No. 20-8035

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

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

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INTRODUCTION

In this case, the Honorable Chad F. Kenney certified a class of tenant applicants under Fed. R. Civ. P. 23 about whom Defendant-Petitioner RealPage, Inc. ("RealPage") prepared tenant screening reports with inaccurate eviction data. With reference to its own internal dispute records, RealPage's error rate for eviction data is over 50%, and for the specific class certified here the error rate is 100%. RealPage states in its tenant screening reports, for example, that tenants such as Plaintiff-Respondent McIntyre had eviction judgments against them when court records show that those judgments had been vacated or the cases had been withdrawn without adjudication. The identity of class members comes directly from RealPage's internal records and official court records. A single national standard applies under the federal Fair Credit Reporting Act ("FCRA") – requiring RealPage to follow procedures that "assure" the "maximum possible accuracy" of its tenant screening reports. 15 U.S.C. § 1681e(b). The district court made no error in its thorough and practical 38-page decision certifying the class. No Rule 23(f) review is warranted here.

STATEMENT OF THE CASE

RealPage, a national tenant screener, has a documented history of inaccurately reporting government and court records on the tenant screening reports it sells to landlords and property managers. *See Federal Trade Comm'n v. RealPage Inc.*, 3:18-

cv-02737-N (N.D. Tex.).[1] In this and other class cases following the Federal Trade Commission's 2018 enforcement action, RealPage has fought hard to keep tenants from discovering the full extent of its inaccurate reporting of government and court records, which it obtains not from the government or the courts, but from private businesses it calls "vendors."[2]

In the case at bar, the data about RealPage's reporting of eviction court records was compelled by the district court's orders. ECF 29, 38. The data was shocking. Nationally, RealPage had an error rate of over 50% in reporting eviction records data among those tenants who disputed. ECF 63 at 11. In Pennsylvania, RealPage's error rate (regardless of dispute) was even higher, over 85%. *Id.* at 10. In McIntyre's case, all three (3) court records on her tenant screening report were inaccurately reported. ECF 41-1 at 9-11, ECF 41-2. The error rate for the class as certified here is 100%. *See* ECF 63 at 11. This undisputed and astoundingly high

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[1] Available at https://www.ftc.gov/enforcement/cases-proceedings/152-3059/realpage-inc.

[2] *See Kelly & Bey v. RealPage, Inc.*, No. 2:19-cv-01706-JDW (E.D. Pa.) at ECF 32 (order dated Mar. 13, 2020 compelling RealPage to identify number of class members in class action alleging that RealPage conceals its private vendor sources of information); *Jones v. RealPage, Inc.*, No. 3:19-cv-02087-B (N.D. Tex.) at ECF 120 (order dated Mar. 19, 2020 compelling RealPage to identify total number of consumers about whom it sold tenant screening reports containing a criminal record with a name that did not match the name of the person who was the subject of the report); *Saylor v. RealPage, Inc.,* No. 1:19-cv-13768-RBK-KMW (D.N.J.) (class action alleging that RealPage routinely fails to consult publicly available records before including sex offender records on tenant screening reports).

error rate is a far cry from meeting the legal standard of assuring "maximum possible accuracy," required by the FCRA at section 1681e(b), words conveniently *not mentioned at all* by RealPage in its brief to this Court. *See* Pet. at 3.

Instead, RealPage begins its Rule 23(f) Petition with what was an afterthought in opposing certification below – the erroneous proposition that the Supreme Court's decision in *Bristol-Myers Squibb v. Super. Ct. of Cal.,* 137 S. Ct. 1773 (2017), means that a federal district court lacks jurisdiction over a Rule 23 nationwide class action under federal law unless the case is in the defendant's home turf. *See* Pet. at 12-17; ECF 51-1 at 24-25. This argument stretches *Bristol-Myers*, a mass tort action in state court, well beyond it clear application, and ignores how federal courts have properly handled nationwide Rule 23 class actions, under FCRA 1681e(b) and other federal laws, both before and after *Bristol-Myers.*

Next, RealPage argues that the district court here allegedly misapplied the ascertainability requirement under Rule 23, yet it fails to even cite to this Circuit's seminal decision on ascertainability, *Byrd v. Aaron's Inc.*, 784 F.3d 154 (3d Cir. 2015). RealPage baldly contends that the class here cannot "possibly" be ascertained, but ignores that the class is precisely identified with reference to RealPage's *own business records* for evictions data which are compared to actual court records for the same evictions. As the district court properly found within its discretion, these criteria are objective and there is a reliable and administratively feasible way to determine whether

putative class members fall within the class. Indeed, many class members have already been identified and RealPage's dispute records will identify the rest.

Finally, RealPage argues that the district court also allegedly abused its discretion is finding that the predominance requirement was satisfied in this case. But the district court was well within its discretion in finding that the predominating issues here are common and can be resolved at trial through common proofs. RealPage's high error rate is explained by its common practice: not obtaining court records from courts and not requiring its "vendors" to prioritize adjudications. The district court here knows how to oversee a trial and understands what evidentiary issues and proofs will predominate.

At a time when our nation is facing an eviction crisis, RealPage's proposal of handling litigation about its exceptionally high error rate in reporting evictions data on a state-by-state, case-by-case basis is self-serving and legally baseless. RealPage has amassed a national database of eviction data and is governed by federal law with a single national standard. The district court here can properly oversee this nationwide class litigation and determine whether RealPage meets this standard. RealPage second-guesses Judge Kenney's conclusions regarding certification, yet it cannot contest that the decision is thorough and vigorously analytical. No error was made below, no discretion was abused, and Rule 23(f) review is not warranted.

RULE 23(f) REVIEW SHOULD BE DENIED

An interlocutory appeal pursuant to Fed. R. Civ. P. 23(f) is a narrow exception to the final-judgment rule. This Court has identified five circumstances in which an interlocutory appeal may be appropriate under Rule 23(f):

> (1) when denial of certification effectively terminates the litigation because the value of each plaintiff's claim is outweighed by the costs of stand-alone litigation;
>
> (2) when class certification risks placing inordinate . . . pressure on defendants to settle;
>
> (3) when an appeal implicates novel or unsettled questions of law;
>
> (4) when the district court's class certification determination was erroneous; and
>
> (5) when the appeal might facilitate development of the law on class certification.

Rodriguez v. Nat'l City Bank, 726 F.3d 372, 376-377 (3d Cir. 2013).

RealPage's arguments here seek to implicate circumstances 3-5 above. These arguments fail, as will be discussed below. RealPage, a publicly traded company (ticker RP) with market capitalization of nearly $6 Billion, also makes a passing reference that certification will allegedly place inordinate pressure on it to settle, but fatally makes no record at all to support such a proposition. *See In re Lorazepam & Clorazepate Antitr. Litig.*, 289 F.3d 98, 108 (D.C. Cir. 2002) (denying review where defendant "failed to submit any evidence that the damages claimed would force a company of its size to settle without relation to the merits of the class's claims.").

I. The District Court Properly Found That *Bristol-Myers* Is Inapplicable To This Federal Court Class Action Under Federal Law

RealPage's attempt to secure interlocutory review based on argument regarding *Bristol-Myers*, raised as an afterthought in the district court, fails. Even assuming Rule 23(f) review is the appropriate mechanism to address such a personal jurisdiction argument now, RealPage fails to demonstrate that there is a novel or unsettled question of law warranting interlocutory review.[3]

The picture of purported "disarray" in the state of the law that RealPage paints falls apart upon even brief scrutiny. The prevailing view, properly followed by the district court here, is that *Bristol-Myers* does not affect a federal district court's specific jurisdiction over nationwide class claims where personal jurisdiction is satisfied with respect to the named plaintiff's claims. ECF 63 at 37; *Gress v. Freedom Mortg. Co.*, 386 F. Supp. 3d 455, 464-65 (E.D. Pa. 2019) (collecting cases).[4]

What's more, the two cases RealPage cites regarding the alleged "disarray" and "diametrically opposed opinions" within this Circuit fail to support that proposition. In *Plumbers' Local Union No. 690 Health Plan v. Apotex Corp.*, No. 16-665, 2017

[3] Rule 23(f) appeals are generally limited to those which present Rule 23 issues. *McKowan Lowe & Co, Ltd. v. Jasmine*, 295 F.3d 380, 391 (3d Cir. 2002); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164-65 (3d Cir. 2001).

[4] Importantly, most of the cases the *Gress* court collected for the minority view that *Bristol-Myers* applies have now been overruled following the Seventh Circuit's ruling in *Mussat v. IQVIA, Inc.*, 953 F. 3d 441 (7th Cir. 2020), discussed *infra*.

WL 3129147, at *9 (E.D. Pa. July 24, 2017), the district court found that no personal jurisdiction existed over class claims under state law because the *named plaintiff* (not absent class members) failed to alleged sufficient facts to support personal jurisdiction. *Id.*[5] And in *Hickman v. TL Transportation, LLC*, the court explicitly recognized that there are "compelling reasons to doubt" the application of *Bristol-Myers* in a class action in under federal law, and only applied it to that case because the plaintiffs did not present any argument to the contrary, possibly for tactical reasons. 317 F. Supp. 3d 890, 899 fn. 2 (E.D. Pa. 2018).

Also, as RealPage must concede, there is circuit court guidance squarely on point. *Mussat v. IQVIA, Inc.*, 953 F. 3d 441 (7th Cir. 2020). Like McIntyre here, the plaintiff in *Mussat* sought to represent a nationwide class of consumers under a federal consumer protection statute and brought her claims in federal district court in her home jurisdiction. 953 F.3d at 443. When the district court struck the class allegations because they embraced consumers residing nationwide, the Seventh Circuit reversed, holding "that the principles announced in *Bristol-Myers* do not apply to the case of a nationwide class action filed in federal court under a federal statute." *Id.*

[5] Furthermore, the *Plumbers* decision (issued only weeks after *Bristol-Myers* was decided and before the present consensus was reached) cites to cases from the U.S. District Court for the Northern District of Illinois, now overruled by *Mussat.* The same is true of the only other case RealPage cites regarding an unsettled state of law. Pet. at 14 n. 3 (citing *In re Dicamba Herbicides Litig.*, 359 F. Supp. 3d 711, 723–24 (E.D. Mo. 2019) (relying solely on N.D. Ill. authorities)).

The *Mussat* court found that the difference between a Rule 23 class action and the state law mass tort device at issue in *Bristol-Myers* is a "critical distinction." *Id.* at 447. Indeed, the *Mussat* court noted that this is exactly how nationwide class actions have been handled for "decades." *Id.* at 445 (citing, *inter alia*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011)). The district court here properly came to the same conclusion. ECF 63 at 38.

RealPage glosses over *Mussat*, preferring *dicta* from the dissent in *Molock v. Whole Foods Market Grp.*, 952 F.3d 293 (D.C. Cir. 2020).[6] In *Molock*, the majority of the court reached a similar conclusion to *Mussat*, finding that unnamed class members in federal court class actions have universally been treated as nonparties prior to class certification for jurisdictional purposes. 952 F.3d at 297. RealPage, however, prefers Judge Silberman's dissent. In addition to being a dissent, and *dicta*, Judge Silberman's reasoning does not provide a basis to depart from the rule against application of *Bristol-Myers* because the due process concerns it addresses simply do not exist with respect to claims under federal law in federal court.

The primary driver of the Supreme Court's decision in *Bristol-Myers* was a "federalism interest" regarding states (in that case California) exceeding the bounds of

[6] RealPage suggests that Judge Silberman's *Molock* dissent is a direct criticism of *Mussat*'s holding which is, of course, not possible since the *Molock* decision was issued *before Mussat*.

their sovereignty and subjecting residents of another state to the coercive power of its court and laws. *Bristol-Myers*, 137 S. Ct. at 1780. The analysis of due process considerations is substantially different with respect to claims under federal law proceeding in federal court, where the relevant sovereignty is that of United States as a whole rather than any particular state. *See, e.g.*, *BP Chemical Ltd. v. Formosa Chemical & Fibre Corp.*, 229 F.3d 254, 258-59 (3d Cir. 2000); *ISL Int'l, Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 547, 551 (7th Cir. 2001) (in federal question cases, "[t]he jurisdiction whose power federal courts exercise is the United States of America, not the [forum state]").[7]

In addition to federalism, the other "primary concern" in a due process analysis of personal jurisdiction is "burden on the defendant." *Bristol-Myers*, 137 S. Ct. at 1780. RealPage cannot credibly argue that defending against the identical federal claims of class members in a single action is unreasonably burdensome.[8] The alternative scenario is to crowd the dockets of up to fifty other federal courts with state-

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[7] RealPage emphasizes the concern in the *Molock* dissent regarding "out-of-state *claims*" (Pet. at 20, emphasis original), but where, as here, the sole claim at issue arises under federal law, there is no such thing as an out of state claim. As the district court recognized below, the claims of all class members here are identical federal FCRA claims, regarding procedures that RealPage applies uniformly nationwide. ECF 63 at 32-34.

[8] RealPage's claim that there are due process concerns for *plaintiffs* in nationwide class actions is irrelevant to its *Bristol-Myers* arguments, and in any event has been considered and rejected by the Supreme Court. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-14 (1985).

by-state actions addressing nearly identical legal and factual issues. This multiplicity of suits and wasting of judicial resources is exactly the result the Rule 23 was designed to avoid. *Kramer v. Scientific Control Corp.*, 534 F.2d 1085, 1091 (3d. Cir. 1976).

RealPage's newfound desire (not present at the beginning of this nationwide class action) to avoid or severely limit the jurisdiction of the district court here is insufficient to support interlocutory review, and the Petition should be denied.

II. The District Court Certified A Class That Can Be Easily Ascertained

In *Byrd v. Aaron's Inc.*, this Court distilled the requirement of class ascertainability: "(1) the class is defined with reference to objective criteria; and (2) there is a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." 784 F.3d 154, 163 (3d Cir. 2015) (internal quotations omitted). Having done so, *Byrd* reversed the district court's denial of class certification for lack of ascertainability because the defendant's own records revealed the identities of those customers who were involved in the relevant transactions. These were "objective records" that can "readily identify" class members. *Id.* at 169. RealPage omits any citation to *Byrd*, this Court's seminal, most applicable pronouncement on ascertainability.

The district court here analyzed ascertainability (ECF 63 at 17-20) and properly found that there is "nothing extensive" (*id.* at 19) about the process for identification of class members, and that the identity of every class member, including their names

and addresses, comes from "business and court records." *Id.* at 20. Indeed, through a simple comparison of RealPage's own business records to court records every class member can be identified using objective criteria. *Id.* And the district court is well within the exercise of its discretion in finding that this comparison of records is an "administratively feasible mechanism." *Byrd*, 784 F.3d at 169; *see also Gulf Oil Co. v. Barnard*, 452 U.S. 89, 100 (1981) (class certification ruling is within sound discretion of the district court).

Specifically, copies of RealPage's tenant screening reports (which it maintains in electronic format) show the date of the report, the landlord or property manager to which it was delivered, and what RealPage specifically reported about any given tenant applicant's eviction. ECF 63 at 5-6; ECF 41-4 (rental report about McIntyre). When RealPage's reporting of an eviction judgment is *predated* by court records which show the case withdrawn or the judgment vacated, for example, that tenant is in the class. ECF 63 at 9-11, 19-20; ECF 41-12. This is readily determined from the face of the records themselves.

As the district court properly found, with this method McIntyre has already identified some 184 class members by name and address for whom RealPage's reports indicated that they owed money judgments to landlords where the publicly available Pennsylvania court records for those same eviction cases show on their faces that the

cases had, at the time of RealPage's report, already been vacated or withdrawn or the judgments had been satisfied, just as in McIntyre's case. ECF 63 at 10-11, 19-20.

RealPage's own investigation records have revealed thousands more class members. *Id.* When investigating disputes, RealPage does what McIntyre did here in Pennsylvania – it compares the face of its reports to the face of the court records for evictions. ECF 41-1 at 13-14. Where its reporting is inaccurate, RealPage must update its records per the official court record. *Id.* Thus, through this straightforward comparison of business records to court records, every class member can be identified using objective criteria and an administratively feasible mechanism. Indeed, for the dispute records, RealPage houses in its database the names and addresses of persons who had to have their eviction reports updated due to a confirmed inaccuracy. ECF 41-3 at 30-31.

Nevertheless, RealPage argues that class members will be "impossible" to identify without a burdensome process of "reconstruct[ing] when, and how, the disposition became publicly available." Pet. at 19. But no such "reconstruction" is necessary. The business and court records *all contain dates* for their dispositions or adjudications. It is therefore very simple administratively to figure out if an eviction judgment was marked satisfied on a given date according to court records but *subsequently* reported by RealPage as owing. The dispute records make class identification even easier. The testimony by RealPage's Rule 30(b)(6) witness is that

RealPage reviews court records when investigating after a dispute and updates its internal records when they are incorrect. ECF 41-1 at 13-14. Thus, in the case of disputes, the comparison of RealPage's record to court records of has been made and is memorialized in RealPage's business records.

Moreover, RealPage is engaging in sheer speculation when it suggests that the dates of court records or even its own records may be unreliable. Pet. at 20-22. As the district court properly found below, RealPage cannot seriously argues that it relies upon summary court records and its own business records "to sell reports and conduct its business, but Plaintiff cannot reply upon those same records to ascertain a class." ECF 63 at 19-20. RealPage's unfounded doubts and speculations are not a basis for review. *See Bridging Communities Inc. v. Top Flite Fin., Inc.*, 843 F.3d 1119, 1125 (6th Cir. 2016) ("We are unwilling to allow ... 'speculation and surmise to tip the decisional scales in a class certification ruling[.]'")

Finally, RealPage's heavy reliance upon *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592 (3d Cir. 2012), is misplaced. Identification of the class in that case involved multiple variables not at issue here, requiring facts maintained in disparate sources not all readily available to the parties: where and whether particular cars where leased, whether they had "Bridgestone RFTs" tires which were "made in Germany by a different company," whether there tires had gone flat, and whether they were replaced. *Id.* at 592-93. By contrast here, the necessary facts are all found in two

easily available sources: RealPage's own records and publicly available court records.

The district court thus correctly did not credit RealPage's argument that ascertainability would be an impossible or unmanageable process here. This determination does not reflect error, or a reason to disrupt the orderly progress of the case with a piecemeal appeal, but rather a prudent exercise of the discretion reposed in the district courts under Rule 23 to determine manageability.

III. The District Court Acted Within Its Discretion In Determining That Common Issues Predominate Over Individual Ones

The district court here also properly found within its discretion that the success or failure of McIntyre's and the Class's claims would depend on the same core evidence and legal issues. The predominance inquiry "calls upon courts to give careful scrutiny to the relation between common and individual questions in a case." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016). To that end, the analysis entails first examining each element of the plaintiff's legal claim to see if it involves common issues of law or fact and then determining whether issues common to the class overwhelm issues subject to individualized proof. *See Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 370-71 (3d Cir. 2015). The district court here properly engaged in such careful scrutiny and made no error.

RealPage offers three arguments to support its claim that individual issues will allegedly predominate at trial in its view: (1) proof of an inaccuracy is an individualized

issue; (2) whether the inaccuracy was caused by unreasonable procedures is an individualized inquiry; and, (3) willfulness is an issue of individualized proof. Pet. at 25-27. The district court did not err in rejecting these arguments.[9]

By characterizing McIntyre's case as requiring a particularized inquiry into each erroneous report, RealPage misconstrues the theory of the case here. ECF 63 at 30. McIntyre's theory as to why RealPage's reports have such an astonishingly high error rate is precisely because RealPage *did not* look into each eviction case individually, *did not* acquire the individual court records themselves, and instead purchased summary eviction data from its vendors, who did not prioritize adjudication updates, as the error rate data plainly shows. RealPage cannot revise the evidentiary record and manufacture an issue (individualized court records assessments) when it is precisely RealPage's failure to conduct any such individual assessments that is the common

[9] Initially, as the district court correctly noted, and as RealPage ignored in opposing class certification, the predominance inquiry is influenced heavily by the fact that this action seeks only uniform statutory damages under FCRA section 1681n. As a result, individual inquiries regarding causation and actual damages are unnecessary and therefore do not overtake the common legal and factual issues. ECF 63 at 14-17. The fact that only statutory damages are at issue undercuts objections to predominance in class actions generally, since the issue of each class member's damages can be resolved by looking at a few "data points," rather than an extensive mini-trial into the merits of each specific claim. *See Feliciano v. CoreLogic Rental Property Solutions, LLC,* 332 F.R.D. 98, 107-08 (S.D.N.Y. 2019) (eviction records reporting FCRA section 1681e(b)case); *Soutter v. Equifax Info. Servs., LLC,* 307 F.R.D. 183, 215-18 (E.D. Va. 2015) (civil judgment record reporting FCRA section 1681e(b) case).

practice that binds the entire class and makes the case amenable to resolution on a class basis in the first place.

The district court acknowledged that this case is no different than other recent FCRA section 1681e(b) public records class actions, like *Feliciano v. CoreLogic Rental Property Solutions, LLC,* 332 F.R.D. 98 (S.D.N.Y. 2019) or *Soutter v. Equifax Info. Servs., LLC,* 307 F.R.D. 183, (E.D. Va. 2015), and should be resolved similarly. ECF 63 at 22, 31-32, 36; *see also* ECF 41-1 at 2 & n.2. *Feliciano* dealt with inaccurate eviction records, and like *Soutter,* the same basic practices with the same exact vendor under a contract worded exactly the same way led to the same widespread inaccuracies. Indeed, the evidence below demonstrated that the primary vendor contract here has the exact same low "commercially reasonable" standard that the *Soutter* court found problematic. *Soutter,* 307 F.R.D. at 203. *See also, Feliciano,* 332 F.R.D. at 107 ("[w]ith the class, common issues predominate individual issues. The allegations as to CoreLogic's collection, updating, and reporting of case information are common to all members of the class.")

RealPage's argument surrounding "inaccuracy" as an individualized issue, therefore, is predicated not on a "fatal dissimilarity, but, rather, a fatal similarity – [an alleged] failure of proof as to an element of [P]laintiffs' cause of action." *Amgen, Inc. v. Conn. Ret. Plans & Tr. Funds,* 568 U.S. 455, 470 (2013).

RealPage's second argument regarding the causes of the inaccuracies is also based upon an intentional misstating of McIntyre's theory of the case, as the district court noted. ECF 63 at 30 ("Defendant's arguments ignore Plaintiff's theory of the case."). The point is not how many vendors RealPage used or the procedures of the courts where the vendors collected their data. Instead, the relevant facts are that RealPage failed to exercise appropriate oversight over its vendors and that RealPage's hands-off practices resulted in a high error rate.[10] *See* ECF 41-1, pp. 8-14.

McIntyre has always contended that RealPage's error rate stems from its use of "private third party vendors instead of retrieving the actual court records," as the

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[10] The incomplete reporting practice of LexisNexis, RealPage's chief vendor, and discussed by the district court (ECF 63 at 33-34), was the impetus for regulatory investigations of the "Big Three" consumer reporting agencies ("CRAs"), TransUnion, LLC, Equifax Information Services, LLC, and Experian Information Solutions, Inc., as well as dozens of FCRA lawsuits throughout the United States, including in this Circuit. *See* ECF 41-1 at 2 & n.2. (citing cases).

For example, in 2015, the Consumer Financial Protection Bureau ("CFPB") noted that CRAs did not adequately oversee their public records vendors:

> Examiners found that the oversight of public records providers by one or more CRAs was weak and required corrective action. For example, one or more CRAs had *never conducted a formal audit* of their public records providers. In addition, one or more CRAs *did not have defined processes to verify* the accuracy of public record information provided by their public records providers. In light of such weaknesses, Supervision directed one or more CRAs to establish and implement suitable and effective oversight of public records providers.

See CFPB, *Supervisory Highlights*, 2.1.1 (Summer 2015), available at http://files.consumerfinance.gov/f/201506_cfpb_supervisory-highlights.pdf (emphasis added). Further, the CFPB expressed concern about the accuracy of public records information that the CRAs imported into their consumer databases. *Id.* at 2.1.2.

district court properly noted. *Id.* at 5; ECF 63 at 30. The evidence also supports the finding that LexisNexis is RealPage's primary eviction records vendor. ECF 63 at 3 (only vendor contract provided in discovery); *id.* at 4 ("common feed" of eviction data from LexisNexis). The district court therefore did not abuse its discretion when it found that the predominating issue regarding the reasonableness of *RealPage's procedures* will be whether RealPage's "reports are consistently inaccurate because Defendant[-Petitioner] obtains summary eviction data from its vendors and does not prioritize adjudication updates." ECF 63 at 30.

Finally, the district court was on solid footing when it found that common issues are more likely to predominate in an FCRA class action seeking only uniform statutory damages for a willful violation.[11] For instance, in *Feliciano,* discussed by the district court (ECF 63 at 31-32), a strikingly similar FCRA section 1681e(b) tenant background screening case involving a tenant screener's failure to properly update eviction adjudications on its reports, the court found that:

> Because the class seeks statutory damages, there is no requirement for individual class members to demonstrate actual harm or for determination of damages. A finding of predominance is consistent with other FCRA cases.

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[11] *See Miller v. Trans Union, LLC*, No. 3:12-cv-1715, 2017 WL 412641, *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) (same).

Feliciano, 332 F.R.D. at 107, *petition for interlocutory review denied*, No. 19-2479 at ECF 40 (2d. Cir. Nov. 26, 2019). The *Soutter* court, the other most analogous FCRA section 1681e(b) class action, similarly held that the "individualized inquiry" into statutory damages was minimally influential in the predominance analysis because the individualized statutory damages questions were both "simple" and "straightforward." *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.").

The district court's analysis shows that in the most analogous and recent FCRA section 1681e(b) public record class actions, courts have correctly found that common issues will predominate. As the district court correctly observed, the willfulness inquiry "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." ECF 63 at 33.[12]

[12] The Brief of Amici Curiae suffers from the same myopia as the RealPage's. The older cases it cites all involved highly individualized data, not a uniform type of public records inaccuracy like here. Amici's conclusion that there can be no class treatment for FCRA section 1681e(b) claims is clearly belied by the mounting recent public record FCRA section 1681e(b) cases cited by McIntyre (ECF 41-1 at 2 & n.2). Indeed, one of those recent FCRA section 1681e(b) class actions involving the erroneous reporting or public records was tried before a jury and affirmed on appeal, demonstrating how manageable such cases can be. *Ramirez v. TransUnion,* LLC, 951 F.3d 1008 (9th Cir. 2020).

The most recent and most analogous circuit court authority confirms this conclusion. *See Taha v County of Bucks*, 862 F.3d, 292, 309 (3d Cir. 2017) ("[t]he class-wide question of fact as to the County Defendants' willfulness predominates over any individual issues of its potential members"); *see also Ramirez*, 951 F.3d 1008 (FCRA section 1681e(b) class statutory damages of $8M for willful violation upheld on appeal); *Stillmock v. Weis Mkts., Inc.*, 385 Fed. App'x 267, 273 (4th Cir. 2010) (reversing denial of certification of class seeking FCRA statutory damages, holding that "overarching issue by far is the liability of the defendant's willfulness").

The district court therefore also did not abuse its discretion with respect to the FCRA willfulness inquiry here when it found that "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." ECF 63 at 34.

CONCLUSION

The decision to certify was well within the district court's considerable discretion. Petitioner-Defendant RealPage, Inc.'s Petition for Permission to Appeal should be denied.

September 21, 2020

Respectfully submitted,

/s/ John Soumilas

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COMBINED CERTIFICATIONS

1. **Bar Membership:** I certify that I am a member of this Court's bar.

2. **Word Count, Typeface, and Type Style:** I certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 5(c) and 32(f) because the brief (as indicated by my word processing program, Microsoft Word) contains 5,132 words. I also certify that this brief meets the page limit requirement of 20 pages or fewer. I also certify that this brief complies with the typeface requirements and type style requirements of Rule 32 because it has been prepared in 14-point Baskerville, a proportionally spaced typeface.

3. **Service:** I certify that on this date I am causing this brief to be filed electronically via this Court's CM/ECF system. All participants in this petition for interlocutory appeal are registered CM/ECF users and will be served by the CM/ECF system.

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September 21, 2020 */s/ John Soumilas*