UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ERIC LAPRAIRIE, on behalf of himself and all other employees similarly situated,

Plaintiffs,

vs.

PRESIDIO, INC., PRESIDIO HOLDINGS INC., PRESIDIO, LLC, PRESIDIO NETWORKED SOLUTIONS LLC, PRESIDIO NETWORKED SOLUTIONS GROUP, LLC, and PRESIDIO TECHNOLOGY CAPITAL, LLC,

Defendants.

Case No. 1:21-cv-08795-JFK

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

THOMAS & SOLOMON LLP
Attorneys for Plaintiff
693 East Avenue
Rochester, New York 14607
Telephone: (585) 272-0540

Of Counsel: J. Nelson Thomas, Esq.
Jessica L. Lukasiewicz, Esq.
Jonathan Ferris, Esq.
Erin K. Hanlon, Esq.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

I. INTRODUCTION.

Plaintiff Eric LaPrairie ("Plaintiff"), individually, and as the representative of a class of similarly situated persons (the "Class Members"), respectfully submits this memorandum of law in support of his motion for preliminary approval of a class action settlement that will fully resolve claims against Defendants Presidio, Inc., Presidio Holdings Inc., Presidio, LLC, Presidio Networked Solutions LLC, Presidio Networked Solutions Group, LLC and Presidio Technology Capital LLC ("Defendants" or "Presidio") arising out of Plaintiff's allegations with respect to a data security incident that occurred in or about March 2020 (the "Data Incident").

The proposed Class Action Settlement Agreement and Release ("Settlement Agreement" or "Settlement") meets all of the requirements of Fed. R. Civ. P. 23(a) and (b)(3) and should therefore be provisionally certified. *See* Exhibit A.[1]

Moreover, the Settlement was reached after nearly a year of arm's-length and good faith negotiations, the exchange of significant informal discovery, and two mediations with separate experienced mediators, as well as months of conference calls amongst the Parties. Indeed, when considering the extensive arm's-length negotiations, as well as the other Rule 23(e) factors, the Settlement provides for a fair, reasonable, and adequate recovery to the Class Members.

Accordingly, this Court should grant this motion in its entirety.

II. FACTUAL AND PROCEDURAL BACKGROUND.[2]

This litigation arises out of a cyber-attack. On or about March 5, 2020, Presidio discovered that an unauthorized third party gained access to Defendants' software and/or systems resulting in

[1] All exhibits are attached to the Declaration of Jessica L. Lukasiewicz, sworn to August 5, 2022 ("Lukasiewicz Decl.").

[2] The facts in this section are those set forth in the Amended Complaint. Defendants do not make any admission as to the facts alleged in the Amended Complaint, and reserve their right to challenge the alleged facts should the Court deny this Motion, whether in whole or in part.

the disclosure of Plaintiff and the Class' personally identifiable information ("PII"), including their names, Social Security numbers, compensation and tax information. ECF No. 26, Amended Complaint ("AC") ¶¶ 2-3. In approximately late April 2020, Defendants sent notice informing approximately 3,324 individuals that their PII may have been compromised in the Data Incident. *Id.* ¶¶ 21, 23, 64.

Plaintiff filed a class action complaint in New York State Supreme Court, County of Monroe on November 18, 2020. *LaPrairie v. Presidio, Inc., et al.*, Index No. E202009128, Dkt. No. 1. On March 29, 2021, Plaintiff moved for class certification. *See* Dkt. No. 9. On April 8, 2021, Defendants filed a Notice of Removal, removing the case to the Western District of New York. *See LaPrairie v. Presidio, Inc., et al.*, No. 6:21-cv-6306, ECF No. 1. On May 10, 2021, Plaintiff filed his Motion to Remand for Lack of Subject Matter Jurisdiction. ECF No. 6. On September 14, 2021, Plaintiff withdrew his Motion to Remand. ECF No. 15.

On October 6, 2021, Defendants filed a Motion to Dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) or, in the alternative, to Transfer Venue. ECF No. 16.

On October 28, 2021, pursuant to a stipulation, the action was transferred to the Southern District of New York. *See LaPrairie v. Presidio, Inc., et al.*, No. 21-cv-08795.

On November 29, 2021, Defendants filed a Motion to Dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). ECF No. 24-25. On December 20, 2021, in part due to the removal of the case to federal court, Plaintiff filed an Amended Complaint. ECF No. 26. On January 10, 2022, Defendants filed Motion to Dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). ECF No. 29. On February 23, 2022, Plaintiff filed his response to Defendants' motion to dismiss. ECF No. 32. On March 16, 2022, Defendants filed their reply in support of their motion to dismiss. ECF No. 33.

On April 13, 2022, Plaintiff filed a pre-motion letter to the Court in anticipation of his motion to strike additional pages from Defendants' reply brief in support of their motion to dismiss. ECF. No. 35. Defendants submitted a response letter, and the Court set a briefing schedule for the anticipated motion to strike. ECF Nos. 36, 37. The Court subsequently granted a stay of the matter, including oral argument on Defendants' motion to dismiss and the briefing schedule on Plaintiff's anticipated motion to strike, given the Parties ongoing settlement discussions, discussed in further detail below. ECF Nos. 39, 41, 43.

III. SETTLEMENT DISCUSSIONS.

The Parties and their counsel have been discussing potential resolution of this matter since its inception, which included nearly a year of arm's-length and good faith negotiations, the exchange of significant informal discovery, and two mediations with separate experienced mediators, as well as months of conference calls amongst the Parties. Lukasiewicz Decl. ¶ 3. During the first mediation attempt, the Parties selected respected mediator, Rodney Max, of Upchurch Watson White and Max, to assist them. *Id.* ¶ 4. The Parties engaged in significant informal discovery, had teleconferences with Mr. Max, and supplied him with written mediation statements prior to mediation. Ultimately, after a full-day mediation session on August 3, 2021 with Mr. Max, the Parties were unable to reach a resolution. *Id.*

Although litigation immediately resumed, throughout the subsequent months, the Parties had numerous teleconferences to once again discuss resolution. Ultimately, the Parties were mutually willing to re-engage in mediation discussions once the briefing on Defendants' motion to dismiss was completed. *Id.* ¶ 5.

Indeed, nearly ten months after the first mediation, the Parties once again agreed to participate in a mediation that occurred on June 16, 2022. *Id.* ¶ 6. This time the Parties engaged of

a different experienced mediator, Bennett G. Picker, of Stradley Ronon Stevens & Young, LLP. *Id.* Ultimately, with the assistance of Mr. Picker during a full-day mediation, the Parties were able to reach an agreement that was memorialized in a Term Sheet. After signing the Term Sheet, the Parties negotiated the Settlement Agreement, which involved the exchange of multiple drafts, multiple conference calls, and resolution of various issues in dispute. *Id.*

IV. TERMS OF SETTLEMENT.

A. The Proposed Class

The Parties have agreed that the proposed Class shall include:

> All individuals who were notified by Presidio that their personal information may have been compromised in the Data Incident that occurred in or about March 2020. The Class specifically excludes: (i) all Class Members who timely and validly request exclusion from the Settlement 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.

(Hereafter referred to as "Settlement Class" or "Class"). Settlement Agreement § I, ¶ 6.

B. Identity Theft Protection Services

The Settlement Agreement provides identity theft protection through TransUnion *my*TrueIdentity for a period of two (2) years for all Class Members who submit a Claim Form within seventy-five (75) days after the Notice Deadline. *Id.* § II, ¶ 37(a). In the event the Class Members previously signed up for credit monitoring and identity theft protection through Presidio following the Data Incident, they are still eligible to receive two additional years of TransUnion *my*TrueIdentity, thus meaning some Class Members will receiving a total of four (4) years of coverage. *Id.* TransUnion *my*TrueIdentity includes credit monitoring from one bureau, access to credit reports, and $1 million in identity theft insurance. *Id.*

C. Reimbursement for Attested Time

In addition, the Settlement Agreement provides for Reimbursement for Attested Time.

Class Members who have expended time remedying issues related to identity theft directly caused by the Data Incident are eligible for reimbursement. Settlement Agreement § II, ¶ 37(c). Class Members are eligible to receive reimbursement for up to four (4) hours of time spent at $15 an hour for a total of $60. *Id.* In order to receive Reimbursement for Attested Time, a Class Member must submit a Claim Form within seventy-five (75) days after the Notice Deadline.[3] *Id.*

D. Reimbursement for Out-of-Pocket Losses

The Settlement Agreement allows for reimbursement to Class Members for Out-of-Pocket Losses up to $500 per individual that have not been reimbursed by another source, including compensation provided in connection with the credit monitoring product offered as part of the notification letter provided by Presidio. *Id.* § II, ¶ 37(b). To receive Reimbursement for Out-of-Pocket Losses, Class Members must submit a Claim Form. *Id.* § II, ¶ 37(b)(ii). The Claim Form must be submitted no later than the seventy-five (75) days of the Notice Deadline. *Id.*[4]

E. Non-Monetary Relief

The Settlement requires Defendant to provide confidential confirmatory discovery regarding the facts and circumstances of the Data Incident, Presidio's response to the Data Incident, and the changes and improvements that have been made or are being made to protect Class Members' personal information from further unlawful intrusions, including but not limited to: (1) password changes; (2) changes to multi-factor authentication requirements; (3) updated reporting and monitoring of access to Presidio's HR application or any information contained therein; and (4) updated employee training. Settlement Agreement § II, ¶ 37(d).

[3] Collectively there is a cap of five hundred dollars ($500) for a Class Member seeking recovery for the Reimbursement for Attested Time and Reimbursement for Out-of-Pocket Losses. *Id.* § II, ¶ 37(b)(v).

[4] Plaintiff's Counsel values the relief provided for under the Settlement Agreement to the Class as follows: credit monitoring is approximately $1.9 million, Reimbursement for Attested Time is approximately $199,440, and Reimbursement for Out-of-Pocket Losses is approximately $997,200. This does not include a valuation for the non-monetary relief which is arguably invaluable. Lukasiewicz Decl. ¶ 8.

F. Release

In exchange for the relief described above, Class Members who do not opt-out of the Settlement will fully release Defendants and their respective present and former predecessors, successors, assigns, parents, subsidiaries, divisions, affiliates, departments, and related entities, and any and all of their past, present, and future predecessors, officers, directors, employees, principals, stockholders, partners, servants, agents, successors, attorneys, advisors, consultants, representatives, insurers, reinsurers, and subrogees (the "Released Parties" defined in the Settlement Agreement) of liability for all claims arising out of or related to the Data Incident, as set forth more fully in the Settlement Agreement. *Id.* ¶ 25.

G. Notice and Settlement Administration

The Parties agreed to the appointment of Postethwaite & Netterville, as Settlement Administrator (the "Settlement Administrator"). *Id.* ¶ 28. The Settlement Administrator will, subject to Court approval, provide notice to the Class in the manner set forth below. The cost of notice and settlement administration will be paid by Presidio, without reduction in any benefits to Class Members. *Id.* ¶ 44.

H. Attorneys' Fees and Costs

The Parties agree that this Court shall determine the appropriate amount of any attorneys' fees and expenses to be paid to Plaintiff's Counsel, except that Presidio has agreed to pay attorneys' fees and costs in the amount of four hundred thousand dollars ($400,000). *Id.* ¶ 38; Should the Court grant preliminary approval, in advance of the Final Approval Hearing, Plaintiff intends to submit more detailed information to support his request. *Id.* ¶ 11.

I. Service Award

Plaintiff's Counsel intends to seek the Court's approval of service award in the amount of

three thousand dollars ($3,000) to the class representative. Settlement Agreement § II, ¶ 39; Lukasiewicz Decl. ¶ 12. The service award reflects the work the class representative has performed in assisting Plaintiff's Counsel with this litigation, including numerous telephonic conferences with Plaintiff's Counsel, assisting with drafting the Complaint and Amended Complaint, assistance with the settlement negotiations which ultimately required him to be available for the two separate mediations, and the work he will continue to perform through the approval process of the Settlement. Lukasiewicz Decl. ¶ 13.

V. THE COURT SHOULD PROVISIONALLY CERTIFY THE CLASS AND CONDITIONALLY APPROVE THE CLASS SETTLEMENT.

The Class, which the parties have proposed for settlement purposes, meet the requirements of Fed. R. Civ. P. 23. As such, this Court should provisionally certify the Class, pending the final fairness hearing, and conditionally approve settlement of the claims of that Class.

Certification of settlement classes is governed by Rule 23 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 23. Where a class is proposed in connection with a motion for preliminary approval, "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). Courts employ a "liberal rather than restrictive construction" of Rule 23, "adopt[ing] a standard of flexibility" in deciding certification. *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997) (internal citation omitted). Under Rule 23(a), class certification is appropriate if the Court finds the following satisfied: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. Once the perquisites of Rule 23(a) are satisfied, a plaintiff seeking class certification must also satisfy at least one of the requirements contained in Rule 23(b). *Roach v T.L. Cannon Corp.*, 778 F.3d 401, 405 (2d Cir. 2015)). In particular, Rule 23(b) is satisfied if a class action may be maintained if:

1. the prosecution of separate actions by or against individual members of the class would

create a risk of inconsistent or varying adjudications with respect to individual members of the class; or

2. the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

2. the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Courts routinely certify settlement classes in data breach cases, and there is no reason why this case should be different. *See, e.g.*, *Coleman v. Railworks Corp.*, No. 20-cv-02428-GBD, ECF No. 41 (S.D.N.Y. May 13, 2021); *Sackin v. Transperfect Global, Inc.*, No. 17-1469, ECF No. 55 (S.D.N.Y. Mar. 13, 2018); *Dumay v. Episcopal Health Servs., Inc.*, No. 715629/2019, Dkt. No. 23 (Sup. Ct. Queens Cty. Jan. 15, 2021).[5]

Here, as set forth in more detail below, the prerequisites of Rule 23(a) and (b) are satisfied.

A. The Prerequisites of Rule 23(a) are Satisfied

1. Rule 23(a)(1): Numerosity Requirement

Rule 23(a)'s numerosity requirement provides that a proposed class must be so numerous that joinder of all members would be "impracticable." *See* Fed. R. Civ. P. 23(a)(1). Here, "[i]mpracticable does not mean impossible." *In re Amaranth Natural Gas Commodities Litig.*, 269 F.R.D. 366, 375 (S.D.N.Y. Sept. 27, 2010). Rather, "[j]oinder may merely be difficult or inconvenient." *Id.* Thus, a determination of practicability "depends on all the circumstances surrounding the case," and the Court should consider factors such as "judicial economy arising

[5] *See also In re Premera Blue Cross Customer Data Security Breach Litig.*, No. 15-md-2633, 2019 WL 3410382 (D. Or. July 29, 2019); *In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.*, No. 08-md-1998, 2009 WL 5184352 (W.D. Ky. Dec. 22, 2009); *Giroux v. Essex Property Trust, Inc.*, No. 16-cv-1722, 2018 WL 2463107 (N.D. Cal. June 1, 2018); *In re Sonic Corp. Customer Data Sec. Breach Litig.*, No. 17-md-2807, 2019 WL 3773737 (N.D. Ohio Aug. 12, 2019).

from the avoidance of a multiplicity of actions, . . . financial resources of class members, [and] the ability of claimants to institute individual suits." *Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993) (internal citation omitted).

Further, while there is no specific minimum number of proposed class members required to satisfy numerosity, a class size of forty or more is considered sufficient. *See, e.g., Shahriar v. Smith & Wollensky Rest. Grp.*, 659 F.3d 234, 252 (2d Cir. 2011) (internal citation omitted).

Here, the proposed Class is comprised of more than 3,000 individuals and, in light of the Settlement, requiring these individuals to institute separate actions would be a waste of judicial resources and serve no useful purpose. As such, Rule 23(a)(1) is satisfied.

2. Rule 23(a)(2): Commonality Requirement

Rule 23(a)'s commonality requirement mandates that there are "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Commonality is demonstrated when the claims of all class members depend on a common contention, with "even a single common question" sufficing. *German v. Fed. Home Loan Mortg. Corp.*, 885 F.Supp. 537, 553 (S.D.N.Y. 1995). The common contention must be of such a nature that it is capable of class-wide resolution and that the "determination of its truth or falsity will resolve an issue." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

Here, there are common questions of fact and law. Indeed, some of those common questions include: (1) whether Defendants unlawfully used, maintained, lost or disclosed Class Members' PI; (2) whether Defendants owed a duty to Class Members to safeguard their PII; (3) whether Defendants breached their duties to Class Members to safeguard their PII; (4) whether Defendants' conduct was negligent; (5) whether Defendants failed to provide notice of the Data Incident in timely manner; and (6) whether Class Members are entitled to damages, civil penalties,

putative damages and/or injunctive relief.

These issues focus on Defendants' conduct as it applied to all Class Members and can thus be answered for all Class Members using common generalized proof. Indeed, where, as here, it is alleged that all Class Members' claims are based on the same conduct of Defendants, failure to adequately safeguard PII, courts routinely find that Rule 23(a)(2) has been met and that certification is proper. *See In re Brinker Data Incident Litig.*, No. 3:18-cv-686-TJC-MCR, 2021 WL 1405508, at *8 (M.D. Fla. Apr. 14, 2021); *Smith v. Triad of Ala., LLC*, No. 14-324, 2017 WL 1044692, at *15-16 (M.D. Ala. Mar. 17, 2017); *St. Joseph Health Sys. Med. Info. Cases*, JCCP No. 4716, ECF No. 418 (Cal. Sup. Ct. Feb. 3, 2016); *Tabata v. Charleston Area Med. Ctr., Inc.*, 759 S.E.2d 459, 466-67 (W. Va. 2014).

Therefore, commonality for purposes of Fed. R. Civ. P. 23(a)(2) is satisfied.

3. Rule 23(a)(3): Typicality Requirement

Rule 23's typicality requirement provides that the claims or defenses of the representative parties must be "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Thus, "[w]hen the same unlawful conduct was directed at or affected both the named plaintiff and the prospective class, typicality is usually met." *Aponte v. Comprehensive Health Mgmt., Inc.*, No. 10 CIV.4825 PKC, 2011 WL 2207586, at *10 (S.D.N.Y. June 2, 2011); *see also Brinker*, 2021 WL 1405508, at *8 (court found that typicality was satisfied in data breach class action where "the "only difference between Named Plaintiffs and putative class members is the amount of damages.").[6] That is the case here.

Here, Plaintiff's claims arise out of the same type of factual and legal circumstances

[6] Further, "[s]ince the claims only need to share the same essential characteristics, and need not be identical, the typicality requirement is not highly demanding." *Dial Corp. v. News Corp.*, 314 F.R.D. 108, 113 (S.D.N.Y. 2015) (internal citation omitted).

surrounding the claims of each Class Member. For example, Plaintiff contends that Defendants failed to safeguard their PII from being compromised – the same claim made on behalf of all of the Class. *See e.g.,* AC ¶¶ 1, 24-26. Further, Plaintiff and Class Members similarly entrusted Defendants with their PII as a condition of employment. *Id.* ¶ 76. Also, the potential compromise of Plaintiff and Class Members' PII all arises out of the same Data Incident.

For these reasons, the typicality requirement of Rule 23(a)(3) is plainly met.

4. Rule 23(a)(4): Adequacy of Representation Requirement

Rule 23(a)'s adequacy of representation requirement provides that the representative parties fairly and adequately protect the interests of the class. *See* Fed. R. Civ. P. 23(a)(4). This requirement is grounded in due process concerns, as Class Members are constitutionally entitled to adequate representation before an entry of a judgment that binds them. *See Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940). Ultimately, courts will evaluate whether "(1) plaintiff's interests are antagonistic to the interest of other members of the class and (2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *Damassia v. Duane Reed, Inc.*, 250 F.R.D. 152, 158 (S.D.N.Y. 2008) (internal citation omitted).

Here, Plaintiff's interests in this litigation are entirely aligned to those of all other members of the Class with no conflicting interests. He shares the same interest in securing relief for the claims in this case as members of the proposed Class, and there is no evidence of any conflict of interest. Lukasiewicz Decl. ¶ 14. Next, Plaintiff has demonstrated his continued willingness to vigorously prosecute this case and has regularly consulted with his counsel, made himself available during two separate mediations, reviewed documents and the proposed Settlement, indicated his willingness to sit for depositions in this case, and has indicated a desire to continue protecting the interests of the Class through settlement or continued litigation. *Id.* ¶ 15. Furthermore, Plaintiff is

familiar with the lawsuit and is fully aware of his claims, as well as the claims of the Class Members he seeks to represent. *Id.* ¶ 16.

Additionally, Thomas & Solomon ("TS") is qualified and able to litigate the claims in this matter. TS has extensive experience litigating major class actions in state and federal courts throughout the United States and is familiar and knowledgeable on the subject matter of this lawsuit. Plaintiff's Counsel had done substantial work identifying, investigating, prosecuting, and settling the claims as lead counsel in many complex class actions - including multiple data breach cases in which they secured favorable judgments in favor of its clients. *See* Exhibit B.

Plaintiff's Counsel will similarly continue to adequately protect the interest of the proposed Class. The lawyers at TS are seasoned litigators who are experienced in employment issues with considerable experience in prosecuting class actions and other complex litigation and therefore competent and capable of conducting this litigation. Lukasiewicz Decl. ¶ 17. TS has devoted the majority of its practice to representing and protecting the rights of individuals against large institutions through complex and class litigation within a variety of contexts. *Id.* ¶ 18.

For example, founding partner, J. Nelson Thomas currently sits on the American Bar Association's editorial board for the Fair Labor Standards Act treatise. *Id.* ¶ 19. Mr. Thomas is a nationally recognized speaker on class and collective actions. *Id.* ¶ 20. Further, partner Jessica Lukasiewicz has litigated class and collective action lawsuits for over thirteen years at Thomas & Solomon LLP. *Id.* ¶ 21. Associate Jonathan Ferris has litigated class and collective actions for over nine years at Thomas & Solomon LLP. *Id.* ¶ 22. During their time with Thomas & Solomon LLP, Mr. Thomas, Ms. Lukasiewicz, and Mr. Ferris have represented classes of thousands upon thousands of class members, in both class and collective actions. *Id.* ¶ 23. Indeed, many courts

have acknowledged Thomas & Solomon LLP's class action leadership and ethical standards.[7]

TS is also highly knowledgeable regarding data breach litigation. *Id.* ¶ 25. TS is currently pursuing numerous data breach cases and has devoted significant resources to extensively researching and analyzing the relevant claims and case law. *See id.* at ¶ 26; TS Firm Resume, Exhibit B. Moreover, Plaintiff's Counsel has diligently investigated, prosecuted, and dedicated substantial resources to the claims in this action and will continue to do so throughout its pendency. Lukasiewicz Decl. ¶ 27.[8]

Therefore, the adequacy requirement of Rule 23(a)(4) is satisfied.

B. The Prerequisites of Rule 23(b)(3) are Satisfied

1. Rule 23(b)(3): Predominance Requirement

Rule 23(b)(3)'s predominance requirement is "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Flores v. Anjost Corp.*, 284 F.R.D. 112, 130 (S.D.N.Y. 2012) (citing *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). "Thus, 'when determining whether common issues predominate, courts focus on the liability issue . . . and if the liability issue is common to the class, common questions predominate over individual ones.'" *Flores*, 284 F.R.D. at 130 (internal citation omitted).

Here, as discussed above in regard to commonality, Plaintiffs contend that the resolution of their claims involve a number of common issues. Resolution of those common issues

[7] *See Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 182 (W.D.N.Y. 2005) (TS "has demonstrated that it is well-qualified to conduct the litigation."); *Camesi v. Univ. of Pittsburgh Med. Ctr.*, No. 09-85J, 2009 WL 3032590, at *1 (W.D. Pa. Sept. 17, 2009) (granting appointment as class counsel because TS were "qualified and could appropriately represent the plaintiffs"); *Masters v. F.W. Webb Co.*, No. 03-CV-6280L, 2006 WL 2604833, at *3 (W.D.N.Y. Sept. 11, 2006) (TS "is abundantly experienced in employment litigation, a substantial portion of which has been conducted before this Court."); *Hamelin v. Faxton-St. Luke's Healthcare*, 274 F.R.D. 385, 396 (N.D.N.Y. 2011) (TS has "established they are qualified and able to conduct this litigation.").

[8] TS has the financial resources available to adequately represent the Class. Lukasiewicz Decl. ¶ 28.

significantly resolves this litigation, and they therefore predominate over any potential individualized issues. For example, the Plaintiff contends that he and the Class Members all provided their sensitive PII as a condition of employment with Defendants and despite promises to protect their PII, Defendants failed to adequately safeguard such information against a data breach. *See e.g.*, AC ¶¶ 1, 24–26, 76. Further, Plaintiff also alleges that Defendants owed a duty to safeguard PII to Class Members and such duty was breached. *Id.* ¶¶ 78–80. The legality of Defendants' actions (or inaction) can be determined once for all Class Members. As a result, the common factual and legal issues raised by the allegations predominate over any potential individualized issues.[9]

Accordingly, the predominance requirement is satisfied.

2. Rule 23(b)(3): Superiority Requirement

Rule 23(b)(3)'s superiority requirement mandates that the "class action [must be] superior to other available methods for the fair and efficient adjudication of the controversy." Where a class is being certified for settlement purposes, three factors are pertinent to this determination:[10]

> (a) The interest of members of the class in individually controlling the prosecution ... of separate actions;
>
> (b) The extent and nature of any litigation concerning the controversy already commenced by ... members of the class;
>
> (c) The desirability ... of concentrating the litigation ... in the particular forum.

Id., quoting Fed. R. Civ. P. 23(b)(3).

[9] As many courts have held, these common issues predominate over individual ones. *See generally Coleman*, ECF No. 31, at ¶ 8 (S.D.N.Y. Jan. 4, 2021) (preliminarily certifying data breach class action finding that "there are predominant common questions of fact or law."); *Sackin*, No. 17-1469, ECF No. 55 (S.D.N.Y. Mar. 13, 2018); *Castillo*, 2017 WL 4798611, at *1 (preliminarily certifying a similar settlement class of employees whose employer disclosed their PII in response to a phishing scam).

[10] Because this motion is made in connection with a Settlement Class, there is no need to consider whether a trial of the matter would be manageable. *See e.g. In re Sony SXRD Rear Projection T.V. Class Action Litig.*, No. 06 Civ. 5173, 2008 WL 1956267 at *14, n.6 (S.D.N.Y. May 1, 2008).

Here, not surprisingly, there is no indication that Class Members seek to individually control their cases. The proposed class action is the surest way to fairly and expeditiously compensate more than 3,000 Class Members while preventing the inundation of cases in the court system. Indeed, commencement of an individual action is cost-prohibitive because the litigation costs will likely far outweigh the potential individual recovery. *See Fonseca v. Dircksen & Talleyrand Inc.*, No. 13 Civ. 5124, 2015 WL 5813382, at *6 (S.D.N.Y. Sept. 28, 2015) ("Courts routinely hold that a class action is superior where, as here, potential class members are aggrieved by the same policies, the damages suffered are small relative to the expense and burden of individual litigation . . .). Further, given the commonality of claims, the PII of all Class Members that may have been exposed as a result of the *same* Data Incident and the plethora of complex legal issues relating to the claims raised in this litigation, there would be little or no interest for each Class Member to proceed with a "single plaintiff" case. Indeed, class-wide resolution can be achieved using generalized, not individualized proof and all of Class Members' claims will rise and fall through the application of law to the same facts.

Next, the Parties are not aware of any other litigation concerning this controversy already commenced by any Class Member.

Finally, each of the Defendants have a principal place of business in New York, New York. AC ¶¶ 8. Further, some of the Class worked and/or reside in New York. Thus, there is no reason that this forum is undesirable.

Accordingly, certification of Class is superior to any other method of resolving this matter, as it will promote economy, expediency, and efficiency.

VI. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE AS TO THE PROPOSED CLASS.

Because the class meets all requirements of Rule 23(a) and (b)(3) for settlement purposes,

this Court should provisionally certify that class, and, having done so, the Court should conditionally approve the Parties' Settlement of the claims of that Class. *See* Fed. R. Civ. P. 23(e) (a class action shall not be dismissed or compromised without the approval of the court).

A court's review of a proposed class action settlement is a "two-step process." *In re Nasdaq Market-Makers Antitrust Litig*., 176 F.R.D. 99, 102 (S.D.N.Y. 1997). Initially, the court decides whether the settlement should be provisionally approved and, if so, "notice is given to the class members of a hearing, at which time class members and the settling parties may be heard with respect to final court approval." *Id*. At the provisional approval stage – the present stage here – the court's review is relatively lenient. *See e.g. Bourlas v. Davis Law Assocs*., 237 F.R.D. 345, 355 n.7 (E.D.N.Y. 2006). Indeed, this is consistent with compromise and settlement of class actions being generally favored by courts. *See* Herbert B. Newburg & Alba Conte, NEWBURGH ON CLASS ACTION § 11.41 (4th ed. 2002) ("The compromise of complex litigation is encouraged by the courts and favored by public policy."). The Court must only determine that the settlement is 'fair, adequate, and reasonable and not a product of collusion.'" *In re Merrill Lynch & Co.*, 246 F.R.D. 156, 165 (S.D.N.Y. 2007) (quoting *Joel v. Giuliani*, 218 F.3d 132, 138 (2d Cir. 2000)).

Rule 23(e)(2), as amended in 2018,[11] requires courts to consider whether:

(A) the class representatives and class counsel have adequately represented the class;

[11] "Prior to 2018, Rule 23(e)(2) set forth no factors, and courts in the Second Circuit instead determined whether a proposed settlement was substantively fair by considering what have come to be known as the *Grinnell* factors, which are: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risk of establishing damages; (6) the risks of maintaining the class action at 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; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation." *Buchanan v. Pay-O-Matic Check Cashing Corp.*, No. 18-CV-885, 2020 WL 8642081, at *6 (E.D.N.Y. Oct. 8, 2020). The application of the *Grinnell* factors, which largely overlap with the amendments of Rule 23(e)(2), likewise demonstrates that the Settlement is fair, adequate, and reasonable. Should the Court not rely upon Rule 23(e)(2), and instead require additional analysis under *Grinnell*, Plaintiff respectfully request leave to supplement their memorandum.

(B) the proposal was negotiated at arm's-length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorneys' fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

As set forth below, each of the factors are easily satisfied.

C. The Class Representative and Plaintiff's Counsel Has Adequately Represented the Settlement Class

First, Rule 23(e)(2)(A) weighs in favor of preliminary approval of the Settlement because the class representative and Plaintiff's Counsel have adequately represented the Settlement Class. The class representative has been actively involved in assisting Plaintiff's Counsel with this litigation since it began, including numerous telephonic conferences with Plaintiff's Counsel, assisting with drafting the Complaint and Amended Complaint, being available to assist during the full-day mediation, and the work he will continue to perform through the approval process of the Settlement Agreement. *See* Lukasiewicz Decl. ¶¶ 14-16. The class representative additionally also has experience and knowledge of information technology infrastructure engineering, therefore providing subject matter expertise to Plaintiff's Counsel in this case. *Id*. ¶ 16. The class representative has also adequately represented the interests of the Class by retaining competent counsel experienced in class action litigation. *See id.* ¶¶ 17-28.

Additionally, as noted above in more detail Plaintiff's Counsel has also adequately represented the Class. Plaintiff's Counsel concentrates its practice in employment litigation, and

its attorneys are experienced in class actions. *See id.* Additionally, Plaintiff's Counsel has committed, and will continue to commit, the resources necessary to litigate and resolve Plaintiffs' and Class Members' claims. *See id.* at ¶¶ 25-28. Further, Plaintiff's Counsel has spent substantial time in investigating the claims, vigorously prosecuting this action, and negotiating a favorable settlement for the Class through extensive negotiations. *Id.*

Accordingly, Rule 23(e)(2)(A) weighs in favor of preliminary approval of the Settlement.

D. Whether Settlement was Reached after Arm's-Length Negotiations

Second, Rule 23(e)(2)(B) weighs in favor of preliminary approval of the Settlement Agreement because the proposed Settlement was negotiated at arm's-length.

Courts have routinely found that arm's-length negotiations are the most important factor in preliminarily approving a class action settlement. *See In re Advanced Battery Techns., Inc. Securities Litig.*, 298 F.R.D. 171, 174 (S.D.N.Y. 2014) ("[a]bsent fraud or collusion, courts should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement.")(internal citation omitted); *Morris v. Affinity Health Plan, Inc.*, 859 F.Supp.2d 611 (S.D.N.Y. 2012) ("A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel") (internal citations omitted); *In re Penthouse Exec. Club Comp. Litig.*, No. 10 Civ. 1145, 2013 WL 1828598, at *2 (S.D.N.Y. Apr. 30, 2013). Further, "the assistance of a well-known [] mediator . . . reinforces that the Settlement Agreement is non-collusive." *O'Dell v. AMF Bowling Centers, Inc.,* No. 09 CV 759 (DLC), 2009 WL 6583142, at *1 (S.D.N.Y. Sept. 18, 2009); Fed. R. Civ. P. 23(e)(2)(B), Advisory Committee Notes (noting the importance of "the involvement of a neutral or court-affiliated mediator or facilitator in [settlement] negotiations").

Here, there is no question that the Parties' negotiations were arm's length as demonstrated

by the two mediations both led by experienced class action mediators. Further, these mediations were only engaged after significant informal discovery was exchanged and the Parties submitted substantial mediation statements. The first-full day mediation session was on August 3, 2021 with respected mediator, Rodney Max, Esq. Then, in June 2022, the Parties again agreed to participate in a mediation, this time with experienced mediator Bennett G. Picker. In the ten months between the first and second mediation, the Parties continued litigation, however, the Parties had numerous telephone discussions to discuss settlement. Even after reaching an agreement in principle codified in the form of a Term Sheet, the Parties negotiated the Settlement Agreement, which involved the exchange of multiple drafts, conference calls, and resolution of various issues in dispute. Again, the Settlement was only reached after these extensive negotiations, which took place at arms' length, without collusion – fully preserving the integrity of the adversarial process.

Accordingly, Rule 23(e)(2)(B) weighs in favor of preliminary approval of the Settlement.

E. The Relief Provided for the Class is Adequate

Third, Rule 23(e)(2)(C) weighs in favor of preliminary approval of the Settlement because the relief provided for the class is adequate—indeed, substantial. This factor considers numerous factors bearing on whether the relief afforded under a Settlement is reasonable, including: (1) the costs, risks, and delay of trial and appeal; (2) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (3) the terms of any proposed award of attorneys' fees, including timing of payment; and (4) any agreement required to be identified under Rule 23(e)(3). As set forth below, each subfactor of Rule 23(e)(2)(C) weighs in favor of preliminary approval.

1. Continued litigation would entail costs, risks, and delay

Without a settlement, this case would be complex, expensive, and any relief obtained on

behalf of the Class would be many years removed. For example, assuming no Settlement had been reached, the Parties would continue briefing Plaintiff's anticipated motion to strike, then the Court would make a determination on the pending motion to dismiss. Further, the Parties would need to complete significant class and merits discovery. This would necessarily involve significant motion practice concerning class certification and summary judgment. Even after such motion practice, and regardless of who prevailed at trial, appeals would likely have been filed. Thus, the ultimate resolution of Plaintiffs' claims would be a long, arduous process requiring significant expenditures of time and money on behalf of both Parties and the Court.

The cost, risk, and delay is especially pronounced in class action litigation, such as this action, as reinforced by "the strong judicial policy in favor of settlement of class action suits." *In re Advanced Battery Techns., Inc. Securities Litig.*, 298 F.R.D. at 174. While Plaintiffs believe that they would have been able to demonstrate that Defendants failed to adequately safeguard PII of Class Members, that this action is appropriate for class certification, and that they would succeed on the merits of their claims, Defendants would vigorously defend against any wrongdoing as evidenced by their motion to dismiss filing.

Accordingly, this subfactor weighs in favor of preliminary approval.

2. The proposed Settlement provides for an effective distribution of proceeds to the Settlement Class

The Settlement provides an effective distribution of the relief to the Class because the relief, credit monitoring, Reimbursement of Out-of-Pocket Losses and Reimbursement for Attested Time will be available for all Class Members. For instance, if someone spent time relating to the Data Incident or incurred unreimbursed Out-of-Pocket Losses, they are eligible for reimbursement of that time and/or losses. This same relief would not be available for someone who did not expend such time. Furthermore, each and every class member is eligible to enroll in

an additional two (2) years of TransUnion *my*TrueIdentity, which provides credit monitoring and identity theft protection including $1 million in identity theft insurance. Accordingly, this subfactor weighs in favor of preliminary approval.

3. The requested award of attorneys' fees and costs, including timing of payment, also support Settlement approval

Plaintiff's Counsel was required to undertake significant legal work on behalf of the Class, including investigating the claims, communicating with Class Members, drafting the Complaint and Amended Complaint, conducting legal research on the pertinent legal issues involved in this case, including the evolving caselaw on the relevant legal issues, reviewing the informal discovery produced, participating in two mediations, as well as the informal settlement discussions throughout the ten months, briefing the motion to dismiss, and preparing and filing this motion and supporting documents. *See* Lukasiewicz Decl., ¶ 10.

Plaintiffs' Counsel will also file a motion requesting that this Court approve an attorneys' fee and cost award of four hundred thousand dollars. *See id.* ¶ 11. As Plaintiffs' Counsel intends to demonstrate, this requested fee award is appropriate under both a percentage of the fund analysis, as well as under a lodestar cross-check. *Fleisher v. Phoenix Life Ins. Co.*, Nos. 11-cv-8405, 14-cv-8714, 2015 WL 10847814, at *12 (S.D.N.Y. Sept. 9, 2015) ("federal courts have established that a standard fee in complex class actions cases like this one, where plaintiffs' counsel have achieved a good recovery for the class, ranges from 20 to 50 percent of the gross settlement benefit, which includes the value of both monetary and nonmonetary relief") (internal citation and quotation omitted).

Accordingly, this subfactor weighs in favor of preliminary approval.

4. The Parties have no other agreements pertaining to the Settlement

The Court must also evaluate any agreements made in connection with a proposed

settlement. Fed. R. Civ. P. 23(e)(2)(C)(iv). Here, the Settlement Agreement before the Court is the only agreement between the Parties. *See* Lukasiewicz Decl., ¶ 7, n 1. Accordingly, this subfactor weighs in favor of preliminary approval.

F. The Proposed Settlement Treats Class Members Equitably Relative to Each Other

Finally, Rule 23(e)(2)(D) weighs in favor of preliminary approval of the Settlement because the proposed Settlement treats Class Members equitably relative to each other. This factor concerns "whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." Fed. R. Civ. P. 23(e)(2)(D), Advisory Committee Notes.

Here, under the Settlement, depending on the harm suffered, Class Members are eligible to recover all categories of relief, including credit monitoring; Reimbursement of Out-of-Pocket losses; and Reimbursement for Attested Time. *See* Settlement § II, ¶ 37. Accordingly, the Settlement is fair, reasonable, and adequate and all of the Rule 23(e)(2) factors weigh in favor of preliminary approval.

VII. Plaintiff's Counsel Should Be Appointed As Class Counsel

"[A] court that certifies a class must appoint class counsel. . . [who] must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1) and 23(g)(1)(B). In particular, the Court must consider the following qualities of counsel: (1) their work in identifying or investigating potential claims; (2) their experience in handling class actions or complex litigation and the types of claims asserted in the case; (3) their knowledge of applicable law; and (4) the resources they have to commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A)(i-iv). Here, as discussed in more detail in Section V(A)(4), TS should be appointed Class Counsel. First,

TS has experience in class action litigation generally, as well as in data breaches. TS has devoted significant resources to the research and analyzing of data breach claims and evolving case law in this area of the law. Second, TS's attorneys have devoted the majority of its practice to representing and protecting the rights of individuals, often through complex and class litigation. Indeed, Plaintiff's Counsel's innovative and complex theories of the claims in this action, ultimately led to the Settlement. Third, TS is knowledgeable regarding data breach litigation and has or is currently pursuing numerous data breach actions. Fourth, TS is committed to litigating this case to its conclusion and will dedicate the necessary resources. Accordingly, Plaintiff respectfully requests that the Court appoint TS as Class Counsel.

VIII. THE COURT SHOULD APPROVE THE FORM AND METHOD OF NOTICE OF THE SETTLEMENT TO THE CLASS.

This Court should likewise approve the notice materials that the Parties have proposed be directed to the Class Members. Specifically, under Fed. R. Civ. P. 23(e)(1)(B), the Court must "direct notice in a reasonable manner to all class members who would be bound by a proposed settlement." The notice standard is satisfied here.

The notice provided to members of a class certified under Rule 23(b)(3) must be the "best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). "Normally, settlement notices need only describe the terms of the settlement generally." *In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 60 (S.D.N.Y. 1993) (citing *Handschu v. Special Servs. Div.*, 787 F.2d 828, 833 (2d Cir. 1986)). As such, notice is satisfactory if it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Moreover, notice that is mailed to each member of a class "who can be identified with reasonable effort" constitutes reasonable notice. *Eisen v. Carlisle &*

Jacquelin, 417 U.S. 156, 176 (1974). For any class certified under Rule 23(b)(3), the notice must inform class members "that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded." Fed. R. Civ. P. 23(c)(2)(B).

In this case, the form and the manner of the notice materials, including the notices, have been negotiated and agreed upon by all counsel. *See* Settlement Agreement, Exhibits 1-6. These notice materials will inform Class Members of, among other things, the nature of the action, the definition of the Class, the claims, the relief available, how to obtain any such relief, the ability to opt-out or object, the attorneys' fees requested, the service award requested, and the release of claims if one elects to do nothing. *See id.*

The Parties propose that, upon entry of an Order granting this motion, the notice materials shall issue. Under the Settlement, the Administrator shall send Settlement Electronic Notice to the Class Members by email (with read receipt requested), where valid email addresses are available. Settlement Agreement § III, ¶ 43(b). Where a valid email address is not available, a Settlement Postcard Notice will be sent in the mail. *Id.* In the event that the read receipt is not indicated for those receiving the Settlement Electronic Notice, a Settlement Postcard Notice will be mailed. *Id.* Furthermore, a reminder notice will also be sent to Class Members as well, in the same methodology as used for the initial notice. *Id.* § III, ¶ 43(c).

In adherence to notice requirements, courts have preliminarily approved data breach settlement agreements which included mailing and/or emailing notices to class members. Those data breach settlements include, *Coleman*, No. 20-civ-02428, ECF No. 31 (S.D.N.Y. Jan. 4, 2021); *Sackin*, No. 17-1469, ECF No. 55 (S.D.N.Y. Mar. 13, 2018); *Castillo*, 16-cv-01958, ECF No. 76 (N.D. Cal. Oct. 19, 2017); and *In re Anthem, Inc. Data Breach Litig.*, No. 5:15-MD-02617, ECF No. 869-8 (N.D. Cal. June 23, 2017); *Hapka*, No. 16-02372, ECF No. 91 (D. Kan. Sept. 29, 2017).

Accordingly, the Court should approve the form and method of the notice as set forth in the Settlement Agreement.

IX. THE COURT SHOULD SET A DATE FOR THE FINAL APPROVAL HEARING.

Lastly, the following schedule sets forth the relevant dates and deadlines (as further detailed in the Settlement Agreement), assuming the Court preliminarily approves the Settlement.

Deadline for Defendants to provide Settlement Administrator with names, last known addresses, and last known email addresses of Class Members.	Within 7 days of entry of the Preliminary Approval Order
Deadline for Settlement Administrator to send Settlement Postcard Notice and Settlement Electronic Notice	Within 21 days of Preliminary Approval Order (for anyone with a valid email address, but who has not indicated read receipt within 7 days of being emailed, Settlement Postcard shall be mailed)
Deadline for Reminder Notices	45 days after Settlement Administrator sends the Settlement Postcard Notice and Settlement Electronic Notice
Deadline for objections, opt-outs, and to submit Claim Form	75 days after Notice Deadline
Final Approval Hearing	Any date after 110 days following the Preliminary Approval Order

X. CONCLUSION.

In light of the foregoing, Plaintiff respectfully requests that the Court enter an order, a proposed form of which is attached: (1) certifying the proposed Class; (2) naming Plaintiff as class representative; (3) appointing Thomas & Solomon LLP as Class Counsel; (4) granting preliminary approval to the Settlement; (5) approving the proposed notices; (6) appointing Postethwaite & Netterville as the Settlement Administrator; (7) setting procedures and deadlines of the exclusion and objections of Class Members; (8) scheduling a Final Approval Hearing; and (9) granting such further relief the Court deems reasonable and just.

Dated: August 5, 2022

Respectfully submitted,

THOMAS & SOLOMON LLP

By: /s/ Jessica L. Lukasiewicz
J. Nelson Thomas, Esq.
Jessica L. Lukasiewicz, Esq.
Jonathan W. Ferris, Esq.
Erin K. Hanlon, Esq.
Attorneys for Plaintiffs
693 East Avenue
Rochester, New York 14607
Telephone: (585) 272-0540
nthomas@theemploymentattorneys.com
jlukasiewicz@theemploymentattorneys.com
jferris@theemploymentattorneys.com
ehanlon@theemploymentattorneys.com