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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-17244

SERGIO L. RAMIREZ,
Plaintiff-Appellee,
v.
TRANSUNION LLC,
Defendant-Appellant.

Argued: Feb. 14, 2019
Filed: Feb. 27, 2020

Before: M. Margaret McKeown, William A. Fletcher, and Mary H. Murguia, Circuit Judges.

OPINION

MURGUIA, Circuit Judge:

This case asks us to resolve whether a class of consumers may sue and recover damages from a credit reporting agency pursuant to the Fair Credit Reporting Act ("FCRA"), where the agency—aware that its practice was unlawful—incorrectly placed terrorist alerts on the front page of the consumers' credit reports and subsequently sent the consumers

confusing and incomplete information about the alerts and how to get them removed.

The United States Department of the Treasury's Office of Foreign Assets Control ("OFAC") maintains a list of Specially Designated Nationals ("SDNs"), i.e., individuals who are prohibited from transacting business in the United States for national security reasons. Because merchants who transact with an SDN can face harsh fines, TransUnion LLC ("TransUnion"), one of the three largest credit reporting agencies, saw a business opportunity in developing a product for its clients that "matched" consumers' names to individuals on the OFAC list.

In producing these purported matches, TransUnion coordinated with a third-party vendor and used a software that conducted basic first-and-last-name searches—despite having the capability to conduct more accurate searches and despite having been put on notice by another circuit court in 2010 that this practice violated the FCRA. As a result, TransUnion inaccurately added OFAC alerts to the front page of the credit reports of thousands of consumers. When consumers began discovering the alerts and trying to have them removed, TransUnion both sent them confusing information falsely suggesting that the alerts had been removed and withheld information about how to dispute the alerts. TransUnion's practice triggered significant concern among affected consumers, such that a number of them contacted the Department of the Treasury directly to inquire about the terrorist labels.

The consumers brought this class action against TransUnion pursuant to the FCRA, and a jury

assessed $60 million in damages for three willful violations of the statute. In this appeal, TransUnion claims that the verdict cannot stand because only Sergio Ramirez, the representative plaintiff, suffered a concrete and particularized injury as a result of TransUnion's unlawful practice. According to TransUnion, the other thousands of class members whose credit reports contained the inaccurate terrorist alerts and received the confusing and incomplete mailings did not suffer the irreducible constitutional minimum showing of harm that Article III standing requires. Ramirez, on the other hand, argues that the class members do not need to demonstrate standing at all because, in a class action, only the representative plaintiff must have standing. The issue of who must show standing in a class action at the final stage of a damages suit is a question of first impression in this circuit.

For the reasons explained below, we hold that every member of a class certified under Rule 23 must satisfy the basic requirements of Article III standing at the final stage of a money damages suit when class members are to be awarded individual monetary damages.[1] Therefore, the dispositive question in this case is whether each of the 8,185 class members had standing on each of the class claims. We conclude that they did. We also reject TransUnion's arguments regarding the sufficiency of the evidence, Rule 23 certification, and statutory damages. However, we hold that the punitive damages award is excessive in

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[1] Our holding does not alter the showing required at the class certification stage or other early stages of a case, and it does not apply to cases involving only injunctive relief.

violation of constitutional due process. We reduce the punitive-damages award from $6,353.08 per class member to $3,936.88 per class member, but otherwise affirm the verdict and judgment.

I. Background

A. Factual History

In February 2011, Sergio Ramirez went to a Nissan car dealership with his wife and father-in-law to purchase a car. After the Ramirezes selected a car and negotiated the terms, the dealership ran a joint credit check on Ramirez and his wife. But once the dealership obtained the credit reports, the salesman told Ramirez that Nissan would not sell the car to Ramirez because he was on "a terrorist list."

The credit report had been prepared by TransUnion, one of the nation's three largest consumer reporting agencies ("CRA"). The report contained the following statement on the first page: "***OFAC ADVISOR ALERT - INPUT NAME MATCHES NAME ON THE OFAC DATABASE[.]" The report also listed the names and birthdates of the two prohibited Specially Designated Nationals who purportedly "matched" Ramirez: Sergio Humberto Ramirez Aguirre (born 11/22/1951) and Sergio Alberto Cedula Ramirez Rivera (born 01/14/196*). The report indicated that Ramirez's middle initial was "L" and his birth year was 1976.

The salesman refused to take further steps to verify whether Ramirez was in fact on the OFAC list. He also refused to provide Ramirez a copy of his credit report, instead recommending to Ramirez that he contact TransUnion directly. Eventually, however, the salesman agreed to sell the car to Ramirez's wife.

Ramirez's wife completed a credit application on her own behalf, and, after another hour, she was able to purchase the car.

Ramirez testified that he was embarrassed, shocked, and scared when he learned his name was on a terrorist watch list. Ramirez was also disappointed and embarrassed that he was unable to purchase the car because he and his wife always made major purchases jointly. Confused and not knowing what to do, Ramirez began researching what the alert meant and how to have it removed. Ramirez first called the Department of the Treasury, but they advised him that he would need to contact TransUnion. When Ramirez called TransUnion, he was repeatedly told that there was no OFAC alert on his credit report. Ultimately, Ramirez requested a copy of his credit report so he could verify whether it contained an OFAC alert.

On February 28, 2011, TransUnion sent Ramirez a copy of his credit report. The first page of the mailing stated:

> Enclosed is the TransUnion Personal Credit Report that you requested. As a trusted leader in the consumer credit information industry, TransUnion takes the accuracy of your credit information very seriously. We are committed to providing the complete and reliable credit information that you need to participate in everyday transactions and purchases.
>
> If you believe an item of information to be incomplete or inaccurate, please alert us immediately. We will investigate the data

> and notify you of the results of our investigation.

The remainder of the page included information about and instructions for an online request for investigation. The following pages contained a copy of Ramirez's credit report, information regarding how to dispute inaccurate information, and a "Summary of Rights" under the FCRA. The credit report contained no mention of OFAC. Ramirez was confused by the report's lack of any information regarding OFAC, but he thought perhaps the problem had been resolved.

The next day, on March 1, 2011, TransUnion sent Ramirez a separate letter (the "OFAC Letter"). The OFAC Letter stated:

> Thank you for contacting TransUnion. Our goal is to maintain complete and accurate information on consumer credit reports.
>
> Our records show that you recently requested a disclosure of your TransUnion credit report. That report has been mailed to you separately. As a courtesy to you, we also want to make you aware that the name that appears on your TransUnion credit file "SERGIO L RAMIREZ" is considered a potential match to information listed on the United States Department of Treasury's Office of Foreign Asset Control ("OFAC") Database.
>
> The OFAC Database contains a list of individuals and entities that are prohibited by the U.S. Department of Treasury from doing business in or with the United States. Financial institutions are required to check

> customers' names against the OFAC Database, and if a potential name match is found, to verify whether their potential customer is the person on the OFAC Database. For this reason, some financial institutions may ask for your date of birth, or they may ask to a see a copy of a government-issued form of identification . . . . Some financial institutions will search names against this database themselves, or they may ask another company, such as TransUnion, to do so on their behalf. We want you to know that this information may be provided to such authorized parties.
>
> The OFAC record that is considered a potential match to the name on your credit file is:
>
> [OFAC records for the two prohibited SDNs who purportedly matched Ramirez, which include first, middle, and last names, dates of birth, and passport information]
>
> For more details regarding the OFAC Database, please visit [the U.S. Department of the Treasury's website].
>
> If you have additional questions or concerns, you can contact TransUnion at [phone number and mailing address].

Unlike the credit-report mailing, there was no summary-of-rights form attached to the OFAC Letter.

Ramirez testified that he was confused by the two mailings. The lack of any OFAC information in the credit-report mailing suggested the alert had been

removed, but the OFAC Letter mailing suggested otherwise. Ramirez also did not know how to remedy the issue because the OFAC Letter did not include instructions for initiating a dispute. Concerned about possible consequences of the OFAC match, Ramirez canceled an international vacation he had planned with his family.

Finally, Ramirez consulted with a lawyer and, at the lawyer's advice, wrote a letter to TransUnion in March 2011 requesting that the OFAC alert be removed from his report. TransUnion responded in writing that the alert had been removed.

Ramirez was not the only consumer who TransUnion incorrectly labeled as a prohibited SDN. TransUnion sent the same OFAC Letter to 8,184 other consumers who also requested copies of their credit reports between January 2011 and July 2011. In February 2012, Ramirez sued TransUnion on behalf of himself and the 8,184 other consumers who were falsely labeled as prohibited SDNs. Ramirez alleged that TransUnion violated the FCRA by placing the false OFAC alerts on their credit reports and later sending misleading and incomplete disclosures about the alerts.

B. TransUnion's "OFAC Advisor" Product

The class's claims trace back to TransUnion's launch of a new product in 2002 and its erroneous belief that the new product was exempt from the FCRA. TransUnion saw a business opportunity because its clients—who purchase consumer credit reports from TransUnion because they are deciding whether to offer credit to consumers—are legally obligated to ensure they are not offering credit to a

prohibited SDN appearing on the OFAC list. TransUnion therefore developed a product it called "OFAC Advisor," which added an alert to a consumer's credit report indicating whether the consumer was a prohibited SDN on the OFAC list.

TransUnion obtained the information about whether consumers were OFAC matches from a third-party company, Accuity, Inc. Accuity's software conducted a "name-only" search, running a consumer's first and last name against the names on the OFAC list. A search would result in a match if the consumer's first and last name were either identical or similar to a name on the OFAC list (*e.g.*, "Cortez" would match with "Cortes").[2]

When TransUnion first began offering the OFAC Advisor product, it determined that the OFAC alerts being placed on consumer credit reports were exempt from the FCRA, including the FCRA's requirement that TransUnion "follow reasonable procedures to assure maximum possible accuracy of the information" it placed on consumer credit reports. 15 U.S.C. § 1681e(b). Specifically, TransUnion determined the OFAC alerts were not governed by the FCRA because the OFAC list was not stored in TransUnion's database; the data was stored in a separate file and software supplied by TransUnion's third-party vendor, Accuity. Therefore, TransUnion

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[2] In collecting other types of data for use on consumer reports—such as tax liens or bankruptcy judgments—TransUnion used at least one additional identifier other than the consumer's name (*e.g.*, address, date of birth, or social security number). OFAC information was the only consumer-report data that TransUnion collected using name alone.

did not follow its normal procedures to ensure accuracy.

TransUnion also adopted a policy of not disclosing OFAC matches to affected consumers when the consumers requested a copy of their credit reports. Although TransUnion received a number of consumer complaints after it launched OFAC Advisor and adopted these policies, TransUnion remained mostly unscathed for these practices until 2005 when a consumer sued.

C. The *Cortez* Litigation

In 2005, Sandra Cortez, a consumer, sued TransUnion in the Eastern District of Pennsylvania under circumstances similar to Ramirez's. *See Cortez v. Trans Union, LLC*, 617 F.3d 688, 696-706 (3d Cir. 2010). Cortez attempted to purchase a car but was delayed for hours because TransUnion sent the car dealership a credit report with a false OFAC alert on it. *Id.* at 697-99. When Cortez attempted to resolve the issue, TransUnion repeatedly told her that there was no OFAC alert on her report and refused to investigate or remove the alert. *Id.* at 699-700.

A jury found in Cortez's favor on four FCRA claims: (1) TransUnion negligently failed to follow reasonable procedures to ensure maximum possible accuracy in producing Cortez's credit report, in violation of 15 U.S.C. § 1681e(b); (2) TransUnion willfully failed to provide Cortez all information in her file despite her requests, in violation of § 1681g(a); (3) TransUnion willfully failed to reinvestigate the OFAC alert after Cortez informed TransUnion of the false alert, in violation of § 1681i(a); and (4) TransUnion willfully failed to note Cortez's dispute on subsequent

reports, in violation of § 1681i(c). *Id.* at 705. The jury awarded Cortez $50,000 in actual damages and $750,000 in punitive damages. *Id.* The district court remitted the punitive damages to $100,000, but otherwise upheld the verdict. *Id.* at 705-06.

On appeal, TransUnion argued that OFAC information was not covered by the FCRA because it was not part of the "consumer report" as defined by the statute. *Id.* at 706.[3] In August 2010, the Third Circuit flatly rejected this argument, noting that it was "difficult to imagine an inquiry more central to a consumer's 'eligibility' for credit than whether federal law prohibits extending credit to that consumer in the first instance." *Id.* at 707-08 (quoting 15 U.S.C. § 1681a(d)(1)). The court upheld the jury's verdict on the reasonable procedures claim, explaining: "The jury could reasonably conclude that [TransUnion] could have taken steps to minimize the possibility that it would erroneously place an OFAC alert on a credit report, such as checking the birth date of the consumer against the birth date of the person on the SDN List." *Id.* at 709.

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[3] Under the FCRA, a consumer report is defined as "any written, oral, or other communication of any information by a [CRA] bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for" credit, employment, or another purpose authorized by the statute. 15 U.S.C. § 1681a(d)(1).

We use the terms "consumer report" and "credit report" interchangeably in this Opinion.

With respect to Cortez's second claim, that TransUnion willfully failed to disclose all of the information in Cortez's file when she requested it, TransUnion argued that OFAC information was not part of the consumer "file" because TransUnion did not store OFAC information in its usual database; rather, it contracted with Accuity to store the information separately. *Id.* at 711. Again, the Third Circuit emphatically rejected this argument: "We do not believe that Congress intended to allow credit reporting companies to escape the disclosure requirement in § 1681a(g) by simply contracting with a third party to store and maintain information that would otherwise clearly be part of the consumer's file and is included in a credit report." *Id.*

Finally, the court upheld Cortez's reinvestigation and dispute claims, and affirmed the district court's rulings as to damages. *Id.* at 712-24. However, the court expressed concern over the district court's reduction of the punitive-damages award because "the record certainly support[ed] a jury becoming 'incensed' over [TransUnion's] 'insensitivity' to Cortez's claim[.]" *Id.* at 718 n.37.

D. TransUnion's OFAC Practices After the *Cortez* Litigation

After being slammed with an $800,000 jury verdict (subsequently remitted to $150,000) in *Cortez*, TransUnion made surprisingly few changes to its practices regarding OFAC alerts. In November 2010, TransUnion changed the language of the OFAC alert used on credit reports. Instead of stating that a consumer was a "match" to the OFAC list, the reports would state that a consumer was a "potential match."

TransUnion also made some adjustments to its matching algorithm, including requiring an exact match between first and last names, reducing the false-positive rate from about 5 percent to about 0.5 percent.[4] TransUnion requested additional software enhancements from Accuity, but these were not implemented until 2013.

Within the timeframe of the *Cortez* litigation, TransUnion received warnings about its OFAC practices from officials at the Department of the Treasury's OFAC. In an October 2010 letter to TransUnion, OFAC officials noted that they continued to hear from TransUnion customers and individual consumers who had been adversely affected by false OFAC alerts on TransUnion credit reports. OFAC officials expressed concern that a product "that does not include rudimentary checks to avoid false positive reporting can create more confusion than clarity and cause harm to innocent consumers." OFAC officials were particularly worried by OFAC alerts being "disseminated broadly in conjunction with credit reports."

As a result of these warnings from OFAC officials and the *Cortez* litigation, TransUnion also changed how it communicated with consumers about the OFAC alerts on their credit reports. Beginning in January 2011, when consumers flagged as OFAC matches requested copies of their credit reports, TransUnion would send them two mailings: (1) the consumer's

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[4] TransUnion presented no data showing that any of its name matches through OFAC Advisor were correct. In other words, TransUnion could not confirm that a single OFAC alert sold to its customers was accurate.

credit report *with the OFAC alert redacted*, and (2) a separately mailed OFAC Letter. The OFAC Letters were sent within one day of the credit reports. These letters were substantially similar to the one described above that Ramirez received. TransUnion did not include a summary-of-rights form in the mailings containing the OFAC Letters. In July 2011, TransUnion finally stopped sending OFAC Letters and began including OFAC alerts directly on the credit reports it sent to consumers.

E. Procedural History

In February 2012, Ramirez filed a putative class action against TransUnion alleging that TransUnion's OFAC practices violated multiple provisions of the FCRA. The district court certified a class action under Rule 23 of the Federal Rules of Civil Procedure over TransUnion's objection and denied TransUnion's motion to decertify the class.

The class included "all natural persons in the United States and its Territories to whom TransUnion sent a letter similar in form to the March 1, 2011 [OFAC Letter] TransUnion sent to [Ramirez] . . . from January 1, 2011-July 26, 2011." In other words, everyone in the class: (1) was falsely labeled by TransUnion's name-only software as a potential OFAC match; (2) requested a copy of his or her credit report from TransUnion; and (3) in response, received a credit-report mailing with the OFAC alert redacted and a separate OFAC Letter mailing with no summary of rights.

Based on TransUnion's records, the parties stipulated that there were 8,185 consumers, including Ramirez, who fell within this class. Out of those 8,185,

the records reflected that 1,853 had their credit reports requested by a potential credit grantor during the class period (January 2011 to July 2011). TransUnion did not furnish credit reports to third parties during the class period for the remaining 6,332 class members.

The case proceeded to a jury trial on three claims. First, the class alleged that TransUnion willfully failed to follow reasonable procedures to assure accuracy of the OFAC alerts because TransUnion used rudimentary name-only matching software without any additional checks to avoid false positives. *See* 15 U.S.C. § 1681e(b). Second, the class alleged that TransUnion willfully failed to disclose to the class members their entire credit reports by excluding the OFAC alerts from the reports. *See id.* § 1681g(a)(1). Third, the class alleged that TransUnion willfully failed to provide a summary of rights as required under the FCRA when it sent consumers the OFAC Letters. *See id.* § 1681g(c)(2).

The jury found in favor of the class on all three claims and awarded each class member $984.22 in statutory damages (about $8 million classwide) and $6,353.08 in punitive damages (about $52 million classwide). TransUnion filed a renewed motion for judgment as a matter of law, and moved alternatively for a new trial, remittitur, or an amended judgment, all of which the district court denied. TransUnion appealed, raising four arguments. We have jurisdiction pursuant to 28 U.S.C. § 1291. We address each argument in turn.

II. Article III Standing

TransUnion first argues that the verdict cannot stand because none of the class members—other than Ramirez—had standing under Article III of the United States Constitution. We review the district court's rulings regarding standing *de novo*. *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 902 (9th Cir. 2002).

Standing is an "essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). The "irreducible constitutional minimum" of standing requires a plaintiff to establish three elements: (1) "the plaintiff must have suffered an 'injury in fact'" that is "concrete and particularized" and "actual or imminent;" (2) "there must be a causal connection between the injury and the conduct complained of;" and (3) "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 560-61 (citations omitted).

A. Who Needs Standing

The parties first dispute *who* must demonstrate standing to recover damages—only the class representative (i.e., only Ramirez) or every class member. This Court has previously held that only the representative plaintiff need allege standing at the motion to dismiss and class certification stages, *see In re Zappos.com, Inc.*, 888 F.3d 1020, 1028 n.11 (9th Cir. 2018); *Melendres v. Arpaio*, 784 F.3d 1254, 1262 (9th Cir. 2015),[5] and even at the final judgment stage in

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[5] *See also Neale v. Volvo Cars of N. Am.*, 794 F.3d 353, 362 (3d Cir. 2015) (holding that "unnamed, putative class members need

class actions involving only injunctive relief, *see Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc); *Casey v. Lewis*, 4 F.3d 1516, 1519-20 (9th Cir. 1993). But we have never addressed the question of who must have standing at the final stage of a money damages suit when class members are to be awarded individual monetary damages.

We address that question today and hold that each member of a class certified under Rule 23 must satisfy the bare minimum of Article III standing at the final judgment stage of a class action in order to recover monetary damages in federal court. Although this is an issue of first impression for this Court, our holding today clearly follows from Supreme Court precedent, as well as the fundamental nature of our judicial system.[6]

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not establish Article III standing" in damages action at class certification stage).

[6] Our holding does not apply to class actions involving only injunctive relief. Nor does our holding alter the showing required at the class certification stage or other early stages of a case. We address only the circumstances of this case: court-awarded, individual monetary awards for class members at the final judgment stage of a class action. We note that, although the standing inquiry in the early stages of a case focuses on the representative plaintiffs, district courts and parties should keep in mind that they will need a mechanism for identifying class members who lack standing at the damages phase. *See Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1137 (9th Cir. 2016) ("[F]ortuitous non-injury to a subset of class members does not necessarily defeat certification of the entire class, particularly as the district court is well situated to winnow out those non-injured members at the damages phase of the litigation, or to refine the class definition." (citing 1 W. Rubenstein, Newberg on Class Actions § 2:3 (5th ed. 2019))).

The Supreme Court has held, albeit in a different context, that all parties seeking to recover a monetary award in their own name must show Article III standing. *See Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) (holding that "an intervenor of right" under Federal Rule of Civil Procedure 24(a)(2) "must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing[,]" including where "both the plaintiff and the intervenor seek separate money judgments in their own names."); *see also Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring) ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not. The Judiciary's role is limited 'to provid[ing] relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm.'" (quoting *Lewis v. Casey*, 518 U.S. 343, 349 (1996))).

The same rule applies here. To hold otherwise would directly contravene the Rules Enabling Act, because it would transform the class action—a mere procedural device—into a vehicle for individuals to obtain money judgments in federal court even though they could not show sufficient injury to recover those judgments individually. *See* 28 U.S.C. § 2072(b) ("[Rules of procedure] shall not abridge, enlarge or modify any substantive right.").

B. Merits of the Standing Inquiry

Having concluded that each class member must have standing to recover damages, we turn to the dispositive and more difficult question in this case: Did each of the 8,185 class members have standing?

TransUnion challenges only the first standing requirement—injury in fact. Because a "plaintiff must demonstrate standing for each claim he seeks to press," *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006), we address standing for each of the class's three claims. Plaintiffs bore the burden of proving standing through evidence at trial. *See Lujan*, 504 U.S. at 561.

1. Reasonable Procedures Claim

Under § 1681e(b) of the FCRA, "[w]henever a [CRA] 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." 15 U.S.C. § 1681e(b). The class's first claim is that TransUnion willfully failed to follow reasonable procedures to assure maximum possible accuracy when it collected OFAC information using rudimentary name-only searches and placed the inaccurate information on the class members' credit reports without further verification.

TransUnion argues that, to have suffered a concrete injury from the § 1681e(b) violation, each class member must show that TransUnion disclosed his or her credit report to a third party. In other words, TransUnion argues no injury results from a false OFAC alert until someone other than TransUnion and the consumer sees it. For support, TransUnion relies on the Supreme Court's decision in *Spokeo, Inc. v. Robins* (*Spokeo II*), 136 S. Ct. 1540 (2016).

Prior to *Spokeo II*, we held that the violation of a "statutory right"—including an FCRA violation—"is usually a sufficient injury in fact to confer standing" without any showing of actual harm. *See Robins v.*

Spokeo, Inc. (*Spokeo I*), 742 F.3d 409, 412 (9th Cir. 2014), *vacated and remanded*, 136 S. Ct. 1540 (2016). The Supreme Court granted certiorari and reversed, explaining that "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Spokeo II*, 136 S. Ct. at 1547-48 (quoting *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997)). Rather, "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.* at 1549.

The Supreme Court recognized, however, that an injury may still be concrete even if intangible. *Id.* And there is sufficient injury in fact when a defendant's statutory violation creates a "risk of real harm" to a plaintiff's concrete interest. *Id.* In determining whether an intangible harm constitutes an injury in fact, we look to historically recognized injuries and Congress's judgment. *Id.* We look to history to determine "whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.* And we are guided by Congress's judgment because "Congress is well positioned to identify intangible harms that meet minimum Article III requirements[.]" *Id.*

Spokeo also involved a consumer's claim against a CRA under § 1681e(b). Robins, a consumer, alleged that Spokeo, a CRA that operated a people-search website, published a profile about him on its website that contained inaccurate information regarding his age, marital status, wealth, employment, and education. *Robins v. Spokeo, Inc.* (*Spokeo III*), 867 F.3d

1108, 1111 (9th Cir. 2017). With respect to injury in fact, Robins alleged that the presence of the false information on Spokeo's website "harmed his employment prospects at a time when he was out of work" and caused him emotional distress. *Id.*

The Supreme Court declined to decide whether Robins sufficiently alleged a concrete injury, but it provided the following guidance:

> On the one hand, Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk. On the other hand, Robins cannot satisfy the demands of Article III by alleging a bare procedural violation. A violation of one of the FCRA's procedural requirements may result in no harm. For example, even if a [CRA] fails to provide the required notice to a user of the agency's consumer information, that information regardless may be entirely accurate. In addition, not all inaccuracies cause harm or present any material risk of harm. An example that comes readily to mind is an incorrect zip code. It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.

Spokeo II, 136 S. Ct. at 1550.

On remand, we held that Robins alleged a material risk of harm to his concrete interests sufficient to satisfy Article III standing. *Spokeo III*, 867 F.3d at 1118. We adopted a two-part inquiry for determining whether the violation of a statutory right constitutes a concrete injury: "(1) whether the

statutory provisions at issue were established to protect [the plaintiff's] concrete interests (as opposed to purely procedural rights), and if so, (2) whether the specific procedural violations alleged . . . actually harm, or present a material risk of harm to, such interests." *Id.* at 1113.

In Robins's case, we held at step one that § 1681e(b) was enacted to protect consumers' concrete interests in avoiding the very real-world harms that result from inaccurate credit reporting—such as the inability to obtain credit and employment and "the uncertainty and stress" that consumers experience when they discover inaccurate information in their credit reports. *Id.* at 1114. We noted that "the interests that [the] FCRA protects also resemble other reputational and privacy interests that have long been protected in the law." *Id.* At step two, we concluded that Robins had been exposed to a material risk of harm to that concrete interest because Spokeo published inaccurate information on its website that was far more material than a mere incorrect zip code. *Id.* at 1116-17.

Applying the test to the facts of this case, we conclude that all 8,185 class members suffered a material risk of harm to their concrete interests protected by § 1681e(b) as a result of TransUnion's failure to follow reasonable procedures to assure maximum possible accuracy of OFAC information.

Step one is clear. Congress enacted the FCRA, including § 1681e(b), "to protect consumers' concrete interests." *Id.* at 1113. "[G]iven the ubiquity and importance of consumer reports in modern life—in employment decisions, in loan applications, in home

purchases, and much more—the real-world implications of material inaccuracies in those reports seem patent on their face." *Id.* at 1114. The FCRA's reasonable procedures requirement is particularly important because the "threat to a consumer's livelihood is caused by the very existence of inaccurate information in his credit report and the likelihood that such information will be important to one of the many entities who make use of such reports[.]" *Id.* at 1114; *see also* 15 U.S.C. § 1681(a)(4) (explaining that Congress enacted the FCRA "to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy"). "Courts have long entertained causes of action to vindicate intangible harms caused by certain untruthful disclosures about individuals, and we respect Congress's judgment that a similar harm would result from inaccurate credit reporting." *Spokeo III*, 867 F.3d at 1115.

At step two, standing is also clear for all class members for a number of reasons. First, the nature of the inaccuracy is severe. TransUnion inaccurately identified and labeled all class members as potential terrorists, drug traffickers, and other threats to national security; it did not inaccurately report a zip code or a minor discrepancy. As a result of its careless procedures for identifying OFAC "matches," TransUnion sent all class members a letter informing them that they were considered potential SDNs. This practice ran a real risk of causing the uncertainty and stress that Congress aimed to prevent in enacting the FCRA. *See Drew v. Equifax Info. Servs., LLC*, 690 F.3d 1100, 1109 (9th Cir. 2012) ("The FCRA permits

'recovery for emotional distress and humiliation.'" (quoting *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995)).

In *Spokeo III*, we stated that it was "clear" that the plaintiff was exposed to a material risk of harm because a CRA made inaccurate information about his age, marital status, education, and wealth available to third parties. 867 F.3d at 1117. The risk here was far graver. The OFAC labels are the type of information that risks triggering significant concern, confusion, and even potential contact with a federal intelligence agency. And the record here shows this risk is far from hypothetical; indeed, the Department of the Treasury informed TransUnion that it "continue[d]" to hear from a number of concerned individuals who had been inaccurately labeled as OFAC matches by TransUnion, and that TransUnion's practice was "creating unnecessary confusion" among affected consumers. As Ramirez testified at trial: "[I]if somebody tells you you're on a terrorist list, what are you going to do?"

Second, TransUnion engaged a third-party vendor—Accuity, Inc.—to develop the software and database containing the underlying information for the OFAC alerts. As a result, TransUnion and Accuity communicated about the database information and OFAC matches. And TransUnion concedes that OFAC matches were not housed by TransUnion; the OFAC list was stored in a separate database operated and maintained by Accuity. It is precisely for this reason that TransUnion purportedly determined that the

OFAC alerts were not governed by the FCRA.[7] This type of access to and information sharing with a third party certainly compounds the risk of harm to all class members' privacy and reputational interests. The practice created a significant risk that third parties other than the affected consumers would learn about the inaccurate and highly embarrassing OFAC matches.

Finally, TransUnion—one of the nation's largest consumer reporting agencies—made all class members' reports available to potential creditors or employers at a moment's notice, even without the consumers' knowledge in some instances. *See* 15 U.S.C. §§ 1681b(b)(2)(A) (requiring notice to the consumer only when a credit report is requested for employment purposes), 1681b(c)(1)(B) (allowing credit reports to be furnished before the consumer has initiated a transaction in certain circumstances). Credit reports exist for the very purpose of being disseminated to third parties. Like in *Spokeo*, where

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[7] In an effort to avoid the FCRA's reach to its unlawful conduct, TransUnion similarly argued in *Cortez* that the OFAC information was maintained and stored by Accuity and, therefore, the information was not part of consumers' "file[s]" in TransUnion's control. *See Cortez*, 617 F.3d at 711. The Third Circuit unequivocally rejected that argument. *Id*. at 711 ("We do not believe that Congress intended to allow credit reporting companies to escape the disclosure requirement in § 1681a(g) by simply contracting with *a third party* to store and maintain information that would otherwise clearly be part of the consumer's file and is included in a credit report.") (emphasis added); *see also id*. at 703 (noting that "TransUnion decided not to include the underlying information for its OFAC product in TransUnion's own database" and "decided to use Accuity rather than maintain the information itself.").

false information was made available to third parties on the Internet, TransUnion created a risk of harm to all class members by allowing third parties to readily access the reports.

Indeed, the 1,853 class members whose reports were disseminated to potential creditors have shown even greater injuries because we know those third parties, which are in the business of denying or approving credit-related requests, actually accessed those class members' reports containing the false OFAC alerts. It is difficult to conceive of information on a credit report that is more damaging to a consumer than a statement that the consumer is potentially prohibited from transacting business in the United States because the consumer is a criminal or a threat to national security. This is not to mention the reputational harm that inevitably results from disseminating this information to a potential creditor.

As to the remaining 6,332 class members, TransUnion argues these class members cannot show any injury because their reports were not disseminated to third parties. However, this reading of the injury-in-fact requirement is too narrow. True, *Spokeo III* did not "consider whether a plaintiff would allege a concrete harm if he alleged only that a materially inaccurate report about him was prepared but never published." 867 F.3d at 1116 n.3 (emphases omitted). But that situation is not this case. Here, the fact that TransUnion made the reports available to numerous potential creditors and employers—coupled with the highly sensitive and distressing nature of the OFAC alerts disclosed to the consumers, the risk of third-party access TransUnion created through its

dealings with Accuity, and the federal government's awareness of the alerts—is sufficient to show a material risk of harm to the concrete interests of all class members.[8]

This case is distinguishable from *Owner-Operator Independent Drivers Ass'n, Inc., et al., v. United States Department of Transportation et al.*, 879 F.3d 339 (D.C. Cir. 2018), a case relied on heavily by the dissent. There, the plaintiffs argued that they were injured "by the mere existence of inaccurate information" in a database operated by the Federal Motor Carrier Safety Administration, but they

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[8] Our dissenting colleague argues that the risk of harm to class members other than Ramirez is too speculative. According to the dissent, "counsel presented no evidence about the consequences of dissemination of the reports for any class member other than Ramirez" and could have offered "expert testimony, representative class members, and credit agency protocol to fill this gap." To the extent the dissent suggests that there is no evidence about dissemination of any of the class members' reports other than Ramirez's, that is inaccurate; indeed, as the dissent recognizes, the parties stipulated that at least a portion of the class had their credit reports requested by a potential credit grantor. As noted above, this evidence coupled with other evidence shows that the remainder of the class members were subject to a material risk of harm. To the extent the dissent suggests that class counsel had to show that all class members suffered adverse consequences as a result of dissemination of their reports, this is also incorrect. *See Spokeo III*, 867 F.3d at 1118 ("[I]n the context of [the] FCRA, [an] intangible injury is itself sufficiently concrete. It is of no consequence how likely [the plaintiff] is to suffer *additional* concrete harm as well (such as the loss of a specific job opportunity)."). The dissent offers no support for the proposition that counsel was required to introduce expert testimony and the other type of evidence that the dissent identifies, precisely because none exists.

conceded that their information was not at risk of dissemination, and the record showed that any risk of future disclosure of inaccurate information was "virtually eliminated by the Department's adoption of an interpretive rule." *Id.* at 343, 346. The court held that, although "it is possible that the mere existence of inaccurate information in a government database could cause concrete harm depending on how that information is to be used," no such harm or risk of future harm existed because the record showed there was no risk of disclosure for the absent class members. *Id.* at 347. Here, by contrast, the class's claim of injury does not simply rest on TransUnion's maintenance of an inaccurate database, with conclusive evidence that there is no risk of dissemination.[9]

[9] The other out-of-circuit cases cited by the dissent are similarly distinguishable. *See Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909, 912 (7th Cir. 2017) ("Had [plaintiff] reason to believe the company intends to release any of that information or cannot be trusted to retain it, he would have grounds for obtaining injunctive relief; but he doesn't even argue that there is a *risk* of such leakage."); *Braitberg v. Charter Commc'ns, Inc.*, 836 F.3d 925, 930 (8th Cir. 2016) (holding that plaintiff had no standing to sue under the Cable Communications Policy Act, where he merely alleged that defendant failed to destroy plaintiff's personally identifiable information and retained certain information longer than the company should have kept it). This case is also distinguishable from *Bassett v. ABM Parking Servs., Inc.*, 883 F.3d 776 (9th Cir. 2018). *Bassett* involved a vendor that printed the expiration date of the plaintiff's credit card on the plaintiff's receipt for a one-time transaction, in violation of another FCRA provision. *Id.* at 777. There was no material risk of harm because only the cardholder himself ever saw the receipt. *Id.* at 783. This case involves credit reports, not receipts. Credit reports, unlike receipts, exist for the purpose of being disseminated to third parties. Moreover, the risk of harm is much

We are not faced with a mere technical or procedural FCRA violation here. There may be a case where the nature of the inaccurate information is such that no risk of harm arises until the credit report information of all class members is actually disseminated to a third party, but this is not it. On the facts of this case, we hold that a real risk of harm arose when TransUnion prepared the inaccurate reports and made them readily available to third parties, and certainly once TransUnion sent the inaccurate information to the class members and some class members' reports were disseminated to third parties. This risk of harm was directly caused by TransUnion's failure to follow reasonable procedures to ensure maximum possible accuracy of its OFAC information, and an award of damages would redress the harm caused by the risk.

2. Disclosure and Summary-of-Rights Claims

The class's second and third claims were that TransUnion failed to: (a) disclose that the class

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more direct here. An OFAC alert placed on a credit report runs an almost inevitable risk of reputational harm, emotional distress, and/or denial of credit or employment if disclosed to a third party—real-world harms. In contrast, printing the expiration date of a credit card does not pose such inevitable risk; rather, harm would only materialize if a number of other contingencies occurred. *Bassett* also did not involve a third-party vendor with access to the inaccurate information or evidence that the defendant's practice created confusion and interaction with an intelligence agency among consumers receiving the inaccurate information. This case is more analogous to *Spokeo III*, 867 F.3d 1108, and *Pedro v. Equifax, Inc.*, 868 F.3d 1275 (11th Cir. 2017) (holding that the plaintiff had standing where credit reporting agency included a debt the plaintiff did not owe in the plaintiff's consumer report).

members had been identified as potential OFAC matches when the consumers requested their credit reports, in violation of § 1681g(a); and (b) include a summary-of-rights form when TransUnion mailed the separate OFAC Letters, in violation of § 1681g(c)(2). Although we must analyze standing on a claim-by-claim basis, the injuries produced by these two violations are closely intertwined.

Subsections (a) and (c)(2) work together to protect consumers' interests in having access to the information in their credit reports upon request and understanding how to correct inaccurate information in their credit reports upon receipt. 15 U.S.C. §§ 1681g(a), (c)(2). These interests can only be fulfilled together; one without the other is meaningless. And they go to the core of Congress's purpose in enacting the FCRA: "to protect consumers from the transmission of inaccurate information about them[.]" *Guimond*, 45 F.3d at 1333; *see also Gillespie v. Equifax Info. Servs., LLC*, 484 F.3d 938, 941 (7th Cir. 2007) ("A primary purpose of the statutory scheme provided by the disclosure in § 1681g(a)(1) is to allow consumers to identify inaccurate information in their credit files and correct this information via the grievance procedure established under § 1681i. . . . In writing § 1681g(a)(1), Congress requires disclosure that is both 'clearly and accurately' made. An accurate disclosure of unclear information defeats the consumer's ability to review the credit file, eliminating a consumer protection procedure established by Congress under the FCRA."). We have previously acknowledged that the rights created by the FCRA to accomplish this purpose "resemble other reputational

and privacy interests that have long been protected in the law." *Spokeo III*, 867 F.3d at 1114.

These are not mere procedural or technical requirements. They protect consumers' concrete interest in accessing important information about themselves and understanding how to dispute inaccurate information before it reaches potential creditors. *Cf. Syed v. M-I, LLC*, 853 F.3d 492, 499-500 (9th Cir. 2017) (holding that the FCRA provision requiring prospective employers to obtain a consumer's consent before obtaining a credit report in a standalone document protected a concrete informational and privacy interest); *Nayab v. Capital One Bank (USA), N.A.*, 942 F.3d 480, 490-93 (9th Cir. 2019) (holding that every violation of the FCRA provision that prohibits obtaining a credit report for an unauthorized purpose violates the consumer's substantive privacy interest, and the consumer has standing "regardless whether the credit report is published or otherwise used by [a] third-party" and "need not allege any further harm" (quoting *Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 983-84 (9th Cir. 2017))). And although the FCRA's disclosure requirements may seem "procedural" in nature, Congress enacted them because they are the only practical way to protect consumers' interests in fair and accurate credit reporting. *See Spokeo III*, 867 F.3d at 1113. Therefore, step one of the *Spokeo III* framework is satisfied for both claims.

At step two, we have no trouble concluding that TransUnion's disclosure violations exposed all class members to a material risk of harm to their concrete informational interests. TransUnion sent the class

members a document that purported to be their entire credit report, containing no mention of OFAC. This put every class member at a risk of real harm: not knowing that they were falsely being labeled as terrorists, drug dealers, and threats to national security. Then, TransUnion sent the class members the separate OFAC Letter without a summary-of-rights form. This conduct posed a serious risk that consumers not only would be unaware that this damaging label was on their credit reports, but also would be left completely in the dark about how they could get the label off their reports.[10] TransUnion's

[10] The dissent suggests that, to establish standing for these two claims under Section 1681g, every class member must have shown evidence of shock or confusion. However, all members of the class were falsely labeled by TransUnion as terrorists and national security threats and requested a copy of their credit reports, and TransUnion sent the confusing mailings to all class members. The mailings that TransUnion provided to class members were inherently shocking and confusing, and Ramirez, as the class representative, testified to that effect. To require further individualized evidence of shock or confusion would defeat the purpose of class actions. And while there may exist a case where additional evidence would be required to ascertain whether the absent class members were indeed shocked or confused, this case is not it. *See also Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998) ("[T]his Court has previously held that a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute."); *Pub. Citizen v. U.S. Dep't of Justice,* 491 U.S. 440, 449 (1989) (holding that failure to obtain information subject to disclosure under Federal Advisory Committee Act was sufficient injury to confer standing); *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 374 (1982) (holding that disclosure of false information about housing availability was sufficient injury to confer standing under the Fair Housing Act, even where plaintiff "may have approached the real estate agent fully expecting that he

conduct therefore exposed every class member to a material risk of harm to the core interests the FCRA was designed to protect—their interests in being able to monitor their credit reports and promptly correct inaccuracies.[11]

C. Standing Conclusion

We agree with TransUnion that every class member needs standing to recover damages at the final judgment stage. But we also agree with Ramirez and the class that every class member has standing on each of the claims in this case. We therefore affirm the district court's denial of TransUnion's motion to decertify the class for lack of standing and TransUnion's post-trial motions based on the same grounds.

III. Willfulness

TransUnion next contends that it was entitled to judgment as a matter of law or to a new trial because Ramirez failed to prove that any of TransUnion's FCRA violations were *willful*.[12] TransUnion argues

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would receive false information, and without any intention of buying or renting a home").

[11] We note that in many instances a violation of §§ 1681g(a) or 1681g(c)(2) might pose no risk of harm. For example, there likely would be no risk of harm if the information excluded from the file disclosure were an inaccurate zip code rather than an inaccurate OFAC alert. And a failure to include a summary of rights might pose no risk of harm if there was no inaccurate information in the consumer's file to begin with.

[12] Ramirez and the class pursued only a willfulness theory for each of their three claims, presumably because statutory and punitive damages are available for willful, but not negligent, FCRA violations. *See* 15 U.S.C. §§ 1681n, 1681o.

that its conduct complied with the statute as a matter of law, or, in the alternative, that its conduct was based on reasonable but mistaken interpretations of the statute.[13] The district court rejected these arguments and found that substantial evidence supported the jury's findings.

We review the denial of a motion for judgment as a matter of law *de novo*, *Josephs v. Pac. Bell*, 443 F.3d 1050, 1062 (9th Cir. 2006), and we review the denial of a motion for a new trial for abuse of discretion, *Guy v. City of San Diego*, 608 F.3d 582, 585 (9th Cir. 2010). We affirm the district court.

Judgment as a matter of law is appropriate only when the evidence—viewed in the light most favorable to the non- moving party—permits a reasonable jury to reach only one conclusion, and that conclusion is contrary to the jury's verdict. *Martin v. Cal. Dep't of Veterans Affairs*, 560 F.3d 1042, 1046 (9th Cir. 2009). Similarly, a new trial is appropriate only if "the verdict is against the clear weight of the evidence[.]" *Id.*

An FCRA violation is willful when a CRA either knowingly violates the statute or recklessly disregards its requirements. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 56-57 (2007). A CRA recklessly disregards the statute if it adopts an objectively unreasonable interpretation that runs "a risk of violating the law substantially greater than the risk associated with a reading that [is] merely careless." *Id.* at 69. When "conduct is so patently violative" of the FCRA that any reasonable person would know without guidance that

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[13] TransUnion does not challenge the verdict form or jury instructions, which closely tracked the text of the FCRA.

its interpretation was erroneous, "closely analogous pre-existing" guidance from the courts is unnecessary. *Syed*, 853 F.3d at 504 (quoting *Boyd v. Benton Cty.*, 374 F.3d 773, 781 (9th Cir. 2004)).

A. Reasonable Procedures Claim

Plaintiffs presented evidence that—despite being told in 2010 by another circuit court that OFAC alerts were covered by the FCRA and subject to § 1681e(b)'s reasonable procedures requirement—TransUnion continued to utilize name-only searches to produce OFAC "matches." Most notably, the Third Circuit specifically reprimanded TransUnion for failing to use an additional identifier such as date of birth to verify the accuracy of OFAC matches. *See Cortez*, 617 F.3d at 723 ("Given the severe potential consequences of [associating a consumer with an SDN, TransUnion's] failure to take the utmost care in ensuring the information's accuracy—at the very least, comparing birth dates when they are available—is reprehensible."). Nonetheless, TransUnion continued to use only first and last names to identify OFAC matches until 2013. A reasonable jury could conclude that this was objectively unreasonable and ran a risk of error substantially greater than a merely careless interpretation. *See Safeco Ins. Co. of Am.*, 551 U.S. at 70 (noting that a finding of recklessness is more appropriate when the defendant had "guidance from the courts of appeals . . . that might have warned it away from the view it took").

B. Disclosure Claim

Section 1681g(a) required TransUnion to "clearly and accurately" disclose "[a]ll information in the consumer's file" when the class members requested

their reports. 15 U.S.C. § 1681g(a)(1). Plaintiffs presented evidence that TransUnion adopted a policy of not including OFAC information on the credit reports it sent to consumers who requested their files, even though TransUnion included the OFAC information on the credit reports it sent to third parties regarding those same consumers. Instead, TransUnion sent the class members vague "courtesy" letters informing them that their names were "considered a potential match" to names on the OFAC list. Nowhere did the OFAC Letter disclose that the version of the class members' credit reports sent to third parties contained an OFAC alert on the first page.

TransUnion's interpretation of § 1681g(a) as allowing this conduct is "unambiguously foreclose[d]" by the language of the statute itself, *Syed*, 853 F.3d at 505, which required TransUnion to *clearly and accurately* disclose *all* information in the consumers' reports. 15 U.S.C. § 1681g(a)(1). TransUnion did not disclose *all* information. It left out the OFAC alerts. TransUnion argues that it did not omit the OFAC alerts from the reports, but simply mailed the OFAC alerts in separate envelopes. This contention is belied by the record. The reports themselves had a clearly indicated beginning and end, and the OFAC Letters explicitly stated that they were "separate[]" from the reports. And even if the OFAC Letters did sufficiently disclose that the OFAC alerts were part of the consumers' reports (which they did not), no reasonable person could conclude that the OFAC Letters were a *clear and accurate* method of disclosure. *See Syed*, 853 F.3d at 504-06.

Moreover, the jury also heard evidence that the Third Circuit had told TransUnion in 2010 that it could not continue to treat OFAC information as somehow separate from the other information included on consumer reports. Accordingly, TransUnion had "guidance from the courts of appeals" suggesting that its interpretation was erroneous. *Safeco Ins. Co. of Am.*, 551 U.S. at 70.

In sum, a reasonable jury could find that TransUnion was objectively unreasonable and ran a risk of error substantially greater than mere carelessness when it excluded arguably the most important piece of information in the class members' files—the OFAC alerts—from the reports it sent to them and instead sent this information in a separate, confusing "courtesy" letter.

C. Summary-of-Rights Claim

Under 15 U.S.C. § 1681g(c)(2), TransUnion was required to provide a summary of rights "with each written disclosure" it sent to consumers pursuant to a consumer file request. TransUnion argues that it was reasonable to send the summary of rights with the first mailing, the consumer report, and assume that the class members would understand that the summary of rights also applied to the second mailing, the OFAC Letter. But as explained above, the two mailings clearly indicated that they were separate, rather than components of one disclosure. And the language of the statute is clear: A summary of rights must be sent with *each* written disclosure. Therefore, there was sufficient evidence to find a willful violation of § 1681g(c)(2) because any reasonable CRA would

have known that TransUnion's interpretation was in error. *See Syed*, 853 F.3d at 504-06.

D. Willfulness Conclusion

Had this case been filed before the Third Circuit's decision in *Cortez*, we might have been faced with a difficult question as to willfulness. But in light of *Cortez*, we have no difficulty upholding the verdict. TransUnion was provided with much of the guidance it needed to interpret its obligations under the FCRA with respect to OFAC alerts in 2010 when *Cortez* was decided. 617 F.3d at 695. Despite this warning, TransUnion continued to use problematic matching technology and to treat OFAC information as separate from other types of information on consumer reports. In doing so, it ran an unjustifiably high risk of error. The jury's verdict is consistent with the law and supported by substantial evidence. Accordingly, we affirm the district court's denial of TransUnion's motion for judgment as a matter of law or a new trial. *See Harper v. City of Los Angeles*, 533 F.3d 1010, 1021 (9th Cir. 2008) ("A jury's verdict must be upheld if it is supported by substantial evidence, which is evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion." (quoting *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002))).

IV. Rule 23

TransUnion next contends that the district court should not have certified the class in this case because Ramirez's claims were not typical of the class's claims, as required by Federal Rule of Civil Procedure 23(a)(3). We review the district court's certification of a class action for abuse of discretion. *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1171 (9th

Cir. 2010). Our review is limited to "whether the district court correctly selected and applied Rule 23's criteria." *Parra v. Bashas', Inc.*, 536 F.3d 975, 977 (9th Cir. 2008).

TransUnion argues that Ramirez was not typical of the class because his injuries were more severe than the injuries suffered by the rest of the class. Ramirez's credit report with the false OFAC alert was sent to a third party; Ramirez's alert stated that he was a match instead of a *potential* match; Ramirez was denied credit because of the alert; he canceled a vacation because of the alert; and he spent significant time and energy trying to remove the alert, including hiring a lawyer. In contrast, only a quarter of the other class members had their credit reports sent to a third party during the class period, and there was no evidence regarding whether other class members had experiences similar to Ramirez's as a result of the alerts.

But these differences do not defeat typicality. The typicality inquiry focuses on "the nature of the claim . . . of the class representative, and not . . . the specific facts from which it arose." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir. 2011) (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). Even if Ramirez's injuries were slightly more severe than some class members' injuries, Ramirez's injuries still arose "from the same event or practice or course of conduct that [gave] rise to the claims of other class members and [his claims were] based on the same legal theory." *Lacy v. Cook Cty., Ill.*, 897 F.3d 847, 866 (7th Cir. 2018) (quoting *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir.

1992)); *see also Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014) ("We do not insist that the named plaintiffs' injuries be identical with those of the other class members, only that the unnamed class members have injuries similar to those of the named plaintiffs and that the injuries result from the same, injurious course of conduct." (quoting *Armstrong v. Davis*, 275 F.3d 849, 869 (9th Cir. 2001))).

Ramirez's injuries were not so unique, unusual, or severe to make him an atypical representative of the class. A class representative satisfies typicality when his "personal narrative is somewhat more colorful" than other class members' experiences, as long as his claim "falls within the common contours of" the class-wide theory of liability. *Torres*, 835 F.3d at 1142; *see also Ellis*, 657 F.3d at 985 n.9 ("Differing factual scenarios resulting in a claim of the same nature as other class members does not defeat typicality."). Nor were the unique aspects of Ramirez's claims significant to the point that they "threaten[ed] to become the focus of the litigation[.]" *Torres*, 835 F.3d at 1142 (quoting *Hanon*, 976 F.2d at 508). Accordingly, the district court did not abuse its discretion in certifying (and refusing to decertify) the class.[14]

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[14] The dissent suggests that "the district court made compounding errors regarding class certification and standing" at earlier stages of the case. Indeed, TransUnion moved to decertify the class nearly a year before trial commenced, primarily on the basis that individualized issues of Article III standing predominated. The district court properly denied the motion, however, because only the class representative must show standing at the class certification stage. *See Melendres*, 784 F.3d at 1262; *see also Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1155 (9th Cir. 2016) ("[T]he need for individual

V. Damages

Finally, TransUnion argues that the jury's statutory and punitive damages awards were grossly excessive in violation of the U.S. Constitution. We review *de novo* the constitutionality of punitive damages, *Cooper Indus. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 436 (2001); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003), and we review a district court's denial of a motion for a new trial on damages for abuse of discretion, *Guy*, 608 F.3d at 585. We agree with the district court that there is no basis to disturb the statutory damages award, but we conclude that the punitive damages were unconstitutionally excessive.

A. Statutory Damages

Under the FCRA, a plaintiff is entitled to statutory damages between $100 and $1,000 for any willful violation. 15 U.S.C. § 1681n(a)(1)(A). Here, the

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damages calculations does not, alone, defeat class certification."). More importantly, the differences between Ramirez's injuries and those of other class members are a matter of degree, not standing. In fact, the district court attempted to distinguish between the class members' degrees of injury at the final pretrial conference. Specifically, the district court suggested to TransUnion that it could object at the charging conference to the aggregation of damages in the verdict form, such that if the jury found TransUnion liable, it could award damages proportional to the number of class members who suffered certain injuries, such as disclosure of their consumer reports to third parties. But TransUnion did not object to the verdict form at the charging conference, allowing the court to instruct the jury to award the same amount of damages to all class members—regardless of their degree of injury.

jury awarded $984.22 per class member for a total of about $8 million class-wide. TransUnion argues that this amount violates due process because it is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *United States v. Citrin*, 972 F.2d 1044, 1051 (9th Cir. 1992) (quoting *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919)).[15]

TransUnion's argument is somewhat of a moving target, but it relies primarily on this Court's decision in *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990). There, we reduced a district court's award of statutory damages to class members in an action under the Farm Labor Contractor Registration Act ("FLCRA"). *Id*. at 1303, 1312. We explained that the "individual awards exceeded what was necessary to compensate any potential injury from the violations," *id*. at 1309, and the "aggregate amount of [the] award was unprecedented," *id*. at 1309-10.

Six (6) Mexican Workers is distinguishable from this case for a number of reasons. First, it involved a district court's determination of damages, which we reviewed for abuse of discretion—rather than a jury's determination, to which we owe "substantial deference." *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1435 (9th Cir. 1996), *aff'd*, 526 U.S. 687 (1999). Second, it involved analysis that was specific to the now-repealed FLCRA, and it

[15] TransUnion also argued below for remittitur on the theory that the damages were "clearly not supported by the evidence, or only based on speculation or guesswork." *Guy*, 608 F.3d at 585 (internal quotation marks and citation omitted).

contained no discussion of constitutional due process. Third, it involved an award of damages within the statutory range for *each* FLCRA violation, rather than one award within the statutory range for all violations combined.

In any event, the jury's award—which falls within the statutory range—is proportionate to TransUnion's offenses and reasonable in light of the evidence. Indeed, if we were to envision a case that might warrant the high end of the statutory-damages range, we might envision something like this case. TransUnion recklessly labeled thousands of consumers as potential terrorists and other sanctioned individuals without taking even basic steps to verify the accuracy of these labels. And then it hid the ball from these consumers when they asked for their files and withheld important information about their right to dispute the labels.

Congress provided for a set range of damages for FCRA violations because the "actual harm that a willful violation of [the FCRA] will inflict on a consumer will often be small or difficult to prove." *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 718 (9th Cir. 2010). We need not determine whether courts have the authority to disturb a jury's statutory-damages award when it falls within Congress's prescribed range because in this case the jury's award is clearly proportionate to the offense and consistent with the evidence.[16]

[16] TransUnion does not seriously argue that the aggregate award—representing about a half percent of TransUnion's total net worth—is "oppressive." *See Citrin*, 972 F.2d at 1051.

B. Punitive Damages

The FCRA also permits an award of punitive damages in an amount "as the court may allow[.]" 15 U.S.C. § 1681n(a)(2). The jury awarded each class member $6,353.08 in punitive damages for a class-wide total of about $52 million. TransUnion argues that this award is constitutionally infirm because: (1) it is duplicative, (2) it punishes for injuries to third parties not involved in this suit, and (3) it is excessive in violation of due process.

TransUnion's first argument is that the statutory damages were sufficient to accomplish deterrence, so the punitive damages, which also aim to deter, were duplicative. But the statute explicitly allows for both types of damages: statutory damages to compensate plaintiffs for their intangible injuries that are difficult to quantify, and punitive damages to punish and deter willful FCRA violations. TransUnion does not challenge the jury instructions regarding damages, nor does TransUnion point to anything specific in the record suggesting that the jury might have misunderstood the distinct purposes of statutory and punitive damages. We will not disturb the jury's award on this basis.

TransUnion next argues that the jury awarded punitive damages because it wanted to punish TransUnion for injuring nonparties, which violates due process. *See Philip Morris USA v. Williams*, 549 U.S. 346, 353-55 (2007). But "[a] jury may consider evidence of actual harm to nonparties as part of its reprehensibility determination," even though it "may not 'use a punitive damages verdict to punish a defendant directly'" for injury inflicted upon non-

parties. *White v. Ford Motor Co.*, 500 F.3d 963, 972 (9th Cir. 2007) (quoting *Williams*, 549 U.S. at 355). "Where there is a significant risk that jurors will misapprehend the distinction, the court must upon request protect against that risk by 'avoid[ing] procedure that unnecessarily deprives juries of proper legal guidance.'" *Id.*

To begin with, TransUnion does not challenge, or even discuss, the jury instructions regarding punitive damages. Nor did TransUnion object to the instructions or class counsel's arguments regarding punitive damages below. Our review of the record reflects nothing that would lend support to TransUnion's argument beyond very limited references to nonparties in counsel's arguments. We reject this challenge.

Finally, TransUnion argues that $6,353.08 in punitive damages per class member is "grossly excessive" in violation of constitutional due process. *State Farm*, 538 U.S. at 416. In reviewing the constitutionality of punitive damages, we consider three guideposts: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.* at 418 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)).

1. Reprehensibility

The reprehensibility of TransUnion's conduct is the most important guidepost. *State Farm*, 538 U.S. at 419. We must consider whether:

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Id.

Here, there was no physical harm, and TransUnion's conduct did not evince an indifference to health or safety. However, "the gravity of harm that could result from [TransUnion's matching] of [a consumer] with an individual on a 'terrorist' list cannot be over stated." *Cortez*, 617 F.3d at 723. The class members were also financially vulnerable in the sense that their ability to obtain credit depended on the care that TransUnion—a billion-dollar company—took in gathering data about them.

But most importantly, TransUnion's misconduct was repeated and willful. TransUnion used name-only OFAC searches for more than a decade, resulting in thousands of false positives and not a single known actual match identified. TransUnion's conduct probably was not "the result of intentional malice, trickery, or deceit," but it was far from "mere accident." *State Farm*, 538 U.S. at 419. TransUnion began receiving consumer complaints regarding false OFAC alerts in 2006; a jury found it liable for hundreds of thousands of dollars for a false OFAC alert in 2007; and the Third Circuit told TransUnion in 2010 that false OFAC alerts were a serious matter

and that its "cavalier[]" reliance on a name-only screening software and treatment of OFAC information as exempt from the FCRA were inexcusable. *Cortez*, 617 F.3d at 710. TransUnion's conduct demonstrated a disregard for the gravity of an OFAC match and what a false positive would mean, emotionally and practically, for each consumer.

2. Ratio

There is no bright-line rule about the maximum ratio due process permits between the harm suffered by the plaintiff (i.e., the compensatory damages) and the punitive damages. *State Farm*, 538 U.S. at 425. However, the Supreme Court has noted that punitive "awards exceeding a single-digit ratio" will rarely satisfy due process, and punitive awards exceeding four times the amount of compensatory damages "might be close to the line of constitutional impropriety." *Id.* A ratio higher than 4 to 1 may be upheld where "a particularly egregious act has resulted in only a small amount of economic damages." *Id.* (quoting *Gore*, 517 U.S. at 582). But "[w]hen compensatory damages are substantial," a ratio lower than 4 to 1 may be the limit. *Id.*

In this case, the ratio between the punitive and statutory awards is 6.45 to 1. Although TransUnion's conduct was egregious for the reasons explained above, the jury's compensatory award was substantial—near the high end of the statutory range. Moreover, when viewed in the aggregate, $8 million in statutory damages is quite substantial. Under the circumstances of this case, we conclude that a ratio of 4 to 1 is the most the Constitution permits.

3. Comparable Civil Penalties

We agree with our sister circuits that consideration of civil penalties is not useful in the FCRA context because there is no "truly comparable" civil penalty to an FCRA punitive-damages award. *Cortez*, 617 F.3d at 724; *see Saunders v. Branch Banking & Tr. Co. of Va.*, 526 F.3d 142, 152 (4th Cir. 2008); *Bach v. First Union Nat. Bank*, 486 F.3d 150, 154 n.1 (6th Cir. 2007). Therefore, we do not consider this factor.

4. Punitive-Damages Conclusion

We conclude that the punitive-damages award was constitutionally excessive in light of the *Gore* guideposts because, although TransUnion's conduct was reprehensible, it was not so egregious as to justify a punitive award of more than six times an already substantial compensatory award.

"When a punitive damage award exceeds the constitutional maximum, we decide on a case-by-case basis whether to remand for a new trial or simply to order a remittitur." *Southern Union Co. v. Irvin*, 563 F.3d 788, 792 n.4 (9th Cir. 2009). This litigation has already spanned a number of years, and we do not think a new trial would bring to light any new evidence that might permit a ratio higher than 4 to 1. We therefore reverse the district court's judgment regarding punitive damages, vacate the punitive damages award, and remand with instructions to reduce the punitive damages to $3,936.88 per class member, which represents four times the statutory damages.

VI. Conclusion

We hold that every member of a class action certified under Rule 23 must demonstrate Article III standing at the final stage of a money damages suit when class members are to be awarded individual monetary damages. And we hold that, on this record, every class member had standing because TransUnion's reckless handling of OFAC information exposed every class member to a real risk of harm to their concrete privacy, reputational, and informational interests protected by the FCRA. We also uphold the jury's verdict finding willful violations of sections 1681e(b), 1681g(a)(1), and 1681g(c)(2) of the FCRA because the verdict was supported by substantial evidence. We conclude that the jury's award of statutory damages near the high end of the range was clearly justified.

With respect to punitive damages, we agree with the Third Circuit that it is unsurprising that a jury was "incensed" by TransUnion's flippant placement of terrorist alerts on consumer credit reports and its consistent refusal to take responsibility or acknowledge the harm it has caused. Indeed, even on appeal, TransUnion continues to take the position that labeling someone a terrorist *causes them no harm*. Nonetheless, despite the reprehensibility of TransUnion's conduct, we are compelled to reduce the punitive damages in this case because the jury's award is unconstitutionally excessive. We conclude that a ratio of 4 to 1 between the statutory and punitive damages is the most the Constitution permits on this record. We vacate the punitive damages and

remand for a reduction, but otherwise affirm the district court.

REVERSED and **VACATED** as to the amount of punitive damages; **REMANDED** with instructions to reduce the punitive damages to $3,936.88 per class member; **AFFIRMED** in all other respects. The parties shall bear their own costs on appeal.

McKEOWN, Circuit Judge, concurring in part and dissenting in part:

A class action jury trial is a high-stakes affair more common in cinema than an actual courtroom. But no screenwriter would feature the complex issue raised in this appeal: a standing infirmity during a time of flux in the doctrine. In its otherwise deft handling of a difficult case, the district court made compounding errors regarding class certification and standing, leading to a jury verdict of nearly $60 million based on the unenviable experience of a single, atypical class representative. The bottom line is that for judgment at trial, every member of the class must have Article III standing. Conjecture based on an unrepresentative plaintiff does not meet the constitutional minimum.

The majority paints a dramatic story of corporate indifference. And, indeed, Sergio Ramirez was the victim of unforgivable circumstances at the hands of TransUnion. But his misfortune alone cannot justify damages for the entire class. At trial each member of the class must establish standing. Except for a limited number of class members whose credit report was disclosed to third parties, there was no evidence of any harm or damages to remaining class members. Instead, the trial focused on Ramirez and his unique circumstances. Missing at trial was evidence related to other members of the class, a deficiency that cannot be cured by speculation. Unfortunately, neither the district court nor the parties followed this dictate.

Let me first note my points of agreement with the majority. It is well established that Article III and the Rules Enabling Act require all members of a damages

class to have standing at trial, so here the 1,853 class members whose inaccurate information was disclosed to a third party had standing to assert a reasonable procedures claim. I also agree that the punitive damages award was impermissibly excessive. In my view, however, no one but Ramirez and the class members whose information was disclosed to a third party had standing to assert a reasonable procedures claim, and only Ramirez had standing to bring the disclosure and summary of rights claims. I therefore respectfully dissent in part.

I. Class Certification

The standing issues at trial germinated from seeds sown during class certification. The only asserted uniform classwide experience was the existence of TransUnion's internal terrorist watch list alerts and the mailing of separate letters—faint allegations that strain Rule 23's typicality requirements. Absent class members simply rode Ramirez's coattails, while his stark atypicality as the lone class representative ensured that he would "'become the focus of the litigation.'" *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (citation omitted); *see also Melendres v. Arpaio*, 784 F.3d 1254, 1263 (9th Cir. 2015) (quoting *Gratz v. Bollinger*, 539 U.S. 244, 265 (2003) (named plaintiffs were adequate class representatives because their "claims do not 'implicate a significantly different set of concerns' than the unnamed plaintiffs' claims"). When it came time for trial, the certification error was only compounded.

II. Ramirez and the Class

The majority declares that "each member of a class certified under Rule 23 must satisfy the bare minimum of Article III standing at the final-judgment stage of a class action in order to recover monetary damages in federal court." This principle, though, does not square with what happened at the trial, which opened with class counsel telling jurors that they would learn "the story of Mr. Ramirez." And indeed they did. Jurors learned that a car dealership refused to grant Ramirez financing because his credit report flagged him as a "match" to a terrorist watch list, and that he was frightened, humiliated, and confused. He contacted TransUnion and was informed he was not on the watch list, but then received two separate mailings: one purporting to be his full credit report and making no mention of the terrorist watch list, and a subsequent letter informing Ramirez that he was a potential match for the terrorist watch list. The second letter omitted the summary of FCRA rights and grievance instructions contained in the first mailing. After closely reviewing both letters, Ramirez was at a loss, and cancelled a planned family vacation to Mexico. Only after consulting with an attorney and the Treasury Department did he finally compel TransUnion to remove his watch list designation.

The story of the absent class members, in contrast, went largely untold. The jury learned class members requested a credit report from TransUnion and were sent separate mailings. The trial featured no evidence that absent class members received, opened, or read the mailings, nor that they were confused, distressed, or relied on the information in any way.

There was no evidence that absent class members were denied credit, or expended any time or energy attempting to clear their name. It's possible that other class members—perhaps many others—had these experiences. But the hallmark of the trial was the absence of evidence about absent class members, or any evidence that they were in the same boat as Ramirez. The jury was left to assume that the absent class members suffered the same injury. But such conjecture is insufficient to confer Article III standing.

III. Claims

A. Reasonable Procedures Claim

The parties stipulated at trial that, like Ramirez, a quarter of the class had their inaccurate credit reports sent to a third party, affording them clear standing for the claim that TransUnion failed to follow reasonable procedures to assure maximum accuracy on their credit reports. For the overwhelming majority of the class, though, we face the open question of whether there is "concrete harm" when "a materially inaccurate report . . . was *prepared* but never *published*" to a third party. *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1116 & n.3 (9th Cir. 2017) ("*Spokeo III*") (emphasis in original). On this record, there is not. Class members do not argue that they have an interest "that [has] long been protected in the law." *Id.* at 1114. And although "publication of defamatory information . . . has long provided the basis for a lawsuit," *Pedro v. Equifax, Inc.*, 868 F.3d 1275, 1280 (11th Cir. 2017), there is no common law analogue for a suit "absent dissemination," *Owner-Operator Indep. Drivers Ass'n, Inc. v. U.S. Dep't of Transp.*, 879 F.3d 339, 344-45 (D.C. Cir. 2018).

Nor is there any indication that Congress sought to protect a consumer's interest in an error-free credit database itself. Rather, Congress's concern was with the "*dissemination* of inaccurate information, not its mere existence in the . . . database." *Owner-Operator*, 879 F.3d at 45 (emphasis added). As we have recognized, Congress enacted the reasonable procedures requirements "'to protect consumers from the transmission of inaccurate information about them.'" *Spokeo III*, 867 F.3d at 1113 (quoting *Guimond v. TransUnion*, 45 F.3d 1329, 1333 (9th Cir. 1995)). Any "concrete interest in accurate credit reporting" is implicated only upon disclosure to a third party. *See Spokeo III*, 867 F.3d at 1115. Nothing in the text, structure, or history of FCRA suggests that Congress sought to afford consumers with plenary police powers over the information contained in credit reporting agencies' internal databases, and "the mere existence of inaccurate database information is not sufficient to confer Article III standing." *Owner-Operator*, 879 F.3d at 345.

The majority does not dispute these points. Instead, it holds that TransUnion's inaccurate reports, once created and stored, were "made available," which—combined with the "distressing nature" of TransUnion's mailings to consumers and the "risk of third-party access" constituted a "material risk" of harm to the entire class. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550 (2016), as revised (May 24, 2016) ("*Spokeo II*"). This statement makes for a good closing argument, but counsel presented no evidence about the consequences of dissemination of the reports for any class member other than Ramirez. The majority observes that a credit report may be

divulged "to potential creditors or employers at a moment's notice." This possibility, however, does not amount to a material risk—one of *Spokeo II*'s core teachings is that Article III requires a discernable, non-conjectural likelihood of harm. Without doubt, counsel could have offered expert testimony, representative class members, and credit agency protocol to fill this gap. But none was proffered. This does not mean that evidence must be proffered as to each class member, and I reiterate that the 1,853 individuals whose report was disclosed to third parties have standing. Rather, Ramirez was required to present something other than his own story; not only was he not typical of the class, but without additional testimony, harm as to the bulk of the class was conjectural. In analogous circumstances, other circuits have determined that similar chains of events are too speculative and attenuated to establish a "material risk of harm." *See Owner-Operator*, 879 F.3d at 347 (determining "prospect of future injury" was purely speculative when "nothing in the record indicates that anyone has recently accessed or used the information at issue"); *Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909, 910-11 (7th Cir. 2017) (concluding mere retention of customer data, in violation of a federal statute but without dissemination to a third party, did not confer standing); *Braitberg v. Charter Commc'ns, Inc.*, 836 F.3d 925, 930-31 (8th Cir. 2016) (same). Because no evidence in the record establishes a serious likelihood of disclosure, we cannot simply presume a material risk of concrete harm, and three-quarters of the class lacks standing for the reasonable procedures claim.

B. Disclosure and Summary of Rights Claims

The lack of evidence of concrete harm to absent class members is even more stark when considering the disclosure and summary of rights claims. The first alleges that TransUnion willfully failed to disclose class members' full credit reports by not including the OFAC information when sending consumers' credit files—that is to say, by sending the information in a separate mailing. The second claim relates to TransUnion's failure to include a summary of rights in the envelope containing the OFAC letter.

Notably, TransUnion sent the credit reports and OFAC alerts contemporaneously. Omitting the OFAC information from the credit summary and instead sending it "within hours," may be a technical violation of FCRA's disclosure requirement, and the "shock," that Ramirez testified he felt upon receiving the separate OFAC communication is sufficient to confer Article III standing upon him. There was no evidence, however, that a single other class member so much as opened the dual mailings, or that anyone other than Ramirez was surprised to receive them.

Similarly, TransUnion's OFAC letter failed to inform him how to dispute being a potential watch list match, an omission that confused Ramirez, who plainly has standing to bring a summary of rights claim. But whether any other absent class member was confused, suffered the adverse consequences that befell Ramirez, or even opened the letter, is pure conjecture. For the absent class members, evidence of disclosure and summary of rights violations were only "a bare procedural violation, divorced from any

concrete harm," *Spokeo II*, 136 S. Ct. at 1549, and no common law analogue or clear congressional directive suggests that Article III requirements are satisfied in the face of such an absence of evidence.

IV. Conclusion

Trial attorneys understand the importance of a narrative, and "the story of Mr. Ramirez" has all the compelling elements: a sympathetic protagonist, a corporate antihero, and thousands of unseen victims. The purpose of a trial, however, is to evaluate evidence, not produce a satisfying plot. Although the strategy behind presenting only Ramirez's unusually sympathetic case to the jury was self-evident, the nature of his claims likely bore little resemblance to experiences of the absent class members. Or perhaps they did. But based on the evidence at trial, it is impossible to know.

At trial, class members lacking a constitutionally cognizable injury should not have been permitted to recover damages, yet TransUnion now owes 8,185 class members tens of millions of dollars based on the unfortunate and unrepresentative experience of a single plaintiff. TransUnion's procedural violations may well have harmed some class members, but we are limited to the evidence in the record—evidence that fails to establish a concrete injury-in-fact for most class members on most claims. Speculation can complete a story, but it cannot cure this infirmity. I respectfully dissent in part.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-17244

SERGIO L. RAMIREZ,

Plaintiff-Appellee,

v.

TRANSUNION LLC,

Defendant-Appellant.

Filed: Apr. 8, 2020

Before: M. Margaret McKeown, William A. Fletcher, and Mary H. Murguia, Circuit Judges.

ORDER

Judges Fletcher and Murguia have voted to deny the petition for panel rehearing and petition for rehearing en banc. Judge McKeown has voted to grant the petition for panel rehearing and petition for rehearing en banc.

The petition for en banc rehearing has been circulated to the full court, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35.

Appellant's petition for rehearing and petition for rehearing en banc is DENIED (Doc. 55).

Appendix C

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 12-cv-00632-JSC

SERGIO L. RAMIREZ,
Plaintiff,
v.
TRANSUNION, LLC,
Defendant.

Filed: Nov. 7, 2017

ORDER

Plaintiff Sergio Ramirez filed this class action alleging that Defendant Trans Union violated the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 et seq., through its OFAC Name Screen Alert. The OFAC Name Screen Alert or OFAC Alert is a service Trans Union provides to its customers which identifies persons whose names match individuals (known as Specially Designated Nationals or SDNs) on the United States government's list of terrorists, drug traffickers, and others with whom Americans are prohibited from doing business. After a jury returned a verdict in Plaintiff's favor and awarded statutory and punitive damages of more than $60 million, Trans Union moved for judgment as matter of law, or in the

alternative, for new trial. (Dkt. No. 321.) Having considered the briefs and having had the benefit of oral argument on October 5, 2017, the Court DENIES Trans Union's motion. The jury's verdict was supported by substantial evidence and there is no basis to set aside the award of statutory and punitive damages.

DISCUSSION

Following a weeklong trial, the jury reached a verdict in favor of Plaintiff and the class and awarded over $60 million in statutory and punitive damages. The jury found in Plaintiff's favor on all three claims under the FCRA: that over a six-month period in 2011 Trans Union violated three FCRA requirements: (1) that credit reporting agencies establish "reasonable procedures" to ensure the "maximum possible accuracy" of information provided about consumers under 15 U.S.C. § 1681e(b); (2) that credit reporting agencies "clearly and accurately" disclose "all information in the consumers file at the time of [a] request" under § 1681g(a), and (3) that credit reporting agencies provide a statement of consumer rights with each such disclosure under § 1681g(c). Plaintiff argued, and the jury apparently agreed, that Trans Union's name-only matching protocol was not a reasonable procedure designed to ensure the maximum possible accuracy of consumer information, and that Trans Union's disclosure of OFAC information to consumers violated Section 1681g by failing to disclose OFAC information to consumers simultaneously with their consumer reports and by failing to provide a statement of consumer rights with

the separately furnished OFAC disclosure. The jury also concluded that Trans Union's conduct was willful.

Trans Union challenges the jury's verdict on multiple grounds. First, Trans Union contends that it is entitled to judgment as a matter of law because the evidence does not support a finding of a willful violation of any of the three FCRA prongs at issue in this case. Next, Trans Union argues that it is entitled to a new trial because Plaintiff's counsel made improper and prejudicial arguments and statements during trial. Finally, Trans Union insists that the statutory and punitive damages verdicts must be set aside because they are excessive and unconstitutional. None of these arguments is persuasive.

A. Trans Union's Motion for Judgment as a Matter of Law

A Rule 50(b) motion for judgment as a matter of law is appropriate when the evidence permits only one reasonable conclusion, and that conclusion is contrary to that of the jury. *Martin v. Cal. Dep't of Veterans Affairs*, 560 F.3d 1042, 1046 (9th Cir. 2009). The court must view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor, *EEOC v. Go Daddy Software, Inc.*, 581 F.3d 951, 961 (9th Cir. 2009), and the court "may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). A "jury's verdict must be upheld if it is supported by substantial evidence, which is evidence adequate to support the jury's conclusion, even if it is possible to draw a contrary conclusion." *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002).

First, as to the Section 1681(e)(b) reasonable procedures claim, Trans Union maintains that there was no willful violation because it did its best and the OFAC Name Screen Alert was exactly that—a name-only match, which is what their customers asked them to provide. The trial record includes substantial evidence from which a jury could have reached a contrary conclusion, including but not limited to the following:

- Trans Union used name-only matching logic, disregarding middle names, dates of birth, social security numbers, places of birth, and all other available identifying information, to associate Ramirez and all other class members with the OFAC list throughout the class period.
- Trans Union's name-only matching procedure for OFAC information contrasted with its procedures for non-OFAC credit reports; to associate information with a consumer on a non-OFAC credit report Trans Union required additional identifying information, such as address, date of birth, or social security number.
- The two other credit reporting agencies (Experian and DealerTrack) that screened Mr. Ramirez against the OFAC list in February 2011 were able to accurately report that he was not a match to the OFAC SDN List.
- Trans Union had repeated notice of problems with its OFAC procedures between 2005 and 2011, including the Cortez action, consumer inquiries, and communications from the United States Department of Treasury.

- Despite all the problems and notwithstanding the Cortez decision, Trans Union did not consider using a vendor other than Accuity, or stopping the sale of OFAC information.
- Trans Union cannot identify a single instance in which its OFAC Alert product identified someone actually on the OFAC list.
- For each person who contacted Trans Union to dispute the OFAC information, Trans Union performed a manual review and removed the OFAC Alert.
- Trans Union removed Mr. Ramirez's OFAC Alert when it received a handwritten note from him saying "please get me off the ofac list."

Second, Trans Union argues that Plaintiff failed to prove a willful violation of either Section 1681g(a) and (c)(2). It maintains that its disclosure attempted to comply with the Third Circuit Court of Appeal's decision in *Cortez v. Trans Union, LLC*, 617 F.3d 688 (3d Cir. 2010), and argues that nothing in the statute requires all the required information to be delivered simultaneously; to the contrary, the statute suggests that only one disclosure of rights is required per request. In any event, Trans Union argues they had no intent to violate the FCRA. The trial evidence, however, fully supports a contrary conclusion. For example, the evidence supports the following findings:

- Ramirez requested a copy of his Trans Union file, and received his file or "personal credit report" which identified itself as the response to his request, and contained no reference whatsoever to OFAC.
- The form of the "personal credit report" was the same for all class members in 2011, and like the

form sent to Ms. Cortez in 2005, omitted OFAC information.

- Trans Union sent Mr. Ramirez and all other class members a separate letter regarding the OFAC record that "is considered a potential match" to the consumer's name. The letter is not identified as a file disclosure, and says that the requested personal credit report "has been mailed to you separately." The letter also states that it is being provided as a "courtesy," and does not inform the consumer that the OFAC information can be disputed if inaccurate.
- Trans Union continued to disclose this information separately because it concluded that it was technologically infeasible to do it all at once, but it never sought outside expert assistance with the issue and it was ultimately able to solve the infeasibility issue six months later.
- Since it introduced the product in 2002, Trans Union has had the capability to incorporate OFAC information into the credit reports sold to customers.
- Trans Union did not begin to disclose OFAC information to consumers in any manner until 2011, and never considered stopping sales of OFAC alerts to third parties.
- Trans Union misrepresented the content of its separate OFAC letter in a communication to the United States Department of Treasury, falsely claiming that it instructed consumers about their right to dispute OFAC information.

Trans Union's motion for judgment as a matter of law is therefore DENIED. Substantial evidence

supports the jury's conclusion that Trans Union willfully violated 15 U.S.C. §§ 1681e(b), 1681g(a), and 1681g(c).

B. Trans Union's Motion for New Trial

Under Rule 59, a court has the discretion to grant a new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). The grounds for a new trial include: (1) a verdict that is contrary to the weight of the evidence; (2) a verdict that is based on false or perjurious evidence; or (3) to prevent a miscarriage of justice. *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007) (quotation marks and citation omitted). Erroneous evidentiary rulings and errors in jury instructions are also grounds for a new trial. *See Ruvalcaba v. City of Los Angeles*, 64 F.3d 1323, 1328 (9th Cir. 1995). A new trial should be granted where, after "giv[ing] full respect to the jury's findings, the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed" by the jury. *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1365 (9th Cir. 1987).

Trans Union insists that it is entitled to a new trial because of counsel's improper statements during closing argument and improper questioning of witnesses regarding the *Cortez* case.

First, Trans Union maintains that Plaintiff's counsel's references to unnamed executives sitting in tall buildings was inflammatory as was other language regarding Trans Union's failure to call a trial witness and a statement suggesting that although only 25 percent of the class applied for credit during

the class period, the effect of Trans Union's OFAC Alert on these individuals beyond the six-month class period is unknown. Trans Union's objections to these statements are unpersuasive. As an initial matter, to the extent that Trans Union took exception to Plaintiff's counsel's remarks, defense counsel should have objected and sought appropriate relief from the Court. *See Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1148 (9th Cir. 2001). In the absence of "a contemporaneous objection or motion for a new trial before a jury has rendered its verdict," a new trial is warranted [only] where the integrity or fundamental fairness of the proceedings in the trial court is called into serious question."[1] *Id.* Further, in evaluating the likelihood of prejudice from the comments, the court considers "the totality of circumstances, including the nature of the comments, their frequency, their possible relevancy to the real issues before the jury, the manner in which the parties and the court treated the comments, the strength of the case, and the verdict itself." *Hemmings*, 285 F.3d at 1193. A new trial "is available only in 'extraordinary cases.'" *Id.* at 1193 (quoting *Bird*, 255 F.3d at 1148). In *Bird*, a new trial was warranted based on counsel's inflammatory

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[1] Trans Union's reliance on the Fourth Circuit Court of Appeal's decision in *Leathers v. Gen. Motors Corp.*, 546 F.2d 1083, 1086 (4th Cir. 1976), for the proposition that counsel was not required to object at the time because it would have drawn more attention to the improper conduct is unpersuasive as Ninth Circuit caselaw is squarely to the contrary. *See, e.g.*, *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1195 (9th Cir. 2002) ("The fact that counsel did not object before the jury was instructed strongly suggests that counsel made a strategic decision to gamble on the verdict and suspected that the comments would not sway the jury.").

closing argument which included several racially charge remarks such as likening a contract dispute to a "massacre" of members of a Native American tribe. *Bird*, 255 F.3d at 1149-51.

Trans Union has made no such comparable showing here. It has thus failed to meet the "'high threshold' [erected by the federal courts] to claims of improper closing arguments in civil cases raised for the first time after trial.'" *Drayton v. Scallon*, 685 F. App'x 557, 560-61 (9th Cir. 2017) (quoting *Hemmings*, 285 F.3d at 1193)). In addition, as in *Drayton*, the Court here "also instructed the jury that the statements or argument of counsel is not evidence, an admonition that [the Court] presume[s] the jury followed." *Drayton*, 685 F. App'x at 561 (citing *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1270-71 (9th Cir. 2000)).

Second, Trans Union objects to Plaintiff's counsel's handling of information relating to the *Cortez* decision. At the final pretrial conference, the parties stated their intent to offer a stipulation regarding the *Cortez* decision. Plaintiff's counsel explained that the stipulation "would not limit us on examining witnesses" to which defense counsel responded "we weren't saying you can't mention *Cortez*" and the Court confirmed, "so you can question, of course." (Dtk. No. 318 at 13:2-3; 14:5-8.) At trial, the parties submitted the stipulation which the Court read to the jury. The stipulation summarized *Cortez* and stated that "[n]othing in this stipulation shall preclude either party from examining any witness about the *Cortez* litigation or about Ms. Cortez." (Dkt. No. 287 at ¶ 2.) Plaintiff's counsel then proceeded to

question Trans Union witnesses regarding their knowledge of the *Cortez* decision, including Michael O'Connell, Trans Union's Vice President of Product Development, who testified to his understanding of the opinion. Trans Union now objects to Plaintiff's counsel's question on redirect wherein he asked Mr. O'Connell whether he was "aware that actually one of the things that the *Cortez* decision said was that the jury could have reasonably concluded that Trans Union could have taken steps to prevent and minimize the possibility of an erroneous OFAC alert by using or checking the date of birth of the consumer against the birthdate of the person on the SDN list?" (Dkt. No. 294 at 158(533):11-16.[2]) This question was fully within the bounds of the parties' stipulation and sought information relevant to the willfulness inquiry.

Next, Trans Union emphasizes that in closing argument, Plaintiff's counsel stated that "[t]he *Cortez* jury found Trans Union in willful violation of this provision on behalf of the FCRA for not showing the OFAC alert in her disclosure." (Dkt. No. 310 at 137(855):14-16.) Defense counsel did not object at the time, but did raise it outside the jury's presence before the punitive damages phase of the case. Counsel sought an instruction or admonition that Plaintiff's counsel should not reiterate this statement in his closing argument regarding punitive damages because

[2] Record citations are to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of the documents. For the Trial Transcript, the main citation is to the ECF-generated page number, the transcript page number (which is sequential from the first day of trial) appears in a parenthetical next to the ECF-generated page number followed by the line number citation.

this was outside the scope of the parties' *Cortez* stipulation. (*Id.* at 200(918):22-25.) The Court noted that while counsel's statement regarding *Cortez* was accurate, the stipulation did not discuss the *Cortez* jury's willfulness finding and as far as the Court was aware the willfulness finding was not otherwise in evidence. (*Id.* at 202(920):2-5.) Plaintiff's opposition does not argue that this evidence is elsewhere in the record—the Court thus accepts that Plaintiff made a statement of fact in his closing argument which was not in the record. Trans Union, however, has not shown how it was prejudiced by Plaintiff's counsel's accurate statement regarding the *Cortez* jury's willfulness finding. Moreover, at the beginning of the case, and again at the end, the Court instructed the jury that their memory of the evidence controls, not attorney argument. Under these circumstances, Trans Union has failed to meet the high threshold necessary to justify a new trial based on counsel's statements made during closing argument.

Trans Union's motion for a new trial based on Plaintiff's counsels' conduct at trial is therefore DENIED.

C. The Damages Award

A willful violation of the FCRA entitles a consumer to statutory damages ranging from $100 to $1,000, as well as punitive damages, and attorney's fees and costs. *See* 15 U.S.C. § 1681n. Trans Union insists that the statutory and punitive damages awards must be set aside, or at a minimum, reduced.

1. Statutory Damages

A court "must uphold a jury's damages award unless the amount is clearly not supported by the

evidence, or only based on speculation or guesswork." *Guy v. City of San Diego*, 608 F.3d 582, 585 (9th Cir. 2010) (internal citation and quotation marks omitted). That is, "the jury's finding of the amount of damages [must be upheld] unless the amount is grossly excessive or monstrous, clearly not supported by the evidence, or only based on speculation or guesswork." *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 791 F.2d 1356, 1360 (9th Cir. 1986) (internal citation and quotation marks omitted). Here, the jury awarded statutory damages of $984.22 per class member which is within the statutory range of $100-$1,000. *See* 15 U.S.C. § 1681n. Trans Union nonetheless argues that the jury's statutory damages award was not supported by the evidence and is grossly excessive.

Trans Union first argues that the statutory damages award is not supported by substantial evidence either on liability or as to harm to every class member. Not so. As discussed above, the trial evidence supported the jury's conclusion that Trans Union's OFAC Alert practices violated three different FCRA subsections. Trans Union's insistence that the aggregation of the statutory damages claim among the three FCRA claims undermines the award is likewise unavailing. Trans Union's proposed verdict form did not disaggregate the FCRA damages claims:

> 5. Do you find that the class is entitled to an award of statutory damages?
>
> ___ Yes
>
> ___ No
>
> ___ There is no single answer that applies to the entire class.

6. Do you find that the class is entitled to an award of punitive damages?

___ Yes

___ No

___ There is no single answer that applies to the entire class.

(Dkt. No. 261 at 4.)

At the final pretrial conference, the Court left the door open for Trans Union to argue that the statutory damages should be categorized in some way: "I'll allow the parties to argue when we have our charging conference—is perhaps a verdict form that allows the jury to give different amount of statutory damages based on different groupings so the Defendants may argue . . . well, if you're going to rule against us, you shouldn't at least for those who no credit report was sent, it should be a hundred." (Dkt. No. 318 at 19:14-22.) But Trans Union did not object at the charging conference and therefore waived an objection to the aggregation of statutory damages. *See Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1109 (9th Cir. 2001) ("[Defendant] waived these contentions [with the verdict form] by failing to raise them until after the jury had rendered its verdict and was discharged [because it had] ample opportunity to object to errors in the form of the verdict" and was in fact invited to raise any objections); *see also Teutscher v. Woodson*, 835 F.3d 936, 950 (9th Cir. 2016) ("because [plaintiff] agreed to the lump-sum verdict form, [he] waived any argument that the jury's verdict should or could be parsed between its compensatory components"). Further, the FCRA is clear: a willful violation of *any one* of its prongs entitles a plaintiff to

a statutory damages award of $100 to $1,000. Thus, even if the evidence is not sufficient as to each claim—which it is—as long as it is sufficient as to one, the jury's award of less than $1,000 to each class member is supported by substantial evidence. Here, however, the evidence is sufficient as to each claim.

Alternatively, Trans Union insists that the award is grossly excessive and should be reduced through remittitur or constitutional review.

> A remittitur is a substitution of the court's judgment for that of the jury regarding the appropriate award of damages. The court orders a remittitur when it believes the jury's award is unreasonable on the facts. A constitutional reduction, on the other hand, is a determination that the law does not permit the award. Unlike a remittitur, which is discretionary with the court . . . a court has a mandatory duty to correct an unconstitutionally excessive verdict so that it conforms to the requirements of the due process clause.

Oyarzo v. Tuolumne Fire Dist., No. 1:11-CV-01271-SAB, 2014 WL 1757215, at *6 (E.D. Cal. Apr. 30, 2014) (quoting *Corpus v. Bennett*, 430 F.3d 912, 917 (8th Cir. 2005)).

There is no basis for remittitur because, as noted, the jury's award is not unreasonable; to the contrary, it is well-supported by the trial evidence. Trans Union nonetheless urges that the statutory damages award should be reduced to an amount no greater than its OFAC-related revenue for 2011. To this end, Trans Union offers the declaration of David Gilbert, Trans

Union's Senior Vice President of Finance, which sets forth Trans Union's 2011 gross revenue for the OFAC Alert product. (Dkt. No. 321-1.) Plaintiff's motion to strike Mr. Gilbert's Declaration is GRANTED. (Dkt. No. 327.) Trans Union cannot now supplement the record with new evidence having made a strategic decision not to introduce *any evidence* regarding its financial status other than the stipulation regarding its total net worth which was read to the jury during the punitive damages phase. (Dkt. No. 285.)

In any event, even if the Court considered this evidence, the Court would still exercise its discretion to deny remittitur because the jury's award of statutory damages is supported by the evidence and within the statutory range. Unlike other statutes which contain statutory damages caps (such as the Fair Debt Collection Practices Act (FDCPA) and the Truth in Lending Act (TILA)), FCRA statutory damages are not capped. *See Saunders v. Equifax Info. Servs., L.L.C.*, 469 F. Supp. 2d 343, 349 (E.D. Va. 2007). Trans Union's argument that FCRA statutory damages should be subject to a cap is for Congress not this Court. *See Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 718 (9th Cir. 2010) ("the [FCRA] does not place a cap on these damages in the case of class actions, does not indicate any threshold at which courts are free to award less than the minimum statutory damages, and does not limit the number of individuals that can be certified in a class or the number of individual actions that can be brought against a single merchant.").

Nor is the damages award unconstitutionally excessive. "A statutorily prescribed penalty violates

due process rights only where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *United States v. Citrin*, 972 F.2d 1044, 1051 (9th Cir. 1992) (internal citation and quotation marks omitted). Trans Union cites only one case where a statutory damages award was reduced on constitutional grounds. *See Golan v. Veritas Entertainment*, No. 14-69 ERW, (E.D. Mo. Sept. 7, 2017). (Dkt. No. 334-1.) *Golan*, however, is inapposite. The court there reduced a statutory damages award under the Telephone Consumer Protection Act from $1,621,246,500 to $32,424,930 on the grounds that an award of over a billion and a half in damages was "obviously unreasonable and wholly disproportionate to the offense." Not so here. The jury's award of just over $8 million in damages is a fraction of *Golan's* reduced damages award and is neither unreasonable nor wholly disproportionate given the evidence regarding Trans Union's practices.[3]

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[3] *Golan* noted that there was only one other case which had commented on the constitutionality of a statutory damages award: *United States v. Dish Network LLC*, 256 F. Supp. 3d 810, 2017 WL 2427297, *139-40 (C.D. Ill. 2017). In *Dish*, following a bench trial, the court awarded $280 million in civil penalties and statutory damages, $84 million of which was allocated towards statutory damages under the TCPA. The court found that this amount—which totaled 20 percent of Dish's 2016 after-tax profits of $1.4 billion, was appropriate and constitutionally proportionate, reasonable, and consistent with due process" because "Dish caused millions and millions of violations of the Do-Not-Call Laws, [] Dish has minimized the significance of its own errors in direct telemarketing and steadfastly denied any responsibility . . . The injury to consumers, the disregard for the law, and the steadfast refusal to accept responsibility require a

Trans Union's reliance on *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990), is misplaced. *Six (6) Mexican Workers* involved a liquidated damages provision under the now-repealed Farm Labor Contractor Registration Act, 7 U.S.C. § 2041 et seq., which stated that "the court may award up to and including . . . actual damages, or $500 for each violation, or other equitable relief." *Id.* at 1303 n.1 (quoting 7 U.S.C. § 2050a(b)). The Ninth Circuit held that the district court abused its discretion in awarding statutory damages of $100-$500 for each violation because "[t]he award also exceeds that necessary to enforce the Act or deter future violations. When the class size is large, the individual award will be reduced so that the total award is not disproportionate." *Six (6) Mexican Workers*, 904 F.2d at 1309. This holding, however, does not apply to FCRA cases. In *Bateman*, the Ninth Circuit held that "[t]here is no language in the [the FCRA], nor any indication in the legislative history, that Congress provided for judicial discretion to depart from the $100 to $1000 range where a district judge finds that damages are disproportionate to harm"; rather, "the plain text of the statute makes absolutely clear that, in Congress's judgment, the $100 to $1000 range is proportionate and appropriately compensates the consumer" and "[t]hat proportionality does not change as more plaintiffs seek relief." *Bateman*, 623 F.3d at 719.

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significant and substantial monetary award." *Id.* at *139, 140. The same reasoning applies to the statutory damages award here which represents just over half a percent of Trans Union's total net worth.

The award here is within the statutory range; indeed, it is not even the maximum award possible under the FCRA. *See Seungtae Kim v. BMW Fin. Servs. NA, LLC*, 142 F. Supp. 3d 935, 947 (C.D. Cal. 2015), aff'd sub nom. *Kim v. BMW Fin. Servs. NA LLC*, No. 15-56801, 2017 WL 3225710 (9th Cir. July 31, 2017) (concluding that statutory damages award was not excessive because the award was within the statutory limits). The award is also proportionate to the harm shown by the trial evidence. There is thus no basis to set aside the statutory damages award.

2. Punitive Damages

The FCRA allows punitive damages for willful noncompliance with its provisions in such amount "as the court may allow." 15 U.S.C. § 1681n(a)(2). Here, the jury awarded punitive damages of $6,353.08 per class member which amounts to a total award of more than $50 million. Trans Union objects to the punitive damages verdict on multiple grounds.

a) Statutory Damages and Punitive Damages are Proper

First, Trans Union insists that no punitive damages are warranted because the jury awarded statutory damages. Not so. Trans Union offers no support for the proposition that because the class received statutory damages they should not also receive punitive damages despite the express statutory statement that statutory and punitive damages are available for willful violations. If Congress had not envisioned cases in which both would have been appropriate they would not have included this language. The FCRA "allows for [a punitive damages] award predicated on either

sufficient proof of actual damages or, in the alternative, an award of statutory damages." *Saunders*, 469 F. Supp. 2d at 348 (collecting cases re: the same).

b) The Jury Instruction was not in Error

Second, Trans Union argues that the punitive damages jury instruction was improper. The court "has broad discretion" in formulating appropriate jury instructions. *United States v. Hayes*, 794 F.2d 1348, 1351 (9th Cir.1986). Moreover, "a defendant is not entitled to any particular form of an instruction so long as the instructions given fairly and adequately cover the defendant's theories of defense." *United States v. Solomon*, 825 F.2d 1292, 1295 (9th Cir.1987).

The jury instruction stated in relevant part:

> You may award punitive damages only if you find that Trans Union's conduct was in reckless disregard of the rights of Plaintiff and the Class. Conduct is in reckless disregard of a plaintiff's rights if, under the circumstances, it reflects complete indifference to the plaintiff's rights, or if the defendant acts in the face of a perceived risk that its actions will violate the plaintiff's rights under federal law.

(Dkt. No. 311 at 12(939):16-20.) Further, over Plaintiff's objection, the Court included the following language: "In considering the amount of any punitive damages, you may consider the purpose of the Fair Credit Reporting Act, the degree of reprehensibility of the defendant's conduct, and the relationship of any award of punitive damages to any actual harm

inflicted on Mr. Ramirez and the Class." (*Id.* at 311(940):1-5.)

This instruction was based on the Ninth Circuit's Model Civil Jury Instruction 5.5 and the Supreme Court's guidance in *Safeco Inc. Co. of Am. v. Burr*, 551 U.S. 47 (2007). Trans Union's insistence that the FCRA demands proof of a higher level of culpability than recklessness is inaccurate. As the Ninth Circuit recently confirmed, "[t]he Supreme Court has clarified that, under Section 1681n, willfulness reaches actions taken in 'reckless disregard of statutory duty,' in addition to actions 'known to violate the Act.'" *Syed v. M-I, LLC*, 853 F.3d 492, 503 (9th Cir. 2017) (quoting *Safeco*, 551 U.S. at 56-57.) Under this standard, "[a] party does not act in reckless disregard of the FCRA 'unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless.'" *Syed*, 853 F.3d at 503 (quoting *Safeco*, 551 U.S. at 69). Given this guidance, the jury instruction was not inaccurate or misleading.[4] *See Masson v. New Yorker Magazine, Inc.*, 85 F.3d 1394, 1397 (9th Cir. 1996) ("We review

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[4] Notably, at the punitive damages charging conference, Trans Union's only objection was to inclusion of the language "if the defendant acts in the face of a perceived risk that its actions will violate the plaintiff's rights under federal law." (Dkt. No. 310 at 204(922):2-8.) Likewise, to the extent that Trans Union now objects that the jury awarded punitive damages on a per class member basis rather than as a lump sum, Trans Union previously agreed that the verdict form should award punitive damages, if any, on a per class member basis. (*Id.* at 202(900):18-25.)

challenges to the district court's formulation of the jury instructions for an abuse of discretion by determining whether the instructions, considered as a whole, were inadequate or misleading.").

c) Trans Union Cannot Supplement the Evidentiary Record Post-Trial

Third, Trans Union complains that even if some amount of punitive damages is appropriate, the amount should be reduced concomitant with Trans Union's 2011 net revenue for the OFAC Alert product. The Court rejects this argument for the same reason it rejected the argument when raised as to the statutory damages award. Trans Union made a strategic decision regarding what evidence it would introduce during the punitive damages phase; that in hindsight it wishes it could supplement the record with additional evidence regarding the profitability of the underlying product is not a basis for remittitur. *See Corpus*, 430 F.3d at 917 ("The court orders a remittitur when it believes the jury's award is unreasonable on the facts").

d) The Punitive Damages are not Constitutionally Excessive

Finally, Trans Union maintains that the punitive damages award is unconstitutional. To determine the constitutionality of an award of punitive damages, the Court must refer to the following three guideposts articulated by the Supreme Court:

> (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages

> award; (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

BMW v. Gore, 517 U.S. 559, 574 (1996).

1) The Reprehensibility of Trans Union's Conduct

In accessing reprehensibility, courts generally consider a number of factors, including (1) whether the harm caused was physical as opposed to economic; (2) whether the conduct demonstrated an indifference to or a reckless disregard for the health or safety of others; (3) whether the target of the conduct had financial vulnerability; (4) whether the conduct involved repeated actions or was an isolated incident; and (5) whether the harm was the result of intentional malice, trickery, or deceit, or mere accident. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003).

These factors, however, "have only marginal relevance in the context of a consumer action" under the FCRA. *Saunders*, 469 F. Supp. 2d at 351. Indeed, "in FCRA cases, the first two factors in the *State Farm* reprehensibility evaluation, namely whether the harm was physical as opposed to economic and whether the conduct evinced an indifference or reckless disregard for the health and safety of others, are not typically present because violations of the Act usually result in 'only' adverse economic, as opposed to physical, harm to consumers in the form of adverse credit ratings, the inability to obtain financial backing from various economic institutions, actual out-of-pocket losses, mental distress . . . " *Id.* So too here. Despite Trans

Union's continued protestations to the contrary, Mr. Ramirez was harmed by Trans Union—he was unable to co-purchase a vehicle with his wife, he endured stress and anxiety trying to figure out why his credit report showed that his name matched someone on the OFAC list, and he and his wife cancelled a family trip to Mexico because they were worried about traveling outside the country under the circumstances. As to whether Plaintiff was a financially vulnerable victim, the Court finds that this factor weighs in Plaintiff's favor because the OFAC Alert product was designed to provide information to lenders making consumer credit decisions—individuals who are falsely flagged as persons on the OFAC list are necessarily financially vulnerable. The fourth factor—whether the conduct involved repeated actions—is likewise satisfied. Trans Union sent over 8000 individuals a letter during the class period stating that they were a "potential match" for someone on the OFAC list and the trial evidence showed that not one of these individuals was actually on the list. (Dkt. No. 294 at 116(491):6-13.) The final factor, that the harm was the result of intentional malice, trickery, or deceit rather than accident, is of questionable relevance in an FCRA action given that the FCRA allows punitive damages upon a willfulness finding but without a finding of malice or evil motive. *See Cousin v. Trans Union Corp.*, 246 F.3d 359, 372 (5th Cir. 2001); *Saunders*, 469 F.Supp. 2d at 351 (citing *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 418 (4th Cir. 2001)).

In FCRA cases, the reprehensibility analysis should focus on factors beyond those set forth in *State Farm*. *See Saunders*, 469 F.Supp. 2d at 351-52 (considering factors unique to a consumer credit

scenario as part of reprehensibility analysis). Here, the reprehensibility analysis should consider Trans Union's actions following the Third Circuit's *Cortez* decision. In the summer of 2010, the Third Circuit explicitly advised Trans Union that the same practices at issue here—the name-only matching protocol and the failure to provide clear and accurate disclosure of OFAC data and consumer's rights—ran afoul of the FRCA. *See Cortez v. Trans Union*, LLC, 617 F.3d 688 (3rd Cir. 2010). Trans Union nonetheless continued to sell its OFAC alert product using name-only matching criteria through the class period and beyond, choosing to merely insert the word "potential" in front of "OFAC NAME SCREEN ALERT." Further, Trans Union's disclosures throughout the class period continued to fail to include the OFAC information, and instead, this information was provided separately in a confusing format which failed to advise consumers how to dispute the accuracy of the OFAC Alert. Equally troublingly, Trans Union's General Counsel misadvised the United States Department of Treasury regarding the contents of the disclosure by erroneously ensuring Treasury that the disclosures were "accompanied by instructions on how the consumer can obtain further information from Trans Union about our OFAC Name Screen service, and how to request Trans Union block the return of a potential match message on future transactions." (*Compare* Trial Ex. 35 (letter to Treasury) *with* Dkt. No. 294 at 160(535):16-121(536):12 (trial testimony of Trans Union witness Michael O'Connell conceding that the OFAC letter Trans Union sent to consumers does not contain the information contained in the Treasury letter).) And perhaps most tellingly, Trans Union to

this day insists that its OFAC Alert practice "benefitted" the consumers it had falsely labeled as individuals on the OFAC list. (Dkt. No. 294 at 170(545):17-20 (testimony of Trans Union witness Michael O'Connell, "Q: It's your testimony that the members of this class who were identified as being a hit on the OFAC list were benefited by Trans Union's practices. A: Yes."). This cumulative conduct is sufficiently egregious to satisfy the constitutional reprehensibility requirement. As the Third Circuit held in *Cortez* when it upheld the punitive damages award against Trans Union there:

> the gravity of harm that could result from Trans Union's "match" of Cortez with an individual on a "terrorist" list cannot be over stated. This is especially true because Trans Union's subscribers rely on the accuracy of the detailed personal information Trans Union provides. Given the severe potential consequences of such an association, Trans Union's failure to take the utmost care in ensuring the information's accuracy—at the very least, comparing birth dates when they are available—is reprehensible.

Cortez, 617 F.3d at 723. That Trans Union continued to use the same name-only match—merely inserting the word "potential" before match—after the Third Circuit labeled such conduct reprehensible and upheld a $100,000 individual punitive damages award is more than sufficient to justify a punitive damages award of $6,353.08 per class member.

2) The Relationship Between Statutory and Punitive Damages

Next, the Court at looks the disparity between the harm suffered by the plaintiff and the punitive damages award. *See BMW*, 517 U.S. at 574. Although "there are no rigid benchmarks that a punitive damages award may not surpass," courts have generally found excessive ratios of punitive damages to compensatory damages of 145:1. *State Farm*, 538 U.S. at 425. The Supreme Court has stated that "single-digit multipliers are more likely to comport with due process." *Id.* Here, the ratio between statutory and punitive damages is 6:1. Trans Union's argument that the ratio is actually $60 million to zero because Mr. Ramirez was not actually injured ignores the psychic harm associated with being falsely labeled as an individual on the OFAC list, as well as the harm inherent in a consumer having to take steps to have his or her name removed from Trans Union's OFAC Alert product. Trans Union's argument also ignores that Congress has charged credit reporting agencies such as Trans Union with standards of care with respect to consumer data that the trial evidence showed Trans Union consistently ignored. The 6:1 ratio here is fully within constitutional limits. *See Saunders v. Branch Banking And Tr. Co. Of VA*, 526 F.3d 142, 154 (4th Cir. 2008) (approving an 80:1 punitive to compensatory damages ratio in an FCRA action); *see also Arizona v. ASARCO LLC*, 773 F.3d 1050, 1055 (9th Cir. 2014) (upholding jury verdict of $300,000 in punitive damages and $1 in nominal damages noting that there is no "bright-line ratio which a punitive damages award cannot exceed" and

a higher ratio may be appropriate even where there are minimal economic damages if the conduct is "especially egregious").

3) Difference between Punitive Damages and Civil Penalties or Comparable Cases

Finally, *State Farm* requires the Court to consider the disparity between the punitive damages award and the "civil penalties authorized or imposed in comparable cases." *State Farm*, 538 U.S. at 428. Under the FCRA, the maximum civil penalty the Federal Trade Commission can seek for knowing violations of the FCRA is $2,500 per violation. 15 U.S.C. § 1681s(a)(2)(A). "This limit [however] is not applicable to actions brought under the FCRA by private citizens" and is thus "not particularly helpful in assessing the constitutionality of the punitive damage award." *Saunders*, 469 F. Supp. 2d at 353 (internal citation and quotation marks omitted). This third guidepost thus has little relevance here. *See Cortez*, 617 F.3d at 724 ("the third guidepost is not useful in the analysis of punitive damages here as there is no 'truly comparable' civil penalty to a FCRA punitive damages award.").

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Trans Union's objection to the punitive damages award is essentially an argument that punitive damages should not be allowed on a class-wide basis in FCRA cases. But that is not the law. *See Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 723 (9th Cir. 2010) ("To limit class availability merely on the basis of 'enormous' potential liability that Congress explicitly provided for would subvert congressional

intent."). Trans Union would likely have no objection, or at least a more muted objection, to a $6,000 individual punitive damages award—it is just the aggregate number that it finds so outrageous. "If the size of a defendant's potential liability alone was a sufficient reason to deny class certification, however, the very purpose of Rule 23(b)(3)—to allow integration of numerous small individual claims into a single powerful unit—would be substantially undermined." *Id.* at 722 (internal citation and quotation marks omitted).

The Court thus DENIES Trans Union's request for a remittitur or new trial with respect to punitive damages.

D. Trans Union's Renewed Objections Regarding Class Certification

Finally, Trans Union yet again challenges class treatment of Plaintiff's claims. The Court has repeatedly rejected these objections and does so again. If anything, the trial evidence demonstrated that class treatment of these claims is even more appropriate than appeared at the class certification stage. Trans Union falsely identified every class member as a potential match and every class member received an incomplete disclosure which failed to properly advise them of their rights to challenge the OFAC information in their file.

Trans Union's argument that the class size should be "corrected" to reflect only those class members who actually received notice is unavailing. Rule 23 requires "the best notice that is practicable under the circumstances" and it does not limit the class to only those who received notice. *See In re Integra Realty*

Res., Inc., 354 F.3d 1246, 1260 (10th Cir. 2004). To the extent that notice to some of the class members was returned, Plaintiff represents that he is committed to undertaking additional efforts to provide notice of the damages award to affected class members. Further, as Plaintiff notes, Trans Union, which maintains a consumer credit file on each of these class members, is likely in the best position to provide up-to-date address information for class members. Trans Union's argument that the judgment should be amended to only cover those who received notice is likewise misplaced. Rule 23 requires judgment be entered as to those class members to whom notice was sent. *See* Fed. R. Civ. Pro. 23(c)(3)(B) ("the judgment in a class action must . . . include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members."); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (holding that "a fully descriptive notice [] sent first-class mail to each class member, with an explanation of the right to 'opt out,' satisfies due process"). All such class members are deemed bound by the judgment. *See Phillips*, 472 U.S. at 811-12 (holding that absent class members are bound to the judgment as long as they are afforded the minimal procedural due process protections of "notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel.") However, the Court will grant Trans Union's unopposed request to amend the form of the judgment to conform to the language of Rule 23(c)(3)(B).

CONCLUSION

Trans Union's Motion for Judgment as a Matter of Law or a New Trial is DENIED. The jury's verdict is supported by substantial evidence and there is no basis to set aside the damages award.

Plaintiff shall file an amended proposed form of judgment which complies with Rule 23(c)(3)(B) by November 13, 2017.

The Court *sua sponte* extends the dates for the parties' briefing regarding Plaintiff's motion for attorneys' fees by 10 days. (Dkt. No. 340.)

This Order disposes of Docket Nos. 321 and 327.

IT IS SO ORDERED.

Dated: November 7, 2017

[handwritten: signature]

JACQUELINE SCOTT CORLEY

United States Magistrate Judge

Appendix D

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS AND FEDERAL RULE

U.S. Const. art. III, §§1-2

Section 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original

Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. Const. amend. XIV, §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

15 U.S.C. §1681e

(a) Identity and purposes of credit users

Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section 1681c of this title and to limit the furnishing of consumer reports to the purposes listed under section 1681b of this title. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to

verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 1681b of this title.

(b) Accuracy of report

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.

(c) Disclosure of consumer reports by users allowed

A consumer reporting agency may not prohibit a user of a consumer report furnished by the agency on a consumer from disclosing the contents of the report to the consumer, if adverse action against the consumer has been taken by the user based in whole or in part on the report.

(d) Notice to users and furnishers of information

(1) Notice requirement.—A consumer reporting agency shall provide to any person—

(A) who regularly and in the ordinary course of business furnishes information to the agency with respect to any consumer; or

(B) to whom a consumer report is provided by the agency;

a notice of such person's responsibilities under this subchapter.

(2) Content of notice.—The Bureau shall prescribe the content of notices under paragraph (1), and a consumer reporting agency shall be in compliance with this subsection if it provides a notice under paragraph (1) that is substantially similar to the Bureau prescription under this paragraph.

(e) Procurement of consumer report for resale

(1) Disclosure.—A person may not procure a consumer report for purposes of reselling the report (or any information in the report) unless the person discloses to the consumer reporting agency that originally furnishes the report—

(A) the identity of the end-user of the report (or information); and

(B) each permissible purpose under section 1681b of this title for which the report is furnished to the end-user of the report (or information).

(2) Responsibilities of procurers for resale.—A person who procures a consumer report for purposes of reselling the report (or any information in the report) shall—

(A) establish and comply with reasonable procedures designed to ensure that the report (or information) is resold by the person only for a purpose for which the report may be furnished under section 1681b of this title, including by requiring that each person to which the report (or information) is resold

and that resells or provides the report (or information) to any other person—

(i) identifies each end user of the resold report (or information);

(ii) certifies each purpose for which the report (or information) will be used; and

(iii) certifies that the report (or information) will be used for no other purpose; and

(B) before reselling the report, make reasonable efforts to verify the identifications and certifications made under subparagraph (A).

(3) Resale of consumer report to a Federal agency or department.—Notwithstanding paragraph (1) or (2), a person who procures a consumer report for purposes of reselling the report (or any information in the report) shall not disclose the identity of the end-user of the report under paragraph (1) or (2) if—

(A) the end user is an agency or department of the United States Government which procures the report from the person for purposes of determining the eligibility of the consumer concerned to receive access or continued access to classified information (as defined in section 1681b(b)(4)(E)(i) of this title); and

(B) the agency or department certifies in writing to the person reselling the report that nondisclosure is necessary to protect classified information or the safety of persons

employed by or contracting with, or undergoing investigation for work or contracting with the agency or department.

15 U.S.C. §1681g

(a) Information on file; sources; report recipients

Every consumer reporting agency shall, upon request, and subject to section 1681h(a)(1) of this title, clearly and accurately disclose to the consumer:

(1) All information in the consumer's file at the time of the request, except that—

(A) if the consumer to whom the file relates requests that the first 5 digits of the social security number (or similar identification number) of the consumer not be included in the disclosure and the consumer reporting agency has received appropriate proof of the identity of the requester, the consumer reporting agency shall so truncate such number in such disclosure; and

(B) nothing in this paragraph shall be construed to require a consumer reporting agency to disclose to a consumer any information concerning credit scores or any other risk scores or predictors relating to the consumer.

(2) The sources of the information; except that the sources of information acquired solely for use in preparing an investigative consumer report and actually used for no other purpose need not be disclosed: Provided, That in the event an action is brought under this subchapter, such sources

shall be available to the plaintiff under appropriate discovery procedures in the court in which the action is brought.

(3)(A) Identification of each person (including each end-user identified under section 1681e(e)(1) of this title) that procured a consumer report—

(i) for employment purposes, during the 2-year period preceding the date on which the request is made; or

(ii) for any other purpose, during the 1-year period preceding the date on which the request is made.

(B) An identification of a person under subparagraph (A) shall include—

(i) the name of the person or, if applicable, the trade name (written in full) under which such person conducts business; and

(ii) upon request of the consumer, the address and telephone number of the person.

(C) Subparagraph (A) does not apply if—

(i) the end user is an agency or department of the United States Government that procures the report from the person for purposes of determining the eligibility of the consumer to whom the report relates to receive access or continued access to classified information (as defined in section 1681b(b)(4)(E)(i) of this title); and

(ii) the head of the agency or department makes a written finding as prescribed under section 1681b(b)(4)(A) of this title.

(4) The dates, original payees, and amounts of any checks upon which is based any adverse characterization of the consumer, included in the file at the time of the disclosure.

(5) A record of all inquiries received by the agency during the 1-year period preceding the request that identified the consumer in connection with a credit or insurance transaction that was not initiated by the consumer.

(6) If the consumer requests the credit file and not the credit score, a statement that the consumer may request and obtain a credit score.

(b) Exempt information

The requirements of subsection (a) respecting the disclosure of sources of information and the recipients of consumer reports do not apply to information received or consumer reports furnished prior to the effective date of this subchapter except to the extent that the matter involved is contained in the files of the consumer reporting agency on that date.

(c) Summary of rights to obtain and dispute information in consumer reports and to obtain credit scores

(1) Commission[1] summary of rights required

[1] So in original. Probably should be "Bureau".

(A) In general

The Commission[1] shall prepare a model summary of the rights of consumers under this subchapter.

(B) Content of summary

The summary of rights prepared under subparagraph (A) shall include a description of—

(i) the right of a consumer to obtain a copy of a consumer report under subsection (a) from each consumer reporting agency;

(ii) the frequency and circumstances under which a consumer is entitled to receive a consumer report without charge under section 1681j of this title;

(iii) the right of a consumer to dispute information in the file of the consumer under section 1681i of this title;

(iv) the right of a consumer to obtain a credit score from a consumer reporting agency, and a description of how to obtain a credit score;

(v) the method by which a consumer can contact, and obtain a consumer report from, a consumer reporting agency without charge, as provided in the regulations of the Bureau prescribed under section 211(c) of the Fair and Accurate Credit Transactions Act of 2003; and

(vi) the method by which a consumer can contact, and obtain a consumer report from, a consumer reporting agency described in section 1681a(w) of this title, as provided in the regulations of the Bureau prescribed under section 1681j(a)(1)(C) of this title.

(C) Availability of summary of rights

The Commission[1] shall—

(i) actively publicize the availability of the summary of rights prepared under this paragraph;

(ii) conspicuously post on its Internet website the availability of such summary of rights; and

(iii) promptly make such summary of rights available to consumers, on request.

(2) Summary of rights required to be included with agency disclosures

A consumer reporting agency shall provide to a consumer, with each written disclosure by the agency to the consumer under this section—

(A) the summary of rights prepared by the Bureau under paragraph (1);

(B) in the case of a consumer reporting agency described in section 1681a(p) of this title, a toll-free telephone number established by the agency, at which personnel are accessible to consumers during normal business hours;

(C) a list of all Federal agencies responsible for enforcing any provision of this subchapter, and the address and any appropriate phone number of each such agency, in a form that will assist the consumer in selecting the appropriate agency;

(D) a statement that the consumer may have additional rights under State law, and that the consumer may wish to contact a State or local consumer protection agency or a State attorney general (or the equivalent thereof) to learn of those rights; and

(E) a statement that a consumer reporting agency is not required to remove accurate derogatory information from the file of a consumer, unless the information is outdated under section 1681c of this title or cannot be verified.

(d) Summary of rights of identity theft victims

(1) In general

The Commission,[1] in consultation with the Federal banking agencies and the National Credit Union Administration, shall prepare a model summary of the rights of consumers under this subchapter with respect to the procedures for remedying the effects of fraud or identity theft involving credit, an electronic fund transfer, or an account or transaction at or with a financial institution or other creditor.

(2) Summary of rights and contact information

Beginning 60 days after the date on which the model summary of rights is prescribed in final form by the Bureau pursuant to paragraph (1), if any consumer contacts a consumer reporting agency and expresses a belief that the consumer is a victim of fraud or identity theft involving credit, an electronic fund transfer, or an account or transaction at or with a financial institution or other creditor, the consumer reporting agency shall, in addition to any other action that the agency may take, provide the consumer with a summary of rights that contains all of the information required by the Bureau under paragraph (1), and information on how to contact the Bureau to obtain more detailed information.

(e) Information available to victims

(1) In general

For the purpose of documenting fraudulent transactions resulting from identity theft, not later than 30 days after the date of receipt of a request from a victim in accordance with paragraph (3), and subject to verification of the identity of the victim and the claim of identity theft in accordance with paragraph (2), a business entity that has provided credit to, provided for consideration products, goods, or services to, accepted payment from, or otherwise entered into a commercial transaction for consideration with, a person who has allegedly made unauthorized use of the means of identification of the victim, shall provide a copy of application and business

transaction records in the control of the business entity, whether maintained by the business entity or by another person on behalf of the business entity, evidencing any transaction alleged to be a result of identity theft to—

(A) the victim;

(B) any Federal, State, or local government law enforcement agency or officer specified by the victim in such a request; or

(C) any law enforcement agency investigating the identity theft and authorized by the victim to take receipt of records provided under this subsection.

(2) Verification of identity and claim

Before a business entity provides any information under paragraph (1), unless the business entity, at its discretion, otherwise has a high degree of confidence that it knows the identity of the victim making a request under paragraph (1), the victim shall provide to the business entity—

(A) as proof of positive identification of the victim, at the election of the business entity—

(i) the presentation of a government-issued identification card;

(ii) personally identifying information of the same type as was provided to the business entity by the unauthorized person; or

(iii) personally identifying information that the business entity typically requests from new applicants or for new

transactions, at the time of the victim's request for information, including any documentation described in clauses (i) and (ii); and

(B) as proof of a claim of identity theft, at the election of the business entity—

(i) a copy of a police report evidencing the claim of the victim of identity theft; and

(ii) a properly completed—

(I) copy of a standardized affidavit of identity theft developed and made available by the Bureau; or

(II) an[2] affidavit of fact that is acceptable to the business entity for that purpose.

(3) Procedures

The request of a victim under paragraph (1) shall—

(A) be in writing;

(B) be mailed to an address specified by the business entity, if any; and

(C) if asked by the business entity, include relevant information about any transaction alleged to be a result of identity theft to facilitate compliance with this section including—

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[2] So in original. The word "an" probably should not appear.

(i) if known by the victim (or if readily obtainable by the victim), the date of the application or transaction; and

(ii) if known by the victim (or if readily obtainable by the victim), any other identifying information such as an account or transaction number.

(4) No charge to victim

Information required to be provided under paragraph (1) shall be so provided without charge.

(5) Authority to decline to provide information

A business entity may decline to provide information under paragraph (1) if, in the exercise of good faith, the business entity determines that—

(A) this subsection does not require disclosure of the information;

(B) after reviewing the information provided pursuant to paragraph (2), the business entity does not have a high degree of confidence in knowing the true identity of the individual requesting the information;

(C) the request for the information is based on a misrepresentation of fact by the individual requesting the information relevant to the request for information; or

(D) the information requested is Internet navigational data or similar information about a person's visit to a website or online service.

(6) Limitation on liability

Except as provided in section 1681s of this title, sections 1681n and 1681o of this title do not apply to any violation of this subsection.

(7) Limitation on civil liability

No business entity may be held civilly liable under any provision of Federal, State, or other law for disclosure, made in good faith pursuant to this subsection.

(8) No new recordkeeping obligation

Nothing in this subsection creates an obligation on the part of a business entity to obtain, retain, or maintain information or records that are not otherwise required to be obtained, retained, or maintained in the ordinary course of its business or under other applicable law.

(9) Rule of construction

(A) In general

No provision of subtitle A of title V of Public Law 106-102, prohibiting the disclosure of financial information by a business entity to third parties shall be used to deny disclosure of information to the victim under this subsection.

(B) Limitation

Except as provided in subparagraph (A), nothing in this subsection permits a business entity to disclose information, including information to law enforcement under subparagraphs (B) and (C) of paragraph (1), that the business entity is otherwise

prohibited from disclosing under any other applicable provision of Federal or State law.

(10) Affirmative defense

In any civil action brought to enforce this subsection, it is an affirmative defense (which the defendant must establish by a preponderance of the evidence) for a business entity to file an affidavit or answer stating that—

(A) the business entity has made a reasonably diligent search of its available business records; and

(B) the records requested under this subsection do not exist or are not reasonably available.

(11) Definition of victim

For purposes of this subsection, the term "victim" means a consumer whose means of identification or financial information has been used or transferred (or has been alleged to have been used or transferred) without the authority of that consumer, with the intent to commit, or to aid or abet, an identity theft or a similar crime.

(12) Effective date

This subsection shall become effective 180 days after December 4, 2003.

(13) Effectiveness study

Not later than 18 months after December 4, 2003, the Comptroller General of the United States shall submit a report to Congress assessing the effectiveness of this provision.

(f) Disclosure of credit scores

(1) In general

Upon the request of a consumer for a credit score, a consumer reporting agency shall supply to the consumer a statement indicating that the information and credit scoring model may be different than the credit score that may be used by the lender, and a notice which shall include—

(A) the current credit score of the consumer or the most recent credit score of the consumer that was previously calculated by the credit reporting agency for a purpose related to the extension of credit;

(B) the range of possible credit scores under the model used;

(C) all of the key factors that adversely affected the credit score of the consumer in the model used, the total number of which shall not exceed 4, subject to paragraph (9);

(D) the date on which the credit score was created; and

(E) the name of the person or entity that provided the credit score or credit file upon which the credit score was created.

(2) Definitions

For purposes of this subsection, the following definitions shall apply:

(A) Credit score

The term "credit score"—

(i) means a numerical value or a categorization derived from a statistical

tool or modeling system used by a person who makes or arranges a loan to predict the likelihood of certain credit behaviors, including default (and the numerical value or the categorization derived from such analysis may also be referred to as a “risk predictor” or “risk score”); and

(ii) does not include—

(I) any mortgage score or rating of an automated underwriting system that considers one or more factors in addition to credit information, including the loan to value ratio, the amount of down payment, or the financial assets of a consumer; or

(II) any other elements of the underwriting process or underwriting decision.

(B) Key factors

The term “key factors” means all relevant elements or reasons adversely affecting the credit score for the particular individual, listed in the order of their importance based on their effect on the credit score.

(3) Timeframe and manner of disclosure

The information required by this subsection shall be provided in the same timeframe and manner as the information described in subsection (a).

(4) Applicability to certain uses

This subsection shall not be construed so as to compel a consumer reporting agency to develop or disclose a score if the agency does not—

(A) distribute scores that are used in connection with residential real property loans; or

(B) develop scores that assist credit providers in understanding the general credit behavior of a consumer and predicting the future credit behavior of the consumer.

(5) Applicability to credit scores developed by another person

(A) In general

This subsection shall not be construed to require a consumer reporting agency that distributes credit scores developed by another person or entity to provide a further explanation of them, or to process a dispute arising pursuant to section 1681i of this title, except that the consumer reporting agency shall provide the consumer with the name and address and website for contacting the person or entity who developed the score or developed the methodology of the score.

(B) Exception

This paragraph shall not apply to a consumer reporting agency that develops or modifies scores that are developed by another person or entity.

(6) Maintenance of credit scores not required

This subsection shall not be construed to require a consumer reporting agency to maintain credit scores in its files.

(7) Compliance in certain cases

In complying with this subsection, a consumer reporting agency shall—

(A) supply the consumer with a credit score that is derived from a credit scoring model that is widely distributed to users by that consumer reporting agency in connection with residential real property loans or with a credit score that assists the consumer in understanding the credit scoring assessment of the credit behavior of the consumer and predictions about the future credit behavior of the consumer; and

(B) a statement indicating that the information and credit scoring model may be different than that used by the lender.

(8) Fair and reasonable fee

A consumer reporting agency may charge a fair and reasonable fee, as determined by the Bureau, for providing the information required under this subsection.

(9) Use of enquiries as a key factor

If a key factor that adversely affects the credit score of a consumer consists of the number of enquiries made with respect to a consumer report, that factor shall be included in the disclosure

pursuant to paragraph (1)(C) without regard to the numerical limitation in such paragraph.

(g) Disclosure of credit scores by certain mortgage lenders

(1) In general

Any person who makes or arranges loans and who uses a consumer credit score, as defined in subsection (f), in connection with an application initiated or sought by a consumer for a closed end loan or the establishment of an open end loan for a consumer purpose that is secured by 1 to 4 units of residential real property (hereafter in this subsection referred to as the "lender") shall provide the following to the consumer as soon as reasonably practicable:

(A) Information required under subsection (f)

(i) In general

A copy of the information identified in subsection (f) that was obtained from a consumer reporting agency or was developed and used by the user of the information.

(ii) Notice under subparagraph (D)

In addition to the information provided to it by a third party that provided the credit score or scores, a lender is only required to provide the notice contained in subparagraph (D).

(B) Disclosures in case of automated underwriting system

(i) In general

If a person that is subject to this subsection uses an automated underwriting system to underwrite a loan, that person may satisfy the obligation to provide a credit score by disclosing a credit score and associated key factors supplied by a consumer reporting agency.

(ii) Numerical credit score

However, if a numerical credit score is generated by an automated underwriting system used by an enterprise, and that score is disclosed to the person, the score shall be disclosed to the consumer consistent with subparagraph (C).

(iii) Enterprise defined

For purposes of this subparagraph, the term "enterprise" has the same meaning as in paragraph (6) of section 4502 of Title 12.

(C) Disclosures of credit scores not obtained from a consumer reporting agency

A person that is subject to the provisions of this subsection and that uses a credit score, other than a credit score provided by a consumer reporting agency, may satisfy the obligation to provide a credit score by disclosing a credit score and associated key

factors supplied by a consumer reporting agency.

(D) Notice to home loan applicants

A copy of the following notice, which shall include the name, address, and telephone number of each consumer reporting agency providing a credit score that was used:

NOTICE TO THE HOME LOAN APPLICANT

"In connection with your application for a home loan, the lender must disclose to you the score that a consumer reporting agency distributed to users and the lender used in connection with your home loan, and the key factors affecting your credit scores.

"The credit score is a computer generated summary calculated at the time of the request and based on information that a consumer reporting agency or lender has on file. The scores are based on data about your credit history and payment patterns. Credit scores are important because they are used to assist the lender in determining whether you will obtain a loan. They may also be used to determine what interest rate you may be offered on the mortgage. Credit scores can change over time, depending on your conduct, how your credit history and payment patterns change, and how credit scoring technologies change.

"Because the score is based on information in your credit history, it is very important that

you review the credit-related information that is being furnished to make sure it is accurate. Credit records may vary from one company to another.

“If you have questions about your credit score or the credit information that is furnished to you, contact the consumer reporting agency at the address and telephone number provided with this notice, or contact the lender, if the lender developed or generated the credit score. The consumer reporting agency plays no part in the decision to take any action on the loan application and is unable to provide you with specific reasons for the decision on a loan application.

“If you have questions concerning the terms of the loan, contact the lender.”.

(E) Actions not required under this subsection

This subsection shall not require any person to—

(i) explain the information provided pursuant to subsection (f);

(ii) disclose any information other than a credit score or key factors, as defined in subsection (f);

(iii) disclose any credit score or related information obtained by the user after a loan has closed;

(iv) provide more than 1 disclosure per loan transaction; or

(v) provide the disclosure required by this subsection when another person has made the disclosure to the consumer for that loan transaction.

(F) No obligation for content

(i) In general

The obligation of any person pursuant to this subsection shall be limited solely to providing a copy of the information that was received from the consumer reporting agency.

(ii) Limit on liability

No person has liability under this subsection for the content of that information or for the omission of any information within the report provided by the consumer reporting agency.

(G) Person defined as excluding enterprise

As used in this subsection, the term "person" does not include an enterprise (as defined in paragraph (6) of section 4502 of Title 12).

(2) Prohibition on disclosure clauses null and void

(A) In general

Any provision in a contract that prohibits the disclosure of a credit score by a person who makes or arranges loans or a consumer reporting agency is void.

(B) No liability for disclosure under this subsection

A lender shall not have liability under any contractual provision for disclosure of a credit score pursuant to this subsection.

15 U.S.C. §1681n

(a) In general

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.

(b) Civil liability for knowing noncompliance

Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be

liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or $1,000, whichever is greater.

(c) Attorney's fees

Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

(d) Clarification of willful noncompliance

For the purposes of this section, any person who printed an expiration date on any receipt provided to a consumer cardholder at a point of sale or transaction between December 4, 2004, and June 3, 2008, but otherwise complied with the requirements of section 1681c(g) of this title for such receipt shall not be in willful noncompliance with section 1681c(g) of this title by reason of printing such expiration date on the receipt.

Fed R. Civ. P. 23

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members 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.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(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.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the

court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) Judgment. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) In General. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and

present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) Combining and Amending Orders. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise**:**

(1) Notice to the Class.

(A) Information That Parties Must Provide to the Court. The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) Grounds for a Decision to Give Notice. The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is

justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) Approval of the Proposal. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) Identifying Agreements. The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) New Opportunity to be Excluded. If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Class-Member Objections.

(A) In General. Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) Court Approval Required for Payment in Connection with an Objection. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) Procedure for Approval After an Appeal. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in

the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) Standard for Appointing Class Counsel. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) Interim Counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) Duty of Class Counsel. Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are

authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).