STATE OF NORTH CAROLINA **COUNTY OF MECKLENBURG**	**IN THE GENERAL COURT OF JUSTICE** **SUPERIOR COURT DIVISION** **22 CVS 17797**
BEVERLY OWENS, KENNETH BRENNAN, CHANDRA BROWN, ARIANN J-HANNA, NICOLE PYLE, MICHAEL YOUNG, NEVSE BREWSTER, WESLEY HANSON, DONNA SMITH, ANGELA STANDERFER, and VICTORIA MARKER, individually and on behalf of all others similarly situated, **Plaintiffs,** **v.** **US RADIOLOGY SPECIALISTS, INC., GATEWAY DIAGNOSTIC IMAGING, LLC, CHARLOTTE RADIOLOGY, P.A. A/K/A CHARLOTTE RADIOLOGY, AND AMERICAN HEALTH IMAGING, INC.,** **Defendants.**	**PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND MEMORANDUM IN SUPPORT**

Pursuant to North Carolina Rule of Civil Procedure 23, Plaintiffs Sylvia Tompkins, Kenneth Brennan, Chandra Brown, Ariann J-Hanna, Nicole Pyle, Beverly Owens, Michael Young, Nevse Brewster, Wesley Hanson, Donna Smith, Angela Standerfer, and Victoria Marker respectfully move this Court grant preliminary approval of class action settlement consisting of a $5,050,000 non-reversionary common fund for approximately 1,300,000 individuals whose sensitive, personal information was potentially compromised in Defendants' December 2021 data security incident. Plaintiffs consulted with Defendant before filing this Motion and determined that this Motion is unopposed. The grounds for the Court's potential granting of this unopposed Motion are included in the accompanying Memorandum in Support of Preliminary Approval of Class Action Settlement and all supporting exhibits.

PLAINTIFFS' MEMORANDUM IN SUPPORT OF PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

I. INTRODUCTION

This action stems from a data security incident in December 2021 (the "Data Incident"), in which bad actors accessed the personal and health information of over one million patients of Defendants US Radiology Specialists, Inc. ("US Radiology"), Gateway Diagnostic Imaging, LLC ("Gateway"), Charlotte Radiology, P.A. A/K/A Charlotte Radiology ("Charlotte Radiology"), and American Health Imaging, Inc. ("AHI," and collectively "Defendants.").[1] After months of negotiations that included two separate mediations, Plaintiffs Sylvia Tompkins, Kenneth Brennan, Chandra Brown, Ariann J-Hanna, Nicole Pyle, Beverly Owens, Michael Young, Nevse Brewster, Wesley Hanson, Donna Smith, Angela Standerfer, and Victoria Marker (collectively "Plaintiffs," and together with Defendants, the "Parties" or "Settling Parties) have reached a class action settlement that, if approved, will provide compensation and identity theft monitoring services to thousands of Defendants' patients. The settlement establishes a $5,050,000 non-reversionary fund ("Settlement Fund") to compensate the affected patients. From the Settlement Fund, Class Members who submit a valid claim form will have the opportunity to recover the following benefits: (a) a *pro rata* cash payment estimated to be approximately $50; (b) reimbursement for out-of-pocket-expenses; (c) compensation for up to four hours of time spent remedying issues related to the Data Incident at a rate of $25 per hour; and (d) reimbursement for verified fraud claims, with the ability to combine multiple valid claims without limitation.

Plaintiffs have secured significant benefits for the Class, in a case in which success on the

[1] Unless otherwise stated, capitalized terms have the same meaning as those terms used in the Settlement Agreement, which is attached as **Exhibit 1**. References herein to "Coates Decl." are to the Declaration of Terence R. Coates in Support of Preliminary of Class Action Settlement, which is attached as **Exhibit 2**.

merits was far from guaranteed. By any measure, the proposed settlement, providing for a non-reversionary common fund in excess of five million dollars, is an excellent result for the Class of approximately 1,300,000 members. Now, Plaintiffs seek, *inter alia*, certification of the proposed Class and preliminary approval of the Settlement Agreement, the claims procedure, and the proposed Notice Program. While Plaintiffs are reasonably confident that, even absent a settlement, they would be able to secure class certification and prevail on the merits at trial, success is far from assured and Defendants have vigorously defended, and would continue to vigorously defend, this case. If approved, the settlement would bring meaningful relief to Class Members, as well as certainty and closure to what would be highly contentious and costly litigation.

As explained in further detail below, Plaintiffs believe this settlement is fair, reasonable, and adequate and, that it provides substantial benefits to the Class Members. Certification of the Class is in the best interests of the putative Class Members and satisfies the requirements under North Carolina law, N.C. Gen. Stat. § 1A-1, Rule 23. Moreover, the proposed Notice provides the best practicable notice under the circumstances and comports with due process. *See* Declaration of Scott M. Fenwick of Kroll Settlement Administration, LLC in Connection with Preliminary Approval of Settlement ("Kroll Decl."), attached as **Exhibit 3**, ¶¶ 4-16. Accordingly, Plaintiffs respectfully request that the Court enter an order: (1) conditionally certifying the Class so that Notice may issue; (2) granting preliminary approval of the settlement; (3) appointing Plaintiffs as Class Representatives; (4) approving the proposed Notice Program; (5) appointing Kroll Settlement Administration LLC as the Settlement Administrator; (6) appointing Jean S. Martin of Morgan & Morgan; Terence R. Coates of Markovits, Stock & DeMarco, LLC; Joseph M. Lyon of The Lyon Firm; Brian Gudmundson of Zimmerman Reed; Gerard Stranch of Stranch Jennings; Jason Rathod of Migliaccio & Rathod; and Mason A. Barney of Siri & Glimstad LLP as Class

Counsel; and (7) scheduling a final approval hearing.

II. BACKGROUND

A. Relevant Factual Background

Defendants are members of a partnership of radiology practices and diagnostic imaging centers with offices in fourteen states. FAC ¶¶ 2-3. Plaintiffs and Class Members (as defined below) include current and former patients of Defendants and their affiliated and acquired entities, their dependents, and other individuals affiliated with Defendants who provided their personal identifying information ("PII") and protected health information ("PHI" and collectively "Private Information") to Defendants as part of seeking treatment. *Id.* ¶¶ 6-8. This case started with the Data Incident, in which Plaintiffs' and Class Members' Private Information was compromised as a result of a data security incident Defendants experienced around December 2021. *Id.* ¶ 4. Approximately nine months later, in September 2022, Defendants finished sending Notice Letters ("Notice Letter") to each impacted individual providing a description of the type of Private Information involved, which may have potentially included: full names, Social Security numbers, dates of birth, addresses, driver's license numbers, U.S. passport numbers, financial account information (bank account and routing numbers), online account usernames and passwords, health insurance plan member ID numbers, and/or dates of coverage. *Id.* ¶¶ 6, 45.

B. Procedural Background

In response, seven class actions including the above-captioned action were filed in multiple jurisdictions: *Standefer v. Gateway Diagnostics Imaging, LLC*, No. 153-336822-22 (Tarrant County, TX) (Filed Sept. 22, 2022) (Removed to N.D. Tex., No. 4:22-cv-00972-P) (Vol. Dismissal); *Marker v. Gateway Diagnostics, Inc.*, No. 352-337300-22 (Tarrant County, TX) (Filed Oct. 3, 2022) (Removed to N.D. Tex. and voluntarily joined with *Standerfer* Action, Case No. 4:22-cv-00972-P) (Vol. Dismissal); *J-Hanna & Pyle v. U.S. Radiology Specialists, Inc.*, No. 1:22-cv-01384 (D.

Del.) (Filed Oct. 21, 2022); *Tompkins, et al. v. U.S. Radiology Specialists, Inc.*, No. 4:22-cv-00133 (E.D.N.C.) (Filed Oct. 26, 2022) (Vol. Dismissal); *Brewster, et al. v. American Health Imaging, Inc.*, No. 1:22-cv-04466 (N.D. Ga.) (Filed Nov. 8, 2022) (Vol. Dismissal); *Young v. U.S. Radiology Specialists, Inc.*, No. 5:23-cv-00156 (E.D.N.C.) (Filed Mar. 29, 2023) (Dismissal) (collectively, the "Litigation").

Plaintiffs alleged that, as a direct result of the Data Incident, Plaintiffs and Class Members suffered numerous injuries and would likely suffer additional harm in the future. Plaintiffs' claims for alleged damages and remedies included the following categories of harms: (a) invasion of privacy; (b) financial costs incurred mitigating the imminent risk of identity theft; (c) loss of time of productivity incurred mitigating the imminent risk of identity theft; (d) loss of time and productivity heeding Defendants' warnings and following their instructions in the Notice Letter; (e) financial costs incurred due to actual identity theft; (f) the cost of future identity theft monitoring for the Class; (g) loss of time incurred due to actual identity theft; (h) loss of time and annoyance due to increased targeting with phishing attempts and fraudulent robo-calls; (i) deprivation of the value of their PII and PHI; and (j) statutory damages. FAC ¶ 13.

Plaintiffs, individually and on behalf of other members of a proposed nationwide Class, collectively asserted claims for: (i) negligence; (ii) negligence *per se*; (iii) negligent misrepresentation; (iv) breach of implied contract; (v) breach of confidence; (vi) unjust enrichment; (vii) breach of contract-third party beneficiary; (viii) intrusion upon seclusion; (ix) breach of fiduciary duty; (x) violations of Texas Medical Practice Act, Tex. Occ. Code § 159.001 *et seq.*; (xi) GA Data Breach Statute, Ga. Code Ann.§ 10-1-912(a) *et seq.*; (xii) Georgia Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-*et seq.*; (xiii) Deceptive Trade Practices-

Consumer Protection Act, Texas Bus. & Com. Code §§ 17.41 *et seq.*; (xiv) injunctive relief; and (xv) declaratory relief. Coates Decl., ¶ 8.

C. Settlement Negotiations

Recognizing the risk and expenses of prolonged multidistrict litigation, the Parties agreed to pursue informal discovery and mediation. Coates Decl., ¶ 9. Following several pre-mediation meetings and negotiations, on February 10, 2023, the Parties engaged in a full-day mediation session with Rodney A. Max of Upchurch Watson White & Max. *Id.* The mediation ended without a settlement. Even so, the Parties continued negotiations privately and, after several weeks of unsuccessful efforts, agreed to a second mediation. *Id.* On March 30, 2023, the Parties re-engaged for another full day mediation with Jill Sperber of Sperber Dispute Resolution – this full day also ended without resolution. *Id.* Afterwards, Ms. Sperber submitted a confidential mediator's proposal that both Parties subsequently accepted, resulting in the $5,050,000.00 Settlement Fund. *Id.* The agreed resolution and settlement are memorialized in the Settlement Agreement. *Id.*

The Settlement Agreement provides for the resolution of all claims and causes of action asserted, or that could have been asserted, against Defendants and the Released Persons (as such term is defined in the Settlement Agreement) relating to the Data Incident and the Litigation, by and on behalf of Plaintiffs and Class Members.

D. Confirmatory Discovery

Before entering into the Settlement Agreement, and in response to informal discovery requests for settlement purposes submitted by Plaintiffs, Defendants agreed to produce relevant information necessary, including the forensic report, to aid negotiations and vet the reasonableness of any settlement. Coates Decl., ¶ 10.

III. THE TERMS OF THE SETTLEMENT

A. The Proposed Class

The proposed settlement would create a nationwide settlement Class defined as follows: "[A]ll natural persons residing in the United States who were sent a Notice Letter notifying them that their Private Information was compromised in the Data Incident." The Class specifically excludes: (i) all Persons who timely and validly request exclusion from the Class; (ii) the Judge assigned to evaluate the fairness of this settlement; and (iii) any other Person found by a court of competent jurisdiction to be guilty under criminal law of initiating, causing, aiding or abetting the criminal activity occurrence of the Data Incident or who pleads *nolo contendere* to any such charge." Settlement Agreement ¶ 1.6.

B. Settlement Relief

The Settlement Agreement provides all Class Members the opportunity to submit a Claim Form for any combination of: (a) Pro-Rata Cash Payment; (b) Out-of-Pocket-Expense Claims; (c) Lost-Time Claims; and (d) Verified Fraud Claims, as set forth below:

> $50 Pro-Rata Cash Payment. After the distribution of attorneys' fees, Class Counsel's litigation expenses, Administrative Fees, Service Awards, Out-of-Pocket Expense Claims, and Lost Time Claims (each of which is defined in the Settlement Agreement), the Settlement Administrator will make *pro rata* payments of the remaining Settlement Fund to each Class Member who submits a claim. This payment is estimated to be around $50 but may increase or decrease *pro rata* from the $50 cash payment. No documentation or attestation is required to receive the Pro-Rata Cash Payment other than that necessary to prove membership in the Class.
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> Out-of-Pocket Expense Claims. Class Members may submit a Claim Form for reimbursement of documented out-of-pocket losses reasonably traceable to the Data Incident up to $5,000.00 per individual. Out-of-Pocket-Expense Claims will include, without limitation, 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 on or after December 17, 2021, that the claimant attests were caused or otherwise incurred as a result of the Data Incident; and miscellaneous expenses such as notary, fax, postage, copying, mileage, and telephone charges. Class Members with Out-of-Pocket-Expense Claims must submit documentation and attestation supporting their claims.

> Lost-Time Claims. Class Members may submit a Claim Form for reimbursement for time spent remedying issues related to the Data Incident for up to four (4) total hours at a rate of $25 per hour capped at $100. No documentation needs to be submitted in connection with Lost-Time Claims, but Class Members must attest that the time claimed was actually spent as a result of the Data Incident.
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> Verified Fraud: Class Members can submit a Claim Form for documented incidents of fraud for $250 per incident capped at $5,000.00 per individual for verified and documented incidents of fraud. Verified Fraud Claims will include, without limitation, any verified incident regardless of reimbursement. This may include fraudulent bank or credit card charges, tax filings, opening of bank and/or credit accounts, unemployment filings, etc. Class Members with Verified Fraud Claims must submit documentation and attestation supporting their claims.

Id., ¶ 2.1. All payments for Claims from the Settlement Fund may be *pro rata* increased or decreased depending on the total number of Valid Claims. *Id.* Any funds remaining after payment of all Class benefits, Settlement Administration fees, attorneys' fees, costs, and service awards shall be used for a *pro rata* increase of the $50 *pro rata* cash payment claims set forth above, with no maximum payment. *Id.*, ¶ 2.1(a). Any funds that remain after the distribution of all payments from the Settlement Fund shall be distributed as a *cy pres* to a charitable organization approved of by the Parties and subject to Court approval. *Id.*, ¶¶ 1.30, 2.2.

The settlement also provides that Defendants certify they have improved their information security since the Data Incident and that Defendants commit to continuing security enhancements. *Id.*, ¶ 2.3. In fact, Plaintiffs have already received assurances that Defendants either have undertaken or will undertake certain reasonable steps to further secure their systems and environments. Defendants have also provided Plaintiffs with reasonable access to confidential confirmatory discovery regarding the number of Class Members broken down by category (*e.g.*, current patient, former patient, etc.) and state of residence, the facts and circumstances of the Data Incident and Defendants' response thereto, and the changes and improvements that have been made or are being made to protect Class Members' Private Information. Defendants will provide

a declaration attesting to the undertaken or planned data security enhancements.

C. Notice and Settlement Administration.

The Parties have agreed to retain Kroll Settlement Administration LLC as the Settlement Administrator to assist with effectuating Notice of the settlement. At the outset, the Parties have drafted and submitted for the Court's review both a long form notice ("Long Notice") (Settlement Agreement, Exhibit B) and a short form notice ("Short Notice") (Settlement Agreement, Exhibit C). The Parties, and the Settlement Administrator believe the language of these Notices is reasonably calculated to fully inform Class Members of their rights, in plain, straightforward text.

Notice will be provided through email and supplemented with mailed Notice to Class Members whose email addresses are not known or available. Settlement Agreement ¶ 3.2(d); *see also* Kroll Decl., ¶¶ 5-13. Specifically, sixty (60) days after entry of an order preliminarily approving the settlement, the Settlement Administrator will begin to provide Notice to the Class through any one of the following means: via Class email to any Class Member for whom Defendants provide an email address to the Settlement Administrator; in the event that an email bounces back or is otherwise undeliverable the Settlement Administrator will send a second round of email Notices to any email addresses deemed not to have received the first email. Settlement Agreement, ¶ 3.2(d). After the second email Notice, the Settlement Administrator will conduct an email change of address search for any email address deemed not to have received either the first or second email Notice. *Id.* The Settlement Administrator will then send an email Notice to any email address updated via this process. *Id.*

In the event that the foregoing methods fail to result in a successful email sent, the Settlement Administrator will send Notice to the Class Member via U.S. mail using postal addresses provided by Defendants. *Id.* Before any mailing occurs, the Settlement Administrator will run the postal addresses through the United States Postal Service ("USPS") National Change

of Address database to update any change of address on file with the USPS. In the event the USPS returns a Notice to the Settlement Administrator because the address is no longer valid and the envelope contains a forwarding address, the Settlement Administrator will re-send the Short Notice to the forwarding address. *Id.* In the event that subsequent to the first mailing of a Short Notice, and at least 14 days prior to the Opt-Out Date and Objection Date, a Short Notice is returned to the Settlement Administrator by the USPS because the address of the recipient is no longer valid, *i.e.*, the envelope is marked "Return to Sender" and does not contain a new forwarding address, the Settlement Administrator will perform a standard skip trace in the manner the Settlement Administrator customarily performs. *Id.* If such an address is ascertained, the Settlement Administrator will re-send the Short Notice within 7 days of receiving such information. *Id.*

A toll-free help line with an Interactive Voice Response ("IVR") system and a live operator option will be made available to provide Class Members with additional information about the settlement and claims process. Settlement Agreement, ¶ 3.2(f); *see also* Kroll Decl., ¶ 15. The Settlement Administrator also will provide copies of the Long Notice and paper Claim Form, as well as the Settlement Agreement, upon request. Settlement Agreement, ¶ 3.2(f). Additionally, the format and language of each category of Notice has been carefully drafted in easy-to-understand language so that the Class Members will be well-informed of all material aspects of the settlement, including the benefits they may obtain under the settlement, their rights to challenge or exclude themselves from the settlement, and the amount of attorneys' fees and expenses and Class Representative Service Awards being sought. Settlement Agreement, Exs. A, B, and D (Claim Form, Long Notice, and Short Notice); *see also* Kroll Decl. at ¶¶ 5-15.

D. Opt-Out and Objection Procedures.

Class Members will have an opportunity to exclude themselves from the settlement or object to its final approval. Settlement Agreement, ¶¶ 4.1-4.3. The Settlement Website and Long

Notice will inform the Class Members of these rights. Additionally, the Long Notice will provide information concerning the Class Members' rights to appear and object at the Final Approval Hearing and will inform them that they will be bound by the release set forth in the Settlement Agreement unless they timely exercise their right to exclusion. *Id.*, at Exhibit B.

E. Class Counsel Fees and Expenses and Plaintiffs' Service Awards

Consistent with best practices, the Parties did not discuss or negotiate payment of attorneys' fees and expenses or Class Representative Service Awards until after the substantive terms of the settlement had been agreed upon. Settlement Agreement, ¶ 7.1. Plaintiffs will seek, and Defendants will not object to, an award of reasonable attorneys' fees to Class Counsel not to exceed 33.33% of the Settlement Fund, or approximately $1,683,333.33 and litigation expenses no to exceed $30,000, subject to Court approval. Settlement Agreement, ¶ 7.2; Coates Decl., ¶ 24. North Carolina courts routinely award attorneys' fees up to 1/3 of the common fund amount in class action settlements. *See e.g. Chrismon v. Meadow Greens Pizza*, No. 5:19-cv-155, 2020 WL 3790866, at *4 (E.D.N.C. July 7, 2020) (granting fees of 1/3 of the of the common fund settlement plus expenses and noting that "'[m]any courts within the Fourth Circuit have held that fees in the amount of 1/3 of the settlement fund is reasonable.*")*; *Silva v. Connected Investors, Inc.*, No. 7:21-cv-00074, 2023 WL 3807026, at *2 (E.D.N.C. June 2, 2023) (approving attorneys' fees of 1/3 of the common fund); *Byers v. Carpenter*, No. 94 CVS 04489, 1998 WL 34031740 (N.C. Super. Jan. 30, 1998) (holding that the appropriate level of compensation in cases such as these is typically 25% of the relief obtained if the case is settled before filing; one-third if after filing; and 40% if after an appeal has been taken); *Brookline Homes, LLC v. City of Mount Holly*, No. 19-CVS-1163, 2020 WL 12933309 (N.C.Super. Oct. 12, 2020) (awarding one-third of common fund settlement to Class Counsel in an action brought for misappropriated taxpayer money).

Defendants also agreed to pay Plaintiffs a service award in the amount of $3,000.00 to each

named Plaintiff for their services rendered on behalf of the Class, subject to Court approval. Settlement Agreement, ¶ 7.3; *see also* Coates Decl., ¶ 20. State and federal courts throughout North Carolina have approved service awards for class representatives, explaining that the "purpose of such awards is to encourage socially beneficial litigation by compensating named plaintiffs for their ... personal time spent advancing the litigation on behalf of the class and for any personal risk they undertook." *Deloach v. Philip Morris Cos., Inc.*, No. 1:00CV01235, 2005 WL 1528783, at *3 (M.D.N.C. June 29, 2005) (citation omitted); *see also Portfolio Recovery Assocs., LLC v. Houston*, No. 12-CVS-642, 2018 WL 9439665 (N.C. Super. July 26, 2018) (approving $10,000 service award per class representative); *Bright v. Wake County Disposal, LLC*, No. 18-CVS-10976, 2020 WL 1930395 (N.C. Super. Mar. 11, 2020) (approving $5,000 award per class representative); *Upright Builders Inc. v. Town of Apex*, No. 18-CVS-3720, 2019 WL 4640418 (N.C. Super. May 28, 2019) (same); *Carl v. State*, No. 06CVS13617, 2009 WL 8561911 (N.C. Super. Dec. 15, 2009) (same).

Plaintiffs will file a separate motion for approval of attorneys' fees and expenses and for Class Representative Service Awards in accordance with the proposed schedule set forth, *infra*.

F. Release of Liability.

In exchange for the benefits and relief described above, each Class Member who does not exclude himself or herself from the settlement will be deemed to have released and discharged Released Persons from any and all Released Claims. Settlement Agreement, ¶¶ 1.27, 6.1.

IV. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT AND GRANT CLASS CERTIFICATION FOR SETTLEMENT PURPOSES

There is a strong judicial policy in favor of settlement to conserve the scarce resources of both the courts and the litigating parties. *Ehrenhaus v. Baker*, 216 N.C. App. 59, 717 S.E.2d 9 (2011); *see also In re Krispy Kreme Doughnuts, Inc. S'holder Litig.*, No. 16-CVS-3101, 2018 WL

264537, at *4 (N.C. Super. Ct., Forsyth Cty. Jan. 2, 2018) ("As a general proposition, North Carolina courts favor settlement over litigation"); Newberg §§ 11.41 ("The compromise of complex litigation can be encouraged by the courts and favored by public policy.").

Courts considering a proposed class action settlement typically engage in a three-step process. First, a court determines whether the proposed settlement merits preliminary approval. Second, the court directs that notice of the proposed settlement be distributed to the class, thereby providing class members with the opportunity to object to or opt out of the settlement. Third, the court evaluates whether final approval of the settlement is warranted and, if so, grants final approval. *See* N.C. Gen. Stat. § 1A-1, Rule 23(c); *see also* Manual for Complex Litigation, Fourth Ed. § 21.632; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622 (1997).

A. The Court Should Preliminarily Approve the Settlement

The preliminary approval stage is an "initial evaluation" of the fairness of the proposed settlement based on the written submissions and informal presentation from the settling parties. *Manual for Complex Litigation (Fourth)*, § 21.632 (4th ed. 2004)). Courts should "appraise the reasonableness of particular class-action settlements on a case-by-case basis, in the light of all the relevant circumstances." *Evans v. Jeff D.*, 475 U.S. 717, 742 (1986). Under North Carolina law, relevant factors include for weigh preliminary approval include: (1) the strength of the plaintiff's case, (2) the defendant's ability to pay, (3) the complexity and potential cost of further litigation, (4) the amount of opposition to the settlement, (5) class members' reaction to the proposed settlement, (6) counsels opinion regarding the settlement's reasonableness, and (7) the stage of the proceedings and how much discovery has been completed. *In re Newbridge Bancorp S'holder Litig.*, No. 15 CVS 10047, 2016 WL 6885882, at *7-8 (N.C. Super. Nov. 22, 2016) (citing *Ehrenhaus I*, 216 N.C. App. at 73–75, 717 S.E.2d at 19–20).

Here, the proposed settlement provides Class Members with substantial monetary and other

relief and is a fair and reasonable resolution of this Litigation and each of the relevant factors weigh in favor of preliminary approval.

i. The First Three Factors Favor Preliminary Approval Because Continued Litigation Would Be Complex, Expensive, Time-Consuming, and Unpredictable

The first factor to be considered is the relative strength of the Plaintiffs' case, the second factor is the ability of the defendant to pay, and the third factor is the complexity and anticipated cost of further litigation. *Id.* Each factor favors preliminary approval.

Plaintiffs and the Proposed Class Counsel fully understand the strengths and weaknesses of this case. Coates Decl., ¶ 10. Having worked on behalf of the putative Class since the Data Incident was first announced, having evaluated the legal and factual disputes, and having dedicated significant time and monetary resources to this Litigation, Plaintiffs and the Proposed Class Counsel believe their case is strong on the merits and they believe they have a favorable chance to ultimately succeed on their claims. *Id.*

However, Class Counsel also recognize that all class actions—especially those involving data security incidents—have a high level of risk, expense, and complexity. *See In re Target Corp. Customer Data Sec. Breach Litig.*, No. 14-2522 (PAM/JJK), 2015 WL 7253765, at *2 (D. Minn. Nov. 17, 2015) (the "legal issues involved in [in data breach litigation] are cutting-edge and unsettled . . . many resources would necessarily be spent litigating substantive law as well as other issues."); *Gordon v. Chipotle Mexican Grill, Inc.*, No. 17-cv-01415-CMA-SKC, 2019 WL 6972701, at *1 (D. Colo. Dec. 16, 2019) ("Data breach cases . . . are particularly risky, expensive, and complex."). Indeed, this case involves a proposed Class of approximately 1,300,000 individuals, a complicated and technical factual overlay, and Defendants with the resources to litigate through Trial if necessary. *Id.*

Moreover, although Plaintiffs have no reason to think Defendants are now or will soon

become insolvent, collectability is always a concern in the data security incident context, especially with coverage limitations on cyber liability insurance. Collectability becomes an even greater concern in the face of protracted complex litigation that will inevitably require extensive discovery and multiple experts' analyses. In sum, further litigation, perhaps for years, would pose a severe disadvantage to the Class Members, especially given the valuable benefits offered to them under this proposed settlement. Therefore, the first three factors weigh in favor of preliminary approval, as it permits the Class Members to obtain meaningful relief now, instead of years from now or perhaps never.

ii. The Fourth and Fifth Factors – the Amount of Opposition to the Settlement Voiced by Class Members and Class Members' Reaction to the Settlement – Can Be Evaluated at Final Approval.

Because Class Members have not been notified of the settlement at this stage, the Court will be in a better position to fully analyze this factor after Notice issues and Class Members have had an opportunity to opt out or object to the settlement. Thus, these factors are neutral at this stage and should be evaluated upon any motion for final approval of the proposed settlement.

iii. The Sixth Factor – Counsel's Respective Opinions as to the Settlement – are Positive and the Product of Arm's-Length Negotiations Which Supports Preliminary Approval.

The opinion of experienced counsel regarding the reasonableness of the proposed settlement is the Sixth Factor and is satisfied here. Indeed, "[t]he opinion of experienced and informed counsel is entitled to considerable weight." *Ehrenhaus v. Baker*, 216 N.C. App. 59, 93, 717 S.E.2d 9, 31 (N.C. Ct. App. 2011) (citation omitted). Class Counsel are very experienced in handling data security incident class action cases such as this one. Coates Decl., ¶¶ 2, 6. Counsel for Plaintiffs include among the most experienced data security incident practitioners in the country and have litigated hundreds of data security incident and privacy actions, including some of the largest in United States history. Based on this experience and the information gained through

the extensive mediation process in this case, Class Counsel opine that the $5,050,000 non-reversionary common fund is a strong recovery for the Class compared against the risk Plaintiffs and the Class faced proceeding with further litigation. *Id.*, ¶ 23. Furthermore, the two mediation sessions with two experienced data security incident class action mediators strongly indicate that the resolution of this class action case was the product of arm's-length settlement negotiations. Accordingly, the Sixth Factor is satisfied and also supports preliminary approval.

iv. The Settlement is Proposed at an Appropriate Stage of the Proceedings and Sufficient Discovery has been Completed to Support Preliminary Approval of the Settlement.

While this settlement was reached before the commencement of dispositive motion practice or formal discovery, Plaintiffs respectfully submit that it is fully informed and that preliminary approval at this stage is appropriate. Indeed, Plaintiffs sent informal discovery requests to Defendants for settlement purposes and received information relating to the size of the Class, data sets impacted in the Data Incident, and information about Defendants' business. Coates Decl., ¶ 10. Furthermore, the Parties participated in two mediation sessions with experienced data security incident class action mediators. *Id.*, ¶¶ 11-12. Through those mediations, Plaintiffs learned additional information about the Data Incident and how Plaintiffs' Private Information was potentially compromised. *Id.*, ¶ 14. Through the information received through settlement information requests and conducting two, extensive mediation sessions, Plaintiffs were well informed about their case and the potential for class-wide damages. *Id.*, ¶ 12. Plaintiffs conducted sufficient discovery and received sufficient information before entering into a settlement in principle to resolve this matter that ultimately resulted in the detailed Settlement Agreement. In sum, Plaintiffs and their counsel believe the terms of the proposed settlement are fair and reasonable, as evidenced by application of the relevant North Carolina factors, which all support preliminary approval of the settlement.

B. The Court Should Certify the Class for Settlement Purposes

At the preliminary approval stage, the Parties must show, at least conditionally, that the proposed Class meets the requirements for class certification. *See Manual for Complex Litigation (Fourth)*, § 21.632. First, under North Carolina law, "the class representatives must demonstrate the existence of a class." *McMillan v. Blue Ridge Cos., Inc.*, 2021-NCSC-160, ¶ 9, 379 N.C. 488. "A proper class exists 'when the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members.'" *Id.* (citations omitted).

In addition to this threshold requirement, "the class representatives must show: (1) that they will fairly and adequately represent the interests of all members of the class; (2) that they have no conflict of interest with the class members; (3) that they have a genuine personal interest, not a mere technical interest, in the outcome of the case; (4) that they will adequately represent members outside the state; (5) that class members are so numerous that it is impractical to bring them all before the court; and (6) that adequate notice is given to all class members." *Id.* at ¶ 10 (citations omitted). "Once a party seeking class certification meets these requirements, 'it is left to the trial court's discretion whether a class action is superior to other available methods for the adjudication of the controversy." *Id.* at ¶ 11 (citation omitted).

i. Plaintiffs Have Demonstrated for Settlement Purposes that Common Issues of Law and Fact Predominate

As in other data security incident cases, common questions of law and fact predominate in this case because all claims arise out of a common course of conduct by Defendants. *Cf. McManus v. Dry, P.A.*, No. 22 CVS 001776, 2020 WL 13589407, at *2 (N.C. Super. Nov. 16, 2020); *Abubaker v. Dominion Dental USA, Inc.*, No. 1:19-cv-01050, 2021 WL 6750844, at *3 (E.D. Va. Nov. 19, 2021) (similar); *In re: Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-md-

2800, 2020 WL 256132, at *13 (N.D. Ga. Mar. 17, 2020) (similar); *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 311-16 (N.D. Cal. 2018); *Hapka v. CareCentrix, Inc.*, 2018 WL 1871449, at *2 (D. Kan. Feb. 15, 2018). In a data security incident class action, the focus is primarily on the reasonableness of a defendant's security measures, which "is the precise type of predominant question that makes class-wide adjudication worthwhile." *Anthem*, 327 F.R.D. at 312.

Furthermore, "[t]here is no requirement under Rule 23 … that the claims asserted in a class action be factually identical as to all class members. Rather, the requirement for the existence of a class is that the same issue of law or fact predominate over any individual issues." *Pitts v. Am. Sec. Ins. Co.*, 550 S.E.2d 179, 189 (N.C. App. 2001), *aff'd, ordered not precedential*, 569 S.E.2d 647 (N.C. 2002). Here, all Plaintiffs and Class Members allegedly had their Private Information compromised by the Data Incident. Settlement Agreement, at 1-2. The Class Members' shared questions of law and fact predominate over any questions affecting individual members. This Litigation and the settlement address the Data Incident, from which the Class's Private Information was allegedly compromised. Each Class Member received a Notice Letter alerting them to the Data Incident. Thus, the elements of any given Class Member's claim will be based on the same class-wide proof applicable to the other Class Members. This satisfies the threshold requirement establishing the existence of a class. *McMillan*, 2021-NCSC-160, at ¶ 9.

ii. Plaintiffs Will Adequately Represent the Interests of All Class Members (including those outside of North Carolina), Lack Any Conflicts with the Class, and Have a Genuine Personal Interest in the Outcome of This Case

"The party seeking to bring a class action also bears the burden of demonstrating the existence of other prerequisites: (1) the named representatives must establish that they will fairly and adequately represent the interests of all members of the class; (2) there must be no conflict of interest between the named representatives and members of the class; (3) the named representatives must have a genuine personal interest, not a mere technical interest, in the outcome

of the case; (4) class representatives within this jurisdiction will adequately represent members outside the state ...." *Elliott v. KB Home N. Carolina, Inc.*, No. 08 CVS 21190, 2017 WL 1499938 (N.C. Super. Apr. 17, 2017) (quoting *Beroth Oil Co. v. N.C. Dep't of Transp.*, 367 N.C. 333, 337, 757 S.E.2d 466, 470 (2014)); *see also McMillan*, 2021-NCSC-160, at ¶ 11.

These requirements are met here. Plaintiffs are aware of no interests that are antagonistic to or at odds with those of Class Members. Each of the Plaintiffs and Class Members received a Notice Letter informing them that their Private Information was compromised in the Data Incident. Settlement Agreement, at 1-2. Plaintiffs and Class Members share the common interest of seeking redress for injuries caused by the Data Incident. Furthermore, all class members are treated equally under the Settlement Agreement—no special treatment is given to any Class Member based on his or her state of residency or otherwise. *See generally* Settlement Agreement. Plaintiffs also understand and have accepted the obligations of Class Representatives, have adequately represented the interests of the putative Class, and have retained experienced counsel who have handled many data security incident class actions. Coates Decl., ¶¶ 3, 6; Exs. A-G (Proposed Class Counsel's resumes). Therefore, the adequacy of representation requirements are satisfied.

iii. The Class Members Satisfy the Numerosity Requirement

Numerosity requires that the number of class members is so numerous that it is impractical to bring them all before the court. *McMillan*, 2021-NCSC-160, at ¶ 11. "It is not necessary that [plaintiffs] demonstrate the impossibility of joining class members, but they must demonstrate substantial difficulty or inconvenience in joining all members of the class. There can be no firm rule for determining when a class is so numerous that joinder of all members is impractical." *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 283, 354 S.E.2d 459, 466 (1987). However, courts in North Carolina have indicated that a class with over 1000 members is sufficiently numerous to satisfy this inquiry. *See Pitts v. Am. Sec. Ins. Co.*, 144 N.C. App. 1, 550 S.E.2d 179 (2001), *aff'd,*

ordered not precedential, 356 N.C. 292, 569 S.E.2d 647 (2002). Here, the Parties estimate that the Class encompasses approximately 1,300,000 individuals. Coates Decl., ¶¶ 10, 17. This plainly satisfies the numerosity requirement.

iv. Adequate Notice Will Be Given to All Class Members

When a class is certified through settlement, North Carolina law and constitutional due process principles require a court to direct notice in a reasonable manner to all class members who would be bound by the settlement. *See Crow*, 319 N.C. at 283 ("fundamental fairness and due process dictate that adequate notice of the class action be given"); s*ee also McMillan*, 2021-NCSC-160, at ¶ 11 (similar). Trial courts "should require that the best notice practical under the circumstances be given to class members. Such notice should include individual notice to all members who can be identified through reasonable efforts, but it need not comply with the formalities of service of process." *Crow*, 319 N.C. at 283-84. Such notice should be provided "as soon as possible" following certification and may "require that potential class members be given an opportunity to request exclusion from the class within a specified time in a manner similar to the current federal practice." *Id.* at 284.

As discussed above, the Parties have agreed to a comprehensive Notice Program that more than satisfies the requirements of due process and North Carolina law. The Notice Program is designed to reach as many potential Class Members as possible and is calculated to reach an overwhelming number of them. Kroll Decl., ¶¶ 5-16. Under the Notice Program, the Settlement Administrator will send direct Notice of the settlement via email to all Class Members, or a Short Notice where email addresses are undeliverable. Settlement Agreement ¶ 3.2. Additionally, the Settlement Administrator will establish a Settlement Website featuring the relevant Court documents and Notices, along with a toll-free help-line with an IVR system and live operator to

provide Class Members with additional information about the settlement if necessary. Kroll Decl., ¶¶ 14 & 15. Furthermore, all of the Notices will inform Class Members, in plain language, of their right to object to or exclude themselves from the settlement. Settlement Agreement, Exhibit B, ¶¶ 13-15. In sum, the proposed Notice Program complies with due process and North Carolina law because it provides for direct Notice to all Class Members and fully apprises Class Members of their rights.

v. Certification of a Class for Settlement Purposes Satisfies Superiority

The last factor to consider is whether "a class action is superior to other available methods of adjudication." *McMillan*, 379 N.C. at ¶ 30. Class actions should be permitted where they are likely to serve useful purposes such as preventing a multiplicity of suits or inconsistent results. *Id.* at ¶ 31. The usefulness of the class action device must be balanced, however, against inefficiency or other drawbacks. *Id.* Ultimately, trial courts have broad discretion to decide if class treatment is superior and need not limit their analysis to matters set forth in Rule 23 or existing caselaw. *Id.*

Class Members here do not have substantial interests in pursuing their claims individually, as their financial losses or expected financial losses are relatively small and would not incentivize litigation on an individual basis. *See In re Marriott Intl., Inc., Customer Data Sec. Breach Litig.*, 341 F.R.D. 128, 165 (D. Md. 2022) (holding class treatment in data breach action was "superior" and stating that "this case 'is the classic negative value case; if class certification is denied, class members will likely be precluded from bringing their claims individually because the cost to bring the claim outweighs the potential payout.'") (citation omitted).

The identities of Class Members are also ascertainable, given that they are already known by Defendants who directly notified the Class Members about the Data Incident and who will provide the Settlement Administrator with a list of all Class Members. For this reason, the plan for effectuating Notice and processing Claims does not present administrative difficulties, as the Class

Members have already been reasonably identified and the process of obtaining the settlement's benefits has been designed to minimize the time and effort Class Members will expend accessing the benefits of this settlement. For the foregoing reasons, class treatment is superior and the Court should certify the Class for settlement purposes.

C. Plaintiffs' Counsel Should Be Appointed Class Counsel

A total of six law firms have worked together to prosecute this matter on behalf of Data Incident victims in the Litigation. All firms agreed to work together for the best interests of the Plaintiffs and Class Members in an effort to maximize the Class's recovery. Coates Decl., ¶ 7. As described in detail above, Proposed Class Counsel have diligently investigated Plaintiffs' claims and the feasibility of class certification and have devoted and will continue to devote substantial time and resources to this Litigation. *Id.*

As previously noted, Proposed Class Counsel has extensive experience with class actions, and data security incident class actions, in particular. Coates Decl., Exs. A-G. Having worked on behalf of the putative Class since the Data Incident was first announced, having evaluated the legal and factual disputes, and having dedicated significant time and monetary resources to this Litigation, Proposed Class Counsel endorse the settlement here without reservation. Accordingly, the Court should appoint Plaintiffs' counsel Jean S. Martin of Morgan & Morgan; Terence R. Coates of Markovits, Stock & DeMarco, LLC; Joseph M. Lyon of The Lyon Firm; Brian Gudmundson of Zimmerman Reed; Gerard Stranch of Stranch Jennings; Jason Rathod of Migliaccio & Rathod; and Mason A. Barney of Siri & Glimstad LLP as Class Counsel for the proposed Class.

V. PROPOSED SCHEDULE OF EVENTS

In considering preliminary approval of the settlement, the Court must set a final approval hearing date, dates for promulgating Notice and deadlines for objecting to the settlement and filing

papers in support of the Settlement. The Parties propose the following schedule:

Event	Deadline
Defendants to provide Class Member contact information to the Settlement Administrator	14 days after entry of the Preliminary Approval Order
Long and Short Notices Posted on the Settlement Website	60 days after entry of the Preliminary Approval Order
Notice Date	60 days after entry of the Preliminary Approval Order
Deadline to submit Motion for Attorneys' Fees and Costs and Service Award	30 days after the Notice Date
Objection Deadline	60 days after the Notice Date
Opt-Out Deadline	60 days after the Notice Date
Claims Deadline	90 days after the Notice Date
Motion for Final Approval	At least 14 days before Final Approval Hearing
Final Approval Hearing	At least 135 days after entry of the Preliminary Approval Order

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an Order in the form attached as **Exhibit 4**: (1) conditionally certifying the Class; (2) granting preliminary approval of the settlement; (3) appointing Plaintiffs as Class Representatives; (4) approving the proposed Notice Program; (5) appointing Kroll Settlement Administration LLC as the Settlement Administrator; (6) appointing Jean S. Martin of Morgan & Morgan; Terence R. Coates of Markovits, Stock & DeMarco, LLC; Joseph M. Lyon of The Lyon Firm; Brian Gudmundson of Zimmerman Reed; Gerard Stranch of Stranch Jennings; Jason Rathod of Migliaccio & Rathod; and Mason A. Barney of Siri & Glimstad LLP as Class Counsel; and (7) scheduling a Final Approval Hearing.

Dated: September 18, 2023

Respectfully submitted,

/s/ Matthew E. Lee
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* indicates that counsel's pro hac vice admission is forthcoming

Proposed Class Counsel for Plaintiffs and Putative Class

CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2023, a true and correct copy of Plaintiffs' Memorandum in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement was served on all counsel of record via e-mail.

/s/ Matthew E. Lee
Matthew E. Lee