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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	ELEVENTH JUDICIAL CIRCUIT
GEORGE BOSKIE, HADEL TOMA and TERRY KELLER,	)	CASE NO. 2019CP3200824
Plaintiffs,	)	**PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT (UNOPPOSED)**
v.	)	
BACKGROUNDCHECKS.COM, LLC	)	
Defendant.	)	

Plaintiffs George Boskie, Hadel Toma and Terry Keller (collectively, "Plaintiffs") respectfully move the Court to (1) enter the Final Approval Order granting final approval of the settlement with Defendant Backgroundchecks.Com, LLC ("Defendant") (collectively, the "Parties") submitted with this motion and attached as Exhibit A and (2) enter the Injunction submitted with the motion and attached as Exhibit B. Defendant does not oppose this Motion.

MEMORANDUM IN SUPPORT

Plaintiffs, on behalf of themselves and the Settlement Classes[1], seek final approval of the settlement with Defendant for alleged violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* ("FCRA"). On May 17, 2019, the Court preliminarily approved the parties' Settlement Agreement. ("Prelim. App. Order.") The Court found on a preliminary basis that the terms of the settlement are "fair, reasonable, and adequate" and approved the distribution of notice to the Class. (*Id.*) The notice process is complete. The response from Settlement Class members confirms that the Court's preliminary analysis was correct. For the HomeAdvisor Class, out of

[1] Unless otherwise defined herein, all capitalized terms have the same meanings as those set forth in the parties' Settlement Agreement, which was filed as Exhibit A to the Declaration of E. Michelle Drake in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement ("1st Drake Decl.").

the 5,353 Class Members, there were zero objections and zero requests for exclusion. For the millions of people estimated to be in the Injunctive Relief Class, only three objections were submitted, none of which have any merit. This constitutes compelling evidence that the settlement is fair, reasonable, and adequate. *See In re The Mills Corp. Secs. Litig.*, 265 F.R.D. 246, 257-8 (E.D. Va. 2009) (stating that a lack of objections and minimal opt-outs gave "the Court a great deal of confidence in the settlements['] adequacy."); *Brunson v. Louisiana-Pacific Corp.*, 818 F. Supp. 2d 922, 927 (D.S.C. 2011) ("lack of opposition to the Settlement indicates that the Settlement is fair, adequate and reasonable."); *Kirven v. Central States Health & Life Co. of Omaha*, No. 11-cv-2149, 2015 WL 1314086, *6 (D.S.C. Mar. 23, 2015) ("An absence of objections and a small number of opt-outs weighs significantly in favor of a settlement's adequacy."). Accordingly, Plaintiffs respectfully request that the Court grant final approval of the settlement.

BACKGROUND

The history of this litigation and settlement, and the claims involved, are set forth in detail in Plaintiffs' preliminary approval papers, and motion for attorneys' fees, which are incorporated herein, and therefore will be only briefly summarized here.

I. SUMMARY OF PROCEDURAL HISTORY AND SETTLED CLAIMS.

This case involves two aspects of Defendant's business: (1) Defendant's provision of criminal record data to consumer reporting agencies ("Downstream CRAs") which in turn sell background checks to end-users and (2) the background checks Defendant directly provided to HomeAdvisor, an end-user of Defendant's reports. On September 8, 2016, Plaintiff Boskie filed an action styled *Boskie v. Backgroundchecks.com*, in the Court of Common Pleas, Philadelphia County in the State of Pennsylvania, alleging that Defendant violated the FCRA when it prepared

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and sold consumer reports on Plaintiff Boskie and on putative classes of similarly situated individuals to HomeAdvisor that contained dismissed charges that antedated the report by more than seven years in violation of the FCRA, 15 U.S.C. § 1681c.

On October 17, 2016, Defendant removed the case to the United States District Court for the Eastern District of Pennsylvania. On November 18, 2016, Defendant filed an Answer to the Complaint and a Motion to Transfer Venue to the United States District Court for the Northern District of Texas where Defendant conducts some of its business. After briefing and oral argument, on February 14, 2017, Defendant's Motion to Transfer Venue was granted and the case was transferred to the Northern District of Texas.

After the case was transferred, Plaintiffs Boskie, Toma, and Keller filed their First Amended Complaint. Plaintiffs Toma and Keller chiefly complained that Defendant provided outdated and incomplete information to Downstream CRAs which in turn included some of the offending information in the Downstream CRAs' background checks to Plaintiffs Toma's and Keller's prospective employers. Plaintiff Boskie's allegations remained substantially the same as they were in the initial Complaint.

On March 8, 2018, the parties conducted an arms-length, contentious, all-day, and complicated in-person mediation session with Rodney Max, a well-respected mediator with substantial experience in mediating disputes arising under the FCRA. During that session, Plaintiffs and Defendant made significant progress towards reaching a settlement to resolve all claims in the case, but the case remained unresolved.

Over the course of the next year, the parties continued settlement discussions, in particular regarding the scope and content of the injunctive relief. During the course of negotiations, the parties agreed to present the settlement in South Carolina state court where Defendant operates

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part of its business due to the United States Supreme Court decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), which involved claims under the FCRA and elaborated on the types of injury necessary to invoke federal jurisdiction and satisfy the Article III limitations on federal jurisdiction. Broadly speaking, the *Spokeo* court held in some instances an alleged violation of a federal statute may not be a concrete injury sufficient to satisfy Article III's injury-in-fact requirement. The maintenance of certain FCRA actions in federal court has become uncertain in the wake of *Spokeo*. Standing in South Carolina state court is broader than Article III standing and can be acquired through statute. *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008) ("Standing may be acquired: (1) by statute; (2) through the rubric of 'constitutional standing;' or (3) under the 'public importance' exception."); *Freemantle v. Preston*, 398 S.C. 186, 194, 728 S.E.2d 40, 44 (2012) ("The traditional concepts of constitutional standing are inapplicable when standing is conferred by statute."). Here, there is no dispute that Plaintiffs have statutory standing to sue and thus have standing to proceed in this Court. *See* 15 U.S.C. § 1681p (providing that any action to enforce civil liability under the FCRA may be brought in any court of competent jurisdiction). For the purposes of facilitating this settlement only, Defendant has agreed to waive any arguments regarding personal jurisdiction and venue in South Carolina. In addition, Defendant has waived the provisions of S.C. Code Ann. § 15-5-150.

The parties, therefore, voluntarily dismissed their action in federal court via stipulation and informed the federal court in the stipulation that they intended to present the Settlement in state court. To effectuate the Settlement, Plaintiffs filed a complaint in this Court on February 25, 2019.

On May 14, 2019, the Court heard Plaintiffs' motion for preliminary approval and on May 17, 2019, the Court entered the preliminary approval order. Pursuant to the Court's order,

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notice was disseminated to the two Settlement Classes. The parties now bring the Settlement before this Court for final approval.

II. SUMMARY OF SETTLEMENT TERMS.

The Court certified, with its Preliminary Approval Order, for settlement purposes, the following Settlement Classes:

> **"Injunctive Relief Class**" means all natural persons residing in the United States or the District of Columbia about whom either (a) information existed in Defendant's public records database or (b) Defendant provided a report to a third party, in either case from September 8, 2014 to the date when the Court enters its order of Preliminary Approval. Excluded from the settlement class are any Released Person, any person who has previously released his or her claims against Defendant, and the judge overseeing the Litigation.

> **"HomeAdvisor Class"** means all natural persons residing in the United States or the District of Columbia who were the subject of one or more reports that Defendant prepared and furnished directly to HomeAdvisor, Inc. during the period from September 8, 2014 to the date when the Court enters its order of Preliminary Approval, which report or reports contained one or more criminal records where the reported disposition in the incident (a) was either blank or something other than a conviction of a crime; and (b) antedates the date of the report by more than seven years. Excluded from the settlement class are any Released Person, any person who has previously released his or her claims against Defendant, any person who validly opts out of the settlement pursuant to Section 4.6, and the judge overseeing the Litigation.

For the HomeAdvisor Class, Defendant will pay $834,675 into a common settlement fund to resolve the claims of the 5,383 HomeAdvisor Class Members. (1st Drake Decl., Ex. 1 ¶ 4.1.1.) After any Court-approved deductions for attorneys' fees, costs, Named Plaintiff service award, and settlement administration expenses, the fund will be distributed *pro rata* to all Settlement Class Members who do not exclude themselves. (*Id.* ¶ § 4.3.1.) Should the full amounts requested for fees, costs, and Named Plaintiff service awards be granted, each Settlement Class member will receive approximately $95. If any funds remain after the check negotiation period closes, 50% of such funds shall be donated to the South Carolina Bar Foundation in accordance with Rule 23(e),

SCRCP, and 50% to the Southern Center for Human Rights. (*Id.* ¶ 4.9.) Defendant has made the requisite changes to its systems to ensure that obsolete information is no longer provided to HomeAdvisor. In exchange for this relief, the HomeAdvisor Class Members will only release claims that were or could have been raised in this litigation. (*Id.* ¶ 4.10.1.)

For the Injunctive Relief Class, Defendant has agreed to abide by the Injunction attached as Exhibit B to this motion. The Injunction sets forth the substantial and groundbreaking practice and process changes undertaken by Defendant for the benefit of Injunctive Relief class members.[2] Defendant is one of the industry's leading data providers, is highly sophisticated, and is well-versed in the duties imposed on consumer reporting agencies under the FCRA. The Injunction governs the situation where Defendant is providing data to Downstream CRAs. Defendant has maintained throughout this litigation that its provision of data to Downstream CRAs is not a consumer-reporting function governed by the FCRA.

However, to resolve this case, Defendant has agreed to abide by the Injunction. The goal of the Injunction is to ensure that the consumer report provided to the end user by the Downstream CRA complies with the FCRA's accuracy, completeness, and obsolescence requirements by allocating responsibility to comply with the FCRA between Defendant and the Downstream CRA. (Injunction, Article I).

The Injunction requires that before Defendant may provide data to a Downstream CRA, Defendant must obtain a certification from its Downstream CRA customers regarding what the Downstream CRA is going to do with the data provided by Defendant to comply with the FCRA.

[2] The Injunction submitted with the Settlement Agreement contemplated that Defendant would be ready to comply with its terms by September 30, 2019. Due to staffing turnovers in Defendant's IT department, Defendant has requested, and Class Counsel does not oppose, an extension until December 31, 2019 to comply. The Injunction submitted with this motion reflects this new date.

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(Injunction, Art. 2). Depending on the certification, Defendant will implement different restrictions on the data that it will provide to the Downstream CRAs.

On one end of the spectrum, Downstream CRAs that certify they will take all the steps necessary to comply with the FCRA will be provided with the most expansive set of data from Defendant's database searches. (Injunction Art. 2, § 3.1 ("Research and Notify") & Art. 5.) On the other extreme, for those Downstream CRAs that do not elect to take further steps to verify the data received, Defendant will limit the data provided to only data that has gone through Defendant's processes and procedures that apply when Defendant provides a report to an end-user. (Injunction Art. 2, § 3.10 ("Restrict") & Art. 5.) And there are various options in between these two extremes. Defendant has provided extensive information regarding the processes and procedures that apply to Defendant's reports that are provided to end users and the data that it will be providing to Downstream CRAs under the various certification regimes in the Injunction.[3]

Additionally, Defendant is required to perform periodic assessments of the Downstream CRAs to ensure that the Downstream CRAs are fulfilling their certifications. (Injunction Art. 6.) The Injunction requires Settlement Class Counsel to play a continuing role in the auditing process. (*Id.*).

The Injunction also requires Defendant to respond to requests for file disclosures regarding the records provided to Downstream CRAs and to reinvestigate any disputed information that Defendant provided to Downstream CRAs. (Injunction, Art. 7.) This ensures that consumers will know exactly what data was provided by Defendant to a Downstream CRAs in the event of a dispute.

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[3] Defendant has not committed to actually offering all of the products set forth in the Injunction, but if it does offer the product it will follow the Injunction.

Defendant is required to comply with the Injunction for seven years. (Injunction, Art. 11.) If Defendant withdraws from the Injunction before the end of the seven-year term, it must cease providing data to Downstream CRAs. (*Id.,* § 11.2.)

The Injunctive Relief is a substantial change from industry practice and the parties believe that the injunctive relief provides reasonable and legally compliant practices for the provision of information from data providers to Downstream CRAs. Class Counsel, who are very experienced FCRA lawyers, believe the Injunction represents a tremendous accomplishment that will benefit millions of consumers and serve as an example to other data providers within the background check industry. Class Counsel's expert Dr. Stan Smith opines that the monetary value of the Injunction, while difficult to precisely determine, is in the hundreds of millions of dollars. (*See generally* Declaration of Dr. Stan Smith filed with Plaintiffs' Motion for Attorney's Fees, Costs, and Class Representative Service Awards).

In exchange for the extensive Injunctive Relief, Injunctive Relief Class members are only releasing claims for willful violations of the FCRA (and state analogues) for statutory and punitive damages against Defendant in connection with Defendant's provision of data to Downstream CRAs in the past and for a period of seven years as long as Defendant is complying with the Injunction (Settlement Agreement § 5.6.1; 5.6.3.) No claims for actual damages are being released. No claims against the Downstream CRAs are being released. (*Id.*) Further, no claims against any of Defendant's data suppliers are being released. Injunctive Relief Class members are also releasing their ability to proceed in a further class action against Defendant related to Defendant's provision of data to Downstream CRAs. (*Id.* § 5.6.2.) There is no right to opt-out from the Injunctive Relief Class. (*Id.* § 5.6.2.)

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III. CLASS NOTICE AND REACTION.

For the HomeAdvisor Class, on June 6, 2019 the Settlement Administrator, JND Legal Administration ("JND"), sent the Court-approved Mail Notice via first-class U.S. mail to the HomeAdvisor Class. (Declaration of Jennifer Keough Regarding Notice Administration ¶ 5.) Of the 5,353 mailed notices, 796 notices were returned, and 236 were re-mailed. (*Id.* ¶ 7.) On May 20, 2019, JND also activated the HomeAdvisor Class Settlement Website, which provided class members with general information about the settlement, copies of court documents, the Long Form Notice, and important dates and deadlines. (*Id.* ¶ 11.) The HomeAdvisor Class Settlement Website has received 479 unique visitors and 2,714 page-views. (*Id.* ¶ 12.) On the same date, the Administrator also established a toll-free telephone line to provide responses to frequently asked questions and provided an email address to receive HomeAdvisor Class member inquiries. (*Id.* ¶ 20.) The HomeAdvisor toll-free phone number received 172 calls. (*Id.* ¶ 21.)

For the Injunctive Relief Class, the Settlement Administrator provided notice via the internet and also through publication notice. (*Id.* ¶¶ 9, 10.) Internet notice was provided through the use of banner advertisements and purchased search terms with popular search engines for a period of 13 weeks. (*Id.* ¶ 10.) This internet advertising redirected to the Injunctive Relief Settlement Website which went live on May 20, 2019 and has contained extensive information regarding the Settlement. (*Id.* ¶ 10, 11.) The Injunctive Relief Settlement Website has received 150,600 unique visitors and 233,274 page-views. (*Id.* ¶ 13.) Like with the HomeAdvisor Class, the Settlement Administrator established a toll-free telephone line and an email address to answer Class member questions. (*Id.* ¶ 22.) The Injunctive Relief toll-free phone number received 345 calls. The Settlement Administrator published the Injunctive Relief Publication Notice (in major national publications *Sports Illustrated* and *People*. The Notice Plan was designed to reach 78%

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of the Injunctive Relief Class, which exceeds the 70% benchmark for due process. *See, e.g.*, *Edwards v. Nat'l Milk Producers Fed'n*, No. 11- CV-04766-JSW, 2017 WL 3623734, at *4 (N.D. Cal. June 26, 2017) (noting that "notice plans estimated to reach a minimum of 70 percent are constitutional and comply with Rule 23" and approving notice plan that reached 75% of settlement class); *McCabe v. Six Continents Hotels, Inc.*, No. 12-CV-04818 NC, 2015 WL 3990915, at *11 (N.D. Cal. June 30, 2015) (approving notice program with 70% reach); *In re Bldg. Materials Corp. of Am. Asphalt Roofing Shingle Prod. Liab. Litig.*, No. 8:11-MN-02000-JMC, 2014 WL 12621614, at *6–7 (D.S.C. Oct. 15, 2014) (approving publication notice plan by Kinsella that would reach 80% of settlement class).

On August 26, 2019, Plaintiffs filed their Motion for Attorneys' Fees, Costs, Class Representative Service Awards, which the Administrator promptly posted on the Settlement Websites for class members to access and review. There have been no objections to Plaintiffs' requests.

The deadline for class members to postmark any opt-outs and objections passed on September 9, 2019. There have been no objections and no requests for exclusion from the HomeAdvisor Class, and only three objections received from the Injunctive Relief Class. (Keough Decl. ¶¶ 24, 25.)[4]

ARGUMENT

I. STANDARD OF REVIEW.

Rule 23(c), SCRCP, gives the Court discretion to approve a class action settlement. Judicial approval ensures that the rights of the absent class members are adequately protected. *See In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991); *Clark v. Experian Info. Sols., Inc.*,

[4] The three objections are attached hereto as Exhibits C, D, and E.

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219 F.R.D. 375, 378 (D.S.C. 2003); *see also* Rule 23, SCRCP, advisory committee note. The South Carolina courts have found it instructive to compare Rule 23, SCRCP with its federal counterpart, Fed. R. Civ. P. 23. *See*, *e.g.*, *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 454, 661 S.E.2d 81, 88 (2008); *Littlefield v. S.C. Forestry Comm'n*, 337 S.C. 348, 354, 523 S.E.2d 781, 784 (1999). Accordingly, reliance on federal precedent is appropriate in the final approval analysis below.

Federal Rule 23 was recently amended to "focus the core concerns of procedure and substance that should guide the decision of whether to approve" a class action settlement, and the goal of the amendment was not to "displace any factor" articulated by the courts in prior case law. Fed. R. Civ. P. 23 adv. comm. nn. (2018).[5] To determine whether a proposed settlement should be finally approved, the Fourth Circuit has provided a two-part analysis of the settlement's (1) fairness, and (2) adequacy. *In re Jiffy Lube*, 927 at 158-59. In considering fairness, the court is to consider "(1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area of . . . class action litigation." *Id.* In determining adequacy, the court looks to "(1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to

[5] The factors under revised Federal Rule 23(e)(2) are:

> (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.

trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement." *Id.*

Based on the reaction of the Settlement Classes, and the factors discussed below, the Court should grant final approval of the parties' settlement.

II. THE SETTLEMENT IS FAIR.

"[A] presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." *Brunson*, 818 F. Supp. 2d at 927 (citing Newberg & Conte, Newberg on Class Actions § 11.41 (3d ed. 1992)). The settlement here easily meets this threshold and should be approved.

1. This Case was Litigated & Meaningful Discovery Conducted Prior to Settlement.

Before the settlement was agreed upon, the parties had undertaken significant efforts in litigation and discovery, including: (1) investigating the claims; (2) researching and drafting the complaints, and the answers; (3) preparing and responding to one another's written discovery requests; (4) reviewing and producing documents; and (5) meeting and conferring regarding discovery-related issues. While the parties had not yet completed discovery or dispositive motion practice, the amount of litigation and discovery conducted had given the parties the opportunity to assess the strength of their respective claims and defenses prior to any settlement negotiations.

Prior to attending mediation with third-party neutral Rodney Max, the parties exchanged comprehensive mediation briefs, which canvassed the applicable law and risks of litigation both as to certification and the merits. The parties then prepared for and participated in a full-day mediation with Rodney Max's assistance and guidance, and conducted extended settlement

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negotiations, through counsel. Additionally, attorneys' fees and the Plaintiffs' service awards were not discussed or negotiated until after all other material terms of the settlement had been agreed upon, eliminating the possibility of a trade-off between compensation for the Settlement Classes and compensation for counsel and Plaintiffs. This timeline of settlement negotiations ensured that the parties were all well-apprised of the facts and each side's position on litigation and settlement prospects, and weighs in favor of approval. *In re Mi Windows and Doors Inc. Prod. Liab. Litig.*, MDL No. 2333, 2015 WL 12850547, *9 (D.S.C. July 22, 2015) (circumstances of settlement negotiations, particularly the assistance of mediators involved, weigh in favor of finding the settlement fair); *In re The Mills Corp.*, 265 F.R.D. at 255 (facts as to how settlement was reached after mediation and subsequent negotiations, demonstrated fairness of settlement).

Moreover, counsel for both parties are highly experienced in consumer class action litigation (*see* 1st Drake Decl. at Ex. 2; troutman.com/professionals/cindy-d-hanson.html) and endorse the settlement as being in the best interests of the Settlement Classes. This further supports a finding that the settlement is fair. *South Carolina Nat'l Bank*, 139 F.R.D. at 339 ("[t]he negotiations in this case were conducted by able counsel who have a substantial amount of litigation experience in this sort of complex [] action. . . . it is therefore appropriate for the court to give significant weight to the judgment of class counsel.").

III. THE SETTLEMENT IS ADEQUATE.

For the adequacy analysis, the Court "should weigh the benefits of the settlement to the class against the strength of the defense, and the expense and uncertainty of the litigation while accounting for class objections." *Case v. French Quarter III LLC*, No. 12-cv-2518, 2015 WL 12851717, at *8 (D.S.C. July 27, 2015). Here, the settlement provides significant monetary and

non-monetary relief to the Settlement Class, avoids the risks of further complex litigation, and has been very well received by class members. This all weighs in favor of a finding of adequacy.

1. The Settlement Provides Substantial Benefits to the Classes, and Avoids the Risks of Further Litigation.

While Plaintiffs firmly believe in the merits of their claims, Plaintiffs faced serious risks if they continued to litigate. The FCRA is not a strict liability statute. *Dalton v. Capital Assoc. Indus.*, 257 F.3d 409, 417 (4th Cir. 2001). A FCRA plaintiff can recover only where the defendant has acted negligently or willfully, and where the defendant's violation was at most negligent, recovery is limited to actual damages. 15 U.S.C. §§ 1681n(a)(1), o(a)(1). In order to recover any damages on a classwide basis, Plaintiffs most likely would have had to prove not only that Defendant violated the FCRA, but that it did so willfully which is a high burden. *Chakejian v. Equifax Info. Servs., LLC*, 275 F.R.D. 201, 212 (E.D. Pa. 2011) (proving willfulness in FCRA case is "a high hurdle to clear," and weighs in favor of settlement approval); *Reibstein v. Rite Aid Corp.*, 761 F. Supp. 2d 241, 253 (E.D. Pa. 2011) (willfulness presented "considerable – albeit not insurmountable – risks" and weighs in favor of approval). Indeed, even a jury finding on the issue of willfulness has been overturned on appeal. *Smith v. LexisNexis Screening Sols., Inc.,* 837 F.3d 604, 607 (6th Cir. 2016).

For the Injunctive Relief Class, willfulness would have proven to be a significant hurdle to recovery. Defendant had asserted that its provision of data to Downstream CRAs was not a consumer reporting activity governed by the FCRA and had asserted that there was no controlling law that established otherwise. Indeed, recent court decisions have found that various data products that contain criminal or credit information are not consumer reports governed by the FCRA. *Zabriskie v. Fed. Nat'l Mortg. Ass'n*, 912 F.3d 1192 (9th Cir. 2019); *Kidd v. Thomson Reuters Corp.*, 925 F.3d 99 (2d Cir. 2019). For the HomeAdvisor Class, Defendant had asserted

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various defenses, including that any alleged violation of the statute was accidental and not willful. While Plaintiffs believe those arguments could have been overcome, they presented stiff challenges and no result could be guaranteed. These factors weigh in favor of settlement approval. Additionally, there remain multiple procedural hurdles should the case continue to be litigated. Plaintiffs' motion for class certification, expert discovery, motions for summary judgment, trial, and potential appeals, would all need to be accomplished, and be successful, for Plaintiffs and the Settlement Class Members to receive relief if the Settlement were not approved. These stages of litigation all present risks and costs which weigh in favor of approving the instant Settlement.

Despite these obstacles to recovery, the Classes are receiving substantial relief. For the Injunctive Relief Class, the relief the relief provided will help everyone on whom Defendant has information in its databases, which is believed to be in the tens of millions of people. The Injunctive Relief represents a substantial and meaningful change from industry practices. It requires Defendant to take a role in ensuring that its Downstream CRA customers are complying with the FCRA, even though Defendant asserted that it was under no legal obligation to do so. The Injunction will help every single consumer about whom Defendant provides data to Downstream CRAs in the future and will help ensure that the consumer reports provided to customers of the Downstream CRAs comply with the FCRA's accuracy, completeness, and obsolescence requirements.

In addition, that Defendant has agreed through the Injunction to reinvestigate disputes and provide information upon request. This relief provides a tremendous benefit for consumers in being able to examine their files, and in ensuring that any issues in their reports are fixed and do not reoccur.

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In sum, the injunctive relief is a landmark achievement that will serve as an example for the entire background check industry. The value of the Injunction is hard to overstate even if the injunctive relief prevents an inaccurate or outdated report for even a minuscule portion of the class. And the relief could have only been achieved in the settlement context as most courts have found that the FCRA does not provide for injunctive relief. *See Walker v. Trans-Union LLC*, No. 1:11CV1110, 2013 WL 664405, at *2 (M.D.N.C. Feb. 22, 2013) (noting "most courts considering the issue conclude that FCRA does not provide for injunctive or declaratory relief for individual plaintiffs" and collecting cases).

The injunctive relief is even more impressive given the very narrow release in this case. Injunctive Relief Class Members are not given up *any claims* for actual damages under the FCRA and are only releasing claims against Defendant for statutory or punitive damages. Further, the release is limited solely to Defendant. If a Downstream CRA allegedly violates the FCRA based on information provided to the Downstream CRA by Defendant, Injunctive Relief Class Members may still sue the Downstream CRA for all available remedies under the FCRA. Moreover, the class waiver is similarly circumscribed to FCRA claims against Defendant only limited to Defendant's communications with the Downstream CRA.

The Fourth Circuit recently approved settlement against an entity that maintained that it was not selling FCRA-regulated products in *Berry v. Schulman*, 807 F.3d 600 (4th Cir. 2015). There, the appellate court upheld the district court's finding that a statutory and punitive damages release in a mandatory (*i.e.*, no opt-out) class was fair and reasonable given the sweeping injunctive relief. The Court should similarly approve the agreement here.

For the HomeAdvisor Class, the FCRA itself does not provide any guidance to courts in choosing the appropriate recovery for a statutory violation, see 15 USC 1681n(a)(1), but in

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determining the amount of statutory damages to impose pursuant to the FCRA, court 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. Sept. 20, 2010). The statutory damages range applies to all FCRA violations. Given the breadth of violations that fall within the range, it is unlikely that Plaintiffs would achieve an award of statutory damages which, on a per person basis, would substantially exceed $100. Here, should the Court approve the requested attorneys' fees, costs, Class Representative service awards, and administration expenses, Settlement Class members will each automatically receive approximately $95. *See Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 833 (E.D.N.C. 1994) (approving settlement representing approximately 5% of plaintiffs' damages as adequate and citing cases in support).

Further, the settlement compares favorably to court-approved settlements of similar claims under the FCRA, providing class members with approximately three times the amount of relief approved in other cases. *See*, *e.g.*, *Ernst v. Sterling Infosystems, Inc.*, No. 12-cv-8794, ECF No. 237 (S.D.N.Y. Oct. 13, 2015) (final approval of settlement that provided payments of $42 to $61 per class member for reporting obsolete information); *Haley v. TalentWise, Inc.*, No. 13-cv-01915, ECF No. 88 (W.D. Wash. June 16, 2015) (final approval of settlement that paid class members approximately $50 for claims based on reporting outdated charges).

2. The Settlement is Supported by the Class.

The minimal opposition to the settlement further demonstrates the settlement's fairness and adequacy. *Brunson*, 818 F. Supp. 2d at 927; *In re The Mills*, 265 F.R.D. at 257-8 ("an absence of objections and a small number of opt-outs weighs significantly in favor of the settlement's adequacy."). As noted above, out of over 5,353 Settlement Class members, there were zero

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objections and zero requests for exclusion from the HomeAdvisor Class, and only three objections received from the Injunctive Relief Class. These numbers represent a positive reaction from the Class and supports final approval.

None of the three objections have any merit. Two of the objections are identical in substance and the substance of the objection seems to be that no information should be transmitted unless there is a conviction. (Exs. C, D.) While Class Counsel sympathizes with that concern, that type of restriction is not what the law provides. The FCRA allows for non-conviction information to be reported up to seven years, 15 U.S.C. § 1681c(a), and this Settlement will help ensure that that provision is being followed. The other "objection" is not really an objection but a statement that the Settlement Class member objects if he is not included in the Settlement. (Ex. E.) The Class Member requests that if he does benefit, then "do nothing." (*Id.*) As detailed above, the Settlement provides significant benefits that from which this Class member will benefit.

All in all, given the number of potential class members, and the robust notice program, that only three objections were received is a testament to the strength and fairness of the Settlement.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court approve the Settlement and enter the proposed Final Approval Order and Injunction.

Respectfully submitted this 4th day of October, 2019.

s/ Dave Maxfield
Dave Maxfield (Fed. ID 6293)
DAVE MAXFIELD, ATTORNEY, LLC
P.O. Box 11865
Columbia, SC 29211
Telephone: (803) 509-6800
Facsimile: (855) 299-1656
dave@consumerlawsc.com

E. Michelle Drake (MN Bar No. 0387366)
John G. Albanese (MN Bar No. 0395882)

BERGER MONTAGUE PC
43 S.E. Main Street, Suite 505
Minneapolis, MN 55414
Telephone: (612) 594-5999
Facsimile: (612) 584-4470
emdrake@bm.net
jalbanese@bm.net

Ryan Allen Hancock (PA Bar No. 92590)
WILLIG, WILLIAMS & DAVIDSON
1845 Walnut Street, 24th Floor
Philadelphia, PA 19103
Telephone: (215) 656-3679
rhancock@wwdlaw.com

ATTORNEYS FOR PLAINTIFFS

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2019, I filed a copy of the foregoing document with the Clerk of Court using the CM/ECF system, which will automatically send notice of such filing to all counsel of record.

s/ Dave Maxfield
Dave Maxfield

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