

**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' UNOPPOSED MOTION FOR FINAL
APPROVAL OF CLASS ACTION SETTLEMENT**

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

1. I have been licensed to practice law in the State of North Carolina since 1998. I was admitted *pro hac vice* into United States District Court for the Middle District of Florida on August 23, 2019.

2. I am one of the attorneys for Plaintiff and the proposed Class in this Action. I submit this declaration in support of Plaintiff's Unopposed Motion for Final Approval of Class Action Settlement.

3. I am a partner at Morgan and Morgan Complex Litigation Group, serving as one of the three lead litigation attorneys for the class action practice. The majority of my practice for the last 20 years has concentrated on complex litigation, including consumer class actions and privacy class litigation.

4. I was recently appointed as interim co-lead counsel in *In re Morgan Stanley Data Security Litigation*, 1:20-cv-05914 (S.D.N.Y.) and *In Re: Ambry Genetics Data Breach Litigation*, No. 20-cv-00791 (C.D. Cal.) (“Ambry”) and presently serves as interim co-lead counsel in *In re Brinker Data Incident Litigation*, No. 18-cv-686 (M.D. Fla.). I have represented consumers in numerous privacy rights and data-breach cases, including serving as class counsel in *Torres, et al., v. Wendy’s International LLC*, No. 6:16-cv-210-Orl-18DAB (M.D. Fla.) (consumer payment card data breach); class counsel in *Brady, et al. v. Due North Holdings, LLC, et al.*, No. 1:17-cv-01313 (S.D. Ind.) (data breach class action involving employees’ W-2 forms); class counsel in *Foreman v. Solera Holdings, Inc.*, 6:17cv02002 (M.D. Fla.) (data breach class action involving employees’ W-2 forms); and co-lead counsel in *Linnins, et al., v. Timco Aviation Services, Inc.*, 16-cv-486 (M.D.N.C.) (data breach class action involving employees’ W-2 forms).

5. I have represented consumers in other national class actions, including as co-lead counsel in *Fuentes, et al. v. UniRush, LLC, et al.*, No. 1:15-cv-08372 (S.D.N.Y.) (class action involving lengthy disruption in service and access to financial accounts for more than 400,000 consumers nationwide resulted in approval of \$28.5m monetary relief for the class); class counsel in *McCoy v. North State Aviation, LLC*, 17cv346 (M.D.N.C.) (WARN Act case); and, class counsel in *Lewis, et al., v. Green Dot Corp., et al.*, No. 2:16-cv-03557 (C.D. Cal.) (class action involving disruption in service and access to financial accounts for more than 56,000 consumers nationwide resulted in approval of \$8.1m monetary relief for the class).

6. 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

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

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.

7. Subsequently, the Parties discussed the possibility of early settlement. To that end, the Parties filed a Joint Motion to Stay Case Pending Mediation (Doc. 18) on August 23, 2019. On August 26, 2019, the Court entered an Order (Doc. 20) granting the Parties' joint motion.

8. The Parties agreed to and did retain Steve R. Jaffe, a highly experienced mediator, to assist the Parties in settlement negotiations. Mr. Jaffe is an experienced and well-respected litigator, having litigated a wide variety of civil matters, from both the defense and plaintiff sides, throughout Florida and nationwide since 1984.

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 mediator Steven R. Jaffe and were able to reach a negotiated resolution to the Lawsuit on a class-wide basis that provides monetary relief to Class Members and obligates Defendant to take remedial measures to safeguard against the reoccurrence of a data breach.

12. While courteous and professional, the negotiations were hard-fought throughout and the settlement process was conducted at arm's length between experienced counsel with an understanding of the strengths and weaknesses of their respective positions in the Lawsuit. Throughout the negotiations, Mr. Jaffe was able to assist the Parties in reaching an agreement on the substantive terms of the Settlement. There was nothing collusive about the settlement negotiations or the ultimate Settlement reached. Lastly, attorneys' fees, costs, expenses, and service awards were negotiated only after all substantive terms of the Settlement were agreed upon by the Parties.

13. During the ensuing months, the Parties continued the exchange of information and negotiations as to the final details of the Settlement Agreement. Defendant provided confirming documentation from payment card processors regarding the number of payment card transactions during the relevant windows of exposure at each of the restaurant locations affected by the Data Breach, as well as additional detail on the customer contact information it maintains from its

customer loyalty program. Consequently, the Parties worked together to prepare a comprehensive set of settlement documents, which are embodied in the Settlement Agreement and the exhibits attached thereto. 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. 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.

15. 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. Further, through confirmatory discovery, Checkers has verified that it has implemented point of sale (P2P) encryption at its restaurants.

16. After the Court issues its Order granting preliminary approval of the Settlement, the Parties worked with Settlement Administrator Angeion Group to effectuate the Notice Plan approved by the Court.

17. Part of the Notice Plan was direct notice through members of Defendant's Flav-R-Hood loyalty program. The Notice Plan provided for one direct notice through email to the Flav-R-Hood members. Approximately two months into the Claims Period, the Parties held discussions and agreed for a second email notice to be delivered to Flav-R-Hood members who had not filed claims at that time.

18. The multi-tiered framework of benefits provided in this Settlement developed as a result of my experience in other payment card breach cases, numerous discussions with affected class members as to the types of injuries and damages suffered as a result of these disclosures, and actual settlement claims made in similar cases.

19. Through materials provided by Checkers during the course of this litigation, I am informed that the Class is composed of approximately 1,500,000 individuals. This number is an estimate based upon the approximate number of payment card transactions compromised as a result of the Data Breach. 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.

20. As mentioned above, 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.

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. 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.

23. I believe that the relief achieved through the settlement is close to if not the same relief we would have achieved had we taken the case to trial and succeeded.

24. The reaction of the Class has been extremely positive: more than 10,044 claims, no objections have been received, and only 19 opt-out has been received.

25. As set forth in previously filed firm resumes and declarations, my co-counsel and I have considerable experience in class actions and have litigated to resolution many, large data breach and privacy cases. I am confident, based on our collective, extensive experience as class action litigators that we had a full understanding of the facts at issue, and the strengths and

weaknesses of the legal allegations in the complaint. We were, therefore, in a position to evaluate the class claims and value of the settlement versus moving for certification and going to trial, and the viability of possible affirmative defenses.

26. 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.

27. 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 and that the settlement should be given final approval.

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