UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JULIA ROSSI, *et al.*, Plaintiffs, v. CLAIRE'S STORES, INC., *et al.*, Defendants.	Case No.: 1:20-cv-5090 Hon. Andrea R. Wood, presiding Hon. Magistrate Heather K. McShain Date: Sept. 27, 2022 Time: 10:00 a.m. Ctrm. 1925

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND CERTIFICATION OF SETTLEMENT CLASS

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On June 16, 2021, Plaintiffs Julia Rossi, Delilah Parker, and Kelvin Holmes (collectively, "Plaintiffs") moved for preliminary approval of the proposed class action settlement with Defendants Claire's Stores, Inc., Claire's Boutiques, Inc., and CBI Distributing Corporation (collectively, "Defendants") and for certification of the Settlement Class in the above captioned action. Dkt. 49. The Court preliminarily approved the settlement on March 28, 2022, finding that the terms of the settlement were "fair, reasonable, and adequate" and that the Class should be given notice. Dkt. 52.

Plaintiffs now move for final approval of the settlement and for certification of the Settlement Class. As set forth in the concurrently filed Joint Declaration of Bradley K. King and M. Anderson Berry ("Joint Decl.") and the Declaration of Teresa Y. Sutor ("Sutor Decl."), the Claims Administrator has implemented an extensive Court-approved Notice Program with direct notice of the settlement delivered by email to the valid email addresses in Defendants' possession and via U.S. first-class mail otherwise. Although the claims deadline has not yet passed, the response from the Settlement Class has been positive: to date the Claims Administrator has received over three hundred claims, only one opt-out, and no objections. *See* Sutor Decl. ¶¶ 12-13, 16.

I. INTRODUCTION

The present case arises out of a data security incident (the "Data Breach") that allegedly compromised the personal and private identifying information of over 60,000 of Defendants' customers. Plaintiffs, individually and on behalf of the Settlement Class (as defined below), filed suit against Defendants, alleging Defendants failed to adequately protect their personal and private information. Throughout the pendency of the litigation, Defendants have denied allegations of wrongdoing and liability and asserted defenses to the individual and representative claims.

As discussed in detail in Plaintiffs' preliminary approval motion (Dkt. 49), the settlement is fair, reasonable, and adequate, and represents an excellent result for the Settlement Class. Through mediation and extensive negotiations, the parties reached an agreement that provides for significant monetary and equitable relief for the Settlement Class. All 60,842 Settlement Class Members are being provided access to one year of credit monitoring and financial services, independent of whether they otherwise participate in the settlement. This credit monitoring alone is conservatively valued as a $5.48 million benefit to the Settlement Class. Additionally, every Settlement Class Member has the opportunity to make a claim for up to $250 in reimbursements for out-of-pocket losses, including for up to three hours in lost time. Class members may also be compensated up to $3,000 for unreimbursed fraudulent charges or out-of-pocket losses not covered in the ordinary expense category for losses more likely than not caused by the Data Breach. Defendants have agreed to an aggregate cap of $350,000 for these reimbursements.

If approved, the settlement will resolve all claims arising out of the Data Breach and will provide Class Members with the precise relief this action was filed to obtain. Accordingly, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure and the Settlement Agreement, Plaintiffs respectfully request that the Court enter an Order granting final approval of the settlement and finally certifying the Settlement Class.

II. SUMMARY OF THE LITIGATION

This litigation arose from a criminal cyberattack on the computer systems that process online shopping transactions for Claire's customers (the "Data Breach"). *See* Joint Decl. ¶ 3. The criminals deployed computer code capable of obtaining information entered by Claire's customers during checkout. Plaintiffs allege that, as a result of the Data Breach, an unauthorized user gained access to Plaintiffs' and Class Members' (Defendants' customers'), personally identifiable

information, including, but not limited to, names, addresses, and credit card numbers (collectively, "PII"). *Id*.

Plaintiff Rossi filed the initial action on July 31, 2020 in the Circuit Court of Cook County, Illinois. Defendants removed Plaintiff Rossi's action to the Northern District of Illinois on August 28, 2020. Dkt. 1. Plaintiffs Parker and Holmes filed their action (No. 20-cv-5574) on September 18, 2020, which was related and reassigned to this Court on October 2, 2020. Dkt. 19. Plaintiffs agreed to coordinate their efforts and, with leave of the Court, filed a consolidated amended complaint (the "CAC") on October 26, 2020. Dkt. 20. The Court granted Plaintiffs' subsequent motion for appointment of interim co-lead counsel on November 6, 2020. Dkt. 30. Defendants filed their motion to dismiss the CAC on December 4, 2020. Dkt. 35.

On December 15, 2020, the parties informed the Court of their intent to mediate. Dkt. 37. On January 5, 2021, the Court granted Plaintiffs' unopposed motion to continue the briefing of Defendants' motion to dismiss to May 2021 and stay substantive discovery pending the parties' mediation efforts, ordering the parties to submit a joint status report after their mediation no later than April 1, 2021. Dkt. 39. After agreeing on a mediation date, the parties engaged in informal discovery, including the exchange of documents relevant to the parties' claims and defenses. The parties also each drafted and submitted confidential mediation statements to experienced mediator Bennett G. Picker, Esq. in advance of their mediation. In doing so, Plaintiffs also conducted independent investigation of factual issues pertaining to the Data Breach and extensive legal research to prepare their arguments for a prospective opposition to Defendants' motion to dismiss, as well as a preview of class certification and merits arguments.

On March 23, 2021, the parties participated, with Mr. Picker's guidance, in a lengthy, full-day mediation session of hard-fought, arm's-length negotiations, ultimately reaching a settlement

in principle. The parties informed the Court of their settlement on March 30, 2021, Dkt. 42, and in acknowledging the notice of settlement, the Court terminated Defendants' motion to dismiss and ordered Plaintiffs to file a motion for preliminary approval of settlement, later granting an extension of that deadline. Dkts. 43, 45. Plaintiffs filed their preliminary approval motion on June 16, 2021. Dkt. 49. The Court granted it and entered the Preliminary Approval Order on March 28, 2022. Dkt. 52. Plaintiffs filed their motion for attorneys' fees, expenses, and service awards on August 11, 2022. Dkt. 53.

The Class notice and claims period commenced on April 27, 2022 (Dkt. 52 at 10), and, to date, no Settlement Class Members have objected to the Settlement and only one Settlement Class Member has requested exclusion. Sutor Decl. ¶¶ 12-13. The deadline for objections and exclusion requests was August 25, 2022; the deadline to submit claims is September 24, 2022. Dkt. 52 at 10. With nearly three weeks remaining in the claims period, there have been over three hundred claims submitted to date. Sutor Decl. ¶ 16.

III. THE TERMS OF THE SETTLEMENT AGREEMENT

A. Settlement Class

The settlement provides for a nationwide Settlement Class, which includes all persons in the United States who made a purchase online with Claire's from April 7, 2020 through June 12, 2020. The Settlement Class specifically excludes: (i) Claire's and its officers and directors; (ii) all Settlement Class Members who timely and validly request exclusion from the Settlement Class; (iii) the Judge assigned to evaluate the fairness of the settlement; (iv) banks and other entities that issued payment cards which were utilized at Claire's during the data security incident; (v) the attorneys representing the parties in this litigation; and (vi) any person found by a court of

competent jurisdiction to be guilty under criminal law of initiating, causing, aiding or abetting the data security incident, or who pleads nolo contendere to any such charge.

B. The Settlement Benefits

The settlement provides for both monetary and equitable relief.

1. Monetary Benefits for Settlement Class Members

There are three types of monetary relief provided for by the Settlement Agreement. First, upon final approval of the Settlement Agreement, all 60,842 Settlement Class Members will be provided automatic access to enroll in one (1) year of Experian's® IdentityWorks℠ Identity product (the "Identity Plan") in accordance with Experian's capabilities in the ordinary course, valued at $107.88 per person. Joint Decl. ¶¶ 8-9. The Identity Plan includes up to $1 million in reimbursement insurance for losses due to identity theft and fraud, Internet surveillance of thousands of websites and millions of data points to identify fraudulent activity, identity restoration in the event of identity theft or fraud, and extended fraud resolution with ExtendCare, which provides access to Experian's Fraud Resolution Agents during and even after expiration of the Identity Plan in the event of identity theft or fraud. *See* Dkt. 49-2 at 3 (¶ 7); Dkt. 49-3 at 2-3 (¶ 4). Each Settlement Class Member received a unique code with the Short Form Notice to be used to enroll directly with Experian.[1] Sutor Decl. ¶ 17.

Second, Settlement Class Members will be compensated for ordinary expenses, subject to an individual cap of $250, for documented out-of-pocket losses plausibly caused by the Data Breach, including card replacement fees, late fees, overlimit fees, interest, other bank or credit card

[1] Importantly, among the many benefits all Settlement Class Members will receive from Identity Plan is a $1 million insurance policy for financial theft. So, even if Settlement Class Members do not make a monetary claim or otherwise participate in the Settlement, they can still be covered up to $1,000,000 for any stolen funds if they are a victim of financial fraud during the life of the policy.

fees, postage, milage, and other incidental expenses resulting from lack of access to a card or account resulting from the Data Breach, and up to $50 in costs associated with credit monitoring or identity theft insurance, if purchased primarily as a result of the Data Breach. Settlement Class Members will also be compensated for documented lost time at $19 per hour for up to three (3) hours. SA at ¶ 2.2.

Third, Settlement Class Members are entitled to compensation for up to $3,000 for unreimbursed fraudulent charges or out-of-pocket losses not covered in the ordinary expense category incurred between April 7, 2020 and the end of the claims period, and more likely than not caused by the Data Breach. *Id*.

2. Remedial Measures Attributable to the Settlement

In addition to the monetary benefits described, as part of the settlement, Defendants have agreed to equitable relief in the form of changes to Defendants' business practices to adequately secure their systems and environments, not limited to the network and/or servers that were used to store certain data and were subject to the Data Incidents. SA at ¶ 2.4. This includes Complete PCI Attestation of Compliance (AOC) in conjunction with a PCI-Security Assessor (QSA), conducting annual penetration testing of the cardholder data environment, regular reviews of logs relating to Claire's e-commerce platforms, deploying an endpoint detection and response tool, and employing a data security and compliance person at the Executive Director level. *Id*. Defendants estimate this equitable relief will cost them approximately $1,080,000 per year. Joint Decl. ¶ 9.

C. Notice and Claims Process

1. Notice

The Notice Program commenced within thirty (30) days after entry of the Preliminary Approval Order and was completed within forty-five (45) days after entry of the Preliminary

Approval Order. Notice consisted of a Short Form Notice by email, and for all Settlement Class Members whose emails returned an undeliverable message, the Claims Administrator sent the Short Form Notice by mail as a postcard. Sutor Decl. ¶¶ 8-11. Settlement Class Members also received a separate email providing an opportunity to sign up for the Identity Plan, regardless of whether they participate in the Settlement. *Id*. ¶ 17. Within thirty (30) days of entry of the Preliminary Approval Order the Claims Administrator established a settlement website and has maintained and updated the website throughout the claims period and will continue to do so until at least until 30 days after the Effective Date. The settlement website includes copies of the Long-Form Notice and the Claim Form approved by the Court as well as the Settlement Agreement. *Id*. ¶ 5. Furthermore, a toll-free help line staffed with a reasonable number of live operators has been made available to address Settlement Class Members' inquiries. *Id*. ¶ 6.

2. Claims, Objections, and Requests for Exclusion

To receive payment for out-of-pocket expenses, a Class Member must complete the appropriate section of the Claim Form by September 24, 2022 and provide any required documentation to support their claim. SA at ¶ 2.33. The Claims Administrator will determine whether the claim is facially valid and may request Claim Supplementation from the claimant as reasonably required to evaluate the claim. *Id*. at ¶ 2.5.1–2.5.2. If the Claims Administrator rejects a claim for reasons other than the lack of information necessary to evaluate the claim, it shall refer the claim to the Claims Referee upon request of the Settlement Class Member. *Id*. at ¶ 2.5.3.

Individual Class Members wishing to opt-out of the Settlement Class can submit a request on their own behalf, in the form of a written request that clearly manifests their intent to be excluded from the Settlement Class. *Id*. at ¶ 4.1.

Settlement Class Members wishing to object to the settlement must file a written notice of objection in the appropriate form with the Clerk and serve it concurrently upon Class Counsel and counsel for Claire's via the Court's electronic filing system. *Id.* at ¶ 5.1.

The exclusion and objection deadlines were August 25, 2022. No objections have been filed and the Claims Administrator has received only one request for exclusion. Sutor Decl. ¶¶ 12-13.

D. Attorney's Fees, Costs, and Service Awards

Plaintiffs requested a total attorneys' fee of $165,000 and a service award for each Plaintiff in the amount of $1,500. Dkt. 53-1. Attorneys' fees, costs, expenses, and the service awards were negotiated only after all substantive terms of the settlement were agreed upon by the Parties. Joint Decl. ¶ 5.

IV. ARGUMENT

A. Certification of the Settlement Class is Appropriate

This Court provisionally certified the Settlement Class for settlement purposes in its Preliminary Approval Order finding that the Settlement Class meets the numerosity, commonality, typicality, and adequacy of representation requirements of Rule 23(a), and the predominance requirement of Rule 23(b). *See* Dkt. 52; Fed. R. Civ. P. 23(a)(1)–(4), (b)(3); MANUAL FOR COMPLEX LITIG. § 21.632 (4th ed. 2004); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Since that time, there have been no developments that would alter this conclusion. Based on the facts and arguments stated herein and for the reasons set forth in Plaintiffs' Preliminary Approval Motion, the Settlement Class should now be finally certified for settlement purposes.

Where (as in this case) final certification is sought under Rule 23(b)(3), the plaintiff must demonstrate that common questions of law or fact predominate over individual issues and that a

class action is superior to other methods of adjudicating the claims. Fed. R. Civ. P. 23(b)(3); *Amchem*, 521 U.S. at 615–16. District courts are given broad discretion to determine whether certification of a class action lawsuit is appropriate. *In re TikTok, Inc., Consumer Priv. Litig.*, MDL No. 3948, 2021 WL 4478403, at *5 (N.D. Ill. Sept. 30, 2021) (slip copy) (internal citations omitted).

Because a court evaluating certification of a settled class action is considering certification only in the context of settlement, the court's evaluation is somewhat different than in a case that has not yet settled. *Amchem*, 521 U.S. at 620. In some ways, the court's review of certification of a settlement-only class is lessened: as no trial is anticipated in a settlement-only class case, the case management issues inherent in the ascertainable class determination need not be confronted. *See id.* "[A] class may be certified 'solely for purposes of settlement where a settlement is reached before a litigated determination of the class certification issue.'" *Burrows v. Purchasing Power, LLC*, No. 1:12-CV-22800, 2013 WL 10167232, at *1 (S.D. Fla. Oct. 7, 2013) (quoting *Lipuma v. Am. Express Co*., 406 F. Supp. 2d 1298, 1314 (S.D. Fla. 2005)). "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem*, 521 U.S. at 620.

Courts regularly certify class actions for settlement, including similar data breach cases, on a national basis. *See, e.g.*, *Carrera Aguallo v. Kemper Corp.*, No. 1:21-cv-01883 (N.D. Ill. March 18, 2022) (Dkt. 53). The Court should similarly certify the Settlement Class as it meets all of the Rule 23(a) and (b)(3) prerequisites, and for the reasons set forth below, certification is appropriate.

B. The National Class Meets the Requirements of Rule 23(a)

Rule 23(a) sets out four specific prerequisites to class certification: (1) the class must be so numerous that joinder of all members is impracticable; (2) there must be questions of law and fact common to the class; (3) the claims or defenses of the class representatives must be typical of the claims or defenses of the class; and (4) the representative parties must fairly and adequately protect the interests of the class. Further, under Rule 23(b)(3), the Court must find that common questions of law or fact predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

1. The Members of the Settlement Class and California Settlement Subclass are so Numerous that Joinder is Impracticable

Rule 23(a) requires that a class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "A class of forty generally satisfies the numerosity requirement." *See Savanna Grp., Inc. v. Trynex, Inc.*, No. 10-cv-7995, 2013 WL 66181, at *4 (N.D. Ill. 2013). Here, there are approximately 60,842 Settlement Class Members. Joinder, therefore, is clearly impracticable, and the Settlement Class thus easily satisfies Rule 23's numerosity requirement. *See, e.g.*, *Karpilovsky v. All Web Leads, Inc.*, No. 17 C 1307, 2018 WL 3108884, at *6 (N.D. Ill. June 25, 2018) (class of 40 or more is sufficient); *McCabe v. Crawford & Co.*, 210 F.R.D. 631, 643 (N.D. Ill. 2002) (same).

2. Questions of Law and Fact are Common to the Members of the Settlement Classes

The second prerequisite to class certification is commonality, which "requires the plaintiff to demonstrate that the class members 'have suffered the same injury,'" and the plaintiff's common contention "must be of such a nature that it is capable of class-wide resolution–which means that

determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2545 (2011) (citation omitted). "[F]or purposes of Rule 23(a)(2) even a single common question will do." *Id*. at 2556.

Here, commonality is readily satisfied because the circumstances of each particular class member retain a common core of factual or legal issues with the rest of the class. Plaintiffs' claims center on whether Defendants failed to adequately safeguard the records of Plaintiffs and other Settlement Class Members. For example, issues common to all Class Members include:

- Whether Defendants owed and breached a duty to exercise due care in collecting, storing, and/or safeguarding their PII;
- Whether Defendants knew or should have known that they may not have employed reasonable measures to keep the PII of Plaintiffs and Settlement Class Members secure; and
- Whether Defendants violated the law by failing to promptly notify Plaintiffs and members of the Classes that their PII had been compromised.

These common questions, and others alleged by Plaintiffs in their operative complaint, are central to the causes of action brought here and can be addressed on a class-wide basis, because they all tie back to the same common nucleus of operative fact—the Data Breach and Defendants' data protection measures. *See Parker v. Risk Mgmt. Alts., Inc.*, 206 F.R.D. 211, 213 (N.D. Ill. 2002) ("[A] common nucleus of operative fact is usually enough to satisfy the [commonality] requirement"); *see also In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.*, No. 3:08-MD-01998, 2009 WL 5184352, at *3 (W.D. Ky. Dec. 22, 2009) ("All class members had their private information stored in Countrywide's databases at the time of the data breach"). Thus, Plaintiffs have met the commonality requirement of Rule 23.

3. Plaintiffs' Claims are Typical of the Claims of the Members of the Classes They Represent

"Rule 23(a) further requires that 'the claims or defenses of the representative parties are typical of the claims or defenses of the class.'" *Spates v. Roadrunner Transp. Sys., Inc.*, No. 15 C 8723, 2016 WL 7426134, at *2 (N.D. Ill. 2016). "A claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and . . . [the] claims are based on the same legal theory." *Id*. (quoting *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006)). Put another way, where the defendant engages "in a standardized course of conduct vis-a-vis the class members, and plaintiffs' alleged injury arises out of that conduct," typicality is "generally met." *Hinman v. M & M Rental Ctr.*, 545 F. Supp. 2d 802, 806–07 (N.D. Ill. 2008) (*citing, e.g., Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998)).

Here, the typicality requirement is satisfied for the same reasons that Plaintiffs' claims meet the commonality requirement. Specifically, Plaintiffs' claims are typical of those of other Settlement Class Members because they arise from the Data Breach. They are also based on the same legal theory, *i.e.*, that Defendants had a legal duty to protect Plaintiffs' and Settlement Class Members' PII. Because there is a "sufficient nexus" between the Plaintiffs' claims and the claims of Settlement Class Members, the typicality requirement is satisfied.

4. The Adequacy Requirement is Satisfied

The test for evaluating adequacy of representation under Rule 23(a)(4) has two components: (1) "the representatives must not possess interests which are antagonistic to the interests of the class," and (2) "the representatives' counsel must be qualified, experienced and generally able to conduct the proposed litigation." *In re TikTok, Inc. Consumer Priv. Litig.*, 2021 WL 4478403, at *7 (quoting *CV Reit, Inc. v. Levy*, 144 F.R.D. 690, 698 (S.D. Fla. 1992)); *Retired*

Chi. Police Ass'n v. City of Chi., 7 F.3d 584, 598 (7th Cir. 1993). Here, the Class Representatives and Settlement Class Counsel meet the test of adequacy.

First, there is no conflict between Plaintiffs and the Settlement Class Members. Plaintiffs are members of the Settlement Class and do not possess any interests antagonistic to the Settlement Class. Plaintiffs were harmed in the same way as all Settlement Class Members when Defendants failed to adequately secure their PII. Plaintiffs and all Settlement Class Members seek relief for injuries arising out of the same Data Breach. In light of this common event and injury, the named Plaintiffs have every incentive to vigorously pursue the class claims and have prosecuted this case for the benefit of all Settlement Class Members.

Further, Settlement Class Counsel are qualified to represent the Class. They have extensive experience in data privacy and consumer class actions. *See* Joint Decl. ¶ 2; *see also* Dkts. 21, 30, 53. Settlement Class Counsel have submitted declarations demonstrating their skills and experience in the recent fee and expense motion. Dkts. 53-2–53-5. The results obtained by this settlement confirm counsel's adequacy.

5. The Predominance and Superiority Requirements of Rule 23(b)(3) Are Satisfied

In addition to meeting the prerequisites of Rule 23(a), the proposed Settlement Class must also meet one of the three requirements of Rule 23(b). Here, Plaintiffs seek certification under Rule 23(b)(3), which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members," and (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

a. Common Questions of Fact and Law Predominate

Rule 23(b)(3)'s predominance requirement focuses primarily on whether a defendant's liability is common enough to be resolved on a class basis, *see Wal-Mart Stores, Inc*, 131 S. Ct. at

2551–57, and whether the proposed class is "sufficiently cohesive to warrant adjudication by representation," *Amchem*, 521 U.S. at 623. "Predominance is satisfied if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 405 (2d Cir. 2015) (quoting *Cath. Healthcare W. v. U.S. Foodservice Inc.*, 729 F.3d 108, 118 (2d Cir. 2013) (internal quotation marks omitted)). "When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.'" *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (quoting 7AA C. WRIGHT, A. MILLER, & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1778, 123–124 (3d ed. 2005)).

In this case, the key predominating questions are whether Defendants had a duty to exercise reasonable care in safeguarding, securing, and protecting the PII of Plaintiffs and the Settlement Class, and whether Defendants breached that duty. The common questions that arise from Defendants' conduct predominate over any individualized issues. Other courts have recognized that the types of common issues arising from data breaches predominate over any individualized issues. *See, e.g., In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 312–315 (N.D. Cal. Aug. 15, 2018) (finding predominance was satisfied because "Plaintiffs' case for liability depend[ed], first and foremost, on whether [the defendant] used reasonable data security to protect Plaintiffs' personal information," such that "the claims rise or fall on whether [the defendant] properly secured the stolen personal information," and that these issues predominated over potential individual issues); *see also Hapka v. CareCentrix, Inc.*, No. 2:16-cv-02372-KGG, 2018 WL

1871449, at *2 (D. Kan. Feb. 15, 2018) (finding predominance was satisfied in a data breach case, stating "[t]he many common questions of fact and law that arise from the E-mail Security Incident and [Defendant's] alleged conduct predominate over any individualized issues"); *In re The Home Depot, Inc., Customer Data Sec. Breach Litig.*, No. 1:14-md-02583-TWT, 2016 WL 6902351, at *2 (N.D. Ga. Aug. 23, 2016) (finding common predominating questions included whether Home Depot failed to reasonably protect class members' personal and financial information, whether it had a legal duty to do so, and whether it failed to timely notify class members of the data breach); *In re Heartland Payment Sys., Inc. Consumer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1059 (S.D. Tx. 2012) (finding predominance satisfied in data breach case despite variations in state laws at issue, concluding such variations went only to trial management, which was inapplicable for settlement class). Thus, this case meets the requirement of predominance.

b. A Class Action is the Superior Method for Resolving These Claims

Finally, a class action is superior to other methods available to fairly, adequately, and efficiently resolve the claims of the proposed Settlement Class. Because the claims are being certified for purposes of settlement, there are no issues with manageability, and resolution of thousands of claims in one action is far superior to individual lawsuits. *Amchem*, 521 U.S. at 620 ("Confronted with a request for settlement-only certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial.").

The resolution of millions of claims in one action is far superior to litigation via individual lawsuits because it promotes consistency and efficiency of adjudication. *See* Fed. R. Civ. P. 23(b)(3). Indeed, absent class treatment in the instant case, each Settlement Class Member will be required to present the same or essentially the same legal and factual arguments, in separate and

duplicative proceedings, the result of which would be a multiplicity of trials conducted at enormous expense to both the judiciary and the litigants. Class certification—and class resolution—guarantee an increase in judicial efficiency and conservation of resources over the alternative of individually litigating millions of individual data breach cases arising out of the *same* Data Breach.

The common questions of fact and law that arise from Defendants' conduct predominate over any individualized issues, a class action is the superior vehicle by which to resolve these issues, and the requirements of Rule 23(b)(3) are met. Accordingly, the Court should finally certify the Settlement Class for settlement purposes.

C. Plaintiffs' Counsel Should Be Appointed as Settlement Class Counsel

Under Rule 23, "a court that certifies a class must appoint class counsel . . . [who] must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). In making this determination, the court must consider the proposed class counsel's: (1) work in identifying or investigating potential claims; (2) experience in handling class actions or other complex litigation and the types of claims asserted in the case; (3) knowledge of the applicable law; and (4) resources committed to representing the class. Fed. R. Civ. P. 23(g)(1)(A)(i)–(iv).

As discussed herein, and as fully explained in their declarations in support of the motion for attorneys' fees and expenses, proposed Settlement Class Counsel have extensive experience prosecuting similar class actions and other complex litigation, including in this District. *See* Dkt. 53-2–53-3. The proposed Settlement Class Counsel have diligently investigated and efficiently prosecuted the claims in this matter, dedicated substantial resources toward the endeavor, and have successfully and fairly negotiated the settlement of this matter to the benefit of Plaintiffs and the Settlement Class. *Id*. Accordingly, Plaintiffs request that the Court appoint Bradley K. King of

Ahdoot & Wolfson, PC and M. Anderson Berry of Clayeo C. Arnold, A Professional Law Corp. as Settlement Class Counsel.

D. The Settlement Should be Finally Approved as Fair, Reasonable and Adequate

As the Seventh Circuit has recognized, federal courts strongly favor and encourage settlements, particularly in class actions and other complex matters, where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain:

> It is axiomatic that the federal courts look with great favor upon the voluntary resolution of litigation through settlement. In the class action context in particular, there is an overriding public interest in favor of settlement. Settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources.

Armstrong v. Bd. of Sch. Dirs. of Milwaukee, 616 F.2d 305, 312–13 (7th Cir. 1980) (citations and quotations omitted), overruled on other grounds by *Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998); *see also Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) ("Federal courts naturally favor the settlement of class action litigation."); 4 NEWBERG ON CLASS ACTIONS § 11:41 (4th ed. 2002) (citing cases).

Under Rule 23(e) of the Federal Rules of Civil Procedure, a class-action settlement may be approved if the settlement is "fair, reasonable, and adequate." *In re AT & T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 345 (N.D. Ill. 2010). "Approval of a class action settlement is a two-step process." *In re Northfield Labs., Inc. Sec. Litig.*, No. 06 C 1493, 2012 WL 366852, at *5 (N.D. Ill. Jan. 31, 2012) (citing *In re AT & T Mobility*, 270 F.R.D. at 346 (quoting *Armstrong*, 616 F.3d at 314)). "First, the court holds a preliminary, pre-notification hearing to consider whether the proposed settlement falls within a range that could be approved." *Id*. "If the court preliminarily approves the settlement, the class members are notified." *Id*.

Where, as here, the proposed settlement would bind class members, it may only be finally approved after the fairness hearing and a finding that the settlement is fair, reasonable, and adequate, based on the following factors:

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

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

(C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class member claims; (iii) the terms of any proposed award of attorneys' fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and

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

Fed. R. Civ. P. 23(e)(2). As explained below, consideration of the relevant factors supports finally approving the settlement.

1. The Class Representatives and Settlement Class Counsel have Adequately Represented the Settlement Class

By their very nature, because of the many uncertainties of outcome, difficulties of proof, and lengthy duration, class actions readily lend themselves to compromise. Indeed, there is an "overriding public interest in favor of settlement," particularly in class actions that have the well-deserved reputation as being most complex. *In re Sears, Roebuck & Co. Front-loading Washer Prods. Liab. Litig.*, No. 06 C 7023, 2016 WL 772785, at *6 (N.D. Ill. Feb. 29, 2016); *Armstrong*, 616 F.2d at 313 ("In the class action context in particular, there is an overriding public interest in favor of settlement. Settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources."). This matter is no exception.

Here, the parties entered into the settlement only after both sides were fully apprised of the facts, risks, and obstacles involved with protracted litigation. *See* Joint Decl. ¶¶ 3-7. At the outset of their investigation, Settlement Class Counsel conducted extensive research regarding the Plaintiffs' claims, Defendants, and the Data Breach. *Id*. The culmination of that process led to an agreement by the parties to mediate the case with respected mediator Bennett G. Picker, Esq. *Id*. ¶ 5. Prior to the mediation, the parties fully briefed the relevant issues and exchanged information and documents to facilitate their discussions. *Id*. Even after reaching an agreement on the central terms at the mediation, the parties spent almost three additional months fully negotiating the finer points of the Settlement Agreement. *Id.* Considering these efforts and counsel's extensive experience in data breach litigation (*see* Dkts. 53-2–53-5), the parties were able to enter into settlement negotiations with a full understanding of the strengths and weaknesses of the case, as well as the potential value of the claims.

In addition, the adequacy of representation requirement is satisfied because Plaintiffs' interests are coextensive with, and not antagonistic to, the interests of the Settlement Class. *See G.M. Sign, Inc. v. Finish Thompson, Inc*., No. 07-cv-5953, 2009 WL 2581324, at *6-8 (N.D. Ill. Aug. 20, 2009). Here, as discussed *supra*, the Plaintiffs' claims are aligned with the claims of the other Settlement Class Members. They thus have every incentive to vigorously pursue the claims of the Class, as they have done to date by remaining actively involved in this matter since its inception, participating in the pre-suit litigation process, and involving themselves in the settlement process. Further, Plaintiffs retained qualified and competent counsel with extensive experience in litigating consumer class actions, and privacy actions in particular. *See, e.g.*, *Karpilovsky*, 2018 WL 3108884, at *8.

2. The Settlement was Negotiated at Arm's-Length by Vigorous Advocates, and There has been no Fraud or Collusion

"A settlement reached after a supervised mediation receives a presumption of reasonableness and the absence of collusion." 2 MCLAUGHLIN ON CLASS ACTIONS § 6:7 (8th ed. 2011); *see also Steele v. GE Money Bank*, No. 1:08-CIV-1880, 2011 WL 13266350, at *4 (N.D. Ill. May 17, 2011), report and recommendation adopted, No. 1:08-CIV-1880, 2011 WL 13266498 (N.D. Ill. June 1, 2011) ("the involvement of an experienced mediator is a further protection for the class, preventing potential collusion"); *Wright v. Nationstar Mortg. LLC*, No. 14 C 10457, 2016 WL 4505169, at *11 (N.D. Ill. Aug. 29, 2016) (similar).[2]

Here, the settlement resulted from good faith, arm's-length settlement negotiations over many months, including a mediation session with an experienced and respected mediator, Bennett G. Picker, Esq. Joint Decl. ¶ 5. Plaintiffs and Defendants put together detailed mediation submissions setting forth their views as to the strengths of their claims and defenses, respectively, and informally exchanged information to facilitate the mediation. *Id*. At all times, the settlement negotiations were highly adversarial, non-collusive, and at arm's-length. *Id*. By the end of the full-day mediation, the parties reached a written agreement in principle on the terms of settlement, but still spent months finalizing all settlement terms and documents. *Id*.

[2] *See also D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) ("[A] mediator[ ] helps to ensure that the proceedings were free of collusion and undue pressure."); *Johnson v. Brennan*, No. 10-4712, 2011 WL 1872405, at *1 (S.D.N.Y. May 17, 2011) (The participation of an experienced mediator "reinforces that the Settlement Agreement is non-collusive."); *Sandoval v. Tharaldson Emp. Mgmt., Inc.*, No. 08-482, 2010 WL 2486346, at *6 (C.D. Cal. June 15, 2010) ("The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive."); *Milliron v. T-Mobile USA, Inc.*, No. 08-4149, 2009 WL 3345762, at *5 (D.N.J. Sept. 14, 2009) ("[T]he participation of an independent mediator in settlement negotiation virtually insures that the negotiations were conducted at arm's length and without collusion between the parties.").

Accordingly, it is clear that the parties negotiated their settlement at arm's-length, and absent any fraud or collusion. *See, e.g.*, *Steele*, 2011 WL 13266350, at *4 (finding no evidence of fraud or collusion where the settlement was negotiated at arms' length, and where the mediation was overseen by an experienced mediator); *Wright*, 2016 WL 4505169, at *11 (finding no evidence of fraud or collusion where the parties participated in two prior mediations and engaged in lengthy discovery). Thus, this factor weighs in favor of final approval.

3. The Settlement Provides Substantial Relief for the Class

The settlement provides for substantial relief, especially considering the costs, risks, and delay of trial, the effectiveness of distributing relief, and the proposed attorneys' fees. "The most important factor relevant to the fairness of a class action settlement is the first one listed: the strength of the plaintiffs' case on the merits balanced against the amount offered in the settlement." *Synfuel Techs, Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006) (internal quotes and citations omitted). Nevertheless, "[b]ecause the essence of settlement is compromise, courts should not reject a settlement solely because it does not provide a complete victory to plaintiffs." *In re AT & T Mobility*, 270 F.R.D. at 347.

"In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." 4 NEWBERG ON CLASS ACTIONS § 11:50 (4th ed. 2002). This is, in part, because "the law should favor the settlement of controversies, and should not discourage settlement by subjecting a person who has compromised a claim to the hazard of having the settlement proved in a subsequent trial . . . ." *Grady v. de Ville Motor Hotel, Inc.*, 415 F.2d 449, 451 (10th Cir. 1969). It is also, in part, because "[s]ettlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Hanlon v.*

Chrysler Corp., 150 F.3d 1011, 1027 (9th Cir. 1998); *see also Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 228 (N.D. Ill. 2016) ("The essential point here is that the court should not "reject[ ]" a settlement "solely because it does not provide a complete victory to plaintiffs," for "the essence of settlement is compromise.").

Here, the settlement provides for both automatic and claims-made monetary relief, as well as equitable relief in the form of specific data security enhancements designed to better protect Settlement Class Members' PII. All Settlement Class Members received access to enroll in one (1) year of Experian's® IdentityWorks^{SM} Identity product in accordance with Experian's capabilities in the ordinary course, valued at up to $107.88 per Settlement Class Member. Joint Decl. ¶¶ 8-9; Sutor Decl. ¶ 17. Moreover, all members of the Settlement Class are able to submit a claim for Out-of-Pocket Losses up to $250 per person with an aggregate cap of $350,000. SA at ¶ 2.2. Settlement Class Members may also claim up to three hours of time spent with a simple attestation, at $19 per hour. *Id*. Finally, Settlement Class Members are entitled to compensation of up to $3,000 for unreimbursed fraudulent charges or out-of-pocket losses not covered in the ordinary expense category, incurred between April 7, 2020 and the end of the claims period, and more likely than not caused by the Data Breach. The settlement benefits are therefore fair, adequate, and reasonable compared to the range of possible recovery.

a. The Costs, Risks, and Delay of Trial and Appeal Favor Approval of the Settlement

The value achieved through the Settlement Agreement here is guaranteed, where chances of prevailing on the merits are uncertain. While Plaintiffs strongly believe in the merits of their case, they also understand that Defendants would assert a number of potentially case-dispositive defenses. In fact, should litigation continue, Plaintiffs would likely have to immediately survive a motion to dismiss in order to proceed with litigation. Due at least in part to their cutting-edge

nature and the rapidly evolving law, data breach cases like this one generally face substantial hurdles—even just to make it past the pleading stage. *See Hammond v. The Bank of N.Y. Mellon Corp*., No. 08 Civ. 6060(RMB)(RLE), 2010 WL 2643307, at *1 (S.D.N.Y. June 25, 2010) (collecting data breach cases dismissed at the Rule 12(b)(6) or Rule 56 stage). Class certification is another hurdle that would have to be met—and one that has been denied in other data breach cases. *See, e.g.*, *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig*., 293 F.R.D. 21 (D. Me. 2013). Moreover, due to the quickly evolving nature of case law pertaining to data protection, it is likely that a win by any party will result in appeals, which will further increase costs and extend the time until Plaintiffs and Class Members can have a chance at relief.

Plaintiffs dispute the defenses Defendants are likely to assert, but it is obvious that their likelihood of success at trial is far from certain. "In light of the potential difficulties at class certification and on the merits . . . , the time and extent of protracted litigation, and the potential of recovering nothing, the relief provided to class members in the Settlement Agreement represents a reasonable compromise." *Wright*, 2016 WL 4505169, at *10.

b. The Method of Providing Relief is Effective

"[T]he effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims," is also a relevant factor in determining the adequacy of relief. Fed. R. Civ. P. 23(e)(2)(C)(ii). The Committee Note to the 2018 amendments to Rule 23(e)(2) says that this factor is intended to encourage courts to evaluate a proposed claims process "to ensure that it facilitates filing legitimate claims. A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding."

This settlement proposes comprehensive class member relief: automatic provision of Experian's® IdentityWorks℠ Identity monitoring services *and* cash payments *and* equitable

relief. Access to IdentityWorks was automatically provided, by code, on the Short-Form Notice sent to Settlement Class Members. Cash Awards will be distributed based upon information provided by claimants on their respective claim forms. Class Members have the opportunity to receive some compensation with a simple attestation, and greater compensation by providing documentary evidence. SA at ¶ 2.2. Claims will be paid within 60-days of the Effective Date, or within 30-days of the date that the claim is approved, whichever is later. *Id*. Accordingly, all Settlement Class Members will receive their award within a reasonable amount of time. For these reasons, the means by which the relief will be distributed is fair, efficient, and effective.

c. The Proposed Award of Attorneys' Fees is Fair and Reasonable

"[T]he terms of any proposed award of attorney's fees, including timing of payment," are also factors in considering whether the relief provided to the Class in a proposed settlement is adequate. Fed. R. Civ. P. 23(c)(2)(C)(iii). Plaintiffs' counsel seek an award of attorneys' fees and costs in the amount of $165,000—a small fraction of the value of the total settlement. After deducting Plaintiffs' counsel's total expenses of $9,944.65 from the requested $165,000 award results in a net fee award of only $155,055.35, which is only 2.7 percent of the Settlement's conservative value. *See* Dkt. 53-1 at 9. This amount falls well below other approved class settlements, including privacy class settlements.

d. There are No Additional Agreements Required to be Identified Under Rule 23(e)(3)

As no additional agreements requiring identification exist, this factor does not weigh either in favor of or against final approval.

4. The Settlement Agreement Treats Class Members Equitably Relative to Each Other

Finally, Rule 23(e) requires that the settlement "treat[] class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). Here, the proposed settlement does not improperly

discriminate between any segments of the Settlement Class. All Settlement Class Members received a code for up to 12-months of Experian's® IdentityWorks℠ Identity product, regardless of whether they submit claims. Sutor Decl. ¶ 17. Similarly, all are eligible to make a claim for up to $250 in reimbursements for Out-of-Pocket Losses, $3,000 for Extraordinary Losses, and up to three (3) hours of Lost-Time Losses. SA at ¶ 2.2. Direct notice was sent to all Settlement Class Members, and all Settlement Class Members have the opportunity to object to or exclude themselves from the settlement. And, while Plaintiffs each seek a $1,500 award for their services on behalf of the Class, this award is significantly less than the amount that any given Settlement Class Member can claim in reimbursements, and thus does not create an improper motivation to settle or give rise to undue inequities across the Class.

5. The Opinions of Class Counsel, Class Representatives, and Absent Settlement Class Members Favor Approval of the Settlement

The Court should also give great weight to the recommendations of counsel for the parties, given their considerable experience in this type of litigation. *See In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 312–13 (N.D. Ga. 1993) ("In determining whether to approve a proposed settlement, the Court is entitled to rely upon the judgment of the parties' experienced counsel. '[T]he trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel.'") (citations omitted).

Here, Settlement Class Counsel have substantial experience prosecuting large, complex consumer class actions. Dkts. 53-2–53-5. After informal discovery, independent factual investigation and mediation before a well-qualified and experienced mediator, Settlement Class Counsel are confident that the Settlement provides significant relief to the Settlement Class and is in their best interests. Joint Decl. ¶ 7. Settlement Class Counsel whole-heartedly endorse the settlement. Additionally, the reaction of the Settlement Class has been positive. To date, there are

no objections, only one opt-out, and over three hundred claims have been filed. Sutor Decl. ¶¶ 12-13, 16. This is "strong circumstantial evidence" that the settlement is fair, reasonable, and adequate and deserves final approval. *In re Mex. Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1021 (N.D. Ill. 2000); *see also Hall v. Bank of Am., N.A.,* No. 1:12-cv-22700, 2014 WL 7184039, at *5 (S.D. Fla. Dec. 17, 2014) (noting where objections from settlement class members "equates to less than .0016% of the class" and "not a single state attorney general or regulator submitted an objection," "such facts are overwhelming support for the settlement and evidence of its reasonableness and fairness").

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant final approval to the settlement and certify the Settlement Class.

Dated: September 6, 2022

Respectfully Submitted,

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