**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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

***Plaintiffs***,

**v.**

**PRESIDIO, INC., PRESIDIO HOLDINGS INC., PRESIDIO LLC, PRESIDIO NETWORKED SOLUTIONS LLC, PRESIDIO NETWORKED SOLUTIONS GROUP, LLC, AND PRESIDIO TECHNOLOGY CAPITAL, LLC,**

***Defendants.***

**NOTICE OF MOTION**

**No. 1:21-cv-08795-ALC**

**PLEASE TAKE NOTICE** that on December 8, 2022 at 4:00 p.m. ET, Plaintiffs in the above-captioned matter, will move this Court for an order: (1) certifying the Settlement Class; (2) granting final approval of the Settlement Agreement; (3) entering the contemporaneously filed Proposed Final Approval Order; and (4) granting such further relief the Court deems reasonable and just.

In support of this motion, Plaintiffs will submit a memorandum of law, the Declaration of Jessica L. Lukasiewicz, the Declaration of Ryan Aldridge of Postlehwaite & Neterville, and the exhibits to the foregoing declaration.

Dated: December 1, 2022

**THOMAS & SOLOMON LLP**

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| ***Defendants.*** |

**Case No. 1:21-cv-08795-ALC**

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

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## INTRODUCTION

Plaintiff Eric LaPrairie ("Plaintiff" or "Class Representative"), 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 final 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").[1]

The proposed settlement ("Settlement Agreement"), *see* ECF No. 52-1, which was achieved with the assistance of two highly respected mediators during two separate mediations, Rodney Max, of Upchurch Watson White and Max and Bennett G. Picker, of Stradley Ronon Stevens & Young, LLP, provides an excellent result for the approximately 3,300 Class Members affected by the Data Incident. The Settlement provides Class Members with two years of identity theft protection and credit monitoring services, Reimbursement for Out-of-Pocket Losses, and Reimbursement for Attested Time, as well as significant changes to Presidio's cybersecurity procedures and measures, which have already been implemented. *See* Declaration of Jessica Lukasiewicz ("Lukasiewicz Decl.") at ¶ 3; Settlement Agreement § II, ¶¶ 37(a)-(d).

Following entry of the Court's Order granting preliminary approval, notice of the Settlement was sent to all Class Members. Declaration of Ryan Aldridge of Postlethwaite & Netterville ("Aldridge Decl.") ¶ 3. The deadline for submitting a Claim Form, objecting to the

[1] Capitalized terms used herein that are not otherwise defined are defined in the Class Action Settlement Agreement and Release. ECF No. 52-1

Settlement, or opting out of the Settlement has passed and the Class' reaction was positive. Significantly, no Class Members have objected to or opted-out of the Settlement. Lukasiewicz Decl. ¶ 4. Given the absence of any objections or exclusions, the Class Members overwhelmingly support the Settlement.

As set forth below and in the submissions supporting Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement, *see* ECF No. 51, the Settlement is fair, reasonable, and adequate within the meaning of Federal Rule of Civil Procedure 23(e).

Accordingly, Plaintiff and Class Members respectfully requests that the Court grant final approval of the Settlement and for certification of the Class.

## BACKGROUND

### *Procedural History*

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

After the parties re-engaged in settlement discussions, on May 17, 2022, the Court 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. ECF Nos. 39, 41, 43.

***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. ¶ 6. During the first mediation attempt, the Parties selected respected mediator, Rodney Max, of Upchurch Watson White and Max, to assist them. *Id.* ¶ 7. The Parties engaged in informal discovery, had teleconferences with Mr. Max, and supplied him with written mediation statements prior to mediation. *Id.* Ultimately, after a full-day mediation session on August 3, 2021 with Mr. Max, the Parties were unable to reach a resolution. *Id.* ¶ 8.

Although litigation immediately resumed, throughout the subsequent months, the Parties discussed potential resolution at various times. *Id.* ¶ 9. Ultimately, the Parties were mutually willing to re-engage in mediation discussions once the briefing on Defendants' motion to dismiss was completed. *Id.* ¶ 10.

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.* ¶ 11. 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.*

## TERMS OF THE SETTLEMENT

***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.*

***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 was required to be submitted no later than the seventy-five (75) days of the Notice Deadline. *Id.*

***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. *Id.*

***Non-Monetary Relief***

The Settlement requires Defendants 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. These changes and improvements include, but are 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).

***Release of Claims under the Settlement***

In exchange for the relief described above, Class Members are releasing 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.* § I, ¶ 25. The release is narrowly tailored so that Class Members are only releasing claims arising out of or related to the Data Incident.

***Settlement Administration***

Pursuant to the Court's order preliminarily approving the Settlement, the Parties retained Postethwaite & Netterville to serve as the Settlement Administrator in accordance with the terms of the Settlement. ECF No. 53; Settlement Agreement § I, ¶ 28. On September 1, 2022, the Settlement Administrator emailed the Notice to those Class Members with valid email addresses. Aldridge Decl. ¶ 7. Where a valid email address was not available or for whom

the Settlement Administrator did not receive a read receipt, the Settlement Administrator mailed the Settlement Postcard Notice via U.S. Mail. Aldridge Decl. ¶ 8; Settlement Agreement, § III, ¶ 43. Through the Notice Program, the Notice reached 99.8% of Class Members through email and/or a postcard sent via U.S. Mail. *See* Aldridge Decl. at ¶ 17.

Class Members who wished to opt-out of the Settlement were required to submit a Request for Exclusion. Settlement Agreement, § III, ¶ 50. Class Members who wished to object to the Settlement were required to send a signed, written objection to the Settlement Administrator by the Objection Deadline. *Id.* § III, ¶ 48.

Those Class Members that submitted a timely and valid Claim Form are eligible to receive relief as set forth in the Settlement. *Id.* § II, ¶ 37(a)-(d). A Claim Form was timely if it was received by the Settlement Administrator via email or fax by the Claim Deadline, or if it was sent via U.S. Mail and postmarked by the Claim Deadline. § III, ¶ 45.

Class Members who failed to submit a timely and valid Claim Form or submit a Request for Exclusion will be bound by the judgment but will not receive any relief as set forth in the Settlement Agreement.

***Reaction from the Class***

The reaction from the Class was overwhelmingly positive. Of the 3,324 Class Members, there was not a single objection to the Settlement, nor any request for by a Class Member to be excluded from the Settlement. Significantly, nearly 7% (232 of 3,324) of Class Members submitted a Claim Form.

***Adequacy of the Class Representative and Class Counsel***

The Class Representative's interests are aligned with those of Class Members because he has suffered the same type of harm resulting from the Data Incident as other Class Members.

*See* Amended Complaint, ECF No. 26, at ¶¶ 75-143. The Class Representative additionally also has experience and knowledge of information technology infrastructure engineering, therefore providing subject matter expertise to Class Counsel in this case. Lukasiewicz Decl. ¶ 12.

Class Counsel has extensive experience in handling class actions and complex litigation and devotes the majority of its practice to representing and protecting the rights of individuals and employees. *See* ECF No. 60 at ¶¶ 26-27; ECF No. 60-1 (Firm Resume of Thomas & Solomon LLP). Class Counsel has already devoted over 800 hours investigating, litigating, conducting informal discovery, mediating, and settling this case. Lukasiewicz Decl. ¶¶ 13-14.

***The Settlement Provides for Attorneys' Fees and Costs***

Class Counsel has requested the Court's approval of attorneys' fees, costs and expenses in the total amount of $400,000 subject to this Court's approval. *See* ECF No. 59. Presidio did not oppose Class Counsel's request for attorneys' fees, costs and expenses. *Id.*

***The Settlement Provides for a Class Representative Service Award***

Class Counsel has requested a Service Award in the sum of three thousand dollars ($3,000) for the Class Representative. The Service Award is justified because the Class Representative assumed personal risks, it reflects the work the Class Representative performed in assisting Class Counsel with the investigation and litigation of this lawsuit, the Class Representative experienced burdens in assisting Class Counsel, and because the ultimate recovery to the Class is significant. *See* ECF No. 59 at *30-32.

## ARGUMENT

### I. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE.

This Court should grant final approval of the Settlement for the same reasons that preliminary approval was granted, as for the additional reason that the most important factor

is determining the adequacy of a settlement, the reaction of class members, has been overwhelmingly positive. The Settlement is the result of arm's-length negotiation after hard-fought litigation and mediation, involving not just one, but two mediators. Not only does the Settlement provide Class Member with monetary benefits and important credit monitoring services, Defendants have also made substantial changes to their cybersecurity policies and practices which will prevent and protect Class Members from future data breaches.

The Settlement also compares favorably compared to other data breach settlements and when weighed against the risks of future litigation. *See In re Heartland Payment Sys.*, 851 F. Supp. 2d 1040, 1049, 1079-80 (S.D. Tex. 2012) (approving settlement providing for reimbursement of economic costs and no credit monitoring). *See also infra* at I.B.2.g. As part of the settlement negotiations that lasted nearly a year, Class Counsel has reviewed informal discovery that was sufficient to understand the strengths and weaknesses of the Parties' respective positions. Having weighed the likelihood of success and inherent risks and expense of litigation, Plaintiff and Class Counsel strongly believe that the proposed Settlement is "fair, reasonable, and adequate[.]" Fed. R. Civ. P. 23(e)(2).

**A. The Legal Standard for Approval of a Class Action Settlement**

"'The compromise of complex litigation is encouraged by the courts and favored by public policy.'" *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 117 (2d Cir. 2005) (quoting 4 ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 11:41, at 87) (4th ed. 2002)). *See also Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) ("There are weighty justifications, such as the reduction of litigation and related expenses, for the general policy favoring the settlement of litigation.") (citing 3 Newberg, Class Actions § 5570c, at 479-80 (1977); *Williams v. First National Bank*, 216 U.S. 582, 595 (1910)); *Spann v. AOL Time*

*Warner, Inc.*, No. 02-8238, 2005 WL 1330937, at *6 (S.D.N.Y. June 7, 2005) ("[P]ublic policy favors settlement, especially in the case of class actions.")). "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 Grp. S.P.A. Sec. Litig.*, 233 F.R.D. 306, 310 (E.D.N.Y. 2006) (citations omitted).

Courts assess proposed class action settlements to determine whether they are "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). To do so, courts must determine whether both the negotiating process leading to a settlement and the settlement itself are fair, adequate, and reasonable. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001). "[C]lass action settlement enjoys a presumption of fairness where it is the product of arm's length negotiations between experienced and capable counsel." *Peoples v. Annucci*, No. 11-CV-2694 (ALC), 2021 WL 9566945, at *1 (S.D.N.Y. Mar. 30, 2021) (Carter, J.); *Wal–Mart Stores, Inc.*, 396 F.3d at 116 (quoting MANUAL FOR COMPLEX LITIGATION (Third) § 30.42 (1995)) (internal quotations marks omitted). Where a settlement is achieved through arm's-length negotiations by experienced counsel and there is no evidence of fraud or collusion, "[courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement." *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, No. 05-10240, 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007).

As amended in 2018, Rule 23 provides that a court may approve a class action settlement "only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(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, 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 attorney's 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."

Fed. R. Civ. P. 23(e)(2).

Prior to the 2018 amendment to Rule 23, the Second Circuit also identified a similar list of nine factors in *City of Detroit v. Grinnell Corp.*, that courts should consider in evaluating a proposed class action settlement. 495 F.2d 448, 462-63 (2d Cir. 1974). The *Grinnell* factors are:

> (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 action 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.

*Id*. The Rule 23(e)(2) factors "clarify[] and supplement[] the *Grinnell* factors." *Rosenfeld v. Lenich,* No. 18-CV-6720, 2021 WL 508339, at *3 (E.D.N.Y. Feb. 11, 2011).

### B. The Settlement Should be Approved Because it Meets the Requirements of Both the Rule 23(e) and the *Grinnell* Factors

As discussed below, the proposed Settlement meets both the procedural and substantive requirements of the Rule 23(e) and *Grinnell* factors used by courts in this Circuit. Because all

of the Rule 23(e)(2) and *Grinnell* factors are met, this Court should grant final approval of the Settlement.

1. The Settlement Is Procedurally Fair

The Settlement is procedurally fair because the Class Representative and Class Counsel have adequately represented the Class, and because the Settlement was reached as a result of arm's-length negotiation after hard-fought litigation and mediation.

"Rule 23(e)(2)(A), which requires adequate representation, and Rule 23(e)(2)(B), which requires arm's length negotiations, constitute the procedural analysis of the fairness inquiry." *Christine Asia Co., Ltd. v. Yun Ma*, No. 1:15-mcd-02631, 2019 WL 5257534, at *9 (S.D.N.Y. Oct. 16, 2019) (internal quotations omitted). Settlements "enjoy a presumption of fairness" when they are "the product of arms-length negotiations conducted by experienced counsel, knowledgeable in complex class litigation." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 173-74 (S.D.N.Y. 2000).

First, as to the Rule 23(e)(2)(A) factor, both the Class Representative and Class Counsel have adequately represented Class Members. The Class Representative's interests are aligned with those of Class Members because he has suffered the same type of harm resulting from the Data Incident as other Class Members. The Class Representative additionally also has experience and knowledge of information technology infrastructure engineering, therefore providing subject matter expertise to Class Counsel in this case. Lukasiewicz Decl. ¶ 12. Additionally, Class Counsel has also adequately represented the Class. Class Counsel are experienced class action attorneys who have devoted over 800 hours investigating, litigating, conducting informal discovery, mediating, and settling this case. Lukasiewicz Decl. ¶¶ 13-14.

Second, as to the Rule 23(e)(2)(B) factor, the Settlement is the product of non-collusive

negotiations; it was reached with the assistance of two different mediators over the period of nearly one year. *See Khait v. Whirlpool Corp*., No. 06-6381 (ALC), 2010 WL 2025106, at *5 (E.D.N.Y. Jan. 20, 2010) (Carter, J.) ("Arm's-length negotiations involving counsel and a mediator raise a presumption that the settlement they achieved meets the requirements of due process."); *Morris v. Affinity Health Plan, Inc*., 859 F. Supp. 2d 611, 618 (S.D.N.Y. 2012) (Carter, J.) ("The involvement of [] an experienced and well-known employment and class action mediator, is also a strong indicator of procedural fairness."); *Peoples*, 2021 WL 9566945, at *1; *Hayes v. Harmony Gold Min. Co. Ltd.*, 509 Fed. Appx. 21, 23 (2d Cir. 2013) (unpublished) (approving class settlement over objection of class representative because "the proposed settlement, on terms recommended by an independent and experienced mediator, was procedurally and substantively fair"). "The Settlement was [also] not conditioned on the approval of Counsel's fee award request, further evidencing arm's-length negotiations." *In re Fab Universal Corp. Shareholder Derivative Litig.,* 148 F. Supp. 3d at 281 (S.D.N.Y. 2015).

For these reasons, the Settlement is procedurally fair.

2. The Settlement Is Substantively Fair

The Second Circuit's *Grinnell* factors generally guide evaluation of whether the Settlement is substantively fair. *Jara v. Felidia Rest., Inc.*, No. 17 CV 9622, 2018 WL 11225740, at *2 (S.D.N.Y. Dec. 17, 2018) (Carter, J.) (stating that *Grinnell* factors "provide[] the analytical framework for evaluating the substantive fairness of a class action settlement, weigh in favor of final approval."); *Peoples,* 2021 WL 9566945, at *1 (S.D.N.Y. Mar. 30, 2021) (Carter, J.). However, "[i]n finding that a settlement is fair, not every factor must weigh in favor of settlement, rather the court should consider the totality of these factors in light of the particular circumstances." *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 138 (S.D.N.Y. 2010)

(internal quotation and citations omitted). "The weight given to any particular factor will vary based on the facts and circumstances of the case." *Ingles v. Toro*, 438 F. Supp. 2d 203, 211 (S.D.N.Y. 2006) (citing 7B Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure: Civil § 1797.1, at 77 (3d ed. 2005)).

Here, each of the *Grinnell* factors weigh heavily in favor of granting final approval of the Settlement.[2]

*a. This action is complex and will be expensive and lengthy to litigate.*

"Most class actions are inherently complex, and settlement avoids the costs, delays and multitude of other problems associated with them." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 174; *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 184-85 (W.D.N.Y. 2005) (same). Adding to the complexity of the case are the many unsettled questions in the novel area of data breach and privacy law.

Moreover, continued litigation would prove time consuming and expensive. At the time that the Parties reached the Settlement, the Parties had fully briefed (but no decision had been issued) Defendants' Motion to Dismiss the Amend Complaint. Even if Class Members had defeated that motion, they still would need to engage in substantial formal discovery, brief Plaintiff's class certification motion and engage in expert discovery. Presidio would likely continue to challenge Plaintiff's ability to prove causation, damages, and the scope of its

[2] In addition to the *Grinnell* factors discussed here, the Rule 23(e) factors applying to substantive fairness also support the Settlement. First, Rule 23(e)(C)(iii) requires consideration of the terms of any proposed award of attorneys' fees. Plaintiff's application for an award of attorneys' fees is discussed in detail in Plaintiff's Motion for an Award of Attorneys' Fees, Costs, and Expenses. *See* ECF No. 59. Most significantly, the requested attorneys' fee award was negotiated only after an agreement for Class Members was reached. Lukasiewicz Decl. ¶ 15. Second, Rule 23(e)(C)(iv) requires the identification of any other agreements. There are no other agreements between the Parties other than the Settlement Agreement. Lukasiewicz Decl. ¶ 16. To the extent that Court requires any further information as to the sufficiency of the Settlement under Rule 23(e)(2), Plaintiff respectfully requests leave to file a supplementary brief.

promise to protect PII (among other issues) at summary judgment and trial, or on subsequent appeal.

Delayed resolution of this matter would also diminish the value of the Settlement to Class Members. *See In re Marsh ERISA Litig.*, 265 F.R.D. at 138-39 ("[E]ven if the Class were to win a judgment at trial, the additional delay of trial, post-trial motions and appeals could deny the Class any actual recovery for years, further reducing its value."). In contrast, the Settlement provides timely and practical relief to the Class Members in the form of identity theft protection provided by TransUnion *my*TrueIdentity and reimbursement for lost time. In addition, the security measures Presidio agreed to in the Settlement will protect the PII of Class Members from future data breaches. *See* Settlement Agreement, § II, ¶ 37(d). These remedies would otherwise not be available to them for years, if at all.

Expeditious resolution is particularly valuable here because identity theft and credit monitoring services are most beneficial in the years immediately following the Security Incident, when the PII is most susceptible to misuse. Absent the Settlement, there is little Class Members could do to immediately protect themselves from the risks of identity theft besides purchase monitoring services themselves (which may never be reimbursed, and they may not be able to afford), and nothing they could do would require Presidio to implement and maintain specific data security measures. In other words, delaying resolution will only hurt Class Members.

Here, because "[l]itigation through trial would be complex, expensive, and long[,]" this factor therefore weighs in favor of approving the Settlement. *Morris*, 859 F. Supp. 2d at 619.

*b. The reaction of the Class is overwhelmingly positive.*

"It is well-settled that the reaction of the class to the settlement is perhaps the most

significant factor to be weighed in considering its adequacy." *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002) (citing *In re American Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 425 (S.D.N.Y. 2001) (citation omitted)). Here, Class Member's response to the Settlement is overwhelmingly positive.

First, of the 3,324 Class Members, there was not a single objection or opt out to the Settlement. *See* Aldridge Declaration, ¶¶ 16-17. This is especially noteworthy, as "the notice and approval process generally solicits negative feedback regarding a settlement, because it is designed to solicit opt outs and objections by advising class members of the procedures and deadlines for filing such responses with the court." *Charron v. Pinnacle Grp. N.Y. LLC*, 874 F. Supp. 2d 179, 197 (S.D.N.Y. 2012). Indeed, courts find a class' reaction to be positive and favor final approval when faced with far more objectors and opt outs. *See id.* at 196 (118 objectors); *Behzadi v. Intl. Creative Mgmt. Partners, LLC*, 2015 WL 4210906, at *2 (S.D.N.Y. July 9, 2015) (holding that "the Settlement Class's reaction to the settlement was positive" where "only 24" class members opted out); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 457 (S.D.N.Y. 2004) (noting that there were 12 objectors and 9 opt-outs and holding that "[t]hese extremely low numbers of objectors and opt-outs strongly support settlement approval.").[3]

Second, "the prevailing rule of thumb with respect to consumer class actions is [a claims rate of] 3–5 percent." *Forcellati v. Hyland's, Inc.*, No. 12-1983, 2014 WL 1410264, at *6 (C.D. Cal. Apr. 9, 2014) (citation omitted). *See e.g.*, *Claridge v. North American Power & Gas,*

[3] In fact, courts in this District have approved settlements even when a majority of the class objected. *See, e.g.*, *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1325 (2d Cir. 1990) (approving settlement where "a majority" of class objected); *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 462 (2d Cir. 1982) (between 54 and 58 percent of class objected).

*LLC,* No. 15-1261, ECF No. 152 (S.D.N.Y. June 29, 2018) (finally approving class settlement with claims rate of 4.8% as of about a month before the claims deadline); *In re: HIKO ENERGY LLC Litigation*, No. 14-1771, ECF No. 93 (S.D.N.Y. May 9, 2016) (approving class settlement with a claims rate of 3.14% as of three weeks prior to the claims deadline); *Zepeda v. PayPal, Inc.*, No. 10-1668, 2017 WL 1113293, at *16 (N.D. Cal. Mar. 24, 2017), *appeal dismissed*, No. 17-15780, 2017 WL 3138104 (9th Cir. July 11, 2017); *Stinson v. City of New York*, 256 F.Supp.3d 283, 289-90 (S.D.N.Y. 2017) (approving class settlement with a claims rate of 4.2% with four months remaining in the claim period window and holding that "[i]t is the absence of significant exclusion[s] or objections that courts in this Circuit regularly consider, not low response rates.").

In a similar data breach action involving sensitive personal information, *Castillo v. Seagate Tech. LLC*, the court approved a similar settlement with a claims rate of 4.28%. *See Castillo v. Seagate Tech. LLC*, No. 16-1958 (N.D. Cal.), Final Approval Motion, ECF No. 80 at 32 (Feb. 15, 2018) and Final Approval Order, ECF No. 85 (Mar. 14, 2018). Likewise, the court granted final approval a similar data breach class action settlement where nine class members opted out of the settlement. *See Sackin v. Transperfect Global, Inc.,* 278 F. Supp. 3d 739 (S.D.N.Y. 2017).

Indeed, courts routinely approve class settlements with lower claims' rates. *See, e.g.*, *Zepeda v. PayPal, Inc.*, No. 10-1668, 2017 WL 1113293, at *16 (N.D. Cal. Mar. 24, 2017), *appeal dismissed*, No. 17-15780, 2017 WL 3138104 (9th Cir. July 11, 2017) (granting final approval with 2.8% claims rate); *Touhey v. United States*, No. 08-1418, 2011 WL 3179036, at *7-8 (C.D. Cal. July 25, 2011) (granting final approval with a 2% claims rate); *Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1377 (S.D. Fla. 2007) (granting final approval with a claims rate

of approximately 1.1%); *Arthur v. SLM Corp.*, No. 10-198 (W.D. Wash. Aug. 8, 2012), ECF No. 249 at 2-3 (granting final approval with a claims rate of approximately 2%). Although courts look to claims rate to gauge class reaction to a proposed settlement, ultimately, "[t]he question for the Court at the Final Fairness Hearing stage is whether the settlement provided to the class is 'fair, reasonable, and adequate,' not whether the class decides to actually take advantage of the opportunity provided." *Hamilton v. SunTrust Mortg. Inc.*, No. 13-60749, 2014 WL 5419507, at *5 (S.D. Fla. Oct. 24, 2014).

Here, nearly 7% of Class Members submitted a Claim Form, surpassing the prevailing rule of thumb of 3-5% for consumer class actions discussed above. Lukasiewicz Decl. ¶ 5. Further, significantly, there are no objections or exclusions.[4]

Therefore, the Class Members' reaction to the Settlement, including the absence of objections and opt-outs, as well as the claims rate, all weigh heavily in favor of final approval of the Settlement.

*c. The current state of litigation and the amount of discovery completed favors final approval.*

"[A] sufficient factual investigation must have been conducted to afford the Court the opportunity to intelligently make an appraisal of the Settlement." *Frank*, 228 F.R.D. at 185 (citing *Plummer v. Chem. Bank*, 668 F.2d 654, 660 (2d Cir. 1982)). *See also In re Austria & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 176. "To approve a proposed settlement [though], the Court need not find that the parties have engaged in extensive discovery . . . it is enough for the parties to have engaged in sufficient investigation of the facts to enable the

[4] Courts have also found that silence from class members constitutes a favorable response when considering whether to approve a settlement. *See Chakejian v. Equifax Info. Serv., LLC*, 275 F.R.D. 201, 212 (E.D. Pa. 2011). No Class Member has opted out or filed an objection, thus demonstrating that the Class' approves of the Settlement.

Court to intelligently make . . . an appraisal of the Settlement." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 176 (internal quotations and citations omitted). Settlement decisions are found to be informed where the parties exchanged evidence and information prior to negotiations. *See, e.g.*, *Reade-Alvarez v. Eltman, Eltman & Cooper, P.C.*, 237 F.R.D. 26, 34 (E.D.N.Y. 2006) (holding that settlement was fair, reasonable, and adequate where, *inter alia*, the parties had begun conducting discovery).

Here, the Parties engaged in substantial informal discovery, with Class Counsel reviewing and analyzing that discovery, had numerous teleconferences with the mediators, and prepared mediation briefs. Additionally, the Parties participated in arm's length mediation negotiations with both Mr. Max and Mr. Picker. Thus, each side had a thorough understanding of the case and were well informed to evaluate the merits of the case before reaching a settlement. As such, this factor weighs in favor of approval.

*d. Class Members face substantial hurdles in establishing liability and damages.*

In examining the factors relating to the hurdles Plaintiff and Class Members face in establishing liability and the damages (*Grinnell* factors five and six), the Court need not "decide the merits of the case or resolve unsettled legal questions," but instead should "weigh the likelihood of success by the plaintiff class against the relief offered by the settlement." *Frank*, 228 F.R.D. at 185–86 (W.D.N.Y. 2005) (citations and quotations omitted).

Here, to prevail at trial, Class Members would have to demonstrate that: (1) Presidio made an implied and expressed promise to the Class Members to protect any PII provided as a condition of their employment; (2) Presidio was on notice that it was the target of hacking or phishing scams; (3) Presidio failed to take adequate measures to protect the Class Members' PII; (4) that Presidio was unjustly enriched; (5) that Presidio breached its duty of confidence

to Class Members; (6) that Presidio had a duty to protect and keep confidential Class Members' PII and breached those duties; and (7) that Presidio breached its fiduciary duties to Class Members.

Although Class Members believe they would prevail on these claims, Class Members would face substantial hurdles in establishing liability. Indeed, "[l]itigation inherently involves risks." *In re PaineWebber Ltd. Partnerships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997) (approving settlement). To defeat liability, Presidio would predictably continue to challenge Plaintiff's ability to prove the scope of its promise to protect PII (among other issues) and argue that it assembled robust data security practices that have prevented other cybersecurity attacks.

Further, even if liability is established, Plaintiff would have to prove causation, and predictably, Presidio would continue to challenge Plaintiff's ability to prove causation. As to the amount of damages, there are a wide range of possibilities depending, for instance, on the scope of class certification, if the case is certified as a class action, which claims survive summary judgment and trial, and whether the Court will require individualized proof of damages.

Indeed, Class Counsel is not aware of any case in which a court has awarded a class-wide monetary judgment outside of settlement in a data breach action, raising the possibility that Class Members could prevail on liability but recover only minor damages. It is also not possible to quantify the precise recovery for each Class Member because each Class Member's recovery under the Settlement depends on whether and to what extent such Class Member accepts the offer of identity theft protection services and/or incurs economic harm as a result of the Security Incident and complies with procedures for obtaining reimbursement of claims. Lukasiewicz Decl. ¶ 17. Here, Class Members may obtain credit monitoring – which comes with up to $1,000,000 in insurance -- plus reimbursement for out-of-pocket expenses and for

time expended as a result of the Data Incident. It is highly unlikely that any Class Member will suffer economic losses not fully reimbursed by this Settlement. Class Counsel believes that the total consideration under the Settlement will provide the Class Members with nearly all – if not all – of the relief to which they would be entitled if they prevailed at trial. *Id.* ¶ 18.

Balancing the strength of Class Members' claims against the substantial hurdles Class Members face in establishing liability and damages, Class Members and their counsel concluded that accepting the relief obtained in the Settlement – which provides almost all of the relief to which the Class Members would be entitled to if they prevailed at trial – was in the best interest of the Class. Lukasiewicz Decl. ¶ 19.

Therefore, this factor also weighs in favor of final approval of the Settlement.

*e. Maintaining the class action through trial would be challenging.*

There is no guarantee that the Court would certify a class if the Parties continue to litigate. While Plaintiff believes the Class would win a contested class certification motion, Presidio would vigorously oppose class certification, and there was a significant risk the Court would deny class certification in whole or in part. Also, even if the Court granted class certification, there is no guarantee the certification would survive through trial, as Presidio would no doubt move for decertification, highlighting the inherent risks and expense of maintaining a class through trial. *See Torres v. Gristede's Operating Corp.*, No. 04-3316, 2010 WL 5507892, at *5 (S.D.N.Y. Dec. 21, 2010) *aff'd,* 519 F. App'x 1 (2d Cir. 2013) ("The risk of maintaining class status throughout trial also weighs in favor of final approval. Defendant would likely move to decertify, requiring another round of briefing. Defendant may also seek permission to file an interlocutory appeal under Fed. R. Civ. P. 23(f). Settlement eliminates the risk, expense, and delay inherent in this process."); *Willix v. Healthfirst, Inc.*, No. 07-1143,

2011 WL 754862, at *4 (E.D.N.Y. Feb. 18, 2011) (same). Thus, this factor weighs in favor of final approval.

*f. Presidio's ability to withstand a greater judgment is a neutral factor.*

Presidio' ability to withstand a greater judgment is, at most, a neutral factor in this case because the availability of insurance coverage and because, as pointed out above, the Settlement, if approved, would provide almost all of the relief to which the Class Members would be entitled to if the Court certified the Class and the Class prevailed at trial. In any event, a "defendant['s] ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *In re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 2d at 178 n.9.

*g. The Settlement benefits are reasonable in light of the best possible recovery, and in light of all the attendant risks of litigation.*

The adequacy of a settlement should be judged "in light of the strengths and weaknesses of the plaintiff[s'] case." *In re Med. X-Ray*, No. 93-5904, 1998 WL 661515, at *5 (E.D.N.Y. Aug. 7, 1998). That a settlement provides less than the maximum potential recovery is not a barrier to approval. *See Grinnell Corp.*, 495 F.2d at 455 n.2 ("[T]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery."); *In re Bear Stearns Companies, Inc. Sec., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 269 (S.D.N.Y. 2012) (approving a settlement that represented under 12% of the class' potential damages). Indeed, judging whether a settlement is reasonable "is not susceptible of a mathematical equation yielding a particularized sum." *In re Michael Milken and Associates Sec. Lit.*, 150 F.R.D. 57, 66 (S.D.N.Y. 1993). Instead, "there is a range of reasonableness with respect to a settlement -- a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs

necessarily inherent in taking any litigation to completion." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972).

Here, the relief provided by the Settlement falls well within such range. If the Settlement Class obtained a complete victory, Class Members would likely receive the same – if not less – relief. However, absent settlement, Class Members would not have the benefit of the TransUnion *my*TrueIdentity identity theft protection services during much of the time this matter was still being litigated, increasing their risk of identity theft during that time.

In fact, the terms of this Settlement are more favorable than the terms of similar employee data breach settlements. Lukasiewicz Decl. ¶ 20. For example, settlements have been approved for other data breach class actions where no credit monitoring was offered, and loss reimbursement was minimal. *See In re Linkedin User Privacy Litig.*, 309 F.R.D. at 587 (approving settlement where "class members who submitted valid claims will each receive approximately $14.81"). *See also In re Adobe Systems Inc. Privacy Litigation*, No. 13-05226 (N.D. Cal. Aug. 13, 2015), ECF No. 105 (approving settlement that provided no credit monitoring and no reimbursement for economic losses); *In re Heartland Payment Sys.*, 851 F. Supp. 2d at 1079-80 (approving settlement providing for reimbursement of economic costs and no credit monitoring); *In re Zappos Sec. Breach Litig.*, No. 12-00325, ECF No. 418 (D. Nev. Dec. 23, 2019) (approving settlement that provided no credit monitoring and no reimbursement for economic losses).[5]

The significant benefits available under the Settlement confirm that it is well within the range that courts have traditionally found to be fair and adequate under the law. Therefore,

[5] For the same reasons that the Settlement is within the range of reasonableness, the Settlement also meets the Rule 23(e)(2)(C)(i) factor in that the relief provided to the class is adequate taking into account costs, risks, and delay of trial and appeal that could occur.

this factor too weighs in favor of granting approval of the Settlement.

## II. NOTICE WAS PROVIDED IN THE BEST PRACTICABLE MANNER.

Rule 23(c)(2)(B) requires that class members receive "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) also requires that any such notice clearly and concisely state in plain, easily understood language: the nature of the action; the definition of the class certified; the class claims, issues, or defenses; that a class member may enter an appearance through an attorney if the member so desires; that the court will exclude from the class any member who requests exclusion; the time and manner for requesting exclusion; and the binding effect of a class judgment on class members under Rule 23(c)(3). Fed. R. Civ. P. 23(c)(2)(B).

Here, the Court found that "all forms of Notice to the Class . . . (the 'Notice Program') is reasonably calculated to, under the circumstances, apprise the members of the Class of the pendency of this action, the certification of the Settlement Class, the terms of the Settlement Agreement, and the right of members to object to the settlement or to exclude themselves from the Class." Preliminary Approval Order, ECF No. 55 at 4. As the Court concluded, the "Notice Program is consistent with the requirements of Rule 23 and due process and constitutes the best notice practicable under the circumstances." *Id.*

Pursuant to the schedule approved by the Court for the dissemination of the Class Notice, on September 1, 2022, the Settlement Administrator provided Email Notices to each Class Member for whom Presidio or Postethwaite & Netterville could ascertain an email address. *See* Aldridge Decl. ¶ 7. The Notice Program resulted in 99.8% of Class Members receiving Class Notice. Aldridge Decl. ¶ 17. The Settlement Administrator also established a

dedicated toll-free phone number for inquiries from Class Members, and launched the Settlement website, which contains key case and Settlement information, including, *inter alia*, the options available to Class Members, including their ability to submit Claim Forms, opt out, and/or object to the Settlement, copies of the Settlement Agreement and the Settlement Long-Form Notice, application deadlines and the Claims Forms. *See* Aldridge Decl. ¶ 14. As the Class Notice was disseminated in strict compliance with the Court's directives, final approval is appropriate.

## III. THE CLASS SHOULD BE FINALLY CERTIFIED.

Plaintiffs moved to preliminarily certify the Class for settlement purposes, and the Court granted the motion on August 11, 2022. *See* Preliminary Approval Order, ECF No. 55. For the reasons stated in Plaintiffs' Memorandum in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement (ECF No. 51), final class certification for settlement purposes is appropriate. Specifically, the requirements of Rule 23(a) and (b)(3) are satisfied for the reasons briefed at length in Plaintiff's prior memorandum (ECF No. 51, at 8-14), which is incorporated herein by reference.

## CONCLUSION

For the reasons stated Plaintiff respectfully requests that the Court: (1) certify the Settlement Class; (2) grant final approval of the Settlement Agreement and (3) enter the contemporaneously filed Proposed Final Approval Order.

Dated: December 1, 2022

Respectfully submitted,

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