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****Pro hac vice motion forthcoming*

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

FRANK LONG, JOSEPH SHIPLEY, MICHAEL WHITE, and RAMEE GARNETT, individually and on behalf of all others similarly situated, Plaintiffs, v. SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, Defendant.	**Case No. 2:16-cv-1991-PBT**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, CONDITIONAL CERTIFICATION OF SETTLEMENT CLASSES, APPOINTMENT OF CLASS COUNSEL, AND APPROVAL OF PROPOSED NOTICE OF SETTLEMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

RULES

OTHER AUTHORITIES

INTRODUCTION

Plaintiffs Frank Long, Joseph Shipley, and Michael White (collectively, "Plaintiffs"), on behalf of themselves and similarly situated job applicants, seek approval of a proposed class action settlement in this criminal history discrimination matter against Defendant Southeastern Pennsylvania Transportation Authority ("Defendant" or "SEPTA") (Plaintiffs and Defendant together, "the Parties"). Plaintiffs brought this case to challenge SEPTA's blanket ban against hiring individuals with drug convictions for broad categories of jobs, leading to hundreds of qualified applicants being denied employment based on old, non-violent, and irrelevant drug offenses. As a result of this lawsuit, SEPTA has rescinded the challenged policy, committed to working with an expert to ensure fair and legally compliant criminal history screening practices, and agreed to priority hiring for class members denied jobs based on the challenged policy and to monetary compensation for class members.

The Parties reached the proposed settlement after nearly five years of dispositive motion practice, appellate litigation, ancillary state court litigation, formal and informal discovery, two mediations conducted by a private mediator, and extensive subsequent settlement negotiations. If approved, the settlement will afford significant and meaningful relief to class members, by providing: (1) monetary compensation from a Gross Settlement Fund of $3,600,000; (2) priority hiring for members of the Pennsylvania Criminal History Record Information Act class, providing access to quality jobs in a time of economic downturn; and (3) programmatic relief, overseen by a neutral third-party expert, to remedy the hiring practices at issue in this litigation.

Plaintiffs now respectfully request that the Court: (1) grant preliminary approval of the Settlement Agreement and Release ("Settlement Agreement") attached as Ex. A to the

Declaration of Ossai Miazad ("Miazad Decl."); [1] (2) conditionally certify the proposed classes under Federal Rule of Civil Procedure 23; (3) preliminarily appoint Plaintiffs Frank Long, Joseph Shipley, and Michael White as Class Representatives; (4) appoint Outten & Golden LLP ("O&G"), Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"), Public Interest Law Center ("PILC"), and Willig, Williams & Davidson ("WW&D") (collectively, "Plaintiffs' Counsel") as Class Counsel; and (5) approve the Notices of Proposed Class Action Settlement and Claim Forms ("Notice and Claim Form" or "Notice"), attached as Exs. B and C to the Miazad Decl., and direct their distribution.

FACTUAL AND PROCEDURAL BACKGROUND

I. SEPTA's Criminal History Screening Policies and Practices

In this lawsuit, Plaintiffs allege that SEPTA's categorical lifetime ban on hiring applicants with felony drug convictions, without any individualized review or suitability determination, violated Pennsylvania's Criminal History Record Information Act ("CHRIA"), 18 Pa. Cons. Stat. § 9125. *See* ECF No. 66 (SAC) ¶¶ 89-90. The CHRIA provides that, "[f]elony and misdemeanor convictions may be considered by the employer only to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied." 18 Pa. Cons. Stat. Ann. § 9125(b). Plaintiffs also allege that SEPTA failed to provide Plaintiffs and other job applicants whose job offers it revoked a copy of their background check prior to Septa's revocation of the job offer in violation of their rights under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681, *et seq*. *See* ECF No. 66 (SAC) ¶ 83. The FCRA provides that "before taking any adverse action based in whole or in part on [a consumer report]," the

[1] Unless otherwise indicated, all exhibits herein are attached to the Miazad Decl.

employer taking the adverse action must provide applicants with a copy of their consumer report. 15 U.S.C. § 1681b(b)(3)(A)(i).

Plaintiffs are applicants whom Septa rejected pursuant to the screening policies described above and were not provided with timely consumer reports. *See* ECF No. 66 (SAC) ¶¶ 36-68.

II. Procedural History

A. Litigation

On April 27, 2016, Plaintiff Frank Long filed a Class Action Complaint against SEPTA in this Court alleging that SEPTA's criminal history screening policy violated the CHRIA and the FCRA. *See* ECF No. 1 (Compl.) ¶¶ 64-76. On May 26, 2016, Plaintiff Long, joined by Plaintiffs Shipley and White, filed a First Amended Class Action Complaint adding additional claims pursuant to the FCRA. *See* ECF No. 21 (FAC) ¶¶ 119-136.

On June 24, 2016, SEPTA moved to dismiss Plaintiffs' First Amended Complaint in its entirety. *See* ECF No. 25 (Mot. to Dismiss). On April 5, 2017, the Court granted SEPTA's motion on the basis that Plaintiffs' FCRA claims lacked standing. *See* ECF Nos. 52 (Mem.), 53 (Order). Plaintiffs appealed this ruling, *see* ECF No. 55 (Notice of Appeal), and on September 10, 2018, after full briefing and oral argument, the United States Court of Appeals for the Third Circuit affirmed, in part, and reversed, in part, the Court's decision. *See* case no. 17-1889.[2] On October 5, 2018, the Third Circuit denied SEPTA's petition for *en banc* review. *See id*.

On August 6, 2019, Plaintiffs filed a Second Amended Class Action Complaint ("SAC").[3] *See* ECF No. 66. SEPTA answered the SAC on August 21, 2019. *See* ECF No. 69.

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[2] After their case was dismissed, Plaintiffs also filed their CHRIA claims in Pennsylvania state court to preserve and press forward those claims to protect against an unsuccessful appeal of their FCRA claims. Miazad Decl. ¶ 9.

[3] The SAC added Plaintiff Ramee Garnett as a named plaintiff as to claims challenging SEPTA's post-August 26, 2018 iteration of the screening policy. Plaintiff Garnett has agreed to resolve his claims against SEPTA on an individual basis. Miazad Decl. ¶ 10.

The Court conducted a preliminary conference on October 23, 2019 and thereafter entered a Scheduling Order setting deadlines for discovery and class certification briefing. *See* ECF No. 73 (Stip. and Order); ECF No. 74 (Minute Entry). After the conference, the Parties engaged in written discovery, including document production, exchange of interrogatory responses, and numerous correspondence and meet and confer efforts. Miazad Decl. ¶ 11. For example, Plaintiffs each responded to 14 interrogatories and over 60 document requests, and SEPTA responded to two sets of document requests (44 requests total) and numerous interrogatories, including supplemental responses. *Id.* ¶ 12. On February 27, 2020, Plaintiffs moved to compel production of documents relating to the creation and modification of SEPTA's screening policy, after the parties engaged in an extended conferral process and reached impasse. *See* ECF No. 76 (Mot. to Compel). On June 6, 2020, the Court stayed discovery to allow the Parties to focus their efforts on settlement negotiations.[4] *See* ECF No. 84 (Order).

B. Settlement Negotiations

On March 20, 2019 and June 28, 2019, the Parties participated in two mediation sessions with the Honorable Patricia McInerney (Ret.), a JAMS mediator with experience in the mediation of complex employment class actions. Miazad Decl. ¶ 13. In preparation for the mediations, the Parties exchanged detailed mediation statements and SEPTA produced data and other informal discovery to facilitate the negotiations. *Id*. ¶ 14. Although the mediations were not successful, the Parties continued discussing settlement with the mediator's assistance. *Id*. ¶ 15. During this period, SEPTA also collected applicant data from five consumer reporting

[4] The Court extended the stay on November 19, and December 11, 2020. ECF Nos. 85-86.

agencies with which it contracted—a time intensive process that aided the Parties in establishing the contours of the putative classes. *Id.* ¶ 16.

In early 2020, the Parties renewed their settlement discussions. *Id.* ¶ 17. In the following months, the Parties engaged in extensive arm's-length negotiations to narrow areas of disagreement, and on or about November 23, 2020, executed a Memorandum of Understanding setting forth material terms of settlement. *Id*. ¶ 18. The Parties continued their negotiations to finalize the Settlement Agreement, which was fully executed on or about January 13, 2021.

SUMMARY OF SETTLEMENT TERMS

I. The Proposed Settlement

The Settlement Agreement mandates that SEPTA will not institute (or reinstitute) an absolute bar to employment for any felony or misdemeanor conviction, unless required by law. Ex. A (Settlement Agreement) § 3.3(C). It also requires SEPTA to retain a mutually agreed upon expert in the field of Industrial and Organizational psychology to serve as a consultant to review its current background check policies and practices in light of the CHRIA, FCRA and other applicable laws. *Id.* § 3.3(B). Further, it provides eligible class members with relief directly tied to the harm they suffered: priority hiring and direct payment. *Id.* §§ 3.3(A), 3.4.

A. Programmatic Relief

In addition to the significant policy change to the benefit of class members as well as hundreds of future applicants who would have otherwise been categorically denied a job at SEPTA based on their criminal history record, SEPTA has agreed to retain Industrial Organizational Psychologist Dr. Katherine Lundquist of APTMetrics (the "Consultant") to evaluate and make recommendations as to SEPTA's ongoing criminal history screening policies and practices. *See id*. §§ 1.7, 3.3(B). Dr. Lundquist is a nationally recognized expert with regard to the design and implementation of hiring selection devices generally and has worked with

many large private and public employers on criminal history screening practices in particular. *See* Miazad Decl. ¶ 20-21. Within thirty (30) days after the Effective Date, SEPTA will retain the Consultant to review SEPTA's criminal history screen as to the Bus Operator, Maintenance Custodian Driver, Railroad Conductor/Engineer Trainee, Mechanic, Railroad Engineer, Surface Train Operator, and Railroad Supervision Manager positions. Ex. A (Settlement Agreement) §§ 3.3(B)(i), (ii)(a). SEPTA will pay up to $50,000 (in addition to the Gross Settlement Fund) to fund the initial Consultant work, *see id*. § 3.3(B)(ii)(e), and, to the extent that there is additional money remaining in the settlement fund after the initial distribution to class members, such funds will be used for additional Consultant work up to $150,000, aimed at long term and sustainable improvements to SEPTA's screening practices. *See id*. § 3.5(A)(i).

After conducting her review, the Consultant will provide a proposal for changes, if any, to SEPTA's criminal history screen (the "Proposal"). *Id*. § 3.3(B)(ii)(b). The Proposal will be provided to the Parties and will specifically include: (1) identification of classes of convictions and/or time periods that are not related to the reviewed positions, and thus can pass through SEPTA's screen without an individualized review; and (2) changes to SEPTA's individual criminal history review aimed at ensuring compliance with the CHRIA, the FCRA, Title VII, and other applicable laws. *Id*.

Within sixty (60) days of receiving the Proposal, if SEPTA does not agree to certain aspects of the Proposal, it must inform the Consultant and Plaintiffs' Counsel of its exact areas of disagreement. *Id*. § 3.3(B)(ii)(c). The Parties will then meet and confer in an effort to resolve any difference between the Parties regarding the Consultant's Proposal. *Id*.

The Consultant will also provide SEPTA with training on best practices for evaluating applicants' criminal history. *Id*. § 3.3(B)(ii)(d).

B. Individual Class Member Relief

1. The Settlement Classes

There are two settlement classes: the CHRIA Class and the FCRA Class (together, the "Class," and members thereof, "Class Members"). *Id*. § 1.6.

CHRIA Class Members are applicants who applied to SEPTA for positions as Bus Operators, Maintenance Custodian Drivers, Railroad Conductor/Engineer Trainees, Mechanics, Railroad Engineers, Surface Train Operators, Rail Vehicle Equipment Welders, Rail Vehicle Machinists, Rail Vehicle Electronic Maintainers, Transportation Managers, Railroad Supervision Managers and/or any other position that requires the operation and/or maintenance of a SEPTA vehicle (collectively, "Covered Positions"), between April 27, 2010, and August 26, 2018, and were denied in whole or in part based on drug conviction(s). *Id.* § 1.3. These job titles reflect the positions for which SEPTA, until August 26, 2018, is alleged to have maintained a blanket ban on hiring for individuals with drug convictions. Miazad Decl. ¶ 22. Applicants with a violent felony conviction on their consumer report within two years of their application to SEPTA are excluded from the CHRIA Class. Ex. A (Settlement Agreement) § 1.3.

FCRA Class Members are SEPTA applicants who were denied employment by SEPTA, from April 27, 2011, through August 26, 2018, because of their criminal history. *Id*. § 1.14.

2. The Settlement Fund

Septa will also establish a settlement fund in the gross amount of $3,600,000 (the "Settlement Fund"). *Id*. § 1.17. Subject to Court approval, the Settlement Fund covers Class Members' awards, Service Awards to Plaintiffs, Plaintiffs' Counsel's attorneys' fees and expenses, the Settlement Administrator's fees and expenses, and any taxes which the Settlement Administrator is required to pay on SEPTA's behalf on W-2 settlement proceeds. *Id*.

Each CHRIA Class Member who submits a timely and valid claim form ("Participating CHRIA Class Member") is entitled to a gross payment of $5,000 from the Settlement Fund, subject to the reduction formula described herein ("Minimum CHRIA Payment"). *Id*. § 3.4(B).

The Settlement Agreement provides for additional monetary compensation, up to $35,000, for Participating CHRIA Class Members who submit documentation as evidence of lost income and mitigation. *Id*. § 3.4(B)(i). To be eligible to receive more than the Minimum CHRIA Payment, Participating CHRIA Class Members must submit the claim form and documentation establishing their wages for relevant years since their denial by SEPTA. *See* Ex. B (CHRIA Notice) ¶ 4; Ex. A (Settlement Agreement) § 3.4(B)(i). To the extent that Participating CHRIA Class Members made less than the yearly entry level salary for the job to which they applied, they are entitled to recover that difference up to a maximum of $35,000.00.[5] Ex. A (Settlement Agreement) § 3.4(B)(i).

FCRA Class Members who submit a timely and valid claim form ("Participating FCRA Class Members") are entitled to receive a flat payment of $250 from the Settlement Fund, subject to the reduction formula described herein. *Id*. § 3.4(A).

3. Priority Hiring for CHRIA Class Members

In addition to the monetary payment, SEPTA will establish a priority hiring process for CHRIA Class Members offering jobs to individuals who were denied based on the policy that SEPTA has agreed to revoke. *See id*. § 3.3(A). In order to qualify for priority hiring, CHRIA Class Members must submit a claim form indicating that they are interested in employment with SEPTA within the next year in the position for which they previously applied (or a substantially similar position) and were disqualified based on a criminal drug conviction ("Priority Hiring

[5] The CHRIA Notice provides CHRIA Class Members with examples of appropriate documentation. *See* Ex. B (CHRIA Notice) at 11.

Candidates"). *Id*. § 3.3(A)(i). Within thirty (30) days after the Effective Date, SEPTA will send a Priority Hiring Invitation Letter to all Priority Hiring Candidates inviting them to make an online submission through SEPTA's exclusive web portal established for the priority hiring process. *Id*. § 3.3(A)(ii). Priority Hiring Candidates will have three (3) months from the date of the invitation to make an online profile through the exclusive web portal. *Id*. § 3.3(A)(iii). SEPTA will also designate recruitment employee(s) to facilitate the process. *Id*. § 3.3(A)(v)(c).

For positions that have job openings, Priority Hiring Candidates who clear all requisite steps of SEPTA's ordinary hiring process will be hired on the date of the next available new employee orientation, or another date agreed to by the candidate.[6] *Id*. § 3.3(A)(v)(a).

4. Reduction Formula

In the event that the amount claimed by all Participating Class Members exceeds the amount of the Net Fund,[7] and the amount claimed by Participating FCRA Class Members exceeds $1,000,000, then the flat per person FCRA payment will first be reduced *pro rata* until the amount claimed by Participating FCRA Class Members equals no more than $1,000,000. *Id*. § 3.4(C). If, after that reduction, the amount claimed still exceeds the amount of the Net Fund (or if the amount claimed exceeds the amount of the Net Fund, but the amount claimed by Participating FCRA Class Members does not exceed $1,000,000), then all Participating Class

[6] For positions that do not have job openings, Priority Hiring Candidates who clear all requisite steps of SEPTA's ordinary hiring process will be placed in a pool of candidates, given a randomized number, and will be offered employment in numerical order (based on that randomized number) as it becomes available. *See* Ex. A (Settlement Agreement) § 3.3(A)(v)(b). Priority Hiring Candidates in the pool will be hired before any other applicants for a period of one year after being placed in the pool, except to the extent that doing so would violate any collectively bargained agreements between SEPTA and any union representing SEPTA employees. *Id*.

[7] The Net Fund is the Settlement Fund minus Court-approved attorneys' fees and expenses, Court-approved Service Awards to the Named Plaintiffs, any taxes which the Settlement Administrator is required to pay on SEPTA's behalf on W-2 settlement proceeds, and the Settlement Administrator's fees and expenses. Ex. A (Settlement Agreement) § 1.21.

Members will receive an equal *pro rata* reduction to their claimed amount, so that the amount claimed by Participating Class Members no longer exceeds the amount of the Net Fund. *Id*.

5. Unclaimed Funds

There is no reversion to SEPTA for unclaimed funds. Rather, should any funds remain in the Net Fund after the one-hundred and twenty (120) day check cashing deadline, then the remaining funds shall be distributed as follows:

First, any additional remaining funds, up to $150,000 will be allocated for additional Consultant work consistent with the scope of work negotiated by the Parties to be conducted by the Consultant both at the outset, and for any follow-up Consultant work within two years of the implementation of the Proposal (either in whole or in part). *Id*. § 3.5(A)(i). Second, any additional remaining funds shall be allocated to reimburse SEPTA for its initial Consultant work up to $50,000. *Id*. § 3.5(A)(ii). Third, any additional remaining funds will be used to make payments to Class Members who submitted untimely claim forms (should the Parties agree to accept their late claim forms).[8] *Id*. § 3.5(A)(iii). Fourth, any additional remaining funds will be redistributed to Participating Class Members, except that, to the extent it is not economically feasible to redistribute to all Participating Class Members, the redistribution will be limited to Participating CHRIA Class Members. *Id*. § 3.5(A)(iv).

6. Release

CHRIA Class Members who do not opt out will release SEPTA from all criminal history discrimination failure to hire claims against SEPTA that accrued during the period April 27, 2010, through August 26, 2018, including, without limitation, claims arising under Pennsylvania's Criminal History Record Information Act, 18 Pa. Cons. Stat. § 9125, Title VII of

[8] The Parties may at their discretion agree to allocate funds to late claims outside of this order. *See* Ex. A (Settlement Agreement) § 3.5(A)(iii).

the Civil Rights Acts of 1964, 42 U.S.C. §§ 2000e, *et seq.*, and the Pennsylvania Human Relations Act, 43 Pa. Stat. Ann. §§ 951, *et seq*. *Id*. § 5.1.

FCRA Class Members who do not opt out will release SEPTA from all claims against SEPTA that accrued during the period April 27, 2011, through August 26, 2018, under the Fair Credit Reporting Act, 15 U.S.C. §§ 1681, *et seq*. *Id*. § 5.2.

The Settlement Agreement further provides that, in consideration for Court-approved service awards, the Named Plaintiffs will agree to a general release. *Id*. § 5.3.

7. Service Awards and Attorneys' Fees and Costs

In addition to their individual awards under the allocation formula, Plaintiffs will request service award payments of $15,000 each ($45,000 total), in recognition of the services they have rendered to the Class over nearly five years of litigation and appeal. *Id*. § 3.7. The proposed Notice informs Class Members of the amount Plaintiffs will seek as service payments and the basis for their applications. *See* Ex. B (CHRIA Notice) ¶ 6; Ex. C (FCRA Notice) ¶ 4.

Plaintiffs expended significant time and effort working with Plaintiffs' Counsel to investigate, prosecute, and settle these claims. Miazad Decl. ¶ 23. Among other things, Plaintiffs responded to voluminous discovery and provided Plaintiffs' Counsel with critical and sensitive information regarding their job applications, employment histories, criminal convictions, and the policies and practices at issue in this case. *Id.* ¶ 24. Plaintiffs also took a significant risk by coming forward to represent the Class and adding their name to the public docket in this criminal history discrimination matter. *Id.* ¶ 25. Without these efforts, there would be no class-wide settlement. *Id.* ¶ 26.

Plaintiffs' Counsel will also request that the Court approve an award of one-third of the Settlement Fund ($1,200,000) for attorneys' fees, plus reasonable out of pocket litigation costs

and expenses. Ex. A (Settlement Agreement) § 3.7. Plaintiffs will move for Court approval of the Service Awards, and attorneys' fees and costs, along with their Motion for Final Approval.

8. Settlement Administration

Plaintiffs will select a Settlement Administrator (with approval by SEPTA) to distribute the Notice and Claim Form, Court-approved Service Awards, Court-approved attorneys' fees and costs, and settlement payments, and to otherwise administer the settlement. *See id*. § 2.2.

CLASS ACTION SETTLEMENT PROCEDURE

Rule 23's class action settlement procedure includes three distinct steps: (1) preliminary approval; (2) dissemination of notice; and (3) a final settlement approval hearing where class members may be heard regarding the settlement, and at which argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented. *See* Fed. R. Civ. P. 23(e); William B. Rubenstein, 4 Newberg on Class Actions ("Newberg") § 13:1 (5th ed. 2020). This process safeguards class members' procedural due process rights and enables the Court to fulfill its role as the guardian of the class's interests.

With this motion, Plaintiffs request that the Court take the first step: granting preliminary approval of the Settlement Agreement; conditionally certifying the Classes for settlement purposes; preliminarily approving Plaintiffs as Class Representatives; appointing Plaintiffs' Counsel as Class Counsel; and approving the proposed Notice and Claim Form and ordering its distribution. A proposed schedule for final resolution of this matter for the Court's consideration and approval is included in the Settlement Administration Appendix to the Settlement Agreement (*see* Ex. A (Settlement Agreement), at 22) and in the Proposed Order submitted with this motion. *See* Ex. G (Proposed Order).

ARGUMENT

I. Preliminary Approval of the Settlement is Appropriate.

Rule 23(e) of the Federal Rules of Civil Procedure ("Rules") requires judicial approval for any compromise of claims brought on a class-wide basis. *See* Fed. R. Civ. P. 23(e). "Judicial review of a proposed class action settlement is a two-step process: preliminary fairness approval and a subsequent fairness hearing." *Smith v. Prof'l Billing & Mgmt. Servs., Inc.*, No. 06 Civ. 4453, 2007 WL 4191749, at *1 (D.N.J. Nov. 21, 2007) (*citing Jones v. Commerce Bancorp Inc.*, No. 05 Civ. 5600, 2007 WL 2085357, at *2 (D.N.J. July 16, 2007)). The first step requires that a court make a preliminary evaluation of the fairness of the settlement before notice is permitted to issue to class members. *See Jones*, 2007 WL 2085357, at *2.

There is a presumption of fairness when a court determines that: "(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995). A court reviews whether: "the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys, and whether it appears to fall within the range of possible approval." *In re Nat'l Football League Players' Concussion Injury Litig.*, 301 F.R.D. 191, 198 (E.D. Pa. 2014); *see Klingensmith v. BP Prods. N. Amer., Inc.*, No. 07 Civ. 1065, 2008 WL 4360965, at *5 (W.D. Pa. Sept. 24, 2008) (preliminarily approving settlement after "arm's-length negotiation between experienced counsel aided by an experienced mediator"). This proposed settlement meets all relevant requirements.

A. The Parties Participated in Arm's-Length Negotiations.

Plaintiffs satisfy the first factor because the settlement was the product of extensive arm's-length negotiations over multiple years between counsel well versed in criminal history discrimination and FCRA class action litigation. Miazad Decl. ¶ 27. These negotiations included two mediations with experienced mediator Hon. Patricia McInerney (Ret.), where the Parties exchanged detailed mediation statements, data, and informal discovery. *Id*. ¶ 28.

B. The Parties Engaged in Sufficient Pre-Resolution Discovery.

The Parties participated in significant discovery prior to settlement, both formally and informally. With respect to this factor, the pertinent question is "whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 537 (3d Cir. 2004) (internal quotation marks omitted).

During the litigation, SEPTA produced over a thousand pages of documents and provided interrogatory responses which were crucial in identifying the various iterations of the screening policy in effect during the relevant period and understanding the process through which SEPTA applied the policy to Class Members. Miazad Decl. ¶ 29. Based on this discovery, the Parties were well-equipped to evaluate the strengths and weaknesses of their claims and defenses. *See In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 640 (E.D. Pa. 2003) (granting final approval where settlement was "based upon significant fact—gathering and investigation into the legal issues"); *Myers v. Jani-King of Philadelphia, Inc.*, No. 09 Civ. 1738, 2019 WL 2077719, at *3 (E.D. Pa. May 10, 2019) (granting preliminary approval where "counsel engaged in pre-filing research, an analysis of Plaintiffs' claims and Defendants' financial condition, and a review of class member documents"). Further, through the mediation process, the Parties also exchanged substantial informal discovery to allow them to further evaluate, and value, the claims at issue. Miazad Decl. ¶ 30. This factor also weighs in favor of preliminary approval.

C. Plaintiffs' Counsel Are Experienced and Well-Respected Class Litigators.

Plaintiffs' Counsel are experienced employment class action and civil rights litigators. Courts have routinely designated them as class counsel in employment class actions, including numerous criminal history discrimination and FCRA matters, and have recognized their expertise in this area. *See, e.g.*, *Mayer v. Driver Sols., Inc.*, No. 10 Civ. 1939, 2012 WL 453234, at *2 (E.D. Pa. Feb. 13, 2012) (appointing O&G as class counsel in criminal history discrimination action); *Times v. Target Corp.*, No. 18 Civ. 2993, 2018 WL 3238821, at *1 (S.D.N.Y. May 14, 2018) (approving O&G and non-profit partners as "experienced counsel" when preliminarily approving criminal background check settlement; granting final approval on Oct. 29, 2019); *Houser v. Pritzker*, 28 F. Supp. 3d 222, 248 (S.D.N.Y. 2014) (appointing O&G and Lawyers' Committee as class counsel in criminal history discrimination matter and noting that defendant "understandably does not dispute the qualifications of the team of lawyers representing the Plaintiffs."); *see also Woods v. Marler*, No. 17 Civ. 4443, 2018 WL 1439591 (E.D. Pa. Mar. 22, 2018) (appointing PILC among class counsel in civil rights case on behalf of inmates in the Philadelphia Federal Detention Center); *Rivera v. Lebanon Sch. Dist.*, No. 11 Civ. 147, 2012 WL 2504926 (M.D. Pa. June 28, 2012) (appointing PILC as class counsel on behalf of parents and students who paid illegally excessive truancy fines); Miazad Decl. ¶¶ 6-8 & Exs. D-F.

D. After Notice Issues, the Court Will Be in a Better Position to Weigh the Reaction of the Class.

The Court will be in a better position to weigh the reaction of the Class after notice issues and Class Members are given an opportunity to opt out or object, but Plaintiffs have already

shown their approval by signing the Settlement Agreement. *See In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 318 (3d Cir. 1998).

E. The Settlement Has No Obvious Deficiencies and Is Reasonable.

In addition to these indicia of fairness, the settlement has no obvious deficiencies and falls with the range of reason. *See In re Nat'l Football League*, 301 F.R.D. at 198.[9]

First, the settlement provides for substantial monetary awards and valuable injunctive relief for Class Members—especially during this period of economic hardship. Specifically, CHRIA Class Members will be eligible to obtain a substantial award of up to $35,000 and for priority hiring. FCRA Class Members will be eligible to obtain a flat payment of $250 to compensate them for their statutory damages, which is more than FCRA Class Members could potentially recover at trial and well exceeds many FCRA settlement recoveries.[10] *See* Ex. A (Settlement Agreement) § 3.4. The settlement also provides for meaningful changes to SEPTA's criminal history screening policy, including removing the criminal history bars that were the subject of this litigation and engaging an expert to assist SEPTA with its future screening policies and practices. *See id*. § 3.3. This relief is particularly significant when weighed against the risks associated with obtaining class certification, prevailing at the summary judgment and trial stages, proving damages, and litigating further appeals. Miazad Decl. ¶ 31. Even setting aside these risks, this case is nearly five years old and involves complex and evolving issues of

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[9] Plaintiffs will make a detailed presentation as to each of the relevant factors in their Motion for Final Approval. *See Jones*, 2007 WL 2085357, at *2 ("Preliminary approval is not binding, and it is granted unless a proposed settlement is obviously deficient.").

[10] *See* 15 U.S.C. § 1681n(a)(1)(A) (providing for statutory damages between $100-$1,000); *see also Domonoske v. Bank of Am., N.A.*, 790 F. Supp. 2d 466, 470, 477 (W.D. Va. 2011) (finally approving proportional payments up to $100, but no less than $2, for class members who submit claim forms); *Manuel v. Wells Fargo Bank, Nat'l Ass'n*, No. 14 Civ. 238, 2016 WL 1070819, at *2, *6 (E.D. Va. Mar. 15, 2016) (same where class members would receive either $35 or $75 dollars); *Syed v. M-I LLC*, No. 14 Civ. 742, 2016 WL 310135, at *2, *8-9 (E.D. Cal. Jan. 26, 2016) (same where class members would receive approximately $16).

law—litigating through judgment would likely take multiple years and involve expenditure of significant resources. *Id.* ¶ 32. This weighs in favor of preliminary approval.

Second, the settlement does not improperly favor any Class Members and fairly apportions settlement relief. All Class Members will receive a settlement award based on the same objective criteria and, while the Court need not evaluate them until final approval, the attorneys' fees and service award provisions are in line with established case law in this Circuit. *See Cullen v. Whitman Med. Corp*., 197 F.R.D. 136, 145 (E.D. Pa. 2000) ("[C]ourts routinely approve incentive awards to compensate named plaintiffs for services they provided and the risks they incurred during the course of the class action litigation.") (internal brackets and quotation marks omitted); *Godshall v. Franklin Mint Co.*, No. 01 Civ. 6539, 2004 WL 2745890, at *5, *8 & n.24 (E.D. Pa. Dec. 1, 2004); *Creed v. Benco Dental Supply Co.*, No. 12 Civ. 01571, 2013 WL 5276109, at *6-7 (M.D. Pa. Sept. 17, 2013).

II. The Court Should Conditionally Certify the Proposed Classes Under Rule 23.

After a preliminary evaluation of the fairness of the settlement, a court must determine if conditional class certification is appropriate. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621-22 (1997). At this stage, a court need only make a preliminary determination that the proposed class satisfies the criteria for class certification under Rules 23(a) and (b). *In re Ins. Brokerage Antitrust Litig.*, No. MDL 1663, 2007 WL 2589950, at *2-3 (D.N.J. Sept. 4, 2007), *aff'd*, 579 F.3d 241 (3d Cir. 2009); Manual for Complex Litigation § 21.633 (4th ed. 2004).

Plaintiffs respectfully request that the Court conditionally certify the following Classes:

> **CHRIA Class**: Applicants who applied to SEPTA for Covered Positions between April 27, 2010, and August 26, 2018, and were denied in whole or in part based on drug conviction(s). Excluded from the CHRIA Class are applicants with a violent felony conviction on their consumer report within two years of their application to SEPTA.

> **FCRA Class**: All applicants to SEPTA who were denied employment by SEPTA, from April 27, 2011, through August 26, 2018, because of their criminal history.

See Ex. A (Settlement Agreement) §§ 1.3, 1.14.

Under Rule 23, a class action may be maintained if all of the requirements of Rule 23(a) are met, as well as one of the requirements of Rule 23(b). Rule 23(a) requires that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a).

Rule 23(b)(2) requires the Court to find that 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. Fed. R. Civ. P. 23(b)(2). Rule 23(b)(3) requires the Court to find that: (1) questions of law or fact common to the members of the class predominate over any questions affecting only individual members; and (2) a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3).

Conditional settlement approval, class certification, and appointment of class counsel have practical purposes, including avoiding the costs of litigating class status while facilitating a global settlement, ensuring that all class members are notified of the terms of the proposed settlement, and setting the date and time of the final approval hearing. *See In re Gen. Motors Corp.*, 55 F.3d at 778, 784.

A. Plaintiffs Meet the Requirements of Rule 23(a).

1. Numerosity

Numerosity is satisfied when the class is "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Courts in the Third Circuit typically find that "classes of close to one hundred members are sufficient." *Jones*, 2007 WL 2085357, at *3 (*citing Eisenberg v. Gannon*, 766 F.2d 770, 785-86 (3d Cir. 1985)). Here, Plaintiffs easily satisfy the numerosity requirement given their estimate that there are approximately 1,200 potential FCRA Class Members and more than 300 potential CHRIA Class Members. *See* Miazad Decl. ¶ 33.

2. Commonality

The proposed Classes also satisfy the commonality requirement, the purpose of which is to test "whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). To demonstrate commonality, Plaintiffs must show that "the named plaintiffs share *at least one* question of fact or law with the grievances of the prospective class." *Stewart v. Abraham*, 275 F.3d 220, 227 (3d. Cir. 2001) (internal quotation marks omitted). All Class Members need not have identical claims or claims arising from the same factual scenario. *See In re Prudential Ins. Co.*, 148 F.3d at 310. Indeed, "factual differences among the claims of the putative class members do not defeat certification." *Id.* (internal quotation marks omitted).

Here, Class Members' claims stem from the creation and implementation of SEPTA's criminal history screening policy and Class Members share common legal theories. Whether SEPTA's criminal history screen violates the CHRIA, whether SEPTA willfully violated the CHRIA, and whether SEPTA failed to provide applicants with a copy of their consumer report under the FCRA are examples of common legal questions which will generate common answers

for the Class Members. *See Little v. Wash. Metro. Area Transit Auth.*, 249 F. Supp. 3d 394, 419 (D.D.C. 2017) (finding that class of applicants in lawsuit challenging employer's criminal history hiring screen satisfied the commonality requirement); *Houser*, 28 F. Supp. 3d at 243-45 (same); *Pickett v. Simos Insourcing Sols., Corp.*, No. 17 Civ. 1013, 2017 WL 3444755, at *1 (N.D. Ill. Aug. 10, 2017) (FCRA class satisfied commonality for settlement purposes).

3. Typicality

Typicality is satisfied where each class member's claims arise from the same course of events and each class member makes similar legal arguments to prove the defendant's liability. *Jones*, 2007 WL 2085357, at *3. The central inquiry is whether "the named plaintiff's individual circumstances are markedly different or . . . the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based." *Baby Neal for & by Kanter v. Casey*, 43 F.3d 48, 57-58 (3d Cir. 1994) (internal quotation marks omitted). The requirement is met where "the plaintiff and each member of the represented group have an interest in prevailing on similar legal claims." *Seidman v. Am. Mobile Sys., Inc.*, 157 F.R.D. 354, 360 (E.D. Pa. 1994).

Plaintiffs easily satisfy this requirement because, like the Class Members, they allege that they applied to Covered Positions at SEPTA during the relevant period and were denied employment pursuant to SEPTA's blanket screening policy, and that SEPTA failed to provide them with a copy of their background check prior to denying them employment. *See* ECF No. 66 (SAC) ¶¶ 36-68. They are each a member of both Classes.

4. Adequacy

Plaintiffs are also adequate representatives. *See* Fed. R. Civ. P. 23(a)(4). Plaintiffs suffered the same injury as the Class Members and share Class Members' interest in establishing the unlawfulness of SEPTA's screening policy (including SEPTA's alleged failure to provide

timely copies of their consumer reports) and obtaining monetary and injunctive relief. *See Amchem Prods.*, 521 U.S. at 625 ("The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent."); *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) ("class representative must be part of the class and possess the same interest and suffer the same injury").

B. Certification is Proper Under Rule 23(b)(2) and (b)(3).

In addition to satisfying the 23(a) requirements, Plaintiffs meet the requirements under 23(b)(2) and (b)(3). Plaintiffs' claim for injunctive relief under the CHRIA may be certified under Rule 23(b)(2), which permits certification where the defendant 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." Fed. R. Civ. P. 23(b)(2). Plaintiffs' claims for monetary damages may be certified under Rule 23(b)(3), which provides that a class may be certified where common issues predominate over individual issues and the class mechanism is superior to individual proceedings. Fed. R. Civ. P. 23(b)(3); *see Osgood v. Harrah's Entm't, Inc.*, 202 F.R.D. 115, 129-30 (D.N.J. 2001) (approving a "hybrid" or "bifurcated" procedure, under which the court certifies a Rule 23(b)(2) class for that portion of the case addressing injunctive relief and a Rule 23(b)(3) class for the portion of the case addressing damages); Newberg § 4.38 (discussing the court's authority to certify hybrid claims under Rule 23(b)(2) and (b)(3)).

Plaintiffs' CHRIA claim for injunctive relief satisfies Rule 23(b)(2) because SEPTA applied the screening policy uniformly to all members of the Class and thus the Class as a whole shares the same interest in obtaining the injunctive relief provided by the settlement. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) ("The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct

is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.") (internal quotation marks omitted).

Plaintiffs' claims for monetary relief satisfy Rule 23(b)(3) because common issues predominate over individual ones and adjudication on a class-wide basis is superior to individual proceedings. *See In re Prudential Ins. Co.*, 148 F.3d at 313-14.

1. Common Issues Predominate.

Predominance ensures that a "class is sufficiently cohesive to warrant adjudication by representation." *In re LifeUSA Holding, Inc.*, 242 F.3d 136, 144 (3d Cir. 2001). Courts in this district have held that "[p]redominance is readily satisfied, where the core claims asserted by each Class member all arise out of the same transaction or occurrence . . . ." *Bonett v. Educ. Debt Servs., Inc.*, No. 01 Civ. 6528, 2003 WL 21658267, at *4 (E.D. Pa. May 9, 2003).

Here, Plaintiffs' common contentions—that SEPTA's criminal screening policy was used to deny employment opportunities to applicants absent the evaluation required by the CHRIA, and that SEPTA violated the FCRA by failing to provide applicants with a copy of their consumer report—predominate over any issues affecting only individual Class Members. *See Times*, 2018 WL 3238821, at *1 (finding allegations that defendants excluded applicants based on criminal history predominated for settlement purposes); *Easterling v. Conn. Dep't of Corr.*, 278 F.R.D. 41, 48-50 (D. Conn. 2011) (finding predominance satisfied as to whether challenged physical fitness test had disparate impact on female applicants or was justified by business necessity); *Pickett*, 2017 WL 3444755, at *1 (predominance satisfied in FCRA class settlement). Moreover, the claims of the Class stem from the same transaction or occurrence—Defendants' application of the policy to screen applicants with criminal histories. Because these questions predominate, this factor weighs in favor of class certification.

2. A Class Action is a Superior Method of Adjudication.

The superiority requirement asks the Court "to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication." *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 632 (3d Cir. 1996) (internal quotation marks omitted). Class actions are particularly appropriate where the potential recovery for each class member is small. *See Amchem Prods.*, 521 U.S. at 617.

Here, a class action is the superior method of adjudication because individual class members likely do not have the resources to litigate their claims individually, especially given the relatively small damages they could expect to recover, and the hurdles to recovery. Miazad Decl. ¶ 34; *see* 15 U.S.C. § 1681n(a)(1)(A) (statutory damages for willful violations of the FCRA capped at $100 to $1,000). A class action, on the other hand, alleviates these problems by providing notice to potential claimants of their rights and allowing them to consolidate their resources in a single action.

III. Plaintiffs' Counsel Should Be Appointed as Class Counsel.

O&G, Lawyers' Committee, PILC, and WW&D should be appointed as Class Counsel. Rule 23(g) sets forth four criteria that courts must consider in evaluating the adequacy of proposed class counsel: (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel's experience in handling class actions and claims of the type asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A). Plaintiffs' Counsel meet all relevant criteria. They did substantial work identifying, investigating, prosecuting, and settling the claims; have substantial experience prosecuting and settling employment class

actions and civil rights litigation; are well-versed in class action law; and are well-qualified to represent the interests of the class. *See supra* Argument, §§ I.A-C.

IV. The Proposed Class Notice is Appropriate.

The proposed Notice fully complies with due process and Rule 23. *See* Ex. B (CHRIA Notice); Ex. C (FCRA Notice). Notices must provide "the best notice that is practicable under the circumstances" stating "concisely and clearly . . . 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 counsel 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).

Fed. R. Civ. P. 23(c)(2)(B). The Notice provides all required points of information in clear, concise and easily grasped language, and is based on models provided by the Federal Judicial Center. *See* Exs. B & C; *see also Camesi v. Univ. of Pittsburgh Med. Ctr.*, No. 09 Civ. 85J, 2009 WL 1929873, at *1 (W.D. Pa. July 1, 2009). It also provides information regarding the range of potential settlement awards, the allocation formula, and the allocation of attorneys' fees and costs, and notifies class members of the date, time, and place of the Fairness Hearing and how to object to or exclude oneself from the settlement. This information puts class members on notice of the settlement and meets Rule 23(c)(2)(B)'s requirements.

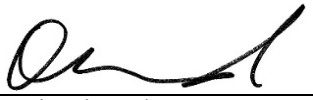
Moreover, the Settlement Agreement provides that the Notice and Claim Form will be distributed via U.S. mail and e-mail, with re-mailings for undeliverable Notices, and reminders for Class Members who have not responded to the settlement after thirty days. Ex. A (Settlement Agreement) § 4.1. Class Members may submit claim forms via mail (in postage pre-paid envelopes provided with the claim form), email, fax, or through a standalone case website. Together, this notice process constitutes the best notice practicable under the circumstances.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court preliminarily approve the Settlement Agreement, conditionally certify the Classes, preliminarily appoint Plaintiffs as Class Representatives, appoint Plaintiffs' Counsel as Class Counsel, approve the Notice and Claim Form, and direct its distribution, and enter the Proposed Order.

Dated: January 15, 2021
New York, New York

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement, Conditional Certification of Settlement Classes, Appointment of Class Counsel, and Approval of Plaintiffs' Proposed Notice of Settlement was served on this 15th day of January, 2021, upon counsel of record via the Court's ECF filing system.

/s/ Ossai Miazad
Ossai Miazad