UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE: MEDNAX SERVICES, INC., CUSTOMER DATA SECURITY BREACH LITIGATION This Document Relates To: All Actions	Case No.: 21-MD-02994-RAR

PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT

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Plaintiffs individually and on behalf of the putative class, move pursuant to Federal Rule of Civil Procedure ("Rule") 23(e) for an Order: (i) granting preliminary approval of the proposed Settlement; (ii) preliminarily certifying a class for purposes of Settlement; (iii) appointing Plaintiffs as the Class Representatives; (iv) appointing William B. Federman of Federman & Sherwood and Maureen M. Brady of McShane & Brady, LLC, as Class Counsel; (v) approving the Parties' proposed form and method of giving notice of the pendency of this action and the Settlement to the Settlement Class; (vi) directing notice be given to the Settlement Class; (vii) scheduling a hearing at which time the Court will consider the request for final approval of the Settlement and request for attorneys' fees and expenses; and (viii) granting such other and further relief as the Court deems proper.[1]

I. INTRODUCTION

In June 2020, Defendants Pediatrix Medical Group, Inc. (f/k/a Mednax, Inc.), PMG Services, Inc. (f/k/a Mednax Services, Inc.), and Pediatrix Medical Group of Kansas, P.C. (collectively, "Mednax"), and American Anesthesiology, Inc. ("AA" and together with Mednax, "Defendants") discovered unauthorized third-party hackers gained access to certain Microsoft Office 365-hosted business email accounts (the "Data Incident"). *See* Second Amended Class Action Complaint ("Compl."), ¶ 4, ECF No. 115. Defendants issued formal notices of the Data Incident in or around December of 2020. *Id.* ¶¶ 19, 42, 60, 79, 102, 127, 152, 176, 241, 263. Thereafter, Plaintiffs commenced this class action lawsuit, alleging Defendants failed to

[1] Defendants do not oppose the relief sought by this Motion for Preliminary Approval (the "Motion") and agree that the Court should grant preliminary approval of the settlement and allow notice to issue to the Settlement Class. By not opposing this relief, Defendants do not concede the factual basis for any claim and deny liability. The language in this Motion, including the description of proceedings, as well as legal and factual arguments, are Plaintiffs', and Defendants may disagree with certain of those characterizations and descriptions.

sufficiently protect their PHI and PII from unauthorized access. *Id.* ¶ 1.

After months of litigation and hard-fought settlement negotiations, the Parties have reached a settlement that provides substantial benefits to the Settlement Class.[2] Specifically, the Settlement provides monetary relief that includes: (i) a non-reversionary Settlement Fund of six million Dollars ($6,000,000) (SA, ¶ 3.1); (ii) reimbursement of Out-of-Pocket Losses up to $5,000.00 for expenses incurred as a result of the Data Incident (*id*. ¶ 7.1.1.); (iii) reimbursement for up to four (4) hours of Attested Time spent responding to the Data Incident at a rate of $30.00 an hour (*id*. ¶ 7.1.4.); and (iv) reimbursement for up to ten (10) additional hours of Documented Time spent responding to the Data Incident at a rate of $30.00 an hour (*id*. ¶ 7.1.5.). In addition, all Settlement Class Members are eligible to receive three (3) years of medical monitoring and medical fraud protection services. *Id.* ¶ 7.1.6. This is an outstanding result for Plaintiffs and the Settlement Class considering the challenges faced and the risks of protracted litigation.

As further discussed below, the Settlement falls within the range of judicial approval and includes a comprehensive notice plan. As such, preliminary approval of the proposed class action settlement is warranted.

II. FACTUAL AND PROCEDURAL BACKGROUND

Defendants are national healthcare services partners providing "newborn, anesthesia, maternal-fetal, radiology and teleradiology, pediatric cardiology, and other pediatric subspecialty care services in 39 states and Puerto Rico." Compl. ¶ 291. Defendants also provide consulting services, including administrative solutions to hospitals and healthcare providers. *Id.* ¶ 292. As part of the services Defendants provide, they are entrusted with the PII and PHI of Plaintiffs and

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[2] Unless otherwise stated, all capitalized terms shall have the definitions set forth in the Settlement Agreement attached as Exhibit 1 to the Declaration of William B. Federman in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement, filed concurrently herewith. Citations to the Settlement Agreement will be abbreviated as "SA, ¶ ___."

the Class. *Id.* ¶ 294.

On or about June 19, 2020, an unauthorized hacker accessed Microsoft Office 365-hosted business and email accounts through a successful phishing event and compromising the PHI and PII of Plaintiffs and the Class. *Id.* ¶ 384. In or around late December 2020 and January 2021, Defendants issued formal notices of the Data Incident to Plaintiffs and the Class. *Id.* ¶¶ 19, 42, 60, 79, 102, 127, 152, 176, 241, 263.

On August 5, 2021, Plaintiffs filed their first Consolidated Class Action MDL Complaint against Defendants, alleging Defendants failed to adequately protect Plaintiffs' and the Class's PII and PHI from unauthorized access. *See* MDL Amended Complaint, ECF No. 53. Plaintiffs filed their First Amended Consolidated Class Action Complaint on October 20, 2021. *See* First Amended Complaint, ECF No. 71. Subsequently, on June 10, 2022, Plaintiffs filed their Second Amended Class Action Complaint asserting multiple common law and statutory claims for relief. *See* Second Amended Complaint, ECF No. 115. In response, Defendants filed a Motion to Dismiss (ECF No. 123), which Plaintiffs opposed (ECF No. 126).

Prior to engaging in mediation and reaching a settlement, the parties conducted meaningful discovery. Decl. of William B. Federman in Support of Pls.' Mot. for Preliminary Approval of Class Action Settlement ("Federman Decl."), ¶ 4. Beginning in May of 2022 through September of 2023, Plaintiffs and Defendants conducted extensive discovery, including responding to written interrogatories and requests for production, producing thousands of pages of documents, taking numerous fact witness depositions, exchanging expert reports, and taking expert depositions. *Id.* On April 17, 2023, the Parties engaged in a full day mediation session with the Honorable Judge John Thornton (Ret.) of JAMS, which did not result in a settlement. *Id.* Although the Parties were participating in good faith, additional follow-up discussions with Judge Thornton were also unsuccessful. *Id.* ¶ 5.

On October 26, 2023, the Court appointed Judge Eduardo C. Robreno (Ret.) as Special Mediator in the case (the "Special Mediator"). *Id*. On January 16 and 17, 2024, Plaintiffs and Defendants participated in two full days of mediation before the Special Mediator and, while considerable progress was made, the mediation did not result in an agreement. *Id*. Over the next several weeks, Plaintiffs and Defendants continued settlement discussions facilitated by the Special Mediator, which resulted in the execution of a term sheet memorializing the essential terms of the settlement on February 9, 2024. *Id*. The terms of the settlement reached are memorialized in the Settlement Agreement, which was negotiated at arm's-length, in good faith and without collusion, by capable and experienced counsel, with full knowledge of the facts, the law, and the inherent risks in the Litigation, and with the active involvement of the Plaintiffs and Defendants. *Id.* Plaintiffs and Defendants now seek preliminary approval of the Settlement Agreement.

III. THE SETTLEMENT TERMS

The Settlement negotiated on behalf of the Settlement Class establishes a $6,000,000 non-reversionary Settlement Fund, which will be used to pay for Administration and Notice Costs;[3] Attorneys' Fees approved by the Court; Expenses approved by the Court; and all approved Claims. SA, ¶ 3.2.

A. Definition of the Settlement Class

Plaintiffs request certification, for settlement purposes only, a nationwide class of 2,597,042 individuals, defined as follows:

> [A]ll persons residing in the United States who were notified in or around December 2020 and January 2021, via either written or substitute notice, that their PHI and PII may have been involved in the Incident.

[3] With the exception that Defendants agreed to pay up to $2,000.00 of the costs incurred by the Settlement Administrator relating to providing the notice required by the Class Action Fairness Act of 2005 outside of the Settlement Fund. SA, ¶ 11.1

Id. ¶ 2.39. The Settlement Class specifically excludes: (i) Defendants, any Entity in which Defendants have a controlling interest, and Defendants' officers, directors, legal representatives, successors, subsidiaries, and assigns; (ii) any judge, justice, or judicial officer presiding over the Action and the members of their immediate families and judicial staff; and (iii) any individual who timely and validly opts out of the Settlement. *Id*.

B. Benefits to the Settlement Class

1. Reimbursement For Out-of-Pocket Expenses

Settlement Class Members may submit a claim for reimbursement of documented Out-of-Pocket Expenses, not to exceed $5,000.00 per Settlement Class Member. *Id.* ¶ 7.1.1. In order to receive reimbursement for Out-of-Pocket Expenses, Settlement Class Members need only provide the Settlement Administrator with: (i) the Settlement Class Member's name and current address; (ii) documentation supporting the Settlement Claim; and (iii) a brief description of the documentation describing the nature of the loss, if the nature of the loss is not apparent from the documentation alone. *Id*. ¶ 7.1.2.

2. Reimbursement for Attested Time Spent

Settlement Class Members may submit a claim for reimbursement for Attested Time Spent researching or remedying issues related to the Data Incident or for any actions that were taken in response to receiving a Notice of Security Incident from Defendants in an amount of $30.00 per hour up to four (4) hours (for a total of up to $120.00 for Attested Time Spent). *Id.* ¶ 7.1.4.

3. Reimbursement for Documented Time Spent

Additionally, all Settlement Class Members who spent more than four (4) hours researching or remedying issues related to the Data Incident or for any actions that were taken in response to receiving a Notice of Security Incident from Defendants may submit a claim for reimbursement of Documented Time Spent in an amount of $30.00 per hour for up to ten (10)

additional hours. *Id.* ¶ 7.1.5.

4. Medical Monitoring and Medical Fraud

Settlement Class Members may elect to receive three (3) years of medical monitoring and medical fraud protection services. *Id.* ¶ 7.1.6. To receive this benefit, Settlement Class Members need only make this election on their Settlement Claim Form. *Id.*

C. Notice Program

The Parties agreed to use Kurtzman Carson Consultants LLC ("KCC") as the Claims and Settlement Administrator. Within sixty (60) days of entry of the Preliminary Approval Order, Notice shall be provided to Settlement Class Members via direct notice and media notice. *Id.* ¶ 10.1. The proposed Notice scheme provides all information required by Rule 23(c)(2)(B). The Notice Plan lays out a program for notifying Class members of the Settlement and their rights in simple terms. *See id.* ¶¶ 10.1–10.3, Ex. A.

D. Claims, Opt-Outs, and Exclusions

The timing of the claims process is structured to ensure that all Settlement Class Members have adequate time to review the terms of the Settlement Agreement, make a claim, or decide whether they would like to opt-out or object.

1. Claims

Settlement Class Members will have 90 days from the Notice Date to complete and submit a claim to the Claims Administrator. *Id.* ¶ 2.9. Settlement Class Members making a claim must complete and submit a written Claim Form to the Settlement Administrator, postmarked (or, if submitted electronically in accordance with the requirements for electronic submission of a Claim Form, the date of such submission) on or before the Claims Deadline. *Id.* ¶ 7.2.

2. Exclusions

Settlement Class Members will have up to and including 60 days following the Notice Date to opt-out of the Settlement Agreement. *Id.* ¶ 2.28. To be considered valid, the request to opt-out must: (i) identify the case name of the Action; (ii) identify the name and address of the individual seeking exclusion from the Settlement; (iii) be personally signed by the individual seeking exclusion; (iv) include a statement clearly indicating the individual's intent to be excluded from the Settlement; and (v) request exclusion only for that one individual whose personal signature appears on the request (or, in the case of a minor, the personal signature of the minor's parent or legal guardian appears on the request). *Id*. ¶ 16.2. If submitted online, the opt-out request must be submitted no later than the Opt-Out Deadline using the link sent to the individual who submitted the request for exclusion. *Id*. ¶ 16.3.

3. Objections

Settlement Class Members will have up to and including sixty (60) days after the Notice Date to object to the Settlement. *Id*. ¶ 2.27. Any Settlement Class who wishes to object shall timely file a written objection to the Court on or before the Objection Deadline. *Id*. ¶ 17.1. The written objection must include: (i) the case name and number of the Acton; (ii) the name, address, and telephone number of the objecting Settlement Class Member and, if represented by counsel, of his or her counsel; (iii) a statement of whether the objection applies only to the objector, to a specific subset of the class, or to the entire class; (iv) a statement of the number of times in which the objector has objected to a class action settlement within three years preceding the date that the objector filed the objection, along with the caption of each case in which the objector has made such an objection; (v) a statement of the specific grounds for the objection; and (vi) a statement of whether the objecting Settlement Class Member intends to appear at the Final Approval Hearing, and if so, whether personally or through counsel. *Id*. ¶ 17.2.

E. Attorneys' Fees and Expenses

The Parties did not discuss the amount of Attorneys' Fees and Expenses until after the substantive terms of the Settlement had been agreed upon. *Id.* ¶ 18.2; Federman Decl. ¶ 9. Defendants agree not to oppose Class Counsel's request for Attorneys' Fees so long as it does not exceed 30.00% of the Settlement Fund. SA, ¶ 18.2. Defendants also agree not to oppose a request by Class Counsel for Expenses up to $800,000.00. *Id.* All requests for Attorney's Fees and Expenses are subject to Court approval and will be paid from the Settlement Fund. *Id.*

F. Release

The Settlement Class Members, who do not timely and validly opt out of the Settlement, release and discharge the Released Parties with respect to any and all Released Claims between and/or among them, known or unknown, arising out of or related in any way to the Data Incident, except for claims relating to the enforcement of the Settlement or this Agreement. *Id*. ¶ 14.1. Within ten (10) days after the Effective Date of the Settlement, Class Counsel and the Settlement Class Representatives shall dismiss with prejudice all claims, Actions, or proceedings that are released pursuant to this Agreement, to the extent any such claims, Actions, or proceedings remain pending after the Court issues the Final Approval Order and Judgment. *Id*. ¶ 14.4.

IV. ARGUMENT AND AUTHORITIES

A. Applicable Law

When deciding a motion for preliminary approval of a class action settlement, a court first evaluates whether certification of a settlement class is appropriate under Federal Rule of Civil Procedure 23(a) and (b). *Diakos v. HSS Sys., LLC*, 137 F. Supp. 3d 1300, 1306 (S.D. Fla. 2015). Rule 23(a) requires: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *See* Fed. R. Civ. P. 23(a)(1)–(4). Rule 23(b)(3) requires that (1) "the 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). The Eleventh Circuit also requires that the class representatives have standing to sue and that the proposed class is adequately defined and clearly ascertainable. *See Prado-Steiman ex rel Prado v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000); *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012).

If certification of a settlement class is appropriate, a court then determines if the proposal is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). To do so, the Court considers whether:

> (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

Furthermore, the Eleventh Circuit "instruct[s] district courts to consider several additional factors." *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1273 (11th Cir. 2021) (citing *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984)). These additional factors are:

> there was no fraud or collusion in arriving at the settlement and ... the settlement was fair, adequate and reasonable, considering (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved.

Bennett, 737 F.2d at 986 (the "*Bennett* factors").

"Preliminary approval is appropriate where the proposed settlement is the result of the parties' good faith negotiations, there are no obvious deficiencies, and the settlement falls within

the range of reason." *Smith v. Wm. Wrigley Jr. Co.*, No. 09-60646-CIV, 2010 WL 2401149, at *2 (S.D. Fla. June 15, 2010) (citations omitted) ("Preliminary approval is not binding, and it is granted unless a proposed settlement is obviously deficient.").

B. Rule 23(a) Requirements are Met for Settlement Purposes.

Standing. [A]ny analysis of class certification must begin with the issue of standing." *Griffin v. Dugger*, 823 F.2d 1476, 1482 (11th Cir. 1987). To satisfy Article III standing, a plaintiff must "(1) suffer[] an injury in fact, (2) that is fairly traceable to the challenged conduct of defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). Plaintiffs extensively argued they had Article III standing in their Opposition to Defendants' Motion to Dismiss. *See* ECF No. 92. For the reasons stated therein, the standing requirement is met.

Numerosity. The next prerequisite is that the "class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). This requirement is "a generally low hurdle" and, as a general rule, "less than twenty-one is inadequate ... [and] more than forty is adequate..." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1267 (11th Cir. 2009) (internal quotations and citation omitted). The Settlement Class here includes approximately 2,712,790 individuals, satisfying the numerosity requirement.

Ascertainability. A class must be "adequately defined and clearly ascertainable." *Little*, 691 F.3d at1304. Identifying Settlement Class Members here is simple and objective: Defendants have a list of all individuals to whom it sent notice that their information was compromised in the Data Incident. As such, ascertainability is satisfied.

Commonality. Next, there must be "questions of law or fact common to the class." Fed. R. Civ. P. 23 (a)(2). Commonality may be shown when the claims of all class members "depend upon a common contention," with "even a single common question" sufficing. *Wal-Mart Stores, Inc. v.*

Dukes, 131 S. Ct. 2541, 2545, 2557 (2011). Therefore, "in order to satisfy the commonality element under Rule 23(a), the question is whether [p]laintiff has shown that the alleged issues require generalized proof, applicable to the proposed class in its entirety." *Ass'n for Disabled Americans, Inc. v. Motiva Ent., LLC*, No. 99-0580, 1999 WL 35815520, at *2 (S.D. Fla. Oct. 19, 1999). Here, Plaintiffs' claims turn on the adequacy of Defendants' data security in protecting Plaintiffs' and Class's PHI/PII. Evidence to resolve that claim does not vary among class members, and so can be fairly resolved, at least for purposes of settlement, for all Settlement Class Members at once. Thus, commonality is met.

Typicality. A class representative's claims must also be typical of the putative class they seek to represent. Fed. R. Civ. P. 23(a)(3). This requirement "measures whether a sufficient nexus exists between the claims of the named representative and those of the class at large." *Hines v. Widnall*, 334 F.3d 1253, 1256 (11th Cir. 2003) (citation omitted). Class Members' claims need not be identical to satisfy this requirement. *Ault v. Walt Disney World Co.*, 692 F.3d 1212, 1216 (11th Cir. 2012). Instead, "[t]he claim of a class representative is typical if the claims or defenses of the class and the class representative arise from the same event or pattern of practice and are based on the same legal theory." *Bouton v. Ocean Prop., Ltd.*, 322 F.R.D. 683, 699 (S.D. Fla. 2017) (internal citations omitted). Plaintiffs' interests are aligned with the Settlement Class because they all received a notice letter from Defendants informing them their PHI/PII may have been compromised as a result of the Data Incident and was therefore impacted by the same allegedly inadequate data security that allegedly harmed the rest of the Settlement Class. Thus, Typicality is met.

Adequacy. Finally, Rule 23(a)(4) requires that "the representative parties ... fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "[C]lass counsel and the class representatives are adequate representatives of the class if: (1) plaintiffs' counsel are

qualified, experienced, and generally able to conduct the proposed litigation, and (2) the plaintiffs lack 'interests antagonistic to those of the rest of the class.'" *Holman v. Student Loan Xpress, Inc.*, No. 8:08-cv-305-T-23MAP, 2009 WL 4015573, at *2 (M.D. Fla. Nov. 19, 2009) (quoting *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 726 (11th Cir. 1987)). The Class Representatives here have no conflicts with the Settlement Class and have demonstrated their adequacy by: (i) having a genuine personal interest in the outcome of the case; (ii) selecting well-qualified Class Counsel; (iii) producing information and documents to Class Counsel to permit investigation and development of the complaints; (iv) being available as needed throughout the litigation; and (v) monitoring the Litigation. Federman Decl., ¶ 12. Moreover, Class Counsel are adequate because of their vast experience as vigorous data breach class action litigators. *See Id.* at Ex. 2 and 3.

C. Rule 23(b) Requirements Are Met for Purposes of Settlement

Common Questions of Law and Fact Predominate. The predominance inquiry looks at "the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement." *Amchem Prods. v. Windsor*, 521 U.S. 591, 623 (1997). "[C]ommon issues of fact and law predominate if they have a direct impact on every class member's effort to establish liability and on every class member's entitlement to injunctive and monetary relief." *Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 985 (11th Cir. 2016). Further, "[i]t is not necessary that all questions of law or fact be common, but only that some questions are common and that they predominate over individual questions." *In re Takata Airbag Prod. Liability Litig.*, No. 2599, 2023 WL 4925368, at *6 (S.D. Fla. June 20, 2023).

Here, as in other data breach cases, common questions predominate because all claims arise out of a common course of conduct by Defendant. *See In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 311-16 (N.D. Cal. 2018). The focus on a Defendants' security measures in a data

breach class action "is the precise type of predominant question that makes class-wide adjudication worthwhile." *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 312 (N.D. Cal. 2018). All Class Members had their PHI/PII compromised in the Data Incident and the security practices at issue did not vary from person to person. Thus, because these common questions represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is a clear justification for handling the dispute on a representative rather than on an individual basis. Thus, the predominance requirement is readily satisfied.

Class Action is the Superior Method of Adjudication. Moreover, certification of this suit as a class action is superior to other methods to fairly, adequately, and efficiently resolve the claims asserted. To satisfy the superiority requirement of Rule 23(b)(3), a movant must show that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). "The focus of the superiority analysis is on the relative advantages of a class action suit over whatever other forms of litigation might be realistically available to plaintiffs." *Mohamed v. American Motor Co., LLC*, 320 F.R.D. 301, 316 (S.D. Fla. 2017) (internal quotations omitted).

Adjudicating individual actions here is impracticable. The amount in dispute for individual class members is too small, the technical issues involved are too complex, and the expert testimony and document review is too costly. The individual amounts here are insufficient to allow anyone to file and prosecute an individual lawsuit—at least not with the aid of competent counsel. Rather, individual prosecution of claims would be prohibitively expensive, needlessly delay resolution, and may lead to inconsistent rulings. Thus, the Court should certify the Class pursuant to Rule 23(b)(3).

D. The Rule 23(e) Factors and the *Bennett* Factors are Satisfied.

Next, the Court must preliminarily determine whether the Settlement is fair, adequate, and

reasonable under Rule 23(e)(2) while also considering the *Bennett* factors. At this juncture, "the court's primary objective ... is to establish whether to direct notice of the proposed settlement to the class, invite the class's reaction, and schedule a final fairness hearing." *Morris v. US Foods, Inc.*, No. 8:20-cv-105, 2021 WL 2954741, at *7 (M.D. Fla. May 17, 2021) (quoting William B. Rubenstein, 4 Newberg on Class Actions § 13:10 (5th ed. Supp. 2020)). In the end, courts have substantial discretion in approving a settlement agreement. *Bennett*, 737 F.2d at 986. For the foregoing reasons, the Rule 23(e) and *Bennett* factors have been satisfied.

1. Fed. R. Civ. P. 23(e)(2)(A): Plaintiffs and Class Counsel have Adequately Represented the Class.

The first factor heavily weighs in favor of granting preliminary approval because both Class Counsel and the Class Representative have adequately represented the Class. Class Counsel have adequately represented the Class by fully investigating the facts and legal claims; preparing the Complaints; briefing multiple Oppositions to Defendants' Motions to Dismiss and Motions for Summary Judgment; fully briefing a motion for Class Certification; conducting extensive discovery, including responding to written interrogatories and requests for production, reviewing thousands of pages of documents, taking numerous fact witness depositions, exchanging expert reports, and taking expert depositions; participating in a full-day mediation session with the Honorable Judge John Thornton and two full days of mediation before Special Mediator Judge Eduardo C. Robreno; and negotiating and reaching a Settlement at arm's length, in good faith, and without collusion. Federman Decl. ¶ 7. Additionally, the Settlement Class Representatives have also demonstrated their adequacy by: (i) having a genuine personal interest in the outcome of the case; (ii) selecting well-qualified Class Counsel; (iii) producing information and documents to Class Counsel to permit investigation and development of the complaints; (iv) being available as

needed throughout the litigation, including for depositions; and (v) monitoring the Litigation. Federman Decl.¶ 14.

2. Fed. R. Civ. P. 23(e)(2)(B): the Settlement was Negotiated at Arm's Length

The Settlement is the result of intensive, arm's-length negotiations through a neutral third-party mediator, and between experienced attorneys who are familiar with data breach class action litigation and with the legal and factual issues in these cases. Federman Decl., ¶ 5. Before discussing a potential settlement, the Parties completed an engaged in significant meaningful discovery that lasted over a year. *Id*. ¶ 4. This allowed the Parties to fully understand the claims, defenses, and risks of continued litigation. *Id*. ¶ 8. The Settlement is the result of prolonged and serious arms' length negotiations through multiple mediation sessions between counsel for the Parties, who fought hard for the interests of their respective clients. *Id*. ¶ 5. As part of the mediation process, the Parties exchanged and provided the mediators with detailed mediation statements outlining the strengths and weaknesses of their claims and defenses and engaged in meaningful discovery. *Id*. The fact that the Settlement was achieved through well-informed, and arm's-length neutrally supervised negotiations weighs in favor of granting preliminary approval under Rule 23(e)(2)(B).

3. Fed. R. Civ. P. 23(e)(2)(C)(i) and *Bennett* Factors 1–4: the Relief Provided is Adequate

When considering the likelihood of success at trial, the complexity, expense, and duration of the litigation, the relief provided is exceptionally reasonable. Simply stated, this case has taken years to litigate with the briefing and arguing of dispositive motions, including Defendants' Motions to Dismiss and Motions for Summary Judgment and Plaintiffs' Motion for Class Certification; engaging in voluminous discovery; and participating in multiple mediation sessions and months of settlement negotiations. *Id*. ¶¶ 3, 7. Given the complexity of the claims and

arguments here, a lengthy trial would follow. Litigation has been extraordinarily complex, and, since the filing of these cases began in January of 2021, several years will have passed before the Class is able to receive any recovery. Thus, the extensive and prolonged litigation conducted here favors preliminary approval.

While Plaintiffs are confident in their claims, data breach class actions are notoriously risky cases. For example, historically, data breach cases face substantial hurdles in surviving the class certification stage. *See, e.g., In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 293 F.R.D. 21 (D. Me. 2013); *Fulton-Green v. Accolade, Inc.*, No. 18-274, 2019 WL 4677954, at *8 (E.D. Pa. Sept. 24, 2019) (noting that data breach class actions are "a risky field of litigation because [they] are uncertain and class certification is rare."). As another court observed in finally approving a settlement with similar class relief, "[d]ata breach litigation is evolving; there is no guarantee of the ultimate result . . . [they] are particularly risky, expensive, and complex." *Fox v. Iowa Health Sys.*, No. 3:18-cv-00327, 2021 WL 826741, at *5 (W.D. Wis. Mar. 4, 2021). Further, maintaining class certification through trial is another over-arching risk emphasizing what is true in all class actions – class certification through trial is never a settled issue, and is always a risk for the Plaintiffs. Thus, the costs, risks, and delay of continued litigation are great, and weigh heavily in favor of preliminary approval. Thus, given this risk and uncertainty, settlement is the more prudent course when a reasonable one can be reached.

In light of the above, the Settlement achieved is an outstanding result. Federman Decl., ¶ 6. The Settlement includes a non-reversionary Settlement Fund of $6,000,000.00, reimbursement of out-of-pocket losses, reimbursement of attested time spent, reimbursement of documented time spent, and medical monitoring services. SA, ¶¶ 3, 7. Through the Settlement, Plaintiffs and Settlement Class Members gain significant benefits without having to face further risk of not receiving any relief at all.

4. Fed. R. Civ. P. 23(e)(2)(C)(ii)–(iv) and Fed. R. Civ. P. 23(e)(2)(D): Notice Will be Effectively Distributed; The Award of Attorneys' Fees and Expenses is Reasonable; No Agreements Required to be Identified; and Class Members are Treated Equitably Relative to Each Other.

Moreover, the method of distributing the settlement benefits will be equitable and effective. As explained above, all Class Members are eligible to make a claim for the reimbursement of Out-of-Pocket Losses, Attested Time Spent, Documented Time Spent, Medical Monitoring, and Medical Fraud Protection Services. SA, ¶ 7.1. The task of validating those claims will be delegated to the Settlement Administrator, KCC, a neutral party which has significant experience processing these claims in similar cases. The only difference in treatment among Class Members is that those who incurred and submit a claim for reimbursement of Out-of-Pocket Losses, Attested Time Spent, and Documented Time Spent will—appropriately and equitably—receive payments in proportion to the amount of their losses. Additionally, the 90-day claim period will be sufficiently long to enable all eligible Class Members to collect any necessary information before submitting their claims. For these reasons, the plan of distribution is both equitable and effective.

Class Counsel will request no more than 30.00% of the Settlement Fund in attorneys' fees and up to $800,000.00 in expenses to be paid from the Settlement Fund, which are both subject to Court approval. SA, ¶ 18.2. The award of attorneys' fees and costs were negotiated after the total amount of the Settlement Fund was established and will be paid from the non-reversionary Settlement Fund. *Id*; Federman Decl. ¶ 9.

5. *Bennet* Factor 5: The Substance and Amount of Opposition to the Settlement

This cannot be discerned at this time because Notice has not yet been given to the Class.

6. *Bennett* Factor 6: The Stage the Settlement was Achieved

The Parties arrived at the proposed settlement following the briefing on Defendants' Motions to Dismiss and Motions for Summary Judgment, Plaintiffs' Motion for Class

Certification, over a year of discovery, several mediation sessions with multiple mediators, and hard-fought settlement negotiations. Federman Decl. ¶ 7. Class Counsel had all the information needed to make an informed decision regarding the appropriateness of settlement. For over a year, the Parties engaged in extensive discovery, including responding to written interrogatories and requests for production, producing thousands of pages of documents, taking numerous fact witness depositions, exchanging expert reports, and taking expert depositions. SA, ¶ 1.5; Federman Decl. ¶ 4. Through the extensive investigation, discovery, and multiple mediation sessions, Class Counsel adequately understood the merits of the case before negotiating, and the Parties were well-positioned to evaluate the strengths and weaknesses of their claims. Federman Decl. ¶ 8. Thus, these efforts equipped the Parties with the information to thoroughly understand the case and negotiate a Settlement providing significant benefits to Plaintiffs and the Class.

V. NOTICE PROGRAM

"For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances…who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). "The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise." Fed. R. Civ. P. 23(e)(1). Notice is "adequate if it may be understood by the average class member." Newberg, § 11:53 at 167.

No later than thirty (30) days after the entry of the Preliminary Approval Order, Defendants will provide the Settlement Administrator with a list of names to which it sent direct mail notice of the Data Incident. SA, ¶ 10.1. Notice will be provided to Settlement Class Members via Direct Notice and Media Notice. *See id* at Exs. A–D.

The Settlement Administrator will administer Direct Notice to Settlement Class Members who received direct mail notice of the Incident, by mailing the Short Notice, attached as Exhibit

B to the Settlement Agreement, by First-Class U.S. Mail. Direct Notice will be provided to Settlement Class Members using double-sided postcards with tear off claims forms attached. *Id. at* Ex. B. If Direct Notices are returned as non-deliverable with a forwarding order, the Direct Notices will be re-mailed to any address identified by the USPS in the automatic forwarding order. *Id*. at Ex. A. Direct Mail Notices returned as non-deliverable without a forwarding address will be further traced through TransUnion or a similar vendor to obtain a more current address. *Id*.

For all Settlement Class Members in which Defendants do not have an address, the Settlement Administrator will administer a robust online and media campaign. KCC has stated that approximately 60,700,000 digital media impressions will be purchased programmatically and distributed over various websites and mobile apps and on Facebook over a period of 60 days. *Id.* The impressions will be broadly targeted to all adults 18 years of age or older. *Id.* The notices will appear on both desktop and mobile devices, including tablets and smartphones, in display (banner) and native ad formats. *Id.* All digital media notices will include an embedded link to the case website for Settlement Class Members to easily submit their claim. *Id.*

All in all, the proposed notices are plain and easily understood. The notices describe the claims, the relief provided under the Settlement, and Settlement Class Members' rights and options, including the deadlines and means of submitting a Claim Form, objecting, and/or appearing at the Final Approval Hearing. *Id.* at Exs. B–C. The Notices also provide information regarding attorney's fees and Service Award Payments. *Id.* Therefore, Plaintiffs submit that the Notice Program is reasonable and provides the best notice practicable under the circumstances.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter the proposed order granting preliminary approval and direct notice be given to the Settlement Class.

Dated: April 5, 2024

Respectfully submitted,

/s/: William B. Federman
William B. Federman (*pro hac vice*)
FEDERMAN & SHERWOOD
10205 N. Pennsylvania Avenue
Oklahoma City, OK 73120
T: (405) 235-1560
wbf@federmanlaw.com

Maureen M. Brady (*pro hac vice*)
MCSHANE & BRADY, LLC
1656 Washington Street, Suite 120
Kansas City, MO 64108
Telephone: (816) 888-8010
Facsimile: (816) 332-6295 E-mail:
mbrady@mcshanebradylaw.com

Interim Co-Lead Counsel for Plaintiffs and the Proposed Settlement Class

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2024, a true and correct copy of the foregoing was electronically filed and served using CM/ECF.

/s/ William B. Federman
William B. Federman

CERTIFICATE OF GOOD FAITH CONFERENCE

Defendants do not oppose the relief sought by this Motion for Preliminary Approval (the "Motion") and agree that the Court should grant preliminary approval of the settlement and allow notice to issue to the Settlement Class. By not opposing this relief, Defendants do not concede the factual basis for any claim and deny liability. The language in this Motion, including the description of proceedings, as well as legal and factual arguments, are Plaintiffs', and Defendants may disagree with certain of those characterizations and descriptions.

/s/ William B. Federman
William B. Federman