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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF TULARE

In re HAPY BEAR SURGERY CENTER DATA SECURITY INCIDENT LITIGATION

This Document Relates To: All Actions

Case No. VCU307987
(Assigned for all purposes to Hon. Gary M. Johnson, Dept. 7)

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

HEARING DATE: September 16, 2024
TIME: 8:30 A.M.
DEPT. 7

COMPLAINT FILED: April 15, 2024

Plaintiffs David Underwood and Duncan Meadows ("Plaintiffs") submit this Memorandum in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement.

I. INTRODUCTION

The Parties have reached a Settlement to resolve all claims arising from the data security incident announced by Hapy Bear Surgery Center, LLC ("HBSC" or "Defendant") that occurred on or around December 27, 2023 (the "Data Security Incident" or "Data Incident"). The Settlement provides significant benefits to Settlement Class Members, including a non-reversionary settlement fund in the amount of $607,500 and $330,000 in cyber security hardening measures. The non-reversionary settlement fund will be used to pay for (1) Compensation for Economic Losses including for (i) documented out-of-pocket expenses and up to $500 per individual and (ii) Reimbursement for Lost Time up to four hours per individual at the rate of $25 per hour ($100 per individual); (2) Compensation for Extraordinary Losses up to $7,500 per individual; (3) Two years of additional Credit Monitoring; (4) $50 payment to all California residents; (5) Costs of Claims Administration; (6) service awards; and (6) attorneys' fees and litigation expenses.

The Settlement is a strong result for the Settlement Class, securing valuable benefits while eliminating the risks of continued litigation. The Settlement is fair, reasonable, and adequate and meets the requirements of Section 382 of the California Code of Civil Procedure. Accordingly, Plaintiffs respectfully request the Court preliminarily approve the parties' Settlement Agreement and enter an order that:

(1) Certifies the Settlement Class for purposes of settlement only;

(2) Preliminarily approves the Settlement Agreement attached as Exhibit A to the Declaration of Jason M. Wucetich;

(3) Appoints Proposed Settlement Class Counsel Daniel Srourian of Srourian Law Firm, P.C. and Jason M. Wucetich of Wucetich & Korovilas LLP, as Settlement Class Counsel;

(4) Appoints Plaintiffs David Underwood and Duncan Meadows as Class Representatives;

(5) Approves the use of a claim form substantially similar to that attached as Exhibit 1 to the Settlement Agreement;

(6) Approves a customary long form notice ("Long Notice") to be posted on the settlement website and the customary short form notice to be mailed to Settlement Class Members (the "Short Notice") in a form substantially similar to the one attached as Exhibit 2 to the Settlement Agreement;

(7) Directs Notice to be sent to the Settlement Class in the form and manner proposed as set forth in the Settlement Agreement and Exhibit 2 attached thereto;

(8) Appoints EAG Gulf Coast LLC to serve as the Notice Specialist and Claims Administrator; and

(9) Sets a hearing date and schedule for final approval of the settlement and consideration of Settlement Class Counsel's motion for award of fees, costs, expenses, and service awards.

II. CASE SUMMARY

a. Factual Allegations

On or around April 11, 2024, Defendant HBSC issued a Notice of Security Incident acknowledging that it was the victim of a cyberattack perpetrated against it on or around December 27, 2023. Thereafter, HBSC launched an investigation and determined that an unauthorized person accessed information on its systems on or around December 27, 2023. The investigation resulted in the determination that files containing individuals' Private Information had been potentially accessed in the Data Incident, including patients' names, information

regarding their care with HBSC and health and medical related information. The Data Incident affected approximately 109,161 individuals, including Plaintiffs. *Id.*

b. The Consolidated Complaint

Plaintiffs have alleged several causes of action pertaining to the Data Incident: (1) negligence; (2) negligence per se; (3) breach of implied contract; (4) violation of the California Confidentiality of Medical Information Act; (5) violation of California's Unfair Competition Law; (6) unjust enrichment; (7) declaratory judgment; (8) violation of the California Consumer Records Act; and (9) invasion of privacy. (*See generally*, Consolidated Complaint ("Compl.,").)

Plaintiffs' first and second causes of action seeks to hold HBSC liable in negligence. The gravamen of Plaintiffs' negligence claim is that, although the third-party hackers' activities caused harm, HBSC played a role in failure to prevent the harm from occurring. Plaintiffs further allege that HBSC's actions and inactions—failing to provide adequate security measures, failing to heed the warning signs of probable hacking activity, and failing to timely disclose notice of the hack—caused foreseeable harm to Plaintiffs and the Class. *Id*., at ¶¶ 107-38. Plaintiffs assert that courts across the country recognize viable negligence claims under similar circumstances. *See, e.g.*, *In re Target Corp. Customer Data Sec. Breach Litig.*, 64 F. Supp. 3d 1304, 1309 (D. Minn. 2014); *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 693 (7th Cir. 2015).

Plaintiffs' third claim is for a breach of implied contract. Plaintiffs allege that in the course of their care and treatment, HBSC implicitly promised to safeguard Plaintiffs' and Class members' Private Information through Defendant's privacy notice and industry customs. *Id.* Plaintiffs further allege that HBSC breached these promises to Plaintiffs and Class members by failing to prevent the Data Incident, including by failing to sufficiently encrypt or otherwise protect Plaintiffs' and Class members' Personal Information. Compl. at ¶¶ 139-147. Plaintiffs assert that accordingly, Plaintiffs and Class members have viable claims for breach of implied contract as well. *See, e.g.*, *Fero v. Excellus Health Plain, Inc*., 236 F. Supp. 3d 735, 761 (W.D.N.Y. 2017) (allegations that privacy notices were incorporated by reference in contracts

with healthcare providers and insurers, which could be read to reflect a definite promise by provider to maintain the security of the personal information that it collected and stored on its networks, and that providers and insurers failed to comply with the privacy policies, leading to data breach, plausibly stated breach of contract claim).

Plaintiffs' fourth cause of action alleges HBSC's conduct violated California's Confidentiality of Medical Information Act ("CMIA"). Cal. Civ. Code §§ 56-56.37. Compl. at ¶¶ 148-153.The CMIA prescribes: "[a] provider of health care, [a] health care service plan, or [a] contractor shall not disclose medical information ...." and any such entity that "negligently creates, maintains, preserves, stores, abandons, destroys, or disposes of medical information ..." is liable under the CMIA. Cal. Civ. Code §§ 56.10, 56.101 (emphasis added). The CMIA states a "contractor" is a "medical group, independent practice association, pharmaceutical benefits manager, or ... medical service organization [that] is not a health care service plan or provider of health care." *Id.* § 56.05(d) (emphasis added). The CMIA states a "provider of health care" is "any clinic, health dispensary, or health facility" licensed under certain California codes, and that a "health care service plan" is "any entity regulated pursuant" to certain California health and safety code statutes. *Id.* § 56.05(m), (g) (emphasis added). Plaintiffs assert that under the circumstances, Plaintiffs have viable claims for violation of the CMIA. *See, e.g.*, *Corona v. Sony Pictures Entm't, Inc.*, No. 14-CV-09600 RGK EX, 2015 WL 3916744, at *8 (C.D. Cal. June 15, 2015) (finding plaintiffs stated claims for violation of the CMIA in data breach case).

Plaintiffs' and Class Members' fifth claim against HBSC is for violation of California's Unfair Competition Law ("UCL"). Plaintiffs and Class Members allege that Defendant failed to adequately safeguard Plaintiffs' and Class Members' Private Information, in violation of California Civil Code § 1798.150, and made material misrepresentations such as promising to safeguard Plaintiffs' and Class members' Private Information. Compl., at ¶¶ 154-164. Plaintiffs assert that courts in California have recognized the applicability of the UCL under similar circumstances. *See, e.g.*, *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 996

F. Supp. 2d 942, 992 (S.D. Cal. 2014), order corrected, No. 11MD2258 AJB (MDD), 2014 WL 12603117 (S.D. Cal. Feb. 10, 2014); *In re iPhone Application Litig*., 844 F. Supp. 2d 1040, 1072 (N.D. Cal. 2012); *In re Experian Data Breach Litig*., No. SACV151592AGDFMX, 2016 WL 7973595, at *9 (C.D. Cal. Dec. 29, 2016). Plaintiffs assert that accordingly, Plaintiffs and Class members have viable claims.

Plaintiffs' sixth claim is for unjust enrichment. Plaintiffs allege that Defendant accepted and was aware of the benefit that Plaintiffs and Class Members conferred upon Defendant (the provision of their Private Information to be used to provide medical services and collect payment) in exchange for properly securing their Personal Information. Compl., at ¶¶ 165-73. Plaintiffs further allege that Defendant failed to do so, and instead, enriched itself by saving the costs it reasonably should have expended on data security measures to secure Plaintiffs' and Class members' Personal Information. *Id*. Plaintiffs assert that accordingly, Plaintiffs and Class members have viable claims for unjust enrichment. *See, e.g.*, *In re Verity Health Sys. of California, Inc*., No. 2:18-BK-20151-ER, 2019 WL 2896189, at *7 (Bankr. C.D. Cal. May 24, 2019) (claim for unjust enrichment sustained in data breach action where claims were "grounded in principles of restitution").

Plaintiffs' seventh cause of action is for declaratory judgment. Compl., at ¶¶ 174-181. Plaintiffs allege that an actual controversy has arisen in the wake of the HBSC Data Incident regarding its present and prospective common law and other duties to reasonably safeguard its customers and their employees' personal information, and regarding whether HBSC is currently maintaining data security measures adequate to protect Plaintiffs and class members from further data breaches that compromise their personal information. Plaintiffs seek declaratory relief on these issues.

Plaintiffs' and Class Members' eighth claim against HBSC is for violation of California's Consumer Records Act ("CCRA"). Plaintiffs and Class Members allege that Defendant was unreasonably delayed in notifying Plaintiffs and Class Members of the Data Incident, notifying

Plaintiffs and Class Members fifty-nine days after the Incident's occurrence. Compl., at ¶¶ 182-196. Plaintiffs assert that courts in California have recognized the applicability of the CCRA under similar circumstances. *See, e.g.*, *Stasi v. Inmediata Health Grp. Corp*., 501 F. Supp. 3d 898, 925 (S.D. Cal. 2020) (plaintiffs alleged a plausible claim based on violations of the CCRA by alleging that by taking 81 days to inform patients of data breach, medical billing provider acted with unreasonable delay).

The crux of Plaintiffs' ninth cause of action—invasion of privacy (Compl., at ¶¶ 197-219)—is that HBSC failed to prevent an intrusion into Plaintiffs' and Class Members' privacy that would be highly offensive to a reasonable person, *i.e*., failing to prevent third-party hackers from gaining access to their private medical records. Plaintiffs assert that numerous courts have recognized a claim for invasion of privacy for the unlawful access of personal information. *See, e.g.*, *In re Nickelodeon Consumer Privacy Litig*., 827 F.3d 262, 293 (3d Cir. 2016), *cert. denied sub nom. C. A. F. v. Viacom Inc*., 137 S. Ct. 624 (2017); *Kausch v. Wilmore*, No. SACV-07-817-AG, 2009 WL 481346, at *4 (C.D. Cal. Feb. 24, 2009); *McKenzie v. Allconnect, Inc.*, 369 F. Supp. 3d 810, 819 (E.D. Ky. 2019) *Capitol Records, Inc. v. Weed*, No. 2:06-cv-1124, 2008 WL 1820667, at *6 (D. Ariz. Apr. 22, 2008); *Bray v. Cadle Co.*, No. 4:09-cv-663, 2010 WL 4053794, at *16 (S.D. Tex. Oct. 14, 2010); *Rodgers v. McCullough*, 296 F. Supp. 2d 895, 904 (W.D. Tenn. 2003); *Smith v. Bob Smith Chevrolet, Inc.*, 275 F. Supp. 2d 808, 821–22 (W.D. Ky. 2003); *see also* Restatement (Second) of Torts § 652A(1) ("One who invades the right of privacy of another is subject to liability for the resulting harm....")). Plaintiffs assert that thus, Plaintiffs and Class members have viable claims for invasion of privacy.

Plaintiffs add that despite their assertion that grounds exist for each of Plaintiffs' claims, none are certain to resolve in Plaintiffs' favor on the merits. Further litigation would subject Plaintiffs to numerous risks, including the risk that they and the other Class Members get no recovery at all.

c. Procedural Posture

After receiving notice that their Private Information had been impacted by the Data Incident, Plaintiffs retained Class Counsel. After an internal investigation, Plaintiffs filed multiple class action suits against HBSC.

On April 15, 2024, Plaintiff David Underwood filed a class action complaint in the Superior County of the State of California, County of Tulare (the "Court") entitled, *Underwood v. Hapy Bear Surgery Center, LLCl*, Case No. VCU307987. On April 22, 2024, Plaintiff Duncan Meadows filed a putative class action against Defendant in the Tulare County Superior Court in California, Case No. VCU308221. On June 24, 2024, the class actions filed by Representative Plaintiffs Underwood and Meadows were consolidated into the *Underwood* action and captioned the *In re Hapy Bear Surgery Center Data Security Incident Litigation.*

d. Settlement Negotiations

Recognizing the risks and continued costs of litigation, Plaintiffs and Defendant decided to engage in private, arms-length negotiations to resolve all matters associated with the litigation. Wucetich Decl., ¶¶ 8-15. Ultimately, the Plaintiffs and Defendant participated in a full day mediation with retired Judge David E. Jones. Through Judge Jones, the basic terms of a settlement were negotiated and finalized. *Id*. Class Counsel conducted a thorough examination and evaluation of the relevant law and facts to assess the merits of the claims to be resolved in this settlement and how best to serve the interests of the putative class in the Litigation. *Id*. Based on this investigation and the negotiations described above at the mediation, Class Counsel concluded that the risks, uncertainty and cost of further pursuit of this Litigation, and the benefits to be provided to the Settlement Class pursuant to the Settlement Agreement, that a settlement with Defendant on the terms set forth in the Agreement is fair, reasonable, adequate and in the best interests of the class. *Id*.

The parties also exchanged confirmatory discovery regarding the number of individuals impacted by the Data Security Incident, details regarding how those individuals were contacted

by Defendant, details regarding the Data Security Incident, and the nature of the Business Practice Enhancements and the timeline for implementation of such changes. *Id*., ¶ 10.

III. SUMMARY OF SETTLEMENT

a. The Settlement Class

The Settlement Class has two components -- the nationwide class is defined as "all individuals residing in the United States whose personal identification information and data was stored in HBSC's systems at the time of the December 27, 2023 cybersecurity incident and who were impacted by the cybersecurity incident, including those to whom Defendant or its authorized representative sent a notice concerning the 2023 Data Security Incident announced by Defendant," and the California subclass is defined as "all members of the Nationwide Class who are also California residents at the time of the December 27, 2023 cybersecurity incident." SA, at ¶ 48.

b. Settlement Class Fund and Benefits

The Settlement provides significant benefits to Settlement Class Members, including a settlement fund in the amount of $607,500 and $330,000 in cyber security hardening measures. *Id.* at ¶ 43.

i. Compensation for Ordinary Economic Losses

All Settlement Class Members are eligible to claim up to $500, which may be decreased based on the number of claims and available funds, in reimbursement for the following:

- Out of pocket expenses, namely, postage, copying, scanning, faxing, mileage and other travel-related charges, parking, notary charges, research charges, cell phone charges (only if charged by the minute), long distance phone charges, data charges (only if charged based on the amount of data used), text message charges (only if charged by the message), bank fees, accountant fees, credit monitoring fees, and attorneys' fees, all of which must be fairly traceable to the Data Security Incident and must not have been previously reimbursed by a third party; and

- Up to 4 hours of lost time, at $25/hour for time spent dealing with the Data Security Incident. SA at ¶51.

ii. Compensation for Extraordinary Economic Losses

All Settlement Class Members are eligible to receive up to a total of $7,500.00 per person, to Settlement Class members, upon submission of an Approved Claim and supporting documentation for proven monetary loss associated with fraud or identity theft if:

- If the loss is actual, documented and an unreimbursed monetary loss;
- The loss was more than likely than not caused by and fairly traceable to the Data Security Incident; and
- The loss is not already covered by the Ordinary Expense Compensation defined above. SA at ¶52.

iii. Credit Monitoring Services

In addition to the benefits otherwise provided herein, all Settlement Class Members may obtain an additional 2 years of credit monitoring services. These services include three-bureau credit monitoring; dark web monitoring; real-time inquiry alerts; and $1 million in identity theft insurance, among other features. All Settlement Class members are eligible to enroll in two (2) years of Credit Monitoring Services, upon submission of a valid Claim Form regardless of whether the Settlement Class Member submits a claim for reimbursement of Unreimbursed Economic Losses or Lost Time. *Id*., at ¶ 53.

iv. California Residents

To account for California specific statutes alleged in the operative Complaint, Class Members with a California residential address are eligible to receive an additional payment of $50. *Id*., at ¶50(b)(ii).

v. Business Practice Enhancements

Defendant has and will continue to undertake certain reasonable steps to enhance the security deployed to secure access to its data network. Defendant has undertaken the following steps:

- Managed Endpoint Detection & Response
- Managed Security Awareness Training & Phish Testing
- Managed Firewall Threat Detection
- Managed Threat Hunting
- Continuous Network Vulnerability Scanning & Oversight
- Business Email Compromise and Phishing Prevention
- Managed Endpoint Detection & Response
- Managed Security Awareness Training & Phish Testing
- Managed Firewall Threat Detection
- Managed Threat Hunting
- Continuous Network Vulnerability Scanning & Oversight
- Business Email Compromise and Phishing Prevention

c. Notice and Claims Administration

The parties agreed to use EAG Gulf Coast LLC as the Notice Specialist and Claims Administrator in this case. *See* Declaration from EAG Gulf Coast LLC, Proposed Claims Administrator. HBSC has agreed to pay for providing notice to the Settlement Class, as a component of the settlement fund.

The Notice Program includes the dissemination of individual notice directly mailed to each Settlement Class Member ("Short Notice") for whom Defendant has an address. Defendant sent notice of the Data Incident to 109,161 who were impacted and the Claims Administrator will send the Short Notice to those same individuals. And if any notices are returned undeliverable, the Claims Administrator will use reasonable efforts to identify updated mailing addresses and resend the notice to the extent updated addresses are identified. *Id.* The Notice Program also includes the publication of a Long Form Notice on a dedicated settlement website (the "Settlement Website"). *Id*. All notices will explain the rights of all individuals under the Settlement Agreement including how to make a claim and how to opt out or object to the

Settlement Agreement. *Id.* A toll-free help line will also be made available to provide Class Members with information about the settlement. *Id*.

The claims process similarly draws upon the most up-to-date techniques to facilitate participation, including the ability to file claims electronically on the Settlement Website or by mail and the establishment and maintenance of a Toll-Free Help Line for Settlement Class Members to call with settlement-related inquiries.

d. Attorneys' Fees and Expenses and Service Awards

After an agreement had been reached as to the essential terms of a settlement (*i.e.*, Settlement Class benefits), the Parties negotiated the amount of Plaintiffs' attorneys' fees and litigation expenses. SA ¶ 71. Plaintiffs intend to seek an award of attorneys' fees not to exceed one-third of the Settlement Fund, and reasonable expenses not to exceed $20,000. *Id.*

After an agreement had been reached as to the essential terms of a settlement (*i.e.*, Settlement Class benefits), the Parties negotiated the amount of a service award to the Representative Plaintiffs. SA ¶ 72. Subject to Court approval, the Representative Plaintiffs intend to seek, and Defendant agrees to pay out of the Settlement Fund, a service award not to exceed $5,000 to each of the Representative Plaintiffs. *Id.*

e. Release

The Settlement Agreement provides for the following release:

Upon the Effective Date, and in consideration of the settlement relief and other consideration described herein, the Releasing Parties, and each of them, shall be deemed to have released, and by operation of the Final Approval Order shall have, fully, finally, and forever released, acquitted, relinquished and completely discharged the Released Parties from any and all

Released Claims—defined as follows:

> Any and all claims, demands, actions, and causes of action that each and every Settlement Class Member has, had, or may ever have, known or unknown, suspected or unsuspected, fixed or contingent, accrued or unaccrued, arising out of or in any way related to the December 27, 2023 cybersecurity incident, including all claims or causes of action stemming from statutory, contractual, or common law rights under which the Settlement Class Members could seek to recover for any impact of the December 27, 2023 cybersecurity incident based on the allegations in the operative complaint, and all claims or causes of action that were or could have been brought in the Action based on the same factual predicate, whether or not those claims, demands, actions, or causes of action have been pleaded or otherwise asserted, including any and all damages, losses, or consequences thereof. SA at ¶ 57.

IV. LEGAL DISCUSSION

a. The Settlement Class Should be Preliminarily Approved.

Plaintiffs here seek certification of a Settlement Class consisting of "All persons whose personal identification information and data was stored in HBSC's systems at the time of the December 27, 2023 cybersecurity incident and who were impacted by the cybersecurity incident," and a subclass of California residents consisting of "All members of the Nationwide Class who are also California residents at the time of the December 27, 2023 cybersecurity incident," with specific and limited exclusions. SA ¶ 48-49. The *Manual for Complex Litigation (Fourth)* advises that in cases presented for both preliminary approval and class certification, the "judge should make a preliminary determination that the proposed class satisfies the criteria…." MCL 4th, § 21.632.

Because a court evaluating certification of a class action that settled is considering certification only in the context of settlement, the court's evaluation is somewhat different than in a case that has not yet settled. *Luckey v. Superior Court*, 228 Cal. App. 4th 81, 93-94. In some

ways, the court's review of certification of a settlement-only class is lessened: as no trial is anticipated in a settlement-only class case, "the case management issues inherent in the ascertainable class determination need not be confronted." *Global Minerals & Metals Corp. v. Superior Court, supra,* 113 Cal. App. 4th 836, 859 (2003); *see also Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Other certification issues however, such as "those designed to protect absentees by blocking unwarranted or overbroad class definitions" require heightened scrutiny in the settlement-only class context "for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold." *Amchem Products, Inc. v. Windsor*, 521 U.S. at 620.

Class actions are regularly certified for settlement. In fact, similar data breach cases have been certified – on a *national* basis—including the record-breaking settlement in *In re Equifax. See In re Equifax, Inc. Customer Data Security Breach Litigation*, Case No. 1:17-md-2800-TWT (N.D. Ga. 2019); *see also, e.g.*, *In re Target*, 309 F.R.D. 482 (D. Minn. 2015); *In re Heartland Payment Systems, Inc. Customer Data Sec. Breach Litig*., 851 F.Supp.2d 1040 (S.D. Tex. 2012). This case is no different.

Under California law, a party seeking certification of a class must demonstrate three things: (1) the existence of an ascertainable and sufficiently numerous class, (2) a well-defined community of interest, and (3) substantial benefits from certification that render proceeding as a class superior to the alternatives. *Brinker Restaurant Corp. v. Superior Court,* 53 Cal. 4th 1004, 1021 (2012). Because the proposed settlement class meets all of California's class action requirements, this Court should certify the class for purposes of settlement.

i. <u>The proposed class is ascertainable and sufficiently numerous.</u>

The proposed settlement class is easily ascertainable. The ascertainability requirement is satisfied if "the potential class members may be identified without unreasonable expense or time and given notice of the litigation, and the proposed class definition offers an objective means of

identifying those persons who will be bound by the results of the litigation...." *Sevidal v. Target Corp.*, 189 Cal. App. 4th 905, 919 (2010) (internal citations omitted).

HBSC will have no difficulty identifying the members of the proposed settlement class, as it maintains records for all of its patients. HBSC will be able to provide the same contact information that it previously used to provide notice of the Data Incident to the Claims Administrator in this case, without unreasonable expense or time.

Moreover, at approximately 109,161 individuals, the proposed class easily meets the threshold for numerosity. Courts have certified cases with much less. *See Rose v. City of Hayward*, 126 Cal. App. 3d 926, 934 (1981) (upholding a class of ten beneficiaries of a trust); *Hendershot v. Ready to Roll Transportation, Inc*., 228 Cal. App. 4th 1213, (2014) (finding the trial court's bare conclusion that nine class members did not constitute sufficiently numerous class without any analysis as to the ultimate issue of whether the class was too large to make joinder practicable was incomplete). As joinder of all 109,161 Class Members would be impracticable (to say the least), the numerosity prong of class certification test is met.

ii. The proposed class presents a well-defined community of interest.

Under California law the "community of interest" requirement embodies three factors: predominating common questions of law or fact; typicality between the claims of Plaintiffs and the class members they seek to represent; and adequacy of representation by both Plaintiffs and counsel seeking appointment as Class Counsel. *Fireside Bank v. Superior Court*, 40 Cal.4th 1069, 1089 (2007); *see also Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 435 (2000).

1. Common questions of law and fact predominate.

Plaintiffs assert that common questions of law and fact predominate here, for purposes of settlement. The Court of Appeal has held that where plaintiffs' theory of recovery is based upon Defendants' application of a uniform policy, the question of whether such a policy existed is common to all class members and thus amenable to class treatment. *Jones v. Farmers Insurance Exchange*, 221 Cal. App. 4th 86 (2013). Here Plaintiffs allege that HBSC had a policy and practice

of failing to adequately safeguard the records of Plaintiffs and Class members. HBSC's data security safeguards at the time of the Data Incident were common across the Class, and those applied to one Class member did not differ from those safeguards applied to another.

Other specific common questions at issue include:

1. if Defendant had a duty to use reasonable care in safeguarding Plaintiffs' and the Class's PII/PHI;
2. if Defendant failed to implement and maintain reasonable security procedures and practices appropriate to the nature and scope of the information compromised in the Data Incident;
3. if Defendant was negligent in maintaining, protecting, and securing PII/PHI; and
4. if Defendant breached contract promises to safeguard Plaintiffs and the Class's PII/PHI.

These common questions, and others alleged by Plaintiffs in their complaint are central to the causes of action brought here and can be addressed on a class wide basis, for purposes of settlement.

2. Plaintiffs' claims are typical of those of Class Members.

Plaintiffs' claims are typical of those of other Class Members because Plaintiffs and the other Class Members all allege that their Private Information was accessed and/or inadequately safeguarded by HBSC. Plaintiffs allege that in not taking reasonable measures to prevent the Data Incident, HBSC caused them and other Class members to experience the anxiety of not knowing if and when their most private health information could be made public. Plaintiffs allege these claims are typical of those of other Class Members, who were also subject to and notified of the Data Incident.

3. Plaintiffs and their counsel are adequate representatives for the class.

Both Plaintiffs and their counsel will provide adequate representation for the Settlement Class. To ensure "adequate" representation, the class representatives' personal claim must not be inconsistent with the claims of other members of the class. *J.P. Morgan & Co., Inc. v. Superior Court*, 113 Cal.App.4th 195, 212 (2003).

Plaintiffs allege that here, Plaintiffs are members of the class and have experienced the same injuries and seek, like other Class Members, both reimbursement for costs incurred due to the Data Incident and actual assurances that the Private Information that HBSC holds is better safeguarded. As such, their interests and claims are not inconsistent with those of other Class Members.

Further, counsel for Plaintiffs have decades of combined class action litigation experience and are well suited to advocate on behalf of the class. *See* Wucetich Decl. ¶¶ 2-6.

iii. Class treatment is superior.

To meet the superiority prong for class certification, a plaintiff must demonstrate that a class action is superior to other available methods for fairly and efficiently adjudicating this controversy. *See* Cal. Code Civ. Proc. § 382. Here, Plaintiffs allege that because all claims on behalf of Plaintiffs and the Class Members arise out of the same single Data Incident, a class action is vastly superior to attempting to litigate each class member's claims individually.

b. The Settlement Terms are Fair, Adequate, and Reasonable.

i. The settlement guarantees Class members relief for real harms and assurance that they are less likely to be subject to similar incidents due to HBSC's data security systems in the future.

Although trial courts are not required to decide the ultimate merits of class members' claims before approving a proposed settlement, an informed evaluation should include an understanding of the strength of the merits of the case, the available defenses, the amount in controversy, and the realistic range of outcomes of the litigation. *Kullar et. al. v. Foot Locker Retail, Inc*., 168 Cal. App.4th 116 (2009).

There is a presumption of fairness that a proposed settlement is fair and reasonable when: (i) it follows arm's length negotiations; (ii) there has been sufficient investigation and discovery to permit counsel and the Court to act intelligently; and (iii) counsel are experienced in similar litigation. *See Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116, 128; 2 Newberg *et al.*, *Newberg on Class Actions* § 11.41 at 11-88 (3d ed. 1992).

The Court should presume the Agreement is fair because it satisfies all three factors. First, the Agreement stems from a successful mediation under Judge Jones, a highly experienced former jurist and mediator, meaning the Agreement resulted from "arm's length negotiations." Second, Defendant provided to Plaintiffs—and Plaintiffs are providing to the Court—information on the Data Incident's scope, including the types of PII at issue, which altogether allows the Court to "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished." *Kullar*, 168 Cal. App. 4th at 130. As a result, the counsel and the Court have the information necessary to "act intelligently."

Third, Plaintiffs are represented by experienced Class Counsel. Class Counsel has, collectively, decades of experience in class action litigation and has successfully handled national, regional, and statewide class actions throughout the United States, in both state and federal courts, including data breach class actions. *See* Wucetich Decl. ¶¶ 2-6. Thus, the Court should presume the Settlement is fair.

The "most important factor" the court considers on preliminary approval is "the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." *Kullar*, 168 Cal. App. 4th at 130. The "legal uncertainty" of the claims at issue "supports approval of a settlement," and courts have noted that the law surrounding "threshold issues" in data breach cases is still being developed. *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 317 (N.D. Cal. 2018).

This weighs in favor of settlement approval here. The Settlement Agreement provides real

relief for Plaintiffs and Class members, and it is the opinion of Class Counsel that the Settlement Agreement is fair, reasonable, and adequate and should be approved. *See* Wucetich Decl. ¶¶ 16-20. Not only can Plaintiffs and Class Members receive reimbursement for costs they incurred related to the Data Incident, but they can also be assured that HBSC will have increased ability to protect their Private Information from the risk of similar data incidents in the future. Economic Losses reimbursements will provide up to $500 per person and reimbursement for lost time up to four hours per individual at the rate of $25 per hour ($90 per individual). SA, at ¶ 51. Extraordinary Losses will provide up to $7,500 per person. These amounts are similar to other data breach class action cases that resolved early. SA at ¶ 5. The benefits to Class Members are provided in exchange for a release of claims reasonably related to the Data Incident. *Supra* § III(e).

This Settlement Agreement also includes terms within the range of those approved by other courts for similar data breaches. *See, e.g., Fulton-Green v. Accolade, Inc.,* E.D. Pa. Case No. 2:18-cv-00274, ECF No. 31 (granting approval of data breach class action settlement providing for expense reimbursement up to $1,500 per Class member, and increased cyber security measures of undisclosed worth for two years following the Data Incident); *Tilleman v. Leaffilter North, LLC,* E.D. Tex. Case No. 5:18-cv-01152, ECF No. 22 (granting approval of a data breach class action settlement providing for expense reimbursement up to $7775 per person).

Moreover, the substantial and immediate benefits achieved by the Settlement avoid the risks, uncertainties, and delays of continued litigation. If this lawsuit were to continue, Plaintiffs and Class members would face a number of difficult challenges, including surviving a motion to dismiss, obtaining class certification, and maintaining certification through trial and likely motions for summary judgment. Thus, absent a settlement, Plaintiffs face serious obstacles in this Lawsuit. This is another indication that the proposed Settlement is fair, reasonable, and adequate and should be approved.

ii. <u>The proposed Claims Administrator will provide adequate notice</u>.

To satisfy due process, notice to class members must be the best practicable, and 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. *Duran v. Obesity Research Institute, LLC,* 1 Cal. App. 5th 635, 648 (2016), *citing Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc.*, 127 Cal. App. 4th 387, 399, fn. 9 (2005) (internal quotations omitted). In determining how to disseminate class notice of settlement—whether by direct mail, e-mail, publication, or something else—the standard is whether the notice has "a reasonable chance of reaching a substantial percentage of the class members. *See Duran v. Obesity Research Clinic, supra,* 1 Cal. App. 5th at 648 (internal quotations omitted). The trial court has virtually complete discretion in determining how that can most practicably be accomplished. *7–Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal.App.4th 1135, 1164 (2000) (internal quotations omitted).

Both parties agreed to use EAG Gulf Coast LLC for settlement administration, the cost of which will be covered by the Settlement Fund. SA, at ¶ 58-61. The Parties have negotiated for adequate notice to be provided to the class. Supra § III(c).

The timing of the claims process is structured to ensure that all Class Members have adequate time to review the terms of the Settlement Agreement, compile documents supporting their claim, and decide whether they would like to opt-out or object. Class members will have 90 days from the commencement of notice mailing to submit their claim form to the Claim Administrator, either by mail or online. *Id.* Similarly, any Class member who wishes to opt-out of the settlement will have 45 days from the commencement of notice mailing to provide such notice to the Claims Administrator. *Id* at ¶ 34, 66. Class members who wish to object to the terms of the Settlement Agreement must do so in writing and file such writing with the clerk of Court within 45 days from the date on which the notice period commences. *Id.* at ¶ 34, 65.

The claim form is not only accessible but also easily understandable. It consists of three pages on which each Class member is asked to describe the expenses they incurred due to the

Data Incident, and requests that each Class member attach documents evidencing the charges such as bank statements, credit card statements, receipts, or telephone bills. *See* Settlement Agreement, Ex. 1. And, in the case that any Class member wishes to dispute the amount offered, there is a process by which he or she can do so. SA, at ¶ 62.

Plaintiffs have negotiated a notice program that is reasonably calculated under all the circumstances to apprise Class members of the pendency of the action and afford them an opportunity to present their objections. The combination of the direct mailing to each and every Class member as well as the lengthy periods provided to make a claim or opt-out ensures maximum participation. As such this Court should approve the notice program negotiated by Plaintiffs. *Id.*

iii. Plaintiffs' enhancement is justified.

The Settlement Agreement provides for an enhancement award to Plaintiffs in the amount of $5,000. SA ¶ 72. The rationale for making enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class. *Clark v. Am. Residential Servs. LLC*, 175 Cal. App. 4th 785, 806 (2009). The modest enhancement here serves the purpose of compensating Plaintiffs for their efforts, which include maintaining contact with counsel, assisting in the investigation of the case, remaining available for consultation throughout negotiation and for answering counsel's many questions. It is further justified by the benefits conferred on the class due to Plaintiffs' willingness to serve as a representative: because of Plaintiffs' desire to file suit here, Class members are able to obtain considerable relief. As such, the enhancement requested for Plaintiffs is reasonable and should be approved.

iv. Costs and fees provided to counsel for Plaintiffs are justified.

After agreeing to the terms of the settlement on behalf of the class, counsel for Plaintiffs negotiated their fees and costs separate from the benefit to Class Members, with attorneys' fees

not to exceed of one-third of the Settlement Fund and reasonable expenses not to exceed $20,000. SA ¶ 71.

Courts most commonly recognize a percent of the common fund method for examining requests for attorneys' fees. *Lafitte v. Robert Half Internat. Inc.*, 1 Cal. 5th 480 (2016). Attorneys' fees in the amount of one-third of the benefit conferred on the class are regularly found reasonable in data breach class actions. *See In re Cincinnati Gas & Elec. Co. Securities Litigation*, 643 F. Supp. 148, 150 (S.D. Ohio 1986) ("typically the percentages range from 20% - 50%"); *see also, e.g.*, *Morano v. Fifth Third Bancorp*, Hamilton C.P. No. A 2003954, 2022 WL 19914939, *2 (July 8, 2022) (awarding fees amounting to 1/3 of the class action settlement fund); *Benedetto v. The Huntington Natl. Bank*, Hamilton C.P. No. A 1904966 (May 10, 2022) (same); *Hughes v. Union Savings Bank*, Hamilton C.P. No. A 1904891 (Aug. 5, 2021) (same); *San Allen, Inc. v. Buehrer*, Cuyahoga C.P. Nos. CV-07-644950 & CV-09-689611, 2014 WL 12917631, *7 (Nov. 19, 2014) (awarding fees totaling 32.5% of the settlement fund); *Dillworth v. Case Farms Processing, Inc.*, N.D. Ohio No. 5:08-cv-1694, 2010 WL 776933, *7 (Mar. 8, 2010) (fee equal to 33% of settlement amount); *Clevenger v. Dillards, Inc.*, S.D. Ohio No. C-1-02-558, 2007 WL 764291, *1 (Mar. 9, 2007) (fee equal to 29% of settlement amount).

In this case, there is no reason to depart from the typical range awarded as attorneys' fees in common fund cases. Notably, Class Counsel agreed to undertake this litigation purely on a contingent basis and at considerable risk. *See* "In a contingent-fee agreement, the lawyer takes on a large part of the financial risk of a case because if the case is resolved against the client, the lawyer will not receive any compensation for his or her work on the case." *Faieta v. World Harvest Church*, 147 Ohio Misc. 2d 51, 2008-Ohio-3140, 891 N.E. 2d 370, ¶ 153 (C.P.), *aff'd*, 10th Dist. Franklin No. 08AP-527, 2008-Ohio-6959. Accordingly, fees totaling approximately one-third (1/3) of the Settlement Fund are appropriate here.

V. CONCLUSION

Plaintiffs have negotiated a fair, adequate, and reasonable settlement that will provide Class Members with both monetary and equitable relief. For the above reasons, Plaintiffs respectfully request this Court grant Plaintiffs' Motion for Preliminary Approval of Class Action Settlement.

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