman took out loans from Western Sky allegedly at usurious interest rates.”); *Brice v. Haynes Invs., LLC.*, 2021 WL 1916466, at *6 (N.D. Cal. Apr. 23, 2021) (same). Indeed, in its Preliminary Approval Order, the Court already found that Ms. Hill-Green has served as an adequate class representative. ECF No. 129 ¶¶ 4(d), 8(d), 13. Nothing has changed since then to warrant revisiting that conclusion.

As to class counsel, this Court and many others have found that the attorneys here are extremely qualified to represent a consumer class.⁷ And Class Counsel has been found qualified in other federal consumer protection litigation. *Galloway v. Williams*, 2020 WL 7482191, at *8 (E.D. Va. Dec. 18, 2020) (“Class Counsel and their firms have extensive backgrounds in complex and class action litigation and consumer protection litigation. And, in particular, members of Class Counsel have significant experience in litigating class action lawsuits against tribal lenders.”); *Hayes v. Delbert Servs. Corp.*, 3:14-cv-258, ECF No. 193 at 9-12 (E.D. Va. Jan. 20, 2017); *Turner v. Zestfinance, Inc.*, No. 3:19-cv-293 (E.D. Va.) (“[W]e have Ms. Kelly and Mr. Bennett here, who are well known to me as being experts in this field, but it looks like the other class counsel is like

⁷ *Clark v. Trans Union, LLC*, No. 3:15CV391, 2017 WL 814252, at *13 (E.D. Va. Mar. 1, 2017) (“This Court has repeatedly found that Clark's counsel is qualified to conduct such litigation. ... This Court echoes the sentiments previously stated about Clark's counsel because they pertain here with equal vigor.”); *Manuel v. Wells Fargo Bank, Nat'l Ass'n*, No. 3:14cv238, 2016 WL 1070819, at *3 (E.D. Va. Mar. 15, 2016) (stating that “this Court would have difficulty overstating Class Counsel's experience[.]”); *Soutter v. Equifax Info. Servs., LLC*, No. 3:10CV107, 2011 WL 1226025 (E.D. Va. Mar. 30, 2011) (“[T]he Court finds that Soutter's counsel is qualified, experienced, and able to conduct this litigation. Counsel is experienced in class action work, as well as consumer protection issues, and has been approved by this Court and others as class counsel in numerous cases.”); *Heath v. Trans Union*, No. 3:18-cv-720 (E.D. Va. Aug. 6, 2019) (Kelly Guzzo's “reputation in this district, and I am sure in others, are sterling.”).

the all-star team of consumer litigation.”); *In re Think Finance*, No. 17-33964 (Bankr. N.D. Tex.) (“[The Court] had two or three sets of law students that sat through this, and each time I told them that when you come into this hearing you’ll see some of the best lawyers in America, and I still feel like that today.”).

2. *Negotiations were arm’s length and involved the use of respected mediators.*

The second factor examines whether the settlement “was negotiated at arm’s length” Fed. R. Civ. P. 23(e)(2)(B); *see also Flint Water Cases*, 571 F. Supp. 3d at 780 (explaining that the second factor requires courts to “consider whether the negotiations were conducted at arm’s length with no evidence of collusion or fraud”). “Courts presume the absence of fraud or collusion unless there is evidence to the contrary.” *Id.* (quoting *UAW v. Gen. Motors, Corp.*, 2006 WL 891151, at *21 (E.D. Mich. Mar. 31, 2006)). Here, no evidence suggests the presence of collusion or fraud between the parties.

To help confirm that the negotiations were arm’s length, courts have looked at several other factors, including the presence of a mediator. As the leading class action treatise explains: “There appears to be no better evidence of [a truly adversarial bargaining process] than the presence of a third party mediator.” Conte & Newberg, *supra*, § 13:48; *see also Flint Water Cases*, 571 F. Supp. 3d at 780 (“highly experienced mediators” provided “ample protections in their roles”). Here, the settlement negotiations involved at several mediation sessions over many months, along with dozens of informal exchanges over email and telephone. The formal mediation sessions were supervised by Magistrate Judge Colombell. Although professional, these mediation sessions were hard-fought, with each side making concessions to reach the Settlement before the court. Each side strongly believed in the strength of their litigation positions, as shown by the hard-fought discovery and settlement discussions. With Judge Colombell’s assistance, however, the Parties resolved the

case in a fair way to both sides, but still provides substantial relief to class members. Judge Colombell's involvement further establishes that there was no collusion among the parties.

Courts also consider the posture of the case at the time of the settlement. *See, e.g., Brown v. Transurban USA, Inc.*, 318 F.R.D. 560, 571 (E.D. Va. 2016). "Considering the posture of the case at the time of settlement allows the Court to determine whether the case has progressed far enough to dispel any wariness of 'possible collusion among the settling parties.'" *Id.* Here, as detailed in Plaintiffs' fee motion (ECF No. 134 at 205), the Parties completed significant discovery before settlement, including the production of more than 570,000 pages of documents and a significant data production of anonymized consumer data that was ultimately used to develop the class list. Plaintiff worked closely with a data expert to analyze Experian's data production. And Plaintiff's counsel also deposed Experian's corporate designee and served extensive third-party discovery. Simply put, there is no argument that parties did not fully explore the claim and defenses at issue. This litigation history reaffirms that there was no possible collusion among the parties.

3. *The Relief Provided to the Class is Adequate.*

Rule 23(e)(2)(C) requires the Court to consider whether the relief is adequate, considering:

(i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3).

Fed. R. Civ. P. 23(e)(2)(C). These subfactors overlap with the factors that the Fourth Circuit has held are required to evaluate a class settlement's fairness, reasonableness, and adequacy. *In re Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg., Sales Practices and Prods. Liab. Litig.*, 952 F.3d 471, 484 n.8 (4th Cir. 2020) (citing *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155,

159 (4th Cir. 1991)). An analysis of each factor shows that this settlement is fair, reasonable, and adequate.

The first Rule 23(e)(2)(C) sub-factor requires the Court to evaluate the settlement against the costs, risks, and delay of trial and appeal. This factor strongly supports approval of the Settlement. While Ms. Hill-Green believed strongly in her claims, there was a risk that Experian could prevail at summary judgment or on appeal. And while Ms. Hill-Green believed that she could overcome those obstacles, certification was by no means a given. A loss on certification would mean that Class Members would receive nothing. But even if Ms. Hill-Green were ultimately successful on the merits and class certification, the litigation would have taken several years to resolve. Even more importantly, the long delay threatened by continued litigation, continued appeals, and terminal appeal would have heightened the difficulty of finding and notifying class members. The settlement eliminates all these risks and substantially reduces the burden on all parties.

Rule 23(e)(2)(C)'s second sub-factor requires the Court to evaluate the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims. Here, Rule 23(b)(2) benefits are automatically implemented by Experian. And each Rule 23(b)(3) Class Member was eligible to receive a cash payment without needing to submit any paperwork or proof establishing their damages or claims. "The use of objective criteria to determine settlement distribution is a hallmark of fairness." *Flint Water Cases*, 571 F. Supp. 3d at 781. As discussed above and in Plaintiff's preliminary approval brief, class membership in the Rule 23(b)(3) Class was determined based on four criteria that were negotiated between the Parties and aimed at identifying class members who were the victim of inaccurate Fraud Shield reporting and who suffered damages as a result. If consumers did not meet the criteria, they are not class

members and therefore do not release any claims against Experian. Because the distribution scheme is based on objective criteria, this factor supports approving the Settlement.

Rule 23(e)(2)(C)'s third sub-factor requires the Court to evaluate the request for attorney fees, including the timing of the request. The focus of this analysis is whether there are signs that “counsel sold out the class's claims at a low value in return for [a] high fee.” Conte & Newberg, *supra*, § 13:54. There are no such indications here. As outlined above, there is no sign that Class Counsel left any money on the negotiating table. Instead, they obtained a \$22,450,000 cash fund, along with significant injunctive relief. This is significant consideration for the Class Members’ claims. And Class Counsel is not seeking any new fee for the new Rule 23(b)(2) relief. For the Rule 23(b)(3) Settlement, they are seeking the usual percentage of the settlement—one third of the cash value.

It is also important to note that the attorneys’ fee component of the settlement was only discussed after all other material settlement terms had been finalized. And the attorneys’ fees were also negotiated under the supervision of a third-party mediator, Magistrate Judge Colombell, who is experienced enough to notice if Class Counsel were compromising the class members’ claims for their own benefit. *Flint Water Cases*, 571 F. Supp. 3d at 782. As to the timing of the attorney fee award request, “courts are to consider this to prevent situations in which the request for attorney fees is unknown and could upset the compensation to claimants at the time of final approval.” *Id.* There is no such concern here. Instead, the proposed attorneys’ fee was included in the class notice, and only one class member raised an objection related to the proposed amount.

Finally, no agreements need to be identified under Rule 23(e)(3).

4. *The Settlement Treats Class Members Equitably Related to Each Other.*

The final factor under Rule 23(e)(2) requires a court to consider whether “the proposal treats class members *equitably* relative to each other.” Fed. R. Civ. P. 23(e)(2)(D) (emphasis added). This factor considers whether class members have been treated in a fair and impartial manner, but “[t]here is no requirement that all class members in a settlement be treated *equally*.” *Swinton v. SquareTrade, Inc.*, 454 F. Supp. 3d 848, 876 (S.D. Iowa 2020) (emphasis in original) (citation omitted). And when considering this factor, a court “must balance the claims of those with potentially substantial damages with those with potentially minimal or insignificant damages.” *Id.* (citation omitted).

The settlement here achieves this balance. The Rule 23(b)(2) Class Members are all treated equally: all will fully benefit from the injunctive relief changes. For the Rule 23(b)(3) Class Members, Class Members could claim a pro rata portion of the Settlement Fund. And if Rule 23(b)(3) Class Members suffered more actual damages than the estimated class payment, they were advised of their right to opt out of the settlement and pursue individual litigation.

CONCLUSION

The settlement provides significant benefits to class members who were the victims of Experian’s Fraud Shield reporting. It meets all of the requirements of Rule 23(e) and the *Jiffy Lube* factors, and the Court should approve it.

Respectfully submitted,
LISA HILL-GREEN

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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA**

LISA HILL-GREEN,

Plaintiff,

v.

EXPERIAN INFORMATION SOLUTIONS,
INC.,

Defendant.

CIVIL ACTION NO. 3:19-cv-00708-MHL

**SUPPLEMENTAL DECLARATION OF
GRETCHEN EOFF REGARDING NOTICE
PROGRAM AND SETTLEMENT
ADMINISTRATION**

I, Gretchen Eoff, declare as follows:

1. I am a Senior Vice President of Operations of JND Legal Administration LLC (“JND”). This Declaration is based on my personal knowledge and information provided to me by Counsel and experienced JND employees and, if called upon to do so, I could and would testify competently thereto.

2. JND previously filed a Declaration Regarding Proposed Notice Program for the Rule 23(b) Settlement Class, filed August 19, 2022, ECF No. 126-5; and a Declaration Regarding Notice Program and Settlement Administration, filed January 13, 2023, ECF No. 135-2. This Supplemental Declaration is being filed to further update the Court regarding the status of the Settlement Administration.

RULE 23(B)(3) DIRECT MAIL NOTICE

1
2 7. As of February 3, 2023, 26,674 Postcard Notices have been returned to JND as
3 undeliverable with no forwarding address. JND performed advanced address research for 26,674
4 undeliverable Postcard Notices without a USPS updated address or forward, and re-mailed 14,059
5 Postcard Notices to an updated address. In addition, JND remailed 20 Postcard Notices to an updated
6 address provided by the USPS, and 6,684 Postcard Notices were forwarded by the USPS.

7
8 8. As of February 3, 2023, of the 568,659 Rule 23(b)(3) Postcard Notices sent, 556,044
9 or 98% were deemed delivered and 12,615 or 2% were deemed undeliverable.

10 **RULE 23(B)(3) DIRECT EMAIL AND MAIL CLAIM REMINDER NOTICE**

11
12 9. Pursuant to paragraph 5.2.4a of the Settlement Agreement, JND commenced a claim
13 reminder campaign by email and mail to Rule 23(b)(3) Settlement Class Members on January 10,
14 2023, including 783,067 email addresses and 546,398 mailing addresses.

15 10. Of the 783,067 dispute and non-dispute Rule 23(b)(3) Settlement Class Member email
16 addresses sent Reminder Email Notices, 774,744 or 99% were deemed delivered and 8,323 or 1%
17 were deemed undeliverable.

18
19 11. As of February 3, 2023, of the 18,145 dispute Rule 23(b)(3) Settlement Class Postcard
20 Reminder Notices sent, 18,081 or 99% were deemed delivered and 64 or 1% were deemed
21 undeliverable.

22 12. As of February 3, 2023, of the 528,253 non-dispute Rule 23(b)(3) Settlement Class
23 Postcard Reminder Notices sent, 526,888 or 99% were deemed delivered and 1,365 or 1% were
24 deemed undeliverable.

RULE 23(B)(3) OBJECTIONS

1
2 13. As of February 3, 2023, JND is aware of 1 Settlement objection, which was provided
3 to the Parties on February 2, 2023. A list of the objection is attached hereto as Exhibit A.
4

RULE 23(B)(3) EXCLUSION REQUESTS

5
6 14. As of February 3, 2023, JND has received 5 timely and valid exclusion requests and 6
7 invalid exclusion requests. Lists of the valid and invalid exclusion requests are attached hereto as
8 Exhibits B and C, respectively.
9

RULE 23(B)(3) CLAIMS

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11 15. As of February 5, 2023, JND has received 77,152 timely Claims for non-dispute Rule
12 23(b)(3) Settlement Class Members (47,282 online and 29,870 by mail) and 2,928 timely Claims for
13 dispute Rule 23(b)(3) Settlement Class Members (1,856 online and 1,072 by mail). In total, JND has
14 received 80,080 timely Claims (49,138 online and 30,942 by mail).
15

16 16. As of February 5, 2023, JND has received 27 late Claims for non-dispute Rule 23(b)(3)
17 Settlement Class Members and 3 late Claims for dispute Rule 23(b)(3) Settlement Class Members.

18 17. JND is continuing to receive and process all Claims to confirm eligibility and Claim
19 deficiencies, perform quality assurance procedures, conduct de-duplication, and solicit feedback from
20 the parties. Although the Claim deadline has passed, JND may yet receive timely mailed Claims
21 postmarked by the January 30, 2023 claim deadline. Accordingly, JND's Claim validation is not
22 complete and this Claim summary is preliminary and subject to change.
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1 18. JND will continue to administer the Settlement through all phases of Settlement
2 Administration, as required by the Settlement Agreement, Preliminary Approval Order, and pursuant
3 to any future Orders of this Court.

4 I declare under penalty of perjury under the laws of the United States of America that the
5 foregoing is true and correct.

6 Executed on February 7, 2023 in Seattle, Washington.

7
8 A handwritten signature in blue ink, appearing to read "Gretchen Eoff", is written over a horizontal line. The signature is stylized and cursive.

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GRETCHEN EOFF

EXHIBIT A



FRAUD SHIELD SETTLEMENT
(USDC EASTERN DISTRICT OF VIRGINIA, CASE NO. 3:19-CV-708-MHL)

OBJECTIONS

	<u>JND ID NUMBER</u>	<u>NAME</u>	<u>CITY/STATE</u>	<u>POSTMARK DATE</u>	<u>SIGNATURE TYPE</u>	<u>WITHDRAWN</u>
1.	DGDZBENUT4	JOAQUIM FRANCISCO DOMINGOS LAUREANO	Fort Myers, FL	1/30/2023 (filed)	Wet	No

EXHIBIT B



FRAUD SHIELD SETTLEMENT
(USDC EASTERN DISTRICT OF VIRGINIA, CASE NO. 3:19-CV-708-MHL)

TIMELY AND VALID EXCLUSIONS

	<u>JND ID NUMBER</u>	<u>NAME</u>	<u>CITY/STATE</u>	<u>POSTMARK DATE</u>	<u>STATUS</u>	<u>SIGNATURE TYPE</u>
1.	D8FY3LVTPE	JESSICA IRENE JACKSON	Grand Prairie, TX	November 23, 2022	Dispute Class	Wet
2.	DQ8YPAFLRK	ALLSIN MURRAY	Vernon, CT	December 6, 2022	Non-dispute Class	Wet
3.	D27YGLDXBP	XINYI GU	Brooklyn, NY	December 20, 2022	Non-dispute Class	Wet
4.	DZDNCR3AF9	THOMAS M WILSON	Portland, OR	December 31, 2022	Dispute Class	Wet
5.	DGY5UHD3VB	MARIA ROJA	West Hartford, CT	January 20, 2023	Dispute Class	Wet

EXHIBIT C



FRAUD SHIELD SETTLEMENT
(USDC EASTERN DISTRICT OF VIRGINIA, CASE NO. 3:19-CV-708-MHL)

INVALID EXCLUSIONS

	<u>JND ID NUMBER</u>	<u>NAME</u>	<u>CITY/STATE</u>	<u>POSTMARK DATE</u>	<u>STATUS</u>	<u>SIGNATURE TYPE</u>	<u>REASON DEFECTIVE</u>
1.	DUQWAYRSB8	LUCILLE DEPHILLIPS	Philadelphia, PA	November 18, 2022 (email)	Non-dispute class	None	Submitted by email; no signature; no telephone number; inadequate statement
2.	DWCY9XK7DB	LINDA NORGAARD	Pacific Grove, CA	December 5, 2022	Non-dispute class	Wet	No current address; inadequate statement
3.	DJRWW8D6FM	Ali Ratzel	Jefferson City, MO	December 5, 2022	N/A	Wet	Non-Class Member
4.	DWL3UKAZR8	PAUL MUSSMAN	Lincoln City, OR	January 20, 2023	Non-dispute class	Wet	No telephone number; no current address; inadequate statement
5.	DBG87RMW93	BETTYANNE MUSSMAN	Lincoln City, OR	January 20, 2023	Non-dispute class	Wet	No telephone number; no current address; inadequate statement
6.	DXG6DM2EQS	Brandon Alexander	Newport News, VA	January 21, 2023	Non-dispute class	Wet	Non-Class Member