

FILED

FEB 27 2004

LARRY W. PROPPS, CLERK
U. S. DISTRICT COURT

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

FRANKLIN E. CLARK
on behalf of himself
and all other similarly situated,

Plaintiffs,

- against -

EXPERIAN INFORMATION
SOLUTIONS, INC.

Defendants.

Civil Action No. 8-00-CV-1217-22

-----X
FRANKLIN E. CLARK and
LATANJALA DENISE MILLER
on behalf of themselves
and all other similarly situated,

Plaintiffs,

- against -

EQUIFAX CREDIT INFORMATION
SERVICES, INC.,

Defendants.

Civil Action No. 8-00-CV-1218-22 *

-----X
FRANKLIN E. CLARK
on behalf of himself
and all other similarly situated,

Plaintiffs,

- against -

TRANS UNION L.L.C.,

Defendants.

Civil Action No. 8-00-CV-1219-22

-----X
PLAINTIFFS' REPLY TO BRIEF OF
TRANS UNION AND EQUIFAX REGARDING
ATTORNEY'S FEES

365

I. Trans Union and Equifax Have Violated the Stipulation of Settlement

Defendants Trans Union and Equifax have submitted to the Court their joint-position on how the Court should fashion an award regarding Plaintiffs' Petition for Fees and Expenses. In doing so, each has violated its express promises and obligations under the Stipulation of Settlement¹ to refrain from contesting Plaintiffs' attorney fee petition that requested no more than \$5 million from each defendant, i.e., the "clear sailing agreement" provision in each of the settlements. The circumlocutions and semantic gymnastics performed by Trans Union and Equifax are unavailing in their efforts to rationalize their individual breaches. It is surprising and disappointing that they would ignore their contractual obligation and attempt to use this Court as vehicle to lessen their eventual exposure after extensive full arms-length negotiations. Similar attempts to circumvent clear sailing agreements have been rebuked by other Courts in the past. See, e.g. *Waters v. International Precious Metals Corporation*, 190 F.3d 1291 (11th Cir. 1999) ("Defense counsel, having reaped the benefits of their bargain in settling the class action suit, cannot expect the court to renegotiate on their behalf the terms of an agreement concluded after arms-length negotiations. *Id.* at 1300.") It is perhaps more surprising and disappointing that Trans Union and Equifax would do so for the purpose of making such a weak argument.

II. Fees in This Case are Being Paid Pursuant to Contracts

The fundamental mistake made by Trans Union and Equifax in their brief is in misunderstanding the basis upon which their obligation to pay attorneys' fees arises. They have assumed that since the FCRA is involved that this automatically makes this a fee shifting case. Such a premise is fundamentally flawed because this case was settled. The settlement has been reduced to writing, signed by the parties and approved by the Court. An element of the

¹ "Stipulation of Settlement," as used here, refers to every -version signed by the parties, including the "Second Modified Stipulation of Settlement" which is the last, and operative, version.

settlement was the agreement by each Defendant, including Trans Union and Equifax, that they would not contest a fee petition of Plaintiffs that requested an award of \$5 million or less.² Likewise, the Defendants agreed that, as it relates to fees, they could only abrogate the Stipulation of Settlement if the Court were to require them to pay more than \$5 million in fees.³ One can search in vain for a provision in the Stipulation of Settlement and never find a provision that says that fees are being paid pursuant to the FCRA; or that fees are being paid according to the standards imposed by the FCRA; or that fees are being paid in conformance with the legal principles articulated in the case law governing fee shifting statutes; or for any other qualifying language or agreed upon governing principles at all. The parties only agreed that fees would be subject to Court approval. In the absence of any agreement to the contrary, the Court, pursuant to its obligations under Rule 23, Federal Rules of Civil Procedure, has only to determine the reasonableness of the fees requested.

As the Stipulation of Settlement clearly states, the issue of fees was negotiated by the parties after all other issues were agreed to.⁴ The agreement by Trans Union and Equifax not to contest a fee petition requesting \$5 million or less can only be reasonably read to mean that they agreed that an award falling within that range was reasonable. One cannot impute irrationality to the Defendants. Since they had negotiated for Court approval of the fees and had negotiated for a cap on the size of the award to which they would not object, the only reasonable conclusion to be drawn is that they considered an award up to \$5 million to be within the range of reasonableness. Otherwise, one must conclude that they negotiated themselves into a position of agreeing not to contest a request for an unreasonable fee.

² Paragraph 29 of the Stipulation of Settlement.

³ Paragraph 36 of the Stipulation of Settlement.

⁴ Paragraph 29 of the Stipulation of Settlement.

III. This is Not a “Statutory Fee-Shifting”

Trans Union and Equifax argue that the fees they have agreed to pay are being paid pursuant to a fee-shifting statute. Their argument seems to be that because, in their view, no common fund exists out of which to pay fees, the only basis for awarding fees is the fee-shifting provision of the FCRA.⁵ Trans Union and Equifax simply ignore the fact that the reason they are obligated to pay fees is because they agreed to do so in the Stipulation of Settlement.

The important distinction between a fee-shifting case and one in which the fees are paid pursuant to a private agreement was recently recognized in *Deloach v. Philip Morris Companies, Inc.*, 2003 WL 23094907 (M.D.N.C.). In that class action, the case was brought pursuant to the federal anti-trust laws. The question was whether the attorney fees to be paid pursuant to a settlement agreement would be analyzed for reasonableness by utilizing the lodestar or common-fund method. In deciding to employ the lodestar method, the Court said in Footnote 2:

“It should be noted, however, that the choice of the lodestar methodology does not mean that this case is a pure statutory fee-shifting case. This case was brought pursuant to statutes that allow fee shifting, but the present petition was brought pursuant to a private agreement among the parties.”
See Wing v. Asarco, Inc., 114 F.3d 986, 989 (9th Cir. 1997).

Both the *Deloach* and *Wing* courts recognized the important distinction that Trans Union and Equifax ignore. The cases cited by Trans Union and Equifax in support of their notion that fees in the instant case are being paid pursuant to a fee-shifting statute are, for the most part, ones in which the fees were awarded to a prevailing party. In fact, in the *General Motors* case, that court concluded “that this case presents a situation more closely aligned with the common fund paradigm than the statutory fee paradigm.” *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litig.*, 55 F.3d 768, 821 (3d Cir. 1995).

⁵ Pages 3-5 of the brief of Trans Union & Equifax.

IV. Lodestar or Common-Fund

Because the fees in the instant case are being paid by agreement, and are to be reviewed only for reasonableness, the Court may employ the methodology it deems most appropriate under all the circumstances. Plaintiffs have previously briefed their position that the appropriate methodology is the common-fund methodology and will not repeat it here. Trans Union and Equifax, on the other hand, have not only argued (incorrectly) that the Court is required to employ the lodestar methodology in its reasonableness determination, they have also argued that no multiplier could be applied (except in the most extraordinary cases) on account of the holding in *City of Burlington v. Dague*, 505 U.S. 557, 112 S. Ct. 2638, 120 L.Ed.2d 449 (1992). Trans Union and Equifax have once again wrongly attributed statutory fee-shifting standards to this case. There is no case law of which Class Counsel is aware that constrains the Court from applying any reasonable multiplier it deems appropriate in considering the question of the reasonableness of the fees requested by Plaintiffs pursuant to a contract with the Defendants.

V. Trans Union and Equifax's Past Conduct Is In Conflict With Their Current Positions

The fee petition of Plaintiffs to which Trans Union and Equifax have directed their recent brief is not the first fee petition filed by them. On August 22, 2003, Plaintiffs served on Trans Union and Equifax a fee petition and memorandum in support in which they asserted their entitlement to \$5 million per each case based upon a common-fund theory. Included in that petition and memorandum was the then estimated number of hours expended on these cases. Neither Trans Union nor Equifax filed any response to that petition or memorandum. They did not contest the amount claimed. They did not contest the proposed methodology for the Court's determination of reasonableness. While Class Counsel is tempted to argue that their failure to do so should constitute a waiver of objection, we do not do so for one reason. Their having filed a

similar response to the first fee petition would have been equally inappropriate and violative of the Stipulation of Settlement and failing to do so was merely consistent with their contractual obligation. It is important to recall that prior to the Court's announcement at the September Fairness Hearing that the issue of attorneys' fees would be deferred until a later time, the parties had good reason to believe that the attorney fee issue would be resolved at that time, with Trans Union and Equifax having filed no objection to the petition of Plaintiffs. That they had filed no objection is powerful evidence that they believed it to be a reasonable request – a conclusion fully consistent with the recitals in the Stipulation of Settlement.

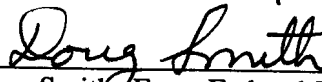
VI. Conclusion

Trans Union and Equifax have fundamentally misunderstood or misrepresented the underlying basis for the award of attorneys' fees, and their errors of legal argument all flow from it. Trans Union and Equifax are obligated to pay reasonable attorneys' fees to Class Counsel because they negotiated and agreed to that obligation in a contract. In light of Defendants Trans Union and Equifax's breach of their obligations under the Stipulations of Settlement, nothing should prohibit Plaintiffs from seeking attorneys' fees in excess of \$5 million per each of those Defendants given the value of the settlements specified by the experts. There is, however, honor in fulfilling one's obligations under an agreement, and Plaintiffs will abide by their agreements.

The Court's obligation to determine a reasonable fee is not bracketed by the fee-shifting jurisprudence cited by Trans Union and Equifax. To the contrary, the Court is obliged only to determine whether the attorney fees requested by Plaintiffs fall within the range of reasonableness. If it does, the Defendants have agreed to pay it.

[Signatures to Follow]

Respectfully submitted,



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Dated: February 27, 2004
Spartanburg, South Carolina

Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE

I, Tonya D. Hendricks, Legal Assistant to David H. Wilkins of the firm of Wilkins & Madden, P.A., do hereby certify that on the **27th** day of **February, 2004**, I served a copy of the following documents on counsel for the Defendants and the designated counsel for Objectors by depositing copies of the same in the United States Post Office at Spartanburg, South Carolina, with proper postage affixed thereto to the addresses shown below:

Documents Served:

Class Counsels' Reply to Brief of Trans Union and Equifax Regarding Attorneys' Fees


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