

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

BREANDAN COTTER and JACK DINH,
individually and on behalf of others similarly
situated,

Plaintiff,

v.

CHECKERS DRIVE-IN RESTAURANTS, INC.,
a Delaware corporation,
Defendant.

Case No. 8:19-cv-01386-VMC-CPT
Class Action

**DECLARATION OF JEAN SUTTON MARTIN IN SUPPORT OF
PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, COSTS, AND EXPENSES
AND SERVICE AWARDS**

I, Jean Sutton Martin, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am one of the attorneys representing Plaintiffs in this matter and was preliminarily appointed as Class Counsel. I submit this declaration in support of Plaintiff's Unopposed Motion for Attorney's Fees, Costs, and Expenses and Service Award. The facts herein stated are true, of my own personal knowledge, and if called to testify to such facts, I could and would do so competently

2. I have been licensed to practice law in the state of North Carolina and have been a member in good standing ever since that time. I am admitted to practice before the United States Supreme Court, the United States Court of Federal Claims, the United States Court of Appeals for the Fourth Circuit, the Western, Middle, and Eastern Districts of North Carolina, and the United States District Court of Colorado.

3. I previously submitted a resume for myself and my firm at Dkt. 43-2, 13-20.

4. I was one of the principal lawyers in charge of all aspects of the litigation and I worked to ensure that Plaintiff and the class which he sought to represent was zealously represented, while also ensuring efficiency and reducing duplicative effort.

5. On June 6, 2019, Plaintiffs' class action case was filed against Defendant following Defendant's announcement that Plaintiffs' and other Class Members' personally identifiable information ("PII")¹ had been stolen via malicious software installed by unauthorized third Parties on data systems at Defendant's Checkers & Rally's ("Checkers") restaurants (the "Data Breach"). Although dates vary by location, the malware at issue remained in Defendant's data systems from September 2016 to April 2019, during which the malware collected cardholders' names, payment card numbers, card verification codes, and expiration dates ("Payment Card Data" or "PCD"). As result, up to 1,500,000 payment card transactions were captured by data thieves. Plaintiffs allege that Defendant failed to ensure that access to its data systems was reasonably safeguarded, failed to acknowledge and act upon industry warnings, failed to use proper security systems and protocols to detect and deter the type of attack that occurred, and failed to provide timely and adequate notice to Plaintiffs and other Class members that their PII had been stolen, putting Plaintiffs and Class Members at a substantially increased risk of identity theft.

6. Counsel in this action undertook investigation of the Data Breach and assessment of the legal claims available to Class members.

7. Along with co-counsel, my firm filed this action on behalf of Breandon Cotter on June 6, 2019.

8. Subsequently, the parties began exploring the potential for consolidating our case with the matter of *Dinh v. Checkers Drive-In Restaurants, Inc.*, No. 8:19-cv-01310-JVS-KES

¹ Unless otherwise defined, capitalized terms have the same meaning attributed to them in the Settlement Agreement.

(C.D. Cal.) (the “*Dinh* Action”), which had been filed on July 2, 2019. The parties also began exploring resolution of Plaintiff’s claims on a class-wide basis.

9. Prior to the mediation, the Parties briefed their respective positions on the facts, claims, defenses, and assessments of the risk of litigation. The Parties also submitted a draft settlement term sheet prepared by Plaintiffs, which was then used as the basis for negotiations.

10. Additionally, Defendant provided Plaintiffs with directed, informal discovery (660 pages) which included: (1) franchise agreements for several locations affected by the Data Breach, which are believed to be representative of the franchise agreements of the approximately 104 affected locations; (2) the number and identity of the affected restaurants; (3) information concerning what consumer contact information Checkers maintains; (4) preliminary information regarding the approximate number of payment card transactions during the Data Breach period; and (5) the Mandiant Report dated August 5, 2019 concerning the Data Breach. Defendant was also forthcoming about its current financial status and corporate affairs.

11. On November 21, 2019, the parties, through their respective counsel, engaged in a full-day mediation session before Steven R. Jaffe, Esq., a highly experienced mediator. At all times, the parties’ negotiations were adversarial, non-collusive, and conducted at arm’s length. During this all-day session, the parties set forth and discussed their respective positions on the merits of the putative class claims and the potential for a settlement that would involve class-wide relief. The parties exchanged offers and counteroffers and negotiated the points of each vigorously. The parties ultimately reached an agreement in principle on the material terms of a class action settlement during this mediation.

12. Attorneys' fees, costs, expenses and the service award to the Class Representative were not discussed or negotiated until after the parties had reached an agreement on the framework and material terms of the Settlement.

13. Thereafter, the parties focused their efforts on documenting the terms of the settlement, which were ultimately memorialized in the Settlement Agreement. The Parties spent significant time negotiating the terms of this final written Settlement Agreement. Indeed, the Parties negotiated the terms of the Settlement Agreement from the mediation, November 21, 2019, until the date of filing the motion for preliminary approval on May 6, 2020.

14. Class Counsel expended significant time drafting and negotiating the Settlement Agreement, Claim Form, and notice documents, and drafting and preparing the motion for preliminary approval and accompanying documents.

15. Throughout the settlement process, Class Counsel carefully weighed: (1) the benefits to the Class Representative and the Class under the terms of this Settlement, which provides significant relief to the Class; (2) the attendant risks and uncertainty of litigation; (3) the desirability of consummating the present Settlement to ensure that the Class receives a fair and reasonable Settlement; and (4) providing Plaintiff and Class Members prompt relief.

16. The Settlement provides significant benefits to Class Members. All Settlement Class Members who submit a valid Claim Form and attest that they used a payment card at an affected Checkers location during the Data Breach are eligible to receive four (4) Checkers vouchers of \$5.00 each, which are valid for one (1) year at any Checkers and Rally's restaurant and are freely and fully transferrable. Additionally, all Settlement Class Members who submit a valid Settlement Claim through the Claim Form and supporting documentation are eligible to receive reimbursement for documented, eligible out-of-pocket expenses incurred by Settlement

Class Members as a result of the Data Breach.

17. Through materials provided by Checkers during the course of this litigation, I am informed that the approximate number of payment card transactions compromised as a result of the Data Breach is 1,500,000. Based upon the information provided through confirmatory discovery efforts in connection with the Settlement, including a deposition of a corporate representative of Defendant which I conducted, I am informed that Defendant is unable through available data to confirm the precise number of class members or their identities.

18. There are no caps on the tiers of monetary relief made available to Class Members. If one assumes an approximate class size of 1,000,000, based upon 1,500,000 affected transactions, the potential total relief made available to Class Members through a claim for four (4) Checkers vouchers of \$5.00 each equates to \$20,000,000. Thus, the requested award of attorneys' fees, costs, and expenses of \$575,000 is 2.87% of the value of the vouchers made available to Class Members.

19. Checkers also agreed to implement several business practices to improve its data security and ensure that the problem which led to the Data Disclosure is not repeated. These business practice changes include implementation of mandatory cybersecurity and data privacy training for all managers within its organization over the next two (2) years and implementation of point to point encryption on its point of sale systems.

20. In conjunction with the Settlement, the Parties engaged in Confirmatory Discovery regarding the investigative efforts Checkers took after the Data Breach and the business practice changes Checkers implemented as a result of the Settlement. This Confirmatory Discovery included special interrogatories to which Defendant responded with additional information as to its investigation of the Data Breach, the containment and remediation efforts taken in the wake of the Data Breach, and the training and other business practice changes Defendant has implemented

in its corporate and franchise restaurants as a result of the Data Breach. Defendant also produced an additional Mandiant Report dated November 25, 2019 concerning the Data Breach. Further, through confirmatory discovery, Checkers has verified that it has implemented point of sale (P2P) encryption at its restaurants.

21. On October 8, 2019, Defendant presented a corporate representative pursuant to Fed. R Civ. P. 30(b)(6) to answer questions on the following topics: (a) how Checkers identified the Affected Restaurants; (b) how Checkers identified the number of payment card transactions subject to the Data Breach; (c) the process by which Checkers contacts its loyalty customers (“Flav-R-Hood” members); (d) the remedial measures Checkers has already taken, including the development, implementation, and cost of such measures; and (e) the cost of the training, business practice changes, and remedial measures undertaken by Checkers for its corporate and franchise restaurants as a result of the Settlement.

22. According to information ascertained through Confirmatory Discovery, the cost of these business practice changes and remedial measures to date have been approximately \$1,270,000 and Defendant anticipates on-going expenses totaling more than \$120,000 annually for training of managers within its organization and endpoint encryption measures.

23. The proposed Settlement provides significant benefits for Settlement Class Members that they otherwise may not receive, and based on the damages sustained by any one class member and the expensive nature of litigation, a class member may not have sought to pursue their individual claims in litigation. A class action advances the purpose of advancing the interests of many individuals in one single forum.

24. I believe that the settlement is fair and reasonable considering the complexities of the case, the uncertainties of class certification and litigation, and the secured benefit to the class.

It is my opinion, and that of Class Counsel, that the settlement is fair, reasonable, and adequate.

25. Throughout the litigation, Defendant was represented by extremely capable counsel at Hunton Andrews Kurth LLP (“Hunton”). My firm has litigated several cases against Hunton, including in *In re: Yahoo! Inc. Customer Data Security Breach Litigation*, No. 5:16-MD-02752-LHK (N.D. Cal.). The attorneys at Hunton are worthy, highly competent adversaries, particularly in the area of data privacy. Based upon their experience, they recognized the benefit of an attempt at early mediation, through which the Parties were able to achieve the Settlement before the Court.

26. All of the work performed and time spent by Class Counsel was undertaken on a contingency basis with a risk of non-payment, as well as the risk of considerably delayed payment even if the case ultimately resulted in a favorable fee award. We performed this work and our firms advanced expenses with the understanding that we would be paid a fee and receive reimbursement for expenses only if successful. Our firms have not been paid for any of its time in this litigation or have we been reimbursed for any of the expenses incurred in this matter.

27. We performed this work and advanced expenses with the understanding that, if the class was certified and the case proceeded as a class action, any award of fees and costs would be subject to approval by the court.

28. The hourly rates of the professionals in my firm, including my own, reflect experience and accomplishments in the area of class litigation and are commensurate with hourly rates charged by our contemporaries around the country based upon level of experience in the area of class litigation.

29. The billable rates charged by the attorneys and other professionals in my law firm have been approved by other federal and state courts, including courts in this District in *Kuss v.*

American Home Patient, Inc., et al., No. 8:18-cv-02348 (M.D. Fla.) and *Torres v. Wendy's International, LLC*, No. 6:16-cv-210 (M.D. Fla.).

30. The lawyers and other professional staff of my firm maintain and record their respective time and the specific services they perform contemporaneously in a computerized system. Based upon the records in this system, my firm's lodestar is in excess of 235 hours as of October 23, 2020, amounts to \$181,657.80 in lodestar. Additional time will be spent to prepare for and attend the fairness hearing and obtain final approval, to defend any appeals taken from the final judgment approving settlement, and ensure that the distribution of settlement proceeds to class members is done in a timely manner in accordance with the terms of the settlement.

31. I assert that the attorneys' fees sought in the motion for attorneys' fee is reasonable and seeks fair and reasonable compensation for undertaking this case on a contingency basis, and for obtaining the relief for Plaintiffs and the class.

32. The chart below reflects the amount of time spent by me and members of my firm in the prosecution of this case:

Name	Hourly Rate	Hours Billed	Total
MORGAN & MORGAN COMPLEX LITIGATION GROUP			
Jean Sutton Martin, Lead Partner	\$894	145	\$129,630.00
Ryan McGee	\$742	2.1	\$1,558.20
Patrick Barthle	\$658	30.3	\$19,740.00
Marcio Valladares	\$894	17.7	\$15,292.80
Francesca Kester	\$384	10.8	\$4,147.20
Ra Amen	\$384	29.4	\$11,289.60
Total		235	\$181,657.80

33. As of October 23, 2020, my firm has expended \$3,721.55 in costs and expenses in this litigation. These expenses include filing fees, research fees, travel costs for mediation, and mediation expenses. My firm's costs and expenses, which I assert are reasonable, are pulled from

a computerized database maintained by individuals in the accounting office of my firm and were checked for accuracy.

34. The work performed and the expenses advanced by my firm were reasonable and necessary to the prosecution and settlement of this case. I will continue to spend time to complete the settlement approval process by responding to inquiries from Class Members, working with the Claims Administrator to address any claims issues, and overseeing distribution of Settlement benefits.

35. I assert that the attorneys' fees sought in the motion for attorneys' fee is reasonable and seeks fair and reasonable compensation for undertaking this case on a contingency basis, and for obtaining the relief for Plaintiffs and the class.

36. The Class Representatives, Breandan Cotter and Jack Dinh, did everything asked of them in the conduct of this litigation. They maintained regular contact with their counsel to keep apprised as to the progress of the litigation. Plaintiffs' interests in this litigation are aligned with, and not antagonistic to, those of the Settlement Class. At all times they have acted in the best interests of the Class in pursuit of this litigation.

37. I believe the requested combined award of attorneys' fees and costs of \$575,000, and the two requested service awards of \$2,500 to the named Plaintiffs, are fair and reasonable.

38. On behalf of Plaintiffs and Class Counsel, I respectfully request that the Court enter an order granting final approval to the Settlement and awarding the requested attorneys' fees, costs and expenses and service awards.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on October 23, 2020, in Tampa, Florida.

By: /s/ Jean Sutton Martin
Jean Sutton Martin