UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JESSICA GUERRERO, JEFFREY MATHEWS, and JOSEPH CASTILLO, individually and on behalf of all others similarly situated, Plaintiffs, v. MERRITT HEALTHCARE HOLDINGS, LLC, d/b/a MERRITT HEALTHCARE ADVISORS, Defendant.	Case No. 3:23-cv-00389 **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT** Hon. Michael P. Shea July 30, 2024

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I. INTRODUCTION[1]

After informal discovery and months of arms-length negotiations, including a mediation session with mediator Hon. Wayne R. Andersen (Ret.), Plaintiffs have reached a Settlement with Defendant on terms that provide excellent relief to the proposed Settlement Class. The proposed Settlement is fair, reasonable, and adequate, handily warranting final approval. The Settlement provides timely and significant benefits to Settlement Class Members whose personally identifiable information ("PII"), private health information ("PHI"), and/or financial information (collectively, "Private Information"), was accessed by an unauthorized party during a security incident that Defendant discovered on or around November 30, 2022 and made public on or around March 14, 2023 (the "Incident"). Plaintiffs vigorously prosecuted this Action on behalf of the Settlement Class and, in that process, developed an understanding of the strengths and weaknesses of their claims. Notwithstanding their confidence in the merits of those claims, Plaintiffs recognize the risks and delays inherent in proceeding through litigation and proving their claims at trial. The Settlement avoids those risks, and provides immediate, meaningful, and robust monetary and injunctive relief to all members of the Settlement Class. The Court preliminarily approved the Settlement on May 14, 2024. ECF No. 80. Plaintiffs now move the Court to: (1) certify the Settlement Class under Rules 23(b)(3) and 23(e) for settlement purposes; (2) approve the Settlement as fair, reasonable, and adequate; and (3) enter the Final Approval Order filed herewith.

[1] Unless otherwise noted, capitalized terms have the same meanings as in the Settlement Agreement ("Settlement") or in the operative complaint.

II. BACKGROUND

A. Summary of Allegations

This is a putative class action arising from an Incident whereby Plaintiffs allege an unauthorized third-party was able to gain access to Defendant's computer network, which Defendant first discovered on or about November 30, 2022, and remove certain files containing sensitive information stored therein. ECF No. 50, ¶¶ 1-4. The Incident allegedly impacted 88,740 people. *Id*., ¶ 2. The information compromised in the Incident potentially included individuals' full names, treatment information, provider names, patient identification numbers, health insurance information, treatment cost information, and health insurance numbers. *Id*., ¶ 1.

On March 29, 2023, Plaintiff Jessica Guerrero filed a Class Action Complaint in the United States District Court for the District of Connecticut against Defendant, asserting claims for negligence, negligence per se, breach of implied contract, breach of implied covenant of good faith and fair dealing, and unjust enrichment. ECF No. 1, ¶¶ 92-151. On April 17, 2023, Plaintiff Jeffrey Matthews filed a Class Action Complaint against Defendant in the United States District Court for the District of Connecticut, asserting similar claims to those asserted by Plaintiff Guerrero. *See Matthews v. Merritt Healthcare Holdings, LLC,* Case No. 3:23-cv-00476 (D. Conn), ECF No. 1. On April 18, 2023, Plaintiff Joseph Castillo filed a Class Action Complaint against Defendant in the United States District Court for the District of Connecticut, asserting similar claims to those asserted by Plaintiff Guerrero. *See Castillo v. Merritt Healthcare Holdings, LLC*, Case No. 3:23-cv-00489 (D. Conn.), ECF No. 1.[2] On June 6, 2023, Plaintiffs moved to consolidate their cases, and have their attorneys Kevin Laukaitis of Laukaitis Law LLC and Laura Van Note of Cole &

[2] Plaintiff Castillo subsequently voluntarily dismissed his complaint. *See Guerrero*, ECF No. 79.

Van Note appointed as Co-Lead Interim Class Counsel. ECF No. 37. The Court granted Plaintiffs' motion on July 13, 2023. ECF No. 43. Plaintiffs thereafter filed their Consolidated Class Action Complaint on July 26, 2023. ECF No. 50. On September 26, 2023, Defendant filed a motion to dismiss Plaintiffs' Consolidated Class Action Complaint. ECF No. 56.

In the time shortly following consolidation, the Parties began discussing possible early resolution and subsequently agreed to mediate the matter. ECF No. 59. In light of their agreement to mediate the case, on October 26, 2023, the Parties moved the Court to stay the action pending mediation, which the Court granted on October 27, 2023. ECF No. 59 & 60. On December 29, 2023, the Parties then notified the Court that they had reached an agreement to resolve the action on a class-wide basis. ECF No. 61.

B. Notice to the Settlement Class

As this Court observed in preliminarily approving the Settlement, the Notice Plan constitutes the best practicable notice and meets the requirements of due process. ECF No. 80, ¶8. The Settlement Administrator effectuated the Notice Plan as approved by the Court. The Settlement Administrator mailed Postcard Notice, posted key documents on the Settlement Website, including the long-form Class Notice, and allowed Settlement Class Members to submit claims via the Settlement Website. Thus, all potential Settlement Class Members will be given forty-five (45) days to make their elections as to whether they wished to participate in the Settlement, object thereto, or opt out. As the Claims Administrator attests in the Declaration of Mark Schey (filed herewith) ("Schey Decl."), 86,997 Notices were mailed. Schey Decl., ¶7. Only 194 Notices were returned as undeliverable, and of those 194 undeliverable notices, 15 were re-mailed to forwarding addresses provided by the USPS. *Id.*, ¶8. This indicates that the Notice program was highly successful.

As the Claims Administrator further explains, only three opt-outs were received. *Id*., ¶15. One individual filed an objection with Defendant's Counsel. *Id*., ¶16. This demonstrates the Settlement Class Members' favorable reaction to the Settlement.

As of the time of this Declaration, 3,055 claims were received by the Claims Administrator. *Id*., ¶18. The deadline to submit a claim is August 12, 2024. After the claims deadline has passed, Plaintiffs' counsel will submit another, supplemental declaration from the Claims Administrator documenting the total number of claims, opt outs, and objections. *Id*., ¶20.

Given all of this, the Notice Plan has been successfully effectuated.

III. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL

The Second Circuit recognizes a "strong judicial policy in favor of settlements, particularly in the class action context." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc*, 396 F.3d 96, 116 (2d Cir. 2005); *accord* Newberg & Rubenstein on Class Actions § 13:44 (6th ed. 2022) ("Settlement is generally favored because it represents a compromise reached between the parties to the suit and relieves them, as well as the judicial system, of the costs and burdens of further litigation.").

In assessing whether a settlement should be finally approved, Rule 23(e) requires courts to ensure that a class settlement is "fair, reasonable, and adequate" in light of the following factors:

(A) the class representatives and Plaintiffs' Counsel have adequately represented the class;

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

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

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

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

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

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

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

Fed. R. Civ. P. 23(e)(2); *Moses v. New York Times Co*., 79 F.4th 235, 242 (2d Cir. 2023).

When applying the Rule 23(e)(2) factors, courts in this Circuit evaluate both the substantive terms of the settlement and whether it is procedurally fair—*i.e*., "whether the negotiating process by which the settlement was reached shows that the compromise is the result of arm's-length negotiations." *In re Synchrony Fin. Sec. Litig*., No. 18-cv-01818, 2023 WL 4992933, at *3 (D. Conn. Aug. 4, 2023). That evaluation requires consideration of the nine "*Grinnell* factors" set forth in *City of Detroit v. Grinnell Corp*., 495 F.2d 448 (2d Cir.1974), which overlap with the Rule 23(e)(2) factors.[3] *See, e.g*., *Moses*, 79 F.4th at 243 ("Rule 23(e)(2) does not displace our traditional *Grinnell* factors.").

A. The Settlement is Procedurally Fair.

The Court first must consider procedural fairness, which is comprised of two considerations: (i) whether "the class representatives and class counsel have adequately represented the class" and (ii) whether "the proposal was negotiated at arm's length." Fed. R. Civ. P. 23(e)(2)(A)–(B); *see also Grinnell*, 495 F.2d at 463 (the third *Grinnell* factor—*i.e*., the stage of

[3] The *Grinnell* factors are: (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. *Grinnell*, 495 F.2d at 463.

the proceedings and the amount of discovery completed—overlaps with Rule 23(e)(2)(B)'s "negotiated at arms-length" factor).

1. The Settlement Class has been vigorously represented.

Adequacy of representation requires consideration of whether "1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *Cordes & Co. Fin Servs. v. A.G. Edwards & Sons, Inc* 502 F.3d 91, 99 (2d Cir. 2007). Plaintiffs' interests are aligned with the Settlement Class. Each Plaintiff is a current or former customer of Defendant whose Private Information was compromised as a result of the Incident. Defendant's alleged failure to implement reasonable data security measures impacted not just Plaintiffs' privacy, but the privacy of all Class Members, and as a result, Plaintiffs and the Class seek the same relief from the same injury.

Plaintiffs' Counsel engaged in a thorough pre-suit investigation and significant informal discovery prior to this Settlement, which informed their understanding of the case's merits. Laukaitis Decl. in Support of Motion for Preliminary Approval, (ECF No. 67-2, hereinafter "Laukaitis Decl."), ¶ 11. Plaintiffs' Counsel is eminently qualified to conduct this litigation and, as discussed below, has done so vigorously to date.

2. The Settlement was negotiated at arm's length after the exchange of informal discovery.

This Settlement bears all of the qualities of arm's length negotiations. First, a neutral mediator's participation in the settlement process is among the indicia of the settlement's fairness. *See* William B. Rubenstein, 4 NEWBERG ON CLASS ACTIONS § 13:50 (6th ed. 2022) ("Evidence of a truly adversarial bargaining process helps assuage this concern [of collusive settlements] and there appears to be no better evidence of such a process than the presence of a neutral third party mediator").

Second, prior to negotiating the Settlement, Plaintiffs and Plaintiffs' Counsel were well informed about the strengths and weaknesses of their claims against Defendant. Laukaitis Decl., ¶ 11. Plaintiffs' Counsel's negotiating strategy benefited from the information obtained from Defendant's public disclosures, their independent investigation, and the pre-mediation information requests. *Id*., ¶ 12.

Lastly, skilled and experienced counsel engaged in adversarial negotiations for each of the parties. Defendant is represented by counsel with extensive experience in privacy and data security law, and with complex class litigation generally. Settlement negotiations took several months and included mediation on December 21, 2023, which resulted in an excellent monetary settlement for the Class. *Id*., ¶ 13. When viewed in their totality, the circumstances fully support the conclusion that the settlement is procedurally fair. *Id*., ¶ 14

Although formal discovery did not take place, the Parties informally exchanged information before, between, and after their mediation session bearing on the merits of Plaintiffs' claims, the size of the class, and the scope of security services employed by Defendant. Accordingly, Plaintiffs' Counsel—attorneys with considerable experience in assessing the strengths and weaknesses of data breach cases—are well-informed about the strengths and risks of the claims, as well as their value. *Id*.

This thoroughness and consistently adversarial posture favor final approval. *See, e.g*., *McMahon v. Olivier Cheng Catering & Events, LLC*, No. 08-cv-08713, 2010 WL 2399328, at *5 (S.D.N.Y. Mar. 3, 2010) ("efficient informal exchange of information" sufficient to recommend settlement approval); *Matheson v. T-Bone Rest., LLC*, No. 09-cv-04214, 2011 WL 6268216, at *5 (S.D.N.Y. Dec. 13, 2011) (informal discovery allowed plaintiffs to "weigh the strengths and weaknesses of their claims" and "day-long mediation allowed them to further

explore the claims and defenses"). As such, the Settlement satisfies Rule 23(e)(2)(A) and (B), as well as the third *Grinnell* factor, and is procedurally fair.

B. The Settlement provides meaningful relief to the class.

The Court should find that the Settlement's benefits are sufficiently robust. The $1,525,000 cash, non-reversionary common fund Settlement represents a significant monetary award. Such relief is particularly significant considering the costs and risks of further litigation, the proposed method of distributing relief to the Settlement Class, the Settlement terms relating to attorneys' fees, and the absence of related agreements. Fed. R. Civ. P. 23(e)(2)(i)–(iv); *see also Grinnell*, 495 F.2d at 463 (overlapping with *Grinnell* factors one, four through six, eight, and nine).

Risks of further litigation. Continued litigation of this case would be "complex, expensive, and lengthy." *In re Namenda Direct Purchaser Antitrust Litig*., 462 F. Supp. 3d 307, 312 (S.D.N.Y. 2020); *see also* Fed. R. Civ. P. 23(e)(2)(C)(i) (requiring courts to consider "the costs, risks, and delay of trial and appeal"); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig*., 330 F.R.D. 11, 36 (E.D.N.Y. 2019) (Rule 23(e)(2)(C)'s "risks" factor overlaps with *Grinnell* factors one, four, five, and six). Indeed, the Settlement resolves a complex class action—previously, three separate class actions—that have been and would continue to be costly to litigate through trial. Laukaitis Decl., ¶ 15; *see In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000) (settlement avoids costs associated with "inherently complex" class actions); *Hicks v. Morgan Stanley & Co*., 2005 WL 2757792, at *6 (S.D.N.Y. Oct. 24, 2005) (similar). Litigation inherently involves risk. *See In re PaineWebber Ltd. P'ships Litig*., 171 F.R.D. 104, 126 (S.D.N.Y. 1997). Plaintiffs likely would need to retain expensive forensics experts and litigate multiple *Daubert* motions. Certifying a class, surviving summary judgment, and proving liability at trial likely would require exhaustive briefing and additional first- and third-

party discovery—*i.e.*, discovery from Defendant and any third-party vendors handling or contracted to handle the Private Information of the proposed Class Members. Achieving a class-wide recovery like that provided by the Settlement also would require maintaining class status through trial—a difficult and uncertain prospect. And even if the Court were to certify the Class (and deny efforts to decertify it thereafter), any initially favorable result would likely be delayed and possibly defeated by any Rule 23(f) petition.

Risks of establishing damages. At least three additional risks attend Plaintiffs' damages claims. *See Grinnell*, 495 F.2d at 463 (factor five). Proving actual damages likely would require substantial discovery into the nuances of how exfiltrated Private Information is first exfiltrated, marketed, and then sold, for what purposes it is used, at what cost this comes to the Plaintiffs, and at what cost these negative actions would have been deterred or prevented by the imposition of other security precautions.

In sum, the Settlement eliminates these risks while providing significant relief to the Settlement Class. These factors sharply weigh in favor of final approval.

Proposed method of distributing relief. The proposed method of distributing relief to the class must be "effective." Fed. R. Civ. P. 23(e)(2)(C)(ii). Digital Settlement, LLC has designed a comprehensive Notice Plan that provides the best notice to the Settlement Class practicable under the circumstances. SA §§ II(G), II(I)(2). Settlement Class Members will submit claims using a simple, straightforward Claim Form, designed to maximize the number of claims made. See SA § II(I)(3); SA, Ex. C. Those who submit valid claims will receive payment by electronic means or by mailed checks. SA § II(H)(5)(a).

Attorneys' Fees and Service Awards. Plaintiffs' Counsel may move for an award of reasonable attorneys' fees and reimbursement of their litigation expenses. Fed. R. Civ. P.

23(e)(2)(C)(iii). In accordance with the Settlement's terms and the schedule set by the Court, Plaintiffs' counsel separately applied for an award of attorneys' fees not to exceed one-third of the Settlement Fund (*i.e.*, $508,283). *See* S.A. § (II)(F)(1). The Settlement is not conditioned upon award of fees. *Id*. Plaintiffs also apply for a service award of up to $2,500 to each Plaintiff.

No other agreements. Pursuant to Rule 23(e)(3), there are no other agreements that would modify any term of the Settlement. Laukaitis Decl., ¶ 16.

C. The Settlement treats Settlement Class Members equitably.

The proposed Settlement treats members of the Settlement Class equitably relative to one another. *See* Fed. R. Civ. P. 23(e)(2)(D). Defendant will establish a common fund from which payments will be distributed to Settlement Class Members who submit valid claims based on documented Out-of-Pocket Losses and on a pro rata basis. S.A. § (II)(H). This factor thus weighs in favor of final approval.

D. The remaining factors weigh in favor of approval.

***Grinnell* factors eight and nine**. Courts also evaluate the reasonableness of a proposed settlement in light of the best possible recovery, discounted by the attendant risks of litigation. *See Grinnell*, 495 F.2d at 463. Analyzing these factors "does not involve the use of a mathematical equation yielding a particularized sum" and instead "recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Frank v. Eastman Kodak Co*., 228 F.R.D. 174, 186 (W.D.N.Y. (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)).

As discussed above, the Settlement's relief is substantial. S.A. § (II)(H). That is so, notwithstanding Defendant's hypothetical exposure should Plaintiffs litigate and prevail on all aspects of their claims and damages theories—an uncertain prospect. Indeed, even if Plaintiffs

cleared the numerous hurdles leading up to trial (at the cost of years of more litigation and, most likely, hundreds of thousands of dollars), a larger recovery is not certain. *See Gilliam v. Addicts Rehab. Ctr. Fund*, No. 05-3452, 2008 WL 782596, *5 (S.D.N.Y. Mar. 24, 2008) (settlement was robust and immediate compared to some "speculative payment of a hypothetically larger amount years down the road").

Courts recognize that in the settlement approval context, a claim's hypothetical value must be discounted by risks and practical realities. Thus, the Second Circuit has noted that courts may approve settlements even where the recovery is a fraction of the amount recoverable at trial. *See, e.g.*, *Grinnell*, 495 F.2d at 455 n.2 ("There is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth of a single percent of the potential recovery."); *In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 428 (S.D.N.Y. 2001) (same); *accord, e.g.*, *In re Packaged Ice Antitrust Litig.*, 322 F.R.D. 276 (E.D. Mich 2017) (approving settlement of 2% of total possible damages); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 246 F.R.D. 156, 167 (S.D.N.Y. 2007) (approving settlement of 3% to 7% of total damages).

Here, Plaintiffs' Counsel weighed the risks against the hypothetical value of their claims and, ultimately, secured a substantial monetary award of $1,525,000.00. Laukaitis Decl., ¶ 14. Because the Settlement Agreement provides this immediate and significant relief without the attendant risks of continued litigation, *Grinnell* factors eight and nine weigh in favor of approval.

Grinnell factor seven. The fact that Defendant might be able to withstand a greater judgment does not change the analysis. *See Grinnell*, 495 F.2d at 463 (factor seven). A defendant need not "empty its coffers before a settlement can be found adequate." *In re IMAX Sec. Litigation* 283 F.R.D. 178, 191 (S.D.N.Y. 2012); *see also In re Sinus Buster Products Consumer Litig.*, No.

12-cv-02429, 2014 WL 5819921, at *11 (E.D.N.Y. Nov. 10, 2014) ("[A]bility to pay is much less important than the other *Grinnell* factors, especially where the other factors weigh in favor of approving the settlement."); *Viafara v. MCIZ Corp.*, No. 12-cv-07452, 2014 WL 1777438, at *7 (S.D.N.Y. May 1, 2014) (similar). This factor is neutral.

Scope of release. A final consideration is the scope of the Release. *See In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig*., 330 F.R.D. 11, 42 n.41 (although not a *Grinnell* factor, courts may look to the scope of the release in determining proposed settlement's reasonableness). In exchange for the relief described above, Plaintiffs and the Settlement Class release all claims that have or could have been asserted against Defendant and relating to the facts, transactions, or events alleged in this action. Further, the Release is limited to the exact conduct alleged in the Amended Complaint by Plaintiffs, because it pertains to claims "relating to the Data Security Incident." *See* SA § II(A)(6). The Release does not immunize Defendant from liability for future events. In sum, the Release is calculated to "achieve a comprehensive settlement that [will] prevent relitigation of settled questions at the core of [this] class action." *TBK Partners, Ltd. v. Western Union Corp*., 675 F.2d 456, 460 (2d Cir. 1982). This factor weighs in favor of approval.

Rule 23(e)(2) and *Grinnell* factors strongly support a finding that the Court will likely be able to approve the Settlement as "fair, reasonable, and adequate."

IV. THE SETTLEMENT CLASS SHOULD BE CERTIFIED

Class certification is a two-step process: first, Plaintiffs must establish numerosity, commonality, typicality, and adequacy under Rule 23(a); second, Plaintiffs must establish that one of the bases for certification in Rule 23(b) is met. Plaintiffs contend, and Defendant does not dispute for settlement purposes only, that the proposed Settlement Class meets these requirements.

A. The Requirements of Rule 23(a) are satisfied.

Rule 23(a) has four prerequisites for certification of a class: (i) numerosity; (ii) commonality; (iii) typicality; and (iv) adequate representation. FED. R. CIV. P. 23(a). The Settlement Class meets each prerequisite and, therefore, satisfies Rule 23(a).

1. Numerosity is Satisfied.

Under Rule 23(a)(1), Plaintiffs must show that the proposed class is "so numerous that joinder of all [its] members is impracticable." Fed. R. Civ. P. 23(a)(1). The Second Circuit has found numerosity met where a proposed class is "obviously numerous." *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997). Here, numerosity is easily satisfied, as the Settlement Class includes over 85,000 people. *See* Laukaitis Decl., ¶ 6.

2. Commonality is Satisfied.

Under Rule 23(a)(2), Plaintiffs must show that "questions of law or fact common to the [proposed] class" exist. FED. R. CIV. P. 23(a)(2). Commonality requires that the class claims "depend upon a common contention" that "must be of such a nature that it is capable of classwide resolution." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). "For purposes of Rule 23(a)(2) even a single common question will do." *Id*. (cleaned up). Plaintiffs need only show that their injuries "derive[d] from defendants' . . . unitary course of conduct." *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 84 (2d Cir. 2015).

Here, many significant common questions of law and fact exist, including:

1) Whether Defendant had a legal duty to Representative Plaintiffs and the Classes to exercise due care in collecting, storing, using, and/or safeguarding their PHI/PII;

2) Whether Defendant knew or should have known of the susceptibility of its data security systems to a data breach;

3) Whether Defendant's security procedures and practices to protect its systems were reasonable in light of the measures recommended by data security experts;

4) Whether Defendant's failure to implement adequate data security measures allowed the Data Breach to occur;

5) Whether Defendant failed to comply with its own policies and applicable laws, regulations, and industry standards relating to data security;

6) Whether Defendant adequately, promptly, and accurately informed Representative Plaintiffs and Class Members that their PHI/PII had been compromised;

7) How and when Defendant actually learned of the Data Breach;

8) Whether Defendant's conduct, including its failure to act, resulted in or was the proximate cause of the breach of its systems, resulting in the loss of the PHI/PII of Representative Plaintiffs and Class Members;

9) Whether Defendant adequately addressed and fixed the vulnerabilities which permitted the Data Breach to occur;

10) Whether Defendant engaged in unfair, unlawful, or deceptive practices by failing to safeguard Representative Plaintiffs' and Class Members' PHI/PII;

11) Whether Representative Plaintiffs and Class Members are entitled to actual and/or statutory damages and/or whether injunctive, corrective and/or declaratory relief and/or an accounting is/are appropriate as a result of Defendant's wrongful conduct; and

12) Whether Representative Plaintiffs and Class Members are entitled to restitution as a result of Defendant's wrongful conduct.

All Settlement Class Members' claims will be resolved by answering these common questions. Indeed, the overarching focus for all these inquiries is Defendant's common course of conduct, *i.e.*, its knowing disclosure of Plaintiffs' and Settlement Class Members' PII.

3. Typicality is Satisfied.

Typicality requires the representative party's claims to be "typical of the claims . . . of the class." Fed. R. Civ. P. 23(a)(3). That requirement is satisfied by showing that "the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented."

Robidoux v. Celani, 987 F.2d 931, 936–37 (2d Cir. 1993). "[D]ifferences in the degree of harm suffered, or even in the ability to prove damages, do not vitiate the typicality of a representative's claims." *In re Nissan Radiator/Transmission Cooler Litig*., No. 10-cv-07493, 2013 WL 4080946, at *19 (S.D.N.Y. May 30, 2013); *see also Fogarazzao v. Lehman Bros*., 232 F.R.D. 176, 180 (S.D.N.Y. 2005) ("The typicality requirement 'is not demanding."). Here, the typicality requirement is met because (1) Plaintiffs' claims stem from the same Incident as the claims of the Settlement Class Members; and (2) such disclosure affected Plaintiffs and Settlement Class Members in substantially the same way. *See Robidoux*, 987 F.2d at 936–37.

4. Adequacy of Representation is Satisfied.

Under Rule 23(a)(4), the adequate representation requirement is satisfied when the proposed class representatives will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requires that: (1) the class representatives do not have conflicting interests with other class members; and (2) class counsel is "qualified, experienced and generally able to conduct the litigation." *Marisol A*., 126 F.3d at 378. "[O]nly a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." *Martens v. Smith Barney Inc*., 181 F.R.D. 243, 259 (S.D.N.Y. 1998) (internal citation omitted).

First, Plaintiffs have no interests in conflict with the Settlement Class, as they are equally interested in obtaining relief for Defendant's alleged misconduct and ensuring that Defendant reforms its business practices. Laukitis Decl., ¶ 17. Plaintiffs and the Settlement Class members were all allegedly injured in the same manner based on their relationship with Defendant. *Cf. Damassia v. Duane Read, Inc.,* 250 F.R.D. 152, 158 (S.D.N.Y. 2008) (plaintiffs' claims being typical of the class is "strong evidence that their interests are not antagonistic"). Further, throughout the pendency of this action, Plaintiffs have adequately and vigorously represented their

fellow Class Members. They have spent time assisting their counsel, including reviewing pleadings, answering counsel's questions, and aiding with settlement. Laukitis Decl., ¶ 17. These same facts support Plaintiffs' appointment as Class Representatives for the Settlement Class.

Second, Plaintiffs' Counsel have extensive experience litigating, trying, and settling class actions, including consumer data breach cases like this, throughout the country. *Id*., ¶ 2. Courts have recognized Plaintiffs' Counsel's experience in complex class litigation and their skilled and effective representation. *Id*. Plaintiffs' counsel had sufficient information at their disposal before agreeing to a mediator's proposal and thus were able to balance the benefits of settlement against the risks of litigation. *Id*., ¶ 12. They have invested considerable time and resources into the prosecution of this case and are capable and committed to achieving the best result for Plaintiffs and the Settlement Class. *Id*., ¶ 13. Accordingly, Plaintiffs' Counsel satisfies Rule 23(a)(4)'s adequacy requirement. *See, e.g*., *In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig.,* 241 F.R.D. 185, 199 n.99 (S.D.N.Y. 2007) ("In the absence of proof to the contrary, courts presume that class counsel is competent and sufficiently experienced to prosecute vigorously the action on behalf of the class.").

Separately, Rule 23(g) requires the Court to appoint Class Counsel to represent the Settlement Class. Considering Plaintiffs' Counsel's work in this action, their collective familiarity and experience in handling similar actions, and the resources they have committed to representing the Settlement Class, they should be appointed Class Counsel under Rule 23(g)(3) and confirmed under Rule 23(g)(1). *See* Laukitis Decl., ¶¶ 11-13; SA, Exs. 2-4.

B. The Settlement Class Meets All Rule 23(b)(3) Requirements.

Rule 23(b)(3) requires the Court to find that (1) 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. *See* Fed. R. Civ. P. 23(b)(3).

1. Predominance

Rule 23(b)(3) requires a finding that common issues of law or fact predominate over any issues unique to individual class members. The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc*., 521 U.S. 591, 623 (1997) (citation omitted). "[A] plaintiff must establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, predominate over those issues that are subject only to individualized proof." *In re Nassau Cty. Strip Search Cases,* 461 F.3d 219, 227 (2d Cir. 2006) (citation omitted). In the settlement context, moreover, the potential for trial manageability problems posed by individualized issues falls away because "the proposal is that there be no trial." *Amchem Prods., Inc*., 521 U.S. at 620; *accord, e.g*., *Tart v. Lions Gate Entm't Corp* , 2015 WL 5945846, at *4 (S.D.N.Y. Oct. 13, 2015) ("[T]he predominance inquiry will sometimes be easier to satisfy in the settlement context.").

Here, common questions predominate over any questions that may affect individual Settlement Class Members. The core questions are whether Defendant had a legal duty to Representative Plaintiffs and the Classes to exercise due care in collecting, storing, using, and/or safeguarding their PHI/PII, and whether Defendant breached this duty. However these core questions are answered, all Settlement Class Members will be entitled to the same legal remedies premised on the same alleged wrongdoing. The issues affecting every Settlement Class Member are substantially the same. Those issues are subject to "generalized proof" and "outweigh those issues that are subject to individualized proof." *In re Nassau Cty. Strip Search Cases*, 461 F.3d at 227–28 (citation omitted). This case thus falls within "the types of cases [that] are uniquely

wellsuited to class adjudication"—*i.e.*, those based on uniform violation of common statutory rights. *See In re M3 Power Razor Sys. Mktg. & Sales Prac. Litig.*, 270 F.R.D. 45 (D. Mass 2010).

2. Superiority

Rule 23(b)(3) requires a class action to be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Here, the class action mechanism is superior to individual actions for at least three reasons.

First, "[t]he potential class members are both significant in number and geographically dispersed" and "[t]he interest of the class as a whole in litigating the many common questions substantially outweighs any interest by individual members in bringing and prosecuting separate actions." *Meredith Corp. v. SESAC* 87 F. Supp. 3d 650, 661 (S.D.N.Y. 2015) (citation omitted).

Second, a class action "will conserve judicial resources" and "is more efficient for Class Members, particularly those who lack the resources to bring their claims individually." *Zeltser v. Merrill Lynch & Co.*, 2014 WL 4816134, at *3 (S.D.N.Y. Sept. 23, 2014) (citation omitted).

Third, the expense and burden of litigating highly technical data breach claims, compared against the modest potential for individual recovery, make it impractical for the Settlement Class Members to seek redress on an individual basis. In a class action, litigation is viable because costs are spread across the entire class. *See, e.g.*, *Tart*, 2015 WL 5945846, at *5.

Accordingly, this Court "will likely be able to" certify the class for purposes of judgment on the proposed Settlement under Rule 23(e).

V. THE COURT-ORDERED NOTICE PROGRAM IS CONSTITUTIONALLY SOUND AND HAS BEEN FULLY IMPLEMENTED.

The Court is given broad power over which procedures to use for providing notice, so long as the procedures are reasonable and comport with due process. *Visa*, 396 F.3d at 113; *Handschu*

v. Special Servs. Div., 787 F.2d 828, 833 (2d Cir. 1986) ("[T]he district court has virtually complete discretion as to the manner of giving notice to class members.").

The Court-approved Notice Plan is a robust, state-of-the-art notice program, developed with Digital Settlement's assistance, that includes direct notice to Settlement Class Members via U.S. mail and email which will include an electronic link to the Claims Form. *See generally* Schey Decl.; S.A., Ex. A (Short Notice). Digital Settlement disseminated a Postcard Notice and established a dedicated Settlement Website through which Settlement Class members accessed case documents and obtained more detailed information about the Settlement, including important deadlines, such as the date for opting out or objecting to the Settlement. Schey Decl., ¶¶7-12. The Settlement Website permitted Settlement Class Members to complete or file Claim Forms online through a simple process. *Id*., ¶10.

The approved Notice Plan also provides a sufficiently detailed Long Form Notice, which is posted on the Settlement Website. *Id*. The notice defines the Settlement Class; explains all Settlement Class members' rights, the Parties' releases, and the applicable deadlines; and describes in detail the injunctive and monetary terms of the Settlement, including the procedures for allocating and distributing Settlement funds among the Settlement Class members. S.A., Ex. B. It plainly indicates the time and place of the Fairness Hearing, and it plainly explains the methods for objecting to, or opting out of, the Settlement. *Id*. It details the provisions for payment of Attorneys' Fees and Expenses and class representative Service Awards, and it provides contact information for Plaintiffs' Counsel. *Id*. This is sufficient. *See George v. Shamrock Saloon II, LLC*, 2021 WL 3188314, at *7 (S.D.N.Y. July 28, 2021) ("Class notice need only describe the terms of the settlement generally, which is a minimal requirement.").

VI. ATTORNEYS' FEES AND COSTS

Plaintiffs' Counsel separately filed a Motion for Attorneys' Fees and Costs which will be heard on the same date as the Fairness Hearing. ECF No. 83. As detailed in that Motion, Plaintiffs' Counsel seeks a total award of $508,283.

VII. REQUEST FOR CLASS REPRESENTATIVE SERVICE AWARD

The proposed class representative service award negotiated here also falls well within the range of those provided in similar settlement conditions, particularly in light of awards approved by courts within this jurisdiction. Plaintiffs seek the Court's approval of the Class Representative Service Awards of $2,500 per Plaintiff.

VIII. CONCLUSION

Plaintiffs respectfully request the Court enter the proposed order granting final approval and certifying the Settlement Class for settlement purposes.

Dated: July 30, 2024

By: /s/ Laura Van Note

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