UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ANGELA FULLER, on behalf of herself and others similarly situated,	Civil Action No. 15-cv-03856-KM-MAH
***Plaintiff*,**	CLASS ACTION
v.	Hon. Kevin McNulty District Judge
AVIS BUDGET CAR RENTAL, LLC and AVIS BUDGET GROUP, INC.,	Hon. Michael A. Hammer Magistrate Judge
***Defendants*.**	Motion Date: November 17, 2017

MEMORANDUM OF LAW IN SUPPORT OF FINAL APPROVAL OF SETTLEMENT AND CERTIFICATION OF A SETTLEMENT CLASS

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I. INTRODUCTION

Plaintiff Angela Fuller (the "Representative Plaintiff"), by her undersigned counsel, respectfully submits this Memorandum of Law in support of her Motion for Final Approval of the proposed settlement with Defendants Avis Budget Car Rental, LLC and Avis Budget Group, Inc., (collectively, "Defendants" or "Avis") as embodied in the Settlement Agreement submitted on March 14, 2017, and certification of a Settlement Class.[1] As discussed herein, the proposed settlement provides comprehensive relief for the Class and meets all of the standards for settlement approval under Rule 23(e). It should, therefore, be granted final approval as fair, reasonable and adequate as to all class members.

This Court conditionally certified a Settlement Class and preliminarily approved this settlement on July 31, 2017 (Dkt. No. 45). Pursuant to the Preliminary Approval Order, notice of the pendency of this action, the terms of the proposed settlement, the opportunity to opt out, object or participate, and the date of the November 28, 2017 final approval hearing, was provided to 45,415 individuals by first class mail. *See* Declaration of Steven R. Platt of American Legal Claim Services, LLC ("Platt Decl."), attached hereto as Exhibit 1.

The settlement represents a fair and reasonable resolution for class members for several reasons. First, in a consumer class action brought under the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x ("FCRA"), which is remedial in nature, the settlement confirms significant practices changes by Defendants which will benefit consumer job applicants into the future.

Second, the settlement provides substantial economic relief to class members, in the form of payments of nearly $700 to those members of the class who did not receive a timely notification of a background report's adverse effect on the prospects of their employment with Defendants. It

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[1] Plaintiff has simultaneously moved for an award of attorney's fees and costs.

also provides relief in the form of an estimated $45 cash payment for class members who were not the subject of adverse employment action, but who nevertheless had a background report about them procured in an allegedly unlawful manner. The settlement even encompasses relief to class members whose claims are beyond the FCRA's 2-year statute of limitations and who might not otherwise have a timely claim.

Third, the release is limited to claims relating to Defendants' use of the form they used with Plaintiff Fuller in order to seek permission to procure a background report and to the use of the consumer reports Defendants obtained as a result.

Fourth, of the over 45,000 class members, only thirty-nine class members requested to be excluded from the class, and only one class members has submitted an objection to the settlement. Platt Decl. at ¶ 10. This factor indicates a fair settlement.

For these reasons and for the reasons set forth in greater detail below, the settlement is fair, reasonable and adequate to the Settlement Class and satisfies all of the criteria that courts routinely apply for the approval of class action settlements. *See, e.g., In re Prudential Insurance Company of America Sales Litigation*, 148 F.3d 283 (3d Cir. 1998); *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975).

II. NATURE AND HISTORY OF THE LITIGATION

Ms. Fuller filed this consumer class action on June 9, 2015, on behalf of herself and other job applicants who applied to work for Avis and who were the subjects of employment background reports performed by Defendants' background check service. Dkt. No 1. The Complaint alleged that Avis violated section 1681b(b)(2) of the FCRA when it procured or caused to be procured a consumer report for employment purposes for Plaintiff and other job applicants without first providing a clear and conspicuous disclosure in writing to the applicant in a document that consists

solely of the disclosure that a consumer report may be obtained for employment purposes.

The Complaint further alleged in Count II alleged that Avis violated section 1681b(b)(3) of the FCRA when it failed to provide Plaintiff and certain members of the settlement class the required Pre-Adverse Action Notice, a copy of the background report, and a written description of the applicant's rights under the FCRA in a timely manner – that is, before taking adverse action against the consumer based in whole or in part upon the consumer report.

After Defendants filed an Answer (Dkt. No. 16), they filed a Motion for Judgment on the Pleadings, which the parties briefed fully. Dkt. Nos. 23, 27, 28. While the motion was pending, the parties conducted discovery identifying the class of consumers, and exchanged voluminous document production. With the benefit of this discovery, the parties agreed to terminate the pending motion in order to attempt to reach a class-wide settlement.

The parties engaged in extensive settlement discussions, including a lengthy mediation session with a well-regarded private mediator on April 26, 2016, directly between counsel for the parties during the summer of 2016, and in a formal settlement conference before Magistrate Judge Michael A. Hammer on November 17, 2017. The parties reached an agreement at the settlement conference, and continued to negotiate the details of the settlement until they reached the formal Settlement Agreement on March 14, 2017. This Court thereafter granted preliminary approval of the settlement (Dkt. No. 45) and scheduled a hearing to consider final approval of the settlement for November 28, 2017.

III. THE TERMS OF THE PROPOSED SETTLEMENT

The essential terms of the settlement preliminarily approved by this Court are set out in the Settlement Agreement attached to the Motion for Preliminary Approval. Dkt. No. 42-2. The settlement is fair, adequate and reasonable in light of the relevant facts, the applicable law, and the

value of the settlement, economic, as well as non-economic, to the Class.

A. The Settlement Class

The settlement class consists of all of those job applicants who, from June 9, 2010 to April 28, 2016, applied for a job with Defendants and for whom Defendants procured or caused to be procured a consumer report for employment purposes using a written disclosure containing language substantially similar in form to the disclosure form provided to Plaintiff Fuller. Defendants' records indicated that subset of those individuals were allegedly the subjects of adverse employment decisions based in whole or in part upon the background report without being provided timely notice of the provision of the reports, and would thus have additional FCRA claims.

FCRA section 1681b(b)(2) applies to the groups of job applicants for whom Defendants allegedly failed to provide a compliant stand-alone disclosure in connection with the procurement of a consumer report for employment purposes (the "Inadequate Disclosure" groups) and FCRA section 1681b(b)(3) applies to the groups to whom Defendants allegedly failed to provide timely notice before taking an adverse action based wholly or in part on a consumer report for employment purposes (the "Failure to Notify" groups).

Both of these claims-based groups are further subdivided based upon the time frames in which Defendants' conduct affected them relative to the FCRA's statute of limitations.[2] According to Defendants' records, the "2-Year Inadequate Disclosure class" described below consists of approximately 20,000 ascertainable individuals. The "3- to 5-Year Inadequate Disclosure class" consists of approximately 25,000 ascertainable individuals. The "2-Year Failure

[2] Although FCRA claims can have up to a five year statute of limitations when the alleged violation is unknown to the plaintiff, class cases like the one at bar are far more frequently bound to the FCRA's two year statute of limitations.

to Notify group" consists of approximately 500 people. Finally, the 3- to 5-Year Failure to Notify group" consists of approximately 600 people. The relief afforded in the settlement agreement, therefore, is tiered based upon the following criteria:

The 2-Year Inadequate Disclosure Group
21,506 Individuals[3]

> All natural persons residing within the United States and its territories regarding whom, from June 9, 2013 through April 28, 2016, Avis Budget Car Rental, LLC procured or caused to be procured a consumer report for employment purposes using a written disclosure containing language substantially similar in form to the Disclosure Form provided to Ms. Fuller.

The 2-Year Failure to Notify Group
590 Individuals[4]

> All employees or applicants for employment with Defendants residing in the United States and its Territories who were the subject of a background report procured or caused to be procured from a consumer reporting agency by Avis Budget Car Rental, LLC, and to whom its records reflect that it directed Sterling InfoSystems, Inc. or Sterling's predecessors or successors to provide, on its behalf, a pre-adverse action notice, from June 9, 2013 through April 28, 2016.

The 3- to 5-Year Inadequate Disclosure Group
24,871 Individuals[5]

> All natural persons residing within the United States and its territories regarding whom, from June 9, 2010 through June 8, 2013, Avis Budget Car Rental, LLC procured or caused to be procured a consumer report for employment purposes using a written disclosure containing language substantially similar in form to the Disclosure Form provided to Ms. Fuller.

The 3- to 5-Year Failure to Notify Group
601 Individuals[6]

> All employees or applicants for employment with Defendants residing in the United States and its Territories who were the subject of a background report procured or

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3 Platt Decl. at ¶ 12.

4 *Id.*

5 *Id.*

6 *Id.*

> caused to be procured from a consumer reporting agency by Avis Budget Car Rental, LLC and to whom its records reflect that it directed Sterling InfoSystems, Inc. or Sterling's predecessors or successors to provide, on its behalf, a pre-adverse action notice, from June 9, 2010 through June 8, 2013.

B. Settlement Benefits

The members of the Two-Year Inadequate Disclosure Group will each receive a one-time payment estimated to be $45. The members of the 2-Year Failure to Notify Group will receive the estimated $45 to which they are entitled for also being a member of the 2-Year Inadequate Disclosure Group and also an additional payment estimated at $650, for a total payout of approximately $700.[7] Every class member falling in the 3-5 year groups with receive a $20 voucher applicable toward a weekday car rental through Avis.

C. Costs of Notice

The Defendants have or will pay all costs associated with notice and settlement administration, as set forth in the Settlement Agreement.

D. Service Award for Class Representative

Subject to the Court's approval, the parties have agreed that the representative Plaintiff, Ms. Fuller, will be paid an individual settlement and service award of $15,000.00 by the Defendants for her individual claims and for her services in connection with representing the Class. *See* Section V., *infra.*

E. Attorneys' Fees Award

Plaintiff's counsel has simultaneously filed today a motion seeking payment of her counsel fees and costs as negotiated by the parties and permitted in the settlement agreement. Plaintiff's Counsel seeks an award of fees and costs in amount of $890,815.20, which represents 33% of the

[7] Pursuant to the Settlement Agreement, no funds revert to the Defendant under any circumstances.

total value of the settlement. The amount of attorneys' fees and expenses to be paid to Class Counsel was not agreed to by the parties until well after agreement was reached on the other terms of the Settlement Agreement.

IV. ELEMENTS FOR CERTIFICATION OF A SETTLEMENT CLASS

When the Court preliminarily approved this settlement, it considered whether the settlement class could be conditionally certified for settlement purposes. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (trial court may disregard management issues in certifying a settlement class, but the proposed class must still satisfy the other requirements of Rule 23). As final approval of the settlement also involves the determination that certification of the Settlement Class is appropriate, the analysis applies again at this juncture.

Rule 23 of the Federal Rules of Civil Procedure governs the certification of class actions. One or more members of a class may sue as representative parties on behalf of a class if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. In support of her contention that proper and sufficient grounds for class certification exist under Rule 23, Plaintiff would show the following:

A. The Proposed Settlement Class Meet Rule 23(a)'s Requirements

1. Numerosity

In applying this rule, it has consistently been held that joinder is impracticable where the class is composed of hundreds of potential claimants; indeed, impracticability of joinder has often been found where the class is composed of fewer than 100 members. *See, e.g., Eisenberg v. Gagnon*, 766 F.2d 770, 785-86 (3d Cir. 1985) (90 class members met numerosity requirement); *Weiss v. York Hospital,* 745 F.2d 786, 808 (3d Cir. 1984) (92 class members met the numerosity

requirement).

Plaintiff asserts that the members of the Settlement Class are so numerous that joinder of all members is impracticable. According to the records produced by Defendants to the Settlement Administrator, and following an address updating procedure, including the removal of duplicate records, it appears that the Settlement Class consists of 46,415 members. Platt Decl. at ¶ 3.

2. Commonality

A putative class satisfies Rule 23(a)'s commonality requirement if "the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994). Cases presenting standardized practices directed at consumers invariably present common predominating issues. *See Perry v. FleetBoston Financial Corp.*, 229 F.R.D. 105 (E.D. Pa. 2005) (finding Rule 23 requirements met in consumer class action and noting cases routinely certified where 'defendants have engaged in standardized conduct towards members of the proposed class by mailing to them allegedly illegal form letters or documents'").

The common questions of law or fact relate to Defendants' uniform procedures for obtaining consent to procure background reports, and its procedures for using such reports to make employment determinations and inform applicants about such decisions. Namely:

1. Whether Defendants procured or caused to be procured consumer reports for employment purposes without providing a clear and conspicuous disclosure in a document that consists solely of the disclosure that a consumer report may be obtained for employment purposes.

2. Whether Defendants failed to provide each job applicant not hired a Pre-Adverse Action Notice, a copy of his or her consumer report and statement of rights before Defendants took adverse action based upon the consumer report;

3. Whether Defendants acted willfully or negligently in disregard of the FCRA.

Because the Defendants' policies and practices with respect to such conduct were essentially uniform regarding these issues, commonality is satisfied. *Prudential*, 148 F.3d at 310.

3. Typicality

This requirement is "designed to align the interests of the class and the class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals." *Prudential*, 148 F.3d at 311. The threshold for establishing typicality is low. Typicality does not require that the claims of the class members be identical. Rather, a plaintiff's claims are typical when the nature of the plaintiff's claims, judged from both a factual and a legal perspective, are such that in litigating her personal claims, she can reasonably be expected to advance the interests of absent class members. *See, e.g., General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 156-157 (1982).

The Class Representative is a member of the settlement class, has the same interest in resolution of the issues as all other members of the class and her claims are typical of all members of the class. Plaintiff was affected by the Defendants' practices in the same manner as all members of the class and also had adverse action taken against her by Defendants like some members of the class. These facts, and Plaintiff's claims, are therefore typical of the facts and claims of all other members of the proposed settlement class. *See Hassine v. Jeffes,* 846 F.2d 169, 177 (3d Cir. 1998).

4. Adequacy of Representation

A representative plaintiff must be able to provide fair and adequate protection for the interests of the class. That protection involves two factors: (a) the representative plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation; and (b) the representative plaintiff must not have interests antagonistic to those of the class. *See, e.g.,*

Prudential, 148 F.3d at 312; *Lewis v. Curtis*, 671 F.2d 779, 788 (3d Cir. 1982).

Plaintiff here fairly and adequately represents the interests of the class. She has retained qualified and experienced attorneys who have substantial experience in class action and FCRA consumer litigation and are qualified to conduct the litigation. *See LaRocque v. TRS Recovery Svcs., Inc.,* 285 F.R.D. 139 (D. Me. 2012). *See also Perry,* 229 F.R.D. at 112-13 (court finding that "I and a number of my colleagues have previously found that class counsel Francis & Mailman, P.C. … possesses the skill, experience and qualifications necessary to conduct litigation similar to the present lawsuit . . . .").[8]

Moreover, Plaintiff has no interests that are antagonistic to the interests of the class, and is unaware of any actual or apparent conflicts of interest between herself and the class.

B. The Proposed Settlement Class Meets Rule 23(b)(3)'s Requirements

The proposed settlement contemplates a class certification permitting opt-outs pursuant to Rule 23(b)(3). An action may be maintained as a class action if the four elements described above are satisfied, and in addition, certain other conditions under Rule 23(b)(3) are met:

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[8] *See, e.g., Magallon v. Robert Half Int'l, Inc.*, 311 F.R.D. 625, 638 (D. Or. 2015) (opinion and order certifying class on contest and finding counsel adequate); *Patel v. Trans Union, LLC*, 308 F.R.D. 292, 307 (N.D. Cal. 2015); *Ramirez v. Trans Union, LLC*, 301 F.R.D. 408 (N.D. Cal. 2014); *Berry v. LexisNexis Risk & Info. Analytics Grp., Inc.*, No. 3:11-cv-754, 2014 WL 4403524, at *11 (E.D. Va. Sept. 5, 2014) (finally approving class settlement, including appointment of class counsel, over objections) *aff'd sub nom Berry v. Schulman*, 807 F.3d 600, 612 (4th Cir. 2015); *King v. Gen. Info. Servs., Inc.*, No. 2:10-cv-6850 (E.D. Pa. Feb. 20, 2013) (Dkt. No. 74, Order appointing interim class counsel); *LaRocque v. TRS Recovery Svcs., Inc*., 2012 WL 291191 (D. Me. July 17, 2012); *Serrano v. Sterling Testing Sys., Inc.* 711 F. Supp. 2d 402 (E.D. Pa. 2010); *Summerfield v. Equifax Info. Svcs., LLC*, 264 F.R.D. 133 (D. N.J. 2009); *Chakejian v. Equifax Info. Svcs., LLC*, 256 F.R.D. 492 (E.D. Pa. 2009); *Marino v. UDR*, 2006 WL 1687026, C.A. No. 05-2268 (E.D. Pa. June 14, 2006); *Seawell v. Universal Fidelity Corp,* 235 F.R.D. 64 (E.D. Pa. 2006); *Perry*, 229 F.R.D. 105; *Wisneski v. Nationwide Collections, Inc.*, 227 F.R.D. 259 (E.D. Pa. 2004). *See also White v. Experian Info. Sols.. Inc.*, No. 05-01070, 2014 WL 1716154, at *13, 19, 22 (C.D. Cal. May 1, 2014) (finding Francis & Mailman "FCRA specialists" and appointing firm and its team as interim class counsel over objections from competing group because their team's "credentials and experience [we]re significantly stronger in class action and FCRA litigation.").

> (3) the Court finds that the questions of law or fact common to the members of the Class predominate over any questions affecting only individual members, and that a Class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Fed. R. Civ. P. 23(b)(3).

The requirement that the questions of law or fact common to all members of the Class predominate over questions pertaining to individual members is normally satisfied where plaintiffs have alleged a common course of conduct on the part of the defendant. *Prudential*, 148 F.3d at 314-315.

Plaintiff has alleged such a common course of conduct by Defendant. Class members were all sent the same form collection letter and envelope with a transparent window disclosing account numbers. The predominating and dispositive issue is whether Defendant violated the FCRA by engaging in this practice.

A class action in this case is superior to other available methods for the fair and efficient adjudication of the controversy because a class resolution of the issues described above outweighs the difficulties in management of separate and individual claims and allows access to the courts for those who might not gain such access standing alone, particularly in light of the relatively small amount of the actual and statutory damage claims that would be available to individuals. In numerous cases, courts have recognized that Rule 23(b)(3) certification is particularly appropriate for consumer claims such as those asserted here. *See*, *e.g.*, *Amchem*, 521 U.S. at 617 ("The policy of the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights"). Moreover, such a certification permits individual claimants to opt-out and pursue their own actions separately if they believe they can recover more in an individual suit.

Thus, both predominance and superiority are satisfied.

Solely for the purposes of settlement, Defendant does not dispute that the Class should be certified in accordance with Rule 23(b)(3). Accordingly, the Court should certify the Class for settlement purposes.

V. THE SETTLEMENT IS FAIR AND ADEQUATE

When a proposed class-wide settlement is reached, it must be submitted to the court for approval. NEWBERG ON CLASS ACTIONS at § 11.24, 5th ed. (2011). Preliminary approval is the first of three steps that comprise the approval procedure for settlement of a class action. The second step is the dissemination of notice of the settlement to all class members. The third step is a settlement approval hearing. *See* MANUAL FOR COMPLEX LITIGATION (Fourth) § 21.63 (2004), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/mcl4.pdf/$file/mcl4.pdf. The first two steps have been completed.

The question presented on a motion for final approval of a proposed class action settlement is whether the proposed settlement is fair in light of the following factors:

> (1) the complexity, expense and likely duration of the litigation;(2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation…

Girsh, 521 F.2d at 157; *Prudential*, 148 F.3d at 317.

Trial courts generally are afforded broad discretion in determining whether to approve a proposed class action settlement. *See Eichenholtz v. Brennan*, 52 F.3d 478, 482 (3d Cir. 1995); *Girsh v. Jepson, supra*.

Thus, this Court is now asked to ascertain whether the proposed settlement is within a "range of reasonableness" which experienced attorneys could accept in light of the relevant risks

of the litigation. *See Walsh v. Great Atlantic and Pacific Tea Co.*, 96 F.R.D. 632, 642 (D.N.J. 1983), *aff'd*, 726 F.2d 956 (3d Cir. 1983). In determining what falls within this range, the Court should bear in mind "the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion . . ." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972).

Recognizing that a settlement represents an exercise of judgment by the negotiating parties, courts have consistently held that the function of a judge reviewing a settlement is neither to rewrite the settlement agreement reached by the parties nor to try the case by resolving the issues intentionally left unresolved. *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, 804 (3d Cir. 1974); *see also Officers for Justice v. Civil Serv. Comm'n of City & Cty. Of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982); *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123-24 (8th Cir. 1975). A settlement represents the result of a process by which opposing parties attempt to weigh and balance the factual and legal issues that neither side chooses to risk taking to final resolution. Courts, therefore, have given considerable weight to the views of experienced counsel as to the merits of a settlement. *See Lake v. First Nationwide Bank*, 900 F. Supp. 726, 732 (E.D. Pa. 1995) ("Significant weight should be attributed to the belief of experienced counsel that settlement is in the best interest of the class").

Here, experienced counsel firmly believes that the settlement, as structured and contemplated by the parties, represents an educated and eminently reasonable resolution of the dispute. An evaluation of the relevant factors demonstrates that the settlement fits well within the range of reasonableness and should be approved.

A. The Complexity, Expense And Likely Duration Of The Litigation

Absent the settlement, the parties would have to proceed with further discovery, a motion for class certification, probably summary judgment proceedings and ultimately, perhaps to trial.

While the Representative Plaintiff believes she would prevail on all issues, there is at least some risk she would not.

Even if Plaintiff were to prevail on class certification and then successfully defeat a motion for summary judgment, a lengthy and expensive trial would most likely ensue. Trial preparation on both sides would be necessary and a jury trial would eventually be before the Court. It would be unrealistic not to expect appeals from any result reached. Avoidance of this unnecessary expenditure of time and resources clearly benefits all parties. *See In re General Motors Pick-Up Trust Fuel Tank Products Liab. Litig.*, 55 F.3d 768, 812 (3d Cir. 1995) (concluding that lengthy discovery and ardent opposition from the defendant with "a plethora of pretrial motions" were facts favoring settlement, which offers immediate benefits and avoids delay and expense).

B. The Reaction Of The Class To The Settlement

As set forth above, notice has been directly mailed to members of the Settlement Class advising them of the terms of the settlement and their right to exclude themselves from the Class. The deadline for Class members to exclude themselves and to object was October 29, 2017. As of that date, the Settlement Administrator received 39 valid exclusion requests. Platt Decl. at ¶ 10. In addition to those exclusion requests, the Settlement Administrator received an additional 31 invalid requests. *Id.* at ¶ 11. Only one class member has submitted an objection to the settlement. Dkt. No. 46.[9] Even when including the invalid exclusion requests, only 71 class members requested to be excluded from the settlement – only 0.0015% of the total class. This is convincing evidence of the proposed settlement's fairness and adequacy. *See Stoetzner v. U.S. Steel Corp.*,

[9] Mr. Carroll objects that, as a class member with a 3-5 year old claim, the settlement sets his recovery at $20. Dkt. No. 46. However, in light of the substantial risk that he would have no FCRA claim at all in light of the FCRA's usual 2-year statute of limitations, the settlement's provision of any recovery at all constitutes a success.

897 F.2d 115, 118-119 (3d Cir. 1990) ("only" 29 objections in 281 member class "strongly favors settlement"); *Prudential*, 148 F.3d at 318 (affirming conclusion that class reaction was favorable where 19,000 policyholders out of 8 million opted out and 300 objected).

C. The Stage of the Proceedings and the Amount of Discovery Completed

The settlement in this matter occurred only after the parties were able to assess the relative strengths and weaknesses of their claims and defenses, by testing their arguments through briefing on Defendants' Motion for Judgment on the Pleadings, and through the exchange and review of substantial document production. The parties then conducted extensive arms-length negotiations, including with the assistance of a well-respected private mediator, Eric D. Green, and Magistrate Judge Michael A. Hammer of this Court. As a result of the parties' efforts, the litigation had reached the stage where "the parties certainly [had] a clear view of the strengths and weaknesses of their cases." *Bonett v. Education Debt Svcs., Inc.*, 2003 WL 21658267, at *6 (E.D. Pa. 2003) (quoting *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986)).

D. The Risks Of Establishing Liability

The risk of establishing liability is another important factor warranting final approval of the settlement. To prevail at trial, Plaintiff would need to succeed on his claims that the Defendants' actions violated the FCRA. Defendants deny that they have committed any wrongful acts or violations of law or that it has any liability to the Plaintiff or the Settlement Class.

While Plaintiff strongly believes that the Defendants' activity violated the law as set forth in her Complaint, she also recognizes the risk that the Court or a jury might not make that finding. Although Plaintiff was prepared to take on these burdens and make substantial arguments opposing Defendants' positions, the risks she faced were not insignificant.

E. The Risks Of Establishing Damages

Even if Plaintiff were to overcome the liability obstacles, there are also risks in obtaining statutory damages, which Plaintiff has avoided by virtue of the proposed settlement. The determination of statutory damages, like the determination of liability, is a complicated and uncertain process, typically involving conflicting opinions. In this case, Plaintiff and the members of the Settlement Class were seeking statutory damages under the FCRA in the range of $100 to $1,000 per class member, as well as punitive damages. 15 U.S.C. § 1681n.

The settlement class provides recovery of nearly $700 to each member of the 2-Year Inadequate Disclosure Group, as well as payments of $45 to each member of the 2-Year Failure to Notify Group. Even members of the Settlement Class whose claims may arguably be barred by the statute of limitations will recover valuable consideration in the form of $20 vouchers toward car rental. The settlement does not require any class members to submit a claim or any proof of injury or damages.

Furthermore, the settlement as a whole will result in substantial practice changes that will benefit all Settlement Class members, as well as others in the future. Also, even if Defendants were to be found liable for willful conduct, and Plaintiff and the Class were awarded statutory damages, that award amount is by no means certain, given the statutory factors that have to be taken into account in making such an award – frequency and persistence of noncompliance with the statute, nature of the noncompliance, and extent to which noncompliance was willful or negligent. 15 U.S.C. § 1681n(a) and § 1681o(a).

Thus, this settlement avoids the litigation risk to the Settlement Class and secures tangible and useful relief that may not be obtainable after trial. The risk of no damages, or a lower damages award at trial, as well as limitations on the Court's ability to award injunctive relief under the FCRA, supports final approval of the Settlement Agreement.

F. The Risks Of Maintaining The Class Action Through Trial

The settlement here comes before Plaintiff has moved for class certification. Defendants would be expected to vigorously oppose certification, and even if class certification were granted, it would not be surprising if Defendants pursued an interlocutory appeal under Rule 23(f).

Alternatively, even if the case were certified, it is likely that Defendants would seek decertification, either before trial, during trial or on appeal. *See Saunders v. Berks Credit and Collections*, 2002 WL 1497374, at *12 (E.D. Pa. July 11, 2002). While the success of such attempts is uncertain at best, the settlement allows Plaintiff to avoid the delay and expense that would be associated with such proceedings.

G. The Ability Of The Defendant To Withstand A Greater Judgment

The ability of a defendant to withstand a greater judgment is a particularly relevant consideration "where a settlement in a given case is less than would ordinarily be awarded but the defendant's financial circumstances do not permit a greater settlement." *Reibstein v. Rite Aid Corp.,* 761 F. Supp. 2d 241, 254 (E.D. Pa. 2011). Here, this factor is neutral.

H. The Reasonableness Of The Settlement In Light Of The Best Possible Recovery

In light of the questions of fact and law present in this litigation, the value of the proposed settlement substantially outweighs the mere possibility of future relief. The expense of a trial and the use of judicial resources and the resources of the parties would have been substantial. Moreover, in light of the contested liability, it would not be unusual that any judgment entered would have been the subject of post-trial motions and appeals, further prolonging the litigation and reducing the value of any recovery. Thus, a settlement is advantageous to all concerned. An appeal could seriously and adversely affect the scope of an ultimate recovery, if not the recovery itself. *See Backman v. Polaroid Corp.*, 910 F.2d 10 (1st Cir. 1990) (class won a jury verdict and

a motion for judgment N.O.V. was denied, but on appeal the judgment was reversed and the case dismissed); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979) (reversal of multimillion dollar judgment obtained after protracted trial); *Trans World Airlines, Inc. v. Hughes*, 312 F. Supp. 478, 485 (S.D.N.Y. 1970), *modified*, 449 F.2d 51 (2d Cir. 1971), *rev'd* 409 U.S. 363, 366 (1973) ($145 million judgment overturned after years of litigation and appeals).

While Plaintiff is confident of her ability to prevail at trial, no final adjudication has been made as to the validity of his claims. Plaintiff also recognizes that Defendants have continued to deny all liability and allegations of wrongdoing and that Plaintiff's claims would be threatened with dismissal in connection with dispositive motions which would be expected to be filed and briefed. In *In re Greenwich Pharmaceutical Secs. Litig.*, 1995 WL 251293 (E.D. Pa. April 26, 1995), the court held in finding a $4.3 million settlement within the range of reasonableness where plaintiff's estimate of damages was $100 million:

> [P]laintiffs' most optimal estimate must be tempered by Defendants' repeated and vigorous claim of no damages. When the probability of success at trial is factored into the equation, the settlement is obviously "within the range of reasonableness."

Id. at *5. *See also, In re Ikon Office Sols., Inc. Sec. Litig.*, 194 F.R.D. 166, 183-84 (E.D. Pa. 2000) (approval of settlement that provided 5.2% of best possible recovery).

Through the proposed settlement, Plaintiff has obtained a very reasonable benefit for the Settlement Class under the FCRA. Moreover, through the practice changes that the lawsuit triggered, Plaintiff has achieved what essentially acts as a settlement injunction requiring Defendants to improve its practices in the future. This settlement allows Plaintiff to avoid the risks described above and ensures an immediate benefit to the Settlement Class. The monetary compensation available under the Settlement Agreement is entirely in line with comparable settlements under the FCRA.

Plaintiff believes the proposed settlement is well within the range of reasonableness and

should be approved.

I. The Range Of Reasonableness Of The Settlement To A Possible Recovery In Light Of All The Attendant Risks Of Litigation

Essentially, this factor is an amalgam of the analysis described above. When the risks of liability and damages are considered in light of the total potential recovery, this settlement is an excellent result for the Settlement Class.

VI. INDIVIDUAL SETTLEMENT AND SERVICE AWARD

Class Counsel also seeks this Court's approval of a fifteen thousand dollar ($15,000.00) individual settlement and service award for Representative Plaintiff Angela, for her willingness to undertake the risks of this litigation and shoulder the burden of such litigation. In this case, there would be no benefit to Class members if the Representative Plaintiff had not stepped forward. Ms. Fuller devoted significant time and energy to the litigation, including reviewing documents, assisting with compiling responses to written discovery requests and consulting with counsel as necessary. She has totally fulfilled her obligations as a class representative. Class Counsel therefore request that the Ms. Fuller be approved for the award described above and as set forth in the Settlement Agreement. The award represents actual and statutory damages under the FCRA, as well as recognition of the benefits and value of the settlement that the Representative Plaintiff achieved for the Settlement Classes. Class members were notified that Class Counsel would request an award for the Representative Plaintiff in this amount and no Class member objected to that proposed award.

This award is well within the range of awards made in similar cases. *See Rodriguez v. Calvin Klein Inc, et. al*, No. 1:15-cv-2590-JSR (S.D.N.Y. Mar. 21, 2016) at Dkt. No. 33 (final approval order awarding $15,000 in class representative in recognition of settlement in FCRA section 1681b(b)(3) case); *Berry*, 2014 WL 4403524, at *16 (awarding $5,000 to each of several

class representatives); *Giddiens v. LexisNexis Risk Solutions, Inc.*, C.A. No. 12-2624 (E.D. Pa. Jan. 20, 2015) (Doc. 55, ¶ I) (awarding class representative $10,000); *Robinson v. General Info. Servs., Inc.*, No. 2:11-cv-07782-PBT (E.D. Pa. Nov. 4, 2014) at Doc. 55 (final approval order awarding $10,000 individual settlement to class representative); *Sapp v. Experian Info. Sols., Inc.*, No. CIV.A. 10-4312, 2013 WL 2130956, at *3 (E.D. Pa. May 15, 2013) (awarding $15,000 to class representative in FCRA settlement); *McGee v. Cont'l Tire N. Am., Inc.*, No. CIV. 06-6234(GEB), 2009 WL 539893, at *18 (D. N.J. Mar. 4, 2009) ($3,500); *Barel v. Bank of America,* 255 F.R.D. 393, 402-403 (E.D. Pa. 2009) ($10,000); *Perry v. Fleet Boston Financial Corp*., 229 F.R.D. 105, 118 (E.D. Pa. 2005) (awarding $5,000, and citing cases);. Accordingly, the award requested for the Representative Plaintiff should be approved.

VII. CONCLUSION

As concluded by Judge Brody in approving a settlement of FCRA claims in the *Chakejian* case, "this settlement is fair, adequate, and reasonable. Such a finding is further bolstered by previous court decisions approving similar settlements whose terms were somewhat less favorable than these." *Chakejian v. Equifax Info. Servs., LLC*, 275 F.R.D. 201, 216 (E.D. Pa. 2011) (citations omitted). *See also Sapp*, 2013 WL 2130956, at *2 ("There is no question but that the settlement was a result of hard-fought, arm's-length negotiation…. In sum, the settlement is unquestionably fair, adequate and reasonable").

The Representative Plaintiff requests final approval of the proposed settlement herein for the same reasons.

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Respectfully submitted,

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