UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Benjamin McKey, individually and as a representative of the Class,

Plaintiff,

v.

TenantReports.com, LLC,

Defendant.

Case No. 2:22-cv-01908-GJP

MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Plaintiff Benjamin McKey ("Plaintiff"), individually and on behalf of the Settlement Class, respectfully moves the Court for final approval of the class action settlement with Defendant TenantReports.com, LLC ("Defendant"). Defendant does not oppose the relief sought in this Motion.

Dated: February 21, 2024

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MEMORANDUM IN SUPPORT OF
MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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Plaintiff Benjamin McKey ("Plaintiff" or "Class Representative"), individually and on behalf of the Settlement Class,[1] seeks final approval of the settlement of Plaintiff and the Class's claims against Defendant TenantReports.com, LLC ("Defendant") for alleged violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* ("FCRA"). This Settlement, if approved, will resolve all claims of Plaintiff and the Settlement Class Members in exchange for Defendant's agreement to pay $877,800 into a non-reversionary common fund, and to implement procedures to avoid reporting outdated adverse information in the future. All Settlement Class Members will receive payment automatically, without having to file a claim form. Settlement Class Members who experienced harm in addition to the invasion of privacy as a result of the challenged conduct could, however, make a claim and receive an enhanced payment. The Settlement provides substantial relief for the Class, both on a monetary and prospective basis, and compares favorably with comparable class settlements of similar claims.

On September 15, 2023, this Court preliminarily approved the parties' Settlement Agreement. (ECF No. 34.) The Court found on a preliminary basis that the terms of the Settlement were "fair, reasonable, and adequate" and approved the distribution of notice. (*Id.* ¶¶ 2, 11.) The response from the Settlement Class confirms the Court's preliminary analysis. Out of 4,615 Class Members, there were zero objections,[2] zero opt-outs, and 211 Class Members filed valid and timely Claim Forms requesting additional settlement shares. This constitutes compelling evidence that the Settlement is fair, reasonable, and adequate. *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005) (low level of objection is a "rare phenomenon"); *In re Philips/Magnavox*

[1] Unless explicitly defined herein, all capitalized terms have the same meanings as those set forth in the parties' Settlement Agreement (ECF No. 33-3, "SA" or "Settlement").
[2] One self-titled "objection" was received, but the individual who submitted it was not a Class Member. (Declaration of Ritesh Patel ("First Patel Decl."), ECF No 36, ¶ 16, Ex. C.). Nor does the "objection" contain any substantive criticism of the Settlement.

Television Litig., No. 09-3072, 2012 WL 1677244, *9 (D.N.J. 2012) ("[t]he paucity of negative feedback . . . leads the Court to conclude that the Settlement Class generally and overwhelmingly approves of the Settlement.").

Accordingly, Plaintiff respectfully requests that the Court grant final approval of the Settlement.

I. BACKGROUND

The history of this litigation and the Settlement, and the claims involved, are set forth in detail in Plaintiff's preliminary approval papers and motion for attorneys' fees, which are incorporated herein and therefore will be only briefly summarized here. (*See* ECF Nos. 33-1, 35-1.)

A. Procedural History and Summary of Claims.

On April 8, 2022, Plaintiff filed his class action complaint with the Philadelphia Court of Common Pleas, alleging that Defendant had violated the FCRA, 15 U.S.C. § 1681c(a), by including non-conviction adverse information in consumer reports that antedated the reports by more than seven years. (ECF No. 1-1.) Defendant removed the action to this Court on May 16, 2022. (ECF No. 1.)

On June 17, 2022, Defendant answered the complaint (ECF No. 11), and the case moved into the scheduling and discovery phase (ECF No. 17). During the course of discovery, Plaintiff determined there were additional factual details to add to the complaint that would clarify allegations for Defendant (ECF No. 21), thus, following a stipulation and order, Plaintiff filed the operative First Amended Complaint on July 28, 2022 (ECF No. 23, "FAC"). The FAC alleges the same claim as the initial complaint, that Defendant violated 15 U.S.C. § 1681c(a). (*Id.*) Specifically, as alleged in the FAC, the FCRA generally prohibits consumer reporting agencies

from including adverse information in a consumer report that is older than seven years from the date of the report. (FAC ¶ 18; *see also* 15 U.S.C. § 1681c.) This general restriction does not apply to criminal conviction records, which may be reported indefinitely. (*Id.*) However, non-criminal conviction information, such as dismissed charges, may not be included in a consumer report if the information predates the report by more than seven years, with certain exceptions. (*Id.*) Plaintiff alleges that Defendant violated this provision of the FCRA by producing consumer reports that included information relating to dismissed charges that predated the reports by more than seven years. (FAC ¶¶ 17-18, 33-43.) Plaintiff alleged that when he was applying for housing, Defendant issued a report containing a number of criminal charges older than seven years which had been dismissed, and that the inclusion of that information had a negative impact on his ability to obtain housing. (*Id.*) Plaintiff alleged this claim on behalf of a class of those similarly situated and sought statutory damages of $100-$1,000 for Defendant's allegedly willful violations. (*Id.* ¶¶ 44, Claim for Relief.)

Defendant answered the FAC on August 11, 2022 (ECF No. 24), and the parties continued discovery. The parties both exchanged written requests and responses, and produced documents. Plaintiff took the deposition of Defendant's 30(b)(6) representative, and Plaintiff himself was deposed. Additionally, the parties engaged in substantial third party discovery with Defendant's data vendor. Plaintiff also worked to depose a key former employee of Defendant's, including filing a motion with the Court regarding service. (ECF No. 27.) Defendant also produced data samples, as did the third party vendor, and Plaintiff retained an expert to review and analyze the same, ultimately providing a formal written report in March 2023. (ECF No. 33-2 ¶ 4.)

On March 17, 2023, the parties attended a full-day mediation with third party neutral Steven Jaffe of Upchurch Watson White & Max, at which the parties reached a settlement in

principle. Following the mediation, the parties continued negotiations, through counsel, resulting in a binding Terms Sheet in April. The parties continued working to formalize the Settlement, and executed the final Settlement Agreement, which the Court granted preliminary approval of on September 15, 2023. (ECF No. 34.)

B. Summary of Settlement Terms.

The Court certified, for settlement purposes only, with the preliminary approval order, the Settlement Class, defined as:

> all persons residing in the United States of America (including its territories and Puerto Rico) who: (1) were the subject of a background report prepared by the Tenantreports.com line of business between April 8, 2020 and April 9, 2023; (2) where the report contained at least one record of a criminal non-conviction, based on the Parties' review of Defendant's records, that predated the date the report was issued by seven years or more.

(ECF No. 34 ¶¶ 1, 4.)

In consideration for the Settlement Class Members' limited release of claims related only to the inclusion of adverse information older than seven years on reports through the Tenantreports.com line of business, Defendant will create a common fund of $877,800. (SA ¶¶ 4.4, 2.24.) After Court-approved deductions for attorneys' fees and costs, settlement administration expenses, and a service award for Plaintiff, the entire remaining balance of the fund will be allocated *pro rata* to Settlement Class Members based on settlement shares, with one settlement share being approximately $95.00, should all requested amounts be approved. (*Id.* ¶ 4.3.2.) All Settlement Class Members will automatically be allocated one settlement share. (*Id.*) Settlement Class Members were all also afforded the opportunity to return a Claim Form which, if returned, entitles them to three additional settlement shares, which would result in an estimated payment of approximately $287. The Claim Form required an attestation that the Class Member experienced harm in addition to invasion of privacy as a result of Defendant's reporting. (*Id.* ¶

4.3.2.1.) Class Members will receive their settlement amounts via check and will have 60 days to negotiate the checks. (*Id.* ¶ 5.3.1.) Following the check negotiation period, any remaining funds will be divided equally between the two *cy pres* organizations the parties propose – Public Justice and Community Action Agency of Delaware County, Inc., both non-profit charitable organizations. (*Id.* ¶ 2.12.) No portion of the fund will revert to Defendant.

Defendant also agreed to important injunctive relief as a result of the Settlement. For at least three years after final approval of the Settlement, Defendant will implement automatic filters to search for records that are slated to be included on a consumer report that (1) are criminal in nature and associated with an offense that did not result in a conviction and (2) the earliest date associated with the record is more than seven years before the date of the report. (*Id.* ¶ 4.3.1, Ex. B.) These identified records will be removed before the consumer report at issue is sent to the end-user. (*Id.*)

C. Class Notice and Reaction.

On October 6, 2023, the Settlement Administrator sent the Court-approved Postcard Notice to each of the Settlement Class Members via first-class U.S. Mail. (First Patel Decl., ECF No 36 ¶ 5.) The Settlement Administrator also activated the Settlement Website, which provided Class Members with general information about the Settlement, hosted important case documents including the FAC, the Settlement Agreement, the Preliminary Approval Order, and within 24 hours of its filing on November 20, 2023, the Motion for Attorneys' Fees, Costs, and Service Award. (*Id.* ¶ 11.) The Website also contained the Long Form Notice and answers to frequently asked questions, and provided Class Members with the ability to submit the optional Claim Form online if desired. (*Id.*) Further, the Administrator established a toll-free telephone line on the same date as the Website. (*Id.* ¶ 12.) Class Counsel had also provided an email address for Class

Members to utilize with inquiries, which were reviewed and responded to throughout the Notice Period.

Prior to mailing and emailing the Notices, the Settlement Administrator reviewed the Class List from Defendant and updated addresses through the National Change of Address Database and other public record sources. (*Id.* ¶ 4.) Out of the 4,615 Notices, 882 were returned undeliverable. (*Id.* ¶ 7.) The Settlement Administrator was able to successfully locate updated addresses and remail 594 of those notices. (*Id.*)

The deadline for Settlement Class Members to opt-out or object passed on February 12, 2024 and December 5, 2023, respectively. Zero Class Members requested exclusion or objected. (Second Declaration of Ritesh Patel ("Second Patel Decl.") ¶¶ 2-4.) One individual submitted an "objection" on November 14, 2023, but the Settlement Administrator, using personal identifiers on the Class List against those provided by the individual, was able to confirm that the individual was not actually a part of the Settlement Class. (First Patel Decl., ECF No 36, ¶ 16, Ex. C.)[3]

The deadline for Settlement Class Members to submit a Claim Form for additional settlement shares passed on December 5, 2023 as well. The Settlement Administrator reviewed all Claim Forms received, and using verification of identifiers provided by the claimants and those on the Class List, was able to confirm that 211 Claim Forms were validly submitted by Settlement Class Members by the deadline, with an additional 12 otherwise valid claims received after the

[3] The purported objection can therefore be disregarded, because "[n]onparties to a settlement generally do not have standing to object to a settlement of a class action." *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 244 (2d Cir. 2007) (quoting *Newberg on Class Actions* § 13:69 (4th ed. 2002)). Even if the Court were inclined to consider the purported objection on the merits, there is nothing to consider: the document makes no coherent criticism of the Settlement, and, indeed, scarcely mentions the Settlement at all.

deadline.[4] (Second Patel Decl. ¶ 5.) The parties propose that these 12 claims be treated as valid. Taken together, these 223 claims reflect a 4.8% claims filing rate.

II. ARGUMENT

Courts favor the voluntary resolution of litigation through settlement, particularly in the class action context. *See In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004) ("there is an overriding public interest in settling class action litigation, and it should therefore be encouraged."); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) ("*Gen. Motors*") ("[t]he law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation."); *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010) ("[s]ettlement agreements are to be encouraged.").

Fed. R. Civ. P. 23(e) requires judicial approval of the compromise of claims brought on a class basis. This is a two-step process, where the court first considers whether the settlement "fall[s] within the range of possible approval," and that notice of the settlement should be sent to the class members. *Mehling v. N.Y. Life Ins. Co.*, 246 F.R.D. 467, 472 (E.D. Pa. 2007). In the second step, the court holds a final fairness hearing and considers whether the settlement is fair, reasonable, and adequate, and warrants final approval. *Id.* The Third Circuit has outlined certain factors to consider when determining whether a settlement should be finally approved:

> (1) the complexity and duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) the risk of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation.

[4] A third party website had provided a link to the online Claim Form on the Settlement Website, without the parties' permission, and this resulted in a number of Claim Forms being submitted by non-Class Members – these are not included in the valid Claim Form number provided herein.

Gen. Motors, 55 F.3d at 785 (citing *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975)).[5] The 2018 amendments to Federal Rule of Civil Procedure 23(e) also formalize a list of considerations for settlement approval, which overlap with those previously adopted by the Third Circuit in *Girsh*. *See, e.g.*, *Sourovelis v. City of Phila.*, 515 F. Supp. 3d 321, 336 (E.D. Pa. 2021) ("[The Rule 23(e)] factors are in many respects a codification of various factors set forth in *Girsh*."). These include:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
> (i) the costs, risks, and delay of trial and appeal;
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> (iv) any agreement required to be identified under Rule 23(e)(3); and
> (D) the proposal treats class members equitably relative to each other.[6]

Fed. R. Civ. P. 23(e)(2).

A court should "apply an initial presumption of fairness when reviewing a proposed settlement where (1) the settlement negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a

[5] In *In re Prudential Ins. Co. America Sales Practice Litig. Agent Actions*, 148 F.3d 283, 323 (3d Cir. 1998), the Third Circuit discussed additional factors to supplement those laid out in *Girsh*, to be reviewed "when appropriate." These considerations are largely only applicable to the settlement of mass torts (*id.*), or overlap with *Girsh* factors (i.e., extent of discovery is discussed in the analysis of *Girsh* factor regarding the stage of the proceedings). The few remaining considerations are met here: (1) Class Members had the right to opt out of the Settlement and the notices informed them of such, (2) provisions for attorneys' fees are reasonable (*see* ECF No. 35-1), and (3) the claims process was fair and reasonable – all Settlement Class Members will receive an automatic payment of an equal settlement share, and all were afforded an equal opportunity to return a simple Claim Form to request additional shares if they were harmed beyond the invasion of privacy by the report at issue.

[6] There are no agreements to be identified under (C)(iv) beyond the Settlement Agreement.

small fraction of the class objected." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d at 535 (internal quotation omitted).

For the reasons set forth below, the Settlement satisfies the considerations at issue and should be finally approved.

A. The Settlement Class was Adequately Represented & the Settlement was Reached by Arms-Length Negotiations, At a Developed Stage in the Proceedings.

The record here demonstrates that the negotiations leading to this Settlement occurred at arms-length, with this Settlement only being reached after mediation with a third party neutral, and subsequent negotiations through experienced, competent counsel. (*Supra* at § I.A.) Plaintiff's Counsel are highly experienced in complex litigation, and FCRA litigation in particular, and committed substantial time and resources to this matter. (*See generally* ECF Nos. 33-5, 35.) Plaintiff himself has additionally demonstrated that he has been invested in this litigation and continuously has put the Class's interests first, by participating actively in discovery, including sitting for his deposition, and reviewing and approving the Settlement.

Further, the stage of discovery was advanced, with both sides responding to written discovery requests and making document productions – including data from Defendant and its vendor, which Plaintiff analyzed thoroughly, and Plaintiff taking the deposition of Defendant and Plaintiff being deposed. (*Id.*) The significant discovery taken in this case allowed for the parties to make reasoned and informed decisions regarding the strengths and weaknesses, and the value of the claims asserted, which weighs heavily in favor of approving the Settlement. *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1314 (3d Cir. 1993) ("[p]ost-discovery settlements are more likely to reflect the true value of the claim and be fair."); *Perry v. FleetBoston Fin. Corp.*, 229 F.R.D. 105, 115 (E.D. Pa. 2005) (finding these considerations satisfied where parties had exchanged some

discovery and participated in mediation process). The parties thus had an "adequate appreciation of the merits of the case before negotiating." *In re Prudential*, 148 F.3d at 319 (internal quotation omitted).

In light of these circumstances, the Settlement should be viewed as presumptively fair. *Mehling*, 248 F.R.D. at 459 ("[a] proposed settlement which is negotiated at arms-length by capable counsel after meaningful discovery is presumed to be fair and reasonable.") (internal quotation omitted); *see also In re Gen. Inst. Sec. Litig.*, 209 F. Supp. 2d 423, 429 (E.D. Pa. 2001); *In re National Football League Players' Concussion Injury Litigation*, No. 2:12-02323, 301 F.R.D. 191, 198-9 (E.D. Pa. 2014) (independent neutral's participation considered when evaluating arms-length negotiations).

B. The Relief Provided Supports Approval, Especially in Light of the Complex Risks of Continuing Litigation.

"While the court is obligated to ensure that the proposed settlement is in the best interest of the class members by reference to the best possible outcome, it must also recognize that settlement typically represents a compromise and not hold counsel to an impossible standard." *In re Aetna Inc. Sec. Litig.*, MDL No. 1219, 2001 WL 20928, *6 (E.D. Pa. 2001). In addition, "a future recovery, even one in excess of the proposed Settlement, may ultimately prove less valuable to the Class than receiving the benefits of the proposed Settlement at this time." *In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 501 (W.D. Pa. 2003). These considerations are meant to collectively balance "the likelihood of success against the benefits of an immediate settlement." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d at 537. In considering risks, the court may "give credence to the estimation of the probability of success proffered by class counsel, who are experienced with the underlying case, and the possible defenses which may be raised to their causes of action." *Perry*, 229 F.R.D. at 115 (internal quotation omitted).

As stated above, Plaintiff filed this case seeking statutory damages under the FCRA, which provides for damages of between $100 and $1,000, if the plaintiff can prove the violation was willful. 15 U.S.C. § 1681n(a)(1). The FCRA itself does not provide any guidance to courts in choosing the appropriate amount of statutory damages to impose pursuant to the FCRA, courts have looked to "the importance, and hence the value, of the rights and protections" at issue in the case. *Ashby v. Farmers Ins. Co. of Oregon*, 592 F. Supp. 2d 1307, 1318 (D. Or. 2008); *In re Farmers Ins. Co., Inc. FCRA Litig.*, 741 F. Supp. 2d 1211, 1224 (W.D. Okla. 2010).

The Settlement here provides for a common fund of $877,800, and if all requested attorneys' fees, costs, and the Class Representative Service Award, are granted, net payments will be roughly $95.00 for every class member, with Class Members who submitted claims receiving roughly $287. This is a significant amount, and well within the range of FCRA settlements of similar claims. *See, e.g.*, *Bankhead v. First Adv.*, No. 17-cv-2910 (N.D. Ga. 2019) (approving § 1681c settlement that provided class members approximately $60); *Haley v. TalentWise, Inc.*, No. 13-cv-1915 (W.D. Wash. 2015) (approving settlement that provided class members approximately $50 each for their claims under § 1681c); *King v. General Info. Servs.*, 2014 WL 12774325, No. 10-cv-6850 (E.D. Pa. 2014) (approving settlement that provided class members approximately $50 each for their claims under § 1681c).

Additionally, the Settlement includes injunctive relief, wherein Defendant has agreed to implement filters that will search for and remove outdated non-conviction records. This further weighs in favor of approval of the Settlement, especially given that the FCRA has been found to not permit private litigants to pursue injunctive relief. *See McIntyre v. RealPage, Inc.*, No. 18-3934, 2023 WL 2643201, *2 n.4 (E.D. Pa. March 24, 2023) (collecting cases, finding this to weigh in favor of approving settlement that provides injunctive relief). Further, this relief both serves

the purpose of the statute and benefits Class Members by ensuring that old non-convictions will not continue to haunt them in future reports.[7]

A recovery, such as this, which monetarily is within the range of the likely award if the case had proceeded all the way through final judgment, and which also provides for injunctive relief, is an excellent result for the Class Members, especially when that recovery comes relatively early in the litigation and before the risks of establishing willfulness, class certification, and trial. *In re Toys R Us-Delaware, Inc. – FACTA Litig.*, 295 F.R.D. 38, 453-4 (C.D. Cal. 2014) ("A $5 or $30 award, therefore, represents 5% to 30% of the recovery that might have been obtained. This is not a *de minimis* amount. Given the likelihood that plaintiffs would have been unable to prove actual damages and the risk that they would have been unable to prove willfulness and recover any damages at all, the court finds that the amount of the settlement weighs in favor of approval."); *In re Cendant Corp. Sec. Litig.*, 109 F. Supp. 2d 235, 263 (D.N.J. 2000) ("The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.") (internal quotation

[7] Numerous academics have also noted that the FCRA enshrines privacy by recognizing the link between protecting individual privacy and forbidding the disclosure of old information. *See* Steven C. Bennett, *The "Right to Be Forgotten": Reconciling EU and US Perspectives*, 30 Berkeley J. Int'l L. 161, 167 (2012) (citing the FCRA's bar on reporting outdated information as an example of "'data minimization' (a form of the right to be forgotten)" which "has long been a central element of 'fair information practices'"); Meg Leta Ambrose, *It's About Time: Privacy, Information Life Cycles, and the Right to Be Forgotten*, 16 Stan. Tech. L. Rev. 369, 378–79 (2013) ("the Fair Credit Reporting Act generally disallows the use of information older than seven years that may cast the consumer in negative or unfavorable light...the hope is that the information no longer represents the individual and would limit her opportunities if it were attached to her name as she moves through life"). As one legislator explained, the FCRA's protections represented "new safeguards to protect the privacy of employees and job applicants;" the Act as a whole, he continued, was "an important step to restore employee privacy rights." 140 Cong. Rec. H9797-05 (1994) (Statement of Congressman Vento); *see also* 138 Cong. Rec. H9370-03 (1992) (Statement of Congressman Wylie) (stating that the FCRA "would limit the use of credit reports for employment purposes, while providing current and prospective employees additional rights and privacy protections").

omitted); *see also McDonough v. Toys R Us, Inc.*, 80 F. Supp. 3d 626, 646 (E.D. Pa. 2015) ("[T]he Third Circuit warned 'against demanding too large a settlement . . . after all, settlement is a compromise, yielding of the highest hopes in exchange for certainty and resolution.'") (citing *Gen. Motors*, 55 F.3d at 806).

Here, Plaintiff faced several risks should litigation continue through trial. First, the risk of establishing and maintaining the Settlement Class through trial favors approval of the Settlement. A litigation class had not yet been certified, and while Class Counsel are confident that such certification would have been achieved, Defendant would have fought aggressively against it. The Settlement removes any potential threats to class certification, and without it, each Class Member would be left to attempt to pursue individual damages that without the aggregation of a class action, are small – as noted, the FCRA caps statutory damages at $1,000 per violation. 15 U.S.C. § 1681n(a)(1). Second, unlike other consumer statutes, in order to recover statutory damages under the FCRA, which is what Plaintiff sought in the FAC, Plaintiff must prove not only that Defendant violated the FCRA, but also that its violations were willful. If this litigation were to continue, Defendant would have vigorously challenged that any violations were willful. Willfulness is a high standard, and one on which FCRA plaintiffs can lose, even after a successful verdict at trial. *See Smith v. LexisNexis Screening Sols., Inc.*, 837 F.3d 604, 611 (6th Cir. 2016) (reversing jury verdict, holding that consumer reporting agency's conduct did not constitute a willful violation of the FCRA); *see also Domonoske v. Bank of Am., N.A.*, 790 F. Supp. 2d 466, 476 (W.D. Va. 2011) ("given the difficulties of proving willfulness or even negligence with actual damages [under the FCRA], there was a substantial risk of nonpayment."); *Chakejian v. Equifax Info. Servs., LLC*, 275 F.R.D. 201, 212 (E.D. Pa. 2011) (proving willfulness in FCRA case was "a high hurdle to clear" which weighed in favor of settlement approval); *Reibstein v. Rite Aid Corp.*, 761 F. Supp. 2d 352,

253 (E.D. Pa. 2011) (holding same). And to recover actual damages under the FCRA, damages must be caused by the FCRA violation itself, not merely by the report associated with the violation. *See Bach v. First Union Nat'l Bank,* 149 Fed. App'x 354, 361 (6th Cir. 2005) (evaluating "causal link" between violation and damages).

In sum, while Plaintiff and Class Counsel believe in the strengths of Plaintiff's claims, and the certifiablity of the Class, they also understand the high stakes and uncertainty involved in continuing litigation through dispositive motion practice, including a motion for class certification, and trial, and that Defendant would have aggressively fought against the claims at each stage. When weighed against the risks of establishing willfulness, and in turn damages, and class certification, the Settlement is even more favorable, and should be approved. *In re Processed Egg Prods. Antitrust Litig.*, No. 08-md-2002, 2016 WL 3584632, **15-16 (E.D. Pa. 2016) (finding relevant *Girsh* factors to favor final approval where court had yet to decide summary judgment or class certification motions).

Moreover, these risks are amplified as procedurally much remained to be done before Plaintiff's claims would have reached a resolution in litigation. While significant discovery had taken place, formal expert discovery, dispositive motions, and a motion for class certification all had yet to occur when this Settlement was reached. In addition, there would have been a trial and likely, appeals, further prolonging the litigation and reducing the value of any recovery to the Class. Each of these stages imposes expense and delay, thus settling now is advantageous for all involved. *See In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 254 (D. Del. 2002) (when settlement reached prior to dispositive motions, trial, and appeals, this factor "strongly supports settlement"); *Gen. Motors*, 55 F.3d at 784 (the gains of avoiding costs and risks of trial "multiply

when settlement also avoids the costs of litigating class status – often a complex litigation within itself.").

C. The Method of Distribution is Effective and Equitable to the Class Members.

Federal Rule of Civil Procedure 23(e)(2)(C) provides that the Court consider the effectiveness of any proposed method of distributing relief to the Class, including the method of processing Class Member claims; the terms of any proposed award of attorneys' fees, including the timing of payment; any agreement required to be identified under Rule 23(e)(3), and whether the proposal treats Class Members equitably relative to each other. Fed. R. Civ. P. 23(e)(2)(D). Here, these considerations are easily satisfied.

The method of allocation is fair, as each Settlement Class Member automatically is allocated an equal settlement share, and all had the same opportunity to submit a Claim Form attesting to harm beyond the invasion of privacy to receive additional settlement shares.[8] This method of allocation is common in FCRA settlements. *See, e.g.*, *Saylor v. RealPage, Inc.*, No. 22-cv-53 (E.D. Va. 2022) (approving distribution of FCRA settlement that provided one settlement share to all class members and two shares to those who returned a form attesting to additional harm); *Thomas v. Backgroundchecks.com*, No. 13-cv-29 (E.D. Va.) (approving FCRA settlement with provision for class members to receive additional payments if assert that background check caused certain harms).

[8] All Class Members suffered harm sufficient for standing under Article III, as "it has long been the case that an unauthorized dissemination of one's personal information, even without a showing of actual damages, is an invasion of one's privacy that constitutes a concrete injury sufficient to confer standing to sue." *Gambles v. Sterling Infosystems, Inc.*, 234 F. Supp. 3d 510, 522 (S.D.N.Y. 2017). *See also King v. Gen. Info. Services, Inc.*, 2012 WL 5426742 at *7 (E.D. Pa. 2012) (upholding constitutionality of FCRA and noting the "vast difference" between an isolated record that exists in "practical obscurity" and a "computerized summary located in a single clearinghouse of information.") (internal citations omitted).

The Settlement Administrator will mail checks for the settlement payments directly to Settlement Class Members, less opt outs, upon final approval, with those Class Members who returned timely and valid Claim Forms receiving their additional payment amounts following the negotiation period of the first payments.

D. The Reaction of the Class Was Positive.

"In an effort to measure the class's own reaction to the settlement's terms directly, courts look to the number and vociferousness of the objectors." *Gen. Motors*, 55 F.3d at 812. Of the 4,615 Settlement Class Members, zero opted-out and zero objected. This decidedly weighs in favor of final approval. *Boone v. City of Phila.*, 668 F. Supp. 2d 693, 712 (E.D. Pa. 2009) ("A low number of objectors compared to the number of potential class members creates a strong presumption in favor of approving the settlement."); *In re Philips/Magnavox Television Litig.*, 2012 WL 1677244, at *9 (finding that where .00002% and .00004% of the settlement class objected or opted-out, showed "overwhelming" approval of the settlement by the class); *Varacallo v. Mass. Mutual Life Ins. Co.*, 226 F.R.D. 207, 237-38 (D.N.J. 2005) (finding objection and opt-out rates of .003% and .06% to be "extremely low" and indicated approval by the class).

Further, as to the optional Claim Form for additional settlement shares, the response rate was 4.8%. Given that the Settlement provides for automatic payments to all Class Members, the "claims rate" here is not directly comparable to class settlements where consumers have to make a claim to receive any payment at all. Claimants here only needed to make a claim in order to receive an enhanced payment, and they were only allowed to receive an enhanced payment if they could identify a particular kind of harm they suffered, in addition to invasion of privacy. Accordingly, one would expect a lower "claims" rate. Nonetheless, even when compared to consumer settlements where a claim was required in order to receive any payment at all, this claims

rate is indicative of a positive reaction from Class Members. *See, e.g.*, *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 329 (3d Cir. 2011) (describing special master finding that "consumer claim filing rates rarely exceed seven percent."): *Rougvie v. Ascena Retail Group, Inc.*, No. 15-724, 2016 WL 4111320, *38 (E.D. Pa. July 29, 2016) (granting final approval of consumer class settlement with 3.3% claims rate); *In re Am. Family Enterprises*, 256 B.R. 377, 418 (D.N.J. 2000) (1.43% claims filing rate weighed in favor of settlement); *see also Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269, 276, 290 (6th Cir. 2016) (citing to a settlement administrator's testimony that "response rates in consumer class actions generally range from 1 to 12 percent," with a "median response rate of 5 to 8 percent."); *Couser v. Comenity Bank*, 125 F. Supp. 3d 1034, 1044 (S.D. Cal. 2015) (claims rate of 7.7% was "higher than average" for a consumer class action); *Zepeda v. PayPal, Inc.*, No 10-2500, 2017 WL 1113293, **15, 16 (N.D. Cal. 2017) (finding in consumer protection case that a 3.8% claims rate indicated that the notice process had been "remarkably successful – and the Settlement Class's reaction to the Settlement has been overwhelmingly positive.").

The reaction of the Class Members thus strongly supports approval of the Settlement. *In re Cendant Corp.*, 264 F.3d at 234-35 (class reaction favored approval where "the number of objectors was quite small in light of the number of notices sent and claims filed.").

E. The Ability of Defendant to Withstand a Higher Judgment.

Defendant, although not a very large corporation, likely could have withstood a larger judgment. "Even if solvency could be assured," the Third Circuit "regularly find[s] a settlement to be fair even though the defendant has the practical ability to pay greater amounts." *McDonough*, 80 F. Supp. 3d at 645 (citing cases). Thus, this factor supports approval.

F. The Requests for Attorneys' Fees, Costs, and Class Representative Award Should be Approved.

On November 20, 2023, two weeks before the deadline for objections, Plaintiff and Class Counsel filed their Motion seeking one-third ($292,600) of the Settlement Fund in attorneys' fees and $19,954 in out-of-pocket costs, a Named Plaintiff service award of $7,500, and reimbursement of settlement administration costs, to be paid from the Settlement Fund. (ECF No. 35-1.) The Motion and its supporting papers were posted to the Settlement Website within 24 hours after filing. No Settlement Class Member has objected to any portion of the Motion's requests, which is further evidence of the reasonableness of the requests. The requests for attorneys' fees, costs, Named Plaintiff's service award, and settlement administration costs, should be approved.

III. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests the Court grant final approval to the parties' Settlement.

Dated: February 21, 2024

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BENJAMIN MCKEY, individually and as a representative of the Class, Plaintiff, v. TENANTREPORTS.COM, LLC Defendant.	Case No. 2:22-cv-01908-GJP

SECOND DECLARATION OF RITESH PATEL

Ritesh Patel, pursuant to 28 U. S. C. § 1746, hereby declares and states as follows:

1. I am member of Continental DataLogix LLC ("Continental"), which was appointed to aid in giving notice to Class Members in the above-captioned matter. This Declaration is intended to supplement my declaration of December 8, 2023, ECF No. 36.

Exclusion Requests and Objections

2. The postmark deadline for Class Members to opt-out from the Class was February 12, 2024.

3. The postmark deadline for Class Members to object to the Settlement was December 5, 2023.

4. As of the close of business on February 19, 2024, Continental has not received any timely filed exclusion requests or objections to the Settlement, apart from one invalid objection, discussed in Paragraph 16 of my prior declaration, and attached to that Declaration as Exhibit C.

Claim Filing

5. Each Settlement Class Member is entitled to an automatic payment, and had the opportunity to file a Claim Form for additional damages. The postmark deadline for Settlement Class Members to file a Claim Form was December 5, 2023. As of the close of business on February 19, 2024, Continental has

received a total of 211 valid and timely filed claim forms. In addition, Continental has received 12 otherwise valid claims which were filed after the deadline.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 20th day of February 2024.

Ritesh Patel

Ritesh Patel

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BENJAMIN MCKEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Case No. 2:22-cv-01908-GJP
TENANTREPORTS.COM, LLC	)	
	)	
Defendant.	)	

FINAL APPROVAL ORDER

This matter, having come before the Court on Plaintiff's Motion for Final Approval of the proposed class action settlement with Tenantreports.com, LLC ("TRC"),[1] the Court having considered all filed papers and arguments made with respect to the settlement, and having preliminarily certified the "Settlement Class" by Order dated September 15, 2023, finds as follows:

1. On February 27, 2024, the Court held a Final Approval Hearing, at which time the parties were afforded the opportunity to be heard in support of, or in opposition to, the settlement. The Court received no objections regarding the settlement.

2. Certification for settlement purposes of the Settlement Class, as defined by the parties' Settlement Agreement, (Dkt. No. 33-3), is appropriate pursuant to Federal Rules of Civil Procedure 23(a) and 23(b).

3. Notice to the Settlement Class required by Rule 23(e) of the Federal Rules of Civil Procedure has been provided in accordance with the Court's Preliminary Approval Order. Such Notice has been given in an adequate and sufficient manner; constitutes the best notice practicable

[1] "TRC" collectively refers to Xactus, LLC, in its capacity as successor in interest to certain assets of Tenantreports.com, LLC, and Tenantreports.com, LLC.

under the circumstances, including the dissemination of individual notice to all members who can be identified through reasonable effort; and satisfies Rule 23(e) and due process.

4. TRC has timely filed notification of this settlement with the appropriate officials pursuant to the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1715. The Court has reviewed such notification and accompanying materials, and finds that TRC's notification complies fully with the applicable requirements of CAFA.

5. The Settlement Agreement was arrived at as a result of arm's-length negotiations conducted in good faith by counsel for the parties and is supported by the parties.

6. The settlement, as set forth in the Settlement Agreement is fair, reasonable, and adequate to the members of the Settlement Class in light of the complexity, expense and duration of litigation and the risks involved in establishing liability, damages and in maintaining the class action through trial and appeal. In connection with its approval, the Court has considered the factors enumerated in Rule 23(e)(2) and finds they counsel in favor of approval.

7. The relief provided under the settlement constitutes fair value given in exchange for the release of claims.

8. The parties and each Settlement Class Member have irrevocably submitted to the jurisdiction of this Court for any suit, action, proceeding, or dispute arising out of the Settlement Agreement.

9. It is in the best interests of the parties and the Settlement Class Members, and consistent with principles of judicial economy, that any dispute between any Settlement Class Member (including any dispute as to whether any person is a Settlement Class Member) and any Released Party which, in any way, relates to the applicability or scope of the Settlement Agreement or the Final Judgment and Order, should be presented exclusively to this Court for resolution.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

10. The Court incorporates the preceding paragraphs of its Order, as if each paragraph was set forth below.

11. This action is a class action against TRC, on behalf of a class of consumers that has been defined as follows:

> **Settlement Class**: all persons residing in the United States of America (including its territories and Puerto Rico) who: (1) were the subject of a background report prepared by the TenantReports.com line of business between April 8, 2020 and April 9, 2023; (2) where the report contained at least one record of a criminal non-conviction, based on the Parties' review of Defendant's records, that predated the date the report was issued by seven years or more.

13. The Settlement Agreement submitted by the parties is finally approved pursuant to Rule 23(e) of the Federal Rules of Civil Procedure as fair, reasonable, and adequate and in the best interests of the Settlement Class. The Settlement Agreement shall therefore be deemed incorporated herein and the proposed settlement is finally approved. The Settlement Agreement shall be consummated in accordance with the terms and provisions thereof, except as amended or clarified by any subsequent order issued by this Court.

14. This action is hereby dismissed on the merits, in its entirety, with prejudice and without costs.

15. As agreed by the parties in the Settlement Agreement, upon the Effective Date, the Released Parties shall be released and discharged in accordance with the Settlement Agreement. The Named Plaintiff also releases the Released Parties in accordance with the Settlement Agreement.

16. Upon the Effective Date, each Settlement Class Member is enjoined and permanently barred from instituting, maintaining, or prosecuting, either directly or indirectly, any lawsuit that asserts Settlement Class Released Claims.

17. Without affecting the finality of this judgment, the Court hereby reserves and retains jurisdiction over this settlement, including the administration and consummation of the settlement. In addition, without affecting the finality of this judgment, the Court retains exclusive jurisdiction over TRC and each member of the Settlement Class for any suit, action, proceeding or dispute arising out of or relating to this Order, the Settlement Agreement or the applicability of the Settlement Agreement. Without limiting the generality of the foregoing, any dispute concerning the Settlement Agreement, including, but not limited to, any suit, action, arbitration or other proceeding by a Settlement Class Member in which the provisions of the Settlement Agreement are asserted as a defense in whole or in part to any claim or cause of action or otherwise raised as an objection, shall constitute a suit, action or proceeding arising out of or relating to this Order. Solely for purposes of such suit, action or proceeding, to the fullest extent possible under applicable law, the parties hereto and all Settlement Class Members are hereby deemed to have irrevocably waived and agreed not to assert, by way of motion, as a defense or otherwise, any claim or objection that they are not subject to the jurisdiction of this Court, or that this Court is, in any way, an improper venue or an inconvenient forum.

18. Upon consideration of Class Counsel's application for fees and costs and other expenses, the Court awards $292,600 as reasonable attorneys' fees and $19,954 as reimbursement for reasonable out-of-pocket expenses, which shall be paid from the Settlement Fund.

19. Upon consideration of the application for an individual settlement and service award, the Named Plaintiff, Benjamin McKey, is awarded the sum of $7,500, to be paid from the Settlement Fund, for the service he has performed for and on behalf of the Settlement Class.

20. Upon consideration of the documentation submitted by the Settlement Administrator, the Court awards the Settlement Administrator reimbursement for the reasonable expenses of notice administration. Defendant already advanced the Settlement Administrator

$25,000 from the Settlement Fund. The remainder of the approved amount shall also be paid from the Settlement Fund.

21. Neither this Final Judgment and Order, nor the Settlement Agreement, shall be construed or used as an admission or concession by or against the TRC or any of the Released Parties of any fault, omission, liability, or wrongdoing, or the validity of any of the Settlement Released Claims. This Final Judgment and Order is not a finding of the validity or invalidity of any claims in this lawsuit or a determination of any wrongdoing by the TRC or any of the Released Parties. The final approval of the Settlement Agreement does not constitute any opinion, position, or determination of this Court, one way or the other, as to the merits of the claims and defenses of Plaintiff, the Settlement Class Members, or TRC.

22. The Court finds, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, that there is no just reason for delay, and directs the Clerk to enter final judgment.

BY THE COURT:

_____

HONORABLE GERALD J. PAPPERT
UNITED STATES DISTRICT JUDGE

Dated: _____