No. 20-_____

In the United States Court of Appeals for the Third Circuit

PATRICIA MCINTYRE,
on behalf of herself and all others similarly situated,
Plaintiff – Respondent,

v.

REALPAGE, INC. d/b/a ON-SITE,
Defendant – Petitioner.

On Petition for Permission to Appeal from the United States District Court for the Eastern District of Pennsylvania, Philadelphia Division, Case No. 2:18-cv-3934

PETITION FOR PERMISSION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

Misha Tseytlin
TROUTMAN PEPPER HAMILTON SANDERS LLP
1 North Wacker Drive, Suite 2905
Chicago, Illinois 60606
Telephone: (312) 759-5947

Ronald I. Raether
TROUTMAN PEPPER HAMILTON SANDERS LLP
5 Park Plaza, Suite 1400
Irvine, California 92614
Telephone: (949) 622-2700

Timothy J. St. George
TROUTMAN PEPPER HAMILTON SANDERS LLP
1001 Haxall Point
Richmond, Virginia 23219
Telephone: (804) 697-1200

Allyson N. Ho
Ashley E. Johnson
Bradley G. Hubbard
GIBSON, DUNN & CRUTCHER LLP
2001 Ross Avenue, Suite 2100
Dallas, Texas 75201
Telephone: (214) 698-3100

Lucas C. Townsend
David W. Casazza
Jason H. Hilborn
Michael J. Showalter
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
Telephone: (202) 955-8500

Counsel for Petitioner RealPage, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes, Rules & Legislative History

INTRODUCTION

The district court improperly certified an unprecedented nationwide class involving highly individualized questions under the Fair Credit Reporting Act (FCRA) about the reasonableness of procedures used to gather housing-court records from thousands of different court systems across the country. Each of these court systems has its own policies and procedures for maintaining and accessing records. In stretching to certify a class, the district court's order violates basic standards of due process, ascertainability, and predominance, and transforms the Act into a strict-liability statute.

First, certification violates due-process limitations on the exercise of personal jurisdiction under the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017). The vast majority of this sprawling class has no relevant contact with the forum for specific-jurisdiction purposes (and Pennsylvania lacks general jurisdiction). District courts have struggled with this issue, and this Court's guidance is needed.

Second, the district court certified a class that doesn't come close to satisfying this Court's rigorous ascertainability requirement. The

district court excused plaintiff's failure to proffer an objective, reliable methodology for identifying individuals who fit the class definition—and adopted methods of identifying prospective class members that would require individualized mini-trials and sweep in thousands of individuals who don't meet the class definition. If permitted to stand, the certification order will seriously undermine this Court's insistence on ascertainability as a prerequisite to certification.

Third, individualized issues concerning the core elements of plaintiff's claim—(a) whether reports of individuals' court records were inaccurate, (b) whether the reporting agency's procedures caused the inaccuracies, and (c) whether the agency acted "willfully"—overwhelm any common issues. The certification order effectively transforms the statute into a strict-liability regime and violates Rule 23's commonality and predominance requirements.

The result of the district court's numerous certification errors is a highly coercive nationwide class action against an out-of-state defendant that creates unfair settlement pressure and threatens to evade this Court's review following a final judgment. Any one of the district court's errors warrants this interlocutory review. Together, they compel it.

QUESTIONS PRESENTED

1. Whether *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), precludes class certification against a non-resident defendant where the class includes a substantial number of non-resident plaintiffs whose claims have no connection to the forum.

2. Whether the district court improperly certified a nationwide class in the absence of any reliable and administratively feasible method of identifying class members.

3. Whether the district court improperly certified a nationwide class given that individualized, fact-intensive questions regarding each element of each class member's claim will predominate.

STATEMENT OF THE CASE

I. Statutory And Factual Background

When Congress enacted FCRA, it recognized the impossibility of guaranteeing complete accuracy for every consumer credit report. *See* 115 Cong. Rec. 2410, 2411 (1969) (Sen. Proxmire). Accordingly, FCRA requires only that consumer-reporting agencies "follow reasonable procedures" when preparing a consumer report. 15 U.S.C. § 1681e(b); *see Nelski v. Trans Union, LLC*, 86 F. App'x 840, 844 (6th Cir. 2004) ("FCRA

does not impose strict liability for incorrect information appearing on an agency's credit reports"). Still, Congress created a mechanism for consumers to dispute the accuracy of information in their reports. When a consumer notifies an agency of her dispute, the agency must:

> [C]onduct a reasonable reinvestigation to determine whether the disputed information is inaccurate and record the current status of the disputed information. . . .
>
> [If] the information is found to be inaccurate or incomplete or cannot be verified, the consumer reporting agency shall . . . promptly delete . . . or modify [the] information.

15 U.S.C. § 1681i(a)(1), (5). Thus, when resolving a dispute, an agency is required to remove even *accurate* reports that it is unable to verify.

RP On-Site LLC ("On-Site") and its corporate parent, RealPage, Inc., both provide property-management software. Op. 2. On-Site is subject to FCRA because it generates tenant-screening reports, which provide property managers with data about prospective tenants' credit, eviction history, and criminal record. Op. 2.

On-Site collects the data in these reports from hundreds of jurisdictions covering over 10,000 court systems—mostly local and municipal courts, which handle the majority of landlord-tenant-related litigation—each with its own policies and procedures for maintaining and

accessing records that are updated millions of times annually. Dkt. 51-2 at 20; Dkt. 51-1 at 9–10 & n.1.[1]

Because there is no centralized database, On-Site must compile the information court by court. On-Site relies on a variety of vendors to capture the data (not just one vendor, LexisNexis, as the district court erroneously concluded). Dkt. 51-1 at 9–10.

Consistent with FCRA, On-Site has procedures for addressing disputes, which consumers submit for various reasons. A consumer can lodge a dispute based on perceived inaccuracies in her report, but this occurs for only a small percentage of all screening reports. Dkt. 51-4 ¶ 7. A consumer can also lodge a dispute even in the absence of an On-Site–generated report, based on information she thinks might be in her file, or after reviewing her file through a file-disclosure request. *See* 15 U.S.C. § 1681g(a); Dkt. 51-4 ¶ 5.

After receiving a dispute, On-Site investigates the accuracy of the information in the consumer's file by reviewing all available information. When necessary, On-Site makes changes to reflect the *current* status of information. As a result, On-Site will resolve a dispute in the consumer's

[1] Docket entry pin cites are to ECF-stamped pagination.

favor even if On-Site can't verify the information, or if a report was accurate when issued, but new information subsequently became available. Dkt. 51-4 ¶¶ 8–11.

II. Procedural History

A landlord denied Patricia McIntyre an apartment based on three prior eviction proceedings that were reflected on her On-Site–generated screening report. Dkt. 1 at 6–9. She sued under FCRA, alleging that On-Site's report was incomplete regarding those proceedings. Dkt. 1 at 6–9. She also alleged that On-Site's use of third-party vendors to gather court records violates FCRA's "reasonable procedures" requirement. Dkt. 1 at 3–6.

McIntyre moved to certify a nationwide class, defined as:

> For the period beginning two (2) years prior to the filing of the Class Action Complaint and continuing through the date of judgment, all natural persons with an address in the United States and its Territories who were (a) the subject of a tenant screening report prepared by Defendant that (b) contained information about an eviction proceeding, but which (c) failed to state that the eviction proceeding had . . . resulted in a favorable disposition or had no judicial finding against the consumer who was the subject of the tenant screening report, as that eviction proceeding is reflected in court records publicly available at the time of Defendant's tenant screening report.

Dkt. 64 at 1–2. McIntyre proposed two methods of ascertaining who should be in this class.

First, under the "Case-by-Case Review Method," McIntyre individually compared every Philadelphia eviction case On-Site *previously* reported from 2016 to 2019 with *current* records from Philadelphia municipal courts. Op. 10; Dkt. 41-1 at 7. She concluded that 184 of the 904 reports reflected an inaccuracy that, in her view, placed the consumer within the class definition. Op. 10; Dkt. 41-1 at 18–19. McIntyre doesn't dispute that this method requires not only individualized comparisons between On-Site's records and court records but also a class-wide assumption about when each of the 184 favorable dispositions first became publicly available. Dkt. 56 at 14.

Second, under the "Dispute Method," McIntyre reviewed On-Site's nationwide eviction-related consumer-dispute records and determined that between 2017 and 2019, roughly 20,500 disputes were resolved partially or fully in the consumer's favor. Op. 10–11; Dkt. 41-1 at 19–20. McIntyre then lumped these consumers into the class based on three assumptions:

(1) Consumers who submitted disputes were subjects of an On-Site report;

(2) the disputes were related to unreported, favorable eviction-proceeding dispositions; and

(3) resolution of the dispute in the consumer's favor establishes that the report was inaccurate.

Dkt. 41-1 at 19–20; Dkt. 56 at 24, 28.

On-Site opposed certification on several grounds relevant here.

First, On-Site argued that the court would lack specific personal jurisdiction over the out-of-state claims by the out-of-state class members under the Supreme Court's *Bristol-Myers* decision. Dkt. 51-1 at 30–31.

Second, On-Site argued that the class wasn't ascertainable. The Case-by-Case Review Method relies on highly individualized fact-findings, which McIntyre didn't seriously dispute, while the Dispute Method rests on a series of flawed assumptions, e.g., that resolution in the consumer's favor invariably demonstrates that the report was inaccurate based on records "publicly available at the time" *of the report* (per the class definition). Dkt. 51-1 at 16–21, 23–25.

Third, On-Site argued that common questions don't predominate because highly individualized mini-trials will be needed to establish FCRA's elements, including that (1) a given report was inaccurate,

(2) On-Site's procedures were unreasonable, and (3) On-Site's conduct was willful. Dkt. 51-1 at 18–22.

The district court rejected On-Site's arguments and certified the class. First, without much analysis, the court held that *Bristol-Myers* doesn't apply. Op. 37–38. Second, the court categorically dismissed numerous ascertainability problems with both of McIntyre's methods as involving "merits determinations"—even though McIntyre's decision to include "inaccuracy" in the class definition necessitates those "determinations." Op. 17–20. And third, the court ruled that predominance was satisfied even though individualized inquiries will be required not only for class members to prove each element of their claims but also for On-Site to defend itself. Op. 27–34.

REASONS FOR GRANTING THE PETITION

An interlocutory appeal is appropriate when: (1) "the certification decision turns on a novel or unsettled question of law," and review would "facilitate the development of the law on class certification"; (2) "as a practical matter, the decision of certification is likely dispositive of the litigation"; or (3) certification rests on "an erroneous ruling." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 163–65 (3d

Cir. 2001). The certification order here warrants immediate review under each criterion.

First, the district court made the wrong decision on a "novel or unsettled question of law" that has divided district courts in this Circuit and nationwide: Whether the Supreme Court's *Bristol-Myers* decision applies to class actions. By providing guidance to district courts in the Circuit, this Court will "facilitate the development of the law on class certification."

Second, by certifying a nationwide class comprising over 10,000 consumers that potentially exposes On-Site to over $10 million in damages, the district court unleashed unfair coercive pressure for On-Site to settle even unmeritorious claims. Many defendants will settle such claims rather than incur the costs of litigating novel, individualized issues across the class while risking substantial liability. Here, for example, no appellate court has ever held that using a third-party vendor *per se* violates § 1681e(b). The burdens of litigating these novel issues across a malleable, unascertainable, ten-thousand-plus member class threaten to end the litigation before the underlying legal theory can be tested. The "potential for unwarranted settlement pressure" is precisely

what Rule 23(f) was designed to address. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2008).

Third, the certification order clearly rests on "an erroneous ruling"—indeed, at least *three* critical legal errors—warranting immediate review.

To begin, the district court lacks personal jurisdiction over the out-of-state class members' out-of-state claims. *See infra* Part I. Rule 23 is a procedural device, not an expansion of personal jurisdiction—it "is not a license for courts to enter judgments on claims over which they have no power." *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 307 (D.C. Cir. 2020) (Silberman, J., dissenting).

Additionally, the district court certified a class that is unascertainable under McIntyre's proposed methods. *See infra* Part II; *see also Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012) (class must be "currently and readily ascertainable based on objective criteria").

Moreover, the certification order trammels On-Site's right to defend itself vigorously by assuming that On-Site provided an inaccurate report without proof and by foreclosing On-Site from proving on a case-by-case basis that its procedures were reasonable—a fact-intensive analysis that turns on the policies and practices of both its vendors and the relevant

reporting jurisdiction. *See infra* Part III; *see also Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) (defendants have "due process right to raise individual challenges and defenses to claims"—so a class "cannot be certified in a way that eviscerates this right or masks individual issues").

The Court should grant review and reverse.

I. Certification Turns On An Unsettled Question Of Law That Has Divided Courts In This Circuit And Across The Nation.

A. In *Bristol-Myers*, the Supreme Court clarified the foundational principles governing personal jurisdiction. Where courts lack general jurisdiction over a corporate defendant, long-standing principles of personal jurisdiction require the plaintiff to establish specific jurisdiction, which requires "the *suit*" to "aris[e] out of or relat[e] to the defendant's contacts with the *forum*." 137 S. Ct. at 1780 (alterations in original).

Applying these principles in a mass action brought in California state court, the Supreme Court held that due process prevented the out-of-state defendant from being haled into California court by out-of-state residents because there was no "connection between the forum and the [non-residents'] specific claims at issue." *Id.* at 1781. This limitation on personal jurisdiction is "a consequence of territorial limitations on the power of the respective States." *Id.* at 1780.

B. *Bristol-Myers* has generated substantial confusion and conflict within this Circuit and across the Nation. Specifically, courts have disagreed about whether *Bristol-Myers* applies "to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there." *Id.* at 1789 n.4 (Sotomayor, J., dissenting).

This case is an ideal vehicle for this Court to resolve the lower courts' confusion surrounding this important issue. As in *Bristol-Myers*, the vast majority of class members are out-of-state residents suing an out-of-state defendant on out-of-state claims. There is no question that the Pennsylvania courts would lack personal jurisdiction had those claims been brought individually.

Moreover, the *Bristol-Myers* issue here was raised at class certification, avoiding a procedural hurdle that prevented both the D.C. and Fifth Circuits from resolving the issue. *See Molock*, 952 F.3d at 295 (personal jurisdiction over absent class members properly raised at class certification, not on motion to dismiss); *Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240, 251–52 (5th Cir. 2020).

Resolving this issue would provide much-needed guidance and clarity to the district courts that "have grappled" with *Bristol-Myers* and reached "differing results." *Gress v. Freedom Mortg. Corp.*, 386 F. Supp. 3d 455, 464–65 (M.D. Pa. 2019). Courts in this Circuit have taken diametrically opposed positions.[2] So have district courts across the country. Some have held that *Bristol-Myers* applies to class actions.[3] Others have held it doesn't.[4]

Noticing the disarray, federal courts of appeals have granted interlocutory review to address the application of *Bristol-Myers* to class actions. *Molock*, 952 F.3d 293; *Mussat v. IQVIA, Inc.*, 953 F.3d 441 (7th Cir. 2020); *Cruson*, 954 F.3d 240; *Moser v. Health Ins. Innovations, Inc.*, No. 19-80111 (9th Cir. 2019) (briefing forthcoming). Unfortunately, they

---

[2] *Compare*, *e.g.*, *Hickman v. TL Transp., LLC*, 317 F. Supp. 3d 890, 899 (E.D. Pa. 2018) (no "reason for distinguishing *Bristol-Myers*"), *and Plumbers' Local Union No. 690 Health Plan v. Apotex Corp.*, 2017 WL 3129147, at *9 (E.D. Pa. July 24, 2017), *with Velazquez v. State Farm Fire & Cas. Co.*, 2020 WL 1942784, at *10 (E.D. Pa. Mar. 27, 2020) ("*Bristol-Myers* is distinguishable"), *adopted*, 2020 WL 1939802 (E.D. Pa. Apr. 22, 2020).

[3] *E.g.*, *In re Dicamba Herbicides Litig.*, 359 F. Supp. 3d 711, 723–24 (E.D. Mo. 2019).

[4] *E.g.*, *Sotomayor v. Bank of Am., N.A.*, 377 F. Supp. 3d 1034, 1037–38 (C.D. Cal. 2019).

have done little to "fill[] the vacuum with clarity." *Gress*, 386 F. Supp. 3d at 464–65.

Only one circuit has resolved the issue on the merits. In *Mussat*, the Seventh Circuit held that *Bristol-Myers* doesn't apply to class actions. 953 F.3d at 443. In reaching that conclusion, the court explained that because absent class members "are more like nonparties," "there is no need to locate each and every one of them and conduct a separate personal-jurisdiction analysis of their claims." *Id.* at 448.

But there is good reason to doubt *Mussat*'s holding, as Judge Silberman noted in his *Molock* dissent. "[L]ike the mass action in *Bristol-Myers*," Judge Silberman explained, "a class action is just a species of joinder, which 'merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits.'" 952 F.3d at 306 (Silberman, J., dissenting). "And since the requirements of personal jurisdiction must be satisfied independently for 'the specific claims at issue,'" he continued, "personal jurisdiction over claims asserted on behalf of absent class members must be analyzed on a claim-by-claim basis." *Id.*

Judge Silberman found "the party status of absent class members" irrelevant because the "focus in *Bristol-Myers* was on whether limits on

personal jurisdiction protect a defendant from out-of-state *claims*, and a defendant is subject to such claims in a nationwide class action as well." *Id.* at 307. Moreover, he refuted the argument, echoed by the district court here, that Rule 23 provides sufficient due-process protections: Rule 23 "is not a license for courts to enter judgments on claims over which they have no power." *Id.*

C. Whether plaintiffs can bring a nationwide class action anywhere a single plaintiff has a sufficient connection to the forum is a question with enormous practical implications for plaintiffs and defendants alike, as this case shows. For plaintiffs, the adjudication of their local claims in far-flung venues raises serious due-process and practical concerns. And for defendants, it's "well known" that certification "unfairly" creates pressure "to settle even unmeritorious claims." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018). If anything, the fairness and predictability concerns underlying *Bristol-Myers* apply with even greater force in the class-action context. Left standing, the district court's decision would mean plaintiffs can bring a nationwide class action anywhere a single plaintiff has the necessary connection to the forum.

This outcome encourages forum shopping and makes it exceedingly difficult for defendants to know where they can be sued.

In sum, the certification order violates due process—and this case presents an ideal opportunity for this Court to dispel the confusion and provide clarity that *Bristol-Myers* applies to class actions.

II. The District Court Certified A Class That Doesn't Meet This Circuit's Stringent Ascertainability Requirement.

A. The class certified in this case lacks "an essential prerequisite of a class action"—a class that is "currently and readily ascertainable based on objective criteria." *Marcus*, 687 F.3d at 592–93. Ascertainability has two important elements:

(i) "[T]he class must be defined with reference to objective criteria"; and

(ii) "there must be a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition."

Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349, 355 (3d Cir. 2013). A plaintiff cannot satisfy the second element if "class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials.'" *Marcus*, 687 F.3d at 593. The plaintiff bears the burden of proving that class members are ascertainable. *Id.* at 591.

The "ascertainability requirement serves several important objectives." *Id.* at 593. First, it "eliminates 'serious administrative burdens that are incongruous with the efficiencies expected in a class action' by insisting on the easy identification of class members." *Id*. Second, it "protects absent class members" by ensuring that appropriate notice can be given to them. *Id*. And third, it "protects defendants by ensuring that those persons who will be bound by the final judgment are clearly identifiable." *Id*.

B. The nationwide class certified here fails this Court's rigorous requirement, and allowing it to go forward would undermine each of the requirement's objectives—essentially nullifying the ascertainability requirement altogether.

The class requires that each member satisfy several elements:

(a) the member must be "the subject of a tenant screening report prepared by Defendant";

(b) the report must have "contained information about an eviction proceeding";

(c)(1) the report must have "failed to state that the eviction proceeding had been withdrawn, dismissed, vacated, satisfied or otherwise resulted in a favorable disposition or had no judicial finding against the consumer who was the subject of the tenant screening report"; and

(c)(2) evidence of the favorable disposition must have been "reflected in court proceedings publicly available" when the report was prepared.

Dkt. 41-1 at 10; Dkt. 64 at 1–2. The most serious difficulty regarding the class is element (c). It is impossible, without reviewing each individual report, to identify whose report omitted a favorable disposition that was available at the time of the report, and then to reconstruct when, and how, that disposition became publicly available.

Neither the district court nor McIntyre put forth any plausible solution to that quandary. And neither method McIntyre proposed offered any means to ascertain which individuals belong in the class through "a manageable process that does not require much, if any, individual factual inquiry." *Carrera*, 727 F.3d at 307–08.

1. *Case-by-Case Review*. McIntyre first proposed a case-by-case review of all "eviction records reported by [On-Site]" to determine which ones were accurate. Dkt. 41-1 at 18, 23.

McIntyre claimed that she conducted this review of the 904 instances that On-Site reported information about eviction cases from Philadelphia courts, and determined that these 904 reports involved 627 unique court cases. Dkt. 41-1 at 18–19. McIntyre's counsel then

"reviewed publicly available documents" and determined that a favorable disposition existed—but was not reported—in 184 of the cases. Dkt. 41-1 at 19. McIntyre apparently intends for each consumer involved in these 184 cases to be a class member.

This approach is a paradigmatic example of prohibited "mini-trials" that don't ascertain members in a "reliable and administratively feasible" manner. *Marcus*, 687 F.3d at 593. To identify the 184 proposed class members, every prospective class member had to be examined individually to determine whether that class member met elements (c)(1) and (c)(2) of the class definition. Dkt. 41-1 at 19. And that analysis is just the beginning. Consistent with due process, On-Site must be permitted to challenge whether any particular report recorded in the data was in fact inaccurate. Even McIntyre doesn't propose applying the case-by-case method nationwide despite certification of a nationwide class, underscoring the infeasibility of this approach to ascertaining class members.

McIntyre's Case-by-Case Method is also unreliable. In an attempt to simplify the individual mini-trials her class definition requires, McIntyre adopted a shortcut—identifying as prospective class members

any individual whose favorable disposition occurred before On-Site prepared the relevant report. Dkt. 41-12 ¶¶ 7–8. But McIntyre did no investigation and introduced no evidence to support her assumption that all pre-report favorable dispositions were publicly available when the report was prepared.

Instead, if a favorable disposition occurred the day before the report was prepared, McIntyre would simply count it, without any further inquiry into whether the adjudicating court would have made the document accessible to the general public immediately or whether a "reasonable" process of gathering information would have located it. Even the result of the prohibited mini-trials, then, isn't a reliable means of identifying individuals who actually satisfy the class definition.

2. *Dispute Data*. McIntyre also argued that class members can be ascertained by using On-Site's dispute-resolution records to identify consumers whose eviction disputes were resolved partially or fully in the consumer's favor. Dkt. 41-1 at 19–20. She then simply assumed that each of those roughly 20,500 consumers is in the class. The district court uncritically accepted McIntyre's approach. Op. 19–20.

This method fails utterly to identify those consumers who satisfy all elements of the class definition. The identified cases don't necessarily even involve disputes about omitted favorable eviction-proceeding dispositions—some involve completely unrelated issues, such as mistaken identity. Dkt. 51-4 ¶ 5. In fact, they don't necessarily involve the issuance of a report in the first place, as disputes can be lodged without any prior reporting by On-Site. Dkt. 51-4 ¶¶ 5–6.

Even with those cases that *do* involve an eviction dispute and a subsequent correction, On-Site amends a consumer's file based on publicly available information *at the time of the* ***dispute***—even if that information came into existence or became available only *after* the initial report (which was accurate) was prepared. Dkt. 51-4 ¶ 5. Moreover, On-Site gives disputing consumers the benefit of the doubt if the investigation cannot definitively confirm the information. Dkt. 51-4 ¶ 10. So the fact that a dispute was resolved in the consumer's favor doesn't necessarily mean that the report was inaccurate when generated (as it must be for FCRA liability to attach).

McIntyre's Dispute Method of identifying class members is vastly over-inclusive, sweeping in thousands of consumers who may neither fall

within the class definition nor have any legal claim at all. McIntyre's failure to refine her Dispute Method is telling, for to do so would require the same type of "mini-trials" that doom McIntyre's first method. Neither method comes close to proving a "reasonable and administratively feasible" means of ascertaining the scope of the class.

C. The district court summarily dismissed these fatal ascertainability flaws as "merits determinations" and held that McIntyre adequately explained how the class would be defined by "objective criteria." Op. 19–20. But the court didn't meaningfully confront the more fundamental problem—that McIntyre's proposals would require delving into the procedures of "hundreds of jurisdictions encompassing thousands of individual courts." Op. 11.

Nor did the district court explain how these ascertainability problems are "merits determinations." As McIntyre has defined the class, individuals don't fall within it unless they were the subject of an inaccurate report—so any overlap with the merits is a function of McIntyre's own class definition and "cannot be helped." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011). A district court "must resolve all factual or legal disputes relevant to class certification, even if they

overlap with the merits." *In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184, 191 (3d Cir. 2020).

In sum, the district court didn't perform anything close to the rigorous review required to ensure that the ascertainability requirement was met—essentially gutting the requirement. For this reason alone, review is warranted.

III. The District Court Erred By Concluding That Common Questions Predominate Over Individual Issues.

A. To certify a Rule 23(b)(3) class, a plaintiff must establish that "the questions of law or fact common to class members predominate over any questions affecting only individual members." Commonality and predominance are "closely linked," but predominance is "far more demanding." *Ferreras v. Am. Airlines, Inc.*, 946 F.3d 178, 185 (3d Cir. 2019).

To assess predominance, courts must "examine each element of the legal claim 'through the prism' of Rule 23(b)(3)." *Marcus*, 687 F.3d at 600. Here, those elements are whether:

(i) the consumer's "report was inaccurate";

(ii) the reporting agency's "unreasonable procedures caused the inaccuracy"; and

(iii) the reporting agency's "behavior was willful."

Soutter v. Equifax Info. Servs., LLC, 498 F. App'x 260, 265 (4th Cir. 2012). "If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." *Lamictal*, 957 F.3d at 190.

B. To say this case doesn't present common questions that predominate over individual, fact-intensive questions is a vast understatement. *Each element* of the claims will need to be proven primarily by *individual* evidence.

1. *Whether the report was inaccurate*. McIntyre's Dispute Method is massively over-inclusive and likely to identify thousands of individuals who weren't the subject of a report that was inaccurate when created (or who disputed the accuracy of a report for some reason other than that covered by the class definition). This flaw alone defeats predominance and is fatal to class certification.

Denying On-Site the right to challenge this over-inclusiveness on the merits also would "eviscerate[]" the "due process right to raise individual challenges and defenses to claims," including whether the report was accurate in light of the contemporaneously available public record; whether On-Site's procedures in generating the report were

reasonable in light of the policies and procedures of both the relevant vendor and the relevant reporting jurisdiction; and whether On-Site's behavior was willful. *Carrera*, 727 F.3d at 307. Accordingly, whether viewed as a failure to prove ascertainability or predominance, McIntyre's inability to offer any common means of identifying which consumers had an inaccurate report is fatal to certification.

2. *Whether unreasonable procedures caused the inaccuracy*. The reasonableness of On-Site's procedures—and the causal connection (if any) between those procedures and the inaccuracy—also raise primarily individualized issues. Indeed, "reasonableness" is quintessentially a fact-specific, individualized inquiry. *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931). Each case must be decided on its own facts and circumstances.

The district court found predominance satisfied because, in the court's view, the reasonableness of On-Site's procedures can be decided based on a single issue: the use of LexisNexis to retrieve records. Op. 30–31. But the court ignored that during the class period, On-Site relied on four different vendors. Each used different procedures at different times in different geographic locations to collect data from different

courts that use different procedures for maintaining and publishing records—further fragmenting the analysis of the reasonableness of On-Site's reliance on its vendors. This inquiry into the reasonableness of On-Site's procedures as to any particular consumer "will require highly individualized proofs as to the injuries suffered by the putative class members." *Harper v. Trans Union, LLC*, 2006 WL 3762035, at *8 (E.D. Pa. Dec. 20, 2006).

Even worse, the district court ignored individualized issues concerning LeasingDesk—a separate platform operated by RealPage, Inc. (not On-Site)—which does use LexisNexis as its only landlord-tenant court-records vendor, but which processes LexisNexis's data differently than On-Site does. Dkt. 51-5 ¶¶ 6–16.[5] The court nevertheless disregarded the separateness of LeasingDesk and On-Site, treating them as a single class defendant. Op. 3, 25.

3. *Willfulness*. Willfulness, which is a required element for the statutory damages that McIntyre seeks, is also primarily an issue of individualized proof. *Soutter*, 498 F. App'x at 265.

[5] This error is likely what led the district court to incorrectly conclude that only one vendor is at issue. *Supra* p. 5.

For every class member, McIntyre will have to show that the procedures On-Site used were so clearly unreasonable vis-à-vis the class member's particular inaccuracy that On-Site knowingly or recklessly failed to meet its obligations. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57, 68 (2007). Because reasonableness itself depends on varying circumstances, willfulness necessarily does too. And no court has ever held that reliance on a vendor is a *per se* violation of FCRA.

In sum, each element of McIntyre's claim would have to be proven primarily by individual proof—so common issues cannot predominate, and a class should not have been certified.

CONCLUSION

For these reasons, the Court should grant On-Site's Rule 23(f) petition and vacate the class-certification order.

Dated: September 8, 2020

Respectfully submitted,

/s/ Allyson N. Ho

Misha Tseytlin
TROUTMAN PEPPER HAMILTON SANDERS LLP
1 North Wacker Drive, Suite 2905
Chicago, Illinois 60606
Telephone: (312) 759-5947
Facsimile: (312) 759-1939
misha.tseytlin@troutman.com

Ronald I. Raether
TROUTMAN PEPPER HAMILTON SANDERS LLP
5 Park Plaza, Suite 1400
Irvine, California 92614
Telephone: (949) 622-2700
Facsimile: (949) 622-2739
ron.raether@troutman.com

Timothy J. St. George
TROUTMAN PEPPER HAMILTON SANDERS LLP
1001 Haxall Point
Richmond, Virginia 23219
Telephone: (804) 697-1200
Facsimile: (804) 698-1339
timothy.st.george@troutman.com

Allyson N. Ho
Ashley E. Johnson
Bradley G. Hubbard
GIBSON, DUNN & CRUTCHER LLP
2001 Ross Avenue, Suite 2100
Dallas, Texas 75201
Telephone: (214) 698-3100
Facsimile: (214) 571-2900
aho@gibsondunn.com
ajohnson@gibsondunn.com
bhubbard@gibsondunn.com

Lucas C. Townsend
David W. Casazza
Jason H. Hilborn
Michael J. Showalter
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
Telephone: (202) 955-8500
Facsimile: (202) 467-0539
ltownsend@gibsondunn.com
dcasazza@gibsondunn.com
jhilborn@gibsondunn.com
mshowalter@gibsondunn.com

COUNSEL FOR PETITIONER

CERTIFICATE OF BAR MEMBERSHIP

I certify that I am a member in good standing of the bar of the U.S. Court of Appeals for the Third Circuit. *See* 3d Cir. R. 46.1(e).

/s/ *Allyson N. Ho*
Allyson N. Ho

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I certify that this petition complies with the typeface and typestyle requirements of Fed. R. App. P. 32(a)(5)–(6) and because it was prepared in 14-point New Century Schoolbook, a proportionally spaced typeface, using Microsoft Word 2016. *See* Fed. R. App. P. 5(c), 32(c)(2). This petition complies with the type-volume limitation of Fed. R. App. P. 5(c) because it contains 5,190 words, excluding the parts exempted under Fed. R. App. P. 32(f).

Pursuant to Local Rule 31.1(c), I certify that (1) the text of this electronic submission is identical to the text in the paper copies submitted to the Court, and (2) this electronic submission was scanned for viruses using Symantec Endpoint Protection, version 14.0.3876.1100, and is free of viruses.

/s/ *Allyson N. Ho*
Allyson N. Ho

CERTIFICATE OF SERVICE

I certify that, on September 8, 2020, a true and correct copy of this petition was served via the Court's CM/ECF system on all counsel of record.

/s/ *Allyson N. Ho*
Allyson N. Ho

No. 20-_____

In the United States Court of Appeals for the Third Circuit

PATRICIA MCINTYRE,
on behalf of herself and all others similarly situated,
Plaintiff – Respondent,

v.

REALPAGE, INC. d/b/a ON-SITE,
Defendant – Petitioner.

On Petition for Permission to Appeal from the United States District Court for the Eastern District of Pennsylvania, Philadelphia Division, Case No. 2:18-cv-3934

APPENDIX TO PETITION FOR PERMISSION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

APPENDIX INDEX

TAB A

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

PATRICIA MCINTYRE,	:	**CIVIL ACTION**
on behalf of herself and all others	:	
similarly situated,	:	
Plaintiff,	:	
v.	:	**No. 18-3934**
	:	
REALPAGE, INC., d/b/a ON-SITE,	:	
Defendant.	:	

MEMORANDUM

I. INTRODUCTION

This case arises from the inaccurate reporting of eviction records about tenant applicants to landlords and property managers. Tenant applicant, Patricia McIntyre ("Plaintiff"), on behalf of herself and similarly situated individuals, filed this consumer class action against RealPage, Inc. ("Defendant") for violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* (the "FCRA").

Plaintiff alleges that Defendant has failed to "assure" the "maximum possible accuracy" of its reporting of eviction records before selling the data and its reports to prospective landlords, who rely on those reports to assess and screen tenant applicants. Plaintiff alleges that due to Defendant's deficient practices in its collection and updating of the records it reports to landlords, Defendant has inaccurately reported thousands of negative dispositions that had been resolved in the tenants' favor. Plaintiff seeks uniform statutory damages under FCRA section

App. 1

1681n for herself and other class members.

Before the Court is Plaintiff's Motion for Class Certification (ECF No. 41). Defendant filed its Response in Opposition (ECF No. 51), and Plaintiff filed its Reply (ECF No. 56). The Court heard oral argument on June 4, 2020. ECF No. 58. The Motion is fully briefed for consideration.

II. BACKGROUND

Plaintiff is an adult individual who resides in Philadelphia, Pennsylvania. ECF No. 1 at 2. Defendant is a nationwide consumer reporting agency ("CRA") and is regulated by the FCRA. ECF No. 41-1 at 10. Defendant is headquartered in Richardson, Texas, and regularly conducts business in the Commonwealth of Pennsylvania. ECF No. 1 at 2.

Defendant operates its tenant screening business through two wholly owned subsidiaries, "On-Site" and "LeasingDesk." ECF No. 41-1 at 10. Defendant acquired "On-Site," and certain assets of On-Site Manager, Inc., in September 2017. *Id*. The "LeasingDesk" division has been in place for many years, and most of Defendant's employees have duties and responsibilities that span both divisions or "platforms." *Id*. According to Defendant's corporate representatives, Defendant utilizes a unified screening business that operates and produces both "On-Site" and "LeasingDesk" branded tenant screening reports. *Id*. at 11.

The screening reports Defendant creates are used by landlords and property

managers to determine whether they should approve or decline a prospective tenant's lease application. *Id*. According to Plaintiff, Defendant purchases its eviction information "from private third-party vendors instead of retrieving the actual underlying court records themselves—or even more manageable digital representations—for the purpose of creating and selling consumer reports to third party landlords and rental property managers." *Id*. The information Defendant purchases is "merely a summary prepared by its vendors that does not include all the information or the most up-to-date information available at the courthouses or government offices where the records themselves are housed in conjunction with the day-to-day functioning of those entities." *Id*. at 12.

Plaintiff alleges that both screening divisions, "On-Site" and "LeasingDesk," use the *same* data from the *same* vendor, LexisNexis. *Id*. (emphasis in original). Defendant's chief financial officer executed the contract with LexisNexis. *Id*. To date, Defendant has not produced any other contracts concerning its acquisition of public record information in this matter and Defendant's chief financial officer testified that he is not aware of another one. *Id*.

According to Plaintiff, regulators investigated the three leading credit reporting agencies, TransUnion, LLC, Equifax Information Services, LLC, and Experian Information Solutions, Inc. (the "Big Three"), for purchasing "distilled, incomplete public records summaries from LexisNexis." ECF No. 1 at 3. As a

result, following a finding that this practice failed to meet certain minimum standards, the Big Three ended their regular collection, or "feed," from LexisNexis. ECF No. 41-1 at 13. Plaintiff posits that "[a]lthough the Big Three stepped back from LexisNexis and using public records information in their consumer reporting products, other CRAs, like Defendant, continue to do so." *Id*. at 14.

Defendant's contract with LexisNexis states that LexisNexis is supposed to deliver court updates to public records when an eviction proceeding had been withdrawn, dismissed, vacated, or satisfied. *Id*. at 15. Plaintiff points out that the "contract also provides that such information is to be provided only when 'commercially reasonable.'" *Id*. Plaintiff alleges that "based upon [this] common policy and practice, Defendant regularly reports inaccurate and out-of-date eviction information pertaining to cases and judgments that have been dismissed, withdrawn, satisfied, or have resulted in a judgment for the tenant." ECF No. 1 at 5. Accordingly, "[c]onsumers who have obtained the dismissal, withdrawal of an eviction matter, satisfied an eviction judgment, or prevailed in an eviction matter are prejudiced in their ability to obtain leased housing." *Id*. at 5-6.

Allegations Specific to Proposed Lead Plaintiff

In Plaintiff's case, she alleges that "Defendant reported three eviction cases from Philadelphia, and all three were inaccurate." ECF No. 41-1 at 7. One eviction

had been voluntarily withdrawn, a second that was vacated and dismissed, and a third that was satisfied years before Defendant prepared its report on Plaintiff. *Id*. Defendant failed to report these favorable final dispositions, "even though it admits in its internal documents and in deposition testimony that it should have done so." *Id*. at 7 (emphasis in original). Plaintiff suggests, "LexisNexis simply never bothered to spend the money to go back to the courts regularly and get those updates, and Defendant never bothered to notice before Plaintiff disputed those records through her attorneys filing this lawsuit." *Id*. at 15.

On or about October 26, 2017, Plaintiff applied to rent an apartment in Philadelphia. ECF No. 1 at 6. Defendant prepared a screening report about Plaintiff, under its trade name "On-Site," and charged a fee for doing so. *Id*. The report included a section labeled "Landlord Tenant Court Records." *Id*.

The first inaccurate and out-of-date item appeared, in relevant part, as follows:

<table>
<tr><td rowspan="6">Date Filed
12/2016</td><td>Case Type
CIVIL ACTION FOR POSSESSION</td><td>Court
PHILADELPHIA</td><td>Case Number
1612063568</td><td>Notice Type</td></tr>
<tr><td>Judgment</td><td>Judgment Amount</td><td>Status</td><td>Amount Paid</td></tr>
<tr><td colspan="4">Defendants
PATRICIA MCINTYRE</td></tr>
<tr><td colspan="2">Address
3701 CONSHOHOCKEN AV. 31 921
PHILADELPHIA, PA 19131</td><td colspan="2">Comments</td></tr>
<tr><td colspan="2">Plaintiff
DUFFIELD HOUSE ASSOC</td><td colspan="2">Plaintiff Phone #</td></tr>
</table>

Id. at 7. According to Plaintiff, "[t]his information was inaccurate and out-of-date

because the complaint filed against Plaintiff in case LT-16-12-06-3568 on December 6, 2016 was reduced to judgment on February 15, 2017, but that judgment was *vacated* on May 18, 2017 and the case itself was withdrawn/dismissed on July 28, 2017." *Id*. (emphasis in original). Documents reflecting these updates were filed on the publicly available case docket contemporaneously with their entry. *Id*. As of the date of the report, Defendant had failed to update the status of the December 6, 2016 filing for nearly six months. *Id*. The report contained no reference to the vacatur of the judgment or the withdrawal of the case. *Id*.

The second inaccurate and out-of-date entry appeared, in relevant part, as follows:

Date Filed 11/2012	**Case Type** CIVIL ACTION FOR POSSESSION	**Court** PHILADELPHIA	**Case Number** 1210053884	**Notice Type**
	Judgment FOR PLAINTIFF 11/6/2012	**Judgment Amount**	**Status**	**Amount Paid**
	Defendants PATRICIA MCINTYRE			
	Address 3902 CITY AVE. B1223, PHILADELPHIA, PA 19131		**Comments**	
	Plaintiff BLDG PHILADELPHIA LP		**Plaintiff Phone #**	

Id. at 8. According to Plaintiff, "[t]his information was inaccurate and out-of-date because Plaintiff *satisfied* the judgment entered against her on November 6, 2012 in case LT-12-10-05-3884 on May 14, 2015, when an entry reflecting that updated disposition was filed on the publicly-available case docket. *Id*. at 8 (emphasis in

original). As of the date of the report, Defendant had failed to update the status of the November 6, 2012 judgment for nearly two and a half years. *Id*. The report contained no reference to the satisfaction. *Id*.

This second eviction case contained another inaccurate entry that appeared in the report, in relevant part, as follows:

Date Filed 10/2012	**Case Type** CIVIL ACTION FOR POSSESSION	**Court** PHILADELPHIA	**Case Number** 1210053884	**Notice Type**
	Judgment	**Judgment Amount**	**Status**	**Amount Paid**
	Defendants PATRICIA MCINTYRE			
	Address 3902 CITY AVE. B1223, PHILADELPHIA, PA 19131		**Comments**	
	Plaintiff BLDG PHILADELPHIA LP		**Plaintiff Phone #**	

Id. According to Plaintiff, "[t]his information was inaccurate and out-of-date because the complaint filed against Plaintiff in case LT-12-10-05-3884 on October 5, 2012 was reduced to judgment on November 6, 2012, which judgment Plaintiff *satisfied* on May 14, 2015, when an entry reflecting that updated disposition was filed on the publicly-available case docket." *Id*. at 8-9 (emphasis in original). As of the date of the report, Defendant had failed to update the status of the November 6, 2012 judgment for nearly two and a half years. *Id*. at 9. The report contained no reference to the satisfaction. *Id*.

The third inaccurate and out-of-date entry appeared, in relevant part, as follows:

Date Filed	Case Type	Court	Case Number	Notice Type
1/2012	CIVIL ACTION FOR POSSESSION	PHILADELPHIA	1201185230	
	Judgment	**Judgment Amount**	**Status**	**Amount Paid**
	Defendants PATRICIA MCINTYRE			
	Address 3902 CITY AVE. B1223, PHILADELPHIA, PA 19131		**Comments**	
	Plaintiff BLDG PHILADELPHIA LP		**Plaintiff Phone #**	

Id. According to Plaintiff, "[t]his information was inaccurate and out-of-date because the complaint filed against Plaintiff on January 18, 2012 in case LT-12-01-18-5230 was *withdrawn* on February 17, 2012, when an entry reflecting that updated disposition was filed on the publicly-available case docket." *Id*. (emphasis in original). As of the date of the report, Defendant had failed to update the status of case LT-12-01-18-5230 for nearly six years. *Id*. The report contained no reference to the withdrawal. *Id*. Ultimately, Plaintiff's rental application was denied. ECF No. 41-1 at 17.

At deposition, Defendant characterized the inaccuracies as a "one-off." *Id*. Plaintiff characterizes the inaccuracies as an example of what is not "commercially reasonable" under the contract with LexisNexis because the accurate information was publicly available at the time Defendant issued its report on Plaintiff. *Id. at 15*.

Defendant also maintains a file in its LeasingDesk platform about Plaintiff. *Id*. at 17. Plaintiff asserts that "both of Defendant's screening divisions or platforms contained the same inaccurately reported eviction cases about Plaintiff

from Defendant's common data source, LexisNexis, [], and upon request through either its On-Site platform or its LeasingDesk platform, Defendant would provide this inaccurate eviction record information about Plaintiff to one or more of its customers." *Id*. at 22.

Plaintiff alleges that "Defendant's conduct was a result of its deliberate policies and practices, was willful, and carried out in reckless disregard for consumers' rights as set forth under sections 1681e(b) and 1681g(a) of the FCRA, and further assumed an unjustifiably high risk of harm." ECF No. 1 at 9-10.

Allegations Specific to the Class at Large

In her complaint, Plaintiff asserted a nationwide class, and two subclasses (one for the Commonwealth of Pennsylvania and one for the city of Philadelphia), for Defendant's violations of FCRA section 1681e(b).[1] ECF No. 1 at 10.

---

[1] **Failure to Update Class – Nationwide**
For the period beginning five (5) years prior to the filing of this Complaint and continuing through the date of judgment, all natural persons with an address in the United States and its Territories who were subjects of tenant screening reports created by Defendant that contained eviction information, but which failed to state that the action had been withdrawn, dismissed, non-suited, or resulted in a judgment for the tenant defendant according to court records dated at least 30 days prior to the date of the report.

Failure to Update Subclass I: Commonwealth of Pennsylvania
For the period beginning five (5) years prior to the filing of this Complaint and continuing through the date of judgment, all natural persons with an address in the United States and its Territories who were subjects of tenant screening reports created by Defendant that contained information pertaining to a landlord tenant action filed within the Commonwealth of Pennsylvania, but which failed to state that the action had been withdrawn, dismissed, non-suited, or resulted in a judgment for the tenant defendant according to court records dated at least 30 days prior to the date of the report.

Failure to Update Subclass II: Philadelphia
For the period beginning five (5) years prior to the filing of this Complaint and continuing

During discovery, which is still ongoing, Plaintiff reviewed Pennsylvania eviction records reported by Defendant to a potential landlord or property manager, as well as internal consumer disputes and investigation records for eviction data. ECF No. 41-1 at 18. Plaintiff claims that "[b]oth of these sources of discovery have revealed numerous class members." *Id*.

Defendant produced a spreadsheet, which Plaintiff represents contains "data concerning 904 times [Defendant] reported information about eviction cases from Pennsylvania courts (from Philadelphia) in a tenant screening report it prepared from October 30, 2016 and July 3, 2019." *Id*. at 18-19. Plaintiff performed her own analysis of the same spreadsheet and explains that "Defendant did not obtain and did not report the correct final disposition of [a] case over 85% of the time." *Id*. at 19. When accounting for repeat inaccuracies, the error rate reaches 88%. *Id*.

Regarding national data, Plaintiff relied on Defendant's supplemental interrogatory response, which Plaintiff claims establishes that out of "43,821 eviction disputes made by tenants between February 7, 2017 and December 10, 2019 … 2,932 disputes were closed as duplicates … 19,393 disputes had to be

---

through the date of judgment, all natural persons with an address in the United States and its Territories who were subjects of tenant screening reports created by Defendant that contained information pertaining to a landlord tenant action filed in the Philadelphia, Pennsylvania Municipal Court but which failed to state that the action had been withdrawn, dismissed, non-suited, or resulted in a judgment for the tenant defendant according to court records dated at least 30 days prior to the date of the report.

resolved fully in favor of the consumer, and 1,156 disputes had to be resolved partially in favor of the consumer." *Id*. at 19 (internal citations omitted). Thus, in sum, Plaintiff posits that "over 50% [of Defendant's nationwide eviction records] had to be corrected in whole or in part." *Id*.

Although Plaintiff originally alleged three separate classes (*see supra* n.1), Plaintiff now moves to certify only the following nationwide class:

> For the period beginning two (2) years prior to the filing of the Class Action Complaint and continuing through the date of judgment, all natural persons with an address in the United States and its Territories who were (a) the subject of a tenant screening report prepared by Defendant that (b) contained information about an eviction proceeding, but which (c) failed to state that the eviction proceeding had been withdrawn, dismissed, vacated, satisfied or otherwise resulted in a favorable disposition or had no judicial finding against the consumer who was the subject of the tenant screening report, as that eviction proceeding is reflected in court records publicly available at the time of Defendant's tenant screening report.

Id. at 10. Plaintiff also moves to be designated class representative. *Id*. at 26.

Defendant contests class certification on multiple grounds. Mainly, Defendant argues class certification is improper for the following three reasons (1) the proposed class "implicate[s] the procedures of thousands of different courts"; (2) "Plaintiff attempts a class across separate entities with different procedures"; and (3) Plaintiff's eviction report was not generated through LeasingDesk, nor did it involve LeasingDesk data. ECF No. 51-1 at 9, 11, 12. Defendant claims that it obtains records "from hundreds of jurisdictions

encompassing thousands of individual courts across the country," and points to an array of other facts, all of which relate to the way in which it gathers the data it uses to generate its reports. Stated differently, Defendant's argument focuses on its conduct *prior to* the point in time when it ultimately sells eviction reports to its customers (i.e., the efforts it makes to gather data used to generate reports). Defendant also claims that in order to prevail, Plaintiff must "show that for herself, and each class member, that RP On-Site's procedures were not only negligent, but that they were also in 'willful' violation of the FCRA." ECF No. 51-1 at 21. Thus, Defendant maintains that Plaintiff must prove negligence.

As explained in greater detail below, however, because the Court finds that Plaintiff is not required to prove that Defendant was negligent, most, if not all, of Defendant's arguments opposing certification are inapplicable.

III. DISCUSSION

A. Legal Standard

1. *Class Certification*

"The class-action device is an exception to the rule that litigation is usually conducted by and on behalf of the individual named parties only." *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015), *as amended* (Apr. 28, 2015) (citing *Comcast Corp. v. Behrend*, 569 U.S. 33 (2013)) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-701 (1979)) (internal quotations omitted). "Accordingly, the

party proposing class-action certification bears the burden of affirmatively demonstrating by a preponderance of the evidence her compliance with the requirements of Rule 23." *Id*. (citation omitted).

In order for a class to be certified, the named plaintiff must satisfy all four prerequisites of Rule 23(a) and at least one of the Rule 23(b) tests. *Baby Neal v. Casey*, 43 F.3d 48, 55 (3d Cir. 1994) (citing *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975)). Rule 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only 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.

Fed. R. Civ. P. 23(a). These four requirements are commonly referred to as numerosity, commonality, typicality, and adequacy, respectively.

Here, Plaintiff states that she is proceeding under Rule 23(b)(3), which provides that a class action may be maintained if:

> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). The requirements are commonly referred to as predominance and superiority. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2008). Under Rule 23(b)(3), class certification is appropriate where "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." *Id*. In other words, a plaintiff "must 'demonstrate that the element of [the legal claim] is capable of proof at trial through evidence that is common to the class rather than individual to its members.'" *In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184, 190-91 (3d Cir. 2020) (alteration in original) (citing *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 600 (3d Cir. 2012) (quoting *Hydrogen Peroxide*, 552 F.3d at 311)).

2. *Substantive Law*

"The FCRA creates a private right of action against credit reporting agencies for the negligent or willful violation of any duty imposed under the statute."

Casella v. Equifax Credit Info. Servs., 56 F.3d 469, 473 (2d Cir. 1995) (citing 15 U.S.C. §§ 1681o & 1681n) (citations omitted).

The duty at issue in this case is imposed by 15 U.S.C. § 1681e(b), which provides: "Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." § 1681e(b).

The statute provides for the following damages:

> Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—
>
> > (1) (A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or
> >
> > (B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;
> >
> > (2) such amount of punitive damages as the court may allow; and
> >
> > (3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

15 U.S.C. § 1681n(a).

The elements of a willfulness claim are (1) inaccuracy and (2) a failure to follow reasonable procedures that is (3) knowing or reckless. *Feliciano v. CoreLogic Rental Prop. Sols., LLC*, 332 F.R.D. 98, 105 (S.D.N.Y. 2019); *see*

Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 57-58 (2007) ("willfulness" in FCRA encompasses both knowing and reckless violations). "Willful" under the FCRA means "reckless disregard of statutory duty." *Safeco*, 551 U.S. at 57-58. A reckless action entails "an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Id*. at 68 (quoting *Farmer v. Brennan*, 511 U.S. 825, 836 (1994)). Thus, unlike with negligence claims, actual damages and causation are not elements of a willfulness claim.

The overwhelming weight of authority holds that a credit report is inaccurate under § 1681e(b) either "when it is patently incorrect or when it is misleading in such a way and to such an extent that it can be expected to have an adverse effect." *Schweitzer v. Equifax Info. Sols. LLC*, 441 Fed. Appx. 896, 902 (3d Cir. 2011) (citations omitted).

B. Application

The law is clear: "[c]lass certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23 are met." *Hydrogen Peroxide*, 552 F.3d at 309 (citations omitted).

However, before addressing the Rule 23(a) factors and the Rule 23(b)(3) test, the Third Circuit recognizes that "an essential prerequisite of a class action, at least with respect to actions [proceeding] under Rule 23(b)(3), is that the class must be currently and readily ascertainable based on objective criteria." *Marcus*,

687 F.3d at 592-93 (citations omitted). "[A]t the certification stage, the plaintiff need not identify the actual class members. She need only show how class members can be identified." *Boyle v. Progressive Specialty Ins. Co.*, 326 F.R.D. 69, 83 (E.D. Pa. 2018) (citing *City Select Auto Sales Inc. v. BMW Bank of N. Am., Inc.*, 867 F.3d 434, 439 (3d Cir. 2017)).

1. *Ascertainability*

"If class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate." *Marcus*, 687 F.3d at 593. "Some courts have held that where nothing in company databases shows or could show whether individuals should be included in the proposed class, the class definition fails." *Id*. (citations omitted).

To date, Plaintiff has identified 184 Pennsylvania eviction records that Defendant reported with inaccuracies identical to those it reported about her. ECF No. 41-1 at 23. And, as Plaintiff uncovered, "[t]here are thousands of other inaccurate eviction records that Defendant had to correct after investigation." *Id*. To identify these additional class members, Plaintiff asserts that "objective criteria derived from Defendant's own records and publicly available court records can be used to ascertain class membership." *Id*. Plaintiff maintains that "these court records as well as … Defendant's own screening reports and investigation records the names and addresses of class members can be compiled for the purposes of

sending them notice, [which] [] plainly satisfies the 'ascertainably' requirement applied by the courts." *Id*.

Defendant claims its reporting is "highly individualized, raising issues with ascertainability, predominance, and commonality." ECF No. 51-1 at 16. As such, Defendant argues that Plaintiff's class definition is incomplete because it "requires proof that, for every class member, RP On-Site failed to report certain types of dispositions that were 'reflected in court records publicly available at the time of Defendant's tenant screening report.'" *Id*. (citing ECF No. 41-1 at 10). According to Defendant, "[t]he proposed class, as identified through the Pennsylvania Reports and the Dispute Records, is not ascertainable as to the single element of inaccuracy" because "Plaintiff has not even attempted to articulate a basis by which the Court could ascertain whether the disposition was publicly available at the time that RP On-Site issued its report." *Id*. at 16-17.

In reply, Plaintiff counters Defendant's position as follows:

> Misconstruing the elements of an FCRA willfulness claim, Defendant compounds its error by arguing that the class definition proposed by Plaintiff is improper allegedly because it 'does not track the elements' of a negligence claim. The causation and damages elements of a negligent violation of a section 1681e(b) claim, however, are not 'tracked' because they are simply not applicable here.

ECF No. 56. at 11 (internal citations omitted). Accordingly, Plaintiff doubles down on its proposed definition and states that it is "firmly grounded upon [] objective criteria," as Plaintiff moves to certify a class for a willful violation of the

FCRA and uses her case as the prime example. *Id*. at 12. Plaintiff has identified "objective criteria" that will enable the parties to identify class members, namely, that "[c]lass members can be identified precisely (by name and address) by reviewing Defendant's eviction reporting and dispute records and/or comparing the same with publicly available court records for eviction proceedings." *Id*. Plaintiff furthers maintains that there is enough to ascertain the class through additional objective criteria *vis a vis* Defendant's interrogatory responses and corporate representative testimony about the dispute records, as well as the requested Pennsylvania records." *Id*. at 13.

Here, members are not impossible to identify. In fact, there is nothing extensive about identification. Defendant's concerns do not reflect an inability to determine class members by reference to an objective criteria. All of the individualized fact-finding Defendant describes—which it claims will give rise to "mini-trials"—are merits determinations, not some administrative review to determine whether an objective element of a class definition is met. At this stage, she need only show how class members can be identified. The Court agrees with Plaintiff that the records are enough to ascertain a class and, moreover, to provide notice to an identifiable group of tenant applicants similarly situated to Plaintiff. Plaintiff correctly points out that Defendant contradicts itself insofar as it may rely upon its summary court records to sell reports and conduct its business, but

Plaintiff cannot rely upon those same records to ascertain a class. *Id*. at 13. Therefore, in sum, Plaintiff has identified objective criteria, in the form of business and court records, from which a class can be ascertained. Accordingly, the proposed class definition meets the requirements for ascertainability.

2. *Rule 23(a) Factors*

a. *Numerosity*

A plaintiff seeking certification must first demonstrate that the class is so numerous that joinder of all members is impracticable. Fed. R. Civ. P. 23(a)(1). "No minimum number of plaintiffs is required," but under Third Circuit precedent "generally, if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met." *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 357, n.5 (3d Cir. 2013) (quoting *Stewart v. Abraham*, 275 F.3d 220, 226-227 (3d Cir. 2001)). Although Rule 23(a)(1) "does not require a plaintiff to offer direct evidence of the exact number and identities of the class members, in the absence of direct evidence, a plaintiff must show sufficient circumstantial evidence specific to the products, problems, parties, and geographic areas actually covered by the class definition to allow a district court to make a factual finding." *Id*. (internal quotation and citation omitted).

Here, Defendant does not contest numerosity, as the requirement is easily satisfied. The proposed class is sufficiently numerous that joinder would be

impracticable, the class is subject to objective criteria that Plaintiff derived from Defendant's own records and publicly available court records.

b. *Commonality*

"[C]ommonality does not require perfect identity of questions of law or fact among all class members. Rather, 'even a single common question will do.'" *In re Suboxone (Buprenorphine Hydrochloride & Nalaxone) Antitrust Litig*., 421 F. Supp. 3d 12, 47 (E.D. Pa. 2019), *aff'd sub nom. In re Suboxone (Buprenorphine Hydrochlorine & Naloxone) Antitrust Litig*., 2020 WL 4331523 (3d Cir. July 28, 2020) (quoting *Reyes v. Netdeposit, LLC*, 802 F.3d 469, 486 (3d Cir. 2015). "The focus of the commonality inquiry is not on the strength of each plaintiff's claim, but instead is on whether the defendants' conduct was common as to all of the class members." *Id.* (internal alterations omitted) (quoting *Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 382 (3d Cir. 2013)). The Third Circuit has held that a putative class satisfies the commonality requirement if "the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *Rodriguez*, 726 F.3d at 382 (internal quotation and citation omitted).

> Plaintiff asserts that the class is subject to three common questions:
>
> (a) whether Defendant's procedures in not obtaining actual court records (even though it chooses to sell eviction data in its reports) is reasonable under section 1681e(b) of the FCRA; (b) whether Defendant's reliance upon its public records vendor is reasonable in light of LexisNexis' poor track-record with other CRAs and

> Defendant's lack of any audit; and (c) whether any violation of FCRA section 1681e(b) was negligent or willful.

ECF No. 41-1 at 24 (citing *Soutter v. Equifax Info. Servs., LLC*, 307 F.R.D 183, 201-02 (E.D. Va. 2015) (finding commonality satisfied on the following subjects: "the inaccuracy of the consumer reports, the reasonableness of the procedures alleged to cause these inaccuracies, whether Equifax's conduct was willful, and the determination of statutory damages.")).

Defendant argues that the common questions Plaintiff identified are "underinclusive and irrelevant" based on the following points:

> With the exception of LexisNexis's 'data collection practices,' none of these proposed questions has anything to do with RP On-Site's reporting processes, which lie at the core of any claim under § 1681e(b), and which would vary based on the many dimensions outlined above. And, with respect to the data practices of LexisNexis (one of four vendors), although Plaintiff concedes the relevance of those facts to the certification inquiry, she has no evidence of those practices, as she failed to engage in any discovery of LexisNexis during the years this case has been pending. LexisNexis's practices, as applied to the record of any class member, would also be individualized.

ECF No. 51-1 22.

In reply, Plaintiff maintains that "[t]he evidence here is that Defendant's procedure is *never* to obtain actual eviction court records and that it relies *exclusively and without any audit* upon its public records vendors (primarily LexisNexis, despite that vendor's poor track-record with other CRAs)." ECF No. 56 at 15 (emphasis in original). Plaintiff goes on to emphasize that "[t]hese are not

just common issues; they are the key issues as to whether Defendant's procedures in reporting eviction data "assures" the "maximum possible accuracy" required under FCRA section 1681e(b), which Plaintiff believes is more than sufficient to satisfy commonality. *Id*. at 16. Moreover, Plaintiff argues the fact that Defendant "concedes commonality as to at least 'one question of fact or law'" is sufficient. *Id*.

The Court agrees. Because Plaintiff shares multiple questions of both fact and law with the prospective class—and the Third Circuit has stated that "the named plaintiffs [must only] share at least one question of fact or law with the grievances of the prospective class"—Plaintiff has satisfied the commonality requirement. *Rodriguez*, 726 F.3d at 382. Defendant continues to conflate a negligence claim with a willfulness claim. The focus is not on LexisNexis' conduct; the focus is on Defendant's conduct and its blanket reliance on LexisNexis to supply its reports that is common to all class members.

c. *Typicality*

Rule 23(a)(3) provides that the typicality requirement is satisfied if the "claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The typicality requirement is "designed to align the interests of the class and the class representative so that the latter will work to benefit the entire class through the pursuit of their own goals. *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 311

(3d Cir. 1998) (citing *Baby Neal*, 43 F.3d at 57). Both typicality and commonality "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interest of the class members will be fairly and adequately protected in their absence." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (internal quotations and citation omitted).

To evaluate typicality, the Third Circuit instructs courts to ask whether the named plaintiff's claims are typical—in common sense terms—of the class' claims thus suggesting that the incentives of the named plaintiff are aligned with those of the class. *Beck v. Maximus, Inc.*, 457 F.3d 291, 295-296 (3d Cir. 2006). A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory. *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 428 (3d Cir. 2016). Typicality is a "low threshold." *Id*.

Again, Defendant maintains that due to the individual nature of each claim Plaintiff cannot satisfy the typicality requirement. Defendant contends that because class members face "unique defenses" renders Plaintiff a "representative not adequate to protect the interests of the class." ECF 51-1 at 13. Defendant appears to blend the typicality and adequacy requirements – "Plaintiff also is an

atypical and inadequate class representative because she is subject to a complete causation and damages defense." ECF 51-1 at 25.

Plaintiff argues that her claim is entirely typical because "Defendant prepared a tenant screening report about her with an inaccurate eviction record on it, like it did for all proposed class members." ECF No. 41-1 at 25. Plaintiff "intends to seek uniform statutory damages under FCRA section 1681n for herself and other class members." *Id*. And, Defendant's failure to "assure" the "maximum possible of accuracy" in its eviction record reporting is exactly the claim of every class member. *Id*. The Court agrees that these questions, which underlie Plaintiffs' claims, are shared by every putative class member. Accordingly, the typicality element is established here.

Plaintiff correctly points out that "none of Defendant's arguments defeat typicality because Defendant again attempts to foist additional requirements onto a section 1681e(b) willfulness claim, and fundamentally mischaracterizes this claim throughout its opposition." ECF No. 56 at 17. Again, Defendant is relying on the elements of a negligence claim to defeat an element of a willfulness claim. As such, a "unique defense" will not become a major focus of this litigation. The fact that records are derived from On-Site, LeasingDesk, or both does not distinguish Plaintiff from prospective class members whose data was derived from the other source because Defendant owns both. The issue underlying both Plaintiff's and

every putative class member's claim, alike, is that Defendant used the same vendor, LexisNexis, and accepted its reports at face value. Plaintiff's claims, therefore, arise from the same practice or course of conduct that gives rise to the claims of other class members that are based on the same legal theory. There are no individualized claims or defenses, and all seek the same statutory damages. Accordingly, the Court finds that the typicality requirement is satisfied.

d. *Adequacy*

The fourth prerequisite under Rule 23(a) is that the class representative and class counsel must "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The adequacy requirement "has two components: (1) concerning the experience and performance of class counsel; and (2) concerning the interests and incentives of the representative plaintiffs." *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 181-182 (3d Cir. 2012) (internal quotations and citation omitted). The Third Circuit has made clear that "adequate representation of a particular claim is determined by the alignment of interests of class members, not proof of vigorous pursuit of the claim." *In re Cmty. Bank of N. Virginia*, 418 F.3d 277, 307 (3d Cir. 2005) (internal quotations and citation omitted). "In analyzing this criteria, the court must determine whether the representatives' interests conflict with those of the class and whether the class attorney is capable of representing the class." *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 185

(3d Cir. 2001) (citations omitted). The Third Circuit instructs courts to consider whether the "attorneys for the class representatives are experienced and qualified to prosecute the claims on behalf of the entire class." *Baby Neal*, 43 F.3d at 55.

Here, there is no indication that Plaintiff possesses any interests adverse to the class. The Court finds that Plaintiff's counsel is qualified and experienced in class action, complex litigation, and consumer litigation. Plaintiff's counsel has been certified to represent classes under the FCRA, as well as other consumer protection laws, by this Court and by courts in other districts, and has tried class actions to verdict. *See* ECF No. 41-14. Accordingly, Plaintiff and her counsel are adequate class representatives.

3. *Rule 23(b)(3) Requirements*

a. *Predominance*

Under Rule 23(b)(3), class certification is appropriate if "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 predominance inquiry 'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.'" *Tyson*

Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045 (2016) (quoting 2 W. Rubenstein, Newberg on Class Actions § 4:49, at 195–96 (5th ed. 2012)).

More specifically, "[t]o determine whether the putative class has satisfied predominance (indeed, all applicable Rule 23 requirements), the District Court must conduct a 'rigorous analysis' of the evidence and arguments presented." *Lamictal*, 957 F.3d at 190–91 (citing *Hydrogen Peroxide*, 552 F.3d at 309 (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982)). The Third Circuit recently broke down this analysis into three parts. "First, the court must 'find[]' that the requirements of Rule 23 are met and any '[f]actual determinations supporting Rule 23 findings must be made by a preponderance of the evidence.'" *Id*. (citing *Hydrogen Peroxide*, 552 F.3d at 307). "Second, 'the court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits.'" *Id*.; *see Dukes*, 564 U.S. at 351 ("That [overlap] cannot be helped."); *see also Marcus*, 687 F.3d at 591 ("Rule 23 gives no license to shy away from making factual findings that are necessary to determine whether the Rule's requirements have been met."). "Third, the court must consider 'all relevant evidence and arguments,' including 'expert testimony, whether offered by a party seeking class certification or by a party opposing it.'" *Id.* (citing *Hydrogen Peroxide*, 552 F.3d at 307). Once completed and the Court finds by a

preponderance of the evidence that the claims are capable of common proof at trial, then the predominance requirement is satisfied. *Lamictal*, 957 F.3d at 191.

Plaintiff highlights courts that have found common issues predominating in FCRA class actions seeking only statutory damages, such as the instant case. *See* ECF No. 41-1 at 27 (citing, *inter alia*, *Miller v. Trans Union, LLC*, 2017 WL 412641, at *8-11 (M.D. Pa. Jan. 18, 2017) (report and recommendation certifying FCRA statutory damages case for class treatment); *Chakejian v. Equifax Info. Servs., LLC*, 256 F.R.D. 492, 498, 500-01 (E.D. Pa. 2009) (certifying FCRA statutory damages class action); *Summerfield v. Equifax Info, Servs. LLC*, 264 F.R.D. 133, 139, 142 (D.N.J. Sept. 30, 2009). Moreover, Plaintiff suggests "predominance is established where common facts about the willfulness of a defendant's conduct provide for a statutory damage remedy." *Id*. (citing *Taha v. Cnty. of Bucks*, 862 F.3d 292, 309 (3d Cir. 2017)).

Defendant raises various arguments at different points throughout its opposition brief directed at predominance. *See* ECF No. 51-1 at 16, 18, 21, 25, 28, 29. But Defendant advances no discernible arguments distinguishing commonality and predominance. First, under the heading "Individualized Issues About RP On-Site's Report Predominate," Defendant argues: (1) "that an individualized review of each screening report and the underlying court documents would be necessary to assess the reasonableness of RP On-Site's reporting"; (2) "[t]he circumstances and

the timing of the last update by the vendor would need to be electronically traced for each record, which would be a highly-individualized task across tens of thousands of records, with varying proof then presented at trial as to whether the collection frequency for an individual court was reasonable"; and (3) "the substantive content of each court file, which would inform an assessment of the reasonableness of RP On-Site's procedures, will vary by record." *See* ECF No. 51-1 at 18-20. Each argument relates to the accuracy, timing, and process that Defendant uses to acquire, maintain, and update the data it reports. Furthermore, Defendant argues that because it "has a due process right to contest any claim of a 'willful' violation based on the facts and circumstance of each record challenged by any putative class member," the purported individualized data collection practice discussed above "will be even more individualized." *Id*. at 21-22.

All of Defendant's arguments ignore Plaintiff's theory of the case—i.e., that Defendant's reports are consistently inaccurate because Defendant obtains summary eviction data from its vendors and does not prioritize adjudication updates. Based on this theory, the Court agrees that "[t]he success or failure of the Plaintiff's claim and that of the class will depend upon the same core evidence and legal issues," including but not limited to the following:

(1) the acquisition of summary eviction records by Defendant (rather than actual court records);

(2) its failure to audit or even properly oversee its public record

vendors;

(3) Defendant's motive to generate profit by selling reports;

(4) LexisNexis' "commercially reasonable" data collection practices and how those practices reflect upon the reporting of eviction records for the class members here;

(5) whether Defendant had sufficient knowledge of its error rate and the undependability of its public records vendors;

(6) whether Defendant's failure to assure accuracy for Plaintiff and the class was willful, or merely negligent.

ECF No. 56 at 22 n.9. These common issues predominate over any individualized issues related to Defendant's data collection practices. Here, the jury should be able to determine whether Defendant's a violation was "willful," or merely negligent, by considering common evidence related to Defendant's policy, practice and procedure without focusing on information individual to a class member.

Defendant's arguments nearly mirror those made in a highly analogous FCRA class action. In *Feliciano v. CoreLogic Rental Property Solutions, LLC*, 332 F.R.D. 98 (S.D.N.Y. 2019), the plaintiff alleged that the defendant violated the FCRA by "fail[ing] to insure the accuracy of … tenant data before selling the data and the resulting reports to prospective landlords, who rely on them to assess and screen potential tenants." *Id.* at 102. Like Plaintiff here, the plaintiff in *Feliciano* alleged "that, because of delays and deficient practices in collecting and updating [court] records reported to landlords, defendant ha[d] inaccurately reported that housing suits against tenants were ongoing, when in fact the suits had been

favorably resolved in favor of the tenant." *Id.* In further similarity to the present case, the plaintiff sought statutory damages. As Defendant argues here, the defendant in *Feliciano* argued that predominance was lacking because "individual issues … [related to] the accuracy of the individual reports and the willfulness of [Defendant] … predominate." *Id.* at 107-08 ("[W]hether a report is accurate may involve an individualized inquiry."). More specifically, the defendant "[took] the position that the accuracy, timing, and technique used to **acquire** … **data** of each class member would require individualized class determinations" and "that its methods have varied over time, creating an individualized question of reasonableness in each case." *Id.* at 108 (emphasis added).

The *Feliciano* court rejected the defendant's arguments outright, explaining that because "[t]he allegations as to [defendant]'s **collection, updating, and reporting of case information** are common to all members of the class," common questions predominated the purported individualized inquiries related to the defendant's collection of data. *Id.* at 107 (emphasis added). Here, Defendant's arguments directed at its data collection practices will similarly be established using common evidence. Plaintiff proposes that Defendant's behavior is systemic. In other words, it takes the form of a policy, practice, or procedure that, effectively, produces the same result – the generation of inaccurate reports. Whether Defendant's blind acceptance of summary reports from its vendor, LexisNexis,

rises to level willful, or reckless, disregard for its duty under the FCRA is the common issue. Plaintiff's sole claim, willfulness violation, does not give rise to individual determinations that triggers causation and defenses, like a negligence claim. Here, the factual context that Plaintiff asserts and her overall contention – that Defendant's behavior produced a common, generally applicable impact – poses common questions capable of classwide resolution.

The Court understands Defendant's desire to challenge causality on a case-by-case basis. Hypothetical individualized errors from one report to the next, however, have no bearing on the key liability inquiry in this case. Plaintiff alleges that Defendant should not have taken LexisNexis data at face value and use it in its own reports, without first performing its own independent assessment of that data. Thus, liability does not turn on the reasonableness of the error(s) in the individual tenant applicant's reports, but rather on the reasonableness of Defendant's collection practice, policy, and procedure that produced the error rate giving rise to the class' claim. Plaintiff asserts that Defendant's procedures in this regard are uniform and do not vary from one individual report to the next.

Similarly, whether Defendant's acceptance of LexisNexis reports at face value constitutes willful conduct will also turn on common evidence related to Defendant's relationship with LexisNexis, process for accepting data therefrom, whether Defendant was aware of the likelihood that its data may contain

inaccuracies, Defendant's knowledge of its error rate, and other common evidence related to the willfulness of Defendant's conduct. As such, this case centers on Defendant's common acts, as well as its state of mind insofar as it was aware of the alleged unjustifiably high risk of harm that was either known or so obvious that it should have been known. The Court is not currently charged with determining whether Plaintiff will ultimately succeed at trial under her theory. That question is for the trier of fact. Here, the question is whether the questions common to the class are capable of common proof at trial, and the Court is convinced by a preponderance of the evidence that it is.

b. *Superiority*

A court must find that the use of a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). To determine whether plaintiffs have met their burden on superiority, courts consider "class members' interests in pursuing separate actions, the extent of any independent litigation already begun by class members, the desirability of concentrating the litigation in this forum, and the difficulties likely to be encountered in the management of a class action." *Suboxone*, 421 F. Supp. 3d at 65, *aff'd sub nom. In re Suboxone (Buprenorphine Hydrochlorine & Naloxone) Antitrust Litig.*, 2020 WL 4331523 (3d Cir. July 28, 2020) (citing *In re Mushroom*

Direct Purchaser Antitrust Litig., 319 F.R.D. 158, 208 (E.D. Pa. 2016) (quotations omitted)).

Here, a class action represents a superior method for resolving this controversy. This class action mechanism allows the class to prosecute claims even for relatively modest statutory damages. Moreover, the vast majority of individuals affected by Defendant's practices are unlikely to know that their rights have been violated. The alternative, therefore, would be no action at all. As such, in light of that comparison, the class-action mechanism constitutes a superior means of adjudicating the claim before the Court.

Defendant argues that predominance is lacking because the Court will need to conduct "a manual review of each report, as well as testimony from each landlord," to assess whether the report "had [any] effect on a consumer's rental prospects." ECF No. 51-1 at 25-26. As such, Defendant asserts that "[t]he class action mechanism is not superior to individual actions because the structure of the FCRA ensures that consumers have sufficient incentives to pursue individual litigation when they have suffered actual injury." *Id*. at 28. In other words, Defendant argues that causation cannot be established without resolving individualized issues. Defendant also argues that "individualized inquiries … predominate as to the amount of damages" because the statute at issue prescribes a

range of awardable damages, between $100 to $1,000. *Id*. at 27. Both of these arguments are inapposite.

Again, Defendant "conflates an FCRA … willfulness claim with a … negligence claim." ECF No. 56 at 26. Plaintiff has not brought a claim for a negligent violation of the FCRA. Therefore, Plaintiff need not prove causation. In a similar vein, Defendant's argument that individualized damages inquiries defeat predominance is equally misguided because it is well-settled that individualized damages inquiries do not defeat predominance. *See, e.g.*, *Suboxone*, 421 F. Supp. 3d at 65, *aff'd sub nom*. *In re Suboxone (Buprenorphine Hydrochlorine & Naloxone) Antitrust Litig.*, 2020 WL 4331523 (3d Cir. July 28, 2020) (rejecting the defendant's argument that "the eventual need for individualized damages inquiries defeats predominance."). This is especially true where, as here, movants for class certification allege only statutory damages. *See, e.g.*, *Soutter*, 307 F.R.D. at 217 ("Unlike individualized, subjective determinations of damages, which could spawn a series of mini-trials, this is simply a matter of counting heads and data points."). Compared to any available alternatives, the facts of the instant case demonstrate that the class-action mechanism constitutes a superior method for fairly and efficiently adjudicating the controversy.

6. *Personal Jurisdiction*

Defendant argues that the Court lacks personal jurisdiction over certain out-of-state class members, relying solely upon the Supreme Court's opinion *Bristol-Myers Squibb v. Superior Court of California, San Francisco County*, 137 S. Ct. 1773, 1777-78 (2017). *See* ECF No. 51-1 at 30-31. A court in this district recently distinguished *Bristol-Myers* as follows:

> *Bristol-Myers* did not involve a proposed class action suit as here. Rather, in *Bristol-Myers*, more than 600 named plaintiffs, residents and nonresidents of California, instituted a mass tort action in California against Bristol-Myers Squibb Company related to a prescription drug, Plavix. 137 S.Ct. at 1778. The *Bristol-Myers* Court held that California lacked specific jurisdiction over the nonresident plaintiffs' claims. *Id*. at 1781-83. The Court reasoned that because the nonresidents were not prescribed, did not purchase, did not ingest, and were not injured by the drug in California, there was no 'connection between the forum and the specific claims at issue.' *Id*. at 1781. The Court explained that '[t]he mere fact other plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims.' *Id*. at 1781.

Velazquez v. State Farm Fire & Cas. Co., 2020 WL 1942784, at *10 (E.D. Pa. Mar. 27, 2020), *report and recommendation adopted*, 2020 WL 1939802 (E.D. Pa. Apr. 22, 2020). Based on these distinctions, this Court refused to extend *Bristol-Myers*' holding to class actions. *See id.* at *11 ("In the absence of binding precedent on the applicability of *Bristol-Myers* to class actions, I respectfully recommend against extending its holding at this time."); *see also Gress v. Freedom Mortg. Corp*., 386 F. Supp. 3d 455, 465 (M.D. Pa. 2019) (declining to apply

Bristol-Myers to class action claim because "[i]t is plain to see that *Bristol-Myers Squibb* is not squarely on point, and we see no basis to extend the application of what otherwise appears to be a limited holding."). Therefore, the Court finds Defendant's personal jurisdiction argument inapplicable.

7. *Trial Plan*

Plaintiff proposes a detailed trial plan in her motion for class certification, *see* ECF No. 41-1 at 30-31, which the Court finds acceptable. In keeping with Plaintiff's proposed plan, the Court agrees and anticipates that trial in this case will be relatively straight forward. *See e.g.*, *Ramirez v. Trans Union, LLC*, 2017 WL 5153280, at *1 (N.D. Cal. Nov. 7, 2017) (upholding verdict rendered after weeklong trial in FCRA class action) *aff'd, Ramirez v. TransUnion, LLC*, 2020 WL 946973 (9th Cir. Feb. 27, 2020) (class certification finding and liability and statutory damages verdict upheld, and also punitive damages were upheld but reduced to 4:1 ratio).

IV. CONCLUSION

The Court finds that Plaintiff has proven by a preponderance of the evidence that class certification is warranted and proper. Plaintiff established all of the Rule 23(a) prerequisites and both parts of the Rule 23(b)(3) test. In addition, the class is readily ascertainable based on objective criteria. Accordingly, Plaintiff's Motion for Class Certification (ECF No. 41) is granted in the accompanying order.

DATE: August 25, 2020

BY THE COURT:

/s/ Chad F. Kenney

CHAD F. KENNEY, JUDGE

TAB B

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

PATRICIA MCINTYRE,	:	**CIVIL ACTION**
on behalf of herself and all others	:	
similarly situated,	:	
Plaintiff,	:	
v.	:	**No. 18-3934**
	:	
REALPAGE, INC., d/b/a ON-SITE,	:	
Defendant.	:	

ORDER CERTIFYING CLASS

AND NOW, this 25th day of August 2020, upon consideration of Plaintiff's Motion for Class Certification (ECF No. 41), Defendant's Response in Opposition (ECF No. 51), Plaintiff's Reply (ECF No. 56), and for the findings and reasons herein and in the accompanying Memorandum Opinion (collectively, the "Order"), it is hereby **ORDERED** that Plaintiff's Motion (ECF No. 41) is **GRANTED**:

1. The Court certifies this action to proceed as a class action in accordance with Federal Rule of Civil Procedure 23(a) and (b)(3) for violations of section 1681e(b) of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681-1681x, on behalf of the Class defined as:

> For the period beginning two (2) years prior to the filing of the Class Action Complaint and continuing through the date of judgment, all natural persons with an address in the United States and its Territories who were (a) the subject of a tenant screening report prepared by Defendant that (b) contained information about an eviction proceeding, but which (c) failed to state that the eviction proceeding had been withdrawn, dismissed, vacated, satisfied or otherwise resulted in a favorable disposition or had no judicial finding against the consumer who was the subject of a tenant screening report, as

that eviction proceeding is reflected in court records publicly available at the time of Defendant's tenant screening report.

2. The Class is so numerous that joinder of all members is impracticable.

3. There are questions of law and fact common to the Class including (1) whether Defendant violated FCRA section 1681e(b) by failing to maintain reasonable procedures to assure the maximum possible accuracy of information included in consumer reports it prepared about class members; (2) whether Defendant acted willfully; and (3) the quantum of statutory damages for the violation(s).

4. Plaintiff's claim is typical of the Class and the damages sought.

5. Plaintiff and her counsel will fairly and adequately represent the interests of the Class. Plaintiff has no interests that appear antagonistic to the Class and Class Counsel has shown to be experienced and competent in consumer class litigation.

6. Common issues predominate over any questions affecting only individual Class members and the questions common to the class are capable of common proof at trial in this FCRA class action seeking only statutory damages.

7. A class action is superior to other available methods for the fair and efficient adjudication of this controversy that seeks modest statutory damages.

8. Plaintiff, Patricia McIntyre, is certified as Class Representative.

9. Plaintiff's counsel, Francis Mailman Soumilas, P.C., is certified as Class Counsel.

10. Plaintiff shall submit a proposed form of class notification to the Court for review and approval within thirty (30) days of this Order;

11. Defendant shall produce a class list to Plaintiff's counsel within fourteen (14) days of this Order.

12. Following an Order approving and directing notice to the Class, the Court will issue an amended scheduling order.

BY THE COURT:

/s/ Chad F. Kenney

CHAD F. KENNEY, JUDGE