UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DERRICK COLES,

Plaintiff,

v. Case No. 8:17-cv-829-T-17AEP

STATESERV MEDICAL OF FLORIDA, LLC, *et al.*,

Defendant.
_____/

REPORT AND RECOMMENDATION

Plaintiff initiated this action on behalf of himself and a putative class against Defendants for violations of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq*. (Doc. 1). Eventually, Plaintiff moved for certification of a class, which Defendants did not oppose (Doc. 38). Upon consideration, the Court granted Plaintiff's request for class certification and, in doing so, certified the class, appointed Plaintiff as class representative, and appointed Plaintiff's counsel as class counsel (Doc. 45). Given that the parties previously reached a proposed settlement, the Court also considered the parties' Joint Motion for Preliminary Approval of Settlement and Notices to Settlement Class (Doc. 42) but denied the motion without prejudice (Doc. 45).

Currently before the Court is the parties' renewed Joint Motion for Preliminary Approval of Settlement and Notices to Settlement Class (Doc. 48). By the motion, the parties seek preliminary approval of the class settlement and permission to issue the notices to potential class members. Under Rule 23(e), the claims, issues, or defenses of a certified class may be settled with the court's approval, with the following applicable procedures:

> (1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.
>
> (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
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> (3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
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> (4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
>
> (5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

Fed. R. Civ. P. 23(e)(1)-(5). Having previously established that preliminary certification of the class was warranted (*see* Docs. 38, 45), the parties established that preliminary approval of the Class Settlement Agreement and Release (the "Settlement Agreement") is similarly warranted.

To approve a class-action settlement, a district court must determine that the settlement is fair, adequate, and reasonable and is not the result of collusion between the parties. *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984) (quotation and citation omitted); *see Fresco v. Auto Data Direct, Inc.*, No. 03-61063-CIV, 2007 WL 2330895, at *4 (S.D. Fla. May 14, 2007) ("At the preliminary-approval step, the Court is required to make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms" (internal quotation and citation omitted)). In making such determination, a district court should "consider the following factors: (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the range of possible recovery at which a settlement is fair, adequate, and reasonable; (4) the anticipated complexity, expense, and duration of litigation; (5) the opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved." *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1240 (11th Cir. 2011). These

factors are neither determinative nor exhaustive, and a district court may consider such other relevant factors as (1) an unjustifiably burdensome claims procedure; (2) unduly preferential treatment of the class representative; (3) the terms of settlement in similar cases; (4) an unreasonably high award of attorney's fees to prevailing class counsel; and (5) impermissibly broad releases of liability. *Palmer v. Dynamic Recovery Sol., LLC*, Case No. 6:15-cv-59-Orl-40KRS, 2016 WL 2348704, at *2 (M.D. Fla. May 4, 2016).

Preliminary approval of a class settlement essentially allows notice to issue to the class and for the class members to either object to or opt out of the settlement. *Pierre-Val v. Buccaneers Ltd. P'ship.*, No. 8:14-CV-01182-CEH-EAJ, 2015 WL 3776918, at *1 (M.D. Fla. June 17, 2015). Accordingly, if a proposed settlement falls within the range of possible approval, or if probable cause exists to notify the class of the proposed settlement, such settlement should be preliminarily approved. *Fresco*, 2007 WL 2330895, at *4. Notably, "[a]lthough class action settlements should be reviewed with deference to the strong judicial policy favoring settlement, the court must not approve a settlement merely because the parties agree to its terms." *Palmer*, 2016 WL 2348704, at *3 (citations omitted).

In this instance, the factors weigh in favor of preliminarily approving the Settlement Agreement. Namely, as the parties illustrate, the settlement did not result from fraud or collusion but rather several months of litigation and negotiations between competent counsel and with the assistance of a mediator. Additionally, the litigation of the case through trial, and possibly the appellate process, would prove complex, expensive, and time-consuming for the parties, as the positions of the parties greatly differ and each would zealously advocate for its position, and would most likely result in protracted litigation with an uncertain outcome. Moreover, under the FCRA, the possible recovery ranges from an amount of actual damages or damages of not less than $100 and not more than $1,000 plus punitive damages, costs, and

reasonable attorney's fees. 15 U.S.C. § 1681n(a)(1)(A), (2), & (3). The Settlement Agreement provides a monetary payment to each class member in the amount of $318.85 before administration expenses and attorneys' fees, leading to an award of at least $185 to each class member depending on the final number of class members. Such recovery is fair, adequate, and reasonable, especially in light of recoveries in similar cases. *See, e.g., Graham v. Pyramid Healthcare Solutions, Inc.*, Case No. 8:16-cv-1324-T-30AAS (M.D. Fla. filed May 26, 2016) (approving settlement providing $100 to each class member in a FCRA case). Further, both the parties and counsel support the Settlement Agreement and believe it is in the best interests of all involved, including the class.

With respect to the possible request for expenses and attorney's fees, such request falls within the parameters of reasonable awards in the class-action context. As the Eleventh Circuit stated, "'[a]ttorney's fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class.'" *Faught*, 668 F.3d at 1242 (quoting *Camden I Condo Assoc., Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991)). In this context, courts generally consider fee requests reasonable where the requests fall between 20% and 30% of the claims fund. *Faught*, 668 F.3d at 1242 (noting that the majority of fees are reasonable where they fall between 20-25% of the claims) (citation omitted); *see Nelson v. Mead Johnson & Johnson Co.*, 484 F. App'x 429, 435 (11th Cir. 2012) (finding reasonable a fee award that constituted 25% of the common fund); *Waters v. Intern. Precious Metals Corp.*, 190 F.3d 1291, 1294 (11th Cir. 1999) (noting that the majority of common fund fee awards fall between 20% and 30% of the common fund). Here, the parties agree that the attorneys' fees and litigation expenses shall not exceed 33.33% of the Gross Settlement Fund, which consists of $172,500 for a class with 541 members. Given that the percentage involves both fees and expenses and will not exceed 33.33% of the fund, such award is fair and reasonable.

Similarly, the request for an incentive award in the amount of $4,000 for Plaintiff does not appear unreasonable for purposes of preliminary approval of the Settlement Agreement (*see* Doc. 48, Ex. 1, at ¶7.2.4. Courts have permitted similar incentive awards. *See Nelson*, 484 F. App'x at 432, 434-35 (affirming a district court's decision finding a class settlement fair, adequate, and reasonable where plaintiffs were awarded incentive awards in the amounts of $10,000 for one plaintiff; $2,500 for four plaintiffs; and $1,000 for the remaining named plaintiffs); *see Graham*, Case No. 8:16-cv-1324-T-30AAS (M.D. Fla. filed May 26, 2016) (Doc. 72) (approving a service award of $7,500 to the named plaintiff in a FCRA case).

Following preliminary approval of a settlement, Rule 23 dictates that the court "direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). Where a class is certified under Rule 23(b)(3), albeit preliminarily for our purposes, "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all class members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The notice must clearly and concisely include the following information in plain, easily understood language:

> (1) the nature of the action;
>
> (2) the definition of the class certified;
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> (3) the class claims, issues, or defenses;
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> (4) that a class member may enter an appearance through an attorney if the member so desires;
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> (5) that the court will exclude from the class any member who requests exclusion;
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> (6) the time and manner for requesting exclusion; and
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> (7) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B)(i)-(vii). Upon review, the notice attached to the proposed Class Settlement and Release (Doc. 48, Ex. 1) satisfies these requirements and should thus be approved.

Furthermore, the manner in which the parties intend to provide notice is fair, adequate, and reasonable (*see* Doc. 48, Ex. 1, at ¶ 4.2 *et seq.*). The parties agree to provide notice by sending it via first-class mail to the last-known addresses of the class members based on information contained in Defendants' records or obtained by a third-party Settlement Administrator. The Settlement Agreement also provides provisions for reasonable efforts to locate class members whose notices are returned as undeliverable. In addition, the Settlement Agreement and Notice provide information regarding creation of a settlement website, which will contain all pertinent pleadings and settlement documents, and will be paid separately by allocated funds.

Following issuance of the Notice and the time period for opting out and objecting, the undersigned will subsequently conduct a fairness hearing. Such hearing will take place no earlier than 100 days following approval by the district judge. The parties shall move for final approval of the Settlement no later than 14 days prior to the fairness hearing. For the foregoing reasons, therefore, it is hereby

RECOMMENDED:

1. The Joint Motion for Preliminary Approval of Settlement and Notices to Settlement Class (Doc. 48) be GRANTED.[2]

2. The Notice of Class Action Settlement (Doc. 48, Ex. 1) be approved for distribution to the class.

[2] To the extent that the parties request that the Court retain jurisdiction to implement and enforce the Settlement Agreement after final approval, such request is likely to be denied.

3. A fairness hearing be scheduled, to occur no earlier than 100 days following approval by the district judge.

4. The parties be directed to move for final approval of the Settlement Agreement no later than 14 days prior to the fairness hearing.

IT IS SO REPORTED in Tampa, Florida, on this 19th day of June, 2018.

ANTHONY E. PORCELLI
United States Magistrate Judge

NOTICE TO PARTIES

A party has fourteen days from this date to file written objections to the Report and Recommendation's factual findings and legal conclusions. A party's failure to file written objections waives that party's right to challenge on appeal any unobjected-to factual finding or legal conclusion the district judge adopts from the Report and Recommendation. *See* 11th Cir. R. 3-1.

cc: Hon. Elizabeth A. Kovachevich
Counsel of Record