

**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

**ORDER CERTIFYING SETTLEMENT CLASS,
PRELIMINARILY APPROVING CLASS ACTION SETTLEMENT AND
DIRECTING NOTICE TO THE SETTLEMENT CLASS**

This matter came before the Court on Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement (Doc. # 43), under Federal Rule of Civil Procedure 23.

Plaintiff Breandan Cotter brought this class action case against Checkers Drive-In Restaurants, Inc. ("Defendant" or "Checkers") on June 6, 2019. (Doc. # 1). Subsequently, on July 2, 2019, Plaintiff Jack Dinh filed a complaint covering the same subject matter in the Central District California in an action styled *Jack Dinh v. Checkers Drive-In Restaurants, Inc.*, No. 8:19-cv-01310 (C.D. Cal.). For purposes of settlement, the Parties agreed to consolidate these matters into the present *Cotter* action (the "Litigation"). To this end, Plaintiffs Cotter and Dinh filed an amended complaint on April 28, 2020. (Doc. # 40). In the Amended Class Action Complaint ("Complaint"), Plaintiffs asserted claims for breach of implied contract, negligence, negligence per se, unjust enrichment, declaratory judgment, breach of confidence, violations of Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. §§ 501.201, *et seq* ("FDUTPA"), and

violations of California Civil Code §§ 1798.80, *et seq.* (the “CRA”) and California Unfair Competition Law, California Business & Professions Code §§ 17200, *et seq.* (“UCL”).

According to the Complaint, 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 as a result, Class Members’ personally identifiable information (“PII”) was stolen via malicious software installed by unauthorized third parties on the point-of-sale (“POS”) systems at Defendant’s Checkers & Rally’s restaurants from approximately December 17, 2015 and October 12, 2019 (the “Data Breach”). The Complaint also alleges that Defendant failed to provide timely and adequate notice to Plaintiffs and other Class Members that their PII had been stolen. Checkers denies the allegations in the Complaint.

After good faith, arm’s-length negotiations overseen by mediator Steven R. Jaffe, Esq., the Parties, through counsel, entered into a Settlement Agreement and Release (“Settlement Agreement” or “Settlement”) on a class-wide basis. The Parties have agreed to settle this action, pursuant to the terms of the Settlement Agreement, and subject to the approval and determination of the Court as to the fairness, reasonableness, and adequacy of the Settlement which, if approved, will result in dismissal of this action with prejudice.

The Settlement provides both injunctive and monetary relief. Under the Settlement, Defendant agrees to provide a cash payment for reimbursement of up to \$5,000.00 per Class member for documented out-of-pocket expenses and time spent dealing with the Data Breach or compensation in the form of four (4) vouchers of \$5.00 each that may be redeemed at any Checkers and Rally’s restaurant, for non-documented losses and time spent dealing with the repercussions of the Data Breach. Defendant has also agreed to take remedial, data security measures, including (1) mandatory cybersecurity and data privacy training for all managers within its organization,

including corporate-owned and franchisee-owned restaurants, over the next two years; and (2) ensuring that each corporate-owned and franchisee-owned restaurant will implement a solution that encrypts payment card data when it is read by the card acceptance device/point of sale system and routes the authorization message out to the payment card networks without the authorization message data being unencrypted on devices owned and managed by Defendant or its franchisees.

Having reviewed the Settlement Agreement, including the exhibits attached thereto, and good cause appearing based on the record, it is hereby ordered that Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement is granted as set forth herein (the "Preliminary Approval Order"). The Court hereby **ORDERS, ADJUDGES, and DECREES** as follows:

1. **Definitions.** The capitalized terms used in this Preliminary Approval Order shall have the same meaning as defined in the Settlement Agreement except as may otherwise be indicated.

2. **Class Certification for Settlement Purposes Only.** For settlement purposes only and pursuant to Federal Rule of Civil Procedure 23(b)(3) and (e), the Court provisionally certifies a class in this matter defined as follows:

All residents of the United States who made a credit or debit card purchase at any Affected Restaurant during the period of the Data Breach Incident.

The Settlement Class specifically excludes: (i) Checkers and its officers and directors; (ii) all Settlement Class Members who timely and validly request exclusion from the Settlement Class; (iii) the Judge or Magistrate Judge to whom the action is assigned and, any member of those Judges' staffs or immediate family members; 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 or occurrence of the Data Breach Incident or who pleads *nolo contendere* to any such charge.

The Court provisionally finds, for settlement purposes only, that: (a) the Settlement Class is so numerous that joinder of all Settlement Class Members would be impracticable; (b) there are issues of law and fact common to the Settlement Class; (c) the claims of the Representative Plaintiffs are typical of and arise from the same operative facts and seek similar relief as the claims of the Settlement Class Members; (d) the Representative Plaintiffs and Settlement Class Counsel will fairly and adequately protect the interests of the Settlement Class as the Representative Plaintiffs have no interests antagonistic to or in conflict with the Settlement Class and have retained experienced and competent counsel to prosecute this matter on behalf of the Settlement Class; (e) questions of law or fact common to Settlement Class Members predominate over any questions affecting only individual members; and (f) a class action and class settlement is superior to other methods available for a fair and efficient resolution of this controversy.

3. Representative Plaintiffs and Settlement Class Counsel.

Plaintiffs Breandan Cotter and Jack Dinh are hereby provisionally designated and appointed as the Representative Plaintiffs. The Court provisionally finds that the Representative Plaintiffs are similarly situated to absent Class Members and therefore typical of the Settlement Class and will be adequate Representative Plaintiffs.

The Court finds that the following counsel are experienced and adequate counsel and are hereby provisionally designated as Settlement Class Counsel pursuant to Federal Rule of Civil Procedure 23(g): Tina Wolfson and Bradley K. King of Ahdoot & Wolfson, PC, Jean Sutton Martin of Morgan & Morgan Complex Litigation Group, Abbas Kazerounian and Jason Ibey, Esq. of Kazerouni Law Group, APC.

4. Preliminary Settlement Approval. Upon preliminary review, the Court concludes that the proposed Settlement is fair, reasonable, and adequate to warrant providing notice of the

Settlement to the Settlement Class and accordingly it is preliminarily approved. Specifically, the Court in reaching this conclusion, has considered the factors set forth in Fed. R. Civ. P. 23(e), to determine whether the Settlement Agreement is “fair, reasonable, and adequate,” and hence whether the Court “will likely be able to” finally approve the Settlement, by considering whether:

- (A) the class representatives and class counsel have adequately represented the class;
- (B) the proposal was negotiated at arm’s length;
- (C) the relief provided for the class is adequate, taking into account:
 - (i) the costs, risks, and delay of trial and appeal;
 - (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
 - (iii) the terms of any proposed award of attorney’s fees, including timing of payment; and
 - (iv) any agreement required to be identified under Rule 23(e)(3); and
- (D) the proposal treats class members equitably relative to each other.

5. **Jurisdiction.** The Court concludes that it has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d)(2), and personal jurisdiction over the Parties before it for the purposes of the Settlement. Additionally, venue is proper in this District pursuant to 28 U.S.C. § 1391(a).

6. **Final Approval Hearing.** A Final Approval Hearing shall be held on **December 8, 2020, at 10:00 AM** in Courtroom 14B of the Sam M. Gibbons United States Courthouse, 801 North Florida Avenue, Tampa, Florida 33602 to determine, among other things, whether: (1) this matter should be finally certified as a class action for settlement purposes pursuant to Federal Rule of Civil Procedure 23(b)(3) and (e); (2) the Settlement should be finally approved as fair, reasonable, and adequate pursuant to Federal Rule of Civil Procedure 23(e); (3) the action should be dismissed with prejudice pursuant to the terms of the Settlement Agreement; (4) Settlement Class Members should be bound by the releases set forth in the Settlement Agreement; (5) the motion of Settlement Class Counsel for an award of attorneys’ fees, costs, and expenses (the “Fee

Request”) should be approved pursuant to Federal Rule of Civil Procedure 23(h); and (6) the motion of Representative Plaintiffs for Service Awards (the “Service Award Request”) should be approved.

Plaintiffs’ motion for final approval of the Settlement, Fee Request, and Service Award Request shall be filed with the Court at least **[45] days prior to the Final Approval Hearing**. By no later than **[21] days prior to the Final Approval Hearing**, the Parties shall file responses, if any, to any objections, and any replies in support of final approval of the Settlement and/or the Service Award Request and Fee Request.

7. **Administration.** The Court appoints Angeion Group, LLC as the Settlement Administrator, with responsibility for class notice and claims administration. Defendant shall pay all costs and expenses associated with providing notice to Settlement Class Members including, but not limited to, the Settlement Administrator’s fees.

8. **Notice to the Class.** The proposed Notice Program set forth in the Settlement Agreement, and the Claim Form, Publication Notice, Long Notice and E-Mail Notice attached to the Settlement Agreement satisfy the requirements of Federal Rule of Civil Procedure 23(c)(2)(B) and (e)(1) and are hereby approved. Non-material modifications to these Exhibits may be made without further order of the Court. The Settlement Administrator is directed to carry out the Notice Program in conformance with the Settlement Agreement.

No later than **30 days from the date of this Order** (the “Notice Date”), the Settlement Administrator shall commence the Notice Program, which shall be completed in the manner set forth in Section VII and Exhibit A of the Settlement Agreement.

9. **Findings and Conclusions Concerning Notice.** The Court finds that the form, content, and method of giving notice to the Settlement Class as described in Paragraph 8 of this

Order and the Settlement Agreement (including the exhibits thereto): (a) will constitute the best practicable notice to the Settlement Class; (b) are reasonably calculated to apprise Settlement Class Members of the pendency of the action, the terms of the proposed Settlement, and their rights under the proposed Settlement, including but not limited to their rights to object to or exclude themselves from the proposed Settlement and other rights under the terms of the Settlement Agreement; (c) are reasonable and constitute due, adequate, and sufficient notice to all Class Members and other persons entitled to receive notice; and (d) meet all applicable requirements of law, including Federal Rule of Civil Procedure 23(c) and (e), and the Due Process Clause(s) of the United States Constitution. The Court further finds that the Notice is written in plain language, uses simple terminology, and is designed to be readily understandable by Class Members.

10. **Class Action Fairness Act Notice.** Within **10 days after the filing of the motion for preliminary approval**, the Settlement Administrator shall have served or have caused to be served a notice of the proposed Settlement on appropriate officials in accordance with the requirements under the Class Action Fairness Act (“CAFA”), 28 U.S.C. § 1715(b).

11. **Exclusion from Class.** Any Settlement Class Member who wishes to be excluded from the Settlement Class must submit an exclusion request electronically on the Settlement Website, or mail a written notification of the intent to exclude himself or herself from the Settlement Class to the Settlement Administrator at the address provided in the Notice, postmarked no later than **120 days after entry of the Preliminary Approval Order** (the “Opt-Out Deadline”). The written notification must include the individual’s name and address; a statement that he or she wants to be excluded from the Action; and the individual’s signature.

The Settlement Administrator shall provide the Parties with copies of all completed opt-out notifications, and a final list of all who have timely and validly excluded themselves from the

Settlement Class, which Settlement Class Counsel may move to file under seal with the Court no later than **10 days prior to the Final Approval Hearing**.

Any Settlement Class Member who does not timely and validly exclude herself or himself from the Settlement shall be bound by the terms of the Settlement. If Final Judgment is entered, any Settlement Class Member who has not submitted a timely, valid written notice of exclusion from the Settlement Class shall be bound by all proceedings, orders, and judgments in this matter, including but not limited to the Release, including Settlement Class Members who have previously initiated or who subsequently initiate any litigation against any or all of the Released Parties relating to the claims and transactions released in the Settlement Agreement. All Class Members who submit valid and timely notices of exclusion from the Settlement Class shall not be entitled to receive any monetary benefits of the Settlement.

12. **Objections and Appearances**. A Settlement Class Member who complies with the requirements of this paragraph may object to the Settlement, the Service Award Request, or the Fee Request.

(a) Each Settlement Class Member desiring to object to the Settlement Agreement shall submit a timely written notice of his or her objection. To be timely, written notice of an objection in the appropriate form must be postmarked to the Clerk of the Court at the address listed in the Notice, no later than **120 days after entry of the Preliminary Approval Order** (the “Objection Deadline”).

For an objection to be considered by the Court, the objection must also set forth:

- a. the objector’s full name, address, email address (if any), and telephone number;
- b. information identifying the objector as a Settlement Class Member, including proof that the objector is a member of the Settlement Class;

- c. the objector's signature and the signature of the objector's duly authorized attorney or other duly authorized representative (along with documentation setting forth such representation);
- d. a written statement of all grounds for the objection, accompanied by any legal support for the objection the objector believes applicable;
- e. whether the objection applies only to the Settlement Class Member, a specific subset of the Settlement Class, or the entire Settlement Class;
- f. a statement confirming whether the objector intends to personally appear and/or testify at the Final Approval Hearing; and
- g. a list of all class action settlement agreements to which the objector has lodged an objection within the last five (5) years.

Any Settlement Class Member who fails to comply with the requirements for objecting in this Paragraph shall waive and forfeit any and all rights he or she may have to object to the Settlement Agreement, and shall be bound by all the terms of the Settlement Agreement, this Order, and by all proceedings, orders, and judgments in this matter, including, but not limited to, the Release in the Settlement Agreement if Final Judgment is entered.

Any Settlement Class Member, including a Settlement Class Member who files and serves a written objection, as described above, may appear at the Final Approval Hearing, either in person or through counsel hired at the Settlement Class Member's expense, to object to or comment on the fairness, reasonableness, or adequacy of the Settlement, the Service Award Request, or the Fee Request. If the objecting Settlement Class Member intends to appear at the Final Approval Hearing through counsel, he or she must also identify the attorney(s) representing the objecting Settlement Class Member who will appear at the Final Approval Hearing and include the attorney(s) name, address, phone number, e-mail address, and state bar(s) to which counsel is admitted, as well as the associated state bar numbers.

If Final Judgment is entered, any Settlement Class Member who fails to object in the manner prescribed herein shall be deemed to have waived his or her objections and shall be forever barred from making any such objections in this action or in any other proceeding or from challenging or opposing, or seeking to reverse, vacate, or modify any approval of the Settlement Agreement, the Service Award Request, or the Fee Request.

13. **Claims Process and Administration.** The Parties have agreed to a process for assessing and determining the validity and value of claims and a payment methodology to Settlement Class Members who submit a timely, valid claim form. The Court preliminarily approves the Claims Process described in Section 3.03 of the Settlement Agreement, and directs that the Settlement Administrator effectuate the distribution of settlement consideration according to the terms of the Settlement Agreement, should the Settlement be finally approved.

Settlement Class Members who qualify for and wish to submit a Claim Form shall do so in accordance with the requirements and procedures specified in the Notice and the Claim Form. If Final Judgment is entered, all Settlement Class Members who qualify for any benefit under the Settlement but fail to submit a claim in accordance with the requirements and procedures specified in the Notice and the Claim Form shall be forever barred from receiving any such benefit, but will in all other respects be subject to and bound by the provisions in the Settlement Agreement, the Release included in that Agreement, and the Final Judgment.

14. **Termination of Settlement.** This Order shall become null and void and shall be without prejudice to the rights of the Parties, all of whom shall be restored to their respective positions existing immediately before this Court entered this Order, if the Settlement is not finally approved by the Court or is terminated in accordance with the Settlement Agreement. In such event, the Settlement and Settlement Agreement shall become null and void and be of no further

force and effect, and neither the Settlement Agreement nor the Court's orders, including this Order, relating to the Settlement shall be used or referred to for any purpose whatsoever.

15. **Use of Order.** This Order shall be of no force or effect if Final Judgment is not entered or if there is no Effective Date and shall not be construed or used as an admission, concession, or declaration by or against Defendant of any fault, wrongdoing, breach, liability, or the certifiability of any class. Nor shall this Order be construed or used as an admission, concession, or declaration by or against the Representative Plaintiffs or any other Settlement Class Member that his or her claim lacks merit or that the relief requested is inappropriate, improper, unavailable, or as a waiver by any Party of any defense or claim he, she, or it may have in this litigation or in any other lawsuit.

16. **Stay of Proceedings.** Except as necessary to effectuate this Order, all proceedings and deadlines in this matter are stayed and suspended pending the Final Approval Hearing and issuance of the Final Judgment, or until further order of this Court.

17. **Continuance of Hearing.** The Court reserves the right to adjourn or continue the Final Approval Hearing and related deadlines without further written notice to the Class. If the Court alters any of those dates or times, the revised dates and times shall be posted on the website maintained by the Settlement Administrator.

18. **Summary of Deadlines.** The preliminarily approved Settlement shall be administered according to its terms pending the Final Approval Hearing. Deadlines arising under the Settlement Agreement and this Order include but are not limited to:

1. **Notice Deadline:** 30 days after entry of this Order
2. **Opt-Out and Objection Deadlines:** 120 days after entry of this Order

3. **Claims Deadline:** 120 days after entry of this Order

4. **Motion for Final Approval of the Settlement, Fee Request, and Service Award Request:** 45 days before the Final Approval Hearing

5. **Parties' responses, if any, to any objections, and any replies in support of final approval of the Settlement and/or the Service Award Request and Fee Request:** 21 days before the Final Approval Hearing

6. **Final Approval Hearing:** December 8, 2020, at 10:00 AM

The dates set in this Order should be used as appropriate in the Notices to the Class.

DONE and ORDERED in Chambers, in Tampa, Florida, on this 30th day of June, 2020.


VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE