COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.	SUPERIOR COURT DEPARTMENT CIVIL SESSION B
JULIE KESNER and DENNIS O'BRIEN, Individually and on behalf of all others similarly situated, Plaintiffs, v. UMASS MEMORIAL HEALTH CARE, INC., Defendant.	Case No. 2185 CV 01210

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

Plaintiffs Julie Kesner and Dennis O'Brien ("Plaintiffs"), on behalf of themselves and the putative Settlement Class,[1] respectfully submit this memorandum of law in support of their motion for preliminary approval of the Settlement Agreement entered into with Defendant UMass Memorial Healthcare, Inc. ("Defendant" or "UMMHC") on October 14, 2022, attached as Exhibit 1 to the concurrently filed Declaration of David Pastor ("Pastor Decl.").

I. INTRODUCTION

The Parties have reached an agreement to settle the above-captioned medical information data security incident class action (the "Action") on terms that provide substantial benefits to the Settlement Class. The Settlement requires UMMHC to create a $1.2 million non-reversionary common fund against which Settlement Class Members can make a claim for benefits from a menu of options. The Settlement Fund will also pay the costs of settlement administration, including Notice and Claims Administration Costs, the Attorneys' Fee, Cost and Expense Award, and payment of any Service Awards to the Class Representatives.

The proposed Settlement was the product of extensive, arm's length negotiations, including a full day mediation session before Hon. Bonnie H. MacLeod (Ret.) of JAMS followed by hours of additional negotiations between the Parties to finalize the terms of the Settlement. Pursuant to Mass. R. Civ. P. 23, Plaintiffs now seek this Court's approval to disseminate the Notice to the Settlement Class Members, and to set a date for a hearing to consider the fairness of the Settlement and Plaintiffs' counsel's forthcoming application for an Attorneys' Fee, Cost and Expense Award, and payment of Service Awards to the Class Representatives.

[1] All capitalized terms not defined herein shall have the same meanings as set forth in the Settlement Agreement ("Settlement Agreement" or "Agreement" or "SA").

If approved, the proposed Settlement will provide immediate and significant benefits to all persons affected by the Data Security Incident. As discussed below, Plaintiffs respectfully request that the Court preliminarily approve the Settlement because it will provide fair, reasonable, and adequate relief for the Class, includes a comprehensive Notice Program that is the best means of providing Notice under the circumstances, and satisfies the requirements of Mass. R. Civ. P. 23 and due process. Defendant assents to the relief requested in the motion. Because the Settlement is "within the range of possible approval," preliminary approval is appropriate.

II. FACTUAL AND PROCEDURAL BACKGROUND

This class action against UMMHC results from a Data Security Incident that allowed an unauthorized actor or actors to potentially access the personal identifying information ("PII") and personal health information ("PHI") (together "PII/PHI") of approximately 209,047 individuals on or about June 24, 2020. Class Action Complaint ("Complaint") ¶¶ 1, 3. UMMHC detected the intrusion on or about January 27, 2021 and began notifying victims of the Data Security Incident on or about October 15, 2021. *Id*. ¶ 5.

The Complaint was filed on November 8, 2021. It alleged, *inter alia*, that UMMHC failed to take adequate measures to protect putative class members' PII/PHI. On January 12, 2022, Defendant served a Motion to Dismiss under Mass. R. Civ. P. 12(b). Plaintiffs served their opposition on February 11, 2022, and Defendant replied and filed the Rule 9A motion package on February 21, 2022. The Court heard oral argument on the Motion to Dismiss on May 5, 2022.

During the pendency of Defendant's motion, the Parties engaged in a dialogue and discussed the prospect of early resolution. Pastor Decl. ¶ 4 As a result of these efforts, the Parties agreed to attend a mediation. *Id*. In advance of the mediation, the Parties submitted detailed mediation statements to the mediator. Plaintiffs requested informal discovery and UMMHC

produced many pages of documentation to Plaintiffs to allow for a meaningful evaluation of the claims and to better inform the parties in preparation of mediation. *Id*., ¶ 5, On June 16, 2022, Defendant filed an unopposed motion to stay proceedings pending the mediation, and this Court allowed the stay on June 21, 2022.

On August 2, 2022, the Parties engaged in a full day mediation before Hon. Bonnie H. MacLeod (Ret.) of JAMS. Pastor Decl., ¶ 6. Despite hard-fought efforts by each side, the mediation did not result in a settlement. *Id*. Accordingly, the Parties continued to engage in arm's-length negotiations during the following week, exchanging draft term sheets until they were able to reach an agreement in principle. *Id*. Thereafter, the Parties negotiated and finalized the details of the Settlement, exchanging drafts of the Settlement Agreement and its exhibits. *Id*., ¶ 7 Plaintiffs also obtained competitive bids from various experienced Settlement Administrators and thereafter chose Angeion Group ("Angeion") to act as the Settlement Administrator, subject to Court approval. *Id*., ¶ 9. The Settlement Agreement was finalized and executed on October 14, 2022. *Id*., ¶ 8. Plaintiffs now move the Court for preliminary approval of the Settlement and for certification of the Settlement Class.

III. SUMMARY OF THE SETTLEMENT

A. The Settlement Class Definition

Under the terms of the Settlement, the Parties agreed to certification of the following Settlement Class for settlement purposes only:

> [A]ll persons whose personal information was potentially compromised in the Data Breach.

S.A. ¶ 10(hh).[2] The Settlement Class consists of approximately 209,047 individuals. Pastor Decl., ¶ 10.

B. Settlement Benefits to Settlement Class Members

Pursuant to the Settlement, UMMHC will establish a $1,200,000 non-reversionary Settlement Fund. Class Members can elect cash payments for ordinary losses up to $150, lost time up to 3 hours at $25 per hour, and extraordinary documented losses up to $5,000. Claimants can also elect to receive 24 months of credit monitoring that includes $1,000,000 of identity theft insurance. In the alternative to these options, the Settlement allows Settlement Class Members to submit a claim for a cash payment, which is estimated to be approximately $40 but will be subject to a *pro rata* adjustment depending upon the number of claimants that participate in the Settlement.

C. Class Representative Service Awards

Class Counsel will make an application to the Court for $3,000, to be paid from the Settlement Fund, for each of the two Class Representatives in recognition of their efforts spent in prosecuting this action on behalf of the Settlement Class. SA, ¶ 61. The Parties did not discuss the payment of Service Awards to Class Representatives until after the substantive terms of the Settlement had been agreed upon. *Id.*

D. Attorneys' Fees, Costs, and Expenses

The Parties have agreed for Class Counsel to request the Court to approve an award of $400,000 for attorneys' fees and for reasonable costs and expenses incurred in prosecuting the litigation to be paid from the Settlement Fund. SA ¶ 60. The Parties did not discuss or agree upon

[2] "Excluded from the Class are UMass Memorial Health Care, Inc. and its affiliates, parents, subsidiaries, officers, agents, and directors, as well as the judge(s) presiding over this matter and the clerks of said judge(s)." SA ¶ 10(hh).

payment of attorneys' fees, costs, and expenses until after they agreed on all materials terms of relief to the Settlement Class. *Id*.

E. Settlement Administration and Notice

The Parties propose that Angeion serve as the Settlement Administrator subject to the Court's approval. Angeion is an experienced and nationally recognized class action settlement administrator and it will provide notice to the Settlement Class (as described in Section IV.E. below) and process Claims. All Settlement administration and notice expenses will be paid from the Settlement Fund. SA ¶ 26.

F. Settlement Class Members' Right to Object

Any Settlement Class Member may object to the Settlement and/or any application for attorneys' fees, expenses, costs, and Service Awards. A Class Member may object by filing an objection with the Court and serving the written objection(s) to the Settlement on Class Counsel and Defendant's Counsel, at the addresses set forth in the Long-Form Notice. SA, ¶¶ 54-56.

IV. THE PROPOSED SETTLEMENT SHOULD BE PRELIMINARILY APPROVED AND NOTICE SHOULD BE DISSEMINATED TO THE SETTLEMENT CLASS

A. Standards Governing Preliminary Approval

Public policy generally favors settlement as a means of resolving disputes. *See Hotel Holiday Inn de Isla Verde v. NLRB*, 723 F.2d 169, 173 (1st Cir. 1983). Indeed, "the law favors class action settlement." *In re Lupron Mktg. & Sales Practice Litig.*, 228 F.R.D. 75, 88 (D. Mass. 2005). By favoring the settlement of class action litigation, the law seeks to minimize the litigation expense on both sides, and to reduce the strain on judicial resources. *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995).[3] "Because settlement

[3] Courts in Massachusetts often look to federal class action case law because of the substantial similarities between Mass. R. Civ. P. 23 and its federal counterpart. *In re: Columbia Gas Cases*, Civil Action No. 1877CV01343-G (Mass Super. March 12, 2020) (Lang, J.).

of a class action, like settlement of any litigation, is basically a bargained exchange between the litigants, the judiciary's role is properly limited to the minimum necessary to protect the interests of the class and the public. Judges should not substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel." *Sniffin v. Prudential Ins. Co. of America*, 395 Mass. 415, 421 (1985). (internal quotation marks and citations omitted).

A Court's review of a proposed class action settlement generally involves three steps: 1) consideration of a written motion for preliminary approval; 2) dissemination of notice of the Settlement to Class Members; and 3) conducting a final approval hearing where, among other things, Class Members have an opportunity to present their views regarding the settlement. *See* Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* §§ 11.22 *et seq.* (5th ed. 2011); Fed. R. Civ. P. 23. If the Court finds the Settlement within the range of possible approval at the time of preliminary approval, notice of the Settlement will be given to Class Members, and a hearing scheduled to consider final settlement approval.

The burden at the preliminary approval stage is low: "the judge reviews the proposal preliminarily to determine whether it is sufficient to warrant public notice and a hearing. If so, the final decision on approval is made after the hearing." *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 57 (D. Mass. 2005). "Where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations and falls within the range of possible approval, preliminary approval is granted." *In re IPO Sec. Litig.*, 226 F.R.D. 186, 191 (S.D.N.Y. 2005). However, the Supreme Court has cautioned that, in reviewing a proposed class settlement, a court should "not decide the merits of the case or resolve unsettled legal questions." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981).

B. Preliminary Approval of the Settlement Is Appropriate

In deciding whether to approve a proposed settlement, the Court must determine whether it is fair, reasonable, adequate, and in the best interests of the class which will be affected by it. *Sniffin v. Prudential Ins. Co.*, 395 Mass. at 421. Relevant factors to this determination include: (1) the strength of the case for plaintiffs on the merits, balanced against the extent of the settlement offer; (2) the complexity, length, and expense of further litigation; (3) the nature and extent of opposition to the settlement;[4] and (4) the progress of the proceedings. *Id.* at 421–426 (citations omitted). The opinion of plaintiffs' counsel as to the desirability of settlement is an important consideration. There is a "strong initial presumption" that an arms-length settlement arrived at by counsel experienced in the type of litigation involved on the basis of sufficient information concerning the claims at issue is fair. Newberg on Class Actions, § 11.41.

Here, an examination of each of the above factors considered at the preliminary approval stage demonstrates that that the proposed Settlement Agreement is fair, reasonable, and adequate to all members of the Class.

1. Strength of the case for Plaintiffs on the merits is well-balanced against the extent of the settlement offer

Defendant disputes Plaintiffs' allegations and denies that it is liable for any harm caused to Plaintiffs from the cyberattack. No doubt Defendant will vigorously defend the case and has already filed an extensive motion to dismiss for failure to state a claim upon which relief can be granted. While Plaintiffs have arguments and authorities that can support their allegations, the number of issues in this case, which centers on a developing area of law—data security incident litigation—creates significant uncertainty. Even assuming Plaintiffs defeat the pending motion to

[4] The nature and extent of opposition cannot be adequately evaluated and addressed at this stage, since Class members have not yet received notice of the Settlement and accordingly, have not had an opportunity to object.

dismiss, there is no guarantee that the Court or a jury would find Plaintiffs' arguments more persuasive during a trial or subsequent appeals. Thus, despite Plaintiffs' confidence in the strength of this case, numerous legal issues and factual disputes exist that undermine the certainty of a more favorable outcome for the Class.

The Parties agree that the value of the Settlement is fair and reasonable given the inherent risks involved with litigation. The Plaintiffs believe their claims are strong, and UMMHC feels the same is true with respect to its defenses. The Settlement is a compromise of claims designed to offer the flexibility to adapt to Class Members' varying exposure levels: the choice to file a claim for reimbursement of certain losses and credit monitoring, or in the alternative, a straight cash payment, extends to Class Members the ability to receive reimbursement amounts commensurate with their injury. Section III(B), *supra*; *see In re Lupron Mktg. & Sales Pracs. Litig.*, 345 F. Supp. 2d at 138 (finding the proposed settlement warranted preliminary approval because, *inter alia*, "the proposed settlement amount is sufficiently within the range of reasonableness").

While Plaintiffs believe they have a path forward past the motion to dismiss and viable arguments for class certification, on balance, the level of benefits under and the high-quality nature of the Settlement weigh in favor of the early resolution achieved here. The amount offered in Settlement—a $1.2 million non-reversionary cash fund—is well-balanced against the hurdles Plaintiffs will have to overcome to find success later down the road.

2. The complexity, length, and expense, of further litigation justify the robust Settlement secured on behalf of the Settlement Class

Due at least in part to the cutting-edge and innovative nature of, and the rapidly evolving law surrounding data security incident cases, they generally face substantial hurdles in litigation. The risks and uncertainties that are inherent in any litigation are even more pronounced in data security incident cases. *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). This field of litigation is evolving; there is no guarantee of the ultimate result. *See Gordon v. Chipotle Mexican Grill, Inc*., 2019 WL 6972701, at *1 (D. Colo. Dec. 16, 2019) ("Data breach cases . . . are particularly risky, expensive, and complex").

Litigating data security incident cases extensively carries much risk, including pre-trial risks of obtaining class certification and defeating summary judgment. And plaintiffs in data security incident cases often allege injuries, such as the risk of future identity theft, and loss of control of their sensitive information, which are the subject of intense controversy. Continued litigation would likely involve costly fact and expert discovery particularly with respect to injury and damages, motions for summary judgment, a vigorously contested motion for class certification, and one or more interlocutory appeals, all of which would delay final resolution. Even if class certification is obtained and Plaintiffs are successful at trial, UMMHC would likely appeal, causing further delay and raising expenses. Simply put, litigating this case to a favorable conclusion will require a considerable amount of time and resources.

The Settlement allows for Class Members to obtain benefits now—as opposed to potentially waiting for years—and eliminates the possibility of receiving no benefits. Resolution in the near-term also helps mitigate any harm that the Settlement Class Members may have suffered by providing access to credit monitoring benefits in the near-term, rather than after prolonged litigation. The value achieved through the Settlement is guaranteed, whereas chances of prevailing on the merits are uncertain—especially where serious questions of law and fact exist, which is common in data security incident litigation.

Plaintiffs' counsel and their respective firms have significant experience in class action litigation and have negotiated many substantial class action settlements—in particular, data

security incident litigation settlements—in state and federal courts across the country. Pastor Decl., Ex. 1; Barnow Decl., Ex. 1; Ferich Decl., Ex. 1. Here, Plaintiffs' counsel have conducted a thorough investigation and, as noted above, have obtained significant information to fully comprehend the relative merits of the factual and legal contentions, as well as the considerable risks associated with further litigation. It is Plaintiffs' counsel's well-informed opinion that, given the uncertainty and further substantial risk and expense of pursuing the Action through contested class certification proceedings, trial and appeal, the proposed Settlement is fair, reasonable, and adequate, and in the best interests of the Settlement Class. Accordingly, the complexity, length, and expense of further litigation favors settlement, and weighs in favor of preliminary approval.

3. The progress of the proceedings favors settlement now

Plaintiffs have obtained sufficient information through pre-mediation discovery provided by Defendant in order to fully understand and evaluate the strengths and weaknesses of their claims and to be able to assess the fairness, adequacy, and reasonableness of the Settlement. In addition, Plaintiffs have expended significant efforts in their initial investigation of this matter, researching and preparing their Complaint, researching and preparing the opposition to Defendant's motion to dismiss, and conducting their continued factual investigation of the Data Security Incident. Pastor Decl., ¶ 11. The Settlement provides a fair, reasonable, and adequate compromise at a critical stage of the litigation, before costs associated with discovery, depositions, class certification proceedings, and dispositive motions begin to accumulate. This factor also weighs in favor of settlement now.

4. Additional considerations weigh in favor of preliminary approval

a. The Settlement provides immediate relief and avoids delay

The Settlement will produce substantial benefits for the class. The value of these benefits is enhanced by the fact that they will be provided to Class members now, without the delay of

protracted litigation, since the extent of Class Members' exposure to risk from the data security incident increases with time: the longer an individual has their PII/PHI in unauthorized hands and without adequate security measures, the greater the chances that their PII/PHI will be misused.

b. The Settlement has been achieved through good faith arms-length negotiations and without collusion

As discussed above, the Settlement is the result of prolonged arm's length negotiations, including a mediation and numerous telephone conferences and e-mails directly between experienced counsel who had a comprehensive understanding of the strengths and weaknesses of each party's claims and defenses. Pastor Decl., ¶¶ 11-12. The negotiations were facilitated by an experienced mediator—Judge MacLeod (Ret.) of JAMS. *Id*., ¶ 6. Courts recognize that the involvement of a neutral mediator in the settlement process confirms a settlement as non-collusive. *See, e.g., G. F. v. Contra Costa Cnty.*, 2015 WL 4606078, at *13 (N.D. Cal. July 30, 2015) ("[T]he assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive.") (internal quotation marks and citation omitted). Moreover, the Settlement was reached only after Class Counsel analyzed information provided by UMMHC in pre-mediation discovery and performed other research and investigation related to the Data Security Incident. Pastor Decl., ¶ 11. Given these facts, the Settlement is clearly non-collusive.

C. The Settlement Class Meets the Rule 23 Requirements and Should Be Conditionally Certified

As the Supreme Court has recognized, the "settlement only class" has become a "stock device" and all federal Circuits have recognized its utility. *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 618 (1997). When granting preliminary approval of a class action settlement, it is appropriate for a court to certify a class for settlement purposes only. *Amchem*, 521 U.S. at 620.

1. <u>The Requirements Under Mass. R. Civ. P. 23(a) Are Satisfied:</u>

A class may be certified when all four of the prerequisites for class certification are met – (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation – and the Court determines that questions of law and fact predominate over any questions affecting class members individually, and that a class action is superior to other methods of adjudicating the claims. Mass. R. Civ. P. 23(a), (b); *Weld v. Glaxo Wellcome Inc.*, 434 Mass. 81, 86 (2001); *Carpenter v. Suffolk Franklin Sav. Bank*, 370 Mass. 314, 318 (1976).

a. The Class Is Sufficiently Numerous

Here, the Class is sufficiently numerous to qualify for certification. The numerosity requirement is satisfied where joinder of all parties would be impractical, unwise or imprudent. *See Brophy v. School Comm. of Worcester*, 6 Mass. App. Ct. 731, 735 (1978). According to information provided by Defendant, there are 209,047 Class Members, resulting in a more than sufficient number of Settlement Class Members to satisfy numerosity. In determining whether joinder would be impractical, the court considers efficiency, limitation of judicial resources, and expenses to the plaintiff. *Brophy*, 6 Mass. App. Ct. at 736. For the same reasons as discussed below regarding superiority, these factors show that the numerosity factor is satisfied here.

b. There Are Common Questions of Law and Fact

In addition, the claims of the Class satisfy both the commonality requirement[5] and the requirement that issues common to Settlement Class Members predominate over any individual issues. To satisfy these requirements, it is not essential that the interests of each Settlement Class member be identical; they need only arise out of a "common relationship to a definite wrong." *Godfrey v. Mass. Med. Serv.*, 359 Mass. 610, 620 (1971). Courts have noted that "[t]he

5 The commonality requirement dictates that plaintiffs seeking class certification must demonstrate that "all persons whom they profess to represent have a common interest in the subject matter of the suit and a right and interest to ask for the same relief." *Spear v. H.V. Greene Co.*, 246 Mass. 259, 266 (1923).

commonality requirement is a 'low bar.'" *Gonzalez v. XPO Last Mile, Inc*., 2022 WL 95930 at *4 (D. Mass. Jan. 10, 2022).

Here, the interests of all Settlement Class Members are the same because they arise out of the same Data Security Incident, and all Settlement Class members were affected in the exact same manner by the acts and omissions alleged in the Complaint. The answer to the question of whether Defendant is found, as a result of the alleged conduct, to have been negligent or to have breached its fiduciary or contractual duties to Plaintiffs will be the same for Plaintiffs and all other Settlement Class members. The terms of the express and implied contracts between Plaintiffs and Settlement Class Members and Defendant will be same for all Settlement Class Members: all Settlement Class Members contracted with Defendant to provide medical services and, as part of that contract, Defendant solicited from all Settlement Class Members, and all Settlement Class Members provided, their PII and PHI to Defendant. Finally, all Settlement Class Members were injured by the alleged conduct in the same manner, notwithstanding some immaterial individual differences.

c. The Class Representatives' Claims Are Typical of the Claims of the Settlement Class

Plaintiffs also satisfy the typicality requirement. "Typicality is established when there is a sufficient relationship . . . between the injury to the named plaintiff and the conduct affecting the class, and the claims of the named plaintiff and those of the class are based on the same legal theory[;] [a] plaintiff normally satisfies the typicality requirement with an allegation that the defendant acted consistently toward the [representative and the] members of a putative class." *Weld*, 434 Mass. at 87 (internal quotation marks and citations omitted).

Here, the alleged injuries to Plaintiffs all arise from the same event—the Data Security Incident—and Defendant's alleged data privacy shortcomings. Further, Plaintiffs' claims and the

Settlement Class Members' claims are all based on the same underlying theories, *i.e.*, that Defendant's failures with respect to Class Members' PHI/PII constituted negligent conduct on Defendant's part, as well as breaches of its contractual duties. Accordingly, the Court should find that the typicality requirement is met.

d. Class Representatives and Counsel Adequately Represent Class Members

Plaintiffs are adequate representatives of the Class. To satisfy the adequacy requirement, a plaintiff need only "show first that that the interests of the representative party will not conflict with the interests of any of the class members and second, that counsel chosen by the representative party is qualified, experienced, and able to vigorously conduct the proposed litigation." *Adikhanov v. Action Emergency Mgmt. Services, Inc*., 2021 WL 3292613 at *3 (Mass. Super. Apr. 16, 2021) (internal quotation marks and citations omitted). There are no conflicts here between Plaintiffs' interests and the interests of the Settlement Class Members, nor has the presence of any such conflicts been suggested.

In addition, Plaintiffs' counsel and their respective firms have decades of combined experience as vigorous class action litigators—with a particular emphasis in cybersecurity incident litigation—and are well suited to advocate on behalf of the Settlement Class, as demonstrated by the declarations of Plaintiffs' counsel submitted herewith.[6] Moreover, Plaintiffs' counsel put their collective experience to use in negotiating an early-stage settlement that guarantees immediate, significant relief to Settlement Class Members, as discussed at length herein. Section III.B. Accordingly, the adequacy requirement is satisfied. *See Cohen v. DiPaolo*, 1995 WL 419942, at *4 (Mass. Super. July 13, 1995).

2. The Requirements Under Mass. R. Civ. P. 23(b) Are Satisfied

6 *See* generally Barnow Decl., Ferich Decl., and Pastor Decl.

Rule 23(b) further requires that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Mass. R. Civ. P. 23(b). Both of those requirements, predominance and superiority, are met here.

a. Questions of law and fact predominate over individual issues

The predominance requirement of Mass. R. Civ. P. 23(b) is satisfied by a sufficient constellation of common issues that that bind class members together. *Weld,* 434 Mass at 92, *citing Waste Mgt. Holdings, Inc. v. Mowbray,* 208 F.3d 288, 296 (1st Cir. 2000). Further, predominance cannot be reduced to a single-issue test. *Id; see also Hochschuler v. G.D. Searle & Co.,* 82 F.R.D. 339 (N.D. Ill. 1978) (The Court must find that "the group for which certification is sought seeks to remedy a common legal grievance").

Courts routinely recognize that the types of common issues arising from data security incidents predominate over any individualized issues. *See, e.g., In re Heartland Payment Sys., Inc. Cust. Data Sec. Breach Litig*., 851 F. Supp. 2d 1040,, 1059 (S.D. Tex. 2012) (finding predominance satisfied in data security incident case); *In re Anthem, Inc. Data Breach Litig*., 327 F.R.D. 299, 312–15 (N.D. Cal. Aug. 15, 2018 (finding predominance was satisfied because "Plaintiffs' case for liability depend[ed], first and foremost, on whether [the defendant] used reasonable data security to protect Plaintiffs' personal information," such that "the claims rise or fall on whether [the defendant] properly secured the stolen personal information," and that these issues predominated over potential individual issues). This case is no different.

The facts discussed above show that not only are there common issues of fact and law in this case, but those common issues also predominate over any individual issues.

b. A class action is superior to other available methods

Second, a class action is superior to other available means of adjudicating this controversy because the potentially small individual financial interests of each Settlement Class Member would not justify the financial burden of each Settlement Class Member individually prosecuting claims on his or her own. *See Hazel's Cup & Saucer v. Around The Globe Travel, Inc.*, 86 Mass. App. Ct. 164, (2014):

> As the Supreme Judicial Court has explained, "[T]he policies of judicial efficiency and access to courts that underlie the consumer class action suit [are that] it aggregates numerous small claims into one action, whose likely range of recovery would preclude any individual plaintiff from having his or her day in court."

Id. at 166 (quoting *Weld*, 434 Mass. at 93).

Individualized litigation carries with it great uncertainty, risks and costs, as well as the potential for varying and inconsistent results and causes judicial burdens from adjudication of the same issues in multiple trials, including trials in each of the lawsuits being settled herein. Therefore, the policies referenced above support satisfaction of the superiority requirement here and certification of the Settlement Class.

D. The Court Should Appoint Plaintiffs' Counsel as Class Counsel and Plaintiffs as Class Representatives

While Mass. R. Civ. P. 23 contains no counterpart to the Federal Rule 23(g) lead counsel appointment provisions, the Federal Rule is compelling here. "An order certifying a class action . . . must also appoint class counsel under Rule 23(g)." Fed. R. Civ. P. 23(c)(1)(B). In appointing class counsel, courts should consider: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A).

The work of proposed Class Counsel in this action to date, as well as their experience prosecuting complex litigation matters, demonstrate that proposed Class Counsel are well-qualified to represent the Settlement Class. Pastor Decl., ¶¶ 20-23, Ex. 2; Barnow Decl., ¶¶ 3–11, Ex. 1; Ferich Decl., ¶¶ 3-31, Ex. 1. Accordingly, the Court should appoint David Pastor of Pastor Law Office LLP, Ben Barnow and Anthony L. Parkhill of Barnow and Associates, P.C., and Andrew W. Ferich of Ahdoot & Wolfson, PC as Class Counsel. The Court should also appoint, as Class Representatives, Plaintiffs Julie Kesner and Dennis O'Brien, who have ably represented the interests of all class members.

E. The Form and Content of the Proposed Notice to the Class Are Sufficient

Proper notification to class members is meant to ensure that absent class members may have an opportunity to appear and present objections and/or defenses if they so desire. Mass. R. Civ. P. 23(d). The primary concern regarding class members and their notification is the protection of their respective due process rights. *See Spence v. Reeder,* 382 Mass. 398, 408-409 (1981). If Class Members' interests are fairly and adequately represented, then their due process rights have been protected. *See id.*

Under the Settlement, direct Notice will be provided to Settlement Class Members by the Administrator via U.S. Mail for Settlement Class Members for whom the Settlement Administrator has a valid address. SA ¶ 43. The Settlement allows for additional Notice via publication to the extent such notice is deemed appropriate by the Settlement Administrator in consultation with the Parties in order to provide the best notice practicable under the circumstances. *Id*. ¶ 29. Within 30 days following the Notice Date, the Settlement Administrator will mail the Postcard Notices to all Settlement Class Members by first class United States mail. The Settlement Administrator will mail a Claim Form to each Settlement Class Member who requests one.

If any Short-Form Notice is returned by the Postal Service as undeliverable, the Settlement Administrator will re-mail the Postcard Notice to the forwarding address, if any, provided by the Postal Service on the face of the returned mail.

Any publication Notice (if deemed necessary) will be conducted no later than 30 days following entry of the Preliminary Approval Order (i.e., by the Notice Date). Also, no later than 30 days following entry of the Preliminary Approval Order, and prior to the mailing of the Postcard Notice to all Settlement Class Members, the Settlement Administrator will create a dedicated Settlement Website where Class Members can access the Complaint, Postcard Notice, Long-Form Notice, Claim Form, this Settlement Agreement, and other relevant settlement and court documents to be available on the Settlement Website. Claimants will be able to submit their claims via the website, which is to be maintained from the Notice Date until 60 days after the Claims Deadline has passed.

This Notice Program is robust. Here, both the form and content of the Notice to the Class are sufficient and should be approved by the Court. As outlined in the Proposed Order Preliminarily Approving Settlement, the Parties have jointly selected Angeion as the Settlement Administrator. The Notice documents are clear and concise and will directly apprise Settlement Class Members about all the information they need to know concerning the Settlement, including the Final Approval Hearing (date, time, and location), the essential terms of the Settlement, the and the process for filing Claim Forms and obtaining the benefits under the Settlement. The Notice will also provide information concerning Class Counsel's and Plaintiffs' application for attorneys' fees, costs, and expenses, and the Class Representative Service Awards, and will set forth the procedure for objecting to the Settlement and to the attorneys' fees, costs, expenses, and Service Awards. The proposed Notice Plan is "reasonably calculated, under all the circumstances, to

apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). Thus, the proposed method of Notice described above satisfies due process requirements. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974).

Plaintiffs' counsel submit that the Notice fairly apprises Settlement Class Members of their rights with respect to the Settlement, including their rights to participate in or object to the Settlement. The Notice Program represents the best notice practicable under the circumstances and should be approved by the Court.

V. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully submit that the Settlement Class be preliminarily certified and that the proposed Settlement be preliminarily approved by the Court, allowing notification to be sent to Settlement Class Members of the terms of the Settlement and the date, time, and location of the Settlement Hearing. Plaintiffs respectfully request that the Court enter the Proposed Order submitted herewith, which contains a schedule for the events related to settlement approval.

Dated: October 14, 2022

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