UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JULIA ROSSI, DELILAH PARKER and KELVIN HOLMES, Individually and on Behalf of All Others Similarly Situated, Plaintiffs, v. CLAIRE'S STORES, INC.; CLAIRE'S BOUTIQUES, INC.; and CBI DISTRIBUTING CORP., Defendants.	Case No.: 1:20-cv-5090 Hon. Andrea R. Wood, presiding Hon. Magistrate Heather K. McShain

MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND CERTIFICATION OF SETTLEMENT CLASS

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Plaintiffs Julia Rossi, Delilah Parker, and Kelvin Holmes (collectively, "Plaintiffs" or "Representative Plaintiffs"), individually and on behalf those similarly situated ("Settlement Class Members"), by and through their undersigned counsel, respectfully submit this memorandum of law in support of their Unopposed Motion for Preliminary Approval of Class Action Settlement and Certification of Settlement Class ("Motion"). The terms of the class action settlement (the "Settlement") are set forth in a Settlement Agreement and Release (the "Settlement Agreement" or "SA"), a copy of which is attached as Exhibit 1.

I. Introduction

Plaintiffs brought this class action on behalf of consumers whose personally identifiable information ("PII") and payment card data ("PCD") was compromised in a data breach that affected e-commerce websites owned and operated by Defendants Claire's Stores, Inc., Claire's Boutiques, Inc., and CBI Distributing Corp. (collectively, "Claire's" or "Defendants") from April 7, 2020 through June 12, 2020 (the "Data Breach" or the "Breach"). Plaintiffs brought this class action against Defendants for failing to secure the PII and PCD Defendants collected and maintained and for failing to provide timely and adequate notice to Settlement Class Members that their information had been stolen.

The Settlement is the product of extensive, complex, spirited and arm's-length negotiations between experienced and informed counsel, including a full-day mediation session with an experienced mediator, Bennett G. Picker, Esq., on March 23, 2021, as well as numerous telephonic conferences between counsel, both with and without the facilitation of Mr. Picker. The Settlement Agreement is fair, reasonable, and adequate given the claims, the alleged harm, and the parties' respective litigation risks. It is "within the range of possible approval" and, thus, merits preliminary approval. *In re AT&T Mobility Wireless*, 270 F.R.D. 330, 346 (N.D. Ill. 2010).

If approved, this Settlement will result in significant monetary and equitable relief to the Settlement Class. Settlement Class Members will be eligible to claim compensation for ordinary out of pocket losses stemming from the Breach, subject to an individual cap of $250 and including bank fees, interest, incidental expenses, and up to $50 in identity theft protection expenses. SA at ¶ 2.1(a). The Settlement also provides for a $19 payment for each payment card on which any Settlement Class Member suffered a fraudulent charge, as well as compensation for lost time spent mitigating Breach-related issues up to $57. *Id.* at ¶ 2.1(b), (c). A Settlement Class Member may also claim up to $3,000 in extraordinary expenses associated with unreimbursed fraudulent charges or out of pocket losses. *Id.* at ¶ 2.2. These monetary benefits are subject to an aggregate cap of $350,000. *Id.* at ¶ 2.3.

In addition, Defendants have agreed to directly provide all Settlement Class Members, in conjunction with notice of the proposed Settlement, a link and redeemable code to obtain a complimentary one-year membership for Experian's® IdentityWorks℠ Identity ("Identity Plan"), a product with a conservative value of $90 per Settlement Class Member. *Id.* at ¶ 2.6; Declaration of Robert Siciliano ("Siciliano Decl."), ¶¶ 5-9; *see also* Joint Declaration of Bradley K. King and M. Anderson Berry ("Joint Decl."), ¶ 8 (Experian estimates the Identity Plan's retail value is $107.88 per Settlement Class Member). The Settlement will provide this benefit to all Settlement Class Members immediately and regardless of whether they submit a claim for the above monetary benefits. SA at ¶ 2.6. Defendants also have agreed to implement prospective equitable relief in the form of enhanced data security and compliance measures for at least one year after Settlement approval. *Id.* at ¶ 2.4. Defendants estimate this equitable relief will cost them approximately $1.08 million to implement per year. Joint Decl., ¶ 9. Further, Defendants have agreed to pay all costs for notice and administration of the Settlement. SA at ¶ 2.7. In exchange for these benefits,

Settlement Class Members will provide a general release to Defendants for all claims relating to the Data Breach that were asserted or could have been asserted in the Litigation. *Id.* at ¶¶ 1.22, 6.1.

For the reasons set forth above and explained in more detail below, Representative Plaintiffs respectfully ask the Court to: (1) preliminarily approve the Settlement Agreement as fair, adequate, and reasonable; (2) provisionally certify the Settlement Class under Federal Rule of Civil Procedure 23(b)(3) and (e) for settlement purposes only; (3) approve the Notice Program set forth in the Settlement Agreement and exhibits thereto, approve the form and content of the Notice, and direct that Notice be provided to Settlement Class Members; (4) approve the procedures set forth in the Settlement Agreement for Settlement Class Members to exclude themselves from the Settlement Class or to object to the Settlement; (5) stay all proceedings in this matter unrelated to the Settlement pending final approval of the Settlement; (6) stay and/or enjoin, pending final approval of the Settlement, any actions brought by Settlement Class Members concerning a Released Claim; and (7) schedule a Final Approval Hearing for the purpose of determining whether the Settlement is fair, reasonable, and adequate and, therefore, deserving of final approval.

II. Summary of Litigation, Investigation, and Settlement

A. Procedural History

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. ECF No. 1. Plaintiffs Parker and Holmes filed their action (No. 20-cv-5574) on September 18, 2020, which was related and reassigned to the Honorable Andrea Wood on October 2, 2020. ECF No. 19. Plaintiffs agreed to coordinate their efforts and, with leave of the Court, filed a consolidated amended complaint (the "CAC") on October 26, 2020. ECF No. 20. The Court

granted Plaintiffs' subsequent motion for appointment of interim co-lead counsel on November 6, 2020. ECF No. 30. Defendants filed their motion to dismiss the consolidated complaint on December 4, 2020. ECF No. 35.

B. Settlement Negotiations

On December 15, 2020, the parties informed the Court of their intent to mediate. ECF No. 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. ECF No. 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 Mr. Picker in advance of their mediation. In doing so, Plaintiffs also conducted independent investigation of factual issues pertaining to the 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 the Settlement in principle. The Parties informed the Court of their Settlement on March 30, 2021, ECF No. 42, and in acknowledging their notice of Settlement, the Court terminated Defendants' motion to dismiss and ordered Plaintiffs to file the instant motion, later granting an extension of that deadline. ECF Nos. 43, 45.

C. Terms of the Proposed Settlement

1. Settlement Benefits

The Settlement's valuable benefits squarely address the issues raised in the litigation and provide significant relief to the Settlement Class Members. The Settlement provides monetary relief to compensate Settlement Class Members for inconveniences and losses as a result of the Data Breach, an additional year of the Identity Plan, and equitable relief in the form of significant business practice changes.

a. Expense Reimbursement

The Settlement will provide Settlement Class Members with the ability to claim the following monetary benefits, subject to an aggregate cap of $350,000:

a. Ordinary expenses. The following expenses shall be subject to an individual cap of $250:

1. Compensation for documented out of pocket losses for the following, if plausibly caused by the Data Breach:

    a. Card replacement fees;
    b. Late fees;
    c. Overlimit fees;
    d. Interest;
    e. Other bank or credit card fees;
    f. Postage, mileage, and other incidental expenses resulting from lack of access to a card or account resulting from the Data Breach; and
    g. Up to $50 in costs associated with credit monitoring or identity theft insurance, if purchased primarily as a result of the Breach.

2. A payment of $19 for each payment card on which a Class Member incurred one or more actual, documented fraudulent charge; and

3. Compensation for documented lost time spent monitoring accounts, reversing fraudulent charges, or otherwise dealing with the aftermath/clean-up of the incident, at the rate of $19 per hour for up to 3 hours (documentation requires at least a narrative description of

the activities performed during the time claimed and their connection to the Data Breach);

b. Extraordinary Expenses. 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.

SA at ¶ 2.2.

To receive payment for out-of-pocket expenses, a Class Member must complete the appropriate section of the Claim Form and provide any required documentation to support their claim. *Id.* at ¶ 2.33. The Claims Administrator will determine whether the claim is Facially Valid. The Claims Administrator may request from the claimant Claim Supplementation as the Claims Administrator may reasonably require to evaluate the claim. *Id.* at ¶ 2.5.1. 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.

b. Identity Theft Protection Plan

Further, every Settlement Class member will receive, in the Class notice, a link and a redeemable code to immediately and directly obtain a complimentary one-year membership of the Identity Plan, regardless of whether they submit a Claim Form. This product will be the same as offered by Claire's in its initial notice letter of the Data Breach. *Id.* at ¶ 2.6. 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. Joint Decl., ¶ 7; Siciliano Decl., ¶ 4.

The Identity Plan, when compared to comparable identity theft protection products available for any consumer to purchase, has a conservative retail value of at least $90 per Settlement Class Member. Siciliano Decl., ¶¶ 5-9. Experian estimates the Identity Plan's retail value to be $107.88 per Settlement Class Member. Joint Decl., ¶ 8. Under the proposed Settlement, Defendants will provide enrollment access to the Identity Plan to all 60,842 Settlement Class Members in conjunction with Class Notice and independent of any claims submitted. SA, ¶¶ 2.6, 3.3.1. Thus, the total value of the Identity Plan to the Settlement Class is, at a minimum, $5.48 Million and, by Experian's own estimate, as much as $6.56 Million.[1]

c. Remedial Measures Attributable to the Settlement

Defendants also agree to implement the following data security measures for a period of at least one year after the Court gives final approval to the Settlement:

a. Complete PCI Attestation of Compliance (AOC) in conjunction with a PCI-Security Assessor (QSA);

b. Conduct annual penetration testing of the cardholder data environment;

c. Conduct regular reviews of logs relating to Claire's e-commerce platforms;

d. Deploy an endpoint detection and response tool; and

e. Employ a data security and compliance person at the Executive Director level.

Id. at ¶ 2.4.

2. Dissemination of Notice to the Class

The Settlement provides that Defendants will pay for a comprehensive Notice Program which, subject to the Court's approval, shall commence within 30 days, and be completed within

[1] $90 value x 60,842 Settlement Class Members = $5,475,780.00; $107.88 value x 60,842 Settlement Class Members = $6,563,634.96.

45 days, after entry of the Preliminary Approval Order. *Id.* at ¶¶ 3.2, 3.3. Within 10 days of entry of the Preliminary Approval Order, Claire's will compile from its business records and provide to the Claims Administrator the email addresses and mailing addresses of all Settlement Class Members. *Id.* at ¶ 3.3.1. The Claims Administrator will then send to Settlement Class Members the Short Form Notice by email. The Claims Administrator will also establish a dedicated settlement website and maintain and update the website throughout the claim period and at least until 30 days after the Effective Date, and will post copies of the Long-Form Notice and the Claim Form approved by the Court as well as the Settlement Agreement. *Id.* at ¶ 3.3.2. The Claims Administrator will also make available to Settlement Class Members a toll-free help line staffed with a reasonable number of live operators to address their inquiries. *Id.* at ¶ 3.3.3. The Claims Administrator will also provide copies of the Long-Form Notice and Claim Form approved by the Court, and this Settlement Agreement, upon request. *Id.*

3. Attorneys' Fees and Expenses

After reaching agreement on the benefits to Settlement Class Members, the Parties separately negotiated the amount of Settlement Class Counsel's attorneys' fees, costs, and expenses, as well as the Representative Plaintiffs' Service Awards. SA at ¶¶ 7.1, 7.2; Joint Decl., ¶ 5. The Settlement Agreement provides that Settlement Class Counsel will make their application for reasonable attorneys' fees, costs, and expenses at least 14 days before the Opt-Out and Objection Deadlines. SA at ¶ 7.3. Settlement Class Counsel agree not to seek an award of attorneys' fees, costs, and expenses in excess of one hundred sixty-five thousand dollars ($165,000), to be paid by Defendants separate from the relief obtained for the Settlement Class. *Id.* at ¶¶ 3.2, 7.1. This maximum amount will be stated on the notice forms. *Id.*, Exs. B, C, D.

4. Service Awards to Class Representatives

Each of the Representative Plaintiffs took the initiative to commence this litigation, assisted in case development, stayed apprised throughout the litigation, and accepted risks and responsibilities individually and on behalf of others similarly situated. Therefore, subject to Court approval and in recognition of these efforts, the Settlement allows each Representative Plaintiff to apply for a Service Award of one thousand five hundred dollars ($1,500), no later than 14 days prior to the Objection Deadline. *Id.* at ¶¶ 7.2, 7.3. Any Service Awards approved by the Court will be paid by Defendants and will not reduce any benefits available to the Settlement Class *Id.* at ¶¶ 3.2, 7.2.

5. Release Provisions

If the Court grants final approval of the Settlement, Settlement Class Members will be deemed to have released Defendants of all claims, known or unknown, that were asserted or could have been asserted in the litigation. *Id.* at ¶ 1.22.

6. Opt-Out Procedure and Opportunity to Object

Any Settlement Class Member may request exclusion from the Settlement Class by sending a written request to the Settlement Administrator postmarked no later than the Opt-Out Deadline, as specified in the Notice. *Id.* at ¶ 4.1. Valid exclusion requests must include information described in the Notice. *Id.* at ¶ 4.1. Any Settlement Class Member who does not request exclusion may object to the Settlement, Settlement Class Counsel's fee application, and/or the requests for Service Awards. *Id.* at ¶ 5.1. To be considered, an objection must be timely filed with the Court, served concurrently upon Settlement Class Counsel, and include the information prescribed by the Notice. *Id.* at ¶ 5.1.

III. The Settlement Meets the Standards for Preliminary Approval.

Federal courts "naturally favor the settlement of class action litigation." *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996). Any settlement of claims brought on a class basis requires that: (i) the Court preliminarily approve the proposed Settlement; (ii) members of the Settlement Class receive notice of the proposed Settlement; and (iii) the Court hold a final hearing at which it decides whether the proposed Settlement is fair, reasonable, and adequate. *See Gautreaux v. Pierce,* 690 F.2d 616, 621 n.3 (7th Cir. 1982); MANUAL FOR COMPLEX LITIGATION, § 21.632 (4th ed. Supp. 2010).

In considering a motion for preliminary approval of class action settlement, the Court must determine whether the settlement is within the "range of possible approval," *i.e.*, within the range of what might be found fair, reasonable, and adequate. *In re AT&T Mobility Wireless Data Servs. Sales Litig.,* 270 F.R.D. 330, 346 (N.D. Ill. 2010); *Gautreaux*, 690 F.2d at 621 n.3. Rule 23 requires the Court to give notice if the Court is likely to approve the settlement and certify a settlement class for purposes of the settlement. Fed. R. Civ. P. 23(e)(1)(B).

At the time of preliminary approval, the Court is not required to make a final determination as to the fairness of the settlement. *In re AT&T Mobility Wireless*, 270 F.R.D. at 346. As a result, Courts have noted that the standard for preliminary approval is less rigorous than the analysis at final approval. *See, e.g.*, *In re Nat'l Collegiate Athletic Assoc. Student-Athlete Concussion Injury Litig.*, 314 F.R.D. 580, 588 (N.D. Ill. 2016) ("At this initial stage, the court is not 'resolving the merits of the controversy or making a precise determination of the parties' respective legal rights.' . . . This is why some courts at this stage perform a summary version of the exhaustive final fairness inquiry.") (quoting *E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985)); *see also In re Bromine Antitrust Litig*, 203 F.R.D. 403, 416 (S.D. Ind. 2001) (the "bar [for

obtaining preliminary approval] is low"); *Butler v. Am. Cable & Tel., LLC*, No. 09-cv-5536, 2011 WL 2708399, at *8 (N.D. Ill. Jul. 12, 2011) ("Although the 'fair, reasonable, and adequate standard' and the factors used to measure it are ultimately questions for the fairness hearing, a more summary version of the same inquiry takes place at the preliminary phase.") (citations omitted). The Supreme Court has cautioned that, in reviewing a proposed class settlement, a court should "not decide the merits of the case or resolve unsettled legal questions." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); *see also Hiram Walker & Sons, Inc.*, 768 F.2d at 889; *Isby*, 75 F.3d at 1196-97.

Here, the Settlement before the Court is fair, reasonable, and adequate, and well within the range of possible approval, because it provides monetary and equitable benefits to Settlement Class Members, avoids the uncertainty and expense of prolonged litigation, and avoids the need to resolve contentious factual and legal issues. The Settlement Agreement further satisfies the factors set forth by the Seventh Circuit in assessing whether a proposed settlement agreement is within the range of fair, reasonable, and adequate.

> In deciding whether to preliminarily approve a settlement, courts must consider: (1) the strength of plaintiffs' case compared to the terms of the proposed settlement; (2) the likely complexity, length and expense of continued litigation; (3) the amount of opposition to settlement among effected parties; (4) the opinion of competent counsel; and (5) the stage of the proceedings and the amount of discovery completed.

In re AT&T Mobility Wireless, 270 F.R.D. at 346; *see also*, *e.g.*, *Wong v. Accretive Health, Inc.*, 773 F.3d 859 (7th Cir. 2014) (reiterating "longstanding guidance" of the relevant factors for determining fairness of a class action settlement). In weighing these factors, the district court should "recognize[] that the first factor, the relative strength of the plaintiffs' case on the merits as compared to what the defendants offer by way of settlement, is the most important consideration." *Isby*, 75 F.3d at 1199.

The Seventh Circuit has explained that district courts should "consider the facts in the light most favorable to the settlement." *Id.* at 1198-99. Further, "[t]he essence of settlement is compromise . . . [t]hus the parties to a settlement will not be heard to complain that the relief afforded is substantially less than what they would have received from a successful resolution after trial." *Hiram Walker & Sons*, 768 F.2d at 889. Indeed, a district court should not reject a settlement "solely because [the settlement] does not provide a complete victory to the plaintiffs." *Isby*, 75 F.3d at 1200.

A. The Strength of Plaintiffs' Case Is Well-Balanced Against the Settlement.

The most important settlement-approval factor is "'the strength of plaintiff's case on the merits balanced against the amount offered in the settlement.'" *In re AT&T Mobility Wireless*, 270 F.R.D. at 346 (internal citations omitted). "An integral part of the strength of a case on the merits is a consideration of the various risks and costs that accompany continuation of the litigation." *Id.* at 347; *see also* Fed. R. Civ. P. 23(e)(2)(C) (requiring courts considering class settlements to consider whether "the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal . . . ."). While Plaintiffs believe in the merits of their case, they must acknowledge the risks of continuing litigation.[2]

First, fact-intensive inquiries are pervasive in this action. Plaintiffs' contention that Defendants failed to secure and safeguard their PII and PCD (*e.g.*, CAC, ¶¶ 19-40) involves

[2] In considering a settlement, a court should take the parties' views into account. *Wong*, 773 F.3d at 863 (reiterating that factors for determining a class settlement's fairness include "'the opinion of competent counsel'") (quoting *Gautreaux*, 690 F.2d at 631); *In re Cendant Corp. Secs. Litig.*, 109 F. Supp. 2d 235, 255 (D.N.J. 2000) ("Significant weight should be attributed to the belief of experienced counsel that settlement is in the best interest of the class.") (citation and internal quotation marks omitted); *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) (holding that in analyzing a class settlement, a trial court may rely on the judgment of experienced counsel and "absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel").

consideration of many facts surrounding the Breach, including the manner in which the information was compromised, the length of time the information was compromised, the types of information that were compromised, and whether any of the information was improperly accessed or used as a result. As the Seventh Circuit recognized in a similar retail data breach case, proving causation presents a significant hurdle. *Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 688, 694 (7th Cir. 2015). Similar difficulties exist for purposes of quantifying Settlement Class Members' damages. Likewise, Plaintiffs' claims regarding Defendants' failure to provide timely and adequate notice to Settlement Class Members after the Breach require a factual inquiry into Defendants' notification program.

Second, continued litigation would present risks of establishing liability and damages. If the Settlement is not approved, this action will proceed to intense litigation and possibly trial and appeal. Plaintiffs and Defendants vehemently disagree about the merits of Plaintiffs' claims, which the Court has not yet considered or ruled upon. Regardless of each party's respective position, there is uncertainty about the ultimate outcome of this action.

Third, valuation of Plaintiffs' damages is difficult. Even without any discount for the significant risks of continued litigation, most if not all injuries suffered by Settlement Class Members were relatively small, and establishing a nexus between those injuries and the instant Data Breach may be problematic. Joint Decl., ¶ 6. Even if Plaintiffs can prove economic damages, the value of any monetary recovery to Plaintiffs erodes over time, and litigation expenses increase.

Fourth, Defendants would oppose class certification if the action were to proceed to that stage. Plaintiffs believe that class certification is appropriate in this action but are cognizant of the risk that the Court may not certify a class at all, may not certify all claims asserted in the CAC, or

may limit the size of any class. This Court or the Seventh Circuit might ultimately conclude that individualized questions predominate over any common questions. Finally, even if Plaintiffs are successful in gaining certification of their claims, the class certified may ultimately be smaller than the nationwide Settlement Class who will benefit from the Settlement.

Finally, the tremendous amount of time and resources it will take to litigate the case to conclusion counsels in favor of accepting the Settlement now. *See General Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1082 (7th Cir. 1997); *see also In re AT&T Mobility Wireless*, 270 F.R.D. at 347 ("Even if Plaintiffs were to succeed on the merits at some future date, a future victory is not as valuable as a present victory. Continued litigation carries with it a decrease in the time value of money, for '[t]o most people, a dollar today is worth a great deal more than a dollar ten years from now.'") (citations omitted). Under this Settlement, the Settlement Class will realize immediate benefits once the Settlement is approved and the claims process is completed. In fact, all Settlement Class Members will receive the identity theft protection benefit via the Identity Plan soon after preliminary approval.

As a factual matter, it is clear that the Breach occurred. But the legal questions, such as whether Defendants' conduct gives rise to liability and valuation of damages, remain disputed. And while Plaintiffs strongly believe that they could overcome these legal hurdles, they cannot responsibly ignore the risk that this Court or a reviewing court might not accept some or all of their arguments. Given the heavy obstacles and inherent risks Plaintiffs face with respect to the novel claims in data breach class actions, including class certification, summary judgment, and trial, the substantial benefits the Settlement provides favors preliminary approval of the Settlement. Settlement Class Members will be eligible to receive the Identity Plan, as well as cash payments.

The Settlement therefore compensates Class Members for the types of damages they suffered without the uncertainty of litigation—indicating the Settlement merits approval.

B. The Complexity, Length, and Expense of Continued Litigation Favors Settlement.

The likely complexity, length, and expense of continued litigation are relevant factors in assessing a proposed settlement. *Wong*, 773 F.3d at 863.

Data breach cases such as this one are especially risky, expensive, and complex. There are numerous hurdles that Plaintiffs must overcome before the Court would find that a trial is appropriate, including class certification and summary judgment. The Settlement makes a final decision on several disputed factual and legal issues unnecessary. While the parties have conducted informal discovery for settlement purposes, in the event litigation proceeded, the parties would need to engage in further and significant discovery. Both parties would require experts. Costs of testifying experts regarding the economic harm caused to consumers, discovery, class certification, summary judgment motion practice, as well as other pre-trial and trial expenses, would be substantial. Continued litigation would likely involve motions to dismiss, motions for summary judgment, a motion for class certification, and interlocutory appeals, all of which would delay final resolution. This factor also weighs in favor of preliminary approval.

C. Plaintiffs Support the Settlement.

At the current stage of the litigation, prior to the dissemination of the class notice, no Settlement Class Members, including the named Plaintiffs, have indicated any objections to the proposed Settlement. Class Counsel will revisit this issue at the Final Approval Hearing, to the extent necessary.

D. The Settlement Is the Product of Serious, Informed, Non-Collusive Negotiations.

A proposed settlement is presumed to be fair and reasonable when it is the result of arm's-length negotiations. *See Wong*, 773 F.3d at 864; *Armstrong v. Bd. of School Dirs. of City of Milwaukee*, 616 F.2d 305, 325 (7th Cir. 1980), *overruled on other grounds in Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 375-76 (D.D.C. 2002) ("A 'presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arms-length negotiations'") (internal quotation omitted); *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 145-46 (E.D.N.Y. 2000) (assessing "the procedural component of the determination" by "focus[ing] on the 'negotiating process by which the settlement was reached'") (citation omitted). This presumption is applicable here.

As discussed above, the Settlement is the result of months of arm's-length negotiations, including a full-day mediation under the supervision of a neutral and experienced mediator, and numerous other telephone conferences between experienced counsel who had a comprehensive understanding of the strengths and weaknesses of each party's claims and defenses. Joint Decl., ¶ 5. Moreover, the parties reached the Settlement only after Plaintiffs' counsel analyzed materials provided by Defendants in informal discovery and performed other meticulous investigation. *Id*. These facts demonstrate that the Settlement is not collusive. These circumstances also weigh in favor of approval. *See* MANUAL FOR COMPLEX LITIG., § 30.42 ("A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.") (internal quotation marks omitted).

E. The Parties Have Engaged in Motion Practice and Informal Discovery.

Class Counsel conducted a detailed investigation into the facts and law relating to the matters alleged. Joint Decl., ¶ 3. Plaintiffs requested, received, and reviewed information from Defendants in connection with mediation and settlement negotiations. *Id.* Prior to the Court staying the case for the purpose of exploring resolution, Plaintiffs expended significant efforts researching and preparing their opposition to Defendants' motion to dismiss and continuing their factual investigation of the Data Breach in anticipation of discovery. *Id.* These efforts continued and were further refined for presentation before and during the parties' mediation. *Id.* As a result of the informal discovery and initial motion practice, Plaintiffs fully understand the merits of this case—weighing in favor of preliminary approval.[3] *Id.*, ¶ 4.

IV. Class Action Treatment is Appropriate.

Plaintiffs seek certification of the following Settlement Class for settlement purposes:

> All persons in the United States who made a purchase online with Claire's between April 7, 2020 through June 12, 2020.

SA, ¶ 1.26.

The Court should certify the Class because Rules 23(a) and 23(b)(3) are satisfied. "Settlement is relevant to a class certification" and is "a factor in the calculus." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619, 622 (1997). The Supreme Court "has expressly approved the use of the settlement class device." *Id.* at 618 ("[T]he 'settlement only' class has become a stock device."). Plaintiffs seek conditional certification of the Settlement Class under Rule 23(b)(3), their appointment as Representative Plaintiffs solely for purposes of the settlement, and

[3] A lack of formal discovery does not preclude preliminary approval "[b]ecause counsel have conducted a significant amount of informal discovery and 'dedicated a significant amount of time and resources to advancing the underlying lawsuits.'" *In re AT&T Mobility Wireless*, 270 F.R.D. at 350 (internal citations omitted).

appointment of their counsel as Settlement Class Counsel. The Court may certify the class if it satisfies all of the requirements of Rule 23(a) and one of the three subparagraphs of Rule 23(b), but without regard to whether the class would be manageable for trial. *See Amchem*, 521 U.S. at 620.

A. This Action Meets the Requirements of Rule 23(a).

Rule 23(a) sets forth the four prerequisites to class certification: (i) the class is so numerous that joinder of all members is impracticable ("numerosity"); (ii) the claims raise common questions of law or fact ("commonality"); (iii) the claims or defenses of the proposed representatives are typical of those of the class ("typicality"); and (iv) the representative parties can fairly and adequately protect the interests of the class ("adequacy"). This action satisfies each of these prerequisites.

1. The Class is Numerous.

Rule 23(a)(1) provides that a class must be "so numerous that joinder of all members is impracticable." Here, the nationwide class includes approximately 60,842 consumers whose information was compromised. SA, ¶ 3.3.1. Courts in the Seventh Circuit have found that classes with significantly fewer members than the Settlement Class satisfy the numerosity requirement. *See, e.g.*, *In re AT&T Mobility Wireless*, 270 F.R.D. at 341 (citing *Swanson v. Am. Consumer Indus., Inc.,* 415 F.2d 1326, 1333 n. 9 (7th Cir. 1969) (forty class members satisfy numerosity requirement)). The proposed Settlement Class is so numerous that joinder would be impracticable.

2. The Action Presents Common Questions.

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." Commonality focuses on the relationship of common facts and legal issues among class members. 1 H. Newberg & A. Conte, NEWBERG ON CLASS ACTIONS, § 3:10 at 271 (4th ed. 2002). "Courts

have consistently found a 'common nucleus of operative fact[s]' when the defendants are alleged to have directed 'standardized conduct toward [the putative class] members.'" *Chandler v. SW. Jeep-Eagle, Inc.,* 162 F.R.D. 302, 308 (N.D. Ill. 1995) (quoting *Rosario v. Livaditis,* 963 F.2d 1013, 1018 (7th Cir. 1992)); *accord Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756 (7th Cir. 2014). Here, commonality is satisfied because a determination of whether Defendants put reasonable information technology security in place prior to the Breach, and complied with their duties following the Breach, will resolve issues "central to the validity" of each class member's claims "in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). For purposes of Rule 23(a)(2), "even a single common question will do." *Id.* at 359.

3. Plaintiffs' Claims Are Typical.

Rule 23(a)(3) requires that the Representative Plaintiffs' claims be typical of other Settlement Class Members' claims. A "plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to . . . the same legal theory." *Rosario*, 963 F.2d at 1018 (quoting *De La Fuente v. Stokely-VanCamp, Inc.,* 713 F.2d 225, 232 (7th Cir. 1983)). While "the typicality requirement may be satisfied even if there are factual distinctions between the claims of the named plaintiffs and those of other class members," the requirement "primarily directs the district court to focus on whether the named representatives' claims have the same essential characteristics as the claims of the class at large." *Muro v. Target Corp.*, 580 F.3d 485, 492 (7th Cir. 2009) (internal quotations omitted); *see also Garner v. Healy*, 184 F.R.D. 598, 604 (N.D. Ill. 1999) (finding typicality satisfied where plaintiffs, like the class, "believed that they were getting something more than they ultimately received"). Typicality is satisfied here because Plaintiffs and the putative class have the same claims arising from the same alleged course of conduct: Defendants' alleged failure to implement reasonable information technology security and

then to respond adequately to the predictable Data Breach that followed in compliance with state laws. Accordingly, like commonality, the typicality requirement is satisfied here.

4. Plaintiffs and Their Counsel Will Fairly and Adequately Protect the Interests of the Class.

Rule 23(a)(4) requires that the named plaintiffs "fairly and adequately protect the interests of the class." Adequacy is satisfied where the class representative "(1) has retained competent counsel, (2) has a sufficient interest in the outcome of the case to ensure vigorous advocacy, and (3) does not have interests antagonistic to those of the class." *Saltzman v. Pella Corp.*, 257 F.R.D. 471, 480 (N.D. Ill. 2009). Moreover, "it is clear that adequacy of representation is established when no collusion is shown between the representative and an opposing party, when the representative does not have or represent an interest adverse to the [other class members], and when the representative has not failed in the fulfillment of his duty." *Ebersohl v. Bechtel Corp.*, No. 09-cv-1029, 2010 WL 2266736, at *2 (S.D. Ill. June 7, 2010) (*quoting Wade v. Goldschmidt*, 673 F.2d 182, 186 n.7 (7th Cir. 1982)).

Here, the interests of Representative Plaintiffs and the Settlement Class Members are fully aligned. Representative Plaintiffs seek the same remedy as all Settlement Class Members: relief to address claims arising from the Data Breach, through which Class Members' PII was compromised. Further, as reflected by their motion and existing Court appointment, ECF No. 3, Interim Class Counsel have extensive experience litigating and settling class actions, including numerous class actions arising from data breaches and other privacy issues. Joint Decl., ¶ 2. They have demonstrated expertise in handling all aspects of complex litigation and class actions and are well qualified to represent the Class. *Id.* Plaintiffs and Interim Class Counsel remain fully committed to advancing the interests of, and obtaining relief for, the Settlement Class Members,

as evidenced by the terms of the Settlement. *See Culver v. City of Milwaukee*, 277 F.3d 908, 913 (7th Cir. 2002) (addressing Rule 23(a)(4)'s adequacy requirement).

B. This Action Satisfies the Requirements of Rule 23(b)(3).

In addition to meeting the requirements of Rule 23(a), the parties seeking class certification must also show that the action is maintainable under Rule 23(b). Here, Rule 23(b)(3) is satisfied because: (i) the questions of law and fact common to members of the class predominate over any questions affecting only individuals; and (ii) the class action mechanism is superior to any other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3).

1. Common Questions of Law and Fact Predominate.

Rule 23(b)(3) "does *not* require a plaintiff seeking class certification to prove that each element of [the] claim is susceptible to classwide proof." *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196 (2013) (emphasis in original). Plaintiffs need only show that "common questions 'predominate over any questions affecting only individual [class] members.'" *Id*. (quoting Fed. R. Civ. P. 23(b)(3)); *see also Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010) (predominance requirement may be satisfied when "the central questions in the litigation are the same for all class members"). Class action status is appropriate where "'common questions represent a significant aspect of [a] case and . . . can be resolved for all members of [a] class in a single adjudication.'" *Messner v. Northshore Univ. Healthsystem*, 669 F.3d 802, 815 (7th Cir. 2012) (quoting 7AA Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 1778 (3d ed. 2011)). Predominance is not determined by "counting noses"—determining whether more common issues or individual issues exist regardless of importance. *Butler v. Sears Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013). "An issue 'central to the validity to each one of the claims' in

a class action, if it can be resolved 'in one stroke,' can justify class treatment." *Id.* (quoting *Dukes*, 131 S. Ct. at 2551). Further, the presence of "some factual variation among the class grievances will not defeat a class action." *Rosario*, 963 F.2d at 1017 (7th Cir. 1992).

Here, the claims are based upon uniform conduct regarding a single Data Breach that affected all Settlement Class Members in similar fashion, and for the same amount of time. The Rule 23(b)(3) predominance requirement is satisfied.

2. A Class Action Is Superior.

A class action is superior to other available methods for the fair and efficient adjudication of this controversy. To determine the issue of "superiority," Rule 23(b)(3) enumerates the following factors: "(A) [T]he interest of members of the class in individually controlling the prosecution . . . of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by . . . members of the class; (C) the desirability . . . of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action." Fed. R. Civ. P. 23(b)(3).

Each of these factors supports certifying the Settlement Class. There is little interest or incentive for Settlement Class Members to individually control the prosecution of separate actions. While the total amount of economic harm caused by this Data Breach is significant, the Settlement Class Members' individual claims are too small to justify the potential litigation costs they would incur by prosecuting these claims individually. *See Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 809 (1985); *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997) (the "policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action"). Although the injuries resulting from Defendants' alleged failure to secure and safeguard the PII and PCD of the Settlement Class

are real, the cost of individually litigating such cases against Defendants would easily exceed the value of any potential relief to any one consumer. This fact strongly warrants a finding that a class action is a superior method of adjudication. In sum, the Settlement Class's claims satisfy Rule 23(b)(3)'s requirements and should be certified.

C. The Court Should Appoint Plaintiffs' Counsel Settlement Class Counsel Under Rule 23(g).

Rule 23(g)(1) states that "a court that certifies a class must appoint class counsel." As discussed *supra*, and in the Joint Declaration, Plaintiffs' counsel is well-qualified, as this Court found in granting Plaintiffs' motion to appoint them interim co-lead class counsel earlier in this litigation. *See* ECF No. 30; Joint Decl., ¶ 2. The Court should now appoint Interim Co-Lead Counsel as Settlement Class Counsel.

D. The Proposed Class Notice Is Adequate.

Class notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Trust,* 339 U.S. 306, 314 (1950). Notice serves to "afford members of the class due process which, in the context of the Rule 23(b)(3) class action, guarantees them the opportunity to be excluded from the class action and not be bound by any subsequent judgment." *Peters v. Nat'l R.R. Passenger Corp*., 966 F.2d 1483, 1486 (D.C. Cir. 1992) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-74 (1974)). Notice must clearly and concisely state the following, in plain, easily understood language: (i) the nature of the action; (ii) the class definition; (iii) the class claims; (iv) that a class member may enter an appearance through an attorney; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members. Fed. R. Civ. P. 23(c)(2)(B). Rule 23(e)(B) similarly directs that "[t]he court must direct

notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise."

Here, the method and form of notice meet all of the requirements of Rule 23. The proposed Notice Program will include direct notice to all Settlement Class Members. SA, ¶ 3.3.1. Moreover, the Short-Form Notice and Long-Form Notice are written in clear and concise language and contain the information required by Rule 23(c)(2)(B). *Id.*, ¶ 3.1(f) and Exs. B, C, D. The proposed Notice, *inter alia*, describes the nature, history, and status of the action; sets forth the definition of the Settlement Class; states the Settlement Class' claims and issues; informs Settlement Class Members of the right to exclude themselves from the Settlement Class or object to the Settlement Agreement, as well as the deadline and procedure for doing so; sets out the attorneys' fees and expenses that Class Counsel intend to seek in connection with final settlement approval; provides contact information for Class Counsel; warns of the binding effect of the settlement approval proceedings; and outlines the date, time, and place of the Final Approval Hearing.

Notice will be disseminated directly to Settlement Class Members via the email addresses in Defendants' records associated with the impacted transactions, as well as via U.S. Mail postcard to those Class Members whose emails are returned as undeliverable. *Id.*, ¶ 3.3.1 and Exs. B, C. The Notice, therefore, is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314. Moreover, the parties designed the Notice to provide "direct notice in a reasonable manner to all class members who would be bound by the proposal . . . ." Fed. R. Civ. P. 23(e)(1)(B). Accordingly, the Court should approve the forms of notice and plan of dissemination.

V. Conclusion

For all of the foregoing reasons, Plaintiffs, by their counsel, respectfully ask the Court to: (1) preliminarily approve the Settlement Agreement as fair, adequate, and reasonable; (2) provisionally certify the Settlement Class under Federal Rule of Civil Procedure 23(b)(3) and (e) for settlement purposes only; (3) approve the Notice Program set forth in the Settlement Agreement and exhibits thereto, approve the form and content of the Notice, and direct that Notice be provided to Settlement Class Members; (4) approve the procedures set forth in the Settlement Agreement for Settlement Class Members to exclude themselves from the Settlement Class or to object to the Settlement; (5) stay all proceedings in this matter unrelated to the Settlement pending final approval of the Settlement; (6) stay and/or enjoin, pending final approval of the Settlement, any actions brought by Settlement Class Members concerning a Released Claim; and (7) schedule a Final Approval Hearing for the purpose of determining whether the Settlement is fair, reasonable, and adequate and, therefore, deserving of final approval.

Respectfully submitted,

Dated: June 16, 2021

/s/ Bradley K. King

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