SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

ALAYNA WOODS, JENNIFER NELSON on behalf of herself and her minor child, E.N.-H., DANA BERKLEY on behalf of her minor child, M.B., JAMELLA MONTGOMERY, SUSAN HALL, ARGIRO TZIAKAS, and CHRISTINA KOVALSKY, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

ALBANY ENT & ALLERGY SERVICES, PC,

Defendant.

Index No. 904730-23

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Plaintiffs Alayna Woods, Jennifer Nelson on behalf of herself and her minor child E.N.-H, Dana Berkley on behalf of her minor child M.B., Jamella Montgomery, Susan Hall, Argiro Tziakas, and Christina Kovalsky (collectively, "Plaintiffs") submit this Memorandum of Law in Support of their Unopposed Motion for Preliminary Approval of Class Action Settlement.

I. CASE SUMMARY

On or around March 27, 2023, Albany ENT & Allergy Services ("AENT" or "Defendant") became aware of suspicious activity on its computer network. *See* Corrected Consolidated Amended Class Action Compl. ("Compl.") ¶ 4, Doc. No. 22. After an investigation, AENT determined that between March 23, 2023 and April 4, 2023, unauthorized actor(s) gained access to AENT's computer systems that stored personally identifiable information ("PII") and protected health information ("PHI") belonging to AENT's current and former patients (the "Security Incident"). *Id.* The types of PII and PHI potentially compromised in the Data Breach included full names, dates of birth, addresses, Social Security numbers, and medical histories and treatment information. *Id.* ¶ 1. On or around May 25, 2023, AENT sent Notice of Security Incident Letters to affected individuals, which prompted the current litigation. *Id.* ¶ 3.

Several class action lawsuits were filed against AENT following the Security Incident.[1] On July 10, 2023, the actions were consolidated into the present action. *See* Doc. No. 20. On August 29, 2023, Plaintiffs filed their operative Complaint, asserting claims for: (i) negligence, (ii)

[1] On June 1, 2023, *Woods v. Albany ENT & Allergy Services, P.C.*, Index No. 904730-23 was filed in the New York Supreme Court for Albany County. On June 8, 2023, *M.B. ex rel. Berkley v. Albany ENT & Allergy Services, P.C.*, Index No. 904919-23 was filed in the New York Supreme Court for Albany County. On June 13, 2023, *Montgomery v. Albany ENT & Allergy Services*, *P.C.*, Index No. 905088-2 was filed in the New York Supreme Court for Albany County, and on June 14, 2023, *Hall v. Albany ENT & Allergy Services, P.C.*, Index No. 905162-23 was filed in the New York Supreme Court for Albany County. There were also several cases filed against AENT in the United States District Court for the Northern District of New York. Those cases were all voluntarily dismissed.

negligence *per se*, (iii) breach of contract, (iv) breach of implied contract, (v) violations of New York General Business Law § 349, and (vi) unjust enrichment. *See* Doc. No. 22. Shortly thereafter, counsel for Plaintiffs and counsel for AENT began discussing the potential for early resolution. As part of this process, Plaintiffs requested, and AENT provided, information concerning the details of the Security Incident and the scope of the Class. *See* Declaration of Daniel O. Herrera ("Herrera Decl."), ¶ 10.

On February 8, 2024, Plaintiffs and AENT engaged in an arm's-length full-day mediation before the Honorable Wayne Andersen (Ret.) and reached an agreement in principle. The discussions, though collegial, involved vigorous negotiation and considerable back-and-forth. *Id.* ¶¶ 11-12. The Settlement Agreement and the exhibits thereto[2] represent the terms reached between Plaintiffs and AENT.

As further discussed below, the Settlement provides significant relief to Class Members well within the range of judicial approval, includes a comprehensive notice plan, all while eliminating the risk of continued litigation. As such, preliminary approval of the proposed class action settlement is warranted.

II. SUMMARY OF THE SETTLEMENT

A. Settlement Class Definition

The Settlement Class is defined as "all individuals whose Personal Information was compromised in the Security Incident." *See* S.A. ¶ 1.22. The Settlement Class consists of approximately 224,486 individuals (each, a "Settlement Class Member"). *See id.* at p.1; Herrera Decl., ¶ 6. Excluded from the Settlement Class definition are: (i) AENT, and its officers and directors; (ii) all Settlement Class Members who timely and validly request exclusion from the

[2] The Settlement Agreement is attached to the Herrera Decl. as Ex. 1.

Settlement Class; (iii) the presiding judge, and his or her staff and family; and (iv) 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 Security Incident or who pleads *nolo contendere* to any such charge. S.A. ¶ 1.22.

B. Settlement Benefits

1. Monetary Benefits

Out of Pocket Losses and Unreimbursed Expenses. All Settlement Class Members are eligible to receive reimbursement for documented and attested-to out-of-pocket expenses directly associated with dealing with the Security Incident not to exceed $7,500 per Settlement Class Member, that were incurred more likely than not as a result of the Security Incident, including but not limited to (i) unreimbursed expenses, charges and/or losses relating to fraud or identity theft; (ii) other fees for credit repair or similar services; (iii) and costs associated with freezing or unfreezing credit. *Id.* ¶ 2.1.1. To receive reimbursement for extraordinary out-of-pocket losses, Settlement Class Members must submit a Valid Claim, including necessary supporting documentation, to the Claims Administrator. *Id.* Reimbursement for out-of-pocket expenses is subject to the following terms: (1) the loss is an actual, documented, and unreimbursed monetary loss; (2) the loss was more likely than not caused by the Security Incident; and (3) the loss occurred between March 27, 2023, and the Claims Deadline. *Id.*

Alternative Cash Payment. In lieu of the benefits described above, Settlement Class Members can elect to receive a one-time cash payment of $50.00. *Id.* ¶ 2.1.2.

2. Credit Monitoring

In addition to monetary relief, all Settlement Class Members may elect to receive two (2) years of three-bureau Credit Monitoring and identity theft protection services provided through

the Claims Administrator, Postlethwaite & Netterville, APAC ("P&N")[3], including identity theft insurance of at least $1 million (no deductible). *Id.* ¶ 2.2.

3. Business Practice Changes

As part of the Settlement consideration, AENT has adopted, paid for, implemented, and will maintain the following business practices changes related to information security to safeguard personal information on its systems for a period of at least three years from the time when the applicable business practices change is initiated: (i) implementation of enhanced multi-factor authentication; (ii) engagement with recognized third-party vendors for managed detection and response; (iii) adoption of additional encryption technologies; (iv) implementation of improved log retention and monitoring policies; and (v) creation of an incident response plan. AENT estimates that it, in total, it will spend approximately $300,000.00 annually to implement and maintain the enhanced security measures provided for herein. *Id.* ¶ 2.3.

4. Release

In exchange for the relief provided by this Settlement, Settlement Class Members who do not exclude themselves (including Plaintiffs) and AENT will mutually release each other from all claims arising out of the Security Incident. *Id.* ¶ 6.1.

C. Notice Program

The Parties agreed to a robust notice program to be administered by a well-respected third-party class administrator, P&N—a company that specializes in class action notice plans and claims

[3] As of May 21, 2023, the Directors & employees of Postlethwaite & Netterville (P&N), APAC joined EisnerAmper as EAG Gulf Coast, LLC. Where P&N is named or contracted, EAG Gulf Coast, LLC employees will service the work under those agreements. P&N's obligations to service work may be assigned by P&N to Eisner Advisory Group, LLC or EAG Gulf Coast, LLC, or one of Eisner Advisory Group, LLC's or EAG Gulf Coast, LLC's subsidiaries or affiliates.

administration—which will use all reasonable efforts to provide direct and individual notice to each potential Settlement Class Member via direct U.S. mail, and perform claims administration. *Id.* ¶ 1.3. The notices and Claim Form are plain and easily understood. *Id.* at Exs. A–C. P&N will establish a dedicated Settlement Website and will maintain and update the website throughout the Claims Period with copies of the Settlement Agreement, as well as the Short Notice, Long Notice, and Claim Form. *Id.* ¶ 3.2. Further, P&N will create a toll-free help line staffed with live operators who can address Settlement Class Members' inquiries. *Id.* The costs of the notice program and claims administration will be paid by AENT from the Settlement Fund. *Id.* ¶¶ 3.2, 8.1–8.3.

D. Fees, Costs, and Service Awards

Settlement Class Counsel will seek an award of attorneys' fees, costs, and expenses not to exceed four-hundred and fifteen-thousand dollars and zero cents ($415,000.00). *Id.* ¶ 7.2. Additionally, Plaintiffs will seek Service Awards of $1,000.00 for each Plaintiff. *Id.* ¶ 7.3. These amounts were negotiated after the primary terms of the Settlement were negotiated. AENT will not oppose these requests. *Id.* ¶¶ 7.2–7.3.

III. LEGAL AUTHORITY

Plaintiffs bring this motion pursuant to C.P.L.R. 908 ("Rule 908"), under which court approval is required to settle a class action. *See* C.P.L.R. § 908; *see also In re Colt Inds. Shareholder Litig.*, 155 A.D.2d 154, 160 (1st Dep't 1990) ("Court approval is required for settlement of a class action."), *aff'd as mod. by Colt Inds. Shareholder Litig.*, 77 N.Y.2d 185 (1991). Courts have discretion to approve a proposed settlement of a class action lawsuit. *See Illoldi v. Koi NY LLC*, No: 1:15-cv-6838 (VEC), 2016 WL 3099372, at *1 (S.D.N.Y. May 31, 2016). "In exercising this discretion, courts should give weight to the parties' consensual decision to settle class action cases because they and their counsel are in unique positions to assess potential

risks." *Gonqueh v. Leros Point to Point, Inc.*, No 14-CV-5883 (GHW), 2015 WL 9256932, at *1 (S.D.N.Y. Sept. 2, 2015) (quoting *Yuzary v. HSBC Bank USA, N.A.*, No. 12 Civ. 3693 (PGG), 2013 WL 1832181, at *1 (S.D.N.Y. April 30, 2013)).

"Preliminary approval of a proposed settlement is the first in a two–step process required before a class action may be settled." *In re Nasdaq-Market Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997) (citing Manual for Complex Litig., Third, § 30.41 (West 1995); F.R.C.P. 23I). When considering preliminary approval, courts evaluate the fairness of a settlement, prior to providing notice to the class members. *See id.* "Where the proposed settlement appears to be the product of serious, informed, non–collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted." *Id.*; *Gonqueh v. Leros Point to Point, Inc.*, No 14-CV-5883 (GHW), 2015 WL 9256932, at *1 (S.D.N.Y. Sept. 2, 2015) (the court must conduct a preliminary review to determine whether the proposed class settlement "appears to fall within the range of possible approval."). After preliminary approval is granted, "the second step of the process ensues: 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.*; *see generally Saska v. Metropolitan Museum of Art*, 54 N.Y.S. 3d 566 (Sup. Ct. N.Y. Cnty. 2017) (granting final approval after the court preliminarily approved settlement as fair, reasonable, and adequate, and in best interests of settlement class).

There is a strong judicial and public policy favoring settlement, particularly in class actions and other complex matters where the inherent costs, delays and risks of continued litigation might otherwise outweigh any potential benefit the individual Plaintiffs—or the class—could hope to obtain. *See Cohen v. J.P. Morgan Chase & Co.*, 262 F.R.D. 153, 157 (E.D.N.Y. 2009) ("There is

a strong judicial policy in favor of settlement, particularly in the class action context. The compromise of complex litigation is encouraged by the courts and favored by public policy.") (quoting *Denney v. Jenkens & Gilchris*t, 230 F.R.D. 317, 328 (S.D.N.Y. 2005), *aff'd in part and vacated in part*, 443 F.3d 253 (2nd Cir. 2006)). "Class action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation. There is a strong public interest in quieting any litigation; this is 'particularly true in class actions.'" *In re Luxottica Group S.p.A. Sec. Litig.*, 233 F.R.D. 306, 310 (E.D.N.Y. 2006). "Courts encourage early settlement of class actions, when warranted, because early settlement allows class members to recover without unnecessary delay and allows the judicial system to focus resources elsewhere." *Illoldi*, 2016 WL 3099372, at *2.

V. ARGUMENT

A. Class Certification is Warranted

Prior to granting preliminary approval of a proposed settlement, the Court must first determine if the proposed settlement class should be conditionally certified for settlement purposes only. *See Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620-32 (1997); *Manual for Complex Litigation*, § 21.632 (4th ed. 2013). Class certification is proper if the proposed class satisfies the numerosity, commonality, typicality, and adequacy of representation requirements of C.P.L.R. Rule 901 ("Rule 901"). *See* C.P.L.R. § 901(a)(1)–(4). Additionally, the class action must also be "superior to other available methods for the fair and efficient adjudication of the controversy," *id.* § 901(a)(5), and meet the factors set forth in C.P.L.R. Rule 902. *Id.* § 902(1)–(5).

Because a court evaluating certification of a class action that settled considers certification only in the context of settlement, the court's review is lessened. *See Amchem Prods., Inc.*, 521

U.S. at 620. Because the Settlement Class meets all requirements for certification under Rules 901 and 902, this Court should grant Plaintiffs' request.

Cybersecurity incident class actions are regularly certified for settlement purposes. *See, e.g.*, *In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig.*, No. 19-MD-2879, 2022 WL 1396522, at *1 (D. Md. May 3, 2022); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1274-75 (11th Cir. 2021); *In re Brinker Data Breach Litig.*, No. 3:18-CV-686-TJC-MCR, 2021 WL 1405508, at *1 (M.D. Fla. Apr. 14, 2021); *In re Target Corp. Customer Data Sec. Breach Litig*, 309 F.R.D. 482 (D. Minn. 2015); *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040 (S.D. Tex. 2012). Thus, this case likewise should be certified, and the Settlement preliminarily approved.

1. The Proposed Settlement Class Meets the Requirements of Rule 901

a. Numerosity

Numerosity requires the members of the class to be "so numerous that joinder of all members, whether otherwise required or permitted, is impracticable." C.P.L.R. § 901(a)(1). Indeed, while there is no fixed numerical requirement, forty class members generally satisfies the numerosity requirement. *See Alcantara v. CNA Mgmt., Inc.*, 264 F.R.D. 61, 64 (S.D.N.Y. 2009); *Iglesias-Mendoza v. La Belle Farm, Inc.*, 239 F.R.D. 363, 370 (S.D.N.Y. 2007); *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (numerosity is presumed at a level of forty).

Here, the Settlement Class consists of approximately 224,486 individuals. Joinder of so many individuals certainly would be impracticable. *See Guadagno v. Diamond Tours & Travel, Inc.*, 392 N.Y.S. 2d 783, 785 (Sup. Ct. N.Y. Cnty. Spec. Term. 1976) (holding 400 class members was sufficient to meet numerosity requirement); *Vickers v. Home Fed. Sav. & Loan Ass'n of East*

Rochester, 386 N.Y.S.2d 291, 296 (Sup. Ct. Monroe Cnty. 1976) (holding 399 persons was sufficient to meet numerosity requirement). Accordingly, the numerosity requirement is satisfied.

b. Common question of law and fact predominate

Rule 901(a)(2) requires that "[t]here are questions of law or fact common to the class which predominate over any questions affecting only individual" class members. C.P.L.R. § 901(a)(2). However, "the rule requires predominance not identity or unanimity among class members." *Friar*, 78 A.D. 2d at 98 (internal citation omitted). "Commonality" is not only whether common issues outweigh individualized issues, but also "whether the use of a class action would 'achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated.'" *Id.* at 97 (internal citations omitted); *see In re Nassau County Strip Search Cases*, 461 F.3d 219, 225 (2d Cir. 2006); *Pludeman*, 74 A.D. 3d at 423. Certification of a class is appropriate even if questions of law or fact not common to the class exist. *See Pludeman*, 74 A.D. 3d at 423.

Courts have previously addressed the commonality issue in the context of cybersecurity incident class actions and found it readily satisfied. *See In re Hannaford Bros. Co. Customer Data Breach Litig.*, 293 F.R.D. at 26; *see also In re the Home Depot, Inc., Cust. Data Sec. Breach Litig.*, 2016 WL 6902351, at *2 (N.D. Ga. Aug. 23, 2016) (finding that multiple common issues center on the defendant's conduct, satisfying the commonality requirement); *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 308 (N.D. Cal. Aug. 15, 2018) (noting that the complaint contains a common contention capable of class-wide resolution—one type of injury claimed to have been inflicted by one actor in violation of one legal norm).

Here, the commonality requirement is easily met as the claims of Plaintiffs and the Settlement Class Members all have common questions of law and fact that arise out of the same event—the Data Incident. To wit:

a. Whether Defendant's data security and retention policies were unreasonable;

b. Whether Defendant failed to protect the confidential and highly sensitive information with which it was entrusted;

c. Whether Defendant owed a duty to Plaintiffs and Class Members to safeguard their PII/PHI;

d. Whether Defendant breached any legal duties in connection with the Security Incident;

e. Whether Defendant's conduct was intentional, reckless, willful, or negligent;

f. Whether an implied contract was created concerning the security of Plaintiffs' and Class Members' PII/PHI;

g. Whether Defendant breached that implied contract by failing to protect and keep secure Plaintiffs' and Class Members' PII/PHI and/or failing to timely and adequately notify Plaintiffs and Class Members of the Security Incident;

h. Whether Plaintiffs and Class Members suffered damages as a result of Defendant's conduct; and

i. Whether Plaintiffs and the Class are entitled to monetary damages, injunctive relief, and/or other remedies and, if so, the nature of any such relief.

As in other cybersecurity incident cases, these common issues all center on Defendant's conduct, or other facts and law applicable to all class members, thus, satisfying the commonality requirement. *See, e.g.*, *In re Countrywide Fin. Corp. Cust. Data Sec. Breach Litig.*, No. 3:08-MD-01998, 2009 WL 5184352, at *3 (W.D. Ky. Dec. 22, 2009) ("All class members had their private information stored in Countrywide's databases at the time of the data breach"); *In re Heartland*, 851 F. Supp. 2d at 1059 ("Answering the factual and legal questions about Heartland's conduct will assist in reaching class wide resolution.").

Accordingly, the commonality requirement for class certification has been satisfied.

c. Typicality

Typicality measures whether "the claims or defenses of the representative parties are typical of the claims or defenses of the class." C.P.L.R. § 901(a)(3). If "a plaintiff's claims 'derive from the same practice or course of conduct that gave rise to the remaining claims of other class members and is based upon the same legal theory . . . [the typicality] requirement is satisfied.'" *Pludeman*, 74 A.D. 3d at 423 (quoting *Friar*, 78 A.D. 2d at 98). "Typicality does not require identity of issues and the typicality requirement is met even if the claims asserted by class members differ from those asserted by other class members." *Id*.

The typicality requirement is satisfied for the same reasons that Plaintiffs' claims satisfy commonality. Specifically, Plaintiffs' claims are typical of those of other Settlement Class Members because they arise from the same Data Incident. They are also based on the same legal theory, *i.e.*, that AENT had a legal duty to protect Plaintiffs' and Settlement Class Members' PII/PHI. Because Plaintiffs' claims and the claims of the Settlement Class Members are the same, and Plaintiffs' claims arise from the same event that gives rise to those of the Settlement Class Members, the typicality requirement is satisfied.

d. Adequacy

To maintain a class action, the representative parties must "fairly and adequately protect the interests of the class" under Rule 901(a)(4). C.P.L.R. § 901(a)(4). "A class representative acts as a principal to the other class members and owes them a fiduciary duty to vigorously protect their interests." *City of Rochester v. Chiarella*, 65 N.Y. 2d 92, 100 (1985) (internal citations omitted). "'The three essential factors to consider in determining adequacy of representation are potential conflicts of interest between the representative and the class members, personal characteristics of the proposed class representative (*e.g.*, familiarity with the lawsuit and his or her

financial resources), and the quality of class counsel.'" *Cooper v. Sleepy's, LLC*, 120 A.D. 3d 742, 743 (2d Dep't 2014) (citing *Globe Surgical Supply v. GEICO Ins. Co.*, 59 A.D. 3d 129, 144 (2d Dep't 2008).

Plaintiffs do not possess any interest antagonistic to the class. They provided their personal information to AENT and alleged that information was compromised because of the Security Incident, as the personal information of the Settlement Class Members also allegedly was compromised. Indeed, Plaintiffs' claims are identical to those of Settlement Class Members, and Plaintiffs and Settlement Class Members desire the same outcome. Plaintiffs have zealously and vigorously prosecuted this case for the benefit of all Settlement Class Members. *See Drabrowski v. Abax Inc.*, 84 A.D. 3d 633, 634 (1st Dep't 2011) (finding that the representative plaintiffs engaged in a "contentious and litigious prosecution" of the matter). Plaintiffs have further participated in the litigation, reviewed pleadings, and participated in the factual investigation of the case, "[t]here is no evidence that plaintiffs lack the financial means to prosecute this case, or that plaintiffs may have conflicts with other putative class members." *See id*. at 635; Herrera Decl. ¶¶ 30-31.

Class Counsel will also adequately represent the interests of Settlement Class Members. Class Counsel have thoroughly investigated the matter, prepared and reviewed pleadings and other relevant filings, and possesses the necessary qualifications and experience to prosecute the action. Settlement Class Counsel have extensive experience in class actions generally, and in cybersecurity incident cases in particular. *See* Herrera Decl. at ¶¶ 34-43, Exs. 2–4. Because Plaintiffs and their counsel possess substantial experience and have vigorously prosecuted the case at hand to get the best result possible for Plaintiffs and Settlement Class Members, the adequacy requirement is satisfied.

e. Superiority

Class treatment "is superior to other available methods for the fair and efficient adjudication of the controversy." C.P.L.R. § 901(a)(5). Here, the resolution of hundreds of thousands of claims in one action is far superior to litigation via individual lawsuits. Class certification—and class resolution—guarantee an increase in judicial efficiency and conservation of the Parties' resources over the alternative of individually litigating thousands of individual data breach cases arising out of the Security Incident.

Further, there is no indication that Settlement Class Members have an interest in pursuing individual litigation or an incentive to pursue their claims individually, given the amount of damages likely to be recovered, relative to the resources required to prosecute such an action. *See Dickens v. GC Servs. Ltd. P'ship*, 706 F. App'x 529, 538 (11th Cir. 2017) (describing "the ways in which the high likelihood of a low per-class-member recovery militates in favor of class adjudication").

Lastly, the proposed Settlement will give the Parties the benefit of finality, and because this case has now been settled pending Court approval, the Court need not be concerned with issues of manageability relating to trial. Accordingly, the superiority requirement has been met.

2. The Proposed Settlement Class Satisfies Factors Set Forth In Rule 902

In addition to the requirements for maintaining a class action set forth in Rule 901, C.P.L.R. Rule 902 ("Rule 902") provides that, in determining whether an action may proceed as a class action, the Court shall also consider the following factors:

1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;

2. The impracticability of or inefficiency of prosecuting or defending separate actions;

3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum; [and]

5. The difficulties likely to be encountered in the management of a class action.

C.P.L.R. § 902(1)-(5); *see Ackerman v. Price Waterhouse*, 252 A.D.2d 179, 191 (1st Dep't 1998). Here, there is no evidence that members of the class have an interest in individually controlling the prosecution or defense of separate actions. Nor should the Court be concerned with the impracticability of or inefficiency of prosecuting or defending separate actions at this time since, at present, there are none. In addition, Plaintiffs are not aware of any litigation concerning the controversy already commenced by or against members of the class. Finally, since this case has now been settled pending Court approval, manageability issues are irrelavant.

Plaintiffs have satisfied all the requirements of Rules 901 and 902 for conditional certification of the Settlement Class. Accordingly, this Court should conditionally certify the Settlement Class for settlement purposes only.

B. Plaintiffs' Counsel Should Be Appointed Class Counsel

Plaintiffs' counsel should be appointed as Class Counsel. In deciding whether counsel is "adequate" to represent the class, a court must consider "the work counsel has done in identifying or investigating potential claims in the action, . . . counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action, . . . counsel's knowledge of the applicable law, and . . . the resources counsel will commit to representing the class.'" *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 165 (S.D.N.Y. 2008) (quoting F.R.C.P. 23(g)). "The Court may also consider 'any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class.'" *Id.*

Here, as fully explained in the Herrera Declaration, Class Counsel have extensive experience prosecuting similar class actions and other complex litigation, in particular, data breach incident litigation, and have extensive knowledge in this area. *See* Herrera Decl. ¶¶ 34-43, Exs. 2–4. Proposed Settlement Class Counsel have diligently identified, investigated, and prosecuted the claims in this matter, have dedicated substantial resources to the investigation and litigation of those claims, and have successfully negotiated the Settlement of this matter to the benefit of Plaintiffs and Settlement Class Members. *Id.* ¶ 32. Accordingly, the Court should appoint Federman & Sherwood, Mason LLP, and Cafferty Clobes Meriwether & Sprengel LLP as Class Counsel.

C. The Proposed Settlement Should Be Preliminary Approved Because it is Fair, Reasonable, Adequate, and in the Best Interests of the Settlement Class.

After determining certification of the Settlement Class is appropriate, the Court must determine whether the Settlement Agreement itself is worthy of preliminary approval and notice should be disseminated to the Settlement Class. Preliminary approval of a settlement of a class action may be given if the court determines that that the settlement is "fair, reasonable, adequate and in the best interests of the class." *Klein v. Robert's Am. Gourmet Food, Inc.*, 28 A.D. 3d 63, 73 (2d Dep't 2006). New York state courts weigh the five *Pfizer*[4] factors when determining whether a class action settlement is fair, reasonable, adequate, and in the best interests of the class: (1) the likelihood of success; (2) the extent of support from the parties; (3) the judgment of counsel; (4) the nature of the issues of law and fact; and (5) the presence of bargaining in good faith. *See Klurfeld v. Equity Enters., Inc.*, 79 A.D. 2d 124, 133 (2d Dep't 1981); *In re Colt Inds. Shareholder*

[4] *State of W. Va. v. Chas. Pfizer & Co., Inc.*, 314 F. Supp. 710, 740 (S.D.N.Y. 1970), *cert. denied sub nom*, *Colter Drugs, Inc. v. Chas. Pfizer & Co., Inc.*, 404 U.S. 871 (1971) (hereinafter, "*Pfizer & Co., Inc.*").

Litig., 155 A.D.2d 154 at 160; *Hibbs v. Marvel Enters., Inc.*, 19 A.D.3d 232, 233 (1st Dep't 2005); *Saska*, 54 N.Y.S. 3d at 222. Application of the *Pfizer* factors does not follow a "formulistic approach"; "rather, it is the circumstance of the case itself which should mold the approach of the court in deciding the weight to be accorded to each of the components." *Klurfeld*, 79 A.D. at 133.

Here, when preliminarily considering the *Pfizer* factors, examined in depth at final approval, there is no question that the proposed Settlement is well "within the range of possible approval" as fair, reasonable, and adequate, and in the best interests of the Settlement Class, and should be preliminarily approved.

1. The Likelihood of Success

"The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement. This factor is sometimes referred to as the likelihood of success." *Pfizer & Co., Inc.*, 314 F. Supp. at 740. The judge should "reach 'an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated' and . . . 'form an educated estimate of the complexity, expense, and likely duration of such litigation, . . . and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise.'" *Id.* at 740–41 (quoting *Protective Comm. for Ind. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968)). This factor has been described as the "'risk and cost of further litigation'" factor. *Id.* at 741 (quoting *Neuwirth v. Allen*, 338 F.2d 2, 3 (2d Cir. 1964)).

Here, Class Counsel negotiated substantial benefits for the Settlement Class Members. All Settlement Class Members are eligible to receive both monetary compensation and credit monitoring services. This is in addition to AENT's data security enhancements. These are immediate and significant benefits to the Settlement Class that demonstrate the adequacy and

reasonableness of the Settlement. *See generally Columbus Drywall & Insulation, Inc. v. Masco Corp.*, 258 F.R.D. 545, 559 (N.D. Ga. 2007) (settlement fair, reasonable, and adequate, and preliminary approval warranted where there was an immediate and substantial benefit to the class).

While Plaintiffs believe strongly in the merits of their case, they also understand that AENT would assert a number of potentially case-dispositive defenses. Due at least in part to the cutting-edge nature and the rapidly evolving state of the law in this area, cybersecurity cases like this one generally face substantial hurdles—even just to make it past the pleading stage. *See Hammond v. The Bank of N.Y. Mellon Corp.*, 2010 WL 2643307, at *1 (S.D.N.Y. June 25, 2010) (collecting data breach cases dismissed at the Fed. R. Civ. P. 12(b)(6) or Fed. R. Civ. P. 56 stage). To the extent the law has gradually accepted this relatively new type of litigation, the path to a class-wide monetary judgment remains unforged, particularly in the area of damages, as set forth below. As one federal district court recently observed in finally approving a settlement with similar class relief: "Data breach litigation is evolving; there is no guarantee of the ultimate result." *Fox v. Iowa Health Sys.*, No. 3:18-CV-00327-JDP, 2021 WL 826741, at *5 (W.D. Wis. Mar. 4, 2021) (citing *Gordon v. Chipotle Mexican Grill, Inc.*, No. 17-cv-01415-CMA-SKC, 2019 WL 6972701, at *1 (D. Colo. Dec. 16, 2019)). For now, cybersecurity incident cases are among the riskiest and uncertain of all class action litigation, making settlement the more prudent course when a reasonable one can be reached.

Given the inherent risks of establishing damages in this case, the Settlement reached between the Parties is the more prudent course of action and should be preliminarily approved by the Court. Because damages may be difficult to prove at the class action certification stage of litigation, settlement of this action will result in the best outcome for Plaintiffs and Settlement Class Members.

Moreover, while Plaintiffs feel confident that they can prove the Rule 901 and 902 requirements for certifying a class action in this case, they also appreciate that there are always inherent risks associated with maintaining a class action, especially in a cybersecurity incident case, which is among the chanciest and most indefinite of all class action litigation. As noted above, while there are data breach cases that have been certified (*see, e.g.*, *In re Marriott, Equifax, Brinker supra*), the cases in which classes have been certified, even on a preliminary basis, are not numerous.

The risk of obtaining and maintaining class status throughout trial also weighs in favor of preliminary approval. Continued litigation would require more discovery, depositions, expert reports, motion practice over class certification and summary judgment, as well as possible appeals, which would require additional rounds of briefing and the possibility of no recovery at all. "Regardless of the risk, litigation is always expensive, and both sides would bear those costs if the litigation continued." *Paz v. AG Adriano Goldschmeid, Inc.*, No. 14CV1372DMS(DHB), 2016 WL 4427439, at *5 (S.D. Cal. Feb. 29, 2016). Settlement eliminates the risk, expense, and delay inherent in this process, and the risk that Settlement Class Members may receive no recovery whatsoever. *See generally Fleisher v. Phoenix Life Ins. Co.*, Nos. 1-cv-8405 (CM), 14-cv-8714 (CM), 2015 WL 10847814, at *10 (S.D.N.Y. Sept. 9, 2010).

The relief to the Settlement Class is a sizeable recovery and will ensure that Settlement Class Members are protected from any harms that may occur as a result of their information being allegedly compromised in the Security Incident while helping protect their information in the future. Indeed, the proposed Settlement is more than a favorable result for Settlement Class Members, given all of the inherent risks of cybersecurity incident litigation, especially when

considering there is a possibility of no relief at all. Accordingly, the first *Pfizer* factor is readily satisfied.

2. The Extent of Support from the Parties

Plaintiffs have no reason to believe there will be opposition to the Settlement. However, this factor is better considered after notice has been provided to the Settlement Class Members and they are given the opportunity to object. *See Columbus Drywall & Insulation, Inc.*, 258 F.R.D. at 561. Accordingly, this factor is satisfied at this time.

3. The Judgment of Counsel

This Settlement will provide meaningful monetary and nonmonetary relief to Settlement Class Members. Plaintiffs and proposed Class Counsel strongly endorse this Settlement. *See* Herrera Decl. ¶ 33. The Settlement also has the support of AENT's counsel, who have significant experience in class action and other complex litigation—including cybersecurity incident litigation. *See Hibbs*, 19 A.D.3d 232, 233 (finding "experienced counsel on both sides endorsed the settlement"); *Saska*, 54 N.Y.S. 3d at 570 (finding the settlement was negotiated "between two . . . firms with excellent reputations"). Accordingly, this *Pfizer* factor is met.

4. The Nature and Issues of Law and Fact

The nature and issues of fact in this case primarily stem from one singular event—the Security Incident. AENT collected the PII and PHI of Plaintiffs and Settlement Class Members in the ordinary course of business, AENT owed Plaintiffs and Settlement Class Members legal and equitable duties to protect their PII and PHI from unauthorized disclosure, Plaintiffs and Settlement Class Members relied on AENT to do so, AENT breached those duties, and AENT's conduct resulted in injuries to Plaintiffs and the Settlement Class Members.

While Plaintiffs are confident in the strength of their claims and, in particular, proving the issues of law and fact in their case, Plaintiffs also recognize the various defenses available to AENT, as well as the attendant risks of continued litigation. AENT has consistently denied the allegations raised by Plaintiffs and will likely assert numerous defenses should this case proceed to trial. It is obvious that Plaintiffs' success at the class certification stage, proving damages, and through trial, and then any possible appeals, is far from certain.

Through the Settlement, Plaintiffs and Settlement Class Members gain real, significant benefits now without having to face further risk of not receiving any relief whatsoever. If the Settlement between the Parties is approved, it is of importance that the substantial recovery is immediately available to class members, instead of at some "distant time in the future." *Pfizer Co., Inc.*, 324 F. Supp. at 473 (finding that there were a number of doubtful questions of law and fact) (quotation omitted), *cert. denied*, 330 U.S. 819 (1947). The proposed Settlement is eminently reasonable, especially considering that it avoids the potential contingencies of continued litigation. Given the uncertainties in success on the merits—and the chances of no relief at all—settlement is the most sensible course of action. Accordingly, this *Pfizer* factor is satisfied.

5. The Presence of Bargaining in Good Faith Between the Parties

"Negotiations are presumed to have been conducted at arm's length and in good faith where there is no evidence to the contrary." *Gordon v. Verizon Comms., Inc.*, 148 A.D. 3d 146, 157 (1st Dep't 2017) (citing *In re Advanced Battery Techs., Inc. Secs. Litig.*, 298 F.R.D. 171, 179 (S.D.N.Y. 2014) ("[A] strong initial presumption or fairness attaches to the proposed settlement if, as here, the settlement is reached by experienced counsel after arm's-length negotiations.").

Here, there being no evidence to the contrary, good faith bargaining between the Parties is presumed, and this factor weighs heavily in favor of approval of the settlement. *See id.* Indeed, the

Parties reached this Settlement after protracted, arms-length negotiations. Herrera Decl. ¶ 10-12. AENT supplied information to Plaintiffs, which included information about the cause and scope of the Data Incident and the class size. *Id*. The Parties have engaged in lengthy negotiations to reach an agreement in principle, and subsequently negotiated and worked to draft the Settlement Agreement and accompanying notices and other exhibits. *Id*. Accordingly, the Settlement was reached through good-faith negotiations between the Parties, is absent of any collusion, and is fair, reasonable, and adequate. *See Joel A.*, 218 F.3d at 144 ("[A] settlement agreement achieved through good-faith, non-collusive negotiation does not have to be perfect, just reasonable, adequate, and fair."). Accordingly, this *Pfizer* factor is also satisfied.

All the *Pfizer* factors for approval of the Settlement are satisfied, and, accordingly, the Settlement should be determined to be fair, reasonable, adequate, and in the best interests of the Settlement Class, and well within the "range of possible approval,' and should be preliminarily approved by this Court, and notice should be sent to Settlement Class Members.

D. The Proposed Notice Program Should Be Approved

Rule 908 provides that "[n]otice of the proposed dismissal, discontinuance, or compromise [of a class action] shall be given to all members of the class in such manner as the court directs." *See* C.P.L.R. § 908. In addition, C.P.L.R. § 904(b) ("Rule 904") states that, in monetary class actions, "reasonable notice of the commencement of a class action shall be given to class in the manner as the court directs." *Id.* § 904(b). In determining the method of notice to give to the class, the court shall also consider:

1. The cost of giving notice by each method considered;
2. The resources of the parties; and
3. The stake of each represented member of the class, and the likelihood that significant numbers of represented members would desire to exclude themselves

> from the class or to appear individually, which may be determined, in the court's discretion, by sending notice to random sample of the class.

Id. § 904(c).

The Notice Program provided for by the Settlement Agreement is designed to be "reasonable notice of the commencement of a class action." *See* Herrera Decl. ¶¶ 20-22. Here, notice will be sent to Settlement Class Members via US mail to the address in AENT's records. S.A. ¶¶ 1.26, 3.1 In addition to sending the notice via US mail, AENT has also agreed to have the Claims Administrator establish and maintain a Settlement Website through which Settlement Class Members can receive additional information about the Settlement. *Id.*

The notices are written in plain language, use simple terminology, and are designed to be readily understandable by Settlement Class Members. Moreover, the notices are clear and straightforward: apprise Settlement Class Members of the pendency of the lawsuit; describes the essential terms of the Settlement; define the Settlement Class; describes the options available to the Settlement Class and the deadlines for taking action; explain procedures for objections or requesting exclusion; disclose the Plaintiffs' requested attorneys' fees, costs, expenses, Service Awards; describe the date, time, and place of the Final Approval Hearing; and prominently display the address and phone number of proposed Settlement Class Counsel. *See Barkwell v. Sprint Comms. Co. L.P.*, 2014 WL 12704984, at *6 (M.D. Ga. Apr. 18, 2014) (finding a notice program involving direct mail notice to satisfy due process); C.P.L.R. §§ 904, 908; S.A. Exs. A-B. Finally, direct mailing, combined with publishing on the Settlement Website, is designed to be the best reasonable notice of the commence of the action to reach the Settlement Class Members under the circumstances. Thus, notice satisfies the requirements of Rules 904 and 908.

Finally, the Parties have agreed that AENT will pay for the costs of claims administration. S.A. ¶ 3.2. Accordingly, this Court should approve the Notice Program.

IV. CONCLUSION

For the above reasons, the Settlement Agreement clearly falls within the range of possible approval, and Plaintiffs respectfully request this Court grant their Unopposed Motion for Preliminary Approval of Class Action Settlement.

Dated: April 18, 2024

Respectfully Submitted,

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CERTIFICATION PURSUANT TO 22 NYCRR § 202.8-b

I, **William B. Federman**, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Memorandum of Law complies with the word count limit set forth in 22 NYCRR § 202.8-b of the Uniform Rules for the Supreme Court and the County Court because it contains 6,794 words excluding the caption, signature block, and this certification. In preparing this certification, I relied on the word-count function of the word-processing system used to prepare the document.

Dated: April 18, 2024

/s/ William B. Federman
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