UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

THOMAS MARTINEZ and MICHAEL CABRERA, individuals and as representatives of the Class,

Plaintiffs,

Case No. 2:16-cv-01230-DSC
Hon. David S. Cercone

v.

PPG INDUSTRIES, INC.,

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

I. INTRODUCTION

On December 13, 2017, the Court granted Plaintiffs' motion for preliminary approval of the class action settlement. *ECF No. 72.* Notice was then sent to the 7,639 members of the Settlement Class,[1] and the reaction has been positive. There have been no objections to the settlement and only 93 opt-outs. In light of this positive reaction from the Settlement Class, the substantial monetary relief afforded under the settlement, and the delay, costs, and significant risks that would be associated with continuing the litigation, Plaintiffs respectfully request that the Court grant final approval of the settlement. PPG does not oppose the relief requested in this motion.

II. BACKGROUND

The history of this litigation and settlement, and the claims involved, are set forth in detail in the Plaintiffs' preliminary approval papers, and in Plaintiffs' motion for attorneys' fees,

[1] Unless otherwise explicitly defined herein, all capitalized terms have the same meanings as those set forth in the Parties' Settlement Agreement.

which are incorporated herein, and therefore will be only briefly summarized here. *See ECF Nos. 67, 74.*

A. Summary of Procedural History and Settled Claims.

Plaintiffs initiated this matter on April 1, 2016, by filing a Complaint in the Superior Court of California, County of Alameda, alleging that PPG uniformly violated the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*, by procuring consumer reports (i.e., criminal background check reports) on job applicants and employees without following the FCRA's "standalone disclosure" requirements.[2] *ECF No. 1-1*. PPG denies any liability for these claims and denies that it acted unlawfully.

PPG removed the case to federal court in California on May 11, 2016, and the case was transferred to this District on August 11, 2016. *ECF Nos. 1, 33.* Following transfer to this District, and Pursuant to LCvR 16.2 and an Order of this Court, the parties agreed to engage in private mediation with Mark Rudy of Rudy, Exelrod, Zieff & Lowe. *ECF Nos. 42, 57.* After the mediation on December 13, 2016, and further negotiation with assistance from Mr. Rudy, the parties came to agreement on the material terms of the settlement on May 30, 2017. *ECF Nos. 65, 68.* The parties subsequently negotiated and executed the Settlement Agreement, along with its exhibits, a copy of which was attached to the *Declaration of Bruce C. Fox* in support of the previously-filed Motion for Preliminary Approval of Class Action Settlement as Exhibit 1, *ECF No. 68-1* (the "Settlement Agreement"). The Court granted preliminary approval of the settlement on December 13, 2017, and Plaintiffs now move the Court for final approval.

[2] See 15 U.S.C. § 1681b(b)(2)(A)(i) (requiring that an employer provide applicants with written notice that it will procure a background check "in a document that consists solely of the disclosure").

B. Summary of Settlement Terms

In its Order granting preliminary approval of the class settlement, this Court conditionally certified the following class for settlement purposes:

> All employees and/or prospective employees of Defendant within the United States who were subject to a background check by Defendant anytime between and including April 1, 2014 and June 26, 2016 (the "Class Period").

ECF No. 72 at 2. This Settlement Class initially consisted of 7,639 individuals. *See Declaration of Brian Devery ("Devery Decl.")* ¶ *6.* Because 93 class members have requested exclusion, the final count is 7,546. *Id.* ¶ 15.

Under the terms of the Settlement Agreement, PPG will create a common fund for Settlement Class Members of $590,000.00. *Settlement Agreement* ¶ *44*. All payments for Settlement Class Members, Class Counsel's Fees and Costs, the Service Awards to the Plaintiffs, and Settlement Expenses are to be paid from the common fund. The funds available for payment to the Settlement Class Members after payment of Class Counsel's Fees and Costs, the Service Awards to the Plaintiffs, and Settlement Expenses are referred to as the Net Settlement Sum. *Id.* The settlement is "claims made," meaning that Settlement Class Members must submit claim forms to receive a share of the Net Settlement Sum. *Id.* ¶ *49*.

The Settlement Class is comprised of two subclasses: a Single Disclosure Subclass and a Multiple Disclosure Subclass. *Id.* ¶¶ *17, 31*. The only distinction between the two subclasses is that members of the Multiple Disclosure Subclass were also sent an email that PPG alleges provided additional disclosure of its intent to procure a consumer report. *Id.* ¶ *17*. The exact amount of the settlement payments to the Settlement Class depends on the number of claim forms submitted, with members of the Single Disclosure Class receiving 1.22 times more than members of the Multiple Disclosure Class. *Id.* ¶ *45*.

Because the total estimated Individual Settlement Payments claimed by the Settlement Class Members submitting accepted claims forms would equal less than 50% of the Net Settlement Sum if they were paid at the minimum estimated amounts ($55 for the Single Disclosure Subclass claimants and $45 for the Multiple Disclosure Subclass claimants), each claim shall be increased on a *pro rata* basis until the total estimated Individual Settlement Payments equals 50% of the Net Settlement Sum. *Id. ¶ 45.b.* Using the current estimates of $181,000.00 for Class Counsel's fees and costs, $15,000.00 for Service Awards to Plaintiffs, and $40,000.00 for Settlement Expenses, the payment to the 522 members of the Single Disclosure Subclass who submitted timely claim forms will be approximately $114.18, and the payment to the 1,201 members of the Multiple Disclosure Subclass who submitted timely claim forms will be approximately $93.59. *Devery Decl. ¶ 16.* Defendant shall retain the unclaimed amounts above 50% of the Net Settlement Sum. *Settlement Agreement ¶ 45.b.*

C. Class Notice and Class Reaction.

On December 28, 2017, the Settlement Administrator sent direct notice of the settlement to members of the Settlement Class. *Devery Decl. ¶ 7.*[3] The Settlement Administrator also submitted reminder postcards on February 1, 2018 to any member of the Settlement Class who had not submitted a claim prior to that date. *Id. ¶ 8.* On behalf of Defendant, the Settlement Administrator also complied with the notice requirements of the Class Action Fairness Act of 2005, 28 U.S.C. § 1715(b), by providing notice of the settlement to the appropriate public officials. *Id. ¶ 5.*

The Settlement Class Members' response to the settlement has been positive. Of the 7,639 Settlement Class Members, 1,723 timely returned claim forms seeking to participate in the

[3] The Notice program was extremely effective: approximately 97% of the Settlement Class successfully received Notice of the Settlement. *Devery Decl. ¶¶ 7, 10.*

settlement, which is a 22.6% response rate. *See id.* ¶ *13*. Furthermore, there have been **no objections**, and only 93 class members have requested exclusion. *Id.* ¶ *15*.

III. ARGUMENT

The courts favor compromise and settlement of class action lawsuits. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995); *see also Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010) ("The strong judicial policy in favor of class action settlement contemplates a circumscribed role for the district courts in settlement review and approval proceedings."). When reviewing a proposed settlement, the court must determine whether the settlement is "fair, reasonable, and adequate." *In re Gen. Motors*, 55 F.3d at 785. At final approval, the court must consider nine nonexclusive factors:[4]

> (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 the 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; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Halley v. Honeywell Int'l, Inc., 861 F.3d 418, 488 (3d Cir. 2017) (quoting *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975)).

As explained below, these factors weigh in favor of finding the Parties' settlement to be fair, reasonable, and adequate, and the Court should (1) grant final approval of the settlement, (2) dismiss Plaintiffs' and the Settlement Class Members' claims with prejudice, and (3) approve the settlement payments for distribution to the Settlement Class.

[4] Although the Third Circuit suggested in *In re Prudential Insurance Company*, 148 F.3d 283, 323 (3d Cir. 1998), that the *Girsh* factors could be expanded when appropriate, consideration of these additional factors is not required. *See In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 174 (3d Cir. 2013). Plaintiffs do not believe that these additional factors are appropriate here because this case does not involve the complexity of facts and issues in *Prudential*.

A. The Amount of the Settlement Appropriately Reflects the Complexity, Expense and Likely Duration of the Litigation.

The first *Girsh* factor captures "the probable costs, in both time and money, of continued litigation." *In re Cendant Corp. Litig.*, 264 F.3d 201, 233 (3d Cir. 2001). Without a settlement, the proceedings would likely be time consuming, costly and risky. If this case were to proceed, in addition to the prospect of holding a trial on the merits, Plaintiffs would likely face a motion to dismiss on the basis of standing and a challenge to class certification. Defendant has previously indicated that it would pursue dismissal for lack of standing if this litigation proceeds based on some authority indicating that disclosure violations under FCRA may not establish concrete injury-in-fact for standing purposes under Article III. *See, e.g., Long v. SEPTA*, Case No. 16-1991, 2017 U.S. Dist. LEXIS 51731 (E.D. Pa. Apr. 5, 2017) (dismissing FCRA stand-alone disclosure requirement claim for lack of concrete injury); *In re Michaels Stores, Inc., FCRA Litig.*, Nos. 14-7563, 15-2547, 15-5504, 2017 WL 354023, 2017 U.S. Dist. LEXIS 9310, at *12 (D.N.J. Jan. 24, 2017) (same); *LeGrand v. Intellicorp Records, Inc.*, No. 15-cv-2091, 2017 U.S. Dist. LEXIS 26156, at *6-8 (N.D. Ohio Feb. 24, 2017) (granting motion to dismiss Section 1681b(b)(2) claim for lack of injury and noting the "majority" of post-*Spokeo* courts to address stand-alone disclosure claims have found no standing). In addition, as described more fully below, Defendant has indicated that it would challenge the typicality of the claims shared by the class as it is currently defined due to an alleged second disclosure sent electronically to a number of class members. Given the legal issues presented, an appeal to the Third Circuit Court of Appeals is also possible following any resolution of the case on the merits. Viewed in the context of the litigation risks faced, as well as the substantial delay, fees, and costs that Settlement Class Members would experience in order to receive proceeds from a post-trial judgment, not to

mention the effort required, this settlement is in the best interests of the Plaintiffs and the Settlement Class Members, and should be approved.

B. The Positive Reaction of the Class Supports Final Approval.

The second *Girsh* factor, which "attempts to gauge whether members of the class support the settlement," *In re Prudential Ins.*, 148 F.3d at 318, weighs in favor of settlement approval. Of the 7,639 Settlement Class Members, 1,723 timely returned claim forms seeking to participate in the settlement (a 22.6% response rate), only 93 opted out (1.2% of the class), and *no one* objected. *Devery Decl. ¶¶ 13, 15*. This result indicates a favorable class reaction supporting approval of the proposed settlement. *See Nyby v. Convergent Outsourcing, Inc.*, Case No. 15-886, 2017 WL 3315264, 2017 U.S. Dist. LEXIS 122056, at *18 (D.N.J. Aug. 3, 2017) (finding the second *Girsh* factor favored settlement after claims rate of 11.6%, 2 opt-out requests in class of 3,546 members, and no objections); *In re Processed Egg Prods. Antitrust Litig.*, 284 F.R.D. 249, 269 (E.D. Pa. 2012) (finding that class reaction weighed in favor of the settlement's fairness and adequacy when 6.9% of claim forms were returned, 150 out of 13,200 class members requested exclusion, and no one objected); *Stoner v. CBA Info. Servs.*, 352 F. Supp. 2d 549, 552 (E.D. Pa. 2005) (finding a favorable class reaction when 16% of class members submitted claim forms, 18 out of 11,980 class members opted out, and five filed objections); *Lazy Oil Co. v. Witco Corp.*, 94 F. Supp. 2d 290, 332 (W.D. Pa. 1997) ("When few class members object, after the dissemination of notice specifically advising them of the procedure for objecting to a proposed settlement, this is generally regarded as supportive of the settlement."). Moreover, even when considered against the total number of Class Members, the claims rate in this case (22.6%) is above average for a consumer class action settlement. *See Gascho v. Global Fitness Holdings, LLC*, 2014 WL 1350509, at *30 (S.D. Ohio April 4, 2014) (crediting expert testimony that "response rates in class actions generally range from one to 12 percent with a median response

rate, and a normal consumer response rate, of approximately five to eight percent"). Thus, the substantial number of claims that were filed also supports approval of the Settlement – especially when compared to the very low number of opt-outs and lack of any objections. *See In re Cendant Corp. Litig.*, 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").

C. The State of the Proceedings and the Amount of Discovery Were Sufficient to Assess the Merits of the Case.

As previously set forth in Plaintiff's Brief in Support of Motion for Preliminary Approval (ECF No. 67) and in the Declaration of Bruce Fox (ECF No. 68), prior to reaching the Settlement, the parties engaged in substantial formal and informal discovery. Prior to the mediation, PPG provided written responses to the Plaintiffs' informal discovery requests. *See ECF No. 68 ¶ 4*. In the ensuing months, while settlement negotiations were ongoing, the parties also exchanged formal written discovery and document productions. *Id. ¶ 7*. It was only after substantially completing written discovery that the parties finally came to an agreement on the material terms of the Settlement. *Id. ¶ 8*. Accordingly, Class Counsel had ample information to intelligently analyze the size and scope of the class claims in this case, as well as the strength and weaknesses of those claims. *Id. ¶ 9*. Therefore, the third *Girsh* factor weighs in favor of approval. *See Klingensmith v. Max & Erma's Rests., Inc.*, Case No. 07-0318, 2007 WL 3118505, 2007 U.S. Dist. LEXIS 81029, at *14-15 (W.D. Pa. Oct. 23, 2007) ("Although Plaintiff's factual inquiry was neither exhaustive nor protracted, it was appropriately focused on the question critical to the merits of the case, *i.e.*, evidence of willfulness in Defendant's statutory violation.").

D. The Risks of Establishing Liability and Damages Favor Settlement.

The fourth and fifth *Girsh* factors, the risks of establishing liability and the risks of establishing damages, are the same for violations of the FCRA because they both require a finding that a defendant has acted willfully. *See* 15 U.S.C. § 1681n(a)(1). Plaintiffs expect that if the matter were litigated, Defendant would vigorously contest the question of willfulness, and Plaintiffs would face the risk that a jury could find that the Defendant did not act willfully. *See Barel v. Bank of Am.*, 255 F.R.D. 393, 401 (E.D. Pa. 2009) (citing *Edwards v. Toys "R" Us*, 527 F. Supp. 2d 1197, 1210 (C.D. Cal. 2007) ("Willfulness under the FCRA is generally a question of fact for the jury.")). Without settlement, the Settlement Class Members face a risk that continued litigation could result in no recovery. Therefore, the fourth and fifth *Girsh* factors weigh in favor of approving the settlement.

E. The Risk of Maintaining a Certified Class Through Trial is Certain.

While the risk of maintaining *any* certified class through trial is not very great, there does exist a risk to maintaining the entire class as it is currently defined. The Settlement Class is comprised of two subclasses, a Single Disclosure Subclass and a Multiple Disclosure Subclass. *Settlement Agreement* ¶¶ *17, 31*.[5] The Multiple Disclosure Subclass consists of Settlement Class Members who were sent a system generated e-mail disclosure after the initial disclosure that was the subject of this lawsuit. *See id.* ¶ *17*. Should this case proceed, Plaintiffs anticipate that Defendant would challenge the claims of that subclass on the basis of this second disclosure as

[5] As explained in Plaintiffs' preliminary approval papers, the Settlement Agreement uses the term "Subclass" as a shorthand reference to distinguish between two groups of Settlement Class Members for purposes of the plan of allocation for the settlement funds. *See ECF No. 67 at p.4 n.4 & p.22 n.13.* In such circumstances, formal certification of two separate subclasses under Fed. R. Civ. P. 23(c)(5) is not necessary because the two groups do not have "divergent interests." *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 272 (3d Cir. 2009). Rather, "all of the class members share a unified interest in establishing" that the PPG willfully violated the FCRA. *Id.* at 273.

well as the Plaintiffs' typicality regarding those claims. *Cf. Reardon v. ClosetMaid Corp.*, Case No. 2:08-cv-01730, 2013 WL 6231606, 2013 U.S. Dist. LEXIS 169821, at *19 (W.D. Pa. Dec. 2, 2013) (dismissing FCRA claims of class members who had subsequently received a legally sufficient form of disclosure). Therefore the risk of maintaining the entire Settlement Class through trial weighs in favor of approving the settlement.

F. Whether Defendant Can Withstand a Greater Judgment is Inconsequential.

As a publicly-traded multi-national corporation, Defendant likely has the resources to withstand a greater judgment. However, because this factor is only important when a defendant's ability to pay a larger amount is in doubt, this factor should be accorded little weight. *See Brown v. Am. Home Prods. Corp. (In re Diet Drugs Prods. Liab. Litig.)*, MDL Docket No. 1203, Case No. 99-20593, 2000 U.S. Dist. LEXIS 12275, at *188-89 (E.D. Pa. Aug. 28, 2000).

G. The Settlement Fund is Reasonable in Light of the Best Possible Recovery and All the Attendant Risks of Litigation.

The final two *Girsh* factors weigh in favor of settlement approval. Plaintiffs filed this case seeking statutory damages for themselves and on behalf of other job applicants under the FCRA, which provides for damages of between $100 and $1000 for each willful violation. 15 U.S.C. § 1681n(a)(1). While Plaintiffs view the right to receive a standalone disclosure before being subjected to a background check by a prospective employer as important, they acknowledge that the facts of this case do not include the sort of aggravating factors likely to justify an award over than the statutory minimum of $100 per violation. Here, the Single Disclosure Subclass members who submitted claim forms will recover more than the likely award if this case had proceeded all the way through final judgment, and the Multiple Disclosure Subclass members who submitted claim forms will recover just under that amount. This is an excellent result for the Settlement Class Members who submitted claim forms, especially in light

of the risks of moving forward. In addition, the settlement offers immediate benefits to the Settlement Class Members while avoiding the risks above. Considering the litigation risks described above, these factors overwhelmingly favor approval of the settlement.

H. Attorneys' Fees, Expenses and Service Awards

On January 29, 2018, Plaintiffs moved the Court for an award of attorneys' fees in the amount of $166,700.00, which equals less than 41% of the minimum total recovery for the class, and litigation expenses in the amount of $14,300. *ECF No. 74 at 9*. This is within the 19%-45% range that this Court has previously found to be typical for fee awards. *See Jackson v. Wells Fargo Bank, N.A.*, 136 F. Supp. 3d 687, 715 (W.D. Pa. 2015) (Cercone, J.). In addition, the requested fees represent a negative multiplier on counsel's actual lodestar, which as of March 30, 2018, total $270,341. Litigation expenses as of that date total $14,300. No objections have been raised to the proposed fee award after Plaintiffs filed their request for attorneys' fees.

In addition to attorneys' fees and expenses, Plaintiffs also moved the Court for modest service awards in recognition of the risk and effort entailed in pursuing the class claims in this litigation. *ECF No. 73.* As explained more fully in the memorandum of law in support of that motion, *ECF No. 74 at 16-17*, Plaintiff Cabrera seeks an award in the presumptively reasonable amount of $5,000, and Plaintiff Martinez, who has also agreed to give up a valuable state law claim against PPG, seeks an award of $10,000. The arguments in favor of Plaintiffs' service awards are set forth in the aforementioned Memorandum of Law and will not be repeated here. Without the Plaintiffs' invaluable participation, the Settlement would not have been achievable. No objections have been raised to the proposed service awards.

IV. CONCLUSION

In sum, the settlement is fair, reasonable, and adequate, and the Court should (1) grant final approval of the settlement; (2) certify the Settlement Class; (3) approve the settlement

payments for distribution to the Settlement Class; (4) dismiss Plaintiffs' and the Settlement Class Members' claims with prejudice; and (5) retain jurisdiction over the implementation and enforcement of the Settlement Agreement.

Respectfully submitted,

Dated: April 5, 2018

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