No. _____

In The

Supreme Court of the United States

ADAM E. SCHULMAN,

Petitioner,

v.

LEXISNEXIS RISK AND INFORMATION ANALYTICS GROUP, INC., SEISINT, INC., and REED ELSEVIER, INC.,

Respondents,

(additional respondents listed on inside cover)

On Petition for Writ of Certiorari
To the United States Court of Appeals for the
Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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(additional parties, continued from the front cover)

GREGORY THOMAS BERRY; SUMMER DARBONNE, on behalf of herself and all others similarly situated; RICKEY MILLEN, on behalf of himself and all others similarly situated; SHAMOON SAEED, on behalf of himself and all others similarly situated; ARTHUR B. HERNANDEZ, on behalf of himself and all others similarly situated; ERIKA A. GODFREY, on behalf of herself and all others similarly situated; TIMOTHY OTTEN, on behalf of himself and all others similarly situated,

Respondents,

MEGAN CHRISTINA AARON and the Aaron Objectors,

Respondents,

and

SCOTT HARDWAY and the Hardway Objectors,

Respondents.

QUESTION PRESENTED

In a class action settlement providing injunctive relief not authorized by statute and releasing or impairing the money-damages claims of absent and objecting members, did class certification under Federal Rule of Civil Procedure 23(b)(2) and the denial of the right to opt out as to the damages claims violate Rule 23 or the Due Process Clause of the Fifth Amendment?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Adam E. Schulman was a plaintiff class member and an objector to the settlement in the district court and an appellant in the Fourth Circuit.

Respondent LexisNexis Risk and Information Analytics Group, Inc., Seisint, Inc., and Reed Elsevier, Inc., were defendants in the district court and appellees in the Fourth Circuit.

Respondents Gregory Thomas Berry, Summer Darbonne, on behalf of herself and all others similarly situated, Rickey Millen, on behalf of himself and all others similarly situated, Shamoon Saeed, on behalf of himself and all others similarly situated, Arthur B. Hernandez, on behalf of himself and all others similarly situated, Erika A. Godfrey, on behalf of herself and all others similarly situated, and Timothy Otten, on behalf of himself and all others similarly situated, were each named plaintiffs in the district court and appellees in the Fourth Circuit.

Respondent Megan Christina Aaron and the Aaron Objectors, were objecting class members in the district court and appellants in the Fourth Circuit.

Respondent Scott Hardway and the Hardway Objectors, were objecting class members in the district court and appellants in the Fourth Circuit.

Given the breadth of the nationwide class there is a likelihood that the Justices of this Court and their staff are class members. But as the Fourth Circuit explained, because "any interest [members of the Court] may have in this litigation is common to the general public, recusal is not required." App. A7 n. 2.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

This Court twice has expressly noted that Rule 23 and the Due Process Clause may require an opt-out right for damages claims. *Wal-Mart Stores, Inc* v. *Dukes*, 564 U.S. 338, 363 (2011); *Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117, 121 (1994). It has twice granted certiorari to determine the due process question, but it dismissed the writ as improvidently granted each time. *Ticor*, 511 U.S. 117; *Adams* v. *Robertson*, 520 U.S. 83 (1997). In one instance, the Court dismissed because the case's posture did not permit deciding the Rule 23 question before reaching the constitutional question. *Ticor*, 511 U.S. at 121. In the other, it dismissed because the constitutional question had not been properly presented to the court below. *Adams*, 520 U.S. at 90. This Petition presents none of those problems. It thus provides the opportunity to resolve a long-standing conflict among the courts of appeals on whether Rule 23 provides damages claimants the right to opt out of class actions and, if not, whether the Due Process Clause guarantees that right.

OPINIONS BELOW

The Order of the District Court for the Eastern District of Virginia approving the class settlement is available at 2014 U.S. Dist. LEXIS 124415 and is attached at Appendix B1.

The Opinion of the Fourth Circuit affirming the district court is available at 807 F.3d 600; 2015 U.S. App. LEXIS 21062, and is attached at Appendix A1.

The Order of the Fourth Circuit denying rehearing and rehearing *en banc* is attached at Appendix C1.

JURISDICTION

The Fourth Circuit issued its opinion and order affirming the district court on December 4, 2015. The Fourth Circuit denied Petitioner's timely petition for rehearing and rehearing *en banc* on January 4, 2016. The Chief Justice granted Petitioner an extension of time to file this Petition to and including May 19, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULE, STATUTE, AND CONSTITUTIONAL PROVISION INVOLVED

Federal Rule of Civil Procedure 23 provides, in relevant part:

* * *

> (b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:
>
> * * *
>
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

* * *

(2) Notice.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), 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. The notice must clearly and concisely state in plain, easily understood language:

* * *

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

* * *

(4) Particular Issues. When appropriate, an action may be maintained as a class action with respect to particular issues.

(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

* * * * *

The Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* ("FCRA") provides, in relevant part:

§ 1681*n*. Civil liability for willful noncompliance

(a) In general. Any person who willfully fails to comply with any requirement imposed under this title [15 USCS

§§ 1681 et seq.] with respect to any consumer is liable to that consumer in an amount equal to the sum of –

(1) (A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $ 100 and not more than $ 1,000; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $ 1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

* * *

§ 1681*o*. Civil liability for negligent noncompliance

(a) In general. Any person who is negligent in failing to comply with any requirement imposed under this title [15 USCS §§ 1681 et seq.] with respect to any consumer is liable to that consumer in an amount equal to the sum of –

(1) any actual damages sustained by the consumer as a result of the failure; and

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

* * *

The Due Process Clause of the Fifth Amendment provides in relevant part: "No person shall be * * * deprived of life, liberty, or property, without due process of law * * *."

STATEMENT OF THE CASE

1. This case involves a class-action settlement in which the putative class was denied the opportunity to opt out despite the elimination of their statutory damages claims for no money at all. The complaint in this case sought only damages on behalf of the class for violations of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681, *et seq.*, and hence was subject to the requirements of Rule 23(b)(3), including the requirement that class members be allowed to opt out. The settlement, however, terminated such claims for the class and instead offered injunctive relief – not even authorized by the FCRA – and thus claimed coverage under Rule 23(b)(2) for a mandatory injunctive class. Petitioner, who objected to this scheme, argued that it violated both Rule 23 and the Due Process Clause by sacrificing absent class members' monetary claims without giving them the oppor-

tunity to opt out. The district court disagreed and the Fourth Circuit affirmed, placing itself in conflict with a number of its sister circuits.

Review by this Court is needed to resolve such conflicts and to protect the due process rights of literally hundreds of millions of absent class members in this and other cases.

2. The settlement at issue in this case comes from a putative class action alleging that Respondents LexisNexis Risk and Information Analytics Group, Inc., and affiliated companies (collectively "Lexis"), violated the FCRA by selling certain personal data reports to debt collectors without providing the protections required by that Act. App. A1-A2, A6. Data regarding over 200 million people was included in Lexis's database during the time relevant to this case. The complaint alleged that the violations were "willful" and thus sought statutory damages ranging from $100 to $1,000 per violation. 15 U.S.C. § 1681*n*(a); App. A4. The FCRA also provides for recovery of actual damages, 15 U.S.C. § 1681*o*(a), but it does not provide for injunctive relief. App. A4, A6, A14-A15.

Lexis denied that the reports it sold were "consumer reports" covered by the FCRA, and denied that any alleged violations were willful. App. A2, A4-A5.

3. Eventually the named parties struck a deal and agreed to settle the claims of two separate classes.

The first and largest class of roughly 200 million persons – the "(b)(2) Class" – would receive no money at all. App. A7-A8, B7, B14. Rather, it would receive the supposed benefit of certain injunctive relief whereby Lexis agreed to comply with the FCRA in connection with some, though not all, of its challenged reports in the fu-

ture. Class members, by contrast would release all of their claims to statutory or punitive damages. They also would be barred from using a class-action suit to seek actual damages, though they could seek such damages individually. *Id*. Nor will class members be able to challenge the legality under the FCRA of half of Lexis' new product line for reports issued before June, 2020. App. A8-A9.

As the name of the class indicates, the settlement proposed to certify the class under Federal Rule of Civil Procedure 23(b)(2). Rule 23(b)(2) permits certification where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2). Rule 23(b)(2) is mandatory, unlike Rule 23(b)(3); it does not provide for class members to opt out of the class. *Wal-Mart*, 564 U.S. at 362.

Accordingly, members of this class, despite having released their statutory damages claims and their only practical means of pursuing any actual damages claims, would not be allowed to opt out.

Finally, the (b)(2) Class settlement provided named class representatives incentive payments of $5,000 each and attorney's fees of over $5 million. App. A10.

A second and far smaller class of approximately 31,000 persons – the so-called "(b)(3) Class" – would receive payments of approximately $300 per person in return for releasing all claims for actual or statutory damages. App. A6-A7. Members of this class were entitled to opt out if they so desired. This part of the settlement was not challenged on appeal and is not at issue in this Court.

4. Petitioner Schulman is a member of the much larger (b)(2) Class, and it is the settlement of the (b)(2) Class's claims that is the subject of this Petition. Along with many other class members, Petitioner filed objections in the district court, arguing that both Rule 23 and the Due Process Clause prohibited the court from certifying the class and approving the settlement on a non-opt-out basis.

5. On September 5, 2014, the district court rejected those challenges, certified the (b)(2) Class, and approved the settlement. App. B1, B28-B31.

6. Petitioner and other objectors timely appealed to the Fourth Circuit, arguing, *inter alia*, that the district court's certification of the mandatory (b)(2) Class, releasing and restricting their damages claims without allowing class members to opt out, violated Rule 23 and the Due Process Clause.

7. On December 4, 2015, the Fourth Circuit rejected those challenges. App. A2, A10-A21. Regarding the requirements of Rule 23, the court held that "mandatory Rule 23(b)(2) classes may be certified in some cases even when monetary relief is at issue," so long as such relief "is 'incidental' to injunctive or declaratory relief and does not 'predominate[].' " App. A12. The court further held that "claims for individualized monetary relief " would not be "incidental" for purposes of Rule 23(b)(2) certification, but more generic damages claims would be incidental and thus capable of inclusion in a mandatory Rule 23(b)(2) class. App. A12-14.

Applying that legal standard to the (b)(2) Class in this case, the court held that the injunctive relief provided by the settlement was sufficient to invoke Rule

23(b)(2) and the statutory damages claims released were not individualized and hence were merely " 'incidental' for purposes of Rule 23(b)(2)." App. A13-A14.[1]

The court further held that the damages aspects of the settlement were still "incidental" to the injunctive relief despite that the complaint did not seek, and the FCRA does not authorize, injunctive relief. App. A14.[2] The court concluded that judgment for such injunctive relief was authorized by the settlement agreement regardless of the narrower scope of the statute. App. A15. It sought to distinguish contrary cases barring Rule 23(b)(2) class certification where the statute in question does not provide for injunctive relief by arguing that a settlement class may be treated more permissively than a litigation class. App. A15 (discussing *Bolin* v. *Sears, Roebuck & Co.*, 231 F.3d 970, 977 n. 39 (5th Cir. 2000); *Christ* v. *Beneficial Corp.*, 547 F.3d 1292, 1298 (11th Cir. 2008)). The court recognized that, absent statutory authorization for injunctive relief, certification of a Rule 23(b)(2) litigation class "would be inappropriate because the plaintiffs would have no prospect of achieving injunctive relief." App. A16. But it nonetheless concluded that because Rule 23(b)(2) certification ap-

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[1] The court assumed, without deciding, that a "class settlement that *releases* damages claims is on precisely the same footing under Rule 23(b)(2) and the Due Process Clause as one that *provides* for damages." App. A13 n. 3.

[2] The court once again assumed, without deciding, that because the FCRA does not provide for a private right of action for injunctive relief, consumers would not be permitted to seek such relief. App. A14-A15.

plied to "final" injunctive relief, an injunction – and hence a (b)(2) class – could be based on the settlement alone, regardless whether such relief was sought in the complaint or authorized by the relevant statute. App. A16.

Regarding due process, the court recognized that this Court in *Wal-Mart*, 564 U.S. at 363, noted "the 'serious possibility' that due process requires opt-out rights (and concomitant notice) under Rule 23(b)(2) even 'where the monetary claims do not predominate.' " App. A17. But because this Court did not find it necessary to "go that far in" *Wal-Mart*, the Fourth Circuit "decline[d] to go where the Supreme Court has not." App. A18. Instead, it stuck to its own precedent allowing for non-opt-out Rule 23(b)(2) classes involving damages deemed "incidental" to injunctive relief. App. A18-19.

The court further held that denying absent class members the right to opt out was fair under the circumstances given the purported uniformity of the damages claims released, the preservation of individual damage claims (though not allowed via a class action), and the various other provisions of Rule 23 designed to protect the interests of absent members by requiring judicial determinations of fair and adequate representation and a fair, adequate, and reasonable settlement. App. A19-20. In light of such protections and an interest in encouraging settlements, the court concluded that due process does not require an opt-out rule where incidental damages claims are involved.

Accordingly, the court affirmed the district court's conclusion that absent (b)(2) Class members could be

denied their right to opt out of the settlement that released and restricted their damages claims.[3]

8. On January 4, 2016, the Fourth Circuit denied a petition for rehearing or rehearing *en banc*. App. C1. This Petition followed.

REASONS FOR GRANTING THE WRIT

This Court should grant the Petition for a writ of certiorari because the decision below takes sides in a multi-faceted split regarding whether and when opt-out rights are required by Rule 23(b) or by the Due Process Clause, and involves important issues affecting hundreds of millions of absent class members in this and similar cases. This Court has twice granted certiorari on the due process question, only to have problems with how the question was presented or preserved result in dismissal. This case presents no such concerns and will finally allow this Court to reach this important issue.

In *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811-12 (1985), this Court held that due process prevents a court from binding an absent class member to a class-action judgment "concerning a claim for money damages" unless the class member is provided a right to opt out. This Court limited its holding to cases involving "claims wholly or predominately for money judgments" and "intimate[d] no view" concerning class actions "seeking equitable relief." *Id.* at 811 n. 3. Later, in *Oritz* v. *Fibreboard Corp.*, 527 U.S. 815, 847-48 (1999), this Court rejected a non-opt-out class settle-

[3] The court also disposed of a number of other objections that were raised below, App. A21-34, but that are no longer at issue in this Petition.

ment involving monetary relief certified under Rule 23(b)(1)(B), relying in part on its reasoning in *Shutts*.

Most recently, in *Wal-Mart*, 564 U.S. at 362, this Court unanimously rejected a Rule 23(b)(2) non-opt-out class certification of Title VII backpay claims, holding that, at the least, non-opt-out Rule 23(b)(2) certification of backpay claims is impermissible because those claims seek "individualized monetary" relief. This Court noted, however, that "[o]ne possible reading of [Rule 23(b)(2)] is that it applies only to requests for * * * injunctive or declaratory relief and does not authorize the class certification of monetary claims at all." *Id.* at 360. This Court also observed that although it has never held that due process requires that class members be provided a right to opt out where monetary claims do not predominate, "the serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here." *Id.* at 363.

This Court has twice granted certiorari on the question whether "absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf." *Ticor*, 511 U.S. at 120-21; *Adams*, 520 U.S. at 85 (question whether "approval of the class action and the settlement agreement in this case, without affording all class members the right to exclude themselves from the class or the agreement, violated the Due Process Clause of the Fourteenth Amendment."). In each case, however, this Court dismissed the writ as improvidently granted after briefing and oral argument on the merits. *Ticor*, 511 U.S. at 121-22; *Adams*, 520 U.S. at 85.

In *Ticor*, the petition presented only the due process question, not the Rule 23 question, making resolution of the constitutional question potentially unnecessary and hypothetical in light of the "substantial possibility" that class actions asserting monetary claims may only be certified under Rule 23(b)(3), which itself guarantees absent class members the right to opt out. 511 U.S. at 121-22. And in *Adams*, petitioners failed to establish they had properly presented the due process issue to the Alabama Supreme Court. 520 U.S. at 86-87.

The current Petition presents both the Rule 23 and due process questions regarding whether the right to opt out is required for class certification of monetary claims, those issues were properly raised and decided below, and hence it is free of the problems that led this Court to dismiss *Ticor* and *Adams*. Here, the Court may decide the Rule 23 question first and reach the constitutional issue only if it determines that Rule 23 does not provide class members an opt-out right. It thus offers an excellent vehicle for addressing a substantial issue in which the Court has expressed "continuing interest," *Adams*, 520 U.S. at 92 n. 6, and on which the Court has twice previously granted review. It also presents the opportunity to resolve the conflict in approaches among the courts of appeals on issues of great importance.

I. The Decision Below Takes Sides in a Multi-faceted Split Over Whether and When Rule 23 or the Due Process Clause Requires Opt-Out Rights from a Mandatory Class Covering Claims for Money Damages.

As described above, at 12-13, this Court's decisions have established that opt-out rights are required under Rule 23 for class certification of at least certain types of damages claims – at a minimum, cases involving individual or non-incidental claims for damages – but left open the question whether such rights are required for class treatment of other, or even all, types of damages claims. *See, e.g.*, *Shutts*, 472 U.S. at 811-12 & n. 3; *Oritz*, 527 U.S. at 842, 844-45; *Wal-Mart*, 564 U.S. at 366; *see also Ticor*, 511 U.S. at 121 (noting the "substantial possibility" that, "in actions seeking monetary damages, classes can be certified only under Rule 23(b)(3), which permits opt-out, and not under Rules 23(b)(1) and (b)(2), which do not").

Given the limited holdings and broader suggestions in those cases, the courts of appeals have struggled with whether and when opt-out rights may be denied where class certification covers other types of monetary claims.

A. The Courts of Appeals Apply Conflicting Approaches to Whether Rule 23 or Due Process Requires the Right to Opt Out.

The Fourth Circuit below held that a mandatory Rule 23(b)(2) class may be certified, and opt-out rights denied, where the damages claims involved are non-individualized and "incidental" to injunctive or

declaratory relief. App. A12 (citing *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998)). Joining the Fourth Circuit in this hostile approach to opting out are the Third, Fifth, Eighth, and Eleventh Circuits. *See, e.g.*, *Kyriazi* v. *Western Elec. Co.*, 647 F.2d 388, 393 (3d Cir. 1981) (citing earlier circuit precedent that "refused to require notice and an opportunity to opt out for absent members in a (b)(2) action, even after the dominant relief sought no longer was principally injunctive, but instead solely monetary," and holding that Rule 23 "permits hybrid class actions involving claims for both classwide and individualized relief to proceed as Rule 23(b)(2) actions"); *Allison*, 151 F.3d at 411 & n. 3 (holding that "monetary relief may be obtained in a (b)(2) class action so long as the predominant relief sought is injunctive or declaratory"; recognizing that Supreme Court decision in *Ticor* "casts doubt on the proposition that class actions seeking money damages can be certified under Rule 23(b)(2)," noting it might reconsider the issue were it "writing on a clean slate," yet viewing itself bound by circuit precedent); *DeBoer* v. *Mellon Mortg. Co.*, 64 F.3d 1171, 1175 (8th Cir. 1995) (regarding a Rule 23(b)(2) certification also involving claims for damages, rejecting contention that "that certification of any class should have been under section (b)(3) so that the class members could opt-out of the settlement" and holding that when "either subsection (b)(1) or (b)(2) is applicable, however, (b)(3) should not be used"), *cert. denied sub nom. Crehan* v. *DeBoer*, 517 U.S. 1156 (1996); *Murray* v. *Auslander*, 244 F.3d 807, 812 (11th Cir. 2001) ("Monetary relief may be obtained in a Rule 23(b)(2) class action so long as the predominant relief sought is injunctive or

declaratory" and the monetary relief is "incidental" to the injunctive or declaratory relief).[4]

Those circuits with the most expansive application of mandatory class certification including damages claims likewise take a narrow view of the due process rights of class members. *See, e.g.*, *Grimes* v. *Vitalink Comm. Corp.*, 17 F.3d 1553, 1560 n. 8 (3d Cir. 1994) (concluding due process permits binding "absent class members who had sufficient minimum contacts with the forum" even in the absence of an opt-out provision), *cert. denied*, 513 U.S. 986 (1994); *DeBoer*, 64 F.3d at 1175 (rejecting due process objection to mandatory 23(b)(2) class covering incidental damages claims by viewing due process as solely concerned with personal jurisdiction and an opportunity to object, not an opportunity to opt out, and holding that "[w]hen an objector submits to the court's jurisdiction, however, the *Shutts* dilemma is avoided.")

Other courts adopt a more lenient "hybrid" approach to mixed cases involving injunctions and damages, allowing monetary claims to be certified separately under Rule 23(b)(3) and injunctive claims under Rule 23(b)(2), or selectively allowing opt-outs from a Rule 23(b)(1) or (b)(2) class where monetary claims are also involved. *See Eubanks* v. *Billington*, 110 F.3d 87, 95, 99 (D.C. Cir. 1997) ("when a (b)(2) class seeks monetary as well as injunctive or declaratory relief the district court may exercise discretion in at least two ways.[fn omitted] * * * [It] may adopt a 'hybrid' approach, certifying a (b)(2) class as to the

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[4] And even courts that employ an incidental-damages analysis conflict on how it should be conducted. *See infra* at 21.

claims for declaratory or injunctive relief, and a (b)(3) class as to the claims for monetary relief, effectively granting (b)(3) protections including the right to opt out to class members at the monetary relief stage[,] * * * [or it] may conclude that * * * opt-outs should be permitted on a selective basis"; applying a flexible "basic fairness" test for whether class members should be allowed to opt out of a properly certified 23(b)(2) settlement class); *Amara* v. *CIGNA Corp.*, 775 F.3d 510, 519-20 (2d Cir. 2014) (noting that while *Wal-Mart* narrowed the types of monetary relief previously allowed by the Second Circuit in *Robinson* to be included in a mandatory Rule 23(b)(2) class, it still allowed inclusion, with no opt-out rights, of claims for monetary relief incidental to injunctive relief); *Robinson* v. *Metro-North Commuter R.R.*, 267 F.3d 147, 164, 166-68 (2d Cir. 2001) (though narrowed as noted in *Amara* as to the type of damages includable in a (b)(2) class, still good as to allowing district courts to mitigate "any due process risk posed by (b)(2) class certification of a claim for non-incidental damages" by "simply affording notice and opt out rights to absent class members for those portions of the proceedings where the presumption of class cohesion falters" or by certifying the liability issues separately from the damages issues), *cert. denied*, 535 U.S. 951 (2002); *Ellis* v. *Costco Wholesale Corp.*, 657 F.3d 970, 986-87 (9th Cir. 2011) (applying due process concern in *Wal-Mart* expansively to vacate a non-opt-out class and remand for further consideration); *Molski* v. *Gleich*, 318 F.3d 937, 950-51 & n. 16 (9th Cir. 2003) (allowing certification of a Rule 23(b)(2) class but requiring notice and the right to opt out as to substantial statutory damage claims; noting that such rights could be

provided through a variety of methods including Rule 23(b)(3) certification, bifurcating the injunctive and damages claims, or allowing opt out under Rule 23(b)(2)).

Indeed, the Seventh Circuit favors opt-out rights as to damages claims whenever possible. *See Jefferson* v. *Ingersoll Int'l Inc.*, 195 F.3d 894, 897-98 (7th Cir. 1999) (holding that when "substantial damages have been sought, the most appropriate approach is that of Rule 23(b)(3), because it allows notice and an opportunity to opt out," that "the controlling authority today is *Ortiz*, which says in no uncertain terms that class members' right to notice and an opportunity to opt out should be preserved whenever possible"; raising the option of bifurcated certification of the injunctive and damages aspects of the case, and noting that even were the damages sought "incidental" and hence potentially includable under Rule 23(b)(2), it remains unclear "whether certification of a class under Rule 23(b)(2) ever is proper when the class seeks money *damages*").

Not surprisingly, the greater willingness to allow opt-outs or bifurcated class certification is coupled with a greater concern with the due process issues raised by involuntary inclusion in a suit involving damages. *See, e.g.*, *Ellis*, 657 F.3d at 986-88 (discussing *Wal-Mart* and the broader scope of due process protections where money damages are sought); *Johnson* v. *Meriter Health Servs. Emp. Ret. Plan*, 702 F.3d 364, 369-71 (7th Cir. 2012) (recognizing due process concerns, still allowing (b)(2) certification under some circumstances, but setting forth potential procedures

for accommodating any due process rights where monetary damages are involved).

The variation in when opt-out rights are required when attempting to certify a Rule 23(b)(2) class that includes damages claims leaves potential class members subject to forum shopping by class counsel. Nationwide federal court class actions, such as the one in this case, should be subject to uniform standards governing when absent class members may be forced into suits affecting their property rights in claims for money damages. As evidenced by the above split, however, in practice such cases are treated differently depending on where the suit is brought.

This Court waded into the thicket in *Wal-Mart*, holding that no standard less protective than that of *Allison* would suffice. 564 U.S. at 365-66. But *Wal-Mart* still left unanswered the more fundamental question whether Rule 23 and the Due Process Clause permit the non-consensual waiver of any damages claims. The Fourth Circuit's application of *Allison* below (if correct) demonstrates how *Wal-Mart* did not go far enough in safeguarding class members' right to "decide *for themselves* whether to tie their fates to the class representatives' or go it alone." 564 U.S. at 364 (emphasis in original); *see also* Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 610-11 (2015) (noting a "troubling" "lingering uncertainty" in the wake of *Wal-Mart*). Thus, this Court should grant certiorari to reconcile the conflicting standards and finally reach the questions left open in its earlier cases.

B. The Courts of Appeals Disagree on How to Determine Whether Monetary Relief Is "Incidental" to Injunctive Relief.

In addition to the broader split regarding the standards for allowing class members to opt out, there is a more focused split regarding application of the *Allison* incidental-damages standard for allowing Rule 23(b)(2) certification. The court below held that damages claims may still be "incidental" and subject to Rule 23(b)(2) class certification even where the statute forming the basis for the suit does not permit private parties to seek injunctive relief, so long as a settlement agreement provides for such relief. App. A14-A17.

The court recognized that the Fifth and Eleventh Circuits hold that damages cannot be incidental to injunctive relief where the relevant statute does not allow injunctive relief. App. A15-A16; *Bolin* v. *Sears, Roebuck & Co.*, 231 F.3d at 977 n. 39 ("Of course, the unavailability of injunctive relief under a statute would automatically make (b)(2) certification an abuse of discretion."); *Christ* v. *Beneficial Corp.*, 547 F.3d at 1298 (non-opt-out Rule 23(b)(2) certification is "improper" where the statute under which plaintiffs sued did not authorize injunctive relief). But it sought to distinguish those cases as arising in the context of a litigation, rather than a settlement, class. App. A15-A16.

Even if the court's purported distinction between certification of litigation and settlement classes made policy sense, which it does not, it does not avoid creating a split with other courts of appeals that reject mandatory Rule 23(b)(2) classes in the settlement context as well.

See Hecht v. *United Collection Bureau*, 691 F.3d 218, 223-24 & n. 1 (2d Cir. 2012) (holding that a (b)(2) settlement certification, which did not provide for notice and the right to opt out, violated due process because injunctive relief was not available to all class members (and perhaps not available to any)); *Crawford* v. *Equifax Payment Services, Inc.*, 201 F.3d 877, 881-82 (7th Cir. 2000) (Easterbrook, J.) (holding Rule 23 and due process barred certification of a no-opt-out (b)(2) class because Rule 23(b)(2) could not be applied to an action under the Fair Debt Collection Practices Act, which provides only for damages, not injunctive relief; rejecting settlement that provided injunctive relief, no money to class members, and restricted use of future class actions to bring damages claims).

Where the statute provides only for damages, and not for injunctive relief, damages are necessarily more than incidental regardless whether class counsel and defendants devise extra-statutory agreements to trade away class rights to damages for otherwise unauthorized "injunctive relief."

Basing class certification on the terms of a settlement offering relief not authorized by the statute itself highlights the agency problems with self-appointed "champions" claiming to speak for, and enter into settlements on behalf of, millions of absent parties. The agreement provides class members so-called "relief" to which they are not legally entitled and never sought, and takes away and impairs their claims for monetary damages to which they are (or may be) entitled under the statute. Regardless whether the certifying court thinks the agreement represents a good deal or fair balance for such absent class members, inventing new

rights to brokered injunctive relief in exchange for existing, and future un-accrued, damages claims of millions of people without their agreement is not litigation, it is legislation.

The Fourth Circuit's failure to be more critical of settlement class certification and its endorsement of such a scheme between class counsel and defendants also conflicts with the rulings this Court and other circuits. Such courts hold that certification of a settlement-only class is subject to greater, not lesser, scrutiny under Rule 23 than is certification of a litigation class. *See, e.g., Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 620-21 & n. 16 (1997) (provisions of Rule 23(a) and (b) are "designed to protect absentees by blocking unwarranted or overbroad class definitions" and "demand undiluted, even heightened, attention in the settlement context"); *Ortiz*, 527 U.S. at 857-59 (refusing to allow the interest in settlement to "swallow the preceding protective requirements of Rule 23"); *In re Telectronics Pacing Sys. Inc.*, 221 F.3d 870, 880 (6th Cir. 2000) (noting, in the context of a Rule 23(b)(1)(B) settlement that "bootstrapping * * * a Rule 23(b)(3) class into a [mandatory] class is impermissible and highlights the problem with defining and certifying class actions by reference to a proposed settlement").[5]

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[5] The Fourth Circuit's distinction between litigation and settlement classes also creates an unusual problem where a case is settled after it has been litigated for a period of time post-certification. Presumably such a later settlement could include injunctive relief not permitted as part of the claims being litigated, and accordingly a properly certified (b)(3) litigation class could then be converted into a (b)(2) class, effectively revoking any previous opt-out rights. Meanwhile, class members who

This further, subsidiary split over when damages are "incidental" in the settlement context provides an additional reason to grant certiorari even were the Court eventually to allow some damages claims to be covered by a mandatory Rule 23(b)(2) class.

II. The Issues in this Case Are Important and Affect Numerous Cases and Hundreds of Millions of Absent Class Members.

Whether and when Rule 23(b)(2) mandatory class certification may be applied to claims for money damages is a question of exceptional importance, and not merely for the 28,000 objectors in this case and the 200 million members of the class who did not receive actual or even the best practicable notice but who are nonetheless bound by the settlement. As this Court has repeatedly held, the right to opt out is an integral aspect of the due process protections owed absent class members when their damages claims are being compromised as part of a class action.

This Court in *Shutts* and *Ortiz* held that Rule 23 and potentially due process protect a class member's right to opt out with respect to their monetary claims, at least in many circumstances. In *Wal-Mart*, this Court indicated that Rule 23 and due process may well protect that right whenever monetary claims are at stake. 564 U.S. at 360, 363, 366; *see also Shutts*, 472 U.S. at 807 ("[P]etitioner correctly points out that a chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs.").

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had either exercised or relied upon the future availability of such rights would thus have done so to their detriment when such rights later evaporate under the Fourth Circuit's rule.

Ortiz likewise expressed this Court's due process concerns, explaining that opt-out rights stem from "our deep-rooted historic tradition that everyone should have his own day in court," *Ortiz*, 527 U.S. at 846 (citing *Martin* v. *Wilks*, 490 U.S. 755, 762 (1989) (internal marks omitted)). And it specifically noted that "[t]he inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damages claims gathered in a mandatory class" where "[t]he legal rights of absent class members * * * are resolved regardless of either their consent, or, in a class with objectors, their express wish to the contrary." *Id.* at 846-47. The Court therefore adopted a limiting construction of Rule 23(b)(1)(B) and reversed the certification of a mandatory damages class under that rule in order to avoid "serious constitutional concerns" presented by more permissive certification. *Id.* at 842, 845, 864.

As discussed above, at 1, 13-14, this Court has twice granted certiorari on the question whether, despite the presence of settlements providing injunctive relief, "absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf." *Ticor*, 511 U.S. at 120-21 (quotation marks omitted); *Adams*, 520 U.S. at 85. This Court thus already has recognized the issue as important. But in both situations, case-specific impediments got in the way, and the Court dismissed the writs as improvidently granted after briefing and oral argument. *Ticor*, 511 U.S. at 121-22; *Adams*, 520 U.S. at 85.

Here, by contrast, Petitioner presents to this Court both the Rule 23 and due process questions, both of

which he raised below and both of which the Fourth Circuit definitively decided. This Petition is an excellent vehicle through which to finally reach such issues.

The issues in this case also are important because the Fourth Circuit's approach encourages manipulation of mandatory classes to terminate all effective damages claims. The Fourth Circuit's holding instructs class counsel, and settling defendants who seek to avoid potentially costly damages suits, that they can subvert (b)(3) opt-out rights and bind absent class members simply by settling a classic damages action for prospective injunctive relief. As a result, settling parties can lock thousands of people into class actions against their will, depriving them of the right to pursue their own claims, either individually or through a separate class proceeding, when they believe current class counsel fails to represents their interests. This result is antithetical to our "day-in-court ideal," and the fundamental constitutional right not to be deprived of property without due process. *Ortiz*, 527 U.S. at 846-47.

Indeed, it invites unscrupulous attorneys to forum-shop national class actions into Fourth Circuit courts in order to engage in the increasingly-common phenomenon of misusing mandatory (b)(2) settlement certifications to the benefit of the settling parties and to the detriment of absent class members across the country. *Richardson* v. *L'Oreal U.S.A., Inc.*, 991 F. Supp.2d 181, 189-90 (D.D.C. 2013) (settlement-only classes have "become increasingly common," and "require 'closer judicial scrutiny' " and " 'undiluted, even heightened' attention"; rejecting an attempted (b)(2) settlement barring any future class-wide dam-

ages claims even though preserving individual damages claims) (citations omitted). Indeed, as the District Court in *Richardson* observed, it "is not hard to imagine adventurous or avaricious counsel taking advantage of this novel settlement structure to the detriment of absent class members." *Id.* at 202. Indeed, the court observed, in connection with a settlement quite similar to the one here, that "releasing all damages claims in a (b)(2) settlement class would almost certainly be improper," and that problem is not cured by preserving individual damages claims, "the value of which is trivial, as in many consumer class actions," but releasing only "class-wide damages claims." Such a scenario results, as here, in the self-serving result that "[p]laintiffs get attorney's fees, defendant gets a near-bulletproof release, and class members get * * * an injunction." *Id.*

Many courts have recognized that, particularly in the context of settlement, the ordinary protections the adversarial process affords to absent class members may break down, leading class counsel and the named parties to commandeer any available monetary recovery for their own benefit. *See, e.g.*, *In re Dry Max Pampers Litig.*, 724 F.3d 713, 717-18 (6th Cir. 2013) ("Hence – unlike in virtually every other kind of case – in class-action settlements the district court cannot rely on the adversarial process to protect the interests of the persons most affected by the litigation – namely, the class. * * * And that means the courts must carefully scrutinize whether those fiduciary obligations have been met."); *Grok Lines, Inc.* v. *Paschall Truck Lines, Inc.,* 2015 U.S. Dist. LEXIS 124812, at *6-*7, *28-*29 (N.D. Ill. Sept. 18, 2015)

(noting the "unfortunate reality" that " 'the structure of class actions under Rule 23 * * * gives class action lawyers an incentive to negotiate settlements that enrich themselves but give scant reward to class members,' " that "courts must 'exercise the highest degree of vigilance' in their review of class-action settlements"; criticizing a (b)(3) settlement that was converted into a (b)(2) settlement with available funds being allocated primarily to class counsel) (citations omitted).

In a mandatory-class settlement such as the one in this case, a defendant effectively receives complete peace and class counsel can absorb the entirety of the monetary relief that the defendant is willing to provide. *See generally* Martin H. Redish, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT 11 (2009) (discussing attorneys' incentives to argue for mandatory certification). After all, "an economically rational defendant will be indifferent to the allocation of dollars between class members and class counsel." *Pearson* v. *NBTY, Inc.,* 772 F.3d 778, 786 (7th Cir. 2014).

This case provides a useful and problem-free vehicle for addressing the Rule 23 and due process issues that have long captured this Court's attention and concern. It also provides an opportunity to put the brakes on some of the more manipulative class-action tactics that have been used to subvert, rather than facilitate, the recovery of monetary relief by large classes facing individually small but collectively meaningful damages claims.

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

807 F.3d 600; 2015 U.S. App. LEXIS 21062

Berry v. Schulman

United States Court of Appeals

for the Fourth Circuit

December 4, 2015, Decided

Nos. 14-2006, 14-2050 & 14-2101

Before KING and HARRIS, Circuit Judges, and George J. HAZEL, United States District Judge for the District of Maryland, sitting by designation. Judge Harris wrote the opinion, in which Judge King and Judge Hazel joined.

[*604] PAMELA HARRIS, Circuit Judge:

The class action settlement at issue in this appeal is "the culmination of years of litigation and negotiations" between class counsel and the defendants, LexisNexis Risk and Information Analytics Group, Inc.; Seisint, Inc.; and Reed Elsevier Inc. (together, "Lexis"). *Berry v. LexisNexis Risk & Info. Analytics Grp., Inc.*, No. 3:11-CV-754, 2014 U.S. Dist. LEXIS 124415, 2014 WL 4403524, at *1 (E.D. Va. Sept. 5, 2014). The dispute centers around Lexis's sale of personal data reports to debt collectors. According to the plaintiffs, **[**3]** Lexis has failed to provide the protections of the Fair Credit Reporting Act (the "FCRA" or the "Act"), 15 U.S.C. § 1681, *et seq.*, in connection with its reports. According to Lexis, its data reports do not qualify as "consumer reports" within the meaning of

the FCRA, and so it is not required to comply with the Act.

After three separate lawsuits, extensive discovery, and a long series of mediation conferences, a deal was struck. Lexis would make sweeping changes to its product offerings in order to protect consumer information, and in exchange, the class members would release any statutory damages claims under the Act. The district court certified a settlement class under Rule 23(b)(2) of the Federal Rules of Civil Procedure and approved the settlement, finding that it would make Lexis "the industry leader among data aggregation companies in the protection of customer information provided to debt collectors." *Berry*, 2014 U.S. Dist. LEXIS 124415, 2014 WL 4403524, at *3.

Now, a group of class members claiming the right to opt out of the settlement class and pursue statutory damages individually (the "Objectors") seeks to undo that settlement.[1] We find no error in the release of the statutory damages claims as part of a Rule 23(b)(2) settlement, and no abuse of discretion in the district court's approval of the settlement agreement. **[**4]** Accordingly, we affirm the district court's decision in full.

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[1] The Objectors consist of three separate groups of class members objecting to the settlement: the "Aaron Objectors," 20,206 members of the ***23(b)(2)*** class; the "Hardway Objectors," another 7,289 class members; and Adam Schulman, a class member representing himself.

I.

A.

The FCRA regulates the collection and dissemination of certain consumer data **[*605]** bearing on credit eligibility. Its protections are focused on the sale of "consumer reports" - communications (1) containing information related to any one of seven specific consumer characteristics (including credit standing and worthiness and other personal information), which are (2) prepared to assist buyers in making certain eligibility determinations, including credit eligibility. 15 U.S.C. § 1681*a*(d).

The Act imposes various obligations on "consumer reporting agencies" - companies that regularly prepare "consumer reports," 15 U.S.C. § 1681*a*(f) - and provides a wide panoply of protections for consumers. For example, consumer reports may be furnished only for certain uses, such as credit transactions. Id. at § 1681*b*(a)(3)(A). Consumers are given the right to view the information in their files, id. at § 1681*g*(a)(1), and if they dispute the information **[**5]** they find, the consumer reporting agency must conduct a reasonable investigation into the information's accuracy, id. at § 1681*i*(a)(1)(A). None of those protections applies, however, unless and until a "consumer report" has been issued.

Lexis is a data broker that sells an identity report called Accurint® for Collections ("Accurint"), used to locate people and assets, authenticate identities, and verify credentials. The Accurint database contains information on over 200 million people, and millions of Accurint reports are sold each year. For years, Lexis sold Accurint without complying with the FCRA, on

the theory that Accurint is not a "consumer report" that triggers the Act's protections. Whether Accurint reports in fact constitute "consumer reports" under the FCRA is the crux of the parties' dispute.

B.

Class counsel and Lexis have a long history. This is the third national putative class action brought by counsel against Lexis, each alleging essentially the same thing: that Lexis violated the FCRA by selling Accurint reports without affording FCRA protections. Neither of the two prior suits resulted in any class settlement or court-ordered relief. In Graham v. LexisNexis Risk & Information Analytics Management Group, Inc., No. 3:09-cv-00655-JRS (E.D. Va. Jan. 21, 2011), **[**6]** the plaintiffs dismissed the claims after Lexis moved to dismiss for lack of standing. And in Adams v. LexisNexis Risk & Information Analytics Group, Inc., No. 08-4708 (D.N.J. October 28, 2010), the parties settled after the district court denied Lexis's motion for judgment on the pleadings. Over the course of these lawsuits, class counsel and Lexis negotiated numerous times, including at least nine in-person mediation conferences and many more telephone conferences.

Throughout this litigation, class counsel endeavored to prove not only that Lexis violated the FCRA, but also that it did so "willfully." That is because in addition to creating liability for actual damages sustained by an individual as a result of a violation, 15 U.S.C. § 1681*o*(a), the FCRA provides for statutory damages of between $100 and $1,000 for willful violations, id. at § 1681*n*(a), which would be available to all class members. But willfulness is a high standard,

requiring knowing or reckless disregard of the FCRA's requirements. *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 57, 69, 127 S. Ct. 2201, 167 L. Ed. 2d 1045 (2007). Unless Lexis was "objectively unreasonable," *id.* at 69, in concluding that its Accurint reports were not "consumer reports" subject to the FCRA, then **[**7]** there would be no liability for statutory damages.

The Adams court's treatment of the willfulness issue, in particular, is relevant **[*606]** to the case we review today. Class counsel focused on the district court's refusal to dismiss the case on the pleadings because it would be "premature . . . to say that [the p]laintiff can produce no evidence to support [a willfulness] finding," No. 08-4708, 2010 U.S. Dist. LEXIS 47123, 2010 WL 1931135, at *10 (D.N.J. May 12, 2010). But Lexis pointed to an Opinion Letter issued by the Federal Trade Commission in 2008 declaring that Accurint reports are not "credit reports" under the FCRA, see FTC Opinion Letter to Marc Rotenberg at 1 n.1 (July 29, 2008) ("FTC Opinion Letter" or "Opinion Letter"), and argued that it cannot be "objectively unreasonable" to adopt the view of the federal agency responsible for enforcing the FCRA. And indeed, as Lexis noted, the Adams court subsequently clarified that unless discovery showed that the FTC had reversed the view taken in its 2008 Opinion Letter, the Adams plaintiffs would have difficulty showing willfulness.

C.

This case began in 2011, when the named plaintiffs (the "Plaintiffs" or the "Class Representatives"), individuals who were the subject of Accurint reports,

filed a putative class action against **[**8]** Lexis. The complaint alleged that Lexis violated the FCRA in three ways: by selling Accurint reports without first ensuring that buyers were purchasing the reports for uses permitted by the FCRA, refusing to allow consumers to view their Accurint reports, and refusing to investigate when consumers disputed information in Accurint reports. The Plaintiffs proposed three classes to match: an "Impermissible Use" class, including all persons listed in Accurint reports sold by Lexis; and "File Request" and "Dispute" classes, limited to consumers who interacted more directly with Lexis and were refused access to their Accurint reports or denied investigations when they filed disputes. The Plaintiffs sought both actual and statutory damages. But - as has become important to the Objectors' argument - because the FCRA does not provide expressly for an injunctive remedy in private actions, they did not seek injunctive relief.

Over a year later, after months of discovery and a series of negotiations with the aid of "three highly skilled mediators," including two federal judges, *Berry*, 2014 U.S. Dist. LEXIS 124415, 2014 WL 4403524, at *14, the Plaintiffs and Lexis at last reached a settlement agreement (the "Agreement"). Instead of the three classes contemplated **[**9]** by the Plaintiffs' complaint, the Agreement calls for just two. The first, not directly at issue here, consists of approximately 31,000 individuals who actively sought to treat Accurint reports as consumer reports under the FCRA by requesting copies or attempting to dispute information. Under the Agreement, those class members will release all potential FCRA claims against Lexis

in exchange for financial compensation of approximately $300 per person. The district court's certification of that class (the "(b)(3) Class") under Federal Rule of Civil Procedure 23(b)(3) and approval of its settlement are not challenged on appeal.

The focus of this controversy is the second class, certified under Federal Rule of Civil Procedure 23(b)(2) (the "(b)(2) Class"). Much larger than the first class, the (b)(2) Class includes all individuals in the United States about whom the Accurint database contained information from November 2006 to April 2013 - roughly 200 million people.[2] And the settlement provided **[*607]** the (b)(2) Class under the Agreement differs significantly from that provided the (b)(3) Class. First, unlike members of the (b)(3)

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[2] Given what is effectively a nationwide class, we must contend with the possibility that we ourselves are among the members of the (b)(2) Class. At oral argument, counsel for Lexis and for the Plaintiffs took the position that we are not class members under a fair and practical reading of the Agreement, which excludes from the class "the presiding judge in the action and his staff, and all members of their immediate family." J.A. 108. Counsel for the Objectors did not disagree and also volunteered to waive any potential conflict. While those representations may be sufficient to resolve any problem that otherwise would arise, we need not rely on them here. We agree with the view expressed in the Compendium of Selected Opinions for the Committee on Codes of Conduct that "[a] judge's inclusion as a class member in a Rule 23(b)(2) class action seeking only injunctive and declaratory relief, **[**11]** in which a substantial segment of the general public are also members, does not require recusal, unless the judge has an interest in the action unique from that of members of the general public included in the class." See Compendium § 3.1-6[4](d). Because any interest we may have in this litigation is common to the general public, recusal is not required.

Class, (b)(2) Class members retain the right to seek actual damages individually under the FCRA, though they waive any claim for statutory damages, **[**10]** as well as punitive damages. And second, what (b)(2) Class members receive in exchange is not monetary but purely injunctive relief - a fundamental change in the product suite that Lexis offers the debt-collection industry that "will result in a significant shift from the currently accepted industry practices." *Berry*, 2014 U.S. Dist. LEXIS 124415, 2014 WL 4403524, at *3.

Specifically, under the Agreement, Lexis is to divide its Accurint report into two new products. The first, "Collections Decisioning," will be treated as falling within the FCRA's "consumer report" definition. This means, among other things, that Collections Decisioning reports can be used only for permissible purposes under the FCRA, and so will be available only to buyers that have completed a detailed credentialing process. Consumers also will have the right to view the information in their reports, free of charge in certain circumstances, and to dispute information they believe to be inaccurate, all as provided by the FCRA.

The second suite of products, called "Contact & Locate," is intended only for the "limited purpose of finding and locating debtors or locating assets," J.A. 121, and will not include any of the "seven characteristic" information **[**12]** that makes a communication a "consumer report." Id. Accordingly, "Contact & Locate" is not treated as subject to the FCRA, and the Agreement stipulates that "the Contact & Locate suite of products and services do not constitute 'con-

sumer reports' as that term is defined under the FCRA." J.A. 123. Nevertheless, consumers will be given certain FCRA-like protections in connection with Contact & Locate. For example, consumers will be able to obtain free copies of their Contact & Locate reports once each year, and they will be able to submit statements disputing the information they find.

In April 2013, the district court granted the parties' joint motion for preliminary certification of two classes for settlement purposes. The Objectors filed motions challenging certification of the (b)(2) Class and the terms of the settlement itself. After a day-long final approval hearing at which the parties and the Objectors presented argument, the district court certified the (b)(2) Class and approved the settlement.

Certification of a settlement class under Rule 23(b)(2) was appropriate, the court ruled, because the relief sought by the class is injunctive, rather than monetary, and "indivisible" in that it "will **[**13]** accrue to all members of the Rule 23(b)(2) class." *Berry*, 2014 U.S. Dist. LEXIS 124415, 2014 WL 4403524, at *11. The **[*608]** court dismissed the Objectors' claim that a lack of opt-out rights from the mandatory (b)(2) Class precluded certification, emphasizing that class members retained the right to sue for individualized relief in the form of actual damages and waived only non-individualized statutory damages, uniform as to all class members. 2014 U.S. Dist. LEXIS 124415, [WL] at *11-12.

The district court also approved the terms of the Agreement as "fair, reasonable, and adequate" under Federal Rule of Civil Procedure 23(e)(2). According to

the court, no concerns as to fairness were raised by the process leading up to the Agreement, involving "arm's-length negotiations by highly experienced counsel after full discovery was completed." 2014 U.S. Dist. LEXIS 124415, [WL] at *14. But most important, the court held, was the "relative strength" of the parties' claims and defenses. 2014 U.S. Dist. LEXIS 124415, [WL] at *15. Given the 2008 FTC Opinion Letter deeming Accurint reports outside the scope of the FCRA, the district court found that the Objectors' prospects of recovering statutory damages for a willful violation were "speculative at best," making release of those claims in exchange for substantial injunctive relief demonstrably fair and adequate. Id.

Finally, the district court approved incentive awards of $5,000 each for **[**14]** the Class Representatives and granted class counsel's motion for attorneys' fees, awarding $5,333,188.21 in connection with the (b)(2) Class settlement. 2014 U.S. Dist. LEXIS 124415, [WL] at *15-16. The Objectors timely appealed, challenging certification of the (b)(2) Class, approval of the Agreement, and the award of attorneys' fees.

II.

The Objectors first challenge the district court's certification of the (b)(2) Class for settlement purposes. ***HN3*** We review a district court's decision to certify a class only for "clear abuse of discretion." *Flinn v. FMC Corp.*, 528 F.2d 1169, 1172 (4th Cir. 1975). An error of law or clear error in finding of fact is an abuse of discretion. *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 317 (4th Cir. 2006). But short of

such error, we give "substantial deference" to a district court's certification decision, recognizing that a "district court possesses greater familiarity and expertise than a court of appeals in managing the practical problems of a class action." *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 179 (4th Cir. 2010).

A.

Under Rule 23(a) of the Federal Rules of Civil Procedure, a party seeking class certification, whether for settlement or litigation purposes, first must demonstrate that: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of **[***15]** the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

Second, if the requirements of Rule 23(a) are met, then the proposed class must fit within one of the three types of classes listed in Rule 23(b). At issue here is Rule 23(b)(2), which permits certification where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "[B]ecause of the group nature of the harm alleged and the broad character of the relief sought, the (b)(2) class is, by its very nature, assumed to be a homogenous and cohesive group with few conflicting **[*609]** interests among its members." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir. 1998). Accordingly,

Rule 23(b)(2) classes are "mandatory," in that "opt-out rights" for class members are deemed unnecessary and are not provided under the Rule. See id.; see also *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541, 2558, 180 L. Ed. 2d 374 (2011).

Federal circuits, including ours, have held that mandatory Rule 23(b)(2) classes may be certified in some cases even when monetary relief is at issue. See *Thorn,* 445 F.3d at 331; *Allison*, 151 F.3d at 413-14. Where monetary relief predominates, Rule 23(b)(2) certification is inappropriate. *Thorn*, 445 F.3d at 331-32. But where monetary relief is "incidental" to injunctive or declaratory relief, Rule 23(b)(2) **[**16]** certification may be permissible. *Allison*, 151 F.3d at 415; see also *Dukes*, 131 S. Ct. at 2560 (discussing *Allison*). This rule follows from the premise underlying the mandatory nature of Rule 23(b)(2) classes: If a class action is more about individual monetary awards than it is about uniform injunctive or declaratory remedies, then the "presumption of cohesiveness" breaks down and the procedural safeguard of opt-out rights becomes necessary. *Allison*, 151 F.3d at 413; see *Eubanks v. Billington*, 110 F.3d 87, 95, 324 U.S. App. D.C. 41 (D.C. Cir. 1997). And indeed, the Supreme Court clarified in *Dukes* that claims for individualized monetary relief — in that case, back-pay awards under Title VII — are not "incidental" for purposes of Rule 23(b)(2) and may not be certified under that Rule. *131 S. Ct. at 2557.*

B.

The Objectors' principal argument is that certification of the (b)(2) Class runs afoul of these limits. According to the Objectors, the statutory damages

waived under the Agreement predominate over the injunctive relief awarded and are not of the "incidental" and non-individualized sort, see *Dukes*, 131 S. Ct. at 2557, 2560; *Allison*, 151 F.3d at 415, that may be certified under Rule 23(b)(2).[3]

We disagree. As the district court explained, this is a paradigmatic Rule 23(b)(2) case: The "meaningful, valuable injunctive relief" afforded by the Agreement is "indivisible," "benefitting all [] members" of the (b)(2) Class at once. *Berry,* 2014 U.S. Dist. LEXIS 124415, 2014 WL 4403524, at *11. And the statutory damages claims released under the Agreement are not the kind of individualized claims that threaten class cohesion and are prohibited by *Dukes*. When it comes to statutory damages under the FCRA, what matters is the conduct of the defendant, Lexis — which, as the district court emphasized, "was uniform **[**17]** with respect to each of the class members." 2014 U.S. Dist. LEXIS 124415, [WL] at *12. The availability of statutory damages in this case, in other words, is a simple function of Lexis's policies with respect to its Accurint reports, applicable to the entire (b)(2) Class.[4] If Lexis unreasonably **[*610]**

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[3] We can assume for purposes of this opinion that a class settlement that releases damages claims is on precisely the same footing under Rule 23(b)(2) and the Due Process Clause as one that provides for damages. We note, however, that Lexis contests that premise, and we do not decide its validity today.

[4] Like the district court, we find unpersuasive the Objectors' contention that the *Adams* decision, see supra at Section I.B., effectively divides the (b)(2) Class into two groups differently positioned with respect to willfulness: (1) class members whose claims arose after the *Adams* decision put Lexis on notice that its Accurint reports were subject to the FCRA, making those

failed to treat Accurint reports as "consumer reports" subject to the FCRA, then every class member would be entitled uniformly to the same amount of statutory damages, set by rote calculation. Id.

Indeed, this settlement appears to be structured precisely to comply with *Dukes* and with Rule 23(b)(2). There are, to be sure, individualized monetary damages claims at issue here — those for actual damages under the FCRA — but those claims, as the district court emphasized, are retained by the (b)(2) Class members. Id. In contrast, the monetary claims released — those for statutory damages — "flow directly from liability to the class as a whole" on the same set of claims underlying the injunctive relief, making them non-individualized under *Dukes* and "incidental" for purposes of Rule 23(b)(2). *Dukes*, 131 S. Ct. at 2560 (quoting *Allison*, 151 F.3d at 415) (emphasis in original).

The Objectors also argue that the statutory damages claims released by the Agreement cannot be deemed "incidental" to injunctive relief because the Plaintiffs' original complaint did not seek any injunctive relief under the FCRA. Again, we disagree.

We may assume, as did the district court, that the FCRA, which does not provide expressly for a private right of action for injunctive relief, does not permit

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members eligible for statutory damages; and (2) class members whose claims arose before *Adams* put Lexis on notice. In fact, the *Adams* court did not rule that Accurint reports qualified as "consumer reports" under the FCRA, as it subsequently explained to the parties: "I think there has been some misinterpretation of what my [motion for judgment on the pleadings] ruling was." **[**18]** J.A. 2367.

consumers to seek injunctive remedies. But like the district court, we think that is beside the point: "[I]n the settlement context, 'it is the parties' agreement that serves **[**19]** as the source of the court's authority to enter any judgment at all.'" *Berry,* 2014 U.S. Dist. LEXIS 124415, 2014 WL 4403524, at *12 (quoting *Local Number 93 v. City of Cleveland*, 478 U.S. 501, 522, 106 S. Ct. 3063, 92 L. Ed. 2d 405 (1986)); see *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 317 (3d Cir. 2011) (court may "approve a mutually agreed-upon stipulation enjoining conduct . . . regardless of whether the plaintiffs could have received identical relief in a contested suit"). And Lexis is free to agree to a settlement enforcing a contractual obligation that could not be imposed without its consent. Indeed, many FCRA class action disputes are resolved in part through consent decrees. See, e.g., *Serrano v. Sterling Testing Sys., Inc.*, 711 F. Supp. 2d 402, 409

Failing to acknowledge the critical role of the settlement agreement, the Objectors rely on authority from outside the settlement context that is unavailing here. Specifically, the Objectors point to decisions from the Fifth and Eleventh Circuits, each noting that the unavailability of injunctive relief under a statute would preclude certification of a Rule 23(b)(2) class. See *Christ v. Beneficial Corp.,* 547 F.3d 1292, 1298 (11th Cir. 2008); *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 977 n.39 (5th Cir. 2000). But in neither of those cases did the defendants agree to a settlement; instead, the defendants in both cases opposed certification. *Christ*, 547 F.3d at 1295-96; *Bolin*, 231 F.3d at 973. We can agree that in those circumstances, where the defendant is unwilling to settle and the

relevant statute does not allow for injunctive relief, Rule 23(b)(2) certification would be inappropriate because the plaintiffs **[**20]** would have no prospect of achieving injunctive relief. But simply to describe those circumstances is to differentiate them from those before us now, where the (b)(2) Class members indeed will achieve substantial injunctive relief, by virtue of **[*611]** the parties' settlement, upon approval of the Agreement.

Nor does the failure of the Plaintiffs to seek injunctive relief in their original complaint independently preclude certification under Rule 23(b)(2). By its terms, Rule 23(b)(2) applies so long as "final injunctive relief . . . is appropriate respecting the class as a whole," Fed. R. Civ. P. 23(b)(2) (emphasis added), and the corresponding Advisory Committee's Note likewise focuses on the "final relief" afforded in a Rule 23(b)(2) case, 39 F.R.D. 69, 102 (1966). We therefore look to the Agreement itself, and to the "final relief" it contemplates, to assess the propriety of any monetary remedy. Any other result would not only contravene the terms of Rule 23(b)(2), it would discourage settlement by binding plaintiffs to the choices they make at the earliest stages of litigation and foreclosing the kinds of remedial compromises necessary to achieve agreement.

That is not to say that the relief requested in a complaint may never inform the inquiry into whether monetary relief is truly "incidental" **[**21]** under Rule 23(b)(2). That inquiry is intended in part to guard against certification when an "injunction request is illusory," made only to justify a damages award that otherwise would be improper under Rule

23(b)(2). See *Thorn*, 445 F.3d at 329; *Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 530, 372 U.S. App. D.C. 53 (D.C. Cir. 2006). So if, for instance, substantial monetary damages actually are awarded under a Rule 23(b)(2) class settlement, then the absence of a request for injunctive relief in the original complaint may give rise to concerns that it is the money and not the injunction that is driving the case. Cf. *Hecht v. United Collection Bureau, Inc.*, 691 F.3d 218, 224 (2d Cir. 2012) (Rule 23(b)(2) certification invalid where complaint did not mention injunctive relief and "damages . . . [were] the only remedy awarded that clearly applied to every class member"); *Fry v. Hayt, Hayt & Landau*, 198 F.R.D. 461, 469 n.8 (E.D. Pa. 2000) (Rule 23(b)(2) certification inappropriate where plaintiff seeks substantial monetary judgment as part of settlement and did not seek injunction in original complaint). But here, where the only relief actually awarded to the (b)(2) Class is injunctive, those concerns are not present.

C.

In the alternative, the Objectors argue that even if the statutory damages claims released by the (b)(2) Class are incidental and not predominant, due process precludes certification of the class without opt-out rights. Here, the Objectors rely on dicta from the Supreme Court's **[****22]** decision in *Dukes*, noting the "serious possibility" that due process requires opt-out rights (and concomitant notice) under Rule 23(b)(2) even "where the monetary claims do not predominate." *Dukes*, 131 S. Ct. at 2559. But as the district court explained, the Supreme Court did not go that far in *Dukes*, holding instead only that claims for in-

dividualized monetary relief may not be certified under Rule 23(b)(2). *Berry*, 2014 U.S. Dist. LEXIS 124415, 2014 WL 4403524, at *12. Like the district court, we decline to go where the Supreme Court has not.

As discussed above, federal courts long have permitted certification of mandatory Rule 23(b)(2) classes involving monetary relief so long as that relief is "incidental" to injunctive or declaratory relief — meaning that damages must be in the nature of a "group remedy," flowing "directly from liability to the class as a whole." *Allison*, 151 F.3d at 415; see *id.* at 411 (collecting cases). In such circumstances, our court has held, opt-out rights are not required because individualized adjudications are unnecessary. See *Thorn*, 445 F.3d at 330 & n.25 ("By requiring that injunctive or **[*612]** declaratory relief predominate . . . Rule 23(b)(2) ensures that the benefits of the class action inure to the class as a whole without running the risk of cutting off the rights of absent class members to recover money damages and class members who want individualized **[**23]** evaluation of their claim for money damages.").

We do not believe that the Court's dictum in Dukes warrants or even authorizes overturning this established precedent. See *United States v. Ruhe*, 191 F.3d 376, 388 (4th Cir. 1999) (Fourth Circuit panels are "bound by prior precedent from other panels in this circuit absent contrary law from an en banc or Supreme Court decision"). And we note that our unwillingness to jump ahead of the Supreme Court in this regard is shared by our sister circuits. Two other federal courts of appeals have considered whether, in

light of *Dukes*, Rule 23(b)(2) certification remains permissible when monetary damages are involved. And both have affirmed the continued validity of Rule 23(b)(2) certification of monetary claims so long as the monetary relief is non-individualized and "incidental" to injunctive or declaratory remedies. See *Amara v. CIGNA Corp.*, 775 F.3d 510, 519-20 (2d Cir. 2014); *Johnson v. Meriter Health Servs. Emp. Ret. Plan*, 702 F.3d 364, 369-71 (7th Cir. 2012); see also *Douglin v. GreatBanc Trust Co.*, No. 1:14-cv-00620-RA, 115 F. Supp. 3d 404, 2015 U.S. Dist. LEXIS 75279, 2015 WL 3526248, at *5-7 (S.D.N.Y. June 30, 2015).

To be sure, and as the district court recognized, when a "proposed settlement is intended to preclude further litigation by absent persons, due process requires that their interests be adequately represented." *Berry*, 2014 U.S. Dist. LEXIS 124415, 2014 WL 4403524, at *11 (citing *In re Jiffy Lube*, 927 F.2d 155, 158 (4th Cir. 1991)). But the premise behind certification of mandatory classes under Rule 23(b)(2) is that because the relief sought is uniform, so are the interests **[**24]** of class members, making class-wide representation possible and opt-out rights unnecessary. See *Dukes*, 131 S. Ct. at 2558; *Thorn*, 445 F.3d at 330 & n.25; *Allison*, 151 F.3d at 413-14. And before a class may be certified under Rule 23(b)(2), of course, a court must find under Rule 23(a)(4) — as the district court did here — that the interests of all of the class members will be fairly and adequately represented by the named plaintiffs and class counsel. Rule 23(e)'s settlement approval process provides additional protection, ensuring that Rule 23(b)(2)

class members receive notice of a proposed settlement and an opportunity to object, and that a "settlement will not take effect unless the trial judge — after analyzing the facts and law of the case and considering all objections to the proposed settlement — determines it to be fair, adequate, and reasonable." *Kincade v. Gen. Tire and Rubber Co.*, 635 F.2d 501, 507-08 (5th Cir. 1981). We see no reason to depart here from the general understanding that these procedural safeguards are sufficient to protect the due process rights of objecting Rule 23(b)(2) class members.

Indeed, the particular terms of this Agreement make opt-out rights especially unnecessary here. The *Dukes* Court was concerned about the "need for plaintiffs with individual monetary claims to decide for themselves whether to tie their fates to the class representatives' or go it **[**25]** alone — a choice Rule 23(b)(2) does not ensure that they have." *Dukes*, 131 S. Ct. at 2559 (emphasis in original). But here, the right to "go it alone" is built into the Agreement itself, under which any (b)(2) Class member may pursue actual damages resulting from individualized harm under the FCRA. In this sense, (b)(2) Class members are "opted out" already, by virtue of the settlement in question. As the district court explained, the Agreement "preserves Rule 23(b)(2) class members' rights to bring **[*613]** claims for actual damages, thereby preserving their due process rights." *Berry*, 2014 U.S. Dist. LEXIS 124415, 2014 WL 4403524, at *12.

Finally, the practical implications of the Objectors' position give us pause. What is being sought is a blanket right to opt out of a Rule 23(b)(2) settlement

that provides purely injunctive relief solely because non-individualized statutory damages claims are released, while individualized actual damages claims are retained. That such a rule would discourage settlement seems undeniable; defendants like Lexis surely will not agree to settlements like this one if they cannot buy something approaching global peace. See *Kincade*, 635 F.2d at 507. And in light of all the other procedural protections already in place, not to mention the retention of actual damages claims under this Agreement, any marginal **[**26]** benefit that might accrue to disenchanted class members is unlikely to be worth this cost. As the Supreme Court has recognized, procedural due process is a "flexible concept," requiring varying degrees of protection "depending upon the importance attached to the interest and the particular circumstances under which the deprivation may occur." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 320, 105 S. Ct. 3180, 87 L. Ed. 2d 220 (1985). We do not think it requires the rigid opt-out rule proposed by the Objectors here.

D.

We briefly address the Objectors' final argument against certification: that the (b)(2) Class's representation is inadequate under Rule 23(a)(4) because monetary payments of $5,000 to each Class Representative created a conflict of interest between those Representatives and the rest of the class. Though we appreciate that such awards can misalign the interests of class representatives and other class members in certain circumstances, we hold that the district

court did not abuse its discretion in approving the payments here.[5]

Incentive awards are **[**27]** "intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009). They are "fairly typical in class action cases." *Id.* at 958 (quoting 4 William B. Rubenstein et al., Newberg on Class Actions § 11:38 (4th ed. 2008)). The district court found that awards of $5,000 were appropriate here because the Class Representatives acted for the benefit of the class, and it cited other cases in which district courts in our circuit have ordered similarly substantial payments.

The Objectors point us to cases from other circuits scrutinizing such awards when a "settlement gives preferential treatment to the named plaintiffs while only perfunctory relief to unnamed class members," *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013). And it is true that when incentive agreements are entered into at the onset of litigation, see *Rodriguez*, 563 F.3d at 959, and particularly when they are conditioned on class representative support for a settlement, *Radcliffe v. Experian Info. Sols. Inc.*, 715 F.3d 1157, 1164 (9th Cir. 2013), large awards

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[5] Nor do we find any abuse of discretion in the district court's judgment that the (b)(2) Class members otherwise were represented adequately under Rule 23(a)(4). To the extent the Objectors argue to the contrary, we find their claims unpersuasive.

may raise concerns about whether named plaintiffs might "compromise the interest of the class for personal gain," **[*614]** *Dry Max Pampers*, 724 F.3d at 722 (quoting *Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003)).

In this case, however, the **[**28]** incentive awards were not agreed upon ex ante, and they were not conditioned on the Class Representatives' support for the Agreement. Indeed, they were not negotiated until after the substantive terms of the Agreement had been established, making it significantly less likely that the Class Representatives would have been influenced in the performance of their representative duties. And finally, this is not a case in which unnamed class members received "only perfunctory relief," see *Dry Max Pampers*, 724 F.3d at 718, — instead, the district court found that the class members were afforded substantial relief by significant changes in Lexis's consumer-protection practices — and there is no indication that the highly experienced class counsel pursued this lawsuit any less vigorously because of the Class Representatives' fee award. Under these circumstances, we defer to the judgment of the district court in approving the Class Representatives' awards and finding adequate representation under Rule 23(a)(4).

III.

The Objectors next challenge the district court's approval of the (b)(2) Class settlement, arguing principally that it is unfair and inadequate because it releases class members' statutory damages claims without providing for any **[**29]** monetary relief in exchange. Again, we afford the district court's deci-

sion substantial deference, reversing only "upon a clear showing that the district court abused its discretion in approving the settlement." *Flinn*, 528 F.2d at 1172 (citations and internal quotation marks omitted).

A.

As discussed above, a key procedural protection afforded Rule 23(b)(2) class members is that a settlement will not be approved over their objections unless a district court finds it to be "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); see *In re Jiffy Lube*, 927 F.2d at 158. The fairness analysis is intended primarily to ensure that a "settlement [is] reached as a result of good-faith bargaining at arm's length, without collusion." *In re Jiffy Lube*, 927 F.2d at 159.

The district court properly considered the factors we have identified as bearing on this inquiry: "(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 area of [FCRA] class action litigation." *Id.* Noting the "extensive discovery" conducted through the course of three separate lawsuits, the district court concluded that the parties here "reached an agreement through arm's-length negotiations by highly **[**30]** experienced counsel after full discovery was completed," sufficient to demonstrate the fairness of the Agreement. *Berry*, 2014 U.S. Dist. LEXIS 124415, 2014 WL 4403524, at *14. The Objectors do not and could not take serious issue with this assessment, and we see no reason to disturb the court's judgment.

As to the Objectors' primary complaint — that the Agreement is inadequate because it fails to provide any monetary compensation for the release of statutory damages claims — the district court emphasized the most important factor in weighing the substantive reasonableness of a settlement agreement: the "strength of the plaintiffs' claims on the merits." *Flinn*, 528 F.2d at 1172. In other words, the fairness of a deal under which class members give up statutory damages **[*615]** claims in exchange for injunctive relief depends critically on an assessment of the Plaintiffs' case that they are entitled to statutory damages in the first place.

The district court deemed that case "speculative at best," *Berry,* 2014 U.S. Dist. LEXIS 124415, 2014 WL 4403524, at *15, and we think that is generous. In order to recover statutory damages under the FCRA, the Plaintiffs would have to show a "willful" violation by Lexis, *15 U.S.C. § 1681n*, which in turn would require that Lexis have adopted an "objectively unreasonable" reading of the Act when it concluded that its **[**31]** Accurint reports were not covered as "consumer reports." *Safeco*, 551 U.S. at 69. As the district court noted, the Supreme Court has made clear that where "the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation . . . a defendant who merely adopts one such interpretation" cannot be held liable as a willful violator. *Id.* at 70 n.20. And here, with agency guidance expressly specifying that Accurint reports are not subject to the FCRA, see FTC Opinion Letter, it

is hard to see how Lexis can be said to have acted unreasonably by adopting that reading.[6]

On the other side of the ledger, of course, is the benefit to the (b)(2) Class of "substantial [injunctive] relief without the risk of litigation." *Berry*, 2014 U.S. Dist. LEXIS 124415, 2014 WL 4403524, at *15. The district court described the injunction in this **[**32]** case as implementing a "substantial, nationwide program that addresses the issues raised in the Complaint by the [(b)(2) Class] and will result in a significant shift" in industry practices, making Lexis "the industry leader" in consumer-information protection. 2014 U.S. Dist. LEXIS 124415, [WL] at *3. Indeed, the record includes a finding by an information privacy law expert that the injunctive relief provided in the Agreement provides consumers with benefits so substantial that their monetary value is in the billions of dollars. The Objectors' exclusive focus on the absence of monetary relief is unsupported by law and also imprudent as a matter of common sense: There was no realistic prospect that Lexis could or would provide meaningful monetary relief to a class of 200 million people.[7]

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[6] Nothing about the Adams litigation dictates a different result. Although the district court in that case denied Lexis's motion for judgment on the pleadings on the willfulness issue, it subsequently clarified on reconsideration that it was "very persuaded by the FTC's letter," J.A. 2377, and that if "the plaintiffs don't come forward with authority to the contrary . . . then . . . [they] have a difficult row to hoe," J.A. 2368.

[7] For that reason and others, the fact that the much smaller (b)(3) Class received monetary relief under the Agreement does not by itself render unreasonable the non-monetary relief provided the (b)(2) Class. The (b)(3) Class, unlike the (b)(2) Class,

We can find no reason to disturb the district court's assessment of the relative strength of the parties' legal positions or its fact-intensive analysis of the benefits provided the (b)(2) Class by the parties' settlement. In our view, the district court was well within its discretion in approving the settlement as fair, reasonable, and adequate under Rule 23(e).

B.

The Objectors bring one final challenge to the settlement, arguing that it impermissibly **[*616]** immunizes Lexis from future FCRA liability in connection with its new Contact & Locate product. We disagree.

The Objectors' claim appears to rest on two sections of the Agreement. In the first, the parties stipulate that "the Contact & Locate suite of products and services will not involve the provision of 'consumer reports' as that term is defined under the FCRA." J.A. 120-21. In the second, the parties "acknowledge that the specific design and content of the Contact & Locate . . . suite of products and services **[**34]** may change over time to respond to the then current requirements of customers and the market." J.A. 122. According to the Objectors, the upshot is that Lexis has carte blanche to develop Contact & Locate into a

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consists of individuals who took some affirmative action against Lexis, seeking to view their Accurint reports or challenging information included in those reports, putting them in a fundamentally **[**33]** different position with respect to Lexis. And in exchange for the monetary relief provided by the Agreement, the (b)(3) Class releases all of its damages claims against Lexis, while the (b)(2) Class retains the right to sue for actual damages.

product that is indeed a "consumer report" under the FCRA, while class members, bound by their stipulation, will be unable to respond.

We think that significantly overstates Lexis's freedom under the Agreement. It is true that the Agreement provides Lexis the discretion it needs to develop Contact & Locate according to market needs. But as the district court explained, it also sets boundaries for the design and implementation of Contact & Locate, which assure that the product cannot operate as a "consumer report" for purposes of the FCRA. Under the Agreement, for instance, Contact & Locate may include only information that does not contain any of the "seven characteristic" consumer information covered by the FCRA. J.A. 121; *Berry*, 2014 U.S. Dist. LEXIS 124415, 2014 WL 4403524, at *4. And in the section of the Agreement labeled the "Rule 23(b)(2) Settlement Class Release," J.A. 129, the parties clarify that their agreement is only that the "Post Settlement Products" (of which Contact & Locate is one) "shall not be 'consumer reports' within the meaning **[**35]** of the FCRA so long as [they] are not used in whole or in part as a factor in determining eligibility for credit" or any other purpose that could qualify them as consumer reports. J.A. 132-33 (emphasis added). Under that provision, Lexis has no free pass from FCRA liability; instead, the Agreement applies only so long as Contact & Locate remains true to the parties' intent and is not used in a manner that would make it a "consumer report."

Releases, of course, are a standard feature of class action settlements. Indeed, the release of claims that form the basis of litigation is the raison d'être of any

settlement, so the Objectors do not dispute that it would have been appropriate for the (b)(2) Class to stipulate that Lexis's Accurint reports comply with the FCRA. But it is different and unreasonable, they argue, to release claims regarding Contact & Locate, because Contact & Locate does not yet exist. Again, we think this overstates the case. Contact & Locate is a new name, but it is a new name for what is essentially a scaled-down version of the old Accurint reports, without the features that allegedly made Accurint troublesome under the FCRA. In class action settlements, parties **[**36]** may release not only the very claims raised in their cases, but also claims arising out of the "identical factual predicate." See, e.g., *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 248 (2d Cir. 2011). Although the name of the product has changed, now, as before, Lexis attempts only to sell information that will enable debt collectors to locate assets, and not information to be used for credit eligibility determinations. Because the (b)(2) Class can release claims against Accurint, it can do so for Contact & Locate, as well.

IV.

We are left with one final argument: a challenge by one (and only one) **[*617]** Objector[8] to the district court's approval of class counsel's approximately $5.3 million fee for securing injunctive relief for the (b)(2) Class. Federal Rule of Civil Procedure 23(h) permits "the court [to] award reasonable attorney's fees . . .

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[8] Objector Schulman is the only Objector and member of the 200 million-member (b)(2) Class to contest the award of fees in this case.

that are authorized by . . . the parties' agreement." Fed. R. Civ. P. 23(h). We review attorneys' fee awards for abuse of discretion only. *Carroll v. Wolpoff & Abramson*, 53 F.3d 626, 628 (4th Cir. 1995). That review is "sharply circumscribed," and a fee award "must not be overturned unless it is clearly wrong." *Plyler v. Evatt*, 902 F.2d 273, 278 (4th Cir. 1990) (internal quotation marks omitted).

Here, class counsel's fee was negotiated by the parties, **[**37]** and the Agreement allowed for a total attorneys' fee award of up to $5.5 million to be paid entirely by Lexis. The district court awarded the requested fee after analyzing it through the lodestar method. With regard to the Rule 23(b)(2) Class settlement, the district court found that "a lodestar of $3,349,379.95 and a multiplier of 1.99 are applicable and, in light of the fact that counsel allocated approximately 80% of their time to crafting injunctive relief for the Rule 23(b)(2) class, an award of $5,333,188.21 is appropriate."[9] *Berry,* 2014 U.S. Dist. LEXIS 124415, 2014 WL 4403524, at *15. Objector Schulman argues primarily that the district court's explanation for its fee award was insufficiently detailed and, in particular, that the court failed to respond to his protests that class counsel's hourly rate and number of hours worked were unreasonable. And indeed, despite our very deferential review in this area,

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[9] Under the lodestar method, the district court multiplies the number of hours **[**38]** worked by a reasonable hourly rate. And it can then "adjust the lodestar figure using a 'multiplier' derived from a number of factors, such as the benefit achieved for the class and the complexity of the case." *Kay Co. v. Equitable Prod. Co.*, 749 F. Supp. 2d 455, 462 (S.D.W. Va. 2010).

we do require district courts to set forth clearly findings of fact for fee awards so that we have an adequate basis to review for abuse of discretion. See *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir. 1978) (adopting the twelve fee-shifting factors of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), whenever the district court is required to determine reasonable attorneys' fees).

We acknowledge that the district court's explanation of its fee award was brief, compressed into a single paragraph. And we stress the importance of addressing fee requests fully and carefully, so that we may engage in meaningful review. See *Blankenship v. Schweiker*, 676 F.2d 116, 118 (4th Cir. 1982) (vacating fee award where district court did not engage in thorough review). On balance, however, and under the circumstances of this case, we think that the district court's explanation was sufficient and that the court did not otherwise abuse its discretion in approving the fee award.

The district court provided the specific basis on which it awarded fees: that class counsel "expended large amounts of time and labor," and "achieved an excellent result in this large and complex action." *Berry,* 2014 U.S. Dist. LEXIS 124415, 2014 WL 4403524, at *15. It went on to detail why the result was indeed "excellent," finding that the Agreement "provides substantial benefits for over 200 million consumers" and "forces [Lexis] to comply with the FCRA." Id. And the court compared the lodestar multiplier to those **[**39]** applied in similar cases. That explanation is in accord with several of the more prominent **[*618]** *Barber* factors, which "include such

considerations as the time and labor required, the novelty or difficulty of the issues litigated, customary fees in similar situations, and the quality of the results involved." *In re MRRM, P.A.*, 404 F.3d 863, 867-68 (4th Cir. 2005).

As to the reasonableness of class counsel's hourly rate, it is not the case, as Objector Schulman would have it, that the court erred by relying solely on counsel's affidavit as evidence of prevailing market rates. On the contrary, the record contains multiple expert opinions, all backed by voluminous evidence, that both counsel's hourly rate and the time spent on the case were reasonable. The district court's findings rest not on unsupported and self-serving assertions from counsel, but on the testimony of experts like Professor Geoffrey Miller, comparing class counsel's rates to those charged in bankruptcy litigation as well as to rates awarded in similar class action cases, and opining that counsel's attestations to the time incurred were consistent with the complexity and the duration of the litigation. The court's reference to "large amounts of time and labor" may have been brief, **[**40]** but it was backed by substantial evidence on which the court was entitled to rely.

Moreover, this case does not raise the kind of concerns that might call for an especially robust or detailed explanation of a fee award by a district court. There is no reason to worry here that "the lawyers might [have] urge[d] a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees." See *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991). As discussed above, given the size of the (b)(2)

Class and the fragility of its legal position, there was never any realistic possibility of class-wide monetary relief; put bluntly, there is no reason to think that class counsel left money on the table in negotiating this Agreement. And it is not as if the injunctive relief ultimately achieved for the (b)(2) Class was below expectations. Again, the district court's assessment of the injunction as an "excellent result in [a] large and complex action" may have been on the terse side, but it is amply supported by the experts who opined on the fee award, characterizing the injunction as bringing about a "sea change" in business practices, J.A. 2015-16, and as a "serious advancement of consumer rights by a dominant member **[**41]** of the data broker industry," J.A. 583. See *McDonnell v. Miller Oil Co.*, 134 F.3d 638, 641 (4th Cir. 1998) (finding that the "most critical factor in calculating a reasonable fee award is the degree of success obtained" (internal quotation marks omitted)).[10]

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[10] Other features of this case further diminish any concern about the fee award and, accordingly, any need for heightened scrutiny by the district court. Because class counsel's fee is to be paid entirely by Lexis, it does not reduce the (b)(2) Class's recovery. Cf. *Cook v. Niedert*, 142 F.3d 1004, 1011 (7th Cir. 1998) (when attorneys' fee reduces amount of common fund, court must carefully scrutinize fee application). Nor, of course, will it require the expenditure of taxpayer funds, which might warrant additional scrutiny. Cf. *Perdue v. Kenny A.*, 559 U.S. 542, 559, 130 S. Ct. 1662, 176 L. Ed. 2d 494 (2010) (limiting the use of multipliers in lodestar-based fee awards against the government under fee-shifting statutes). Finally, the parties did not even begin to negotiate class counsel's fee until after the substantive terms of the Agreement were finalized, making it far less likely that counsel could have traded off the interests of class members to advance their own ends.

Finally, the fact that only one of the approximately 200 million members of the (b)(2) Class objects to the award of attorneys' fees is relevant to our decision. **[**42]** Notice **[*619]** of the proposed settlement in this case reached 75.1 percent of the (b)(2) Class members, but only Objector Schulman raised any concerns; indeed, the other Objectors specifically declined to join this portion of the challenge. That almost complete lack of objection to the fee request provides additional support for the district court's decision to approve it. See *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005) (noting that only two of 300,000 class members objecting to fee request is a "rare phenomenon" and evidence that the district court did not abuse its discretion in awarding fees); see also *Flinn*, 528 F.2d at 1174 (finding class action settlement reasonable where "[o]nly five members of the class filed any dissent from the settlement").

Again, we should not be understood to minimize the need for district courts to explain their attorneys' fee awards and to take account of relevant objections. But on the facts of this case, we find that the district court satisfied that standard, and committed no abuse of discretion in awarding attorneys' fees to class counsel in connection with the (b)(2) Class settlement.

V.

For the reasons set forth above, we affirm the decision of the district court.

AFFIRMED

APPENDIX B

2014 U.S. Dist. LEXIS 124415

Berry v. LexisNexis Risk & Info. Analytics Group, Inc.

United States District Court for the Easter District of Virginia

September 5, 2014, Decided; September 5, 2014, Filed

Action No. 3:11-CV-754

James R. Spencer, Senior United States District Judge.

MEMORANDUM OPINION

THIS MATTER is before the Court on a Joint Motion for Final Approval of Class Action Settlement ("Motion for Final Approval") (ECF No. 100) filed by Plaintiffs and Defendants (collectively, "Parties"), a Motion for Attorneys' Fees, Expenses, and Service Awards ("Motion for Attorneys' Fees") (ECF No. 102) filed by Plaintiffs, and a Consent Motion to File Amended Complaint ("Motion to Amend") (ECF No. 114) filed jointly by the Parties. For the reasons that follow, the Motion for Final Approval will be GRANTED, the Motion for Attorneys' Fees will be GRANTED, and the Motion to Amend will be DENIED as moot.

I. BACKGROUND

A. Factual and Procedural History

The Motion for Final Approval is the culmination of years of litigation and negotiations between the Parties. The Parties seek final approval of their joint class action settlement agreement ("Settlement Agreement") (ECF No. 101-2) and dismissal of this lawsuit.

Plaintiffs allege that LexisNexis Risk Solutions FL Inc.,[1] LexisNexis Risk Data Management Inc.,[2] and Reed **[*4]** Elsevier Inc. ("Defendants") violated the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681 *et seq.*, by selling certain Accurint® brand reports to debt collectors without treating the reports as "consumer reports" within the meaning of the FCRA.[3] Defendants have consistently and explicitly taken the position that the Accurint® reports are not "consumer reports" under the FCRA, and as a result, have not attempted to afford customers rights with respect to the Accurint® reports that the FCRA requires with respect to "consumer reports."

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[1] Formerly known as LexisNexis Risk & Analytics Group, Inc.

[2] Formerly known as Seisint, Inc.

[3] This same claim was raised in two prior lawsuits—*Adams, et al. v. LexisNexis Risk & Information Analytics Group, Inc., et al.*, No. 08-4708 (D. N.J.) and *Graham, et al. v. LexisNexis Risk & Information Analytics Group, Inc., et al.*, No. 3:09-655-JRS (E.D. Va.). Both of these cases were dismissed prior to decisions on any of the significant issues between the parties. The parties did however conduct discovery in both cases prior to initiating the instant suit.

The Parties engaged in a series of mediation conferences with the aid of three mediators (United States Magistrate Judge M. Hannah Lauck, **[*5]** the Honorable Dennis Dohnal (Ret.), and Randall Wulff). This lawsuit initially contemplated three classes of people affected by the Defendants' alleged violations of the FCRA: (1) the Impermissible Use Class, which included every person listed in the Accurint® reports; (2) the File Request Class, which included every person who requested a copy of their file from the Defendants; and (3) the Dispute Class, which included every person who filed a dispute regarding the information reported with the Defendants. After mediation, the Parties moved the Court for preliminary certification of two classes for settlement purposes only, pursuant to Federal Rule of Civil Procedure 23. The first proposed class is the Rule 23(b)(2) Settlement Class, which is made up of the Impermissible Use Class. The second proposed class is a Rule 23(b)(3) Settlement Class, which is made up of the File Request and Dispute Classes. The Court granted preliminary certification and approval on April 29, 2013.

The Court appointed Kinsella Media, LLC as the administrator for the Rule 23(b)(2) Settlement Class. Although the Parties state notice of the Rule 23(b)(2) Settlement Class members may not have been mandatory, an extensive and substantial notice plan was negotiated as part of the class settlement. **[*6]** The Rule 23(b)(2) Notice Plan circulated information about the settlement to class members by five different methods:

- The Rule 23(b)(2) Publication Notice was published in various national newspaper sup-

plements and consumer magazines (including *Parade, Better Homes and Gardens, National Geographic, Parents*, People, and *People en Español*). The Publication Notice provides information on how to object to the proposed settlement and directs Rule 23(b)(2) Settlement Class Members to the Class Settlement Website.

• The Rule 23(b)(2) Class Settlement Website contained the following information (1) a brief description of the parties and the claims, (2) a summary of the settlement terms, (3) disclosures regarding Class Counsel and their right to seek separate representation, (4) a summary of Rule 23(b)(2) Class Members' rights and options (including how to object to the proposed settlement), (5) the date, time, and location of the hearing on final approval. The website will be created and maintained by the Settlement Administrator and will also provide the Settlement Agreement, the Rule 23(b)(2) Internet Notice (in English and Spanish), and the Preliminary Approval Order.

• Banner Advertisements were placed on selected websites (Facebook and 24/7 Network). These advertisements **[*7]** directed Rule 23(b)(2) Settlement Class members to the Class Settlement Website.

• Search keywords and phrases relating to the lawsuit were purchased on major search engines.

• A toll-free telephone number was established to provide Rule 23(b)(2) Settlement

> Class Members with access to recorded information regarding the settlement and live operators who will be able to respond to inquiries regarding the settlement.

The Paid Media Program reached approximately 75.1% of potential class members, as estimated by Kinsella Media. The website and toll-free phone number established for the Rule 23(b)(2) class received 199,867 unique visits and 3,084 calls, respectively.

The Court appointed Rust Consulting as the administrator for the Rule 23(b)(3) Settlement Class. The Rule 23(b)(3) Settlement Class Members were notified about the settlement by direct mail to each member of the class. The Rule 23(b)(3) Settlement Class Members were identified by the Defendants using commercially reasonable procedures to search their archive logs to identify each person who requested a copy of an Accurint® Report or initiated or submitted a dispute or other inquiry regarding the content of an Accurint® Report between October 1, 2006 and April 29, 2013. The Mail Notice explained that the **[*8]** Rule 23(b)(3) Settlement Class Members have the option of opting out of the class, and if the Member does not do so within sixty days, he or she will be receive their portion of the Settlement Fund and will be bound by the Settlement Agreement. The Mail Notice also indicated that Class Members could stay in the Settlement Class and object to the Settlement Agreement. The Mail Notice directed the recipient to a telephone number and a website for more information.

Rust Consulting created and maintained a Rule 23(b)(3) Class Settlement Website, on which information such as the Settlement Agreement, the Mail Notice, and the Preliminary Approval Order were posted. The website also outlined procedures for opting out of or objecting to the settlement, a description of the Settlement Fund, a section for frequently asked questions, and procedural information regarding the status of the Court approval process. A toll-free telephone number was also established to provide Rule 23(b)(3) Settlement Class Members with access to recorded information regarding the settlement and live operators who were able to respond to inquiries regarding the Settlement Agreement. The website and toll-free phone number established for the Rule 23(b)(3) class received **[*9]** 6,261 unique visits and 2,211 calls, respectively.

For both the Rule 23(b)(2) Class and the Rule 23(b)(3) Class, the Parties submitted Class Action Fairness Act (CAFA) Notification, pursuant to 28 U.S.C. § 1715(b), to provide state and federal officials with notice of the proposed Settlement Agreement and an opportunity to object.

On Tuesday, December 10, 2013, the Parties and several objectors were heard by the Court at a Final Fairness Hearing to determine the legality and propriety of the Settlement Agreement. Prior to the Final Fairness Hearing, nine interested parties, (collectively, "Objectors"), filed objections to the Rule 23(b)(2) Settlement Agreement, either with the Court or with the Parties. Seven of these parties are individual class members representing themselves *pro se*. Two of these parties seek to represent the interest of

a large number of class members: the Aaron Objectors are a group of some twenty thousand class members represented by Watts Guerra LLC;[4] the Cochran Objectors include of more than seven thousand Rule 23(b)(2) class members purportedly represented by Attorney Edward Cochran.

B. Settlement Agreement Summary

The Parties have agreed to provide injunctive relief **[*10]** to the Rule 23(b)(2) Settlement Class pursuant to an Injunctive Relief Order (ECF No. 126-1). The Parties have agreed to a monetary settlement benefiting the Rule 23(b)(3) Settlement Class Members. The terms of the agreements are discussed more fully below.

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

The Parties move the Court to certify a Rule 23(b)(2) Settlement Class, which is composed of all persons about whom information resided in the Accurint® Database from November 14, 2006 to the present (the Impermissible Use Class). Approximately 200 million people fall within the Rule 23(b)(2) class definition. The Parties have determined that the violations alleged by the Impermissible Use Class are largely procedural in nature and any claim for statutory damages by this Class was incidental to its interest in compelling changes to the Defendants' data practices. The Parties have therefore agreed to injunctive relief for the Rule 23(b)(2) Settlement Class under which the Defendants will implement a substantial, nationwide program that addresses the is-

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[4] The first named objector of this group is Megan Christina Aaron.

sues raised in the Complaint by the Impermissible Use Class and will result in a significant shift from the currently accepted industry practices. The Injunctive Relief will cause Defendants to become the industry leader among **[*11]** data aggregation companies in the protection of customer information provided to debt collectors.

a. Settlement Terms

Pursuant to the Settlement Agreement, the Defendants will overhaul their currently existing *Accurint® for Collections* ("AFC") suite of products for the Receivables Management Market, which they currently do not treat as "consumer reports" as defined by the FCRA.[5] The Defendants will split AFC into two newly developed suites of products and services. The first suite, called "Collections Decisioning," falls within the FCRA definition of a "consumer report" and will be treated as such. The second suite, called "Contact & Locate," will not be treated as falling within the "consumer report" definition under the FCRA because the Parties agree it does not fall within the FCRA definition.

The Collections Decisioning suite will be created for the Receivables Management Marke. It will be available only to customers who **[*12]** have completed a credentialing process and customers will be permitted to use the information only for a permissi-

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[5] Upon the final approval of the settlement in this case, the Parties will ask the Court to enter the Injunctive Relief Order, attached to the Settlement Agreement as Exhibit A. This will ensure the enforceability of the changes agreed to in the settlement agreement.

ble purpose under 15 U.S.C. § 1681b, including, but not limited to, for extension of credit, review or collection of a customer's account, or to review a consumer's credit account to determine whether the consumer continues to meet the terms of the account. The Defendants will also have a compliance program designed to provide reasonable procedures to assure the Collections Decisioning products and services are used for permissible purposes under § 1681b. When a user enters into the Collections Decisioning suite for the first time in each user session, a message will be displayed, indicating the reports fall under the FCRA.[6] The user will also be required to certify a permissible purpose under § 1681b and that the information will be used only for purposes permitted by the FCRA. The Defendants acknowledge that the Collections Decisioning products and services meet the FCRA definition of a "consumer report." Accordingly, the Defendants will put customers through a credentialing process consistent with § 1681e(a) and the customers' contractual commitments and certifications will be consistent with the regulatory frame-

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[6] The message displayed will be substantially similar to the following:

> You are entering the LexisNexis Collection Decisioning FCRA offerings provided by LexisNexis Risk Bureau LLC, a consumer reporting agency. The LexisNexis Collections Decisioning offerings are designed to be compliant with the Fair Credit Reporting Act, 15 U.S.C. Sec. 1681, *et seq*. ("FCRA"), and may only be accessed for permissible purposes in compliance with the FCRA and in accordance with your agreement and certifications.

Settlement Agreement § 4.3.1.1.3.

work **[*13]** governing the Collections Decisioning product or service.

The Contact & Locate suite of products and services will be created to assist the Receivable Management Market to locate debtors and to locate assets securing debt for the purpose of repossession. The Contact & Locate suite of products and services will not involve the provision of "consumer reports" under the FCRA. The data available will include only: (1) information that does not contain "seven characteristic" information; (2) information that does not bear on any eligibility determination for credit, insurance, employment, or any other purpose in connection with which a consumer report may be used under the FCRA; (3) information bearing a relationship **[*14]** to the location of a debtor or the location of assets securing debt for the purpose of repossession, even if such information may arguably bear on an eligibility determination under the FCRA; and (4) information that includes any combination of the first three types of information. Use of the Contact & Locate suite of products is intended only for the limited purpose of finding and locating debtors or locating assets securing debt for purposes of repossession. When a user enters the Contact & Locate suite of products and services for the first time during each user session, a message will indicate Contact & Locate is not provided by consumer reporting agencies as defined in the FCRA and may not be used in determining eligibility for credit, insurance, or employment, or for any other eligibility purpose that would qualify as a consumer

report under the FCRA.[7] The customers' contractual commitments and certifications will be consistent with the non-FCRA characterization and treatment of the Contact & Locate suit of products and services. The Parties agree that the contemplated design for the new Contact & Locate suite meets the limitations on data defined above.

In spite of the fact the Parties agree that the Contact & Locate suite of products and services do not constitute "consumer reports" as defined under the FCRA, a "Consumer Access Program" for the Contact & Locate suite will be created. The Consumer Access Program will include procedures that permit an individual to obtain a free copy of a Contact & Locate Comprehensive Report regarding the individual once per year. Additionally, a cover letter accompanying consumer's information responsive to a request made under the FCRA, § 1681g(a), will include the following language: "An affiliate of [Consumer Reporting Agency] **[*16]** provides debt collectors with 'contact and locate' information about consumers. That in-

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[7] The message displayed will **[*15]** be substantially similar to the following:

> Accurint® Contact & Locate is provided by LexisNexis Risk Solutions FL Inc. Accurint® Contact & Locate is not provided by "consumer reporting agencies," as that term is defined in the Fair Credit Reporting Act (15 U.S.C. § 1681, et seq.) (FCRA) and does not constitute a "consumer report," as that term is defined in the FCRA. Accurint® Contact & Locate may not be used in whole or in part as a factor in determining eligibility for credit, insurance, or employment or for any other eligibility purpose that would qualify as a consumer report under the FCRA.

Settlement Agreement § 4.3.1.2.4.

formation is not a 'consumer report' under the FCRA and is not enclosed in this mailing. For more information about this 'contact and locate' information, or to request a copy of such report about you, please visit [website] or call [number]." The Consumer Access Program will further include procedures that permit an individual to submit a statement of up to 100 words regarding any phone number or address displayed in the Contact & Locate suite. All such comments will be made available via a link on the main page and search forms where the phone number or addresses may be displayed in the Contact & Locate Suite. In addition, the Defendants will provide customer educational seminars and materials, free of charge, regarding their use of and responsibilities relating to Collections Decisioning and Contact & Locate. The Defendants will also provide training for employees who work on or with Collection Decisioning and Contact & Locate regarding the requirements of the Injunctive Relief.

The Settlement Agreement sets the following timeline for the Defendants to implement the Injunctive Relief:

- Release **[*17]** of the initial versions of Collection Decisioning and Contact & Locate by December 31, 2013.
- Defendants will market Collections and Contact & Locate to all new online Receivable Management Market customers and provide new online access to Collections Descisioning and Contact & Locate by December 31, 2013.

- Defendants will initiate the migration of existing *online* Receivable Management Market customers to Collections Decisioning and Contact & Locate beginning on or before December 31, 2013 and will use reasonable and good faith to complete migration as soon as practicable, but will complete the migration by December 31, 2015.
- Defendants will initiate the migration of *all other* existing Receivable Management Market customers to Collections Decisioning and Contact & Locate beginning on or before December 31, 2013 and will use reasonable and good faith to complete migration as soon as practicable, but will complete the migration by June 30, 2016.
- Consumer Access Program will be implemented by December 31, 2013.

The Settlement Agreement provides that if the Defendants are unable to comply with any of the deadlines, they will receive a reasonable extension of time sufficient to permit **[*18]** completion of the task upon submission of an application to the Court showing good cause for the extension. The Settlement Agreement also provides that during the implementation period, Defendants may continue to permit access to the full suite of Accurint® Reports to Receivable Management Market customers that have not yet migrated to Collections Decisioning and Contact & Locate. Under the Sunset Provision of the Settlement Agreement, the obligation of the Injunctive Relief will expire the earlier of seven years from the Effective Date (the date on which the Court's Final Judgment

is finalized—meaning the period for review of the judgment has expired) or June 30, 2020.

b. Releases

The Rule 23(b)(2) Settlement Class members do not have the right to opt out of the Settlement Agreement. Accordingly, under the proposed settlement, the Rule 23(b)(2) class does not release or discharge the right to file an individual lawsuit under § 1681*o* or the FCRA State Equivalents for actual damages sustained. The class members do, however, waive the right to bring claims as a class and waive any willful noncompliance remedies against the Defendants. The Rule 23(b)(2) Settlement Class also waives any and all rights and benefits afforded by California Civil Code § 1542 and any **[*19]** other applicable federal or state law relating to limitations on release.

c. Attorney Fees and Service Awards

Plaintiffs and their counsel ask the Court to approve the attorneys' fees and Class Representation Service Awards ("Service Awards") negotiated by the Parties and permitted in the Settlement Agreement. The Parties assert these subjects were addressed in mediation only after the Parties had reached an agreement as to the recovery for each class.

Plaintiffs' counsel will seek an award for attorneys' fees and expenses for their representation of the Rule 23(b)(2) Settlement Class in obtaining relief. The request is based in large part on the value of the relief to consumers and the dynamic shift that it represents in the industry and the fact that the injunction affords far better substantive rights than the Court or a jury could compel following a complete victory on

all of Plaintiff's claims. The Settlement Agreement approves an award for attorneys' fees, costs, and other expenses in an amount up to $5.5 million in the aggregate. The amount will be paid entirely by LexisNexis. The Defendants have agreed to pay this amount and the Plaintiffs' counsel have agreed not to seek a higher amount.

[*20] The Parties also agreed the named Plaintiffs may ask the Court for an award for their service as class representatives in the amount of $5,000. This amount will also be paid by the Defendants.

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

The Parties also move the Court to finally certify a Rule 23(b)(3) Settlement Class, which is composed of all persons who, from October 1, 2006 through April 29, 2013, requested a copy of an Accurint® Report (File Request Class) or submitted a dispute or other inquiry regarding an Accurint® Report (Dispute Class). Approximately 31,000 people fall within the Rule 23(b)(3) class definition. The Parties propose a monetary settlement be paid to the members of the Rule 23(b)(3) Settlement Class.

a. Settlement Terms

Under the Settlement Agreement, the Defendants will create a common fund of $13.5 million to be distributed *pro rata* to the approximately 31,000 members[8] of the Rule 23(b)(3) Settlement Class. This equates to approximately $435 per person in the class before attorneys' fees. If the full amount of attorneys'

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[8] The Settlement Agreement deems the estimated number of ***Rule 23(b)(3)*** Settlement Class Members (31,000) a material term of the settlement.

fees authorized by the Settlement Agreement is requested and awarded by the Court, the amount paid per person will be approximately $300. The Settlement Agreement directs that the Defendants will deposit the Settlement **[*21]** Fund into an Escrow Account within thirty days after the Effective Date. The Escrow Account will be managed by an Escrow Agent.

The payment schedule is as follows:

- Within 45 days of after the Effective Date, the Escrow Agent shall disburse the amount of Court approved award of attorney's fees and costs.
- Any Service Award approved by the Court shall be paid within the later of (1) 45 days after the Effective Date; or (2) 14 days after receipt by the Escrow Agent of each Named Plaintiff's completed W-9 form.
- The amount remaining shall be distributed in equal shares to each member of the Rule 23(b)(3) Settlement Class, but in no case shall any member receive more than $400.
- The Escrow Agent shall make one attempt to deliver any payment returned as undeliverable within 45 days of the initial mailing.
- Any checks not cashed within 90 days of delivery revert back to the Escrow Account.
- The Escrow Agent shall provide an accounting of the Escrow Account 150 days after the Effective Date.
- Within 14 days following the accounting, any remaining funds shall be used to reimburse

Defendants **[*22]** for the monies paid for the Rule 23(b)(2) and Rule 23(b)(3) Notice Plans.

• The remaining funds shall be paid to a non-profit entity or entities submitted jointly by the Parties and approved by the Court as a *cy pres* award for the purpose of supporting research activities relating to the privacy or security of personal information; provided, however, that such grants must stipulate that the grant amounts may not be used in furtherance of litigation.

b. Releases

Unless the Rule 23(b)(3) Settlement Class members opt out of the settlement, they release the Defendants from all claims resulting from, arising out of, or in any way connected to the covered conduct of the suit. The payment the members receive as part of this settlement is compensation for any such claims. This release is effective even if the Rule 23(b)(3) Settlement Class Member did not receive actual notice of the settlement prior to the hearing for final approval of the settlement in this litigation. The Rule 23(b)(3) Settlement Class Members also waive California Civil Code § 1542 and/or any other applicable federal or state law relating to limitations on releases.

Upon the Effective Date, no default by any person in the performance of any covenant or obligation under the Settlement Agreement will affect the dismissal **[*23]** of the litigation; provided, however that all other legal and equitable remedies for violation of a court order or breach of the Settlement Agreement remain available to all Parties. For those Rule 23(b)(3) Settlement Class Members who opt out,

Class Counsel will refer the opt-outs to the applicable state bar association or other referral organization for appropriate counsel. This is necessary because Class Counsel agree that the proposed settlement is fair, reasonable, and in the best interest of the Rule 23(b)(3) Settlement Class Members.

c. Attorney Fees and Service Awards

Plaintiffs' counsel will seek an award for attorneys' fees and expenses for their representation of the Rule 23(b)(3) Settlement Class in obtaining relief. The Settlement Agreement approves payment to counsel of up to 30% of the Settlement Fund to be paid out of the Settlement Fund. Plaintiffs' counsel, however, seek only 25% of the Settlement Fund for fees and expenses.

The Settlement Agreement also allows the Named Plaintiffs to apply to the Court for Court approval of a Service Award of $5,000 each. The Defendants do not oppose such an award for each Named Plaintiff. The Service Awards constitute the sole consideration for the individuals acting as **[*24]** Named Plaintiffs, and will be made separately from any attorney's fees.

3. Other Provisions of the Settlement Agreement

Aside from the Class Settlements detailed above, the Settlement Agreement includes a number of other provisions. Section 7 of the Settlement Agreement details a number of circumstances under which the "Defendants have the right to terminate th[e] Settlement Agreement, declare it null and void, and have no further obligations under" it. Most of the circumstances relate to the Court's disapproval of provisions of the proposed settlement. Several provisions,

however, are worth noting individually.[9] One provision provides that the Defendants may terminate the

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[9] A full list of the conditions upon which the Defendants may terminate the Settlement Agreement follows:

> a) the Parties fail to obtain and maintain preliminary approval of the proposed settlement of the Rule 23(b)(2) Settlement Class Claims;
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> b) the Parties fail to obtain and maintain preliminary approval of the proposed settlement of the Rule 23(b)(3) Settlement Class Claims;
>
> c) any court requires a notice program in addition to or in any form other than as specifically set forth in Sections 4.2 and 5.2 and attached Exhibits B-E;
>
> d) any court requires Defendants, or any of them, to comply with obligations or requirements that are greater than or materially different from the Injunctive Relief;
>
> e) any court orders the Defendants to pay, in the aggregate, attorneys' fees, costs, and other expenses in connection with the Litigation, in excess of $5.5 million in connection with the settlement of the Rule 23(b)(2) Settlement Class;
>
> f) any court orders the Defendants to pay, in the aggregate and inclusive of attorneys' fees, costs, and other expenses, in connection with the Litigation, in excess of $13.5 million in connection with the settlement **[*26]** of the Rule 23(b)(3) Settlement Class;
>
> g) two percent (2%) or more of the members of the Rule 23(b)(3) Settlement Class opts out of the proposed settlement;
>
> h) the Court fails to enter a Final Judgment and Order consistent with the provisions in Section 6;
>
> i) the Court fails to enter the Injunctive Relief Order in the form attached as Exhibit A to this Settlement Agreement;

Settlement Agreement if 2% or more of the members of the Rule 23(b)(3) Settlement Class opt out of the proposed settlement. Settlement Agreement § 7(g). The Defendants may also terminate the Settlement agreement if the Defendant's insurers refuse or otherwise fail to fund the full Rule 23(b)(2) Settlement Class Attorneys' Fees, Settlement Fund, or the costs for the Notice Plans. Settlement Agreement § 7(m). The Plaintiffs may also terminate the Settlement Agreement as to the Rule 23(b)(3) Settlement Class in the event that the total number of Rule 23(b)(3) Settlement Class Members exceeds 34,000 **[*25]** unless the Defendants agree to proportionately increase the amount of the Rule 23(b)(3) Settlement Class Settlement Fund.

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j) the settlement of the Rule 23(b)(2) Settlement Class Claims is not upheld on appeal, including review by the United States Supreme Court;

k) the settlement of the Rule 23(b)(3) Settlement Class Claims is not upheld on appeal, including review by the United States Supreme Court;

l) the Effective Date does not occur for any reason, including but not limited to the entry of an order by any court that would require either material modification or termination of the Settlement Agreement; or

m) the Defendants' insurer or insurers refuse to or otherwise fail to fund in full the Rule 23(b)(2) Settlement Class Attorneys' Fees, Settlement Fund or the costs for the Notice Plans as provided in Section 4.4 and Sections 5.3- 5.7, subject to the exhaustion of the self- insured retention, if the Defendants give notice of the termination of this Settlement Agreement within ten (10) days after the deadline for funding.

Settlement **[*27]** Agreement § 7.

Other important miscellaneous provisions include:

- The Settlement Agreement may not be offered as an admission by either party on the facts or law at issue in the case. Settlement Agreement § 8.2.
- If any Rule 23(b)(2) or (b)(3) Settlement Class Member has a claim or dispute regarding the Defendants' compliance with the terms of the Settlement, the Class Member must first submit his or her dispute directly to the Defendants before taking any other action. The Defendants will then investigate the claim within 30 days. If the claim is not then resolved, the Class Member may submit his or her dispute to this Court under the caption for this litigation. Settlement Agreement § 8.3.
- The Court retains jurisdiction with respect to implementation and enforcement of the terms of the Settlement Agreement. The Court retains exclusive jurisdiction over any subsequent claim against the Defendant subject to the dispute process described in section 8.3.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 23(e) provides that a class action may be settled only with court approval. Courts considering proposed class action settlements are required by Rule 23(e) to assess whether the settlement is in the best interests of represented class members. The Supreme Court has held that **[*28]** while "[s]ettlement is relevant to a class certification," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997), certification of a class for settlement purposes still

requires that the provisions of Rule 23 to be met. Although "there is [a] strong initial presumption that the compromise is fair and reasonable," approval of a class action settlement is committed to the "sound discretion of the district courts to appraise the reasonableness of particular class-action settlements on a case-by-case basis, in light of the relevant circumstances." *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 663 (E.D. Va. 2001) (internal quotation marks and citations omitted).

Rule 23(a) contains four requirements for proceeding as a class action: numerosity, commonality, typicality, and adequacy of representation. The final three requirements of Rule 23(a) "tend to merge," with commonality and typicality "serv[ing] as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 157 n.13, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982).

"In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), *(2)* or (3)." *Amchem*, 521 U.S. at 614. Federal Rule of Civil Procedure 23(b)(2) applies when "the party opposing the class has **[*29]** acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Federal Rule of Civil Procedure 23(b)(3) requires that "the court find[] that the

questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

Finally, Rule 23 requires that a class action settlement be "fair, reasonable and adequate." Manual for Complex Litigation (Fourth) § 21.62 (2004) (citing Fed. R. Civ. P. 23(e)(1)(C)). Fairness is assessed by a comparison of the treatment of class members to each other and to similarly situated, non-class members; reasonableness is assessed by an analysis of the settlement's responsiveness to the class claims; adequacy is assessed by a comparison of the agreed relief to what class members may have obtained absent the class action process. *Id*. Factors to be considered in the fairness calculus include, among others: "(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 **[*30]** the negotiations, and (4) the experience of counsel in the area of securities class action litigation." *In re Jiffy Lube Sec. Litig*., 927 F.2d 155, 159 (4th Cir. 1991). Factors to be considered in the adequacy calculus include, among others: "(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*.

III. DISCUSSION

A. Requirements of Rule 23(a)

Plaintiffs have met the requirements of Federal Rule of Civil Procedure 23(a) and, therefore, "may sue or be sued as representative parties on behalf of all members" of the class of which they are members. Fed. R. Civ. P. 23(a). Both the Rule 23(b)(2) class and the Rule 23(b)(3) class satisfy the requirements of numerosity, commonality, typicality, and adequacy of representation.

To assess the numerosity requirement of Rule 23(a), courts must look to the "particular circumstances of the case" to determine whether members of the class are "so numerous that joinder of all members is impracticable." *Brady v. Thurston Motor Lines*, 726 F.2d 136, 145 (4th Cir. 1984). However, "[n]o specified number is needed to maintain a class action." **[*31]** *Id.* (internal quotations and citation omitted). The Fourth Circuit has consistently found the numerosity requirement satisfied for classes with far fewer than either 200 million or 31,000 members. *Gunnells v. Healthplan Svcs., Inc.*, 348 F.3d 417, 425 (4th Cir. 2003) (finding that a class of 1400 members "easily satisfied Rule 23(a)(1)'s numerosity requirement"); *accord In re Kirschner Med. Corp. Sec. Litig.*, 139 F.R.D. 74, 78 (D. Md. 1997). Accordingly, the Court finds that the Rule 23(b)(2) class and the Rule 23(b)(3) class each satisfy the numerosity requirement of Rule 23(a).

To establish commonality, the party seeking certification must "demonstrate that the class members have suffered the same injury" and that their claims "depend upon a common contention." *Wal-Mart*

Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011) (internal quotation marks omitted). "That common contention, moreover must be of such a nature that it 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*. "A common question is one that can be resolved for each class member in a single hearing . . . . A question is not common, by contrast, if its resolution 'turns on a consideration of the individual circumstances of each class member.'" *Thorn v. Jefferson-Pilot Life Ins. Co*., 445 F.3d 311, 319 (4th Cir. 2006).

Both the Rule 23(b)(2) class and the Rule 23(b)(3) class satisfy the commonality requirement. As to the Rule 23(b)(2) class, **[*32]** the class members have suffered the same injury, based on Defendants' collection and possession of class members information without treatment required by the FCRA; their claims depend on a common contention—namely, that Defendants' collection of information is subject to the FCRA. As to the Rule 23(b)(3) class, the class members have suffered the same injury, based on Defendants' treatment and sale of class members' information without treatment required by the FCRA; their claims depend on a common contention—namely, that Defendants' treatment and sale of information is subject to the FCRA. Because each of these common contentions could be resolved as to both the Rule 23(b)(2) class members and the Rule 23(b)(3) class members, the commonality requirement is met.

The Fourth Circuit has explained that an assessment of typicality requires "a comparison of the plaintiffs' claims or defenses with those of the absent class members." *Deiter v. Microsoft Corp.*, 436 F.3d 461, 467 (4th Cir. 2006). The Named Plaintiffs are members of both the Rule 23(b)(2) class and the Rule 23(b)(3) class. The Named Plaintiffs "possess the same interest" in FCRA protections "and suffer[ed] the same injury as the [absent] class members" from each of the respective classes. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982). Accordingly, the requirement of typicality has been met.

If the proposed **[*33]** settlement is intended to preclude further litigation by absent persons, due process requires that their interests be adequately represented. *In re Jiffy Lube*, 927 F.2d at 158 (citing *Manual for Complex Litigation 2d*, § 23.14 at 166 (1985)). Here, the Named Plaintiffs' and class members' claims stem from the same operative facts and give rise to the same entitlement to relief. Accordingly, the claims are sufficiently "interrelated that the interest of the class members will be fairly and adequately protected in their absence." *Id.* at 157 n.13. Objectors to the Settlement Agreement argue that the different relief offered to members of the two different classes evinces a lack of adequate representation of the Rule 23(b)(2) class. However, the Court finds this argument unpersuasive because it fails to appreciate the value of the Rule 23(b)(2) injunctive relief and the challenges that Rule 23(b)(2) class members—those who are not also eligible for Rule 23(b)(3) relief—would have in bringing claims against

Defendants. Accordingly, the Court finds that the requirement of adequate representation has been met.

B. Certification Requirements of Rule 23(b)

To be maintained, a class action must fall within one of the three types of action enumerated in Rule 23(b). Classes falling in each of these categories must meet distinct **[*34]** requirements in order to be properly certified. Plaintiffs seek certification of a class pursuant to Rule 23(b)(2) and a class pursuant to Rule 23(b)(3). Both of these classes will be properly certified for the reasons that follow.

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

A class may be certified pursuant to Rule 23(b)(2) when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted--the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'" *Dukes*, 131 S. Ct. at 2557 (quoting Nagareda, 84 N. Y. U. L. Rev., at 132). In interpreting the requirements of Rule 23(b)(2), the Fourth Circuit has held that certification is appropriate where final injunctive relief is sought and will settle "the legality of the behavior with respect to the class as a whole." *Thorn*, 445 F.3d at 329 (4th Cir. 2006) (quoting Rule 23(b)(2) 1966 advisory committee's note).

The Court finds that certification of the Rule 23(b)(2) class in this case is appropriate because the injunctive relief sought is indivisible and applicable

to all members of the Rule 23(b)(2) class. **[*35]** The Parties have negotiated meaningful, valuable injunctive relief that will accrue to all members of the Rule 23(b)(2) class. Because the Rule 23(b)(2) class will obtain "an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute." *Dukes*, 131 S. Ct. at 2558. In other words, certification is appropriate pursuant to Rule 23(b)(2), and the requirements of Rule 23(b)(3) are inapplicable. *Id.* ("The procedural protections attending the (b)(3) class--predominance, superiority, mandatory notice, and the right to opt out--are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary *to a (b)(2) class*.").

Objectors vigorously oppose certification of the Rule 23(b)(2) class in this case; however, the Court finds these objections to be unpersuasive and, accordingly, overrules them. Specifically, objectors first argue that monetary claims predominate the Rule 23(b)(2) class claims and, therefore, the Settlement Agreement's lack of opt-out rights precludes final certification. Second, they argue that the Rule 23(b)(2) class, which seeks only injunctive relief, may not be certified because **[*36]** the FCRA does not provide a private right of action for injunctive relief.

The objectors' first argument is based primarily on dicta from recent Supreme Court precedent on Rule 23(b)(2). In *Dukes*, the Supreme Court noted the "serious possibility" that due process requires notice and opt-out rights for a Rule 23(b)(2) class, even "where

the monetary claims do not predominate." 131 S. Ct. at 2559. However, the Court also explicitly declined to consider whether Rule 23(b)(2) entirely precludes claims for monetary damages and, instead, held only that "claims for *individualized* relief (like the back-pay at issue [in *Dukes*]) do not satisfy" Rule 23(b)(2). *Id*. at 2557.

The objectors' first argument is unpersuasive for at least two reasons. First, for the same reasons that common questions of law predominate over the Rule 23(b)(3) class claims, the statutory damages at issue in this case are not individualized within the meaning of *Dukes*. The "the qualitatively overarching issue[s]" in this case relate to Defendants' conduct, which was uniform with respect to each of the class members.[10] *Stillmock v. Weis Markets, Inc.*, 385 F. App'x 267, 273 (4th Cir. 2010). For this reason, the appropriate amount of statutory damages would also be uniform as to each of the class members, and is not "individualized" because it is the product of rote calculation. *See Johnson v. Meriter Health Servs. Emp. Ret. Plan*, 702 F.3d 364, 372 (7th Cir. 2012) ("*Wal-Mart* left **[*37]** intact the authority to provide purely incidental monetary relief in a (b)(2) class action."). Second, the objectors fail to distinguish or ac-

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[10] The objectors' reliance on *Adams, et al. v. LexisNexis Risk & Information Analytics Group, Inc., et al.*, No. 08-4708 (D. N.J.), to divide the Rule 23(b)(2) class into differently positioned groups is unpersuasive. While Plaintiffs and the objectors argue that the *Adams* court held Accurint® reports to be subject to the FCRA, the Court appears to have disavowed such a holding. (*See* ECF No. 106-1, Ex. A ("I think there has been some misinterpretation of what my [motion for judgment on the pleadings] ruling was.").)

count for the regular use of general release waivers in class action settlements. *See Ass'n for Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 471 n.10 (S.D. Fla. 2002) (collecting cases). Notably, the Settlement Agreement preserves Rule 23(b)(2) class members' rights to bring claims for actual damages, thereby preserving their due process rights. The only claims released are non-individualized statutory damages claims that will be addressed by the injunctive relief provided by the Settlement Agreement.

The objectors' second argument is similarly unpersuasive. While the objectors correctly note that the FCRA does not provide individuals with **[*38]** a right to bring non-monetary claims, in the settlement context, "it is the parties' agreement that serves as the source of the court's authority to enter any judgment at all." *Local Number 93 v. City of Cleveland*, 478 U.S. 501, 522, 106 S. Ct. 3063, 92 L. Ed. 2d 405 (1986). Courts in this district and elsewhere have found that the lack of a private right of action does not preclude certification of a Rule 23(b)(2) class or inclusion of injunctive relief in a negotiated settlement. *See, e.g., Palamara v. Kings Family Rests.*, No. 07- 317, 2008 U.S. Dist. LEXIS 33087, at *3-4 (W.D. Pa. Apr. 22, 2008) (approving entry of consent decree requiring defendant to comply with FCRA and distribute food vouchers to class members and to charity as part of settlement of FCRA claims); *Karnette v. Wolpoff & Abramson*, No. 3:06cv44, 2007 U.S. Dist. LEXIS 20794, at *34 (E.D. Va. Mar. 23, 2007) (certifying Rule 23(b)(2) class in FDCPA action despite objections that FDCPA does not provide for injunctive relief).

The Court finds that the requirements for certification of a class pursuant to Rule 23(b)(2) have been met. Accordingly, the Rule 23(b)(2) class is appropriately certified.

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

Class certification pursuant to Rule 23(b)(3) requires satisfaction of the predominance and superiority criteria. See Fed. R. Civ. P. 23(b)(3) ("[T]he court [must find] that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action **[*39]** is superior to other available methods for fairly and efficiently adjudicating the controversy"). The predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc.*, 521 U.S. at 623. Superiority "requires that a class action be superior to other methods for the fair and efficient adjudication of the controversy." *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 147 (4th Cir. 2001). As described by the Supreme Court, Rule 23(b)(3) allows for class action treatment that "is not clearly called for," but "may nevertheless be convenient and desirable." *Amchem Prods.*, Inc., 521 U.S. at 615.

The Court finds that common questions of law and fact predominate over questions affecting individual members of the Rule 23(b)(3) class. These common questions include whether Accurint® reports are consumer reports as defined by the FCRA and whether Defendants' conduct was willful. Even the determination of appropriate statutory damages constitutes a common question under these circumstances, because "the qualitatively overarching issue[s]" are the De-

fendants' willfulness and the applicability of the FCRA to Defendants' Accurint® reports. *Stillmock*, 385 F. App'x at 273. Because "the purported class members were exposed to the same risk of harm every time the defendant violated the statute in the identical manner, the individual statutory **[*40]** damages issues are insufficient to defeat class certification under Rule 23(b)(3)." *Id.*; *accord Ealy v. Pinkerton Gov't Servs.*, 514 Fed. Appx. 299, 305 (4th Cir. 2013).

Similarly, the Court finds that a class action is the superior method for "fair and efficient adjudication of the controversy" as maintained by the Rule 23(b)(3) class. *Lienhart*, 255 F.3d at 147. Factors pertinent to an assessment of superiority include (i) the strength of the individual class members' interest in controlling separate actions, (ii) the extent and nature of parallel, existing litigation, (iii) the desirability or undesirability of concentrating the litigation in the single forum, and (iv) the likely difficulties in managing the class action. *See* Fed. R. Civ. P. 23(b)(3). None of these factors weighs against certification of the Rule 23(b)(3) class. The individual class members have a little interest in maintaining separate actions because of the low individual recoveries available and the high cost of litigation; the Court has no knowledge of parallel litigation; concentration of this litigation is not undesirable; and the class action has not proven to be difficult to manage.

The Court finds that the predominance and superiority requirements for certification of a class pursuant to Rule 23(b)(3) have been met. Accordingly, the Rule 23(b)(3) class is appropriately certified.

C. Settlement [*41] Agreement Fairness, Reasonableness, and Adequacy

The Court finds that the Settlement Agreement is fair, reasonable, and adequate. In overruling objections to the contrary, the Court notes that three highly skilled mediators have been involved in the negotiation of the Proposed Settlement Agreement: United States District Court Judge M. Hannah Lauck (then, a Federal Magistrate Judge), Federal Magistrate Judge Dennis W. Dohnal, and Randall Wulff. More importantly, the factors enumerated in *In re Jiffy Lube*, 927 F.2d 155, weigh in favor of approval.

In considering the fairness of a proposed settlement agreement, courts in the Fourth Circuit must consider "(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 area of securities class action litigation." *In re Jiffy Lube*, 927 F.2d at 159. This is the third class action suit filed by Plaintiff's counsel against Defendants raising claims related the FCRA and Defendants' Accurint® reports. Extensive discovery was conducted in each of the three lawsuits, but the preceding suits settled prior to any substantive court determination. These factors alone **[*42]** could be enough to demonstrate the fairness of the Settlement Agreement—the Parties reached an agreement through arm's-length negotiations by highly experienced counsel after full discovery was completed.

Factors to be considered in the adequacy calculus include, among others, the existence of any difficulties of proof or strong defenses the plaintiffs are like-

ly to encounter if the case goes to trial, the anticipated duration and expense of additional litigation, and the degree of opposition to the settlement. *Id*. Only one person objected to the Rule 23(b)(3) settlement and only eighteen individuals opted out. These figures are minimal and do not preclude settlement. *See, e.g., Pettway v. Am. Cast Iron Pipe Co*., 721 F.2d 315 (11th Cir. 1983) (approving settlement where five percent of class objected). With regard to the Rule 23(b)(2) class, the objectors collectively represent more than twenty-thousand individuals; however, this figure is minimal in light of the facts that (1) the class includes some 200 thousand members and (2) measures were taken to provide notice of settlement and the opportunity to object. See *Cotton v. Hinton*, 559 F.2d 1326 (5th Cir. 1977) ("[A] settlement can be fair notwithstanding a large number of class members who oppose it."). Further, the fact that three prior lawsuits were brought and settled **[*43]** is indicative of the fact that the duration and expense of additional litigation in the absence of a settlement would be significant. Again, these factors alone could be enough to demonstrate the adequacy of the Settlement Agreement.

However, the fact that most clearly demonstrates the fairness, reasonableness, and adequacy of the Settlement Agreement is the relative strength of each Party's legal claim or defense. *See Carson v. Am. Brands, Inc*., 450 U.S. 79, 88 n.14, 101 S. Ct. 993, 67 L. Ed. 2d 59 (1981). Despite settlement of the prior lawsuits, the ultimate merit of Plaintiff's claims is far from certain. Consumers can recover statutory damages under the FCRA only if they can establish that a

defendant willfully violated the law's provisions. The Supreme Court has drawn on qualified immunity jurisprudence to hold that defendants cannot willfully violate the FCRA unless its requirements are "clearly established." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 70, 127 S. Ct. 2201, 167 L. Ed. 2d 1045 (2007). Where the statutory text and relevant agency and court guidance allow for more than one reasonable interpretation, a defendant that acts consistently with one of those interpretations cannot be held liable as a willful violator. *Id.* at 70 n.20. In this case, all of Plaintiffs' claims are predicated on Accurint® reports being deemed "consumer reports" within the meaning **[*44]** of the FCRA. However, the FTC in 2008 voted unanimously that Accurint® for Collection reports do not fall within the FCRA and do not involve credit reports. Official FTC Opinion Letter to Commenter Rotenberg, *In re Reed Elsevier Inc. and Seisant Inc.*, File No. 0523094, Docket No. C-4226 (Fed. Trade Comm'n July 29, 2008). Absent some authority to the contrary, the merit of Plaintiffs' claims—and, necessarily, the absent class members' theoretical future claims—is speculative at best. For this reason, the benefit of substantial relief without the risk of litigation demonstrates the adequacy of the Settlement Agreement.

The Court finds that the Settlement Agreement presents a fair, reasonable, and adequate bargain between Defendants and all members of both the Rule 23(b)(2) class and the Rule 23(b)(3) class.

D. Motion for Attorneys' Fees

With regard to attorneys' fees for the Rule 23(b)(3) settlement, the Court finds that an award of twenty-

five percent of the Rule 23(b)(3) settlement fund is an appropriate award for the benefit secured for the 23(b)(3) Class. Where there is a common fund, the percentage method of awarding attorneys' fees is favored by the Supreme Court, the Fourth Circuit, and district courts within this Circuit. *See, e.g.,* **[*45]** *Blum v. Stenson*, 465 U.S. 886, 900 n.16, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984); *Deem v. Ames True Temper, Inc.*, No. 6:10-CV-01339, 2013 U.S. Dist. LEXIS 72981, 2013 WL 2285972, at *4 (S.D. W. Va. May 23, 2013) (noting that "[d]istrict courts within the Fourth Circuit have consistently endorsed the percentage method," and collecting cases supporting this conclusion).

With regard to attorneys' fees for the Rule 23(b)(2) settlement, the Court finds that a lodestar of $3,349,379.95 and a multiplier of 1.99 are applicable and, in light of the fact that counsel allocated approximately 80% of their time to crafting injunctive relief for the Rule 23(b)(2) class, an award of $5,333,188.21 is appropriate. *See Robinson v. Equifax Info. Servs.*, 560 F.3d 235, 243-44 (4th Cir. 2009). Specifically, the Court finds that (1) Plaintiffs' counsel expended large amounts of time and labor, demonstrated skill commensurate with their reputations, and achieved an excellent result in this large and complex action; (2) Plaintiffs negotiated a Settlement Agreement that provides substantial benefits for over 200 million consumers; and (3) the Settlement Agreement forces Defendants to comply with the FCRA and increases consumer privacy protection measures. Finally, the Court notes that a multiplier of 1.99 is similar to those applied in similar cases. *See, e.g., In re Cardi-*

nal Health Inc. Sec. Litigs., 528 F. Supp. 2d 752, 768 (S.D. Ohio 2007).

Finally, the Court finds that an incentive award of $5,000 each is an appropriate award for the Named Plaintiffs' **[*46]** service as Class Representatives. The Named Plaintiffs acted for the benefit of the class, reviewed documents provided to them by their Counsel, and discussed with their Counsel aspects of the case, discovery issues, and settlement negotiations. Further, Defendants do not oppose the award. As such, service awards in the amount of $5,000 each are appropriate. *See Cappetta v. GC Servs. LP*, Civil Action No. 3:08-CV-288 (E.D. Va. April 27, 2011) (granting $5,000 service awards); *see also Henderson v. Verifications Inc.*, Civil Action No. 3:11-CV-514 (E.D. Va. Mar. 13, 2013).

E. Motion to Amend

Subsequent to the Final Fairness Hearing held on December 10, 2013, the Parties filed a Consent Motion for Leave to File Amended Class Complaint. In an apparent effort to address Objectors' concerns that the Complaint failed to seek injunctive relief, the proposed Amended Class Complaint alleged that injunctive relief was appropriate pursuant to the Court's inherent equitable power. *See Califano v. Yamasaki*, 442 U.S. 682, 705, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979); *Porter v. Warner Holding Co.*, 328 U.S. 395, 398, 66 S. Ct. 1086, 90 L. Ed. 1332 (1946). Because the Court has found approval of the Settlement Agreement appropriate under the existing Complaint, the Motion to Amend will be DENIED as moot.

IV. CONCLUSION

For the foregoing reasons, the Motion for Final **[*47]** Approval will be GRANTED, the Motion for Attorneys' Fees will be GRANTED, and the Motion to Amend will be DENIED as moot.

Let the Clerk send a copy of this Memorandum Opinion to all counsel of record.

An appropriate Order shall issue.

/s/ James R. Spencer

Senior U. S. District Judge

ENTERED this 5th day of September 2014.

FINAL ORDER

THIS MATTER is before the Court on a Joint Motion for Final Approval of Class Action Settlement ("Motion for Final Approval") (ECF No. 100) filed by Plaintiffs and Defendants (collectively, "Parties"). The Court finds that certification of the two classes defined by the Settlement Agreement proposed by the Parties in this case (ECF No. 101-2) is appropriate pursuant to Federal Rules of Civil Procedure 23(b)(2) and 23(b)(3). The Court further finds that the Settlement Agreement proposed by the Parties in this case is fundamentally fair, reasonable, and adequate under Fourth Circuit precedent.

Accordingly, and for the reasons set forth in the accompanying Memorandum Opinion, the Rule 23(b)(2) class and the Rule 23(b)(3) class, as defined in the proposed Settlement Agreement, are FINALLY CERTIFIED; the Motion for Final Approval is GRANTED; and the claims of all class members who

did not timely opt out of the proposed Settlement Agreement **[*48]** are DISMISSED with prejudice.

Let the Clerk send a copy of this Order to all counsel of record.

It is SO ORDERED.

/s/ James R. Spencer

Senior U. S. District Judge

ENTERED this 5th day of September 2014.

ORDER

THIS MATTER is before the Court a Motion for Attorneys' Fees, Expenses, and Service Awards ("Motion for Attorneys' Fees") (ECF No. 102) filed by Plaintiffs. For the reasons set forth in the accompanying Memorandum Opinion, the Motion for Attorneys' Fees is GRANTED. It is hereby ORDERED that:

• Class Counsel is awarded as reasonable attorneys' fees and expenses incurred in this litigation, $3,333,297.05 in fees, and $41,702.95 in expenses, totaling $3,375,000, or 25% of the $13.5 million *Rule 23(b)(3)* Class common fund, in compensation for the benefit secured for the *Rule 23(b)(3)* Class;

• Class Counsel is awarded $5,333,188.21 in fees and $166,811.79 in expenses totaling $5,500,000, in compensation for the benefit secured for the *Rule 23(b)(2)* Class, to be paid separately by Defendants per the Parties' agreement; and

• Each Named Plaintiff is awarded $5,000 for his or her service as a Class Representative, to be paid separately by Defendants per the Parties' agreement.

Let the Clerk send a copy of this Order to all counsel of **[*49]** record.

It is SO ORDERED.

/s/ James R. Spencer

Senior U. S. District Judge

ENTERED this 5th day of September 2014.

ORDER

THIS MATTER is before the Court on a Consent Motion to File Amended Complaint ("Motion to Amend") (ECF No. 114) filed jointly by the Parties. For the reasons set forth in the accompanying Memorandum Opinion, the Motion to Amend is DENIED as moot.

Let the Clerk send a copy of this Order to all counsel of record.

It is SO ORDERED.

/s/ James R. Spencer

Senior U. S. District Judge

ENTERED this 5th day of September 2014.

APPENDIX C

FILED: January 4, 2016

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-2006 (L) (3:11-cv-00754-JRS)

GREGORY THOMAS BERRY; SUMMER DARBONNE, on behalf of herself and all others similarly situated; RICKEY MILLEN, on behalf of himself and all others similarly situated; SHAMOON SAEED, on behalf of himself and all others similarly situated; ARTHUR B. HERNANDEZ, on behalf of himself and all others similarly situated; ERIKA A. GODFREY, on behalf of herself and all others similarly situated; TIMOTHY OTTEN, on behalf of himself and all others similarly situated

Plaintiffs - Appellees

and

LEXISNEXIS RISK AND INFORMATION ANALYTICS GROUP, INC.; SEISINT, INC.; REED ELSEVIER, INC.

Defendants - Appellees

v.

ADAM E. SCHULMAN

Party-in-Interest - Appellant

JAMES TAYLOR LEWIS GRIMMELMANN

Amicus Supporting Appellants

No. 14-2050 (3:11-cv-00754-JRS)

GREGORY THOMAS BERRY; SUMMER DARBONNE, on behalf of herself and all others similarly situated; RICKEY MILLEN, on behalf of himself and all others similarly situated; SHAMOON SAEED, on behalf of himself and all others similarly situated; ARTHUR B. HERNANDEZ, on behalf of himself and all others similarly situated; ERIKA A. GODFREY, on behalf of herself and all others similarly situated; TIMOTHY OTTEN, on behalf of himself and all others similarly situated

Plaintiffs - Appellees

and

LEXISNEXIS RISK AND INFORMATION ANALYTICS GROUP, INCORPORATED; SEISINT, INCORPORATED; REED ELSEVIER, INCORPORATED

Defendants - Appellees

v.

MEGAN CHRISTINA AARON and the Aaron Objectors

Party-in-Interest - Appellant

JAMES TAYLOR LEWIS GRIMMELMANN

Amicus Supporting Appellants

No. 14-2101 (3:11-cv-00754-JRS)

GREGORY THOMAS BERRY; SUMMER DARBONNE, on behalf of herself and all others similarly situated; RICKEY MILLEN, on behalf of himself and all others similarly situated; SHAMOON SAEED, on behalf of himself and all others similarly situated; ARTHUR B. HERNANDEZ, on behalf of himself and all others similarly situated; ERIKA A. GODFREY, on behalf of herself and all others similarly situated; TIMOTHY OTTEN, on behalf of himself and all others similarly situated

Plaintiffs - Appellees

and

LEXISNEXIS RISK AND INFORMATION ANALYTICS GROUP, INCORPORATED; SEISINT, INCORPORATED; REED ELSEVIER, INCORPORATED

Defendants - Appellees

v.

SCOTT HARDWAY and Hardway Objectors

Party-in-Interest - Appellant

JAMES TAYLOR LEWIS GRIMMELMANN

Amicus Supporting Appellants

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge King, Judge Harris, and District Judge Hazel.

For the Court

/s/ Patricia S. Connor, Clerk