UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CARA MCDOWELL, individually and on behalf of all others similarly situated, Plaintiff, v. **FONTAINEBLEAU FLORIDA HOTEL, LLC,** Defendant.	**CASE NO. 1:23-CV-22042-GAYLES/TORRES** **PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND MEMORANDUM IN SUPPORT**

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Plaintiff Cara McDowell ("Plaintiff") submits this Motion for Preliminary Approval of Class Action Settlement and Memorandum in support pursuant to Federal Rules of Civil Procedure 23. Plaintiff requests this Court preliminarily approve the Settlement memorialized in the Settlement Agreement (also referred to herein as "SA") attached as Exhibit A to the Declaration of Mason A. Barney in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement ("Barney Decl."), which Declaration is being submitted herewith. Plaintiff also requests that the Court certify the Settlement Class, approve the proposed plan of Notice, and schedule a Final Approval Hearing.

I. INTRODUCTION

This case arises from a data incident that Plaintiff alleges compromised the security of her personal identifiable information, including Social Security numbers, employer-sponsored health plan member names, and health plan selections (the "Private Information"), belonging to her and roughly 18,000 other similarly situated current and former employees of Defendant. After extensive arms'-length negotiations and a full-day mediation, the Parties have negotiated a Settlement that provides significant relief for Plaintiff and the Settlement Class she seeks to represent. Because the Settlement provides substantial recovery for those affected by the data breach, the Court should preliminarily approve the Settlement and authorize Notice to be provided to Settlement Class Members.

II. CASE SUMMARY

A. The Data Incident

Defendant Fontainebleau Florida Hotel, LLC ("Fontainebleau") is a 22-acre oceanfront luxury hotel located in Miami Beach, Florida. Plaintiff's First Amended Class Action Complaint (Dkt. No. 20) ("Compl.") ¶ 18. As a condition of employment, Plaintiff and Class Members were required to and did provide Defendant with sensitive personal information such as: Social Security numbers and health insurance information *Id.* ¶¶ 1, 19. In the notice letters Defendant sent to Plaintiff and Settlement Class Members notifying them of the Data Incident, Defendant unequivocally stated that it was on or about August 2022 that computer hackers gained access to Defendant's computer servers and data infrastructure, resulting in potential access to and/or acquisition of files containing Plaintiff's and Class Members' Private Information. *Id.* ¶ 2. As a result of the Data Incident, approximately

18,000 current and former employees' Private Information was impacted and potentially compromised. *Id.* ¶ 1.

B. Procedural Posture

On June 1, 2023, Plaintiff filed a class action complaint alleging five counts against Defendant: (1) negligence; (2) invasion of privacy; (3) breach of implied contract; (4) unjust enrichment; and (5) declaratory judgment and injunctive relief. (Dkt. No. 1). On August 28, 2023, Defendant filed a motion to dismiss Plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6). (Dkt. No. 7). On September 18, 2023, Plaintiff filed her First Amended Class Action Complaint (Dkt. No. 20), and Defendant filed its motion to dismiss on October 2, 2023. (Dkt. No. 22). Plaintiff filed her response in opposition to Defendant's motion to dismiss on October 30, 2023. (Dkt. No. 26). Defendant's reply in support of its motion to dismiss was filed on November 20, 2023. (Dkt. No. 29). Following discussions regarding the potential for early resolution, the Parties mediated with Bruce A. Friedman, Esq. of JAMS on March 5, 2024. Barney Decl., ¶ 8. In advance of the mediation, and in addition to the extensive legal research and briefing on Defendant's motion to dismiss engaged in by the Parties, Plaintiff and her counsel researched publicly available information related to the Data Incident, the merits of Plaintiff's claims, and issues relating to class certification, and the Parties discussed their respective positions regarding the same. *Id.* ¶ 9. Following mediation and continued extensive arm's length negotiations, the Settlement Agreement was finalized and executed on June 28, 2024. *Id.* ¶ 10.

The Parties recognize the benefits of settling this case. Although Plaintiff is confident that she will prevail in certifying the Class of approximately 18,000 current and former employees of Defendant, she recognizes that all litigation has risks, and that discovery, class certification proceedings, and trial will be time consuming and expensive for both Parties. SA § II. Plaintiff also recognizes the potential benefits of early resolution, not the least being that Settlement Class Members may now receive proper identity theft protections and compensation much sooner than otherwise would be possible if the Parties were to engage in long, protracted litigation. Barney Decl. ¶11.

Defendant maintains that it has several defenses to the claims asserted by Plaintiff. SA § III. Nevertheless, Defendant also recognizes the risks and uncertainties inherent in litigation, the

significant expense associated with defending class actions, the costs of any appeals, and the disruption to its business operations. *Id.* Accordingly, Defendant believes that the settlement set forth in the SA is likewise in its best interests and, for the purposes of settlement, Defendant does not dispute that the Settlement Class should be certified for purposes of this settlement. *Id.*

III. SUMMARY OF SETTLEMENT

The Settlement provides that every Settlement Class Member who makes a valid claim will be entitled to recover under any or all of four categories of relief: (1) up to $1,000 in ordinary loss reimbursements; (2) up to six (6) hours of lost time at $25 per hour; (3) up to $4,000 in extraordinary loss reimbursements; and (4) two years of credit monitoring and identity protection services. SA ¶¶ 2.1-2.3. There is no overall cap on the total amount that Defendant has agreed to pay, therefore, the foregoing payments will not need to be prorated under any circumstance. *Id.* ¶ 2.1. The Settlement Class includes approximately 18,000 individuals and is defined as: "all individuals in the United States who were impacted by the Data Incident, including all who were sent a notice of the Data Incident that occurred on or around August 30 to September 2, 2022." *Id.* ¶ 1.45. It specifically excludes "(i) all persons who are employees, directors, officers, and agents of Fontainebleau; (ii) the judges assigned to the Action and to evaluate the fairness, reasonableness, and adequacy of this Settlement, and that judge's immediate family and Court staff; and (iii) any other Person found by a court of competent jurisdiction to be guilty under criminal law of perpetrating, aiding, or abetting the criminal activity occurrence of the Data Incident or who pleads nolo contendere to any such charge." *Id.*

A. Settlement Benefits

1. Settlement Payments

First, the Settlement benefits provides Settlement Class Members who submit a valid Claim the opportunity to receive up to $1,000 for reimbursement of out-of-pocket expenses incurred as a result of the Data Incident, as follows: documented out-of-pocket losses fairly traceable to the Data Incident, including, but not limited to unreimbursed losses relating to fraud or identity theft; professional fees including attorneys' fees, accountants' fees and fees for credit repair services; costs associated with freezing or unfreezing credit with any credit reporting agency; credit monitoring costs

that were incurred between August 2022 through the date of the Claims Deadline; and miscellaneous expenses such as notary, fax, postage, copying, mileage and long-distance telephone charges that were incurred on or after August 2022, through the date of the Claims Deadline. SA ¶ 2.1. Settlement Class Members can also claim up to six (6) hours total of lost time spent in response to the Data Incident, calculated at the rate of $25.00 per hour, pursuant to the following requirements: (i) up to three hours of lost time claimed with an attestation by checking a box in the Claim Form, which is attached as Exhibit 3 to the Settlement Agreement, representing that they spent the claimed time responding to issues raised by the Data Incident; and (ii) up to an additional three hours of lost time if that lost time is supported by reasonable documentation establishing a connection between the lost time and the Data Incident, which documentation cannot be self-prepared. *Id.* ¶ 2.1.2.

The second category of benefits for which Settlement Class Members may qualify is up to $4,000.00 in proven, extraordinary monetary loss if the Settlement Class Member can confirm (i) the loss is an actual, documented, and unreimbursed monetary loss; (ii) the loss was fairly traceable to the Data Breach; (iii) the loss occurred between August 30, 2022 and the date of the close of the Claims Period; (iv) the loss is not already covered by one or more of the normal reimbursement categories; and (v) the Settlement Class Member made reasonable efforts to avoid, or seek reimbursement for, the loss, including and not limited to exhaustion of all available credit monitoring insurance and identify theft insurance. SA ¶ 2.1.3

2. Credit Monitoring and Identity Protection Services

The third benefit offered to Settlement Class Members is two (2) years of three (3) bureau credit monitoring services. SA ¶ 2.3. The services shall include (i) real time monitoring of the credit file at all three bureaus; (ii) dark web scanning with immediate notification of potential unauthorized use; (iii) comprehensive public record monitoring; (iv) medical identity monitoring; (v) identity theft insurance (no deductible); and (vi) access to fraud resolution agents to help investigate and resolve identity thefts. Defendant will pay for the credit monitoring services separate and apart from other Settlement benefits. *Id.*

3. Information Security Improvements

An additional category of benefits includes information security enhancements ensuring the Private Information of former, current, and future Fontainebleau employees will be better protected. SA ¶ 2.4. Costs associated with these security-related measures have been, or will be, paid for by Defendant separate and apart from any other settlement benefits. *Id.*

4. Release

Upon entry of the Final Approval Order, Settlement Class Members who do not submit a valid and timely request for exclusion from the Settlement Agreement will release claims against Defendant related to the Data Incident. The "Released Claims" are fully defined in Paragraph 1.41 of the Settlement Agreement and include all claims "based on, relating to, concerning or arising out of the Data Incident or the allegations, transactions, occurrences, facts, or circumstances alleged in or otherwise described in the Complaint." SA ¶ 1.41. Thus, the Release is tailored to the claims that have been pled or could have been pled in this case. Barney Decl. ¶ 22.

B. The Notice and Claims Process

1. Notice

Defendant has agreed to pay for the cost of providing notice, which cost will be paid separate and in addition to the payments available to Settlement Class Members. Barney Decl., ¶ 24. The Parties agreed to use RG2 Claims Administration, LLC ("Settlement Administrator") as Settlement Administrator, with the Court's approval. SA ¶ 1.43.

Subject to approval of the Court, within 30 days of entry of the Preliminary Approval Order, the Postcard Notice shall be provided to Settlement Class Members via direct mail to Settlement Class Members. SA ¶ 1.29. The Postcard Notice is clear and concise and provides information about the Settlement. SA ¶ 3.2(d); *see also* Exhibit 1 to the Settlement Agreement. A website will also be established and maintained by the Settlement Administrator as a means for the members of the Settlement Class to submit Claim Forms and obtain notice, information, and relevant documents about the Settlement, including the Postcard Notice, Long Notice, and Claim Form (the "Settlement Website"). *Id.* ¶ 3.2(c). The Long Notice, which is attached as Exhibit 2 to the Settlement Agreement,

explains the terms of the Settlement Agreement, provides contact information for Proposed Class Counsel, and describes the different settlement benefits available to Settlement Class Members. *Id.* ¶ 1.23. The Settlement Administrator will also establish and maintain a toll-free help line to provide Settlement Class Members with additional information about the settlement. *Id.* ¶ 3.2(c). Total settlement administration costs are estimated to be $39,704. Barney Decl., ¶ 25.

2. Claims

The timing of the Claims process is structured to ensure that Settlement Class Members have adequate time to review the Settlement, make a Claim, or decide whether they would like to opt-out or object thereto. Barney Decl., ¶ 31. Specifically, the Settlement Class will have 90 days from completion of Notice to submit a Claim to the Settlement Administrator. SA ¶ 1.7. The Claim Form, which is attached to the Settlement Agreement as Exhibit 3, is written in plain language to facilitate Settlement Class Members' ease in completing it. Barney Decl., ¶ 32; *see also,* SA at Ex. 3.

C. **Requests for Exclusion and Objections**

Settlement Class Members will have up to and including 75 days following entry of the Preliminary Approval Order to object to or exclude themselves from the Settlement. Barney Decl., ¶ 34. Similar to the timing of the claims process, the timing with regard to objections and exclusions is structured to give Settlement Class Members sufficient time to review the Settlement documents—including Plaintiff's Motion for Attorneys' Fees and Costs, which will be filed 14 days prior to the deadline for Settlement Class Members to object or exclude themselves from the Settlement. *Id.* ¶ 40; *see also* Proposed Preliminary Approval Order, submitted herewith and attached to SA as Ex. 4.

Any Settlement Class Member who wishes to be excluded from the Settlement must make the request in writing. SA ¶ 4.1. To be considered valid, the request must be timely mailed to the Post Office box established by the Settlement Administrator and must clearly express the individual Settlement Class Member's intent to be excluded from the Settlement Class. *Id.* Any Member of the Settlement Class who elects to be excluded "shall not receive any Settlement Class Member Benefits or be bound by the terms of the Agreement." *Id.* ¶ 4.3.

Any Settlement Class Member who wishes to object shall timely file notice of his/her intention to do so and at the same time: (i) file his/her written objection with the Clerk of the Court; and (ii) send copies of such papers to both Class Counsel and Defendant's Counsel. SA ¶ 5.1. The objection to the Settlement Agreement must include: (i) the objector's full name, address, telephone number, and e-mail address (if any); (ii) information identifying the objector as a Settlement Class Member, including proof that the objector is a member of the Settlement Class (e.g., copy of notice, copy of original notice of the Data Incident); (iii) a written statement of all grounds for the objection, accompanied by any legal support for the objection the objector believes applicable; (iv) the identity of all counsel representing the objector; (v) a statement whether the objector and/or his or her counsel will appear at the Final Approval Hearing; (vi) the objector's signature and the signature of the objector's duly authorized attorney or other duly authorized representative (along with documentation setting forth such representation); and (vii) a list, by case name, court, and docket number, of all other cases in which the objector and/or the objector's counsel has filed an objection to any proposed class action settlement within the last three (3) years. *Id.* To be timely, written notice of an objection in the appropriate form must be filed with the Clerk of the Court and contain the case name and docket number, no later than the Opt-Out and Objection Deadline and served concurrently therewith on Class Counsel and counsel for Fontainebleau. *Id.*

D. Attorneys' Fees and Costs

The Parties did not discuss the payment of attorneys' fees, costs, or expenses until after the substantive terms of the Settlement had been agreed upon. Barney Decl., ¶ 40. As set forth in the Settlement Agreement, the Parties agreed to request that the Court appoint Mason A. Barney and Tyler J. Bean of Siri & Glimstad, LLP as Settlement Class Counsel. *Id.*, ¶ 41. Defendant offered to pay Proposed Class Counsel's fees and expenses up to $175,000, which offer has remained open to the present day, subject to Plaintiff's agreement not to seek an amount greater than that in her motion seeking attorneys' fees. Proposed Class Counsel will submit a separate motion seeking attorneys' fees and costs prior to Settlement Class Members' deadline to exclude themselves from or object to the Settlement Agreement. *Id.* ¶ 42. If such a request is more than $175,000 in fees and expenses,

Defendant's previous settlement offer regarding attorneys' fees is deemed withdrawn and Defendant has reserved its right to oppose that portion of Proposed Class Counsel's request, regardless of the amount of fees sought. *Id.* The award of attorneys' fees, costs, and expenses will be paid by Defendant separate and apart from any other sums agreed to under the Settlement Agreement, meaning that payment of Class Counsel's fees and expenses will not affect the relief available to Settlement Class Members. *Id.* ¶ 43.

IV. ARGUMENT

Federal Rule of Civil Procedure 23, which governs class action litigation in federal court, provides that the claims of a proposed class may be settled 'only with the court's approval." Fed. R. Civ. P. 23(e). The approval of a class action settlement is a two-step process. First, the Court must conduct a preliminary review to determine whether the proposed class settlement "is within the range of possible approval." *Fresco v. Auto Data Direct, Inc.*, No. 3-cv-61063, 2007 U.S. Dist. LEXIS 37863, at *11 (S.D. Fla. May 11, 2007) (internal citations omitted); *see also Manual for Complex Litigation*, Sec. 30.41 (3rd ed. 1995). This first step involves both preliminary certification of a proposed class and an initial assessment of the proposed settlement. *Id.* At the preliminary approval stage, there is no need to "conduct a trial on the merits." *In re Motorsports Merchandise Antitrust Litig.*, 112 F. Supp. 2d 1329, 1333 (N.D. Ga. 2000). Instead, the court should "rely upon the judgment of experienced counsel for the parties … [and] [a]bsent fraud, collusion, or the like, the … court should be hesitant to substitute its own judgment for that of counsel." *Nelson v. Mead Johnson & Johnson Co.*, 484 F. App'x 429, 434 (11th Cir. 2012) (internal quotations omitted). It is only after the court has preliminarily approved a settlement and notice provided to the Class that the Court makes a final determination of the fairness, adequacy and reasonableness of a settlement. *Newberg on Class Actions* (5th ed.) §13:41 (2018).

There is a strong judicial preference and public policy favoring the voluntary conciliation and settlement of complex class action litigation. *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) ("Public policy strongly favors the pretrial settlement of class action lawsuits"). This is because class action settlements ensure class members a benefit, as opposed to the "mere possibility of recovery at some indefinite time in the future." *In re Domestic Air Transp.*, 148 F.R.D. 297, 306 (N.D.

Ga. 1993). In addition, "[s]ettlements conserve judicial resources by avoiding the expense of a complicated and protracted litigation process[.]" *In re Motorsports Merchandise Antitrust Litig.*, 112 F. Supp. 2d 1329, 1333 (N.D. Ga. 2000). Accordingly, a court has broad discretion in approving a settlement. *Id.*

A. Certification of the Settlement Class is Warranted.

Prior to granting preliminary approval of a proposed settlement, a court should first determine whether the proposed settlement class is appropriate for certification. *See Manual for Complex Litigation., Sec. 21.632 (4th ed. 2013); Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Class certification is proper if the proposed class, proposed class representative, and proposed class counsel satisfy the numerosity, commonality, typicality, and adequacy of representation requirements of Fed. R. Civ. P. 23. Additionally, where (as in this case) certification is sought under Fed. R. Civ P. 23(b)(3), the plaintiff must demonstrate that common questions of law or fact predominate over individual issues and that a class action is superior to other methods of adjudicating the claim. Fed. R. Civ P. 23(b)(3); *Amchem Prods. Inc.*, 521 U.S. at 615-16.

"A class may be certified 'solely for purposes of settlement where a settlement is reached before a litigated determination of the class certification issue.'" *Burrows v. Purchasing Power, LLC*, No. 1:12-CV-22800, 2013 U.S. Dist. LEXIS 189397, at *3 (S.D. Fla. Oct. 4, 2013) (quoting *Lipuma v. American Express Co.*, 406 F. Supp. 2d 1298. 1314 (S.D. Fla. 2005)). Because a court evaluating certification of a class action that settled is considering certification only in the context of settlement, the court's evaluation is somewhat different than in a case that has not yet settled. *Amchem Prods., Inc.*, 521 U.S. at 620. In some ways, the court's review of certification of a settlement-only class is lessened: as no trial is anticipated in a settlement-only class case, the case management issues inherent in the ascertainable class determination need not be confronted. *See id; see also Columbus Drywall & Insulation, Inc. v. Masco Corp.*, 258 F.R.D. 545, 557 (N.D. Ga. 2007). Other certification issues, however, such as "those designed to protect absentees by blocking unwarranted or overbroad class definitions" require heightened scrutiny and active role as a guardian of the interests of the absent class members. *Amchem Prods., Inc. v. Windsor*, 521 U.S. at 620. "Confronted with a request for settlement-only class

certification, a district court need not inquire whether the case, if tried, would present intractable management problems…for the proposal is that there be no trial." *Id.* This Settlement meets all of the requirements set forth in Fed. R. Civ P. 23 and, as set forth below, certification is appropriate.

1. The Proposed Settlement Class Meets the Requirements of Fed. R. Civ P. 23(a).

a. The class is so numerous that joinder of all members is impracticable.

Numerosity requires the members of the class be so numerous that separate joinder of all members is impracticable. Fed. R. Civ P. 23(a)(1). To demonstrate numerosity, "Plaintiff need not prove that joinder is impossible; rather, Plaintiff 'need only show that it would be extremely difficult or inconvenient to join all members of the class.'" *Columbus Drywall & Insulation, Inc. v. Masco Corp.*, 258 F.R.D. 545, 557 (N.D. Ga. 2007). "There is no specific threshold." *Nuwer v. FCA United States LLC*, 343 F.R.D. 638, 650 (S.D. Fla. 2022). Here, the Parties have identified approximately 18,000 people in the proposed settlement class. Barney Decl., ¶ 14. Thus, the numerosity requirement is easily satisfied.

b. Questions of law and fact common to the class.

The second prerequisite to certification is that there exist questions of law or fact common to the class. Fed. R. Civ P. 23(a)(2). To demonstrate commonality, Plaintiff must demonstrate class members "have suffered the same injury" such that their claims can be productively litigated at once. *Nuwer*, 343 F.R.D. at 650 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-50, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)); *see also Sellers v. Rushmore Loan Mgmt. Servs., LLC,* 941 F.3d 1031, 1040 (11th Cir. 2019) ("For the commonality requirement, 'even a single common question will do.'"). Courts have previously addressed this requirement in the context of data breach class actions and found it readily satisfied. *In re Equifax Inc.*, 2020 U.S. Dist. LEXIS 7841, at *182, *citing In re the Home Depot, Inc., Customer Data Security Breach Litigation*, No. 1:14-md-02583, 2016 U.S. Dist. LEXIS 200113, at *30 (N.D. Ga. Aug. 23, 2016) (finding that multiple common issues center on the defendant's conduct, satisfying the commonality requirement); *In re Anthem, Inc. Data Breach Litigation*, 327 F.R.D. 299, 308

(N.D. Cal. Aug. 15, 2018) (noting that the data breach complaint contains a common contention capable of class-wide resolution—one type of injury claimed to have been inflicted by one actor in violation of one legal norm).

Here also, the commonality requirement is readily satisfied, as Plaintiff and Settlement Class Members all have common questions of law and fact that arise out of the same event—the Data Incident. Specifically, the following questions of law and fact are common to the class:

- whether Defendant failed to timely notify the public of the Data Incident;
- whether Defendant unlawfully lost or disclosed Plaintiff's and Class Members' Private Information;
- whether Defendant owed a legal duty to Plaintiff and the Class to exercise due care in collecting, storing, and safeguarding their Private Information;
- whether Defendant's security measures to protect their data systems were reasonable in light of best practices recommended by data security experts;
- whether Defendant's failure to institute adequate protective security measures amounted to negligence.

Like in other data breach cases, these common questions all center on Defendant's conduct, thus satisfying the commonality requirement. *See, e.g., In re Mednax Servs.*, No. 21-md-02994, 2024 U.S. Dist. LEXIS 65379, at *15 (S.D. Fla. Apr. 10, 2024) (finding commonality when "Plaintiffs' claims turn on the adequacy of Defendants' data security in protecting Plaintiffs' and the Class's PHI/PII. These issues are common to the Settlement Class, are alleged to have injured all Settlement Class Members in the same way and would generate common answers central to the viability of all claims.").

c. Plaintiff's claims and defenses are typical of the claims and defenses of the Settlement Class.

The next prerequisite to certification – typicality – measures whether the claim or defense of the representative party is typical of the claim or defense of each member of the class. Fed. R. Civ P. 23(a)(3). "Typicality measures whether a significant 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). Like commonality, typicality does not require all putative class members share identical claims; factual

differences amongst the claims will not necessarily defeat certification. *Cooper v. Southern Co.*, 390 F.3d 695, 714 (11th Cir. 2004). The named representatives need only share the same "essential characteristics" of the larger class. *Id.* The typicality requirement is regularly met in data breach class actions. *In re Equifax Inc. Customer Data Security Breach Litigation*, 2020 U.S. Dist. LEXIS 7841, at *183.

Here, the typicality requirement is satisfied for the same reasons that Plaintiff's claims meet the commonality requirement. Specifically, Plaintiff's claims are typical of those of the other Settlement Class Members because they arise from the same Data Incident. *See Desue v. 20/20 Eye Care Network, Inc.*, 2023 U.S. Dist. LEXIS 117355, at *18 (S.D. Fla. July 8, 2023) (finding "the typicality requirement of Rule 23(a)(3) is met because Plaintiffs' claims arise from the same Data Incident and legal duty Defendants had to protect the PII and PHI."). Plaintiff's and Settlement Class Members' claims are also based on the same legal theory, *i.e.*, that Defendant had a legal duty to protect their Private Information. Because there is a "strong similarity of legal theories" between Plaintiff's claims and the claims of the Settlement Class Members, the typicality requirement is satisfied.

d. Plaintiff will fairly and adequately protect the interests of the Settlement Class.

Fed. R. Civ P. 23(a)(4) requires that Plaintiff fairly and adequately protect the interests of the Settlement Class. This requirement involves a two-part test that asks (1) whether a representative plaintiff has interests antagonistic to the interests of the other class members; and (2) whether the proposed class counsel has the necessary qualifications and experience to lead the litigation. *In re Tri-State Crematory Litigation*, 215 F.R.D. 660, 690-691 (N.D. Ga. 2013).

As for the first prong, Plaintiff is a member of the Settlement Class and does not possess any interests antagonistic to the Settlement Class. She provided her Private Information to Defendant for employment purposes and alleges that the same Private Information was compromised as a result of the Data Incident. Indeed, Plaintiff's claims are identical to the claims of the Settlement Class, and Plaintiff and the Settlement Class desire the same outcome of this litigation. Plaintiff has vigorously prosecuted this case for the benefit of all Settlement Class Members, actively participating in the litigation, reviewing pleadings, and participating in the factual investigation of the case.

The second prong is also met. Proposed Class Counsel have extensive experience in data breach class actions. *See* Barney Decl., ¶¶ 2-7. Because Proposed Class Counsel possess substantial experience and track records in similar litigations and have vigorously prosecuted the case at hand to get the best result for Plaintiff and Class Members, the adequacy requirement is satisfied. *Desue*, 2023 U.S. Dist. LEXIS 117355, at *18 (finding the second prong of adequacy is met when "counsel are qualified, competent, and have extensive experience and expertise.").

2. The Proposed Settlement Class Meets the Requirements of Fed. R. Civ P. 23(b)(3).

In addition to the requirements discussed at length above, Plaintiff must demonstrate that at least one of the requirements of Fed. R. Civ P. 23(b) is met. Here, questions of law or fact common to class members predominate over any individual issues, making class treatment superior to other available methods of adjudication. *See* Fed. R. Civ P. 23(b)(3).

a. Common issues predominate over individualized issues.

The predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc.*, 521 U.S. at 623. "Common 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 . . . relief." *In re Equifax,* 2020 U.S. Dist. LEXIS 7841, at *186, *quoting Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 985 (11th Cir. 2016).

Common issues readily predominate here because the central liability question in this case—whether Defendant failed to safeguard Plaintiff's Private Information, like that of every other Settlement Class Member—can be established through generalized evidence. *See, Klay v. Humana, Inc.*, 382 F.2d 1241, 1264 (2004) ("When there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position, the predominance test will be met."). Several case-dispositive questions could be resolved identically for all members of the Settlement Class, such as whether Defendant had a duty to exercise reasonable care in safeguarding, securing, and protecting the Private Information of Plaintiff and Settlement Class Members, and whether Defendant breached that duty.

Other courts have recognized that these types of common issues arising from a data breach predominate over individualized issues. *See, e.g. In re Mednax Servs.*, 2024 U.S. Dist. LEXIS 65379, at *19 ("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.") (internal citation omitted); *In re Citrix Data Breach Litig.*, No. 19-cv-61350, 2021 U.S. Dist. LEXIS 112272, at *6 (S.D. Fla. June 10, 2021) (finding predominance where "[a]ll Plaintiffs' and Class Members' claims arise from the same data breach that compromised personal information hosted on [Defendant's] network."). Accordingly, the common questions of fact and law arising from Defendant's conduct predominate over individualized issues.

b. Class treatment is superior to individual litigation.

Finally, a class action is superior to other methods available to fairly, adequately, and efficiently resolve the claims of the Proposed Settlement Class. A superiority analysis involves an examination of "the relative advantages of a class action suit over whatever other forms of litigation might be realistically available to the Plaintiff." *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1183-84 (11th Cir. 2010) (internal quotation omitted). The focus is efficiency. *In re Equifax*, 2020 U.S. Dist. LEXIS 7841, at *188.

Here, resolution of numerous claims in one action is far superior to individual lawsuits, because it promotes consistency and efficiency of adjudication. Indeed, absent class treatment in the instant case, each Settlement Class Member would be required to present the same or essentially the same legal and factual arguments in separate and duplicative proceedings, the result of which would be a multiplicity of trials conducted at enormous expense to both the judiciary and the litigants. Moreover, there is no indication that Settlement Class Members have an interest in individual litigation or an incentive to pursue their claims individually given the amount of damages likely to be recovered relative to the resources required to prosecute such an action. *See Dickens v. GC Servs. Ltd. P'ship*, 706 F. App'x 529, 538 (11th Cir. 2017) (describing "the ways in which the high likelihood of a low per-class-member recovery militates in favor of class adjudication").

Additionally, the proposed Settlement will give the parties the benefit of finality, and because this case is now settled pending Court approval, the Court need not be concerned with issues of manageability relating to trial. *See Amchem Prods., Inc.*, 521 U.S. at 620 ("[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case . . . would present intractable management problems…"). Class certification—and class resolution—guarantee an increase in judicial efficiency and conservation of resources over the alternative of individually litigating thousands of individual data breach cases arising out of the *same* Data Incident.

As the predominance and superiority requirements are satisfied, along with all other requirements of Fed. R. Civ. P. 23, the Court should certify the Settlement Class.

B. Plaintiff's Counsel should be appointed Settlement Class Counsel.

As discussed above, and as fully explained in the Barney Declaration, proposed Settlement Class Counsel have extensive experience prosecuting similar class actions and other complex litigation. *See* Barney Decl., ¶¶ 2-7. Further, proposed Settlement Class Counsel have diligently investigated and prosecuted the claims in this matter, have dedicated substantial resources to the investigation and litigation of those claims, and have successfully negotiated the Settlement of this matter to the benefit of Plaintiff and the Settlement Class. *See generally*, Barney Decl. Accordingly, the Court should appoint Mason A. Barney and Tyler J. Bean of Siri & Glimstad LLP, as Settlement Class Counsel.

C. The Proposed Settlement Should be Preliminarily Approved Because it is Fair, Reasonable, Adequate, and Free of Collusion.

After determining that certification of the Settlement Class is appropriate, the Court must determine whether the Settlement Agreement itself is worthy of preliminary approval and of providing Notice to the Settlement Class. Courts in the Eleventh Circuit have found preliminary approval 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." *In re Checking Account Overdraft Litigation*, 275 F.R.D. 654, 661 (S.D. Fla. 2011) (internal quotations omitted). Other courts take a preliminary look at the factors considered fully at the second—or final approval—stage, known as the *Bennett* factors. The *Bennett* factors include:

> "(1) the likelihood of success at trial; (2) the range of possible recoveries; (3) the point on or below the range of possible recoveries at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and degree of opposition to the settlement; and (6) the stage of the proceedings at which the settlement was achieved."

Columbus Drywall & Insulation, Inc. v. Masco Corp., 258 F.R.D. 545, 557 (N.D. Ga. 2007), *quoting Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir 1984). In either case, courts consider the relevant factors "informed by the strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement." *Bennett v. Behring Corp.*, 737 F.2d at 986; *see also Meyer v. Citizens and Southern Bank*, 677 F. Supp. 1196, 1200 (M.D. Ga. 1988). For the reasons explained below, the proposed Settlement here warrants preliminary approval under each approach.

3. The proposed Settlement is the result of good faith negotiations, is not obviously deficient, and falls within the range of reason.

Here, the Settlement is the result of intensive, arm's-length negotiations between experienced attorneys who are familiar with class action litigation, including data breach class actions. Barney Decl., ¶ 10. As discussed above, the parties engaged in formal mediation with an experienced and well-respected mediator, Bruce Friedman, Esq. of JAMS, ensuring the Settlement was not collusive. *Id.*, ¶ 8; *see also Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1384 (S.D. Fla. 2007) (concluding that class settlement was not collusive in part because it was overseen by "an experienced and well-respected mediator"). Moreover, the Settlement provides real value to valid claimants who have been harmed—where continued litigation would provide significant risks. Barney Decl., ¶¶ 11-12.

4. The *Bennett* factors support preliminary approval.

Here, when preliminarily considering the *Bennett* factors examined in depth at final approval, there is no question that the proposed Settlement is well "within the range of possible approval," fair, reasonable, and adequate, and should be approved. While the Court cannot yet consider class approval before notice has been provided, an initial examination of the merits of the case, risks of litigation, and the benefits obtained by the Settlement Agreement wholly support preliminary approval.

a. The benefits of settlement outweigh the risks at trial.

Settlement Class Members who submit valid claims are eligible to receive up to $1,000 in ordinary expense reimbursements and payments for lost time (up to six hours at $25.00 per hour); up to $4,000 in extraordinary expense reimbursement; two-years of three bureau credit monitoring and identity protection services; and will be the beneficiaries of extensive data security enhancements implemented by Defendant. SA ¶ 2.1. The value achieved through the Settlement Agreement is guaranteed, whereas chances of prevailing on the merits are uncertain.

While Plaintiff strongly believes in the merits of her case, she also understands that Defendant will assert a number of potentially dispositive defenses. Due at least in part to their cutting-edge nature and the rapidly evolving law, data breach cases like this one generally face substantial hurdles—even just to make it past the pleading stage. *See Desue*, 2023 U.S. Dist. LEXIS 117355, at *24 ("This is not only a complex case—it lies within an especially risky field of litigation: data breach."). Class certification is another hurdle that would have to be met—and one that has been denied in other data breach cases. *See, e.g., In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 293 F.R.D. 21 (D. Me. 2013).

While Plaintiff is confident in the strength of her claims, she is also pragmatic in her awareness of the various defenses available to Defendant, as well as the risks inherent to continued litigation. Defendant has consistently denied the allegations raised by Plaintiff and made clear at the outset that it would vigorously defend the case. Through the Settlement, Plaintiff and Class Members gain significant benefits without facing further risk of not receiving any relief at all.

b. The settlement is within the range of possible recoveries and is fair, adequate, and reasonable.

The second and third *Bennett* factors are often considered together. *See Burrows*, 2013 U.S. Dist. LEXIS 189397, at *14. In evaluating the range of possible recoveries and the fairness, reasonableness, and adequacy of the settlement, "[t]he Court's role is not to engage in a claim-by-claim, dollar-by-dollar evaluation, but to evaluate the proposed settlement in its totality. *Lipuma,* 406 F. Supp. at 1323. Here, Settlement Class Members can receive up to $1,000 in ordinary reimbursements for expenses incurred and time expended related to the Data Incident. SA ¶ 2.1. Settlement Class Members can

claim up to 3 hours of lost time at a rate of $25.00 per hour simply by attestation, and they can claim an additional 3 hours of lost time at a rate of $25.00 per hour by submitting documentation. *Id.* Settlement Class Members can also claim up to $4,000 in extraordinary expenses with documentation. These expense reimbursements are available to all Settlement Class Members without a cap. *Id.* Indeed, all 18,000 Settlement Class Members could each recover the maximum if they had, in fact, incurred such damages and timely submit valid Claims. Thus, this Settlement provides an immediate and substantial benefit to Settlement Class Members and is eminently reasonable, especially considering that it avoids the potential contingencies of continued litigation. *See Columbus Drywall & Insulation, Inc.,* 258 F.R.D. at 559 (court found settlement fair, reasonable, and adequate, and preliminary approval warranted where there was an immediate and substantial benefit to the class).

c. Continued litigation would be lengthy and expensive.

As discussed above, data breach litigation is difficult and complex, and the rapid evolution of caselaw makes outcomes uncertain. While early settlement has allowed the expenditure of resources by the Parties to remain modest (and the Settlement Agreement provides for such costs to paid for separate and apart from the funds available to the class), protracted litigation would only serve to increase the expenditure of the Parties' time and resources, while also having a potentially negative affect on class recovery that is, itself, far from certain. Continued litigation would also increase the burden on the court, without any guaranteed benefit to Plaintiff or Settlement Class Members. "Complex litigation . . . 'can occupy a court's docket for years on end, depleting the resources of the parties and the taxpayers while rendering meaningful relief increasingly elusive.'" *Woodward v. NOR–AM Chem. Co.,* No. Civ-94-0870, 1996 U.S. Dist. LEXIS 7372, *62-63 (S.D. Ala. May 23, 1996), *quoting In re U.S. Oil & Gas Litig.,* 967 F.2d 489, 493 (11th Cir. 1992)). Where a settlement, like here, "will alleviate the need for judicial exploration of . . . complex subjects [and] reduce litigation costs[,]" this factor weighs in favor of approval. *See Lipuma,* 406 F. Supp. 2d at 1324.

d. There has not been any opposition to the Settlement.

Plaintiff has no reason to believe there will be opposition to the Settlement. This factor, however, is better considered after Notice has been provided to Settlement Class Members and they

are given the opportunity to object. *See Columbus Drywall & Insulation, Inc.*, 258 F.R.D. at 561. Thus, at this point, this factor is neutral in the analysis.

e. Plaintiff had sufficient information to evaluate the merits and negotiate a fair, adequate, and reasonable settlement.

The final *Bennett* factor allows a Court to consider whether "Plaintiff had access to sufficient information to adequately evaluate the merits of the case and weigh the benefits of settlement against further litigation." *Lipuma,* 406 F. Supp. 2d at 1324. Vast formal discovery is not a requirement. *Id., quoting Cotton v. Hinton,* 559 F.2d 1326,1332 (5th Cir. 1977).

This case, though at an early stage when settled, has been thoroughly investigated by counsel experienced in data breach litigation. Barney Decl., ¶¶ 2-7, 9. Counsel's experience and investigation, combined with the informal exchange of information that occurred at following mediation, put Plaintiff in a position to proficiently evaluate the case and negotiate a settlement she views as fair, reasonable, adequate, and worthy of preliminary approval. SA § II.

D. The Proposed Notice Program Should be Approved.

Rule 23(e)(1)(B) provides that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal[.]" Due process requires provision of the best notice that is practicable under the circumstances, including individual notice to all putative class members who can be identified through reasonable effort. *See* Fed. R. Civ. P. 23(c)(2)(B). The best practicable notice is that which "is reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950).

The Notice provided for by the SA is designed to be the best practicable, and to meet all the criteria set forth by the Manual for Complex Litigation. *See* Barney Decl. ¶ 27. Here, Notice shall be provided to Settlement Class Members via direct mail to the postal address used by Defendant for providing its original notice of the Data Incident to the Settlement Class Members. *Id.* ¶ 26-28. In addition to this individualized and direct mailing, Defendant also agrees to have the Settlement Administrator establish and maintain the Settlement Website and toll-free helpline through which

Settlement Class Members can receive additional information about the Settlement and file a Claim. *Id.* ¶¶ 29-30.

The Notices are clear and straightforward. They define the Class; clearly describe the options available to Settlement Class Members and the deadlines for taking action; describe the essential terms of the Settlement; disclose the amount that proposed Settlement Class Counsel intends to seek in fees and costs; explain procedures for making claims, objections, or requesting exclusion; provide information that will enable Settlement Class Members to calculate their individual recovery; describe the date, time, and place of the Final Approval Hearing; and prominently display the address and phone number of Proposed Settlement Class Counsel. SA, Exs. 1 and 2. Accordingly, the Notice Program should be approved. *See Agnone v. Camden County, Georgia*, 2019 U.S. Dist. LEXIS 50662, at *28 (S.D. Ga. Mar. 26, 2019) (finding class notice mailed directly to settlement class members was the best practicable and satisfied concerns of due process); *Barkwell v. Sprint Communications Company L.P.*, No. 4:09-cv-56, 2014 U.S. Dist. LEXIS 203011, at *17 (M.D. Ga. Apr. 18, 2014) (finding a notice program that involved direct mail notice to satisfy due process).

V. CONCLUSION

The Parties have negotiated a fair, adequate, and reasonable settlement that guarantees Settlement Class Members significant relief in the form of (i) direct reimbursements for expenses incurred and time spent relevant to the Data Incident, (ii) credit monitoring and identity theft protection, and (iii) equitable relief in the form of data security enhancements that will better protect their sensitive information in the future. For these and the above reasons, Plaintiff respectfully requests this Court grant her Motion for Preliminary Approval of Class Action Settlement.

Dated: July 1, 2024

Respectfully submitted,

/s/ Jessica Wallace

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