IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

GREGORY STEWART, ON BEHALF OF HIMSELF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,	)	
Plaintiff,	)	
v.	)	**No. 2:21-cv-02377-SHM-cgc**
BAPTIST MEMORIAL HEALTH CARE CORPORATION,	)	
Defendant.	)	

ORDER GRANTING AMENDED UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Before the Court is Plaintiff Gregory Stewart's Amended Unopposed Motion for Preliminary Approval of Class Settlement (the "Motion"). See ECF No. 19. Plaintiff's Motion is GRANTED.

I. Background

The Fair Credit Reporting Act ("FCRA") is intended to protect consumers' "right to privacy." See 15 U.S.C. § 1681(a)(4); see also United States v. Bormes, 568 U.S. 6, 7 (2012). Section 1681b(b)(2) provides that a person generally "may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless" the consumer has authorized procurement after being notified through a written disclosure

that a report may be obtained for employment purposes. Section 1681b(b)(3)(A) provides that people who take an adverse employment action "based in whole or in part" on a consumer report for employment purposes must generally first "provide to the consumer to whom the report relates . . . a copy of the report [and] a description in writing of the rights of the consumer."

On December 6, 2021, Plaintiff filed, on behalf of himself and a proposed putative class, an Amended Complaint alleging that Defendant had violated 15 U.S.C. §§ 1681b(b)(2)(A)(i), 1681b(b)(2)(A)(ii), and 1681b(b)(3)(A) by obtaining and using consumer reports for employment purposes without making the required disclosures and obtaining the required authorizations. See ECF No. 19-1, at 2.

The parties began informal discovery and negotiations. See id. On June 20, 2023, the parties participated in mediation with a neutral mediator, who had experience with FCRA class actions. See id. The parties negotiated a class-wide settlement agreement (the "Proposal") for two classes: a "Disclosure and Authorization Class" and a "Pre-Adverse Action Subclass." See id. The Disclosure and Authorization Class consists of approximately 14,041 members "who applied for a position with Defendant" and "about whom Defendant procured a consumer report between June 7,

2019, through August 8, 2022." See id. at 3–4. The Pre-Adverse Action Subclass consists of approximately 111 members "who are members of the Disclosure and Authorization Class", "who Defendant declined to hire", "who are marked in Defendant's system as 'Failed Background Report', 'Null' or 'Other'", and "who Defendant has been unable to confirm receipt of a pre-adverse action notice." See id. at 4.

Plaintiff seeks certification of the proposed Class and Subclass for purposes of settlement, preliminary approval of the Proposal, approval of the proposed class notice forms, and approval of the proposed timeline for effecting the Proposal.

II. Terms of the Settlement Agreement

The Proposal establishes a fund of $420,566.00, which is the maximum amount Defendant will pay. See id. Any unclaimed funds will revert to Defendant. See id. at 5.

Plaintiff will receive $5,000.00 in return for a general release of claims and a pledge to forego future employment with Defendant. See id. at 4. A settlement administrator will receive about $25,000.00. See id. Class counsel will receive attorney's fees "in an amount approved by the Court but not to exceed thirty-three percent (33.33%) of the total settlement plus reimbursement of incurred costs." See id.

Every Disclosure and Authorization Class member who submits a timely claim will receive a pro rata share of $365,066.00, which will be reduced by the member's "proportional share of Class Counsel's Fees and Costs", "proportional share of Settlement Administration Costs", and "proportional share of Plaintiff's General Release and Agreement Not to Seek Future Employment." See id. Every Pre-Adverse Action Subclass member who submits a timely claim will receive a pro rata share of $55,500.00, reduced by the same costs applied to the Disclosure and Authorization Class members. See id.[1]

III. Jurisdiction

Plaintiff alleges that Defendant violated the FCRA, 15 U.S.C. §§ 1681b et seq. The Court has jurisdiction pursuant to 28 U.S.C. § 1331.

IV. Law

The claims of a "class proposed to be certified for purposes of settlement" may be settled only with court approval. See Fed. R. Civ. P. 23(e). "The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class." Id. The parties must show

[1] Disclosure and Authorization Class members are expected to receive around $26.00, minus fees and costs. See ECF No. 19-3. Pre-Adverse Action Subclass members are expected to receive around $500.00, minus fees and costs. See ECF No. 19-4.

that the court will likely be able to (1) "certify the class for purposes of judgment on the proposal" and (2) "approve the proposal under Rule 23(e)(2)." See id.

If the parties meet their burden for class certification, the court must appoint class counsel. See Fed. R. Civ. P. 23(g). If the parties also meet their burden for preliminary settlement approval under Rule 23(e)(2), the Court must direct notice of the approval to the class members. See Fed. R. Civ. P. 23(e)(1).

A. Class Certification under Rules 23(a) and 23(b)

Class certification may be appropriate if certain prerequisites under Rule 23(a) and Rule 23(b) are met.

1. Prerequisites under Rule 23(a)

Pursuant to Rule 23(a), a representative plaintiff may only sue on behalf of a larger class of plaintiffs if,

> (1) the class is so numerous that joinder of all members is impracticable ["numerosity"]; (2) there are questions of law or fact common to the class ["commonality"]; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ["typicality"]; and (4) the representative parties will fairly and adequately protect the interests of the class ["adequate representation"].

See Fed. R. Civ. P. 23(a).

Although there is "no strict numerical test" to define the "numerosity" requirement under Rule 23(a)(1), "'substantial'

numbers of affected consumers are sufficient to satisfy this requirement." In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 722 F.3d 838, 852 (6th Cir. 2013).

To satisfy the "commonality" requirement, the parties must show "that the class members 'have suffered the same injury.'" Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349–50 (2011) (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 (1982)). It is not enough that all class members have "suffered a violation of the same provision of law." Id. at 350. Rather, the "claims must depend upon a common contention" that "is capable of classwide resolution", "which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Id. at 350. There "need be only one common question to certify a class." In re Whirlpool, 722 F.3d at 853.

The "typicality" requirement "is met if the class members' claims are 'fairly encompassed by the named plaintiffs' claims.'" Id. at 852 (quoting Sprague v. Gen. Motors Corp., 133 F.3d 388, 399 (6th Cir. 1998) (en banc)). That requirement ensures "that the representatives' interests are aligned with the interests of the represented class members so that, by pursuing their own interests, the class representatives also advocate the interests of the class members." Id. at 852–53.

To satisfy the "adequate representation" requirement, "there must be an absence of a conflict of interest, and the presence of common interests and injury." Rutherford v. City of Cleveland, 137 F.3d 905, 909 (6th Cir. 1998) (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625–26 (1997)).

2. Prerequisites under Rule 23(b)

"A class action may be maintained if Rule 23(a) is satisfied" and if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members ["predominance"], and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy ["superiority"]." See Fed. R. Civ. P. 23(b)(3).

The "predominance" requirement is satisfied when the proposed class is "sufficiently cohesive to warrant adjudication by representation." Amchem Prods., 521 U.S. at 623. The "inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy." Id. The requirement is met if the factual or legal questions common to all class members are "at the heart of the litigation." Powers v. Hamilton Cnty. Pub. Def. Comm'n, 501 F.3d 592, 619 (6th Cir. 2007). "Cases alleging a single course of wrongful conduct are particularly well-suited to class certification." Id.

In determining whether the "superiority" requirement is satisfied, courts consider (1) "the difficulties of managing a class action", (2) a comparison of the class action to "other means of disposing of the suit",[2] and (3) "the value of individual damage awards, as small awards weigh in favor of class suits." Pipefitters Loc. 636 Ins. Fund. v. Blue Cross Blue Shield of Mich., 654 F.3d 618, 630–31 (6th Cir. 2011).

Considerations that are pertinent to the predominance and superiority requirements include "the class members' interests in individually controlling the prosecution or defense of separate actions", "the extent and nature of any litigation concerning the controversy already begun by or against class members", "the desirability or undesirability of concentrating the litigation of the claims in the particular forum", and "the likely difficulties in managing a class action." See Fed. R. Civ. P. 23(b)(3).

B. Appointment of Class Counsel under Rule 23(g)

A court that certifies a class generally "must appoint class counsel." See Fed. R. Civ. P. 23(g)(1). In determining the

[2] The goal of this comparison is to determine whether a class action "is sufficiently effective to justify the expenditure of the judicial time and energy that is necessary to adjudicate a class action and to assume the risk of prejudice to the rights of those who are not directly before the court." Pipefitters, 654 F.3d at 630 (quoting 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1779 (3d ed. 2010)).

appropriateness of a particular appointment, a court must consider "the work counsel has done in identifying or investigating potential claims in the action;" "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;" "counsel's knowledge of the applicable law;" and the resources that counsel will commit to representing the class." Id.

C. Settlement Approval under Rule 23(e)(2)

If a proposed settlement would bind class members, "the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate." See Fed. R. Civ. P. 23(e)(2).

Rule 23(e)(2) lists the factors that a court should consider when determining whether a proposed settlement is "fair, reasonable, and adequate." See id. The Sixth Circuit has used those factors to establish its own "seven-factor test." See Does 1-2 v. Déjà Vu Servs., Inc., 925 F.3d 886, 894-95 (6th Cir. 2019). The seven factors include:

> (1) the "risk of fraud or collusion," (2) the "complexity, expense and likely duration of the litigation," (3) the "amount of discovery engaged in by the parties," (4) the "likelihood of success on the merits," (5) the "opinions of class counsel and class representatives," (6) the "reaction of absent class members," and (7) the "public interest."

Id. (quoting Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Gen. Motors Corp., 497 F.3d 615, 631 (6th Cir. 2007)).

D. Issuance of Reasonable Notice under Rule 23(e)(1)

If the court concludes that it will likely be able to "certify the class for purposes of judgment on the proposal" and "approve the proposal under Rule 23(e)(2)", it "must direct notice in a reasonable manner to all class members who would be bound by the proposal." See Fed. R. Civ. P. 23(e)(1)(B).

The "court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." See Fed. R. Civ. P. 23(c)(2). "To comport with the requirements of due process, notice must be 'reasonably calculated to reach interested parties.'" Fidel v. Farley, 534 F.3d 508, 514 (6th Cir. 2008) (quoting Karkoukli's, Inc. v. Dohany, 409 F. 3d 279, 283 (6th Cir. 2005)).

"The notice must clearly and concisely state in plain, easily understood language" (1) "the nature of the action;" (2) "the definition of the class certified;" (3) "the class claims, issues, or defenses;" (4) "that a class member may enter an appearance through an attorney if the member so desires;" (5) "that the court will exclude from the class any member who

requests exclusion;" (6) "the time and manner for requesting exclusion"; and (7) "the binding effect of a class judgment on members under Rule 23(c)(3)." See Fed. R. Civ. P. 23(c)(2)(B).

V. Analysis

A. Class Certification under Rules 23(a) and 23(b)

Certification of the "Disclosure and Authorization Class" and the "Pre-Adverse Action Subclass" is warranted.

1. Members and Representatives of the Proposed Class under Rule 23(a)

a. Numerosity

The numerosity requirement is satisfied. Plaintiff avers that the proposed Disclosure and Authorization Class consists of about 14,041 members, with 111 of those members also belonging to the proposed Pre-Adverse Action Subclass. See ECF No. 19-1, at 3–4. Those figures meet the Sixth Circuit's substantiality standard. See, e.g., Bacon v. Honda of Am. Mfg., Inc., 370 F.3d 565, 570 (6th Cir. 2004) (noting that the "sheer number of potential litigants in a class, especially if it is more than several hundred, can be the only factor needed to satisfy Rule 23(a)(1)").

b. Commonality

The commonality requirement is satisfied. The proposed Class and Subclass members all allege that Defendant violated

the FCRA, and they all allege that Defendant violated the FCRA in the same way.

The proposed Disclosure and Authorization Class consists of individuals who allege that, after they had applied for a job with Defendant, Defendant procured a consumer report about them for employment purposes without authorization, in violation of 15 U.S.C. § 1681b(b)(3)(A). See ECF No. 19-1, at 3-4. Those claims all rest on the contention that Defendant obtained the Class members' consumer reports for employment purposes and that Defendant's disclosures did not satisfy the FCRA's requirements.

The proposed Pre-Adverse Action Subclass consists of people who allege that Defendant declined to hire them based, in whole or in part, on a consumer report procured for employment purposes. The Pre-Adverse Action Subclass members allege that, before Defendant rejected their job applications, Defendant failed to provide them a copy of the consumer report and a written description of their rights, in violation of 15 U.S.C. § 1681b(3)(A). See id. Those claims all rest on the contention that Defendant used the Subclass members' consumer reports as a basis for taking adverse employment actions against them and that Defendant failed to provide sufficient notice to the Subclass members before taking those adverse actions.

c. Typicality

The typicality requirement is satisfied. Plaintiff is a member of the proposed Disclosure Class and the Pre-Adverse Employment Subclass. See id. at 9–10. Plaintiff alleges that Defendant's hiring practices were fairly standardized and that the practices to which Plaintiff was unlawfully subjected, which form the basis of this action, were also used against the other proposed Class and Subclass members. Plaintiff's interests are aligned with those of the other proposed Class and Subclass members.

d. Adequate Representation

The adequate representation requirement is satisfied. Plaintiff has a common alleged injury with the proposed Class and Subclass, and there is no apparent conflict of interest among Plaintiff, Plaintiff's counsel, and the other proposed Class and Subclass members.

2. Nature of the Action under Rule 23(b)

a. Predominance

The predominance requirement is satisfied. The heart of this action is whether Defendant's employment practices as to the proposed Class and Subclass members violated the FCRA, 15 U.S.C. §§ 1681b(b)(2)(A)(i)–(ii) and 1681b(b)(3)(A). Plaintiff alleges that Defendant used a fairly standardized process to procure consumer reports about the proposed Class and Subclass

members, used those reports for employment purposes, and failed to provide the required disclosures. To the extent that particular Class and Subclass members present unique issues, the central allegations about Defendant's consumer-report practices predominate.

b. Superiority

The superiority requirement is satisfied. Allegations of FCRA violations are not uncommon, and Plaintiff avers that there "are no other questions requiring individual review or any other pertinent facts requiring impermissible individualized analysis", so that management of this class action would be a relatively straightforward endeavor. See ECF No. 19-1, at 11.

Resolving all of the allegations through a single class action in a single forum is a superior method than resolving the allegations through 14,041 individual lawsuits in different courts. Requiring every proposed Class member to file his or her own lawsuit would clutter court dockets needlessly.

Given the nature of the alleged unlawful conduct, it is unclear whether all 14,041 proposed Class members would file a lawsuit. That uncertainty strengthens the case for using a class action to resolve the claims against Defendant. If the proposed Class members brought individual actions and were not awarded punitive damages, the maximum recovery they could obtain would

be capped at $1000.00. See 15 U.S.C. § 1681n(a). That cap could discourage proposed Class members from pursuing claims individually. See Amchem, 521 U.S. at 617 ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.") (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)). Plaintiff's representation that none of the other proposed Class members have initiated related litigation against Defendant is evidence of that discouragement. See ECF No. 19-1, at 12. Plaintiff's representation also supports an inference that none of the other proposed Class members have an interest in controlling prosecution of the case.

3. Summary

The "Disclosure and Authorization Class" and the "Pre-Adverse Action Subclass" are CERTIFIED for purposes of judgment on the Proposal.

B. Appointment of Class Counsel under Rule 23(g)

Plaintiff's counsel seeks to be appointed class counsel. Plaintiff's counsel represents that he has practiced law for 27 years and has extensive experience serving as class counsel in FCRA class actions throughout the country, including in the Western District of Tennessee. See ECF No. 19-1. The Court

credits those representations. Considering the factors in Rule 23(g), appointment of Plaintiff's counsel is appropriate.

C. Settlement Approval under Rule 23(e)(2)

Considering the factors set forth in the Sixth Circuit's seven-factor test, see Does 1-2, 925 F.3d at 894-95, the parties' Proposal is fair, reasonable, and adequate.

1. Risk of Fraud or Collusion

This factor weighs in favor of settlement. Both parties were represented by counsel with extensive experience litigating FCRA class actions. See ECF No. 19-1, at 2; see also Scobey v. Gen. Motors, LLC, No. 20-12098, 2021 WL 5040312, at *3 (E.D. Mich. Oct. 28, 2021) ("The fact that Plaintiffs were represented by experienced counsel supports the conclusion that the settlement was a product of an arms' length transaction."). Plaintiff's counsel represents that the parties exchanged relevant information, negotiated with the help of an experienced mediator, and reached an agreement. "Courts presume the absence of fraud or collusion in class action settlements unless there is evidence to the contrary." In re Family Dollar Stores, Inc., Pest Infestation Litig., No. 22-md-03032, 2023 WL 7112838, at *10 (W.D. Tenn. Oct. 27, 2023) (quoting Leonhardt v. ArvinMeritor, Inc., 581 F. Supp. 2d 818, 838 (E.D. Mich. 2008)). There is no evidence to rebut this presumption.

2. Complexity, Expense, and Likely Duration of the Litigation

This factor weighs in favor of settlement. Although the legal questions in this action are fairly straightforward, litigation could have a long way to go. Before Plaintiff submitted his Motion, the most recent substantive docket entry was Defendant's Answer to Plaintiff's Amended Class Action Complaint, which was filed in 2021. See ECF No. 15. Given the early stage of this litigation, Plaintiff might have to wait several more years for relief—if any is received—if a settlement is not reached. Counsel would likely accrue significant expenses as well.

3. Amount of Discovery Engaged in by the Parties

This factor favors settlement. Although the parties have not engaged in formal discovery, Plaintiff's counsel represents that they agreed to exchange relevant information early in the litigation, and that Plaintiff received "the information necessary to evaluate and analyze his claims." See ECF No. 19-1, at 2–3. The Court has no reason to doubt those representations.

4. Likelihood of Success on the Merits

This factor is neutral. Although Plaintiff filed his original Complaint in 2021, litigation is in its early stages. The parties have not presented any arguments or evidence about

the legal or factual issues at the heart of this case. This action has not proceeded far enough for the Court to make an informed assessment of this factor.

5. Opinions of Counsel and Class Representative

The opinions of Plaintiff and his counsel weigh in favor of settlement. Plaintiff's counsel "believes this settlement is in the best interest of the Class, and merits approval by the Court." See id. at 19. Plaintiff, by agreeing to have this Motion filed, has also demonstrated that he approves the settlement. Although Plaintiff does not provide the opinions of Defendant, Defendant has not opposed the Motion. See id. at 1.

6. Reaction of Absent Class Members

This factor is neutral. Plaintiff's counsel avers that he "is not aware of any reactions from unnamed" Class members. As Plaintiff notes correctly, the Agreement provides a means by which unnamed Class members may submit objections after the preliminary approval of the settlement.

7. Public Interest

This factor weighs in favor of settlement. "If a settlement agreement reflects a reasonable compromise over the issues, a court may approve the settlement 'in order to promote the policy of encouraging settlement of litigation.'" Foster v. Residential Programs, Inc., No. 19-cv-2358, 2021 WL 664055, at *4 (S.D. Ohio

Feb. 18, 2021) (quoting Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1354 (11th Cir. 1982)). The Proposal reflects a reasonable compromise.

8. Summary

The Proposal is fair, reasonable, and adequate. The Court "will likely be able to" approve the Proposal under Rule 23(e)(2), pending a fairness hearing. See Fed. R. Civ. P. 23(e).

D. Issuance of Reasonable Notice under Rule 23(e)(1)

Plaintiff requests that his proposed class notice forms be approved. Plaintiff offers separate notices for the Disclosure and Authorization Class, see ECF No. 19-3, and the Pre-Adverse Action Subclass, see ECF No. 19-4. Both satisfy the requirements in Rule 23(c)(2)(B).

The Proposal includes a requirement for Plaintiff's counsel to contract with a settlement administrator, who will, among other tasks, mail notices to Class members' last known addresses, re-send all returned and undelivered mail, develop a website containing information about the settlement and allowing the submission of electronic claims, and establish a live call center providing pre-recorded information about "relevant topics." See ECF No. 19-2, at 16–17. This satisfies the due process requirement of ensuring that notices are "reasonably calculated to reach interested parties." Fidel, 534 F.3d at 514.

The notice forms proposed by Plaintiff are APPROVED for issuance to the Disclosure and Authorization Class members and the Pre-Adverse Action Subclass members.

VI. Final Approval and Fairness Hearing and Related Schedule

If a settlement proposal would bind class members, a court must hold a "fairness hearing" before approving it. See Fed. R. Civ. P. 23(e)(2). The purpose of the fairness hearing is to ensure that a proposal is indeed fair, reasonable, and adequate, and to approve that proposal if so. See id.

The parties have proposed a schedule to govern certain deadlines before and after the fairness hearing. Under the proposed schedule, Defendant must provide the settlement administrator with the names and last-known addresses of the Disclosure and Authorization Class members and the Pre-Adverse Action Subclass members within fifteen (15) days of the issuance of this Order. See ECF No. 19-2, at 20. The settlement administrator must mail the class notice forms within ten (10) days of receiving the members' information from Defendant. See ECF No. 19-1, at 22. Class and Subclass members will have forty-five (45) days after the settlement administrator mails the notice forms to submit their claims or objections. See id. at 23. Plaintiff must submit a motion for attorney's fees at least thirty (30) days before the objection deadline. See id.

The motion for final approval of the Proposal and a response to any objections to the settlement must be filed at least fourteen (14) days before the final fairness hearing. See id.

The parties' proposed schedule is reasonable and is ADOPTED. The Court will issue a second Order setting a date for a fairness hearing.

VII. Conclusion

The Disclosure and Authorization Class and the Pre-Adverse Action Subclass are CERTIFIED for purposes of judgment on the Proposal. Plaintiff's counsel is APPOINTED class counsel. The Proposal for settlement is fair, reasonable, and adequate. Plaintiff's proposed notice forms, see ECF Nos. 19-3, 19-4, are APPROVED for issuance in accordance with Rule 23(e). The parties' proposed schedule is ADOPTED. The Court will issue a separate Order setting a date for a fairness hearing.

SO ORDERED this *20th* day of May, 2024.

/s/ *Samuel H. Mays, Jr.*
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE