No. 11-1564

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

EQUIFAX INFORMATION SERVICES, LLC,
Defendant-Appellant,

v.

DONNA K. SOUTTER, for herself and on behalf of all similarly situated individuals,
Plaintiffs-Appellees.

On Appeal from the U.S. District Court for the
Eastern District of Virginia, No. 3:10cv107

BRIEF OF APPELLANT

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August 29, 2011

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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2. Does party/amicus have any parent corporations? ☑ YES ☐ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
   Equifax Inc.
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☑ YES ☐ NO
   If yes, identify all such owners:
   Equifax Inc.
4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☐ NO
   If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☐ NO
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I certify that on 8/29/2011 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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JURISDICTION

The district court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 over this action filed by plaintiff-appellee Donna Soutter alleging violations of the Fair Credit Reporting Act ("FCRA"). On March 30, 2011, the district court granted Soutter's motion for class certification. J.A. 717–18. On April 13, 2011, defendant-appellant Equifax Information Services, LLC ("Equifax") filed a petition for leave to appeal the class certification order pursuant to Fed. R. App. P. 5 and Fed. R. Civ. P. 23(f). The district court modified the class definition on May 9, 2011, J.A. 719–20, and this Court was promptly notified. *See* No. 11-168, Dkt. 11 (4th Cir. May 13, 2011). This Court granted Equifax's petition on June 1, 2011, and has appellate jurisdiction under Rules 5 and 23(f) and 28 U.S.C. § 1292(e).

STATEMENT OF ISSUES

Soutter alleges that Equifax violated the FCRA by willfully failing to follow "reasonable procedures to assure maximum possible accuracy" of credit reports. 15 U.S.C. § 1681e(b). Equifax allegedly reported that Soutter owed a judgment entered against her in the General District Court for the City of Richmond that had been dismissed. The district court ultimately settled on the following class definition:

> "All natural persons, for whom Equifax's records note that a credit report was furnished to a third party who requested the credit report in connection with an application for credit on or after February 17, 2008 to February 17, 2010, other than for an employment purpose, at a time when any Virginia General District Court or Circuit Court judgment that had

> been satisfied, appealed, or vacated in the court file more than 30 days earlier was reported in Equifax's file as remaining unpaid."

J.A. 719–20.

Equifax challenges this class certification order, which raises three distinct issues:

1. Whether the district court erred in finding that common issues predominate where, to determine liability, the court must assess not only (1) the individual court file for each class member as well as each class member's credit report to determine whether the report was "inaccurate" but also (2) the reasonableness of different procedures for retrieving and reporting judgment dispositions used at different times, in different parts of Virginia, and under different circumstances, to determine whether Equifax's procedures willfully violated the FCRA.

2. Whether the district court erred in finding Soutter to be a "typical" and "adequate" class representative when adjudication of her own claim, which related to a dispute resolved in 2008, would not advance the claims of class members whose claims relate to different retrieval procedures used in different circumstances in 2009 and 2010.

3. Whether the district court erred in concluding that this class action with novel and disputed claims was the "superior" method of adjudication when the FCRA includes multiple features that facilitate individual suits alleging willful violations, including fee-shifting and punitive damages.

STATEMENT OF THE CASE

A. Soutter's Allegations

In a trio of cases she separately filed against the three major consumer reporting agencies—Equifax, the defendant here, Experian, and Trans Union—Soutter alleged that each willfully violated the FCRA by inaccurately reporting as outstanding a judgment entered against her in the General District Court for the City of Richmond that had later been set aside and dismissed. J.A. 25–26; *see Soutter v. Experian Info. Solutions, Inc.*, No. 3:09-cv-695 (E.D. Va.); *Soutter v. Trans Union, LLC*, No. 3:10-cv-514 (E.D. Va.). Each action involved the claim that the consumer reporting agency willfully failed to maintain "reasonable procedures to assure maximum possible accuracy of" Soutter's credit report by failing to discover and record the judgment's disposition sooner. 15 U.S.C. § 1681e(b). In the present case, filed on February 17, 2010, Soutter seeks statutory damages, punitive damages, and attorney's fees from Equifax. J.A. 16–17. Soutter has yet to identify potential class members, but, by her estimates, the class could be anywhere from 300,000 to 600,000 individuals. J.A. 530; J.A. 671.

B. The Changing Class Definitions

Throughout this case, including even after the class certification motion was granted, Soutter's proposed class definition was constantly changing as she—and the district court—struggled to fit this case within Fed. R. Civ. P. 23(a) & (b)(3) and rebut Equifax's objections that class certification is inappropriate here.

In her initial complaint, Soutter sought to represent an extremely broad class consisting of "[a]ll consumers for whom Equifax furnished a consumer report which reported a judgment that was either set aside, vacated or dismissed with prejudice." J.A. 14. Soutter's first amended complaint, filed nine days later, narrowed the definition dramatically to cover only credit reports inaccurately showing judgments from the Richmond General District Court, the sole court at issue for her own claim:

> "All consumers (a.) who Equifax credit files show had a primary address in Virginia as of February 17, 2010, (b.) about whom Equifax furnished a consumer report to a third party that showed a civil judgment in the General District Court for the City of Richmond at any time on or after February 17, 2008; and (c.) where, on such date the report was furnished, the records of the General District Court for the City of Richmond showed that the judgment had been satisfied, appealed, vacated or otherwise set aside."

J.A. 25. Soutter has not sought to amend her complaint again, so this continues to be the class definition in the operative complaint.

During the discovery period, Soutter revised the class definition a third time, broadening it to cover judgments in both circuit and general district courts across the entire Commonwealth. In response to an Equifax interrogatory, she explained that she would seek to certify a class of:

> "(a.) All natural persons who (b.) during February 2008 or any month thereafter maintained a primary address located in the Commonwealth of Virginia in their Equifax credit file and (c.) during any such month had within their Equifax credit file a civil judgment in a Virginia General District Court or Virginia Circuit Court with an unpaid status, (d.) and after the date such judgment was added to the Equifax credit file, but before any update was made to the file to show that

> judgment as paid, satisfied, vacated, set aside or appealed, were the subject of a hard inquiry request for an Equifax consumer report, (e.) more than thirty days after the respective Virginia General District Court or Virginia Circuit Court records showed the judgment as paid, satisfied, vacated, set aside or appealed."

J.A. 450.

Soutter revised the definition a fourth time in her papers in support of her class certification motion. There, she sought to certify a class of:

> "(1) all natural persons (2) for whom Equifax's records note that a 'hard inquiry' credit report was furnished to a third party (3) other than for an employment purpose (4) at a time when any Virginia General District Court or Circuit Court judgment that had been satisfied, appealed, or vacated more than 30 days earlier was reported in Equifax's file as remaining unpaid."

J.A. 216.

In her class certification motion, Soutter also "suggested" that the definition "exclude from the Class 'those individuals who have suffered actual damages [greater than $1,000] due to Defendant's [FCRA] violations.'" *Id.* The FCRA caps statutory damages at $1,000, but it allows a plaintiff to recover unlimited actual damages based on the unique ways in which the inaccurate credit report damaged a particular individual. 15 U.S.C. § 1681n(a)(1). Seemingly aware that seeking to represent class members with actual damages would highlight the individualized nature of the claims, Soutter thus sought to define out of the class those individuals who would pursue actual rather than statutory damages. J.A. 529–31. Soutter presumably also recognized that if she pursued the broader class but attempted to limit the remedy to statutory damages in

order to limit individualized issues, she could not adequately represent individuals with claims for actual damages. J.A. 229–30.

This attempt to exclude individuals with actual damage claims over $1,000 from the class definition created a glaring ascertainability problem. There is no way to know ex ante which individuals who otherwise meet the class definition's criteria believe they suffered more than $1,000 in actual damages. If Equifax were to prevail on the merits in the class action, individuals wishing to escape the class judgment could simply allege that they suffered more than $1,000 in actual damages and thus were never members of the class. Since that allegation would place them outside the class definition, such persons could bring individual claims against Equifax despite not having opted out. If the class were to prevail, in contrast, it would be just as easy for individuals to self-determine that they have less than $1,000 in actual damages and partake of the favorable class award or settlement.

Soutter proposed yet another way to define the class in her reply brief. J.A. 528–29. Equifax had argued that, given the variety of court-side procedures—*e.g.*, how different clerks' offices coded different dispositions, the timeliness of their data entry, and any typographical errors—inaccuracies in a consumer's report could be the result of *court* procedures or errors, and not the result of Equifax procedures. J.A. 322–23. Thus, deciding whether the court or Equifax was responsible for any given inaccuracy

was yet another individualized issue that would require investigation of facts specific to each class member's claim. *Id.*

In response, Soutter proposed yet another new class definition, this time including only those consumers who still had a judgment on their credit reports when, "more than 30 days earlier," that "judgment . . . had been satisfied, appealed, or vacated *in the court file*." J.A. 529 (emphasis in original). This revision, Soutter contended, would eliminate concerns about individual issues arising from varying court-side procedures for entering judgments (or from data entry mistakes). J.A. 528–29; J.A. 668. Equifax would be responsible for ensuring that its data mirrored the court data, but it would not be responsible for ensuring that the court data were themselves correct.

C. Oral Argument on the Class Certification Motion

At the argument on her class certification motion, Soutter and the district court struggled to define a class in such a way as to permit Soutter to litigate her novel theory of FCRA liability: As the court told Soutter, "giving me a dartboard to throw at doesn't help me much. I want to know what the class is now that you think ought to be certified." J.A. 624.

And the class definition evolved yet again. Soutter clarified at the argument that "in the court file" was short-hand for the files maintained electronically by the Supreme Court of Virginia. J.A. 668–69. So, whereas Soutter had originally planned to go to each of over 250 general district and circuit courts to obtain "file" data to determine

who was a member of the class, she could, instead, go to the Supreme Court for a master list of individuals with judgment dispositions. *Id.* Soutter ordered judgment disposition data from the Supreme Court and offered it to the district court to show the simplicity of her proposed approach. That effort backfired, however, when the data Soutter received did not contain Soutter's own name. J.A. 630–31.

Moreover, Soutter confirmed the novelty of her liability theory. When the district court observed that "there aren't any court decisions saying that what they [Equifax] are doing is wrong," Soutter's counsel agreed: "That's correct, that says this method, this particular procedure is wrong. That's correct, judge." J.A. 669. In response to Equifax's objection that there was no justification for a rush to class treatment for this novel claim, Soutter's counsel threatened to "flood[] the courts with individual cases" if a class remedy was not made available. J.A. 671.

D. The Grant of Class Certification and Equifax's Appeal

On March 30, 2011, the district court granted Soutter's motion for class certification. J.A. 676–716; J.A. 717–18. Equifax timely petitioned this Court for leave to appeal pursuant to Rule 23(f).

One of the grounds raised by the petition was the ascertainability problem created by the exclusion from the class of individuals with more than $1,000 in actual damages. *See* Pet. at 2, 7-10. While Equifax's petition was pending, Soutter sought to change the class definition yet again, in order to eliminate this exclusion. J.A. 732–34.

The district court obliged, amending the class definition to include all individuals meeting the definition's other criteria, without regard to whether they had sustained actual damages in excess of $1,000. J.A. 719–20. On June 1, 2011, after the parties notified this Court of the amended definition, the Court granted Equifax's petition.

STATEMENT OF THE FACTS

A. The Fair Credit Reporting Act

The FCRA ensures that Equifax, as one of the three major consumer reporting agencies, carries out its work using "reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer." 15 U.S.C. § 1681(b). To this end, Equifax must "follow reasonable procedures to assure maximum possible accuracy of the information" on its credit reports. *Id.* § 1681e(b). The FCRA provides a cause of action for an individual who demonstrates that the consumer reporting agency's failure to follow reasonable procedures to ensure accuracy caused her report to be inaccurate. *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 415–16 (4th Cir. 2001). A successful plaintiff who proves a willful violation of the FCRA will recover (i) either statutory damages of up to $1,000 or actual damages to the full extent of the individual's injury, (ii) reasonable attorney's fees, and (iii) punitive damages "as the court may allow." 15 U.S.C § 1681n(a)(1)–(3).

A consumer's report includes civil judgments entered against the consumer. J.A. 386; J.A. 389. As is standard industry practice, Equifax contracts with a public records vendor to capture this data from court systems across the country. J.A. 386. Since February 2007, Equifax has contracted with LexisNexis to obtain public records information from Virginia courts. *Id.* Under its contract with Equifax, LexisNexis must meet certain quality and performance standards and must fully comply with all laws and regulations relating to the contract. *Id.*

B. Soutter's Richmond General District Court Judgment

On June 22, 2007, in Richmond General District Court, the Virginia Credit Union filed a warrant in debt against Soutter for $15,000 she owed on her credit card. J.A. 423. Soutter and the credit union worked out a payment plan. J.A. 413. As a result of the credit union's error, however, the court did not receive word of the settlement, and it entered a default judgment against Soutter. J.A. 425–28. The credit union later moved "to set aside the judgment entered" against Soutter, and on March 20, 2008, the court ordered the judgment "set aside and dismissed without prejudice." J.A. 430. When the clerk's office recorded the disposition in its database, it labeled the case "dismissed" without noting (additionally) that the judgment against Soutter had been set aside. J.A. 431; J.A. 496.

Shortly after the court's March 20 order, Soutter sent Equifax a letter asking it to remove the judgment from her report. J.A. 395. At that time, however, the judgment

itself was not yet reporting on Soutter's file, so there was no action for Equifax to take. J.A. 393. On December 28, 2008, Equifax received another letter from Soutter requesting that the judgment be removed. J.A. 400. She claimed that she had "been denied credit because" the judgment was showing on her report. *Id.* Based on the information Soutter included in her letter (a copy of the Richmond General District Court order setting aside the judgment), Equifax promptly removed the judgment from her report. J.A. 393–94. Soutter alleges that six different third-party creditors received credit reports from Equifax before it removed this judgment. J.A. 446. She also claims that she (and others supposedly similarly situated) suffered "credit score damage" as a result of the alleged inaccuracy. J.A. 25.

C. How the Virginia Courts Report Judgments

There are over 250 circuit and general district courts in the Commonwealth. J.A. 669. There are 32 general districts, and each county and city has a general district court with limited jurisdiction over civil matters involving less than $25,000 in controversy.[1] The Commonwealth's 120 circuit courts are courts of general jurisdiction. Because, like most Virginia consumers with credit disputes, Soutter's claim involves a judgment issued by a general district court, J.A. 423, the litigation here has focused on general district court procedures.

[1] *See* Virginia Courts in Brief, http://www.courts.state.va.us/courts/cib.pdf (last visited August 28, 2011).

The clerk's office in each Virginia court processes the court's cases, records the judgment, and enters that judgment into the court's electronic database. J.A. 347. The Office of the Executive Secretary of the Supreme Court of Virginia oversees these electronic databases and runs a shared case management system for the Commonwealth's courts. *Id.* In principle, therefore, the Supreme Court's data mirror the data each local court enters into the system. J.A. 349. All general district courts and all but three circuit courts use this centralized "case management system" to record case data. J.A. 355.

The public may access case information through a search engine on the Supreme Court's website. J.A. 348. One hundred of the Commonwealth's 120 circuit courts have elected to make their data publicly searchable on the Supreme Court's site. *Id.* The search engine retrieves all important case data (without revealing private or internal court information), including the named parties and disposition type. J.A. 349; *see, e.g.*, J.A. 431–32.

The clerk of each local court uses codes to enter the disposition of each case into the system. For example, "A" is for "vacated" and "I" is for "dismissed." J.A. 376. If a clerk enters the judgment in error or otherwise captures some data point incorrectly, the case management system reflects that mistake. J.A. 349. The system reflects only the most recent disposition: If a judgment is set aside (or vacated) and then dismissed,

as in Soutter's case, it would appear today as an "I" case for "dismissed," not an "A" case for vacated. J.A. 353; J.A. 431–32.

D. How LexisNexis Retrieved Judgments During the Class Period

Less than 25% of civil judgments are ever paid or otherwise terminated in the Commonwealth, but LexisNexis has employed a variety of collection techniques to ensure that Equifax has accurate disposition data for those cases. J.A. 405. These procedures have varied significantly over time and by court. *Id.*

First, throughout the class period, LexisNexis used in-person review as the exclusive means for collecting judgment and disposition data from the Commonwealth's circuit courts. J.A. 411. LexisNexis employs independent contractors who travel throughout the Commonwealth to collect these records. J.A. 405, 407–08. They do so in a variety of ways: Some courts allow the collector access to a public computer terminal to search that court's records; some allow the collector access to a court employee's computer to search the court's records; some collectors review original paper records; some receive print-outs or summaries prepared by the clerk's office. J.A. 408–09. Clerks in certain jurisdictions prepare weekly spreadsheets with disposition data, while others accumulate a pile of records in a box in between a collector's visits. J.A. 409.

Second, during the class period, LexisNexis used a variety of means to obtain data from the Commonwealth's general district courts. The methods changed

significantly in May 2009. Until then, the Supreme Court of Virginia provided LexisNexis with regular bulk feeds of electronic case data, which included, among other things, information about the parties, judgment amount and date, and satisfactions, if any. J.A. 406. The data had "known gaps," however, for judgments that had been vacated, so to compile accurate data and perform quality control checks LexisNexis employed independent contractors to verify the data in person. J.A. 406–07. In May 2009, the Supreme Court stopped providing LexisNexis with bulk feeds. J.A. 406.

From then until December 2009, LexisNexis used a "webscrape" program to retrieve satisfactions, vacated judgments, and appeals directly from the Supreme Court's public website. J.A. 407. A "webscrape" is an automated program that conducts massive website searches with different search terms, captures the results, and organizes the search results in a standard, data-ready manner. *Id.* In December 2009, however, the Supreme Court modified its system to require the search user to input a series of displayed, distorted numbers before conducting a search—a common security feature to eliminate the use of automated programs like LexisNexis's webscrape. *Id.* As a result of the change, LexisNexis could no longer use the public search feature to obtain data directly from the Supreme Court's website. *Id.* With no access to electronic general district court data from December 2009 through the end of the class

period in February 2010, LexisNexis had to rely on the in-person collection methods described above to collect general district court judgment dispositions. J.A. 407–08.

E. Soutter's Plan to Obtain Data to Define the Class and Litigate the Class Members' Claims

One challenge in trying to pursue a class action was to identify potential class members in an efficient manner. At first, Soutter proposed to identify class members by conducting her own in-person record-collection process. J.A. 669. Subsequently, Soutter discovered that she could purchase data from the Supreme Court of Virginia that appeared to contain historical judgment and disposition records. *Id.*

In an effort to show the district court that it would be a simple matter to identify class members and to prove inaccuracy on a classwide basis, Soutter purchased certain judgment disposition data over a nine-year period, from 2001 to 2010. J.A. 478. This data included general district court dispositions only, not circuit court dispositions. J.A. 476. Soutter's counsel also asked for a report of only those judgments satisfied, appealed, or vacated. *Id.* Because Soutter's judgment, in contrast, had been recorded by the Richmond General District Court as "dismissed," the data from the Supreme Court did not identify Soutter herself among the potential class members. J.A. 496. Soutter claimed that this was a mere oversight on the part of counsel and that she could fashion broader search terms and obtain a complete data set. J.A. 498. No such complete data set has arrived. J.A. 690–91.

Even with an incomplete data set that did not include the proposed class representative herself, the effort to use the purchased data to identify class members proved painstaking. Soutter's counsel described the manual review process he conducted in order to cross-match just three zip codes' worth of data. J.A. 548–53. Counsel claims that he developed an "algorithm" to link up case numbers formulated differently in the two data sets and then hand-checked approximately 5,000 matches. J.A. 551–52.[2] For example, the algorithm would have to link case numbers that appeared in the Supreme Court data as "703GV0102421400" but could appear in Equifax's file as "01 024214," "24214," "1-24214," or "0102421400." J.A. 551. Because of discrepancies in case-number reporting, "a single judgment may sometimes appear in a consumer's credit file multiple times," a seeming error that had to be manually checked to assure accuracy. *Id.* According to Soutter, the district court will have to do the same cross-matching and hand-checking dozens of times over for the estimated 300,000 (or more) members of the class simply to determine who meets the class definition. J.A. 551–52. Even assuming, therefore, that it ultimately proves feasible to obtain and use a "master" data set from the Supreme Court, identifying class members will still require a laborious process.

[2] Soutter's counsel is neither a statistician nor an expert, was not disclosed as such, and submitted his declaration describing this cross-matching process with Soutter's reply brief well after the close of discovery and after Equifax had filed its opposition brief, thus depriving Equifax of the ability to test his theories.

Because the class is defined in reference to what appears "in the court file" and because Soutter plans to use data to be obtained from the Supreme Court to determine what was "in the court file," the notice will only go to those individuals whom she can identify from the Supreme Court and Equifax data. J.A. 667–68.[3] Thus, in a best-case scenario (which, as noted, has not been tested in any manner), determining who had a "judgment that had been satisfied, appealed, or vacated in the court file more than 30 days earlier" but that was "reported in Equifax's file as remaining unpaid"—*i.e.*, who is in the class—will require Soutter (and the district court) to fashion search terms to capture all the data corresponding to Soutter's class definition, obtain that data from the Supreme Court, run an algorithm to link the Supreme Court data with Equifax data for hard inquiries during the class period, and then rigorously hand-check all the results to ensure accurate cross-matching despite potential discrepancies. J.A. 719–20. If a mistake is made in that process, someone who falls within the class definition will not receive notice.

STANDARD OF REVIEW

A class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011). Courts, therefore, must engage in a "rigorous analysis"

[3] The class, presumably, will not include individuals whose credit reports accurately reflect the electronic case file information to be obtained from the Supreme Court, even if that information is inaccurate.

before certifying a class. *Id.* at 2551. "[I]n case after case," this Court has stressed that "it is *not the defendant* who bears the burden of showing that the proposed class *does not comply* with Rule 23, but that it *is the plaintiff* who bears the burden of showing that the class *does comply* with Rule 23." *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 321 (4th Cir. 2006) (emphasis in original). Although the Court reviews a certification order for abuse of discretion, *id.* at 317–18, a district court abuses its discretion when it misapplies the law. *Koon v. United States*, 518 U.S. 81, 100 (1996). In addition, a district court's "failure to evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative" is reversible error. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982).

SUMMARY OF THE ARGUMENT

The district court certified an ill-defined class riddled with problems. The court failed to engage in the rigorous analysis demanded by this Court and the Supreme Court and instead accepted Soutter's representations at face value and shifted the burden to Equifax to show why the case could not proceed as a class action. As the Supreme Court's recent decision in *Wal-Mart*, 131 S. Ct. at 2550, makes clear, that is not a remotely acceptable way to proceed in taking the momentous step of certifying a class action. It is not the district court's job to make the case "work" as a class action; nor is it the defendant's burden to show why a class action will not work and why the default method of adjudicating disputes—an individual action—is superior.

Wal-Mart also makes clear what should have been evident to the district court before *Wal-Mart*—namely, that this case involves far too many individual issues and far too few truly common issues to conclude that the latter predominate over the former. As *Wal-Mart* clarified, it is not enough to have common questions (*e.g.*, were there inaccuracies in class members' credit reports). To justify class treatment, the "common 'questions'" must "generate common *answers*" such that by showing that one class member had an inaccurate report, the court could necessarily conclude that all other class members' reports were inaccurate for the same reason. *Id.* at 2551 (emphasis added). This case does not involve common questions with common answers, and any such issues certainly do not predominate over individual ones.

The sole claim asserted in the complaint is under 15 U.S.C. § 1681e(b). To prevail on that claim, each consumer must show, at a minimum, that (1) her credit report was inaccurate, and (2) Equifax caused that inaccuracy by using procedures to collect judgment dispositions that were willfully unreasonable. Neither issue will generate common answers. The first will require the court to sift through hundreds of thousands of individual credit reports, cross-matched against the court file information, to determine whether each credit report was inaccurate. There are no shortcuts possible to determine inaccuracy; whether one individual's report was accurate, or inaccurate, says nothing about whether some other individual's report was accurate.

The second issue will require the court to evaluate the particular collection procedures in place at the relevant time and in the relevant court and location and the surrounding circumstances bearing on their reasonableness, negligent unreasonableness, or willful unreasonableness. Those procedures and circumstances varied significantly across the two-year span of time and the 250 courts covered by the class definition. There are multiple different reasons a report could be inaccurate, and the particular reason in turn could inform the reasonableness of the procedures used.

For similar reasons, Soutter is neither adequate nor typical of the class she seeks to represent. Resolving her claim will not provide a common answer to the claims of class members that relate to different retrieval procedures used in different courts and locations at different times under different circumstances. Most obviously, Soutter's claim does not in any way implicate the reasonableness of Equifax's response to (1) the Supreme Court's elimination of the bulk feed in May 2009 or (2) the technological change that prevented LexisNexis's "webscrape" from being effective after December 2009. That demonstrates not only that Soutter is an atypical and inadequate representative, but that no one individual could represent this sprawling class that implicates the reasonableness of procedures across hundreds of courts during materially different time periods.

By certifying this massive class, the district court exponentially aggregated statutory damages (300,000 or more times $1,000), threatening Equifax with

devastating liability. That creates enormous pressure to settle without regard to the actual merit of the claims. The claims included in this class are both novel and disparate. As the district court and Soutter have acknowledged, no court has ever held that the "particular procedure[s]" of which Soutter complains here "[are] wrong," much less that they willfully violate the FCRA. J.A. 669. Litigation of individual claims may reveal that they lack merit or confirm that the claims involve the litigation of too many individual issues to permit efficient class treatment. But premature class certification creates such enormous settlement pressure that the underlying novel theory may never be tested.

Proceeding in that manner—certify first, then force a settlement that obscures whether the claims had merit or were appropriate for class treatment—is not the superior method of adjudication, especially where individual litigation is a realistic option. The FCRA facilitates such individual suits by providing for statutory damages, punitive damages, and attorney's fees where, as here, the plaintiff alleges willful violations. Soutter herself stands as proof that individual suits are a realistic option, having brought and settled her own individual claim against a different consumer reporting agency. There is nothing "superior" about allowing this novel case to proceed as a sprawling and ill-conceived class action.

ARGUMENT

I. THE DISTRICT COURT FAILED TO APPLY THE RIGOROUS CLASS CERTIFICATION ANALYSIS THAT RULE 23 REQUIRES.

A plaintiff who seeks class certification carries a heavy burden. Soutter did not carry that weight here, nor did the district court require her to do so. Instead of engaging in the "rigorous analysis" that Rule 23 requires, *see Wal-Mart*, 131 S. Ct. at 2551, with the burden squarely on the proponent of class treatment, the district court accepted Soutter's allegations and arguments at face value and took her counsel's word for it that he could eventually come up with a workable and effective way to identify the class members and litigate this case on a classwide basis. *See, e.g.*, J.A. 690–91. The district court seemed to think it had an obligation to make this case "work" as a class action and that Equifax had the burden of showing why it could not work. This gets matters backwards. Class treatment is the exception and individual litigation is the norm.

"A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart*, 131 S. Ct. at 2551 (emphasis in original). Soutter thus was required to affirmatively prove her ability to satisfy each element of Rule 23(a)—"numerosity of parties, commonality of factual or legal issues, typicality of claims and defenses of class representatives, and

adequacy of representation"—and one of the three subparts of Rule 23(b) before the district court could certify a class. *Thorn*, 445 F.3d at 318.

To evaluate a motion for class certification, it is often "necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Falcon*, 457 U.S. at 160. The court may not "simply . . . accept the allegations of a complaint at face value." *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 365 (4th Cir. 2004). "[A]ctual, not presumed, conformance with" Rule 23 is "indispensable." *Falcon*, 457 U.S. at 160. And, "[f]requently," this "'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart*, 131 S. Ct. at 2551. Class certification is "an especially serious decision" with enormous consequences. *In re Constar Int'l Inc. Sec. Litig.*, 585 F.3d 774, 780 (3d Cir. 2009); *see also In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1295 (7th Cir. 1995). Thus, questions that go to the heart of whether a case can proceed as a class action cannot be deferred until after certification. *Gariety*, 368 F.3d at 365–66.

The district court's analysis was anything but "rigorous." Numerous times it impermissibly shifted the burden to Equifax to *disprove* Soutter's entitlement to proceed on a classwide basis. *See, e.g.*, J.A. 698 ("Equifax offered no evidence to support this contention."); J.A. 702 ("Equifax has offered no proof"); J.A. 711 ("Equifax has made only general assertions").

In particular, the court simply accepted Soutter's counsel's representations that he could and would secure data at some future time that would permit the parties and the court to determine who was in the class. *See* J.A. 690–91. Soutter asserted that, at the certification stage, she needed only to show that data were available, and did not need to obtain the data and show that her proposal worked as she hoped. *See* J.A. 631 ("all we needed to show for the purpose of the first phase of this case is that it can be done"). That certify-first, answer-difficult-questions-later approach would not suffice even in a case where earlier efforts had not failed miserably. But Soutter's misadventure with her first attempt to purchase data to identify the proposed class members vividly demonstrated the gap between her hopes and reality. Where the ability to identify and provide notice to class members is in serious doubt, there is no substitute for showing that the plaintiff's plan will actually work.

The time for requiring Soutter to provide such data thus was before class certification, not after. The district court could no more accept the representations of counsel than it could "simply . . . accept the allegations of a complaint at face value." *Gariety*, 368 F.3d at 365. This Court has repeatedly warned that the "record must affirmatively reveal that resolution of the [claim] on its merits may be accomplished on a class-wide basis," *Thorn*, 445 F.3d at 321, and that courts should not certify "merely on the assurance of counsel that some solution will be found." *Windham v. Am. Brands*, 565 F.2d 59, 70 (4th Cir. 1977) (en banc). Indeed, if the court "defer[s]" to the

plaintiff's assertions, it "default[s] on the important responsibility conferred on the courts by Rule 23 [to] carefully determin[e] the class action issues and supervis[e] the conduct of any class action certified." *Gariety*, 368 F.3d at 367.

Nothing demonstrates the court's lax approach to certification better than the blatant ascertainability error described above in the class definition the court originally adopted. *See supra* at 5–6; J.A. 717–18. Although the court later attempted to fix this mistake, the error itself typifies the lack of rigor in the court's approach. The gaffe was of Soutter's own making, but the district court embraced the error without scrutiny and over Equifax's objection. *See* J.A. 739. The error was no surprise, for the class definition has been a moving target throughout the litigation: from the first complaint, to the amended complaint, to the interrogatory response, to the motion for certification, to the reply in support of the motion, to Soutter's various suggestions at the oral argument, to the district court's certification order, to the amendment of that order. *See supra* at 3–7. The ever-shifting nature of the definition underscores that neither counsel nor the district court ever had a clear idea of whom Soutter seeks to represent or how Soutter will determine who is in this class, let alone how the case would actually be litigated as a class action.

Nor is it clear that the post-certification amendment of the class definition really fixed the problem or that it did not create new problems. The ascertainability of class membership in any kind of practical or meaningful way is the precise question the

district court kicked down the road by accepting counsel's representations about data sets that would make the identification of class members straightforward. As things stand, it is unclear whether a practical method of determining class membership will emerge or whether the parties will have to resort to reviewing paper records in over 250 courts across the Commonwealth. The one thing that seems clear is that even if Soutter's hoped-for data sets materialize and work as hoped—*i.e.*, in the best-case scenario from Soutter's and the district court's perspective—class members will be able to be identified only through an elaborate and difficult process of manual cross-checking. Presumably, if a mistake is made in that process an individual could technically be within the class definition but not receive notice. But even if the ascertainability problem is eventually solved, the court's post-certification amendment creates problems of its own. Individuals with substantial claims for actual damages who are now in the class raise distinct predominance and adequacy issues, *see infra* at 44–46; yet, because those individuals were only added to the class several weeks after the court had granted certification (indeed, while Equifax's petition to appeal was pending in this Court), the district court never addressed those issues at all, let alone subjected them to the required "rigorous analysis."

The district court's failure to engage in the required rigorous analysis infected all aspects of its certification order. The court certified an ill-defined and sprawling class on a novel issue of law, and did so even without requiring Soutter to show that she

could identify class members. The required rigorous analysis would also have revealed that Soutter cannot demonstrate that common issues predominate and cannot adequately represent the class she persuaded the court to certify.

II. INDIVIDUAL ISSUES PREDOMINATE OVER COMMON ISSUES.

At the heart of this appeal lies a massive predominance problem: Determining whether Equifax is liable for willfully failing to use reasonable procedures to report judgment dispositions raises substantial and pervasive individual questions that generate no common answers.

A. Soutter Had to Demonstrate that this Case Would Generate Common Answers to Common Questions that Predominate over Individual Issues.

Under Rule 23(b)(3), "questions of law or fact common to the members of the class" must "predominate over any questions affecting only individual members." *See also Thorn*, 445 F.3d at 319. In *Wal-Mart*, the Supreme Court clarified and fortified the basic commonality inquiry under Rule 23(a)(2) on which the predominance inquiry rests. Both requirements share the same root: the presence of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). To satisfy commonality under Rule 23(a)(2), a plaintiff need identify only a single common question; to satisfy the predominance standard of Rule 23(b)(3), however, that common question (or questions) must "predominate" over individual ones. *Compare* Fed. R. Civ. P. 23(a)(2) *with* Fed. R. Civ. P. 23(b)(3); *see Wal-Mart*, 131 S. Ct. at 2551; *id.* at 2556 ("We consider

dissimilarities not in order to determine (as Rule 23(b)(3) requires) whether common questions predominate, but in order to determine (as Rule 23(a)(2) requires) whether there is '[e]ven a single [common] question.'").

Under either rubric, *Wal-Mart* clarified that raising a common "question" is not enough. The central concern for class certification "is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id.* at 2551. To satisfy commonality, then, a class action must generate at least one "common *answer[]*" to a common "question," and to satisfy predominance, the common answers the class action generates must also predominate over individual issues. This case perfectly illustrates the difference between common questions and common answers.

B. This Case Will Generate No Common Answers to "Common" Questions, Much Less Ones that Predominate.

The district court identified five purportedly "common" issues of law or fact in this case:

> "1. Were Equifax's procedures for reporting Virginia civil judgments and judgment dispositions unreasonable?
>
> 2. Did these procedures violate § 1681e(b)?
>
> 3. Were credit reports that omitted the current status of a terminated judgment [*i.e.*, a judgment disposition] inaccurate?

4. Were Equifax's FCRA violations willful?

5. If Equifax's FCRA violations were willful, what is the proper damage measure per violation?"

J.A. 694. Whether or not these can be described as common "questions," the dispositive point is that none has the "capacity . . . to generate common answers apt to drive the resolution of the litigation." *Wal-Mart*, 131 S. Ct. at 2551. Identifying the class (which requires proof of inaccuracy), establishing Equifax's liability, and setting the proper award of statutory damages all involve considerations specific to each individual class member. None of the common "questions" the district court identified is capable of generating even a single common "answer," much less common answers that predominate.

1. Accuracy is an Individual Issue.

To *answer* the "common" questions the district court identified, the court will have to start by reviewing "literally [hundreds of thousands] of [credit reports] at once" and cross-matching those reports against data from the Supreme Court of Virginia to determine whether these reports are inaccurate. *Id.* at 2552. This is inherently and inescapably an individual issue: There is no way to determine whether a given individual's report was accurate without examining that individual's report and that individual's court file. *See Owner-Operator Indep. Drivers Ass'n, Inc. v. USIS Commercial Svcs., Inc.*, 537 F.3d 1184, 1194 (10th Cir. 2008) (affirming denial of class

certification in § 1681e(b) case, where district court had reasoned that "the accuracy of each individual's [report], an essential element of a § 1681e(b) claim, required a particularized inquiry"). Finding an error in one individual's report will not allow the court to answer the question of accuracy for anyone else. It will do nothing "to drive the resolution of the litigation," *Wal-Mart*, 131 S. Ct. at 2551; it will merely resolve one individual issue for one person, leaving multiple remaining individual issues even for that person, not to mention 299,999 or more additional persons.

Although the district court recognized that it would be a "not insubstantial" undertaking to identify potential class members, even this concession was an understatement. J.A. 698. The data the court expected to use do not yet exist, and what experience the court did have with the far more limited data Soutter obtained is not encouraging. *See supra* at 15–17. But the court's analysis in any event missed the point: Even if the task were simple, it would still be an individual task. The court will have to consider 300,000 or more individuals' credit reports and corresponding court records to determine inaccuracy on an individual-by-individual basis. The unavoidable need to evaluate the record for each potential class member makes it impossible for common issues to predominate over individual ones: "Evaluating the merits of individual cases is not a *common* manner of resolving them." *Thorn*, 445 F.3d at 323 n.13 (emphasis added).

The district court failed to understand the individualized nature of the inaccuracy question before it because the court viewed this case as a close cousin of the FCRA class this Court approved in *Stillmock v. Weis Markets, Inc.*, 385 Fed. App'x 267 (4th Cir. 2010). J.A. 712–13. But this case is nothing like *Stillmock*. There was only one "question" in that case, and it *could* generate a common answer for all class members: whether the defendant's "repeated identical conduct" (printing receipts showing the consumer's entire credit card number in violation of the FCRA) was willful. *Stillmock*, 385 Fed. App'x at 273. Because *Stillmock* was not brought under § 1681e(b), there was no need for an individual-by-individual determination of accuracy; indeed, there was no need for any individualized determination of any issue relevant to liability because liability was conceded and was based on uniform conduct. *Id.* at 273–74. Each consumer had been exposed to an "identical risk" as a result of uniform conduct. *Id.* at 273. The court could answer the question of willfulness once, on a classwide basis, because each class member had experienced the same violation based on the same conduct under the same circumstances. Under these unusual circumstances, this Court not surprisingly viewed it as a relatively simple process to resolve the FCRA claims on a classwide basis. *See id.* at 272–75. But the FCRA claims at issue here are entirely different. Hundreds of thousands of individual inaccuracy determinations cannot be equated with a single, unitary willfulness determination.

2. The "Reasonableness" of Equifax's Procedures is an Individual Issue.

Even after the district court engages in the arduous and inherently individualized inquiry necessary to determine inaccuracy, it will have to engage in another fact-intensive, individualized inquiry to determine whether Equifax is liable for a given inaccuracy. That inquiry turns on whether the judgment-disposition retrieval procedures that Equifax had in place at the relevant time and for the relevant court were reasonable vis-à-vis a particular inaccuracy. Because those procedures, and the circumstances surrounding their use, varied widely on numerous dimensions, the reasonableness determination cannot be made on a classwide basis. *See Harper v. TransUnion, LLC*, No. 04-3510, 2006 WL 3762035, at *8 (E.D. Pa. Dec. 20, 2006) (holding that each element of § 1681e(b) claim, including the reasonableness of defendant's procedures, "will require highly individualized proofs as to the injuries suffered by the putative class members"). Moreover, even for a particular court during a particular time, procedures deemed unreasonable in failing to identify one type of inaccuracy might be reasonable as to a different inaccuracy.

To decide whether an inaccuracy in a given individual's report was caused by Equifax's failure to follow "reasonable procedures," the court must examine the procedures and circumstances applicable to that inaccuracy. Those procedures and circumstances varied widely during the class period, across multiple dimensions: between the two types of courts at issue (circuit versus general district), over the two-

year timeframe, among the dozens of cities and counties throughout the Commonwealth, and against a backdrop of varying access to court-file data thanks to changes in the Supreme Court's own procedures. There is nothing "common" about the reasonableness of the various procedures used under differing circumstances:

- Throughout the class period, LexisNexis used in-person review to collect disposition data for circuit court proceedings. J.A. 411. LexisNexis employs independent contractors who retrieve documents in a variety of ways, depending on how each clerk's office handles their request. J.A. 408–09; *see supra* at 13.

- During the class period, LexisNexis used at least three different means to obtain general district court data:

    - Until May 2009, the Supreme Court provided regular bulk feeds of electronic case data, which included, among other things, information about the parties, judgment amount and date, and satisfactions, if any. J.A. 406. During this time, to compile accurate data, LexisNexis also employed independent contractors to verify the electronic data in person at courthouses across the Commonwealth. J.A. 406–07.

    - When the Supreme Court discontinued the bulk feeds in May 2009, J.A. 406, LexisNexis used a "webscrape" program to retrieve satisfactions, vacated judgments, and appeals directly from the Supreme Court's public website. J.A. 407.

    - In December 2009, the Supreme Court cut off website access to "webscrape" programs like LexisNexis's and, through the end of the class period, LexisNexis had to use in-person collection means to acquire judgment disposition data from general district courts. J.A. 407–08.

- LexisNexis's in-person collection methods varied widely by jurisdiction type and size: For example, per its contract with Equifax, LexisNexis collected records every 14 days from larger jurisdictions, such as the Richmond, Prince William, and Fairfax General District Courts; every 31 days from other jurisdictions, such as the Alexandria and Arlington General District Courts; and

every year from jurisdictions with much lower volumes of judgments and dispositions. J.A. 386–87.[4]

To resolve the supposedly "common" question of liability, then, the trier of fact will have to decide, at a minimum, (1) which of these procedures was used when the particular inaccuracy appeared, and (2) whether that procedure was reasonable vis-à-vis a particular inaccuracy, given any number of variables, including how easy it was to obtain disposition information at that time and from that court. Determining whether one procedure was reasonable under the circumstances will not resolve whether other procedures were reasonable or even whether that same procedure was reasonable under different circumstances. To the contrary, "reasonableness" is quintessentially a fact-specific, individualized inquiry. "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931); *see also, e.g.*, *Ohio v. Robinette*, 519 U.S. 33, 39 (1996).

Accordingly, when the question of liability turns on the reasonableness of the defendant's conduct in circumstances that differ across a class, courts routinely deny

[4] Equifax presented this information to the district court in great detail, both in a lengthy declaration from LexisNexis, J.A. 404–11, and in nearly five pages in its opposition to Soutter's class certification motion, J.A. 306–10. The district court nonetheless concluded that "Equifax has made only general assertions about unspecified differences in the LexisNexis procedure" and that "the failure to be specific has to be resolved against Equifax, and not against Soutter." J.A. 711. Apart from demonstrating the court's improper shifting of the burden to *dis*prove class certification to Equifax, *see supra* at 23, this conclusion simply ignores the record.

class certification on predominance grounds. *See, e.g.*, *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 742 (5th Cir. 2003) (denying class certification in Real Estate Settlement Procedures Act case when court would have to assess "reasonableness on a transaction-by-transaction basis"); *Harper v. Sheriff of Cook Cnty.*, 581 F.3d 511, 515 n.4 (7th Cir. 2009) (denying class certification in civil rights case when "reasonableness . . . remain[ed] an individual issue to be determined according to" individual circumstances). The 250 different courts and materially different timeframes lumped together in the class here make the absence of a common answer to the question of reasonableness manifest.

Moreover, the class definition implicitly imposes a "reasonableness" bright-line rule by defining the class to include those individuals who had judgments reporting more than 30 days after the disposition of that judgment appeared in the court file. J.A. 719–20. In other words, the definition appears to presume that Equifax was required to retrieve every disposition from every court within 30 days. Not only is such a bright-line rule fundamentally at odds with the fact-specific, individualized nature of a reasonableness inquiry, but it also exacerbates the need for individual determinations. The class may contain individuals whose judgment dispositions were collected at substantially different intervals: For example, Equifax may have removed one class member's judgment at 34 days, while another's may still have been reporting far longer after its disposition. Whether it was reasonable to take 34 days to retrieve a disposition

is a very different question from whether it was reasonable to take (say) a year. Yet the one-size-fits-all class definition broadly sweeps together claims involving significantly different intervals, adding yet another individualized issue to the determination of whether a given Equifax report violated the FCRA.

3. The Question of Willfulness is Individualized.

To make the issue of liability even less common, Soutter seeks statutory damages for the class, an issue requiring proof that Equifax was *willful* in its alleged failure to "follow reasonable procedures to assure maximum possible accuracy." 15 U.S.C. § 1681e(b); *id.* § 1681n(a). Soutter will thus have to show, for every class member, that whichever procedure Equifax used at the time and place relevant to an individual inaccuracy was so clearly unreasonable vis-à-vis the particular inaccuracy that Equifax acted knowingly or recklessly in failing to meet its obligations under the FCRA. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57, 68 (2007).

Because reasonableness itself depends on the varying circumstances described above, willful unreasonableness will vary *a fortiori*. Any given inaccuracy could be due to Equifax procedures that were imperfect but reasonable, or to procedures that were unreasonable but not willfully so. *See, e.g.*, *Stevenson v. TRW Inc.*, 987 F.2d 288, 294 (5th Cir. 1993) (finding defendant "negligent in its compliance with the [FCRA's] prompt deletion requirement" but not willfully unreasonable); *Casella v. Equifax Credit Info. Servs.*, 56 F.3d 469, 476 (2d Cir. 1995) (same). Whether the procedures that

caused a given inaccuracy were willfully unreasonable thus cannot be determined without considering the circumstances surrounding the use of those procedures, and, as shown above, those circumstances varied across multiple dimensions during the class period.[5]

The novelty and weakness of Soutter's claim exacerbate this problem. With no case law addressing whether Equifax's procedures for reporting judgment dispositions are reasonable, it is all the more likely that any unreasonableness would be found *not* willful. This is commonly the case when there is little case law clarifying how a generally-stated standard applies in particular circumstances. *Cf. Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (only in "an obvious case" can Fourth Amendment's generalized reasonableness standard provide sufficient notice to define "clearly established law" for purposes of qualified immunity). A "reading of the [FCRA]" that is "mistaken," or even "careless," will not be a willful violation when the legal requirement is not "define[d]" with particularity and when interpreting authority does not exist. *Murray v. New Cingular Wireless Servs., Inc.*, 523 F.3d 719, 724–26 (7th Cir. 2008); *see also Levine v. World Financial Network Nat'l Bank*, 554 F.3d 1314,

[5] Some inaccuracies could have been caused by misinterpretations of ambiguous notations in the court file, rather than a failure to retrieve the court file within Soutter's 30-day time limit. The possibility of third-party involvement is an additional reason why a given inaccuracy may not be attributable to willfully unreasonable procedures on Equifax's part, as well as an additional individualized issue.

1318 (11th Cir. 2009).[6] For all these reasons, there will be no "common answer to the crucial question why" a given inaccuracy occurred. *Wal-Mart*, 131 S. Ct. at 2552.

4. The Amount of Statutory Damages is an Individual Issue.

Finally, the amount of statutory damages that a given class member should receive is also an individual issue. This measure too will vary by class member based on class-member-specific considerations, within the statutory range of $100 to $1,000. 15 U.S.C. § 1681n(a)(1)(A). These damages are awarded "per consumer," and not "per violation." *See Stillmock*, 385 Fed. App'x at 273. This scheme "places the focus on the characteristics of individual class members, rather than on the defendant's conduct that is common to the entire class." *Id.* at 277 (Wilkinson, J., concurring). Only when the conduct at issue is identical and the class members were exposed to identical risk will assessing this measure of statutory damages be a relatively rote exercise—*e.g.*, in *Stillmock*, determining only "the number of receipts received by a single class member." *Id.* at 273. But here, neither the alleged violations nor the type of conduct at issue is uniform across the class. Thus, setting a statutory damages amount is more

[6] Soutter's individual claim for willful FCRA violations is exceptionally weak. First, her claim for relief is based, admittedly, on a novel theory of reasonable judgment-disposition retrieval practices. J.A. 669. Accordingly, it will be difficult for her to prove that Equifax acted willfully when no judicial decisions provided notice of what procedures would be reasonable under what circumstances. Moreover, Equifax acted quickly and reasonably to respond to Soutter's claim that her report was inaccurate. When she first contacted Equifax (in May 2008), she learned that the judgment was not even reporting yet, and following her second contact (in December 2008) Equifax immediately removed the judgment from her file. J.A. 393–94.

complicated, and a more meaningfully individual issue, because it must take into account each consumer's unique circumstances. *See Campos v. ChoicePoint, Inc.*, 237 F.R.D. 478, 486 n.20 (N.D. Ga. 2006) (individual issues precluding class certification included "the determination of the proper amount of statutory damages to impose for each violation").

The simple math calculation that sufficed in *Stillmock*—the number of receipts each consumer received, 385 Fed. App'x at 272–75—will not suffice here, where other variables come into play, including the possibility that some, but not other, class members suffered actual credit score damage as alleged in the operative complaint. Indeed, it is unclear that the number of alleged violations is the sole, or even a, proper basis to calculate damages within the statutory range in a case like this where any violations may not all be equally culpable or harmful.

In *Stillmock*, the Court recognized that calculating statutory damages per consumer will always be an *individual* issue by its nature. *Id.* at 272–73; *id.* at 277 (Wilkinson, J., concurring) ("because statutory damages are intended to address harms that are small or difficult to quantify, evidence about particular class members is highly relevant to a jury charged with this task"). In the typical case, therefore, "businesses deserve at least the opportunity to argue that certain individuals should receive statutory damages at the low end of the range." *Id.* at 277 (Wilkinson, J., concurring). But in *Stillmock*, the existence of this one individual issue did not prevent common issues

from predominating, because there were no other individual issues and the only significant disputed issue was common (whether the defendant's uniform violative conduct was willful). The district court here relied on *Stillmock* for far too much, given how closely tied the class certification there was to the unique circumstances of the conceded FCRA violation at issue. *See* J.A. 712–13. Here, where there are a raft of disputed, significant individual issues, the need for individual assessment of statutory damages tips the balance even farther away from a finding that common issues predominate.

In sum, there is nothing uniform or consistent across the class: to determine inaccuracy, the court must perform an individual assessment of each potential class member's report and history; to determine the reasonableness of Equifax's procedures relative to a given inaccuracy, the court must assess multiple varying procedures used under varying circumstances; to determine whether any unreasonableness was willful, the court must consider Equifax's knowledge and intent under these varying circumstances; and to determine the amount of statutory damages, the court must consider the circumstances of each consumer. None of these questions will generate common answers across the class, much less ones that predominate over individual issues.

III. THE NAMED PLAINTIFF IS NOT TYPICAL AND DOES NOT ADEQUATELY REPRESENT THE CLASS.

The predominance of individual issues infects all aspects of the district court's certification order. Because of the individual nature of the claims here, there is a huge gulf between the class representative and the sweeping class she seeks to represent. *See Deiter v. Microsoft Corp.*, 436 F.3d 461, 468 (4th Cir. 2006) (affirming denial of certification given the "substantial gap between what [representative] plaintiffs proved for their individual cases and what would be required proof for the [other] customer[s]"). Soutter's claim turns entirely on the timing and circumstances of her own alleged inaccuracy and the particular Equifax procedures in place at that time and in her particular jurisdiction—*i.e.*, the procedures used in 2008 to retrieve Richmond General District Court judgment dispositions. The court may not extrapolate from Soutter's claim on a classwide basis because each class member's claim depends, just as Soutter's does, on the particular facts and circumstances of her own judgment history and credit report.

"The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997). Similarly, the typicality requirement ensures that a class representative "possess[es] the same interest and suffer[s] the same injury as the class members." *Falcon*, 457 U.S. at 156. These inquiries both "tend to merge" with commonality because they similarly "serve as guideposts for determining whether

under the particular circumstances 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." *Wal-Mart*, 131 S. Ct. at 2551 n.5 (quoting *Falcon*, 457 U.S. at 157–58 n.13). In other words, "plaintiff's claim cannot be so different from the claims of absent class members that their claims will not be advanced by plaintiff's proof of [her] own individual claim." *Deiter*, 436 F.3d at 466-67.

Any "rigorous analysis" of these factors would have revealed that Soutter is neither adequate nor typical. *Gariety*, 368 F.3d at 359. The district court concluded otherwise only by watering down Soutter's burden to demonstrate typicality and adequacy and by assessing these requirements at "an unacceptably general level." *Deiter*, 436 F.3d at 467. A class representative cannot survive the rigorous analysis required by Rule 23(a) merely by asserting that she and the class members experienced the same statutory violation at the hands of the same defendant. *Cf. Wal-Mart*, 131 S. Ct. at 2551 (Rule 23(a)'s commonality requirement was not satisfied by asserting that class members "all suffered a violation of the same provision of law"). Instead, the class representative must show that there are no "meaningful differences" between her claims and those of the class, *Deiter*, 436 F.3d at 467, and that they are "so interrelated" as to be one in the same. *Wal-Mart*, 131 S. Ct. at 2551 n.5. In essence, "as goes the

claim of the named plaintiff, so go the claims of the class." *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998).

Soutter's claim and the claims of the class members are not remotely "interrelated" enough to meet this standard. As explained above, *see supra* at 29–34, the claims vary widely based on the facts and circumstances of each class member's credit report and the facts and circumstances surrounding collection of the judgment information that appears there. Thus, adjudicating Soutter's claim will not advance other class members' claims, because doing so will not resolve Equifax's liability in circumstances Soutter does not share in common with other class members, who had judgments disposed of in different courts, at different times, subject to different court-file access policies, and related to the use of different retrieval procedures under different circumstances bearing on their reasonableness. For example, Soutter's 2008 claim is not typical, and does nothing to advance the claim, of a class member whose principal complaint concerns the reasonableness of Equifax's procedures after the discontinuation of the Supreme Court data feed in May 2009, or another class member whose report was inaccurate after technological changes rendered the "webscrape" ineffective in December 2009.

The district court permitted Soutter to strategically broaden the class to sweep in the claims of hundreds of thousands of others, arising out of circumstances she does not share. That process created a much bigger class and exerted much greater settlement

pressure, but it also rendered Soutter wholly atypical of the vast majority of the class members she purports to represent. Soutter may not pursue claims based on circumstances she does not share with the class, and this Court has emphasized that a named plaintiff cannot circumvent the representation problem posed by variance within a class by constructing a "perfect plaintiff" out of bits and pieces of disparate members and "strik[ing] [the defendant] with selective allegations." *Broussard*, 155 F.3d at 345. That cannot help but occur here. Soutter cannot prosecute classwide claims without assailing actions in 2009 that have nothing to do with her individual case.

Moreover, Soutter claims that she does not seek actual damages, even though she testified at deposition that she had "actual, cognizable damages." J.A. 420**.** As Soutter's testimony indicates—especially if she is, as she claims, an adequate and typical representative of the class—the class will include individuals with actual damage claims, who will have interests quite different from her own. J.A. 719–20; J.A. 627–36. "[B]asic due process requires" that Soutter "possess undivided loyalties to absent class members" to be an adequate class representative, and "conflict in remedial interests" renders representation inadequate under Rule 23(a)(4). *Broussard*, 155 F.3d at 335, 339. But she cannot avoid a conflict here. Proof of actual damages would be inherently individualized, which is presumably why Soutter sought to gerrymander individuals with claims for actual damages in excess of $1,000 out of the class and to limit each class member's recovery to statutory damages only. *See supra* at 5–6.

Indeed, the district court acknowledged as much when it sought to distinguish the on-point *Harper* case on the ground that, there, because some class members had actual damages claims, individualized issues would predominate, whereas here Soutter sought to represent individuals with only statutory damages claims. J.A. 709 (stating that "the individualized inquiries into actual damages and harm suffered that the district court worried about in *Harper* [are] inapposite") (citing *Harper*, 2006 WL 3762035, at **8-9). Soutter and the district court belatedly recognized, however, that this definitional exclusion created a serious ascertainability problem, and the definition was amended post-certification to trade that ascertainability problem for the predominance problem Soutter was trying to avoid. Now that individuals with actual damage claims are in the class, Soutter's inability to represent them adds an adequacy and typicality problem to the list.

Soutter contends that this adequacy and typicality problem does not matter because class members with actual damages can opt out. J.A. 229. If a named plaintiff is typical and adequate only on the assumption that those within the class she purports to represent as to whom she is atypical and inadequate will opt out, then the plaintiff is not typical or adequate. Class certification precedes the opt-out process, and the named plaintiff must be adequate and typical even on the assumption that no class member will opt out. *See Colindreas v. QuietFlex*, 235 F.R.D. 347, 376 (S.D. Tex. 2006) ("Providing class members notice and opt-out opportunity may alert class members that

they can pursue individual damages claims, but are not a substitute for the adequate, conflict-free representation required under Rule 23(a)(4).").[7] If an inadequate and atypical named plaintiff is permitted to represent a class on the assumption that members whose interests she cannot (or refuses to) represent will opt out, then "any person would be an adequate representative of a proposed class so long as there was an opt-out procedure, and there would be no need for an adequacy requirement." *Gardner v. Equifax Info. Servs., LLC*, No. 06-3102, 2007 WL 2261688, at *6 (D. Minn. Aug. 6, 2007). Soutter's need to rely on class members with claims for actual damages to opt out underscores that she is neither a typical nor adequate representative of the class she convinced the district court to certify.

IV. A CLASS ACTION IS NOT THE SUPERIOR MECHANISM FOR ADJUDICATING THIS NOVEL CLAIM.

A. Adjudicating this Case as a Class Action Threatens Equifax with Devastating, Disproportionate Liability.

Soutter presses a novel claim that raises a myriad of factual and legal issues that, by her own admission, no court has ever resolved. No individual litigation concerning judgment-disposition retrieval procedures has ever demonstrated that common issues recur such that a claim like Soutter's could be efficiently litigated through a class action.

[7] *See also Small v. Lorillard Tobacco Co.,* 679 N.Y.S.2d 593, 601-02 (N.Y. App. Div. 1998) ("The ability to opt out of the class is insufficient to protect the rights of putative class members who would want to seek remedies other than those chosen by the [class] representatives."); Wolff, *Preclusion in Class Action Litigation*, 105 Colum. L. Rev. 717, 786 (2005) (same).

She seeks class treatment for her novel claims while seeking statutory damages, plus punitive damages, plus attorney's fees on behalf of 300,000 or more as-yet-unidentified consumers. The existence of those statutory remedies—along with her own actions vis-à-vis another consumer reporting agency—demonstrate that individual litigation is a realistic option. And yet the district court certified this massive class of novel claims, which threatens Equifax with uncertain and devastating liability. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.").

Such "exponential expansion of statutory damages through the aggressive use of the class action device" could never have been contemplated by the drafters of the FCRA or Rule 23. *Stillmock*, 385 Fed. App'x at 276 (Wilkinson, J., concurring). The FCRA contains numerous devices—statutory damages, punitive damages, and fee-shifting—to facilitate individual litigation. *See* 15 U.S.C. § 1681n. Massive aggregation of claims with those features in the context of novel claims converts salutary aspects of the FCRA into a threat of crippling liability. To justify certification, Soutter had to prove that the class mechanism was "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). There is nothing fair or efficient about litigating this case as a class action. Upholding this certification order would threaten "corporate death by a thousand cuts through Rule

23." *Stillmock*, 385 Fed. App'x at 276 (Wilkinson, J., concurring); *see also London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1255 (11th Cir. 2003) (doubting whether plaintiff could demonstrate superiority when "defendants' potential liability would be enormous and completely out of proportion to any harm suffered by the plaintiff"); *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 26 (2d Cir. 2003) (Newman, J., concurring). There are ready alternatives for Soutter to press this claim, but given the enormous stakes raised by the district court's order, there are no ready alternatives for Equifax to defend it.

"Chief among the justifications for [the class action] device is its efficiency: It . . . saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion." *Thorn*, 445 F.3d at 318 (quotation marks omitted). But there is nothing economical about proceeding in this case by class action. As explained above, even deciding who is in the class will require substantial work. The data Soutter promised to define the contours of the class have not yet arrived and it is still unclear whether Soutter will obtain that data and, even if she does, whether the process she envisions will work. From there, things will only get more complicated, for the court will have to engage in a painstaking individual review of hundreds of thousands of credit reports, cross-matched against court records, and analyzed in light of a variety of retrieval procedures, just to

define who is in the class. At best, litigating this case as a class action will require a Herculean effort; at worst, it will be entirely unmanageable.

B. The FCRA Provides Superior Alternatives to Class Adjudication.

All of this is unnecessary, to boot. The district court had no basis for finding class treatment to be "the only realistic means of adjudicating these disputes." J.A. 713. To the contrary, Soutter's counsel promised to "flood[] the courts with individual cases" if certification were denied. J.A. 671; *cf. Castano v. Am. Tobacco Co.*, 84 F.3d 734, 748 (5th Cir. 1996) (noting, in rejecting superiority, that "plaintiffs' counsel in this case has promised to inundate the courts with individual claims if class certification is denied").

This was surely no empty threat. Multiple provisions of the FCRA make individual suits a practical and realistic alternative to the district court's rush to certify a sprawling and novel class action. Rather than limiting plaintiffs to actual damages, Congress provided the alternative of statutory damages within a $100-$1,000 range, anticipating that amounts will vary with consumer-specific evidence. 15 U.S.C. § 1681n(a)(1)(A). Congress further incentivized individual FCRA actions by authorizing attorneys' fees for plaintiffs in "any successful action" brought under the FCRA and providing for punitive damages on top of statutory damages for willful violations. 15 U.S.C. §§ 1681n(a)(2), (a)(3); 1681o(a)(2). *See Thorn*, 445 F.3d at 328 n.20 (recognizing that availability of punitive damages and attorneys' fees incentivizes

individual actions); *Harper*, 2006 WL 3762035, at *10 ("I am further persuaded by defendant's argument that the FCRA, by providing for the award of attorneys' fees, already provides an incentive for the putative class members to bring individual claims.").

Taken together, these remedies ensure that "[t]here is no shortage of incentives for consumers to bring individual suits" and render FCRA cases "'essentially costless' to winning plaintiffs." *Stillmock*, 385 Fed. App'x at 282 (Wilkinson, J., concurring). Not only are individual FCRA actions "'costless'" for consumers, but they may produce substantial recoveries. For example, this Court recently affirmed a jury award of $1,000 in statutory damages and $80,000 in punitive damages in an individual FCRA action against a bank that furnished information to a consumer reporting agency. *Saunders v. Branch Banking & Trust Co.*, 526 F.3d 142, 145 (4th Cir. 2008).

The district court glossed over these incentives and the realistic alternative for individual actions they create. The court dismissed superiority concerns out of hand by reading the Court's recent unpublished decision in *Stillmock* as blessing class actions whenever statutory damages are modest. J.A. 714–15. That is a vast overreading of *Stillmock*'s more limited and fact-bound rationale. *See* 385 Fed. App'x at 274–75. *Stillmock*, after all, was an unpublished decision that did not purport to overrule this Court's precedent holding that the availability of punitive or statutory damages and fee-shifting can demonstrate the viability of "individual actions in the absence of a class

action." *Thorn*, 445 F.3d at 328 n.20; *see also, e.g.*, *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 420 (5th Cir. 1998) (statutory damages and attorney's fees "eliminate[d] financial barriers that might make individual lawsuits unlikely").

In reality, *Stillmock* highlights only that some cases may present unique circumstances where the balance tips in favor of class treatment. *See Stillmock*, 385 Fed. App'x at 273 (defendant's conduct was uniform across the class and liability was conceded, leaving whether defendant's violations were "willful" as only disputed issue). Under those circumstances, the relatively limited redress available in individual actions may counsel in favor of class treatment, as *Stillmock* found on the facts before the Court there. But there is no basis for reading that narrow and non-precedential decision to justify class treatment where, as here, the issues are neither distilled nor common.

In these circumstances, FCRA's statutory scheme ensures that individual suits are a meaningful alternative to class actions. *Cf. AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (concluding that arbitration agreement that set minimum amount of damages and promised successful claimants twice their attorney's fees provided "incentive for the individual prosecution of meritorious claims" and thus made class treatment unnecessary). Were there any doubt about whether a consumer might bring an individual action to redress this type of alleged FCRA violation, Soutter herself has already done so, bringing and settling her individual claim against Experian.

J.A. 683. Yet now she inexplicably insists that it must be this class action seeking statutory damages or nothing.

C. A Class Action is Not Appropriate to Test a Novel Claim Like Soutter's.

The choice is not a class action or nothing. Instead, a plaintiff who claims actual damages—as Soutter did in her case against Experian—is the ideal claimant to prosecute an individual action and test Soutter's novel legal theory. Testing that theory in an individual case seeking actual damages presents a reasonable, and infinitely more manageable, alternative to certifying a vaguely defined class to adjudicate a hodge-podge of questions that will produce no common answers. Allowing some individual actions to proceed will have the benefit of both testing the merits of Soutter's novel theory of FCRA liability and clarifying what litigating such claims will entail and thus whether they could be amenable to class treatment under certain circumstances. Equifax certainly believes that individual litigation would only confirm the individual nature of these claims. But if experience demonstrated that common evidence provided common answers to common questions—or perhaps more realistically that suits involving a specific court during a specific time period presented truly common issues—then a more limited class proceeding could be certified based on actual experience, not rank speculation that novel claims on behalf of a class whose members are not yet ascertained will involve truly common issues that predominate.

But allowing novel claims carrying enormous aggregated statutory (and potentially punitive) damages to proceed initially as a class action creates enormous settlement pressure and threatens to ensure that the merits of claims such as Soutter's never are tested. *See In re Rhone-Poulenc*, 51 F.3d at 1299 (class certification in case pursuing novel legal theory inappropriate where defendants are forced "to stake their companies on the outcome of a single trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability"); *see also In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 26 (1st Cir. 2008) ("[W]e . . . hold that when a Rule 23 requirement relies on a novel or complex theory as to injury, . . . the district court must engage in a searching inquiry into the viability of that theory and the existence of the facts necessary for the theory to succeed."); *Castano*, 84 F.3d at 750 (expressing "discomfort with a district court's certification of a novel theory"). That would thwart the purpose of the FCRA to ensure use of "reasonable procedures," for no consumer reporting agency will gain the benefit of a ruling to clarify its obligations to retrieve and record judgment dispositions. The class action mechanism is not a tool for "judicial blackmail," *id.* at 746, whereby courts are used to force settlements upon defendants who "may seek to settle early and often to avoid litigation costs and the risk of getting hit with a large verdict at trial." *Malack v. BDO Seidman, LLP*, 617 F.3d 743, 755 (3d Cir. 2010).

* * *

The district court could certify this case as a class action only by committing multiple errors. The court did not conduct the required rigorous analysis to determine whether Soutter had met her burden to prove that the requirements of Rule 23 were met. Instead, the court shifted the burden to Equifax and elected to certify a class based on little more than Soutter's counsel's assurance that he would figure out a way to make it work. The court failed to appreciate the laborious and necessarily individualized analysis required to show inaccuracy and thus even determine who is in the class. The court disregarded the need for additional individualized analysis of the varied records-collection procedures and circumstances applicable to any given inaccuracy in order to determine whether the inaccuracy resulted from Equifax procedures that in a specific context were reasonable but imperfect, unreasonable, or willfully unreasonable. The court brushed aside the novelty of the claims here, even though the absence of guidance from any other court identifying what types of procedures are "reasonable" under what circumstances makes it even more inappropriate to aggregate 300,000 or more willful unreasonableness claims and thus expose Equifax to devastating liability. And the court overlooked the significant differences between Soutter's claim and the claims and interests of the class, essentially concluding that Soutter can adequately represent people with divergent interests because these very divergences of interests will induce them to opt out of being represented by her. To make matters worse, the court rushed headlong into class treatment without any need to do so, given the FCRA's ample

incentives for individual claims. Even if these aspects of the district court's decision did not individually require reversal, taken together they make crystal clear that the court abused its discretion in certifying the class.

CONCLUSION

For the reasons set forth above, this Court should reverse the district court's order of class certification.

STATEMENT REGARDING ORAL ARGUMENT

This appeal, which this Court allowed under Rules 5 and 23(f), presents important issues relating to the requirements for class certification. In addition, the district court's certification of a class of 300,000 or more individuals seeking statutory damages threatens Equifax with massive liability. Equifax respectfully submits that oral argument may be of assistance to the Court and is appropriate given the importance of this case.

Respectfully submitted,

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August 29, 2011

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Rule 32(a), I certify that this brief complies with the length limitations set forth in Fed. Rule App. Proc. 32(a)(7) because it contains 13,559 words, as counted by Microsoft Word, excluding the items that may be excluded under Federal Rule 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25, I certify that on August 29, 2011, I served the foregoing via CM/ECF and U.S. mail upon:

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