STATE OF NORTH CAROLINA COUNTY OF DURHAM	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 22-CVS-3533
DANIEL GREEN, as an individual and on behalf of all others similarly situated, Plaintiff, v. EMERGEORTHO, P.A., Defendant.	**MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

Plaintiff Daniel Green ("Plaintiff"), individually and on behalf of all others similarly situated, submits the following memorandum and exhibits in support of his Motion for Final Approval of Class Action Settlement.

I. INTRODUCTION

On February 23, 2024, this Court preliminarily approved a proposed class action settlement between Plaintiff and EmergeOrtho, P.A. (hereinafter "Defendant" and "EmergeOrtho"). Specifically, Plaintiff's counsel negotiated a substantial non-revisionary common fund class settlement. In addition to providing substantial benefits to Class Members, including compensation for out-of-pocket losses, reimbursement for lost time, Pro Rata Cash Payments, and a credit monitoring service, the Settlement Fund will be used to pay for the requested attorneys' fees, expenses, and service award sought by Plaintiff. Importantly, even after payment of all of these costs, the Class Members will receive the majority of the Settlement Proceeds. In addition, considering that the Pro Rata Cash Payments effectively "sweep" all the remaining Settlement

funds into actual payments to Class Members, the benefits of this Settlement will be delivered almost entirely to the Class (with only uncashed checks or unnegotiated electronic payments, if any, likely going to a not-for-profit residual beneficiary).

Settlement Class Counsel zealously prosecuted Plaintiff's claims, achieving the Settlement Agreement only after an extensive investigation and prolonged arm's-length negotiations.

After this Court granted preliminary approval, the Settlement Administrator—with the help of the Parties—successfully disseminated Notice to the Settlement Class. Individual Notice, in the form of postcards, was provided directly to Settlement Class Members via First-Class Mail. *See* Declaration of Jordan Turner, Settlement Administrator ("Admin. Decl.") ¶ 6, attached hereto as **Exhibit 1**. Notice reached[1] a total of 64,760 Class Members (92.8% of the Class), easily meeting the due process standard. *Id.* ¶ 13. The Notice provided each Settlement Class Member with information regarding how to reach the Settlement Website, make a Claim, and how to opt out or object to the Settlement. *Id.* ¶ 6. Out of the 64,760 Settlement Class Members who received direct notice, only five (5) Members opted out of the Settlement and not one (0) has objected. The Claims Period runs through June 24, 2024 and Plaintiff will update the Court accordingly.

Plaintiff now moves the Court for final approval. The Settlement meets all the criteria for final approval, and the overwhelmingly positive response from the Class

[1] A Class Member is considered "reached" by direct Notice if a Notice mailed to the Class Member has not been returned by the USPS as undeliverable or, if a Notice mailed to the Class Member was returned by the USPS as undeliverable, a subsequent Notice was mailed to an alternative mailing address for the Class Member and was not returned.

affirms that the Court's initial conclusion that the Settlement is fair, reasonable, and adequate was justified. Consequently, the Court should grant final approval.

II. INCORPORATION BY REFERENCE

In the interest of judicial efficiency, for factual and procedural background on this case, Plaintiff refers this Court to and hereby incorporates his Unopposed Motion for Preliminary Approval of Class Action Settlement and supporting memorandum filed on February 9, 2024, and the accompanying exhibits, including the proposed Settlement Agreement, filed in conjunction therewith. Plaintiff also incorporates by reference his Motion and Memorandum in Support Motion for Attorneys' Fees, Expenses, and Service Awards, filed on May 10, 2024.

III. SUMMARY OF SETTLEMENT

The Settlement reached by the Parties should be finally approved because it provides for a non-reversionary common fund of $550,000, from which meaningful and substantial benefits to Settlement Class Members will flow, and is based upon Plaintiff's good faith assessment of the strengths and weaknesses of his claims.

The Settlement's key terms include:

A. Certification of Settlement Classes

The Settlement provides for certifying the Settlement Class for settlement purposes only. The "Settlement Class" is defined as follows:

> **All individuals who were issued notice by EmergeOrtho stating that their Private Information may have been involved in the Data Incident discovered by EmergeOrtho on or about May 1, 2022**.

Excluded from the Settlement Class are any judge(s) presiding over this matter

and any members of their first-degree relatives, judicial staff, EmergeOrtho's officers, directors, and members, and persons who timely and validly request exclusion from the Settlement Class.

B. Settlement Benefits to the Settlement Class

To briefly recap the Settlement benefits, the non-revisionary common fund provides various forms of relief, including the following:

1. Compensation for Documented Out of Pocket Losses. All Members of the Settlement Class who submit a valid and timely Claim Form and supporting documentation are eligible for documented Out-of-Pocket Losses incurred as a result of the Data Incident, not to exceed $10,000 per Member of the Settlement Class, including, without limitation, unreimbursed losses relating to fraud or identity theft; professional fees including attorneys' fees, accountants' fees, and fees for credit repair services; costs associated with freezing or unfreezing credit with any credit reporting agency; credit monitoring costs that were incurred on or after the Data Incident through the date of claim submission; and miscellaneous expenses such as notary, fax, postage, copying, mileage, and long-distance telephone charges. S.A. ¶ 72 (i). Settlement Class Members with Out-of-Pocket Losses must submit documentation supporting their claims. *Id*. This can include receipts or other documentation not "self-prepared" by the claimant that document the costs incurred. "Self-prepared" documents such as handwritten receipts are, by themselves, insufficient to receive reimbursement, but can be considered to add clarity or support other submitted documentation. *Id*.

2. Compensation for Lost Time. Members of the Settlement Class are also eligible to receive compensation for up to six (6) hours of Lost Time spent mitigating

the effects of the Data Incident, calculated at the rate of $25 per hour (totaling $150 per claimant). S.A. ¶ 72(ii). Members of the Settlement Class claiming Lost Time need only submit an attestation demonstrating that they spent the claimed time responding to issues raised by the Data Incident. *Id*. This attestation may be completed by checking a box next to the sentence: "I swear and affirm that I spent the amount of time noted in response to the EmergeOrtho data security incident." Claims for Lost Time can be combined with claims for Out-of-Pocket Losses but are subject to the $10,000.00 cap. *Id*.

3. Credit Monitoring and Identity Theft Protections. Under the Settlement, Settlement Class Members will be eligible to claim two (2) years of three-bureau credit monitoring, including $1 million of identity theft insurance. S.A. ¶ 72(iii).

4. Cash Compensation (Pro Rata Cash Payment): After the distribution of Fee Award and Expenses, Notice and Administrative Expenses, a Service Award, Compensation for Out-of-Pocket Losses and Lost Time, and distribution of credit monitoring codes, the Settlement Administrator will make Pro Rata Cash Payments of any remaining funds to each Class Member who submits an Approved Claim. S.A. ¶ 72(iv). Any Class Member may make a claim for a Pro Rata Cash Payment regardless of whether the Member made claim reimbursements for Lost Time or Out-of-Pocket Losses or not. This may pro rata increase or decrease the Cash Payment. *Id*.

5. Remediation Efforts: All Settlement Class Members will benefit from Defendant's improvements to its cybersecurity since the Data Incident, regardless of whether they file a claim for any other Settlement Benefits. EmergeOrtho has taken steps to implement additional security measures and has provided training to its employees to protect against similar incidents. S.A. ¶ 72(v).

C. Attorneys' Fees and Service Award

Plaintiff previously moved for, and Defendant did not oppose, attorneys' fees of $183,315 and expenses of $15,699. Plaintiff also moved for a reasonable service award in the amount of $5,000.

D. Administration of Notice Administration

On February 23, 2024, the Court entered an Order granting preliminary approval of the Class Settlement Agreement and instructing EisnerAmper, the Settlement Administrator, to implement the Notice Program. See Prelim. Order. As a result, on February 28, 2024, EmergeOrtho provided EisnerAmper with a database of Class Members' names and addresses (where available). Admin Decl. ¶ 5. EisnerAmper received the Settlement Class List from Defendant's Counsel in one Excel file with a total of 72,552 records. *Id.* EisnerAmper de-duplicated the data records provided based on name and address and determined that 69,773 unique Class Members existed to which Notice should be issued as outlined within the Settlement Agreement. *Id.*

EisnerAmper coordinated and caused the Short Form Notice to be mailed via First-Class Mail to Class Members for which a mailing address was available from the class data. *Id.* ¶ 6. The Short Form Notice included (a) the web address to the Settlement website for access to additional information, (b) rights and options as a Class Member and the dates by which to act on those options, the requested attorneys' fees, and (c) the date of the Final Approval Hearing. *Id.* The Notice mailing was completed on or before March 25, 2024, in accordance with the Preliminary Approval Order. *Id.*

Prior to the mailing, all mailing addresses were checked against the National Change of Address (NCOA) database maintained by the United States Postal Service

("USPS"). *Id.* ¶ 7. In addition, the addresses were certified via the Coding Accuracy Support System (CASS) to ensure the quality of the zip code and verified through Delivery Point Validation (DPV) to verify the accuracy of the addresses. *Id.* Of the 69,773 Class Member records, 10 records did not successfully pass the address validation procedures noted above. *Id.*

In the initial mailing campaign, EisnerAmper executed mailings to the 69,763 Class Members that passed address validation. *Id.* ¶ 7. EisnerAmper also executed supplemental mailings to 8,687 Class Members, for which the initial Short Form Notice was not deliverable but for which EisnerAmper was able to obtain an alternative mailing address through (1) forwarding addresses provided by the USPS, (2) skip trace searches using the LexisNexis third-party vendor database, or (3) requests received directly from Class Members. *Id.* In total, Direct Notice reached[2] a total of 64,760 Class Members (92.8% of the Class), easily meeting the due process standard. *Id.* ¶ 13.

On March 25, 2024, EisnerAmper also published the Settlement website, www.EmergeOrthoSettlement.com. *Id.* ¶ 13. Visitors to the Settlement website can download the Long Form Notice (English and Spanish), the Claim Form (English and Spanish), as well as Court Documents, such as the Class Action Complaint, the Settlement Agreement, Motions filed by Class Counsel, and Orders of the Court. *Id.* Visitors are also able to submit claims electronically, download a Claim Form to submit by mail, and find answers to frequently asked questions (FAQs), important dates and

[2] A Class Member is considered "reached" by direct Notice if a Notice mailed to the Class Member has not been returned by the USPS as undeliverable or, if a Notice mailed to the Class Member was returned by the USPS as undeliverable, a subsequent Notice was mailed to an alternative mailing address for the Class Member and was not returned.

deadlines, and contact information for the Settlement Administrator. As of May 22, 2024, the Settlement Website received 8,794 unique visits. *Id.*

Further, on March 25, 2024, EisnerAmper established a dedicated toll-free telephone number, 1-844-979-3915 (the "Toll-Free Number"), which is available twenty-four hours per day. *Id.* ¶ 11. Class Members can call and interact with an interactive voice response ("IVR") system that provides important settlement information and offers the ability to leave a voicemail message to address specific requests or issues. EisnerAmper also provided copies of the Short Form Notice, Long Form Notice, paper Claim Form, as well as the Settlement Agreement, upon request to Class Members, through the Toll-Free Number. *Id.* The Toll-Free Number appeared in all Notices, as well as in multiple locations on the Settlement Website. *Id.* The Toll-Free Number will remain active through the close of this Settlement Program. *Id.*

EisnerAmper also established an Email address, info@EmergeOrthoSettlement.com, to provide an additional option for Class Members to address specific questions and requests to the Settlement Administrator for support. *Id.* ¶ 12.

Thus, between the direct notice, the Settlement website, the toll-free telephone number, and email support, Notice was successfully carried out in accordance with the Court's Preliminary Approval Order.

E. Claims

The timing of the Claims Process was structured to ensure that all Class Members had adequate time to review the terms of the Settlement Agreement, compile documents supporting their Claims, and decide whether they would like to opt-out or

object. Class Members were given sixty (60) days from the notice deadline to opt out or file objections to the Settlement. As of May 22, 2024, EisnerAmper has received a total of 1,099 claims. *Id.* ¶ 12. Of these, EisnerAmper has determined that 1,097 claims (approximately 1.6% of the Class Members) are from Class Members and are non-duplicative claims. *Id.* EisnerAmper will continue to intake and analyze claims through the claims filing deadline of June 24, 2024. Accordingly, the Claims Process has thus far been a success. *Id.*

IV. LEGAL ARGUMENT

A. The Court Should Finally Approve the Settlement.

Under Rule 23(c) of the North Carolina Rules of Civil Procedure, a "class action shall not be dismissed or compromised without the approval of the judge." Courts considering a proposed settlement under Rule 23, or its federal law counterpart, typically engage in a three-step process. First, the court determines whether the proposed settlement merits preliminary approval. Second, the court directs that notice of the proposed settlement be distributed to the settlement class, thereby providing class members with the opportunity to object to the settlement. Third, the court evaluates whether final approval of the settlement is warranted and, if so, grants final approval. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.632 (2004) ("MCL 4th"); N.C. Gen. Stat. § 1A-1, Rule 23(c); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622 (1997). Because the first two steps in the class action approval process have been completed, Plaintiff now requests that the Court take the third step and finally approve his Settlement.

B. The Proposed Settlement Is Fair, Reasonable, and Adequate, and

Should Be Approved by the Court.

It is well-established that the public interest favors settling litigation. *See Ehrenhaus v. Baker*, 216 N.C. App. 59, 72, 717 S.E.2d 9, 19 (2011) ("Our judicial system has a strong preference for settlement over litigation. Courts are generally indifferent to the nature of the parties' agreement; why or how the case is settled is of little concern.") (emphasis in original); *Knight Pub. Co., Inc. v. Chase Manhattan Bank, NA.*, 131 N.C. App. 257, 262 (N.C. Ct. App. 1998) ("[T]he law favors the avoidance of litigation, and a compromise made in good faith will be sustained as not only based upon a sufficient consideration but upon the highest consideration of public policy as well.") (citation omitted).

North Carolina Courts follow a two-step process in evaluating whether to award final approval to a class action settlement. *See, e.g.*, *Nakatsukasa v. Furiex Pharms., Inc.*, 2015 NCBC LEXIS 71 (N.C. Super. Ct. July 1, 2015). First, the courts review whether the proposed class satisfies Rule 23 of the North Carolina Rules of Civil Procedure. *Ehrenhaus*, 216 N.C. App. at 73, 717 S.E.2d at 19. Second, the courts review whether the settlement is "fair, reasonable, and adequate." *Id*.

Although the Court has previously determined (on a preliminary basis) that the Settlement is within the range of reason for a potential class settlement, now the Court must finally determine if the Settlement is fair, reasonable, and adequate pursuant to Rule 23. Since the Settlement significantly clears that bar, the Court should grant final approval.

1. The Settlement Class Merits Certification.

The first step in granting final approval to a class action settlement is to review

whether the proposed class satisfies Rule 23. Rule 23 has three basic requirements: (1) there must be a class; (2) the named class representatives must be able to fairly and adequately represent the interests of all the class members; and (3) the proposed class members must be so numerous that it is impractical to bring them all before the court. *Ehrenhaus*, 216 N.C. App. at 70, 717 S.E.2d at 17–18.

Settlement classes are routinely certified in consumer data breach cases.[3] There is nothing unique about this case that would counsel otherwise. Moreover, this Court already found, when it preliminarily approved the Settlement, that it would likely certify the Settlement Class. In addition, the Class still meets the requirements of numerosity, commonality, typicality, and adequacy, and because common issues predominate and a class action is the superior means by which to resolve Class Member claims, the Court should finally certify the Settlement Class for settlement purposes. Where nothing has changed relative to the Rule 23 factors since preliminary approval, that decision should be made final, for the reasons set forth in the Plaintiff's preliminary approval motion and supporting memorandum.

2. The Proposed Settlement Is Fair, Reasonable, and Adequate.

The second step in analyzing whether to give final approval to a class action

[3] *See, e.g.*, *Abubaker v. Dominion Dental USA, Inc.*, No. 1:19-cv-01050, 2021 WL 6750844 (E.D. Va. Nov. 19, 2021); *Hutton v. Nat'l Bd. of Exam'rs in Optometry, Inc.*, No. l:16-cv-03025, 2019 WL 3183651 (D. Md. July 15, 2019); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. l:17-md-2800-TWT, 2020 WL 256132 (N.D. Ga. Mar. 17, 2020), *aff'd in relevant part* 999 F.3d 1247 (11th Cir. 2021), *cert. denied sub nom. Huang v. Spector*, 142 S. Ct. 431 (2021), and *cert. denied sub nom. Watkins v. Spector*, 142 S. Ct. 765 (2022); *In re Anthem, Inc. Data Breach Litig.,* 327 F.R.D. 299 (N.D. Cal. 2018); *In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig.*, 341 F.R.D. 128, 172–74 (D. Md. 2022) (certifying certain statewide classes; Rule 23(f) appeal granted).

settlement is to consider whether it is "fair, reasonable, and adequate." *Ehrenhaus*, 216 N.C. App. at 73, 717 S.E.2d at 19 (citation omitted). In this vein, courts are chiefly concerned with two factors: (1) "the likelihood the class will prevail should litigation go forward;" and (2) "the potential spoils of victory, balanced against benefits to the class offered in the settlement." *Id*. at 20.

a. The Settlement Is Well Within the Range of Reasonableness Given the Litigation Risks of Proceeding with the Litigation.

Prior to agreeing to the Settlement, Settlement Class Counsel and Plaintiff carefully weighed the benefits of the Settlement against the likelihood of a greater recovery through continued litigation. As part of this review, Settlement Class Counsel and Plaintiff considered the length of the case, the likelihood of success at the summary judgment phase and at class certification, as well as the potential for extended and drawn-out appeals.

Plaintiff would face significant risks and costs would he had continued to litigate the case. First, there was a risk that the Court would never have certified the Class. Due at least in part to the cutting-edge, innovative nature of data breach cases and the corresponding rapidly evolving law, data incident cases like this one generally face substantial hurdles when it comes to class certification. *See, e.g.*, *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig*., 293 F.R.D. 21, 35 (D. Me. 2013) (denying class certification in cybersecurity incident class action litigation).

Second, another significant obstacle faced by Plaintiff is the challenge of maintaining class action status through trial. To be clear, the Class has not yet been certified, and Defendant will certainly oppose certification should the case proceed.

Thus, Plaintiff "necessarily risk[s] losing class action status." *Grimm v. Am. Eagle Airlines, Inc.*, No. LA CV 11-00406 JAK(MANx), 2014 WL 1274376, at *10 (C.D. Cal. Sept. 24, 2014). Class certification in contested consumer data incident cases is not common, first occurring in *Smith v. Triad of Ala., LLC*, No. 1:14-CV-324-WKW, 2017 U.S. Dist. LEXIS 38574, at *45–46 (M.D. Ala. Mar. 17, 2017). Moreover, in one of the few significant data breach class actions that have been certified on a national basis, this risk was very real. For example, *In re Marriott Int'l Customer Data Sec. Breach Litig.*, 341 F.R.D. 128 (D. Md. 2022) was recently decertified on appeal. *See In re Marriott Int'l*, 78 F.4th 677, 680 (4th Cir. 2023).[4] The relative absence of trial class certification precedent in the relatively novel data breach setting adds to the risks posed by continued litigation. Therefore, this over-arching risk simply puts a point on what is true in all class actions: class certification through trial is never a settled issue and is always a hazard for the plaintiffs.

Third, there was a risk that Plaintiff's claims would not have survived, or survived in full, on a class-wide basis after a motion for class certification, motions for summary judgment, and *Daubert* motions on damages methodologies, among other such opposition. To the extent the law has gradually accepted this relatively new type of litigation, the path to a class-wide monetary judgment remains unpaved, particularly in the area of damages. The damages methodologies, while theoretically sound in Plaintiff's view, remain untested in a disputed class certification setting

[4] To complete the story, the classes were re-certified by the district court on remand. *See In re Marriott Int'l Customer Data Sec. Breach Litig.,* No. 19-MD-2879, 2023 WL 8247865, at *1 (D. Md. Nov. 29, 2023).

and unproven in front of a jury.

Fourth, if Plaintiff had prevailed on a motion for class certification, successfully defeated all the other objections and motions Defendant would have filed, and proceeded to trial, Plaintiff still would have faced significant risk, costs, and delay including likely interlocutory and post-judgment appeals.

Balanced against these inherent risks, the $550,000 Settlement Fund provides significant and immediate value to Class Members. This is especially true given that the fund is non-reversionary. That is, if the aggregate amount of all Settlement Payments does not exceed the Net Settlement Fund (*i.e.*, fewer Class Members submit valid claims than anticipated), the remaining funds will be distributed on a pro rata basis to the individuals that submitted valid claims. Then, if any money remains in the Settlement Fund after the pro rata distribution process is exhausted, the remainder will ultimately be distributed to one or more charitable organizations jointly recommended by the parties, thereby ensuring that the entire Settlement Fund will benefit the Class and public at large rather than revert to EmergeOrtho. Settlement Agreement. S.A. ¶ 56. Broken down further, the proposed Settlement ensures that Settlement Class Members with valid claims for Out-of-Pocket Losses (including ordinary and extraordinary losses) or Lost Time will receive guaranteed compensation now and provides Settlement Class Members with access to credit monitoring services, benefits that may not have been available at trial. As this field of data breach litigation is evolving, there is no guarantee of the ultimate result. *See Gordon v. Chipotle Mexican Grill, Inc.*, No. 17-cv-01415-CMA-SKC, 2019 WL 6972701, at *1 (D. Colo. Dec. 16, 2019) ("Data breach cases . . . are particularly

risky, expensive, and complex."); *see also McManus v. Gerald O. Dry, P.A.*, 2023 NCBC LEXIS 69, at *4 ("Furthermore, the Court concludes that this action involved complex and novel questions which required high legal skill to satisfactorily resolve. This case revolves around rapidly evolving legal questions of digital security, data breaches, and digital privacy, which are at the cutting edge of the interplay between new technology and the law."). Therefore, the substantial costs, risk, and delay of a trial and appeal, when contrasted with the substantial benefits contained in the present Agreement, support a finding that the proposed Settlement is adequate.

b. The Settlement Is Fair, Reasonable and Adequate Given the Balance between a Potential Recovery and the Benefits Offered in the Settlement.

When compared to the risks inherent in proceeding with this litigation, the Settlement benefits are more than reasonable. The Settlement provides for the fair and adequate relief outlined above, which is tailored to address the actual injuries and damages claimed to have been sustained by Plaintiff and Settlement Class Members. These benefits include the ability to claim significant cash for out-of-pocket losses, cash for extraordinary losses reasonably related to the Data Incident, compensation for lost time, an alternative cash payment, and credit monitoring services.

Settlement Class Members will be able to obtain their benefits relatively quickly, rather than waiting several more years to see whether this litigation (if not settled), would provide *any* relief. Further, the Settlement reflects Class Counsel's assessment of the strengths and weaknesses of both classes, as well as the amount of damages Class Members could expect to receive from a favorable verdict. Therefore, the Settlement is within the range of reasonableness, and is ripe for final approval.

3. The Settlement Class Supports the Settlement.

The reaction to a class action settlement can be a strong factor in gauging the class's acceptance of the settlement and its reasonableness. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 118 (2d Cir. 2005) ("the absence of substantial opposition is indicative of class approval"); *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1324 (S.D. Fla. 2005) ("a low percentage of objections points to the reasonableness of a proposed settlement and supports its approval"); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 527 (E.D. Mich. 2003) ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.").

As of May 22, 2024, the Settlement Administrator had received 1,097 valid claims. Admin Decl. ¶ 14. This represents a robust 1.6 percent claims rate, signaling that the Class approves of this Settlement.

The response to a class settlement can also often be measured by those who opt - out of the settlement or object to it. Here, only five (5) Settlement Class Members have asked to opt-out of the Settlement, and not one (0) has objected to the Settlement. Considering the size of the Class, including the extent of the Claims Process, those who have opted-out and objected constitute a very low percentage of individuals who have expressed dissatisfaction with the Settlement. "These low opt- out and objection rates indicate widespread approval among the class and are consistent with or better than the objection rates in other large class action cases … in which district courts have approved settlements in part because of low disapproval ratings within the class." *In re Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg.*, No. 1:15-md-2627 (AJT/TRJ), 2018 U.S. Dist. LEXIS 240724, at *29 (E.D. Va. Oct. 9, 2018).

For all the above reasons, the Settlement is favorable and weighs in favor of final approval.

4. Experienced Counsel Favor Approval of the Settlement.

Lastly, Settlement Class Counsel, who are experienced and skilled in consumer litigation and class actions, support the Settlement as fair, reasonable, and adequate, and in the best interests of the Settlement Class. "[T]he opinion of experienced and informed counsel is entitled to considerable weight." *Ehrenhaus*, 216 N.C. App. at 83, 717 S.E.2d at 31 (internal citations omitted).

As mentioned above, Settlement Class Counsel are experienced in complex consumer litigation and data breach class actions. Declaration of Danielle L. Perry, attached to the Motion for Preliminary Approval (Doc. 50) as Exhibit 2 ("Perry Dec.") ¶¶ 2-13. Settlement Class Counsel are extremely pleased and proud of the Settlement, as it provides tangible financial benefits. These benefits were thoughtfully crafted to provide relief to the entire Class and represent precisely the creative solutions that class settlements can offer. For that reason, as well as the rationale outlined above, Settlement Class Counsel favor approval of the instant Settlement.

C. Notice to the Settlement Class Complied with Due Process and Rule 23.

The Court has previously approved Plaintiff's proposed Notice Plan and found that it satisfied all requirements of due process and Rule 23. Since receiving preliminary approval, the Notice Plan has been successfully implemented. *See generally* Admin. Decl. By having reached over 92.8% of the identified Settlement Class Members, the Notice Plan, as implemented, easily meets the requirements of Rule 23 and due

process. See Admin. Decl. ¶ 13; *see, e.g.,* Fed. Jud. Ctr., "Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide" (2010) (recognizing the effectiveness of notice that reaches between 70 and 95 percent of the class). In sum, such notice complies with the program approved by this Court in its Preliminary Approval Order, is consistent with Notice Programs approved in the Fourth Circuit and across the United States, is considered "high percentage," and is within the "norm." *See* Barbara J. Rothstein & Thomas E. Willging, Fed. Jud. Ctr., "Managing Class Action Litigation: A Pocket Guide or Judges", 27 (3d Ed. 2010). Thus, the Court should find that the Class received the best notice practicable under the circumstances and in compliance with Rule 23 and the Due Process Clause. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985).

D. The Court Should Approve the Requested Attorneys' Fees, Expenses, and Service Award.

1. Attorneys' Fees and Expenses.

As demonstrated by Plaintiff's memorandum in furtherance of his Motion for an Award of Attorneys' Fees, Expenses, and Service Award, the requested attorneys' fees, costs, and expenses are reasonable and should be approved. Under both the percentage of the benefit approach, or the summary lodestar cross-check, the attorneys' fee of $183,315 and expenses of $15,699 are reasonable and due to be approved.

2. Service Award

Plaintiff has requested a $5,000 service award. Service awards "are intended

to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Berry v. Schulman*, 807 F.3d 600, 613 (4th Cir. 2015) (internal quotation omitted). In *Berry,* the Fourth Circuit stated that such awards are "fairly typical in class action cases" and upheld $5,000 service awards as within the district court's discretion "because the Class Representatives acted for the benefit of the class." *Id.* (citation omitted).

Further, service awards are "awarded to class representatives in recognition of their time, expense, and risk undertaken to secure a benefit for the Class they represent" and such awards are "within the discretion of the Court." *Carl v. State*, 2009 NCBC LEXIS 36, at *36–37 (N.C. Super. Ct. Dec. 10, 2009). While the amount of the award is ultimately within the discretion of the Court, the size of the award itself is typically commensurate with the level of activity performed and the proportion of the case. *See Smith v. Krispy Kreme Doughnut Corp*., No. 1:05CV00187, 2007 WL 119157, at *4 (M.D.N.C. Jan. 10, 2007) (awarding a service award of $15,000).

Here, the Settlement Class Representative has fulfilled his duties to the Class, thereby rendering the requested service award appropriate. Specifically, Plaintiff made himself available to Class Counsel to assist with the investigation into his claims, assisted Counsel by providing information (which was necessary to the drafting of the Complaint), and made himself available throughout the negotiation process to offer imperative information and insight. Additionally, the Settlement Class Representative considered and approved the terms of the proposed Settlement as in

the best interests of the Class after extensive review and discussion with Class Counsel. The Court should therefore award Plaintiff the exceedingly reasonable and typical service award of $5,000.

V. CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court enters an Order that finally approves the instant Settlement as fair, reasonable, and adequate under Rule 23, certifies the Settlement Class for purposes of judgment on the Settlement, and grants his request for attorneys' fees, expenses, and service award.

Dated: May 28, 2024

Respectfully submitted,

MILBERG COLEMAN BRYSON PHILLIPS GROSSMAN, PLLC

/s/ Scott C. Harris
Scott C. Harris
N.C. Bar No.: 35328
900 W. Morgan Street
Raleigh, North Carolina 27603
Telephone: (919) 600-5000
Facsimile: (919) 600-5035
sharris@milberg.com

Gary M. Klinger (admitted PHV)
227 W. Monroe Street, Suite 2100
Chicago, IL 60606
gklinger@milberg.com

MASON LLP

Danielle L. Perry (admitted PHV)
5335 Wisconsin Ave. NW, Ste. 640
Washington, D.C. 20015
Telephone: (202) 429-2290
dperry@masonllp.com

Counsel for Plaintiff and the Settlement Class

CERTIFICATE OF COMPLIANCE WITH BUSINESS COURT RULE 7.8

The undersigned, in accordance with Business Court Rule 7.8, certifies that the foregoing brief (exclusive of the case caption, signature blocks, and required certificates) contains fewer than 7,500 words, as reported by word-processing software.

This 28th day of May 2024.

/s/ Scott C. Harris
Scott C. Harris

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing has been served on all counsel of record in accordance with Business Court Rule 3.9 through electronic filing with the North Carolina Business Court.

This 28th day of May 2024.

MILBERG COLEMAN BRYSON PHILLIPS GROSSMAN, PLLC

/s/ Scott C. Harris
Scott C. Harris
N.C. Bar No.: 35328
900 W. Morgan Street
Raleigh, North Carolina 27603
Telephone: (919) 600-5000
Facsimile: (919) 600-5035
sharris@milberg.com

Counsel for Plaintiff and the Settlement Class