

NO. 88036-1

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

2013 JUN -3 P 4: 37

SUPREME COURT OF THE STATE OF WASHINGTON

BY RONALD R. CARPENTER

CLERK

Aaron Hundtofte and Kent Alexander,

Plaintiffs,

v.

Ignacio Encarnación and N. Karla Farías,

Defendants/Petitioners,

v.

King County Superior Court Office of Judicial Administration

Intervenor/Respondent.

---

**BRIEF OF DEFENDANT-PETITIONERS IGNACIO ENCARNACIÓN  
AND N. KARLA FARÍAS IN RESPONSE TO BRIEF OF  
AMICI CURIAE ALLIED DAILY NEWSPAPERS, WASHINGTON  
NEWSPAPER ASSOCIATION, AND WASHINGTON  
COALITION FOR OPEN GOVERNMENT**

---

Allyson O'Malley-Jones, WSBA #31868

Eric Dunn, WSBA #36622

Leticia Camacho, WSBA #31341

**NORTHWEST JUSTICE PROJECT**

401 Second Ave S. Suite 407

Seattle, Washington 98104

Tel. (206) 464-1519

Respondent Ignacio Encarnación and N. Karla Farías

 ORIGINAL

## TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	ii
I. Introduction .....	1
II. Argument .....	1
A. An unlawful detainer record significantly diminishes a person's rental housing opportunities, regardless of the underlying merits or disposition of the case .....	2
B. Adding explanatory details to the court indices would not have materially improved Encarnación's and Farías's ability to obtain rental housing .....	4
C. Redaction is effective despite limited access .....	6
D. Replacing party names with initials in the on-line judicial indices is not tantamount to judicial misrepresentation .....	11
E. Redaction of party names from the court's on-line indices does not violate the First Amendment .....	12
F. The evidence showing that Encarnación and Farías lacked culpability was persuasive and should not be discounted simply because it was not contested below .....	16
III. Conclusion .....	20
Appendix	

## TABLE OF AUTHORITIES

	<u>Page</u>
<b><u>Constitutional Provisions</u></b>	
Wash. St. Const., Art. I, Sec. 7 .....	2
<b><u>Statutes</u></b>	
Laws of 2012, Ch. 41, § 1 .....	12
RCW 19.182.060(2) .....	8, 12
RCW 19.182.090(5) .....	8
RCW 59.12.030 .....	18
RCW 59.12.030(1) .....	18
RCW 59.12.030(2) .....	18
RCW 59.12.030(3) .....	18-19
RCW 59.12.030(4) .....	18-19
RCW 59.12.030(5) .....	18
RCW 59.12.030(7) .....	18
RCW 59.18.180 .....	18
15 USC 1681b .....	20
15 USC 1681c .....	13
<b><u>Court Rules (Washington)</u></b>	
CR 40(a)(5) .....	16
GR 14.1(b) .....	8
GR 15 .....	7, 16- 17, 19
GR 15(c)(4) .....	7

## TABLE OF AUTHORITIES

	<u>Page</u>
GR 15(c)(5) .....	7
GR 31(a) .....	2
GR 31(e) .....	15
JISCR 15 .....	2, 12
RPC 3.3(f) .....	16
 <b><u>Court Rules (Non-Washington)</u></b>	
Cal. Code of Civ. Proc. 1161.2 .....	15
Cal. Code of Civ. Proc. 1161.2(a)(6) .....	15
Federal Rule of Appellate Procedure 32.1 .....	8
Southern District of New York Local Civil Rule 7.2 .....	8
 <b><u>Judicial Decisions</u></b>	
<i>Ali v. Vikar Management, Ltd.</i> , 994 F.Supp. 492 (S.D.N.Y. 1998) .....	20
<i>Allied Daily Newspapers v. Eikenberry</i> , 121 Wn.2d 205; 848 P.2d 1258 (1993) .....	15
<i>Bellevue John Does 1-11 v. Bellevue School Dist.</i> , 164 Wn.2d 199; 189 P.3d 139 (2008) .....	15, 17
<i>Bellevue John Does 1-11 v. Bellevue School Dist.</i> , 129 Wn. App.832; 120 P.3d 616 (2005) .....	15
<i>City of Tacoma v. Tacoma News, Inc.</i> , 65 Wn. App. 140; 827 P.2d 1094 (1992) .....	17
<i>Cowles Publishing Co. v. Murphy</i> , 96 Wn.2d 584; 637 P.2d 966 (1981) .....	15
<i>Crafts v. Pitts</i> , 161 Wn.2d 16; 162 P.3d 382 (2007) .....	5

## TABLE OF AUTHORITIES

	<u>Page</u>
<i>Dun &amp; Bradstreet, Inc. v. Greenmoss Builders</i> , 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985) .....	13
<i>Hundtofte v. Encarnación</i> , 169 Wn. App. 498, 280 P.3d 513 (2012) .....	17
<i>King v. General Information Systems, Inc.</i> , ___ F.Supp.2d ___, 2012 WL 5426742 (E.D.Pa.) .....	13, 14
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254; 84 S.Ct. 710; 11 L.Ed.2d 686 (1964) .....	13
<i>Saunders v. Equifax Information Services, LLC</i> , 469 F.Supp.2d 343, 356 (E.D.Va. 2007) .....	8
<i>Seattle Times Co. v. Ishikawa</i> , 97 Wn.2d 30; 640 P.2d 716 (1982) .....	2, 7, 16
<i>State v. Duckett</i> , 141 Wn. App. 797; 173 P.3d 948 (2007) .....	17
<i>Stella Sales, Inc. v. Johnson</i> , 97 Wn. App. 11; 985 P.2d 231 (1999) .....	16
<i>Transunion Corp. v. Federal Trade Commission</i> , 267 F.3d 1138 (2001) .....	13
<i>U.D. Registry v. California</i> , 34 Cal.App.4th 107; 40 Cal.Rptr.2d 228 (1995) .....	13-14
<i>U.D. Registry v. State</i> , 144 Cal.App.4th 405; 50 Cal.Rptr.3d 647 (2001) .....	14
<i>White v. First American Registry, Inc.</i> , 2007 WL 703926 (S.D.N.Y.) .....	8-9
 <b><u>Other Authorities</u></b>	
Access to Justice Technology Principle No. 3 .....	2

**TABLE OF AUTHORITIES**

	<u>Page</u>
Keller, Michael, “State to stop selling tenant names to landlord screening companies,” <i>New York World</i> (Apr. 26, 2012).	10
Kleystauber, Rudy, “Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records,” 116 <i>Yale L.J.</i> 1344, 1363 (2007) .....	5, 10, 12
Levin, Sam Thu, “Courts will stop selling information that landlords use in ‘Tenant Blacklists,’” <i>Village Voice</i> (Apr. 26, 2012) .....	9
Prudenti, Chief Administrative Judge A. Gail, Letter to Senator Liz Krueger (Apr. 10, 2012) .....	10
Rogers, Teri Karush, “Only the strongest survive,” <i>New York Times</i> (Nov. 26, 2006) .....	9

## **I. Introduction**

Petitioners Ignacio Encarnación and Karla Farías submit this brief in response to the Amici Curiae Allied Daily Newspapers of Washington, Washington Newspaper Publishers Association and Washington Coalition for Open Government (hereafter “Amici”).

## **II. Argument**

The superior court’s order directing the King County Clerk to replace Ignacio Encarnación’s and Karla Farías’s full names in the judicial databases available to the public on-line, and to replace those names with their first and last initials, interfered only slightly with the public’s ability to oversee and evaluate the court’s administration of justice.<sup>1</sup> The full names remain intact on all the pleadings, orders, and other documents in the court file—which remains fully unsealed and open to the public. The case is still accessible on-line using the defendants’ initials, the plaintiffs’ names, or the cause number, or in a bulk distribution of court records. All the redaction does is prevent members of the public from being able to learn, simply by running name queries in the electronic superior court indices, that Encarnación and Farías were sued for unlawful detainer.

Amici argue this modest redaction would have “erect[ed] an impossible barrier to public access,” while contradictorily maintaining that

---

<sup>1</sup> CP 727-733.

because the file remains readily available to the public, the redaction would not have effectively safeguarded Encarnación's and Farías's ability to obtain housing.<sup>2</sup> Amici even argue sweepingly that Encarnación's and Farías's privacy rights do not extend to electronic court records. Yet the redaction here would have helped Encarnación and Farías obtain housing, because it would have made tenant-screeners—who look up eviction suits by running name queries in the on-line judicial databases whenever rental applications are submitted—unlikely to find this case and associate it with Encarnación and Farías.<sup>3</sup> And it would have achieved this privacy-related benefit without excessively limiting public access, because balancing the public's ability to oversee and evaluate the administration of justice against threats to individual privacy interests has long been at the heart of this Court's pronouncements on electronic court records.<sup>4</sup>

**A. An unlawful detainer record significantly diminishes a person's rental housing opportunities, regardless of the underlying merits or disposition of the case.**

---

<sup>2</sup> Br. of Amici Curiae Allied Daily Newspapers, et al., at 12.

<sup>3</sup> CP 175-189, 252-256, 731-732.

<sup>4</sup> See *Seattle Times v. Ishikawa*, 97 Wn.2d 30, 39; 640 P.2d 716 (1982) (order denying public access to a court record must be “no broader in its application or duration than necessary to serve its purpose”); see JISCR 15 (“It is declared to be the policy of the courts to facilitate public access to court records, provided such disclosures in no way present an unreasonable invasion of personal privacy and will not be unduly burdensome to the ongoing business of the courts.”); see GR 31(a) (“Access to court records is not absolute and shall be consistent with reasonable expectations of personal privacy as provided by Art. 1, Sec. 7 of the Wash. St. Const. and shall not unduly burden the business of the courts.”); Access to Justice Technology Principle No. 3 (“The justice system has the dual responsibility of being open to the public and protecting personal privacy. Its technology should be designed and used to meet both responsibilities.”).

The on-line court indices showing that Encarnación and Farías were sued for unlawful detainer in 2009 markedly diminish their housing opportunities. This is an actual and substantial harm that will affect them for as long as the record remains open to the public. This harm acutely affected them at the time of their motion, because they did not have stable or suitable housing and were unable to obtain it due to the case record.<sup>5</sup>

Amici contend that Encarnación and Farías have only “generalized fears” of being denied housing because they did not have specific rental applications pending at the time of their motion.<sup>6</sup> But rental applications are typically processed within a matter of minutes or hours, or at most a couple of days, so Encarnación and Farías could not practically have waited to bring their redaction motion until an application was pending.

Amici also argue that Encarnación and Farías might have found a landlord who would have been willing to accept them as tenants despite the eviction case. This may be true, but does not mean that Encarnación’s and Farías’s housing prospects were not seriously diminished, or that they were not limited to less desirable properties with less-selective admissions policies. Moreover, at the time of their motion Encarnación and Farías were not aware of any suitable property that might accept them despite the

---

<sup>5</sup> CP 729-730.

<sup>6</sup> Br. of Amici Allied Daily Newspapers et al. at 5-6.

eviction suit—and to find one, they would have had to blindly submit applications (at substantial expense) and hope to get lucky.<sup>7</sup> The superior court was within its discretion not to require such dubious actions.

**B. Adding explanatory details to the court indices would not have materially improved Encarnación’s and Farías’s ability to obtain rental housing.**

Amici argue that the way to keep landlords from unfairly rejecting rental applicants based on unlawful detainer suits is to “provide *more* information, not less.”<sup>8</sup> Instead of redacting Encarnación’s and Farías’s names from the on-line indices, they say, the superior court should just add explanatory details to the database, such as a “no eviction notation.”<sup>9</sup> Adding such a notion into the court databases, however, would not protect Encarnación’s and Farías’s ability to obtain rental housing.

As Amici themselves acknowledge, many Washington housing providers presume that if a previous landlord went to the time and expense to bring an eviction suit against a tenant, then that tenant is not desirable—whether or not the action was, in fact, meritorious.<sup>10</sup> Some such landlords simply wish to avoid spending time and resources to obtain details about eviction suits and attempt to distinguish between the culpable tenants and

---

<sup>7</sup> CP 95.

<sup>8</sup> Brief of Amici Allied Daily Newspapers et al. at 2.

<sup>9</sup> Br. of Amici Allied Daily Newspapers et al. at 14.

<sup>10</sup> Br. of Amici Allied Daily Newspapers et al. at 11; CP 24.

the non-culpable. Others more cynically view tenants who prevail in eviction suits as even more undesirable—as litigious, “activist” tenants.<sup>11</sup> Whatever the rationale, the end result is that housing providers often deny applicants with eviction suits on a reflexive, categorical basis. Where such policies are common, adding a “no eviction” notation—or even detailed information showing that a tenant was innocent—to the on-line databases makes no appreciable difference. Such details are simply not relevant to leasing decisions, which are seldom made with objective fairness in mind.

Not only did Encarnación and Farías have good reason to believe they would be denied housing under such categorical policies due to their unlawful detainer record, but they were actually turned down for housing to which they applied—and which they desperately needed for themselves and their family—because of that record.<sup>12</sup> They were turned down even though they lacked culpability, even though they settled their case on favorable terms, even though the court never made any adverse findings against them, and even though they had a favorable reference from the

---

<sup>11</sup> See, e.g., Kleystauber, Rudy, “Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records,” 116 Yale L.J. 1344, 1363 (2007).

<sup>12</sup> CP 42, 95; see also *Crafts v. Pitts*, 161 Wn.2d 16, 24-26; 162 P.3d 382 (2007) (denial of interest in real property is irreparable harm that has no adequate remedy at law).

very landlords who sued them.<sup>13</sup> None of this mattered, because the landlord to whom they applied had a policy of rejecting any applicant who had been sued for eviction.<sup>14</sup> Successive housing rejections may have created a stronger record, but were not necessary to establish that blanket “no evictions” policies were in use by residential landlords in Burién, where Encarnación and Farías had been living and wished to remain.<sup>15</sup>

In a footnote, Amici also contend that the court databases did not actually reveal the case to housing providers because Farías’ name was misspelled and Encarnación’s name was entered backwards.<sup>16</sup> But these minor clerical errors did not prevent the case from being discovered when Encarnación and Farías applied for housing.<sup>17</sup> The superior court was thus within its discretion to find redaction to their initials was necessary.

### **C. Redaction is effective despite limited public access.**

An unlawful detainer defendant whose name is absent from the on-line superior court indices is significantly less likely to be rejected (based on the filing) because many tenant-screeners rely on those indices to find eviction suits.<sup>18</sup> The full names continue to appear on records inside the

---

<sup>13</sup> CP 90-92, 730.

<sup>14</sup> CP 95.

<sup>15</sup> CP 42, 95, 730.

<sup>16</sup> Br. of Amici Allied Daily Newspapers et al. at 6 (fn 2); CP 105-111.

<sup>17</sup> CP 42, 95.

<sup>18</sup> CP 175-189, 252-256, 731-732.

publicly-available court file, and thus an uncommonly diligent background checker may yet detect the suit. But this is not a reason to deny relief; *Ishikawa* requires only an “effective” remedy, not a perfect one.<sup>19</sup>

Furthermore, even if redacting only the on-line indices would not protect Encarnación’s and Farías’s housing opportunities, that would only make broader relief appropriate—such as deleting their names from all the documents in the court file, or even sealing the file altogether. GR 15 contemplates such far-reaching measures.<sup>20</sup> But *Ishikawa* also requires that a remedy interfere as minimally as possible with public access, while still being effective.<sup>21</sup> So long as tenant-screeners continue relying upon the on-line indices to detect eviction suits, redacting those indices is probably sufficient to protect innocent tenants’ access to housing.

Amici argue that redaction is futile because Encarnación’s and Farías’s names have already been entered into the on-line databases, and could have been downloaded or otherwise recorded and kept on private lists outside the court system. Again, however, evidence shows that screeners often search for eviction filings by running name queries in the

---

<sup>19</sup> See *Ishikawa*, 97 Wn.2d at 39.

<sup>20</sup> See GR 15(c)(4) (procedures for sealing an entire court file), (5) (procedures for sealing entire court documents within a court file).

<sup>21</sup> See *Ishikawa*, 97 Wn.2d at 39.

superior court databases at the time a rental application is submitted.<sup>22</sup>

And though some screeners do maintain unlawful detainer information in their own private systems, the Fair Credit Reporting Act requires such records be kept up-to-date and that unverifiable information be deleted.<sup>23</sup>

Thus, a tenant-screener that keeps its own database of unlawful detainer information might still have Encarnación's and Fariás' names even after the judicial indices are redacted—but that record would disappear from the private database the next time its contents are refreshed.<sup>24</sup>

Indeed, redacting the on-line indices functions similarly to a solution the New York Housing Court settled upon in 2012, to address an identical problem concerning the use of its records in tenant-screening.<sup>25</sup> For years, tenant screeners had used that court's records “to create lists, which landlords and real estate management agents use to filter out tenants” who had

---

<sup>22</sup> CP at 19-26, 29-37, 97-99.

<sup>23</sup> See RCW 19.182.060(2); see RCW 19.182.090(5); see generally *Saunders v. Equifax Information Services, LLC*, 469 F.Supp.2d 343, 356 (E.D.Va. 2007) (“The FCRA is designed to protect consumers from inaccurate information in consumer reports by establishing credit reporting procedures which utilize correct, relevant and up-to-date information in a confidential and responsible manner.”), internal citation omitted.

<sup>24</sup> Alternatively, redacting a tenant's name from the court database could prevent a screener from verifying the case record, thus requiring deletion per RCW 19.182.090(5).

<sup>25</sup> *White v. First American Registry, Inc.*, 2007 WL 703926 at 1 (S.D.N.Y. 2007). Citation of this opinion is permissible under GR 14.1(b) because the Southern District of New York permits citations to cases reported only electronically under Local Civil Rule 7.2, as do federal appellate courts under F.R.A.P. 32.1. A copy is appended.

been sued for eviction.<sup>26</sup> As one federal judge observed, “risk averse landlords [were] all too willing to use such consumer reports as a ‘blacklist,’ refusing to rent to anyone whose name appears on it regardless of whether the existence of a litigation history in fact evidences characteristics that would make one an undesirable tenant.”<sup>27</sup> Media accounts further corroborated the devastating effects of mere eviction filings on tenants’ future housing prospects; for instance, the founder of one nationwide tenant-screening company explained:

“It is the policy of 99 percent of our customers in New York to flat out reject anybody with a landlord-tenant record, no matter what the reason is and no matter what the outcome is, because if their dispute has escalated to going to court, an owner will view them as a pain.”<sup>28</sup>

The widespread use of court records in this manner not only kept blameless defendants from obtaining rental housing, but also “translated into people fearing going to housing court...because they are terrified of being blacklisted.”<sup>29</sup> This phenomenon undermined public policy by “attach[ing] excessive stigma to involvement in the legal process and thus

---

<sup>26</sup> Levin, Sam Thu, “Courts will stop selling information that landlords use in ‘Tenant Blacklists,’” *Village Voice*, Apr. 26, 2012, available on-line at: [http://blogs.villagevoice.com/runninscared/2012/04/courts\\_will\\_sto.php](http://blogs.villagevoice.com/runninscared/2012/04/courts_will_sto.php)

<sup>27</sup> *White v. First American Registry*, 2007 WL 703926 at 1.

<sup>28</sup> See, e.g., Rogers, Teri Karush, “Only the strongest survive,” *New York Times* (Nov. 26, 2006); available on-line at: [http://www.nytimes.com/2006/11/26/realestate/26cov.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2006/11/26/realestate/26cov.html?pagewanted=all&_r=0)

<sup>29</sup> Levin, Sam Thu, *supra*.

discourag[ing] tenants from vindicating the very rights that legislatures have gone to great pains to protect, and courts to enforce.”<sup>30</sup> Thus, the court ultimately announced it would stop releasing unlawful detainer records electronically.<sup>31</sup> Though the records remained available to the public through other avenues, removing the data from electronically-accessible court databases helped tenants by “mak[ing] it so that landlords could not simply cross-check every person who wants an apartment with a centralized list.”<sup>32</sup>

Redacting Encarnación’s and Farías’s names from the superior court’s on-line indices similarly made it so that Washington tenant-screeners cannot simply cross-check their names against a centralized list of unlawful detainer defendants. In practical terms, the superior court’s order differs from the New York measure only in that the redaction is temporary, applies to this case only, and still leaves extensive information available electronically (including the plaintiffs’ names, the cause number, and the defendants’ initials).

---

<sup>30</sup> See Kleystauber, 116 Yale L.J. at 1363.

<sup>31</sup> See Letter from Chief Admn. Judge A. Gail Prudenti to Senator Liz Krueger, Apr. 10, 2012, available on-line at: <https://www.documentcloud.org/documents/347858-letter-from-judge-prudenti.html>, see also Keller, Michael, “State to stop selling tenant names to landlord screening companies,” *New York World* (April 26, 2012), available on-line at: <http://www.thenewyorkworld.com/2012/04/26/state-to-stop-selling-tenant-names-to-landlord-screening-companies/>

<sup>32</sup> *Id.*

**D. Replacing party names with initials in the on-line judicial indices is not tantamount to judicial misrepresentation.**

Substituting Encarnación's and Farías's names in the court index with their initials hardly makes the court complicit in a falsehood, as Amici contend. Superior court database users must acknowledge a set of disclaimers before proceeding to the search screen, including that the courts "do not warrant that the information is accurate or complete [or] in its most current form" and "make no representations regarding the identity of any person whose name appears on these pages."<sup>33</sup> The same page warns that the on-line database "is provided for use as reference material and is not the official court record," and directs users to "consult official case records from the court of record to verify all provided information."<sup>34</sup>

A tenant-screener that routinely verifies database information by checking actual case files is hardly burdened by the redaction ordered here; that screener would match Encarnación's and Farías's initials to their names once the full case records are obtained. Only a user who ignores the court's warnings and disclaimers, and irresponsibly assumes the on-line indices will always reveal the full names of every person sued for

---

<sup>33</sup> CP 113.

<sup>34</sup> CP 113.

unlawful detainer, could possibly construe the redaction of parties' names as misleading or "creating a false impression."<sup>35</sup>

Tenant-screeners may prefer to rely solely on court databases to ascertain whether applicants have performed poorly in prior tenancies, and routinely neglect to verify the information or obtain further details from the official case files, but this is ultimately an abuse of court records—not a practice that the Court should protect. As the Legislature has observed, such perfunctory practices have made tenant-screening reports unreliable, particularly with respect to eviction court records.<sup>36</sup> No court has a duty, or even a good reason, to facilitate shoddy background checks. No court has any reason to accommodate cursory data-mining practices at odds with the mandatory acknowledgments required for access to electronic records. And no court should facilitate decision-making based on stigmas and stereotypes—especially when the cumulative effect of such practices chills litigants from fair and appropriate access to that very court.<sup>37</sup>

**E. Redaction of party names from the court's on-line indices does not violate the First Amendment.**

---

<sup>35</sup> Br. of Amici Allied Daily Newspapers et al. at 1.

<sup>36</sup> Laws of 2012, Ch. 41, Sec. 1 ("tenant screening reports purchased from tenant screening companies may contain misleading, incomplete, or inaccurate information, such as information relating to eviction or other court records"); see also RCW 19.182.060(2) (requiring "reasonable procedures to assure the maximum possible accuracy" of information transmitted in consumer reports).

<sup>37</sup> See JISCR 15; see also Kleystauber, 116 Yale L.J. at 1363-1364.

Consumer reporting agencies have challenged the federal Fair Credit Reporting Act—a law which, among other things, prohibits the reporting of certain true information after certain time limits—on First Amendment ground several times.<sup>38</sup> Yet the FCRA has survived each of these challenges; consumer reports generally entail commercial speech subject to intermediate scrutiny,<sup>39</sup> and the FCRA directly advances substantial government interests in protecting consumer privacy and preventing credit, housing, and employment decisions from being tainted by obsolete or unfairly-stigmatizing information.<sup>40</sup>

The case cited by Amici, *U.D. Registry v. California* (or *UD Registry I*), is unusual in that the panel deviated from settled law to decide, in a First Amendment challenge to a California statute prohibiting the reporting of unsuccessful eviction suits, that a consumer report *does not* constitute commercial speech.<sup>41</sup> The *U.D. Registry I* court thus reviewed the statute under strict scrutiny—the same level of analysis pertinent to

---

<sup>38</sup> See *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749; 105 S.Ct. 2939; 86 L.Ed.2d 593 (1985); see *Transunion Corp. v. Federal Trade Commission*, 267 F.3d 1138 (2001); see *King v. General Information Systems, Inc.*, \_\_\_ F.Supp.2d \_\_\_, 2012 WL 5426742 at 3 (E.D.Pa.).

<sup>39</sup> See *Dun & Bradstreet*, 472 U.S. at 462 (“There is simply no credible argument that this type of credit reporting requires special protection to ensure that ‘debate on public issues will be uninhibited, robust, and wide-open.’”), quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270; 84 S.Ct. 710; 11 L.Ed.2d 686 (1964).

<sup>40</sup> See *King*, 2012 WL 5426742 at 5 (“[T]he federal government enacted section 1681c of the FCRA to provide businesses with the most accurate and relevant information while simultaneously protecting the privacy rights of consumers.”).

<sup>41</sup> See *U.D. Registry v. California*, 34 Cal.App.4th 107, 111; 40 Cal.Rptr.2d 228 (1995).

political debate and other speech on matters of public concern—and ultimately struck it down.<sup>42</sup>

*U.D. Registry I* remains the only decision to have found consumer reporting laws subject to strict scrutiny. A recent federal decision, *King v. General Information Systems*, treated consumer reports (specifically, of dismissed criminal charges) as commercial speech, as did a different division of the California Court of Appeals in *U.D. Registry II* (which concerned a “security freeze” law California had enacted for identity theft victims).<sup>43</sup> But more importantly, even *U.D. Registry I* did not hold—as Amici argue here—that the First Amendment obligates courts to publish unlawful detainer records in the first instance.

On the contrary, *U.D. Registry I* actually said the exact opposite: that restricting the initial dissemination of lawsuit information from the courts to the public would be an appropriate way to protect tenants’ privacy rights *without* violating the First Amendment:

Concern about the availability of rental housing for those needing housing, and particularly those facing eviction, is a valid and significant state interest. But ... [t]he information is in the custody of the state. If the state is concerned about dissemination of this information, it has the power to control its initial release. [T]he government may classify the information, establish procedures for its redacted

---

<sup>42</sup> See *U.D. Registry*, 34 Cal.App.4<sup>th</sup> at 113-114.

<sup>43</sup> See *King*, 2012 WL 5426742 at 3; see *U.D. Registry v. State*, 144 Cal.App.4<sup>th</sup> 405, 420; 50 Cal.Rptr.3d 647 (2001).

release, and extend a damages remedy [if] mishandling of sensitive information leads to its dissemination.<sup>44</sup>

And so, like the New York Housing Court, California's courts now also protect tenants against blacklisting—and protect the integrity of their forum—by requiring *all* residential unlawful detainer actions to be filed under seal.<sup>45</sup> California unlawful detainer suits remain sealed for at least sixty days, and are only unsealed if the landlord prevails.<sup>46</sup>

It is unclear whether Washington could permissibly adopt broad restrictions on public access to unlawful detainer records like California and New York have done.<sup>47</sup> But this Court should make it clear that a Washington superior court can, on a case-specific basis, redact the name of a specific tenant found not to deserve the stigma that an eviction filing carries, or the diminished rental housing prospects that stigma causes,

---

<sup>44</sup> *U.D. Registry*, 34 Cal.App.4th at 114-115.

<sup>45</sup> See Cal. Code of Civ. Proc. 1161.2.

<sup>46</sup> See Cal. Code of Civ. Proc. 1161.2(a)(6) (public may access unlawful detainer file “if 60 days have elapsed since the complaint was filed with the court, and, as of that date, judgment against all defendants has been entered for the plaintiff, after a trial.”).

<sup>47</sup> C.f. GR 31(e) (requiring redaction of “personal identifiers”); but see also *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205; 848 P.2d 1258 (1993) (statute prohibiting courts from disclosing names of child sexual abuse victims was unconstitutional without case-by-case determinations); see *Cowles Publishing Co. v. Murphy*, 96 Wn.2d 584, 590; 637 P.2d 966 (1981) (public has general right of access to search warrants, but court can withhold specific warrants for case-specific reasons).

when that tenant's name is of little or no legitimate value to the public in overseeing the administration of justice.<sup>48</sup>

**F. The evidence showing that Encarnación and Farías lacked culpability was persuasive and should not be discounted simply because it was not contested below.**

Where proper notice is given, a party may proceed in the absence of his or her opponent, unless the court directs otherwise.<sup>49</sup> Such ex parte proceedings are sometimes necessary in civil cases. But because factual conclusions drawn from uncontested evidence may not necessarily be as robust as those made in hotly-litigated trials, additional safeguards apply in the ex parte setting. For instance, a party or attorney who appears in an ex parte proceeding assumes “an extraordinary burden to disclose all material information, both for and against their position, to the tribunal.”<sup>50</sup>

In the GR 15 context, a person seeking redaction always bears the burden to prove that his or her privacy concern outweighs the public

---

<sup>48</sup> See GR 15(c)(2); see *Cowles Publishing*, 96 Wn.2d at 590; see also *Bellevue John Does 1-11 v. Bellevue School Dist.*, 164 Wn.2d 199, 221; 189 P.3d 139 (2008) (“disclosure of the identities of [people] who are the subject of unsubstantiated allegations ‘serves no interest other than gossip and sensation,’” quoting the Court of Appeals’ decision in the same case, *Bellevue John Does v. Bellevue School Dist.*, 129 Wn. App.832, 854; 120 P.3d 616 (2005).

<sup>49</sup> See CR 40(a)(5) (“Either party, after notice ... may bring the issue to trial, and in the absence of the adverse party, unless the court for good cause otherwise directs, may proceed with his case, and take a dismissal of the action, or a verdict or judgment, as the case may require.”).

<sup>50</sup> *Stella Sales, Inc. v. Johnson*, 97 Wn. App. 11, 23; 985 P.2d 231 (1999); see also RPC 3.3(f) (“In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.”).

interest in access to the court record in question.<sup>51</sup> And as the Court of Appeals pointed out, “even where no party opposes a closure or redaction request, [a] trial court has an ‘independent obligation to safeguard the open administration of justice.’”<sup>52</sup> These measures assure a reasonable level of trustworthiness to ex parte fact-findings in GR 15 motions.

Amici seem to argue that a court should never enter a redaction order based on ex parte fact-findings. Such a result would hardly be practical. Disallowing ex parte fact-finding in GR 15 matters would impede settlement and lead to arbitrary results, as parties anticipating an eventual need for privacy would have no ability to settle their claims.

Furthermore, the only point relevant to the redaction motion on which a genuinely adversarial case posture might have mattered was the underlying question of whether Encarnación and Farías had unlawfully held over in their apartment.<sup>53</sup> Yet the evidence of Encarnación’s and Farías’s non-culpability was extensive, and heavily based on documents rather than uncorroborated testimony. The most important of these documents were a copy of the rental agreement, which entitled them to

---

<sup>51</sup> *Ishikawa*, 97 Wn.2d at 37-38

<sup>52</sup> Pub. Op. at 8-9, citing *State v. Duckett*, 141 Wn. App. 797, 804; 173 P.3d 948 (2007).

<sup>53</sup> See *Bellevue John Does*, 164 Wn.2d at 217 (truth or falsity of an allegation is one factor bearing on whether the identity of the accused is of legitimate concern to the public), quoting *City of Tacoma v. Tacoma News, Inc.*, 65 Wn. App. 140, 148; 827 P.2d 1094 (1992).

occupy the apartment for one year beginning July 5, 2009, and copies of the lease termination notices they were given on August 7 and September 9, 2009 (which purported to terminate the tenancy on September 1 and 30, 2009, respectively).

These documents conclusively established that Encarnación and Farías had not unlawfully detained their apartment because, as a matter of law, neither notice terminated the tenancy.<sup>54</sup> Both notices invoked RCW 59.12.030(2), by which a landlord may terminate a periodic (e.g., “month-to-month”) tenancy by serving at least twenty days’ notice in writing.<sup>55</sup> However, Encarnación and Farías had a lease for a specified term, not a periodic tenancy—and RCW 59.12.030(2) does not apply to leases for specified terms.<sup>56</sup>

A landlord can terminate a lease for a specified term if the tenant defaults in rent, breaches the lease, or for causing waste or a nuisance, provided the tenant is given notice and at least one opportunity to cure the default.<sup>57</sup> But neither the August 7 nor the September 9 termination notice alleged a failure to pay rent or other violation of the rental agreement—let

---

<sup>54</sup> See RCW 59.12.030.

<sup>55</sup> CP 68, 78.

<sup>56</sup> See RCW 59.12.030(1).

<sup>57</sup> See RCW 59.12.030(3-5), (7). Note that there do exist three circumstances, none relevant here, in which a landlord may terminate a residential lease without an opportunity to cure: drug related criminal activity, gang-related activity, or where the tenant is arrested for an assault on the premises. See RCW 59.18.180.

alone described the infraction and specified a deadline to cure.<sup>58</sup> Since the superior court could have determined from these documents alone that Encarnación and Farías had not held over, it is difficult to conceive of how the landlords' participation could have made any difference to the analysis of whether to redact Encarnación's and Farías's names under GR 15.

Amici's claim that "the trial court failed to address the Notice to Terminate Tenancy stating that the petitioners did not meet requirements for a credit check, criminal background check, employment check, rental history, and completing documents" is a red herring.<sup>59</sup> Nothing in their rental agreement obligated Encarnación and Farías to submit to new credit or background checks in August 2009.<sup>60</sup> Even if their lease had contained such a provision, the notice of this supposed "violation" would not have terminated the tenancy because it presented them no opportunity cure.<sup>61</sup>

Furthermore, as Encarnación's declaration detailed, after the plaintiffs (Hundtofte and Alexander) bought the building, they asked Encarnación and Farías on August 4, 2009, to give up their one-year term lease and accept a new month-to-month rental agreement instead.<sup>62</sup> The

---

<sup>58</sup> CP 40, 67-68; see RCW 59.12.030(3) (assuring tenant at least three days' notice to cure rent default), (4) (at least ten days' notice to cure other lease violation).

<sup>59</sup> Br. of Amici Allied Daily Newspapers et al. at 12; CP 69-70.

<sup>60</sup> CP 38-39, 48-50.

<sup>61</sup> See RCW 59.12.030(4).

<sup>62</sup> CP 39-40, 54-66.

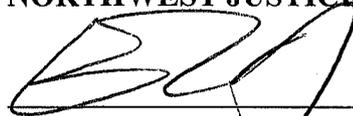
August 2009 background checks were associated with the new lease that the plaintiffs proposed.<sup>63</sup> Encarnación and Farías did not authorize the background checks because they did not agree to give up their year term and replace it with a month-to-month tenancy.<sup>64</sup> These facts were not contested in connection with the redaction motion, but were also heavily corroborated by documents (such as a copy of the proposed month-to-month lease) and the circumstances (e.g., background checks are typically conducted before a new tenancy—not in the midst of a term lease).<sup>65</sup>

### III. Conclusion

For all of the foregoing reasons, the Court should reverse the Court of Appeals and reinstate the Superior Court's order for redaction.

Respectfully Submitted this 3<sup>rd</sup> day of June, 2013

#### NORTHWEST JUSTICE PROJECT



Eric Dunn, WSBA #36622 | Leticia Camacho, WSBA #31341  
Allyson O'Malley-Jones, WSBA #31868  
Attorneys for Encarnación and Farías

#### Appendix

#### Page

<i>White v. First American Registry, Inc.</i> , 2007 WL 703926 (S.D.N.Y.)	1-4
---	-----

<sup>63</sup> CP 40.

<sup>64</sup> CP 39-41.

<sup>65</sup> CP 54-66 (new month-to-month lease proposed by the plaintiffs); see also *Ali v. Vikar Management, Ltd.*, 994 F.Supp. 492, 499 (S.D.N.Y. 1998) (a landlord has no permissible purpose under FCRA (at 15 USC 1681b), and thus may not lawfully procure, a consumer report about a tenant to whom the landlord is obligated to continue leasing the premises).

Se

Not Reported in F.Supp.2d, 2007 WL 703926 (S.D.N.Y.)  
(Cite as: 2007 WL 703926 (S.D.N.Y.))



Only the Westlaw citation is currently available.

United States District Court,  
S.D. New York.  
Adam WHITE, et ano., Plaintiffs,  
v.  
FIRST AMERICAN REGISTRY, INC., et ano., De-  
fendants.

No. 04 Civ. 1611(LAK).  
March 7, 2007.

#### MEMORANDUM AND ORDER

KAPLAN, J.

\*1 Plaintiffs brought this putative class action against defendants First American Registry and First Advantage SafeRent, Inc. for violating the Fair Credit Reporting Act <sup>FN1</sup> ("FCRA"), the New York Fair Credit Reporting Act <sup>FN2</sup> ("NYFCRA"), and Section 349 of the New York General Business Law. They contend that defendants lack reasonable procedures to assure the maximum possible accuracy of the consumer reports they furnish to their customers, which, in this case, are New York City landlords. The matter now is before the Court on plaintiffs' motions for (1) class certification and approval of a settlement and (2) an award of attorneys' fees and other relief.

FN1. 15 U.S.C. §§ 1681 et seq.

FN2. N.Y. GEN. BUS. LAW. §§ 380 to 380-t (McKinney 1996 & Supp.2005).

#### *Class Certification*

The parties agree that the following class should be certified:

All persons who are listed, or who were listed from

February 26, 2001 to March 16, 2006 in Defendant First Advantage SafeRent, Inc.'s RegistryCheck™ database as a tenant, occupant, respondent, defendant or other similar categorization in a proceeding commenced in the Civil Court of the City of New York, Housing Part. Excluded from the Class is Defendant, any entity in which defendant has a controlling interest, and any of its subsidiaries, affiliates, and officers, directors, employees and agents as well as any person or entity who is named in any such proceeding as a landlord.

Although I previously denied certification on the ground that plaintiff White was not an adequate representative, a new plaintiff has been joined. I now am satisfied that each of the requirements of Rule 23 is satisfied and so certify the proposed class.

#### *The Settlement*

This lawsuit arises by reason of the nature of defendants' business, which consists of selling landlords the opportunity to consult a list of individuals who have been involved in landlord-tenant litigation. As defendants doubtless well understand, <sup>FN3</sup> risk averse landlords are all too willing to use defendants' product as a blacklist, refusing to rent to anyone whose name appears on it regardless of whether the existence of a litigation history in fact evidences characteristics that would make one an undesirable tenant. Thus, defendants have seized upon the ready and cheap availability of electronic records to create and market a product that can be, and probably is, used to victimize blameless individuals. The problem is compounded by the fact that the information available to defendants from the New York City Housing Court ("NYCHC") is sketchy in the best of cases and inaccurate and incomplete in the worst. Any failure by defendants to ensure that the information they provide is complete, accurate, and fair heightens the concern-and there has been ample reason for heightened

Not Reported in F.Supp.2d, 2007 WL 703926 (S.D.N.Y.)  
(Cite as: 2007 WL 703926 (S.D.N.Y.))

concern.

FN3. The use of the name First Advantage SafeRent above evidences this understanding.

Against that background, the parties propose to settle the case for both programmatic and monetary relief.

The programmatic relief would include principally the following:

- Defendants' reports of summary non-payment proceedings indicating "Case Filed" in which there has been no disposition for 12 months as reported by the NYCHC would contain a note indicating that there has been no disposition within 12 months and that proceedings in which no disposition has been obtained within 1 year after a default are subject to dismissal.

- \*2 • Defendants' reports would contain a note indicating that the filing of a case does "not mean that an applicant was evicted from an apartment or was found to owe rent. Lawsuits may be filed in error or lack merit."

- Defendants would improve their customer service in a variety of ways.

On the monetary side, the settlement proposes creation of a Class Settlement Fund of \$1,900,000 and payment by defendants' insurer of up to \$1,065,000 in fees and expenses to plaintiffs' attorneys. Settlement expenses and proposed payments to the two named plaintiffs totaling \$20,000 would be paid out of the \$1.9 million, with the balance applied to pay each class member who submits a timely and proper claim \$100 or, if the total of such claims exceeds the available balance, a *pro rata* reduced amount. Any part of the \$1.9 million left after paying the settlement ex-

penses, the named plaintiffs, and the individual class members would be donated to appropriate governmental and/or charitable entities "to further the goal of increasing awareness of tenant screening and the duties and obligations under" pertinent laws.

A court confronted with a proposed class action settlement is called upon to determine whether the settlement is "fair, adequate, and reasonable" to class members,<sup>FN4</sup> a standard that includes both procedural and substantive components.<sup>FN5</sup> Assessing procedural fairness requires attention to such matters as the negotiation history and adequacy of class representation. Factors pertinent to substantive fairness are included among those set out in *City of Detroit v. Grinnell Corp.*:<sup>FN6</sup>

FN4. *In re NASDAQ Market-Makers Anti-trust Litig.*, 187 F.R.D. 465, 473 (S.D.N.Y.1998).

FN5. *E.g., Malchman v. Davis*, 706 F.2d 426, 433 (2d Cir.1983); *see D'Amato v. Deutsche Bank*, 236 F.3d 78, 85-86 (2d Cir.2001).

FN6. 495 F.2d 448 (2d Cir.1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir.2000).

"(1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation."<sup>FN7</sup>

Not Reported in F.Supp.2d, 2007 WL 703926 (S.D.N.Y.)  
(Cite as: 2007 WL 703926 (S.D.N.Y.))

FN7. *Id.* at 463.

Moreover, the settlement court must assess the fairness of a proposed settlement in a practical way on the basis of reasonably available information. It should not attempt to approximate a litigated determination of the merits of the case <sup>FN8</sup> lest the process of determining whether to approve a settlement simply substitute one complex, time consuming and expensive litigation for another.

FN8. See *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1085 (2d Cir.), cert. denied, 404 U.S. 871 (1971).

I am troubled by this settlement. It leaves defendants' business model essentially intact. While there will be very modest improvements, the potential for abuse quite plainly remains. The fact that defendants are willing, indeed anxious, to engage in activities that are bound to harm innocent people is distressing. Moreover, while this litigation has been hard-fought, and I do not impugn anyone's motives, the structure of the deal does not put my mind entirely at ease. If approved as proposed, plaintiffs' counsel would receive over \$1 million. The two named plaintiffs would receive a total of \$20,000 above and beyond anything to which they would be entitled as class members. Individual class members, for all practical purposes, would receive nothing of substantial monetary value. Defendants would be rid of a troublesome and embarrassing lawsuit for programmatic consideration that costs them little and economic consideration that at best would be a small multiple of the legal fees required to litigate the case to conclusion.

\*3 Nevertheless, substantial factors point in favor of approval. To begin with, I acknowledge that my discomfort stems in part from defendants' business model, which in and of itself is not unlawful, however distasteful and deserving of legislative attention it may

be. Notice has been widely disseminated, yet there have been only 21 opt-outs from a class of over 35,000 people. There has been only one objector. It is not clear that plaintiffs could obtain greater programmatic relief even if they prevailed. The litigation would be difficult and costly.

Accordingly, in all the circumstances, I have concluded that the basic terms of the settlement, as amended most recently, should be approved. I do not, however, see any reason to approve the additional payments to the individual plaintiffs. This is especially true of Mr. White, who was rejected as an adequate class representative. Indeed, approving these proposed payments, in the context of this case, would create an incentive for other representatives to act in a manner inconsistent with the interests of other classes.

#### *Attorneys' Fees*

Plaintiffs' counsel seek an award of \$990,000 in attorneys' fees and \$75,000 in expenses against total expenses of \$80,084.18.

Counsel asserts that they devoted 1,900 hours to this case through the filing of the initial motion for approval of the settlement. They claim a lodestar of \$836,318.75. I accept that as reasonable. I see no reason for a multiplier. In addition, I am aware that plaintiffs' counsel subsequently have devoted additional efforts to the matter in seeking approval of the settlement, which in my judgment are worth an additional \$25,000.

#### *Conclusion*

Plaintiffs' motion to approve the settlement as amended [docket item 148] is granted save that the proposed payments to the individual plaintiffs are not approved. Plaintiffs' motion for an award of attorneys' fees and expenses [docket item 149] is granted to the extent that they shall recover attorneys' fees in the amount of \$861,318.75 plus expenses in the amount of \$75,000 for a total of \$936,318.75.

Not Reported in F.Supp.2d, 2007 WL 703926 (S.D.N.Y.)  
(Cite as: 2007 WL 703926 (S.D.N.Y.))

SO ORDERED.

S.D.N.Y., 2007.  
White v. First American Registry, Inc.  
Not Reported in F.Supp.2d, 2007 WL 703926  
(S.D.N.Y.)

END OF DOCUMENT