

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

SEAN MARINO, on Behalf of Himself and all Others Similarly Situated Plaintiff,	:	CIVIL ACTION
	:	
vs.	:	NO. 05-2268
	:	
UDR, also know as, THE U.D. REGISTRY, INC. Defendant.	:	
	:	

ORDER

AND NOW, this 13th day of June, 2006, upon consideration of plaintiff’s Motion for Final Approval of Class Action Settlement and Award to Representative Plaintiff (Document No. 30, filed May 2, 2006), following a Fairness Hearing on the Motion for Final Approval of Class Action Settlement and Award to Representative Plaintiff on May 12, 2006, for the reasons set forth in the attached Memorandum, **IT IS ORDERED** as follows:

1. Plaintiff’s Motion for Final Approval of Class Action Settlement and Award to Representative Plaintiff is **GRANTED**. The class is defined as “all persons residing in the United States of America and its Territories who, during the period from December 1, 2004 through June 30, 2005, paid money to UDR in exchange for a copy of their annual file disclosure”;¹ and,

2. The Settlement Agreement is **APPROVED** pursuant to Federal Rule of Civil Procedure 23(e) as being fair, reasonable and adequate and in the best interest of the plaintiff classes as certified by the Court.

¹ This settlement class was certified upon stipulation of the parties by Order dated January 19, 2006

MEMORANDUM

Presently before the Court is plaintiff's Motion for Final Approval of Class Action Settlement and Award to Representative Plaintiff. A Fairness Hearing was held on May 12, 2006. For the reasons that follow, the Court grants the Motion and approves the settlement between the class and defendant.

I. BACKGROUND

A. Procedural and Factual Background

The representative plaintiff filed a class action against defendant on May 12, 2005, alleging that defendant unlawfully denied consumers the right to obtain a free annual consumer report. The Complaint alleged that Defendant operated as a "nationwide specialty consumer reporting agency" (NSCRA) as defined by 15 U.S.C. § 1681a(w), providing consumer reports to landlords and other entities for tenant and/or resident screening.² Compl. ¶ 6. Under the 2003 amendments to the Fair Credit Reporting Act (FCRA), a consumer is entitled to request and receive from a NSCRA a "free annual disclosure," which shall consist of "all information in the consumer's file at the time of the request." 15 U.S.C. §§ 1681g(a), 1681j(a)(1)(C). Compl. ¶ 8. Defendant allegedly negligently and/or willfully failed to provide consumers with a "free annual disclosure" as required by the FCRA, instead charging consumers for the disclosures.³ Id. ¶ 26.

² The FCRA defines a nationwide specialty consumer reporting agency as a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis relating to 1) medical records or payments; 2) residential or tenant history; 3) check writing history; 4) employment history; or 5) insurance claims. 15 U.S.C. § 1681a(w).

³ With respect to plaintiff Marino, the Complaint alleged that on December 20, 2004, he contacted defendant and requested a free copy of his consumer report. Compl. ¶ 12. Plaintiff was informed that there was a charge of eight dollars (\$8.00) to obtain his report, which he paid. Id.

Defendant filed an Answer to the Complaint, denying the factual allegations, disputing that the case could be maintained as a class action, and denying all liability under the FCRA. After discovery in the case began, the parties entered into settlement negotiations which ultimately resulted in the Settlement Agreement.

B. The Proposed Settlement

1. Notice to the class

The Settlement Agreement, which is attached to Plaintiff's Motion for Preliminary Approval of Settlement and Notice to Class filed on December 23, 2005, documents the parties' settlement. After a telephone conference on January 19, 2006, the Court granted preliminary approval of the Settlement Agreement and ordered notice to the Class. This Order also certified the settlement class upon stipulation of the parties. Jan. 19, 2006 Order ¶ 1. The class was defined as "all persons residing in the United States of America and its Territories who, during the period from December 1, 2004 through June 30, 2005, paid money to UDR in exchange for a copy of their annual file disclosure." Id.

In accordance with the Class Action Fairness Act of 2005, 28 U.S.C. § 1715, defendant provided notification of the settlement to the appropriate federal and state officials on January 27, 2006. The approved notice was mailed to 135 members of the class whose names were supplied by defendant on February 16, 2006. Francis Decl., April 20, 2006. No class member filed objections to the settlement, and no individual requested exclusion from the class. Francis Decl., May 2, 2006. The Court held a Fairness Hearing on May 12, 2006; no class members appeared at the hearing to contest the terms of the Settlement Agreement.

2. Terms of the settlement

Under the agreement, defendant agrees to pay \$100 to each member of the class, and \$3,000 to the representative plaintiff. Settlement Agreement at 3. Defendant also agrees to stop charging consumers for their consumer reports, and to provide consumers with a copy of their file once during any 12-month period upon request and without charge. *Id.* at 4.

The agreement also requires defendant to pay all reasonable costs and expenses incurred in connection with the notice and administration of the settlement, including compiling the class list, printing, publishing and mailing notice to the class, distributing payments to class members, and all other aspects of settlement administration. *Id.* Defendant also agrees to pay plaintiff's reasonable attorneys' fees and costs.⁴ *Id.* at 7.

II. LEGAL STANDARD

“The decision of whether to approve a proposed settlement of a class action is left to the sound discretion of the district court.” *Girsh v. Jepson*, 521 F.2d 153, 156 (3d Cir. 1975) (footnote omitted). In exercising that discretion, the Court is guided by Federal Rule of Civil Procedure 23(e), which provides that “[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such a manner as the court directs.” In determining whether to approve a class action settlement under Rule 23(e), “the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members [T]he court cannot accept a

⁴ At the time of the Fairness Hearing on May 12, 2006, the parties had not reached an agreement on attorneys' fees and costs. After the Court issued some guidelines for reaching an agreement, the parties continued to negotiate the attorneys' fees. On or before June 12, 2006, the parties will report to the Court on the progress of their negotiations.

settlement that the proponents have not shown to be fair, reasonable and adequate.” In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig., 55 F.3d 768, 785 (3d Cir. 1995)

(internal quotation and citation omitted).

In determining whether a class action settlement is fair, adequate, and reasonable, the Court must consider the factors set forth in Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975):

- (1) The complexity, expense and likely duration of the litigation;
- (2) The reaction of the class to the settlement;
- (3) The stage of the proceeding 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 a 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.

Id. at 157.

III. ANALYSIS

Upon consideration of each of the nine Girsh factors, the Court concludes that the settlement is fair, adequate and reasonable.

A. Complexity, Expense, and Likely Duration of the Litigation

The case was settled after the parties had begun discovery, but before the completion of discovery. Moreover, the Court had not yet ruled on class certification or any other dispositive motions. Given defendant’s position that it did not violate the FCRA, it is likely that the case would proceed to trial, and any outcome would be the subject of post-trial motions and an appeal. Avoiding this expenditure of time and resources benefits all parties. See In re General Motors, 55 F.3d at 812 (concluding that lengthy discovery and ardent opposition from the defendant with

“a plethora of pretrial motions” favored settlement). Therefore, this factor favors settlement.

B. Reaction of the Class to the Settlement

As stated above, 135 notices were mailed to class members, advising them of the settlement terms and their right to exclude themselves from the class. The deadline for class members to object was March 20, 2006; the deadline for class members to exclude themselves was May 2, 2006. As of the Fairness Hearing on May 12, 2006, no class member has objected or opted out. The fact that there are no opt-outs and no objections favors the proposed settlement. See, e.g., Stoetzner v. U.S. Steel Corp., 897 F.2d 115, 118-119 (3d Cir. 1990) (concluding that “only” 29 objections in 281 member class “strongly favors settlement”).

C. Stage of the Proceeding and Amount of Discovery Completed

A settlement should only be approved if the parties have an “adequate appreciation” of the merits of the case. In re Prudential, 148 F.3d 283, 319 (3d Cir. 1998). In this case, although additional discovery would have been required to prepare the case for trial, the settlement came after the parties had exchanged written discovery and plaintiff had taken the deposition of defendant’s corporate designee. Each party has had an opportunity to assess the merits of their respective cases. This factor weighs in favor of the proposed settlement.

D. Risks of Establishing Liability

This factor surveys the possible risks of litigation in order to balance the likelihood of success and potential damages against the benefit of settlement. In re Prudential, 148 F.3d at 319.

In this case, plaintiff claimed that defendant negligently and/or willfully violated sections 1681g(a) and 1681j(a)(1)(c) of the FCRA by failing to provide consumers with the free annual

credit reports. Defendant contended that it was not a NSCRA obligated to provide consumers with free annual credit reports.

Given that the duties imposed on NSCRAs went into effect only a year ago, there is little authority on the criteria for determining whether a company is a NSCRA. Moreover, because this lawsuit challenged defendant's failure to comply with the FCRA, a relatively recent law, plaintiff faced significant risk in proving that defendant acted negligently or willfully, a contention defendant would have vigorously opposed. Therefore, this factor weighs in favor of settlement.

E. Risks of Establishing Damages

Actual damages of \$8.00 for each class member would not have been difficult to prove because the cost of a credit report is a known quantity and class members are easily identifiable. However, plaintiff, to prevail, would also have to prove that defendant was covered under the FCRA and the merits of plaintiff's legal theories.

Recovery of statutory damages would be more problematic, as FCRA allows the recovery of statutory damages only if it is proven that the violation was "willful." To show willful noncompliance with the FCRA, a plaintiff must show that the defendant adopted a policy "either knowing that policy to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy contravened those rights." Cushman v. Trans Union Corp., 115 F.3d 220, 226 (3d Cir. 1997). Proving knowledge or reckless disregard is often difficult. Therefore, this factor weighs in favor of settlement.

F. Risks of Maintaining Class Action Through Trial

The settlement here comes before the Court has ruled on class certification. "Class

certification is always conditional and may be reconsidered.” Saunders v. Berks Credit and Collections, 2002 WL 1497374, at *12 (E.D. Pa. July 11, 2002). Even if the Court did certify the class, defendant could always raise a number of issues in favor of decertification, any one of which could result in the loss of certification. This factor weighs in favor of approving the settlement.

G. Ability of Defendant to Withstand Greater Judgment

According to plaintiff, defendant is a large financial institution with the capacity to withstand a larger judgment than the amount of the proposed settlement, which totals \$ 14,300. This factor is therefore neutral.

H. Range of Reasonableness of Settlement in Light of Best Possible Recovery

Assessing the reasonableness of a proposed settlement requires the Court to analyze the present value of the damages a plaintiff would likely recover if successful, discounting for the risk of not prevailing. In re Prudential, 148 F.3d at 322.

In light of the legal and factual questions in this litigation, the value of the proposed settlement outweighs the mere possibility of future relief. The parties estimate that a trial in this case would last several days or more. The expense of such a trial, the use of judicial resources, and the expenditure of the parties’ resources would be substantial. Moreover, in light of the highly contested nature of liability, any judgment would likely be the subject of post-trial motions and an appeal, further prolonging the litigation and reducing the value of any recovery. Parks v. Portnoff Law Associates, Ltd., 243 F. Supp.2d 244, 253 (E.D. Pa. 2003) (finding that likelihood of lengthy appeals favored settlement). Thus, a settlement is advantageous to all parties.

I. Range of Reasonableness of Settlement to Possible Recovery in Light of Risks of Litigation

This factor requires the Court to examine the terms of settlement from a “slightly different vantage point[]” than the prior factor, reasonableness in light of the best recovery. In re General Motors, 55 F.3d at 806. As discussed above, the litigation involves difficult legal and factual issues. Even if plaintiff prevailed at trial, any judgment would likely be the subject of post-trial motions and an appeal, resulting in further delay of any recovery. In light of these risks, the settlement offers a more reasonable means of addressing the injuries to the class. Therefore, this factor supports the proposed settlement.

IV. CONCLUSION

Because eight of the nine Girsh factors weigh in favor of the settlement agreement, and the remaining factor is neutral, the Court concludes that the proposed settlement is fair, reasonable and adequate. In re Gen. Motors Corp., 55 F.3d at 785.

BY THE COURT:

/s/ Jan E. DuBois
JAN E. DUBOIS, J.