UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

PATRICIA MARSHALL, individually and on behalf of all others similarly situated, Plaintiff, v. LAMOILLE HEALTH PARTNERS, INC., Defendant.	)	Case No. 2:22-CV-166-WKS

MEMORANDUM IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Plaintiff Patricia Marshall ("Plaintiff") submits this Memorandum in Support of Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement.

I. INTRODUCTION

This case arises from a June 2022 cyberattack against Defendant Lamoille Health Partners, Inc. ("LHP" or Defendant," and together with Plaintiff, the "Parties") in which unauthorized third parties gained access to LHP's computer networks ("Data Security Incident"). LHP determined that files containing Plaintiff's and Settlement Class Members' personally identifiable information ("PII") and protected health information ("PHI") including names, addresses, dates of birth, social security numbers, patient identification numbers, account numbers, financial information, health insurance information, medical information, and other health information, may have been compromised.

On September 1, 2022, Plaintiff filed her class action complaint ("Complaint"). Plaintiff alleged that Defendant failed to safeguard the PII and PHI that it collected and maintained from Plaintiff and Settlement Class Members. On February 2, 2023, LHP filed a motion to dismiss Plaintiff's Complaint. Plaintiff filed her opposition on March 3, 2023, and LHP filed its reply brief

on March 17, 2023. The Court issued an Opinion and Order denying LHP's motion to dismiss on April 13, 2023. LHP then filed a notice of appeal on May 5, 2023, resulting in the United States Court of Appeals for the Second Circuit opening case 23-800. LHP filed its appellant brief on August 24, 2023. Before Plaintiff filed her responsive brief, the Parties filed a Joint Notice of Settlement on November 6, 2023. The Second Circuit Court of Appeals issued an order holding the appeal in abeyance pending approval of the Parties' Settlement Agreement.

After extensive arm's length negotiations over the course of several months, the Parties have reached a settlement that is fair, adequate, and reasonable. The agreement provides for a non-reversionary common fund of $540,000.00, from which Class Members can claim (1) a pro-rata cash payment estimated at $50.00 per Settlement Class Member who submits a Claim Form; and (2) reimbursement of up to $5,000.00 for Out-of-Pocket Losses per eligible Settlement Class Member.[1]

Pursuant to Federal Rule of Civil Procedure 23(e), Plaintiff moves the Court for an order certifying the class for settlement purposes, preliminarily approving the proposed settlement agreement, and approving the content and manner of the proposed Notice process. Accordingly, and relying on the following memorandum of points and authorities, the Declaration of Plaintiff's Counsel David Lietz and attached exhibits filed herewith, Plaintiff respectfully requests the Court preliminarily approve the Parties' Settlement Agreement and issue the proposed order attached to the Declaration of David Lietz in Support of Plaintiff's Unopposed. Motion for Prelim. Approval, ("Lietz Dec.") filed herewith as Exhibit 1.

[1] The Settlement Agreement ("Agr.") in its entirety is attached as Exhibit 1 to the Declaration of David Lietz ("Lietz Dec.") filed herewith. Capitalized terms shall have the same meaning as assigned to them in the Settlement Agreement.

II. CASE SUMMARY

A. The Data Security Incident

Defendant LHP is a health care institution that provides health care, dentistry, and pharmacy services in the State of Vermont. Defendant has approximately six treatment locations with offices in Vermont. Defendant offers medical and dental services and clinics in the fields of family medicine, pediatrics, dentistry, and behavioral health and wellness. *See* Lietz Dec. ¶ 28.a. In the ordinary course of receiving healthcare services from Defendant, each patient must provide Defendant with PII and PHI such as: name, address, phone number, email address, date of birth, social security number, demographic information, drivers license or state identification, medical history, insurance information and banking and/or credit card information. *See* Lietz Dec. ¶ 28 b.

On or about August 10, 2022, LPH began notifying Settlement Class Members about the Data Security Incident. According to notice letters sent to Plaintiff and Settlement Class Members ("Data Breach Letter"), LHP discovered on June 13, 2022, that "an unknown, unauthorized third party locked some of our files in a ransomware attack." *Id* at ¶ 28 c. After investigating the Data Security Incident, LHP admitted that "an unauthorized third party may have accessed certain documents from our systems between June 12, 2022, and June 13, 2022." *Id* at ¶ 28 d

B. Plaintiff's Complaint

On or about September 1, 2022, Plaintiff, individually and on behalf of all others similarly situated, filed an action against Lamoille Health Partners, Inc. in the United States District Court for the District of Vermont styled, *Marshall v. Lamoille Health Partners, Inc.*, Docket No.: 2:22-cv-166. *Id* at ¶ 29. Plaintiff alleges four causes of action: (1) negligence; (2) unjust enrichment; (3) breach of fiduciary duty; and (4) breach of implied contract. In her Complaint, Plaintiff alleges that the Data Security Incident put her at risk of imminent, immediate, and continuing risk of harm

from fraud and identity theft. She also alleges that she, and other class members, have been forced to spend time dealing with the effects of the Data Security Incident. *Id.* at ¶ 30-31. Plaintiff seeks an award of actual, compensatory, and statutory damages as well as attorneys' fees and costs, and any such further relief as may be deemed just and proper. *Id.* ¶ 32.

On November 6, 2023, prior to Plaintiff's responsive Appellee brief to Appellant's August 24, 2023, appellate brief being due, the Parties filed a Joint Notice of Settlement. *Id.* ¶ 36. The Parties conducted arm's-length negotiations over the course of several months. *Id.* ¶ 37. The Parties' negotiations took place during the course of the District Court litigation and the appellate litigation. *Id.* ¶ 37. Following the extensive arms-length negotiations in this case, the Parties were able to reach an agreement that resolves all the matters arising from and pertaining to the Data Security Incident. *Id.* ¶ 33. The Settlement Agreement was finalized by the Parties on February 9, 2024. It is the opinion of Plaintiff and proposed settlement Class Counsel, based on their experience and investigation, that the Settlement Agreement presents a favorable result for the Plaintiff and the Settlement Class. *Id.* ¶ 40.

III. SUMMARY OF SETTLEMENT

A. Settlement Benefits

The settlement negotiated on behalf of the Settlement Class calls for the formation of a non-reversionary Settlement Fund. The Settlement Fund will be formed from the payment made by, or on behalf of, Defendant LHP of five hundred and forty thousand dollars ($540,000.00). The Settlement Class Members will be entitled to two separate forms of relief from the Settlement Fund: (1) a pro-rata cash payment estimated at $50.00; and (2) compensation for Out-of-Pocket Losses. *See generally, Agr.* The Settlement Agreement provides for relief for a Settlement Class defined as:

> the individuals whose personal information may have been impacted during the Data Security Incident, including those individuals who received a letter from LHP notifying them of the Data Security Incident.

Id. ¶ 42. The Settlement Class consists of approximately 59,381 individuals. The Settlement Class specifically excludes: (1) the judge presiding over this Action, and members of the presiding judge's direct family; (2) the Defendant, its subsidiaries, parent companies, successors, predecessors, and any entity in which the Defendant or its parents have a controlling interest and their current or former officers and directors; and (3) Settlement Class Members who submit a valid Request for Exclusion prior to the Opt-Out Deadline. *Id.* ¶ 43.

1. Monetary Relief

Under the terms of the Settlement Agreement, after the distribution of attorneys' fees, Class Counsel's Litigation Expenses, Administrative Fees, compensation for Out-of-Pocket Losses, and Service Award, the Settlement Administrator will make pro rata settlement payments of any remaining funds to each Settlement Class Member who submits a claim. This estimated $50.00 cash payment may increase or decrease on a pro rata basis, depending upon the number and amount of claims approved. *Id.* ¶ 45.

Additionally, the Settlement Administrator, from the Settlement Fund, will provide compensation, up to a total of $5,000.00 per Settlement Class Member, upon submission of a Claim Form and supporting documentation, for Out-of-Pocket Losses incurred as a result of the Data Security Incident, including, without limitation, 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 on or after the Data Security Incident through the date of claim submission; and/or miscellaneous expenses such as notary, fax, postage, copying,

mileage, and long-distance telephone charges. *Id.* ¶ 46. Such payment is subject to reduction on a pro rata basis if there are not enough funds in the Settlement Fund to pay all such claims in full.

2. Release

The release is tailored to the claims that have been plead or could have been plead in this case. *Id.* ¶ 47. Settlement Class Members who do not exclude themselves from the Settlement Agreement will release all claims, whether known or unknown, against Defendant and its affiliates, that relate to the Data Security Incident. *Id*. ¶ 48.

B. The Notice and Claims Process

1. Notice

The Parties mutually agree, and seek Court approval of, the appointment of Analytics – a firm with considerable experience in notice and settlement administration -- as Settlement Administrator. *Id*. ¶ 49. The Settlement Fund amount provided by Defendant, or on behalf of Defendant, will pay the entirety of the Notice and Administrative Expenses, including the cost of Notice. *Id*. ¶ 50. The Notice plan provides for individual Notice to Settlement Class Members directly through first-class mail, to the postal address that LHP has on record for each Settlement Class Member. *Id.*¶ 51.

The Settlement Administrator will also establish a dedicated Settlement Website, along with a toll free telephone number, and will maintain and update the website throughout the claim period, with the Short Notice, Long Notice, and Claim Form approved by the Court, as well as the Settlement Agreement, and relevant case documents. *Id.*¶ 52. Settlement Class Members will be able to submit Claim Forms through the Settlement Website, by mail, or through use of the tear-off claim form attached to the Postcard Notice. *Id.* ¶ 53.

2. Claims

The timing of the claims process is structured to ensure that all Settlement Class Members have adequate time to review the terms of the Settlement Agreement, compile documents supporting their claim, and decide whether they would like to opt-out or object. *Id.* ¶ 54. Settlement Class Members will have until ninety (90) days after the Notice Commencement Deadline to complete and submit their Claim Form to the Claims Administrator, either by mail or online. *Id.* ¶ 55. The Claim Form is written in plain language to facilitate Settlement Class Members' ease in completing it. *Id.* ¶ 56; Agr., Ex. 1. The Claims Administrator will be responsible for reviewing the Claim Forms and determining if they are complete and valid. *Id.* ¶ 57. Should a claim be incomplete or lacking sufficient documentation, the Claims Administrator may reach out to the claimant for supplementation. *Id.* ¶ 66.

3. Request for Exclusion and Objections

Settlement Class Members will have up to and including sixty (60) days after the Notice Commencement Deadline to object to or to submit a request for exclusion from the Settlement Agreement. *Id.* ¶ 58. Similar to the timing of the claims process, the timing with regard to objections and requests for exclusion is structured to give Settlement Class Members sufficient time to access and review the settlement documents—including Plaintiff's Motion for Attorneys' Fees, Costs, and Service Awards, which will be filed forty-six (46) days after the Notice Commencement Deadline. *Id.* ¶ 59.

To be excluded from the Settlement Agreement, a Settlement Class Member's request for exclusion must include the name of the proceeding, the individual's full name, current address, personal signature, and the words "Request for Exclusion" or a comparable statement that the individual does not wish to participate in the Settlement Agreement. *Id.* ¶ 60. Any Member of the

Settlement Class who elects to be excluded shall gain no rights from the Settlement Agreement, shall not be bound by the Settlement Agreement, and shall have no right to object to the Settlement Agreement or proposed Settlement Agreement or to participate at the Final Approval Hearing. *Id.* ¶ 61.

The Notice shall explain the procedure for Settlement Class Members to object to the Settlement Agreement or Fee and Expense Application by submitting written objections to the Court no later than the Objection Deadline. *Id.* ¶ 62. For an objection to be a valid objection under the Settlement Agreement, it must be in writing, postmarked by the Objection Deadline, filed with/or mailed to the Court and the Settlement Administrator and must include (1) the name of the proceedings; (2) the Settlement Class Member's full name, current mailing address, and telephone number; (3) a statement of the specific grounds for the objection, as well as any documents supporting the objection; (4) the identity of any attorneys representing the objector; (5) a statement regarding whether the Settlement Class Member (or his/her attorney) intends to appear at the Final Approval Hearing; (6) a statement identifying all class action settlements objected to by the Settlement Class Member in the previous five (5) years; and (7) the signature of the Settlement Class Member or the Settlement Class Member's attorney. *Id.* ¶ 63.

C. Fees, Costs, and Service Awards

The Settlement Agreement calls for a reasonable service award to Plaintiff in the amount of $3,500. *Id.* ¶ 64. The Service Award is meant to compensate Plaintiff for her efforts on behalf of the Settlement Class, including maintaining contact with counsel, assisting in the investigation of the case, reviewing the Complaint, remaining available for consultation throughout settlement negotiations, reviewing the Settlement Agreement, and answering counsel's questions. *Id.* ¶ 65.

After agreeing to the terms of the settlement on behalf of the Class, counsel for Plaintiff obtained the concurrence of counsel for Defendant to an award of attorneys' fees to be paid from the Settlement Fund not to exceed one-third (33.33%) of the Settlement Fund for fees ($179,982.00), and litigation expenses not to exceed $25,000.00. *Id.* ¶ 66. Any award of attorneys' fees, litigation expenses, and a Service Award shall be paid exclusively out of the Settlement Fund. *Id.* ¶ 67.

Class Counsel will submit a separate motion seeking attorneys' fees, costs, and Plaintiff's Service Award prior to filing the Motion for Final Approval of Class Action Settlement, and prior to Settlement Class Members' deadline to exclude themselves from or object to the Settlement Agreement. *Id.* ¶ 68.

IV. LEGAL STANDARD

Federal courts strongly encourage settlements, particularly in class actions and other complex matters where inherent costs, delays, and risks of continued litigation might otherwise outweigh any potential benefit the individual Plaintiff—or the class—could hope to obtain. *See Cohen v. J.P. Morgan Chase & Co*., 262 F.R.D. 153, 157 (E.D.N.Y Sept. 24, 2009) ("There is a strong judicial policy in favor of settlement, particularly in the class action context. The compromise of complex litigation is encouraged by the courts and favored by public policy.") (*quoting Denney v. Jenkens & Gilchrist*, 230 F.R.D. 317, 328 (S.D.N.Y. Feb. 18, 2005) (aff'd in part and vacated in part, 443 F.3d 253 (2d Cir. 2006)). "Class action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation. There is a strong public interest in quieting any litigation; this is 'particularly true in class actions.'" *In re Luxottica Group S.p.A. Sec. Litig.* (*In re Luxottica Group Litig.*), 233 F.R.D. 306, 310 (E.D.N.Y.2006).

Under Federal Rule Civil Procedure 23(e), a class action may not be settled without approval of the Court. In weighing a grant of preliminary approval, district courts must determine whether "giving notice is justified by the parties' showing that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." The Settlement here warrants preliminary approval so that persons in the Settlement Class can be notified of the Settlement and provided an opportunity to makes claims, voice objection, or opt-out.

V. ARGUMENT

Plaintiff here seeks to certify, for settlement purposes, a class defined as: "individuals whose personal information may have been impacted during the Data Security Incident, including those individuals who received a letter from LHP notifying them of the Data Security Incident." The Settlement Class is estimated to include approximately 59,381 individuals.

In determining whether to preliminarily approve a class action settlement, courts must first determine that the settlement class, as defined by the parties, is certifiable under the standards of Rule 23(a) and (b). "Before certification is proper for any purpose—settlement, litigation, or otherwise—a court must ensure that the requirements of Rule 23(a) and (b) have been met." *Denney v. Deutsche Bank AG,* 443 F.3d 253, 270 (2d Cir. 2006) (concluding in part that "the District Court conducted a Rule 23(a) and (b) analysis that was properly independent of its Rule 23(e) fairness review"); *see also Lizondro-Garcia v. Kefi LLC*, 300 F.R.D. 169, 174 (S.D.N.Y. May 29, 2014). In this Circuit, courts have found that "[i]n deciding certification, 'courts must take a liberal rather than restrictive approach in determining whether the plaintiff satisfies these requirements and may exercise broad discretion in weighing the propriety of a putative class.'" *Cohen v. J.P. Morgan Chase & Co*., 262 F.R.D. at 158, *quoting Steinberg v. Nationwide Mut. Ins.*

Co., 224 F.R.D. 67, 72 (E.D.N.Y. Sept. 4, 2004). Because the Settlement Class meets all requirements for certification under Rule 23, this Court should grant Plaintiff's request.

1. The Proposed Class is Sufficiently Numerous

Numerosity requires "the class [be] so numerous that joinder of all members is impractical." Fed. R. Civ. P. 23(a)(1). While there is no numerical requirement for satisfying the numerosity requirement, forty class members generally satisfies the numerosity requirement. *Alcantara v. CNA Mgmt., Inc*., 264 F.R.D. 61, 64 (S.D.N.Y. Dec. 8, 2009)). Here, the Parties have identified approximately 59,381 individuals who are a part of the Settlement Class. Lietz Dec. ¶ 43. The large number of persons in the Settlement Class clearly renders joinder impracticable. As such, the numerosity requirement is easily satisfied.

2. Questions of Law and Fact Are Common to the Class

Commonality requires Plaintiff to demonstrate "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The threshold for meeting this prong is not high commonality does not require that every question be common to every member of the class, but rather that the questions linking class members are substantially related to the resolution of the litigation and capable of generating common answers even where the individuals are not identically situated. *Lizondro-Garcia v. Kefi LLC*, 300 F.R.D. at 175, *citing Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 350 (2011). A plaintiff may meet the commonality requirement where the individual circumstances of class members differ, but "their injuries derive from a unitary course of conduct by a single system." *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir.1997) (*per curiam*). "Even a single common legal or factual question will suffice." *Jackson v. Bloomberg, L.P.*, 298 F.R.D. 152, 162, (S.D.N.Y. Mar. 19, 2014), *quoting Freeland v. AT & T Corp*., 238 F.R.D. 130, 140 (S.D.N.Y. Aug. 17, 2006).

Here, the commonality requirement is met because Plaintiff can demonstrate numerous common issues exist. For example, whether LHP failed to adequately safeguard the records of Plaintiff and other Settlement Class Members is a common question across the entire class. Defendant LHP's data security safeguards were common across the Settlement Class, and those applied to the data of one Settlement Class Member did not differ from those safeguards applied to another. Other specific common issues include (but are not limited to): whether LHP failed to implement and maintain reasonable security procedures and practices appropriate to the nature and scope of information compromised in the Data Security Incident; and whether LHP's conduct rose to the level of negligence.

These common questions, and others alleged by Plaintiff in her Complaint, all of which are denied by LHP, are central to the causes of action brought here, will generate common answers, and can be addressed on a class-wide basis. Thus, Plaintiff has met the commonality requirement of Rule 23.

3. Plaintiff's Claims are Typical of the Class

Typicality under Rule 23(a)(3) is satisfied where "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *In re Flag Telecom Holdings, Ltd. Securities Litig.,* 574 F.3d 29, 35 (2d Cir. 2009) (internal quotation omitted). The crux of the typicality requirement is to ensure that "maintenance of a class action is economical and [that] the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Marisol A. v. Guiliani,* 126 F.3d at 376.

Here, Plaintiff's and Settlement Class Members' claims all stem from the same event—the Data Security Incident at issue in the Complaint—and the cybersecurity protocols that Defendant

had (or did not have) in place to protect Plaintiff's and Settlement Class Members' data. Plaintiff's claims are typical of the Settlement Class Members' and the typicality requirement is satisfied.

4. Plaintiff Will Provide Fair and Adequate Representation of the Class.

A representative Plaintiff must be able to provide fair and adequate representation for the class. To satisfy the adequacy of representation requirement, plaintiffs must establish that: (1) there is no conflict of interest between the class representatives and other members of the class; and (2) the plaintiff's counsel is qualified, experienced, and generally able to conduct the litigation. *Bolanos v. Norwegian Cruise Lines Ltd.*, 212 F.R.D. 144, 156 (S.D.N.Y. Nov. 26, 2002) *quoting Marisol A. v. Giuliani,* 126 F.3d at 378; *see also Amchem Prod., Inc. v. Windsor,* 521 U.S. at 624.

Here, Plaintiff's interests are aligned with those of the Settlement Class in that they seek relief for injuries arising out of the same Data Security Incident. Plaintiff and Settlement Class Members' data was all allegedly compromised by Defendant in the same manner. Under the terms of the Settlement, Plaintiff and Settlement Class Members will all be eligible for monetary relief.

Further, counsel for Plaintiff have decades of combined experience as vigorous class action litigators and are well suited to advocate on behalf of the class. *See* Lietz Dec. ¶¶ 1-27. Moreover, they have put their collective experience to use in negotiating an early-stage settlement that guarantees immediate relief to class members. Thus, the requirements of Rule 23(a) are satisfied.

5. Common Issues Predominate Over Individualized Ones, Class Treatment is Superior.

To show that common issues predominate, Plaintiff must demonstrate that common questions of law or fact relating to the class predominate over any individualized issues. *Bolanos v. Norwegian Cruise Lines Ltd.*, 212 F.R.D. at 157. This requirement "tests whether the proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 623 (1997). The predominance requirement is met when the defendant's

wrongful acts involve common practices, or when the defendant has a common defense. *Fox v. Cheminova,* 213 F.R.D. 113, 130 (E.D.N.Y. Feb. 28, 2003), *citing In re Agent Orange" Prod. Liab. Litig.,* 818 F.2d 145, 166-167 (2d Cir. 1987). Commonality is regularly met in cases where the focus is on the conduct of a defendant rather than that of individual plaintiff, making it particularly susceptible to common, generalized proof. *Cohen v. J.P. Morgan Chase & Co.,* 262 F.R.D. at 159.

The key predominating questions here are whether Defendant had a duty to exercise reasonable care in safeguarding, securing, and protecting the PII and PHI of Plaintiff and the Settlement Class, and whether Defendant breached that duty. The common questions that arise from LHP's conduct predominate over any individualized issues. Other courts have recognized common issues arising from data breaches predominate over any individualized issues.[2]

Additionally, because the claims are being certified for purposes of settlement, there are no issues with manageability, and resolution of thousands of claims in one action is far superior to individual lawsuits. *Amchem*, 521 U.S. at 620 ("Confronted with a request for settlement-only 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.").

[2] *See, e.g., In re Anthem, Inc. Data Breach Litig*., 327 F.R.D. 299, 312–315 (N.D. Cal. Aug. 15, 2018) (finding predominance was satisfied because "Plaintiffs' case for liability depend[ed], first and foremost, on whether [the defendant] used reasonable data security to protect Plaintiffs' personal information," such that "the claims rise or fall on whether [the defendant] properly secured the stolen personal information," and that these issues predominated over potential individual issues); *see also Hapka v. CareCentrix, Inc.*, 2018 WL 1871449, at *2 (D. Kan. Feb. 15, 2018) (finding predominance was satisfied in a data breach case, stating "[t]he many common questions of fact and law that arise from the E-mail Security Incident and [Defendant's] alleged conduct predominate over any individualized issues"); *In re The Home Depot, Inc., Customer Data Sec. Breach Litig*., 2016 WL 6902351, at *2 (N.D. Ga. Aug. 23, 2016) (finding common predominating questions included whether Home Depot failed to reasonably protect class members' personal and financial information, whether it had a legal duty to do so, and whether it failed to timely notify class members of the data breach); *In re Heartland*, 851 F. Supp. 2d at 1059 (finding predominance satisfied in data breach case despite variations in state laws at issue, concluding such variations went only to trial management, which was inapplicable for settlement class).

The resolution of thousands of claims in one action is far superior to litigation via individual lawsuits. 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 Security Incident.

The common questions of fact and law that arise from Defendant's cybersecurity activities predominate over any individualized issues, a class action is the superior vehicle by which to resolve these issues, and the requirements of Rule 23(b)(3) are met. Accordingly, the class should be certified for settlement purposes.

B. The Terms of the Settlement are Fair, Reasonable, and Adequate.

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 class. Under the current iteration of the Rule, notice is only justified where the parties can show that the court will "likely" be able to approve the proposed settlement. Fed. R. Civ. P. 23(e)(1)(i). Thus, consideration on preliminary approval requires an initial assessment of factors to be fully considered on final approval, namely that (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate . . .; and (D) the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(A)-(D). In determining whether the relief provided is adequate, Courts must consider: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule

23(e)(3). *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 330 F.R.D. 11, 28 (E.D. N.Y. Jan. 28, 2019); Fed. R. Civ. P. 23(e)(2)(C)(i)-(iv).

Before the 2018 revisions to Rule 23(e), the Second Circuit had developed its own list of factors for consideration, finding preliminary approval of a proposed class action settlement is warranted where it is the result of "serious, informed, non-collusive ("arm's length") negotiations, where there are no grounds to doubt its fairness and no other obvious deficiencies. . . and where the settlement appears to fall within the range of possible approval." *See Cohen v. J.P. Morgan Chase & Co*., 262 F.R.D. at 157; *In re Nasdaq Antitrust Litig.,* 176 F.R.D. 99, 102 (S.D.N.Y. Oct. 16, 1997); *Bourlas v. Davis Law Assocs.,* 237 F.R.D. 345, 354 (E.D.N.Y. Aug. 30, 2006); *see also* Manual for Complex Litigation, § 30.41 (3d ed. 1995). In making this determination, Second Circuit Courts considered nine *Grinnell* factors:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

In re Initial Pub. Offering Sec. Litig., 260 F.R.D. 81, 88 (S.D.N.Y. June 10, 2009), citing *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974) (abrogated on other grounds).

This Settlement satisfies both the Rule 23 factors, as well as the *Grinnell* factors historically considered by Second Circuit courts in order to demonstrate that the Settlement Agreement falls well within the "range of possible approval," is "likely" to be granted final approval and warrants preliminary approval so that notice can issue to the class.

1. The Settlement Warrants Preliminary Approval Under Rule 23(e).

a. The Plaintiff and Proposed Settlement Class Counsel have adequately represented the Settlement Class

Under Rule 23(e)(2)(A), the first factor to be considered is whether the class representatives and Class Counsel have adequately represented the class, including the nature and amount of discovery undertaken in the litigation. *See* Fed. R. Civ. P. 23(e)(2)(A). Here, Plaintiff has maintained contact with counsel, assisted in the investigation of the case, reviewed the Complaint, remained available for consultation throughout settlement negotiations, reviewed the Settlement Agreement, and answered counsel's many questions. Lietz Dec. ¶ 65. Plaintiff does not have any conflicts with the proposed class and has adequately represented Settlement Class Members in the litigation.

Proposed Settlement Class Counsel has also adequately represented the class. Class Counsel has extensive experience in class action litigation generally, and data breach cases in particular. *See* Lietz Dec. ¶ 1-27. In negotiating the Settlement, Class Counsel was well positioned and able to benefit from years of experience and familiarity with the factual and legal bases for this case.

Although formal discovery had not been completed, such discovery is not required for a settlement to be adequate. *Castagna v. Madison Square Garden, L.P.*, 2011 WL 2208614, *6 (S.D.N.Y. June 7, 2011) (approving settlement where no formal discovery had taken place but the parties had "completed enough investigation to agree on a reasonable settlement); *Willix v. Healthfirst, Inc.*, No. 07–cv–1143, 2011 WL 754862 at *4 (E.D.N.Y. Feb. 18, 2011). ("The pertinent question is whether counsel had an adequate appreciation of the merits of the case before negotiating") (internal quotations omitted). "In fact, informal discovery designed to develop a settlement's factual predicate is encouraged because it expedites the negotiation process and limits costs which could potentially reduce the value of the settlement." *Castagna*, 2011 WL 2208614, *6,

Here, proposed Class Counsel carried out a thorough investigation of the claims, and settlement negotiations included a significant exchange of information, allowing both Parties to evaluate the strengths and weaknesses of Plaintiff's claims and Defendant's defenses. Lietz Dec. ¶ 26. Class Counsel argued against and prevailed on Defendant's Motion to Dismiss resulting in Defendant filing an appeal. *Id* at ¶ 26. Plaintiff and Class Counsel here have adequately represented the Settlement Class, and this factor weighs in favor of preliminary approval.

b. The Settlement was negotiated at arm's length and is absent of any collusion.

Rule 23(e)(2)(B) requires procedural fairness, as evidenced by the fact that "the proposal was negotiated at arm's length." If a class settlement is reached through arm's-length negotiations between experienced, capable counsel knowledgeable in complex class litigation, "the Settlement will enjoy a presumption of fairness." *In re Austrian & German Bank Holocaust Litig*., 80 F. Supp. 2d 164, 173-74 (S.D.N.Y. 2000); *D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2007); *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 693 (S.D.N.Y. 2019).

Here, both Parties were represented by experienced counsel, and the Settlement Agreement was only reached after months of arm's length negotiations. There is no evidence of collusion. Accordingly, this factor weighs in favor of preliminary approval.

c. The relief provided for the class is adequate.

Fed. R. Civ. P. 23(e)(2)(c) requires examination of the relief provided by the Settlement. The Settlement Agreement negotiated on behalf of the class provides for significant relief. Valued at $540,000.00, the Settlement provides for a pro rata cash payment to Settlement Class Member in monetary relief, plus reimbursement of Out-of-Pocket Losses up to $5,000.00.

The Settlement Agreement terms are consistent with agreements in other similar data breach cases across the country. *See e.g., Baksh et al. v. IvyRehab Network, Inc*. No. 7:20-CV-

01845 (S.D.N.Y.) (providing up to $75 per class member out of pocket expenses incurred related to the data breach and $20 reimbursement for lost time, with payments capped at $75,000 in aggregate; credit monitoring for claimants; and equitable relief in the form of data security enhancements); *Rutledge et al v. Saint Francis Healthcare System*, No. 1:20-cv-00013-SPC (E.D. Mo.) (data breach settlement providing up to $280 in value to Settlement Class Members in the form of: reimbursement up to $180 of out of pocket expenses and time spent dealing with the data breach; credit monitoring services valued at $100; and equitable relief in the form of data security enhancements).

As the relief provided is well within the range of possible approval when considered in light of the Rule 23(e)(2)(c)(i)-(iv) factors, preliminary approval should be granted.

i. The costs, risks, and delay of trial and appeal are great.

The relief provided for by the Settlement Agreement is significant, especially considering the costs, risks, and delay of further litigation. The Settlement Agreement guarantees Settlement Class Members the opportunity to make a claim for cash compensation in the form of a pro-rata cash payment estimated at $50.00 and compensation for Out-of-Pocket Losses. The value achieved through the Settlement Agreement is guaranteed, where chances of prevailing on the merits are uncertain. While Plaintiff strongly believes in the merits of the case, she also understands that Defendant will assert a number of potentially case-dispositive defenses. Proceeding with litigation would open up Plaintiff to the risk inherent in trying to achieve and maintain class certification, and prove liability—both factors considered under the test for final approval established by *Grinnell.*

Moreover, 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 Hammond v. The Bank of N.Y. Mellon Corp*., 2010 WL 2643307, at *1 (S.D.N.Y. June 25, 2010 (collecting data breach cases dismissed at the Rule 12(b)(6) or Rule 56 stage). 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).

Plaintiff disputes the defenses it anticipates LHP will likely assert—but it is obvious that her success at trial is far from certain. Through the Settlement Agreement, Plaintiff and Settlement Class Members gain significant benefits without having to face further risk of not receiving any relief at all.

ii. The proposed method for distributing relief, including the method of processing class-member claims, is objective, efficient, and fair.

As described in detail in Section III.B, *supra*, the Claims Administrator will be responsible for assessing claims and distributing relief. Class Members will have ninety (90) days from the Notice Commencement Deadline to complete and submit a claim form. The Claims Administrator will be responsible for evaluating the claims and the evidence submitted, requesting additional documentation and/or information where the claim form is insufficient, and awarding funds. The procedure provided for by the Settlement Agreement is objective, efficient, and fair.

iii. The attorneys' fees, costs and service awards that Plaintiff will request this Court approve are reasonable.

By separate motion, Plaintiff will seek Court approval of attorneys' fees to be paid from the Settlement Fund not to exceed one-third (33.33%) of the Settlement Fund ($179,982.00), costs not to exceed $25,000.00, and a Service Award for Plaintiff in the amount of $3,500.00. Lietz Dec. ¶ 66. Such requests are well within the range of those regularly accepted by Second Circuit Courts. *See Warren v. Xerox Corp*., 2008 WL 4371367, at *22 (E.D.N.Y. Sept. 19, 2008) (awarding class

counsel attorneys' fees and expenses at 33.33% of the total settlement value, and finding such a sum "comparable to sums allowed in other cases"); *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 262 (S.D.N.Y. 2003) (finding 33% in attorneys' fees alone to be reasonable)(collecting cases); *Beckman v. KeyBank, N.A.,* 293 F.R.D. 467, 481-83 (S.D.N.Y. 2013) (granting an award of $5,000 to $7,500 to Plaintiffs); *In re Polaroid ERISA Litig.*, 2007 WL 2116398, at *3 (S.D.N.Y. July 19, 2007) (granting award of $10,000 to named plaintiffs); *Dornberger v. Metropolitan Life Ins. Co*., 203 F.R.D. 118 (S.D.N.Y. 2001) (noting in class actions representative plaintiff awards from $2,500 to $85,000 are commonly accepted). While Plaintiff will fully brief their request by separate motion prior to Settlement Class Members' deadline to object to or exclude themselves from the Settlement Agreement, the attorneys' fees, costs, and service awards sought clearly fall within the range of possible approval.

iv. No additional agreements related to the settlement exist.

There are no additional agreements that require identification and/or examination under Rule 23(e)(3).

d. The Settlement Treats Class Members Equitably to Each Other.

Under the terms of the Settlement Agreement, the Settlement Class Members will be treated equitably to each other. Every Settlement Class Member has the opportunity to submit a claim for a pro-rata cash payment and compensation for Out-of-Pocket Losses.

Accordingly, and because the Settlement Agreement meets all of the required criteria under Rule 23 (e), preliminary approval should be granted.

2. The Settlement Warrants Preliminary Approval After Consideration of the *Grinnell* Factors.

This settlement also satisfies the *Grinnell* factors. These factors remain instructive and have been used by Second Circuit courts in evaluating settlements in conjunction with Rule 23(e). *See*

Johnson v. Rausch, Sturm, Israel, Enerson & Hornik, LLP, 333 F.R.D. 314, 320 (S.D.N.Y. 2019) (considering both the Rule 23(e) and *Grinnell* factors for preliminary approval).

First, the complexity, expense, and likely duration of the litigation support preliminary approval as continued litigation is likely to be complex, long, and expensive. Plaintiff would need to prevail in the pending appeal and later likely need to prevail on summary judgment and both gain and maintain class certification through trial. Additionally, the amount of data expert analysis and testimony needed to bring this case to trial would increase costs significantly, as well as add to the length of time needed to resolve the matter. Thus, this factor weighs in favor of approval.

Second, the reaction of class members is not yet apparent. While the named Plaintiff has reviewed and approved the Settlement Agreement, other Settlement Class Members have not yet had the same opportunity. As such, this factor is appropriately examined after Notice has been issued to the Class and Settlement Class Members have had the opportunity to make a claim, exclude themselves, or object to the Settlement.

Third, the stage of the proceedings and the amount of discovery completed supports settlement approval. While the case is early in litigation, the Parties' negotiations included an exchange of information sufficient to allow both Parties to assess the claims and defenses at issue. A motion to dismiss has already been heard and ruled on by the Court and the case is currently pending appeal. The Parties are adequately informed to negotiate, and settlement at this stage is to be commended. *Castagna*, 2011 WL 2208614, at *6 (commending Plaintiffs' attorneys for negotiating early settlement an avoiding hundreds of hours of legal fees); *In re Interpublic Sec. Litig.*, No. 02 Civ. 6527, 2004 WL 2397190, *12 (S.D.N.Y. Oct. 26, 2004) (early settlements should be encouraged when warranted by the circumstances of the case). The Parties had more

than enough information to adequately evaluate the claims and defenses at issue. As such, this factor weighs in favor of approval.

Fourth, Fifth, and Sixth, the risks of establishing liability, damages, and maintaining a class through trial weigh in favor of approving the Settlement Agreement. Although Plaintiff firmly believes in the merits of the case, litigating in such an evolving area of law involves significant risk. "Litigation inherently involves risks." *In re Painewebber Ltd. P'ships Litig*., 171 F.R.D. 104, 126 (S.D.N.Y. 1997). "If settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome." *Id., quoting In re Ira Haupt & Co*., 304 F. Supp. 917, 934 (S.D.N.Y. 1969); *see also Velez v. Majik Cleaning Serv*., *Inc.*, No. 03 Civ. 8698, 2007 WL 7232783, at *6 (S.D.N.Y. June 25, 2007) (noting "there are always risks in proceeding to trial and these risks are compounded by virtue of the nature of class action litigation.") *citing Frank v. Eastman Kodak Co.*, 228 F.R.D. at 185 (W.D.N.Y. 2005). While Plaintiff remains confident in the strength of her claims, additional litigation leaves open the risk that she will be unable to meet the burdens of establishing liability, proving causation and damages, and gaining and maintaining certification through trial. Thus, these factors weigh in favor of settlement approval.

Seventh, although Defendant is a healthcare provider with limited financial resources, the ability of Defendant to withstand a greater judgment is not at issue here. In fact, even if Defendant could withstand a greater judgment, its ability to do so, "standing alone, does not suggest that the settlement is unfair." *Frank v. Eastman Kodak Co.*, 228 F.R.D. at 186 (*quoting In re Austrian*, 80 F. Supp. 2d at 178 n.9). Thus, this factor is neutral and does not preclude the Court from granting preliminary approval.

Eighth and Ninth, the Settlement Agreement provides for substantial relief for the Settlement Class, especially in light of all attendant risks of litigation. The Settlement guarantees

Settlement Class Members a pro-rata cash payment and reimbursement for Out-of-Pocket Losses from a $540,000.00 Settlement Fund established by Defendant. The value achieved through the Settlement is guaranteed, where chances of prevailing on the merits are uncertain. Again, while Plaintiff strongly believes in the merits of her case, she also understands that Defendant will assert a number of potentially case-dispositive defenses. Proceeding with litigation would open Plaintiff to the risks inherent in trying to achieve and maintain class certification and prove liability and damages. Through the Settlement, Plaintiff and Settlement Class Members gain significant benefits without having to face further risk of not receiving any relief at all.

The *Grinnell* factors weigh in favor of approval of the Settlement Agreement—and certainly at least support preliminary approval. As such, this Court should grant Plaintiff's motion and allow notice to issue.

C. The Proposed Claims Administrator Will Provide Adequate Notice

Rule 23(e)(1) requires the Court to "direct reasonable notice to all class members who would be bound by" a proposed Settlement. For classes like this one, certified under Rule 23(b)(3), parties must provide "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Rule 23(c)(2)(B) specifically permits notice to be sent by "U.S. Mail, electronic mail, or other appropriate means."

The Notice Plan negotiated here is the best practicable. The Notice plan calls for Notice to issue via U.S. mail to the addresses Defendant LHP has on record, and that it used to provide Settlement Class Members with initial notice of the Data Security Incident.

"The standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness." *Wal–Mart Stores, Inc. v. Visa*

U.S.A. Inc., 396 F.3d 96, 113–14 (2d Cir.2005). There are no rigid rules for determining whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice merely must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Id.* at 114. Second Circuit courts have explained that a Rule 23 Notice will satisfy due process where it describes the terms of the settlement generally and informs the class about the allocation of attorneys' fees, and provides specific information regarding the date, time, and place of the final approval hearing. *Charron v. Pinnacle Group N.Y. LLC*, 874 F. Supp. 2d 179, 191 (S.D.N.Y. 2012) (internal citations omitted). The notice must also "contain information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class and be bound by the final judgment". *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1105 (5th Cir.1977); *Achtman v. Kirby, McInerney & Squire*, LLP, 464 F.3d 328, 338 (2d Cir.2006).

The substance of the Notice here is designed to be clear and concise and inform Settlement Class Members of the general terms of the Settlement Agreement, the allocation of attorneys' fees, and provide specific information regarding the date, time, and place of the Final Approval Hearing. *See* Agr., Exs. B-C. As such, the proposed Notice plan should be approved.

VI. CONCLUSION

Plaintiff has negotiated a fair, adequate, and reasonable settlement that guarantees Settlement Class Members significant relief. The Settlement Agreement is well within the range of reasonable results, and an initial assessment of both Rule 23 and the *Grinnell* factors demonstrates that final approval is likely, and Notice should issue to the class. For these and the

above reasons, Plaintiff respectfully requests this Court certify the class for settlement purposes and grant her Motion for Preliminary Approval of Class Action Settlement.

Dated: February 9, 2024

Respectfully submitted,

/s/David K. Lietz

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CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2024, the foregoing document was filed through the Electronic Case Filing system of the United States District Court for the District of Vermont and will be served electronically by the Court to the Registered Participants identified in the Notice of Electronic Filing (NEF).

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