UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JAE LEE, on behalf of himself and all others similarly situated, Plaintiff, v. TARO PHARMACEUTICALS U.S.A., INC., Defendant.	Case No. 7:23-cv-03834-CS Judge Cathy Seibel

MEMORANDUM IN SUPPORT OF PLAINTIFF'S UNOPPOSED
MOTION FOR FINAL APPROVAL

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I. INTRODUCTION

The Court should approve the parties' settlement under Rule 23. Since the Court preliminarily approved the settlement in February 2024 as "fair, reasonable, and adequate." (Dkt. No. 32), the notice and claims program has only proved that point. The settlement administrator notified the class through mail, reaching more than 99% of the class. Decl. of Dana Boub Regarding Notice Administration ("RG/2 Decl."), ¶ 11. In response, the class welcomed the settlement, with many Settlement Class Member filing claims, no Settlement Class members opting out, and no Settlement Class Members objecting.[1] Given the benefits it will deliver, the Court should approve the settlement under Rule 23 so the parties may deliver them to the class.

For background, this case involves a security incident wherein the "personally identifiable information" ("PII") of approximately 527 of Defendant Taro Pharmaceuticals U.S.A., Inc.'s current and former employees was accessed by an unknown person. The information involved in the Security Incident included full names, state identification numbers, passport numbers, driver's license numbers, and Social Security numbers, about its current and former employees. Taro did not discover the Security Incident was in progress until more than two weeks after it began. Plaintiff is a former Taro employee who was a victim of the Security Incident.

This fact pattern posed risks for both sides. On liability, Plaintiff believed he would have proved Defendant had not met its duty to safeguard the PII in its possession under tort, contract, and statutory principles. On the other hand, Defendant disputed the putative class could prove losses from the breach, including whether they suffered fraud and spent resources remediating or mitigating it, and that Plaintiff could plead viable causes of action.

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[1] The deadline for Settlement Class Members to submit a Claim Form was May 6, 2024.

Recognizing those risks and the risks that come with litigating data breach class actions, the parties explored grounds for a settlement. The parties engaged in Federal Rule of Evidence 408 communications and were able to make significant progress negotiating a term sheet at arm's length, communicating their positions and evaluating the strengths and weaknesses underlying their claims and defenses. Dkt. 29 at ¶¶ 5-6 ("Borrelli Prelim. App. Decl."). In the weeks that followed, and after additional negotiations, the parties reached a final resolution and diligently negotiated and prepared the Settlement, along with accompanying notices, a Claim Form, and other exhibits.

As recognized by the Court in the Preliminary Approval Order (Dkt. 32), the Settlement is fair, reasonable, and adequate, and, should be approved. It secures significant benefits for the Settlement Class, including compensation up to $5,500 for out-of-pocket expenses, up $20 per hour for up to four hours of time spent responding to the Security Incident, and two years of credit monitoring at no cost. Alternatively, Settlement Class Members are eligible for an alternative cash payment of $30 in lieu of all other compensation and credit monitoring protection. Moreover, Taro will pay the costs to administer the parties' settlement, for Plaintiff's counsel's attorney's fees and costs, and a service award to Plaintiff, subject to Court approval.

Since preliminary approval was granted, the parties and the settlement administrator, RG/2, directly notified more than 99% of the Settlement Class via U.S. mail, providing them a chance to claim benefits either online or by mail. In response, zero Settlement Class Members excluded themselves and zero Settlement Class Members filed objections. As a result, the Settlement satisfies Rule 23(e) and should receive final approval.

II. THE SETTLEMENT AND ITS VALUE

The Settlement's details are contained in the Settlement Agreement the Parties executed on January 25, 2024, Dkt. 28-1 ("S.A.") (as later modified by the First Stipulation to Amend the Settlement Agreement, Dkt. 31-1). The Settlement negotiated on behalf of the Settlement Class provides that Taro will pay up to $190,000 to Settlement Class members for valid and timely claims for damages arising out of the Data Incident, credit monitoring, as well as the costs of Notice and Administration Expenses. S.A. ¶45. Specifically, Settlement Class Members are eligible to receive compensation for up to $5,500 of unreimbursed losses that were incurred "as a direct result of the Data Incident" for documented out-of-pocket costs, expenditures, and losses of time. S.A. ¶44(a). Additionally, Settlement Class Members who have spent time monitoring accounts or otherwise dealing with issues as a direct result of the Data Incident can submit a claim for reimbursement for that time of $20 per hour up to 4 hours (for a total of $80) provided they provide an attestation on the claim form that the activities they performed were a direct result of the Data Incident. S.A. ¶44(b). Moreover, Settlement Class Members shall have the ability to make a claim for 2 years of credit monitoring services, to include credit monitoring through all three national credit reporting bureaus and with at least $1,000,000 in identity theft insurance, for the Settlement Class. S.A. ¶43. In the alternative to these benefits, Settlement Class Members may alternatively claim a cash payment of $30. S.A. ¶44. This cash payment can be claimed without attestations or supporting documents.

Finally, Taro will pay all costs of notice and settlement administration costs of notice to the Settlement Class and costs of Settlement Administration (subject to the $190,000 Settlement Cap), which RG/2 has agreed to cap at $18,500. S.A. ¶56; RG/2 Decl. ¶15. Taro will also pay for Plaintiff's attorneys' fees, costs, and expenses (not to exceed $105,000) and service award to

Plaintiff (not to exceed $2,500) separate from the $190,000 cap, and subject to Court approval.[2] S.A. ¶¶70, 72.

As the forgoing makes clear, the Court should certify the Settlement Class and approve the settlement under Rule 23 so the parties may deliver these benefits.

III. BACKGROUND

a. Defendants' Data Breach and Plaintiffs' Claims

Taro is a pharmaceutical company with its United States' headquarters located in Hawthorne, New York. Amended Compl., Dkt. 18, ¶12. To operate its business, Taro collects and maintains the PII of its current and former employees. *Id*. ¶13.

On March 3, 2023, Taro's network was attacked by cybercriminals, but Taro did not discover the breach until more than two weeks later, on March 25, 2023. *Id*. ¶ 20. In the intervening time, the cybercriminals had access to the Plaintiff's and the Class's exposed PII. *Id*. On April 19, 2023, Taro began to notify its current and former employees affected by the Security Incident. *Id*. Plaintiff is a former Taro employee and victim of this Security Incident whose PII, along with approximately 527 others, was accessed by cybercriminals. *Id*. ¶¶ 6, 40-41.

b. Procedural History and Settlement

Following Taro's notification to those affected by the Security Incident and a thorough investigation of the claim by Settlement Class Counsel, Plaintiff Jae Lee filed this class action lawsuit against Taro in this Court on May 8, 2023. Dkt. 1. In response to Defendant's pre-motion to dismiss letter (Dkt. 14, 16), Plaintiff's complaint was amended on September 28, 2023. Amended Compl., Dkt. 18. Plaintiff alleges that, as a result of the Security Incident, Taro was liable for negligence, breach of implied contract, unjust enrichment, and declaratory judgment. *Id*.

[2] Plaintiff previously moved the Court for an order granting the request for attorney's fees and costs and a service award. *See* Dkt. 33, 34, 35, 37.

Recognizing the benefits of early resolution of Plaintiff's and the Class's claims, the parties engaged in Federal Rule of Evidence 408 communications and exchanged informal discovery. Plaintiff requested, and Defendants produced, key information about the size and residence of the putative class, the types of information affected by the Security Incident, the scope of the Security Incident and how it occurred, and how Defendants responded to the Security Incident. Borrelli Prelim. App. Decl. ¶ 6. As a result of this exchange of information, the parties were able to evaluate the strengths and weaknesses underlying their claims and defenses. *Id.* ¶¶ 5-6. After many weeks of negotiations between counsel, the parties reached an agreement in principle on the material terms of the Settlement on November 16, 2023, and in the weeks that followed, the parties diligently negotiated and circulated drafts of the Settlement Agreement, along with accompanying notices, a Claim Form, and other exhibits, and agreed upon a Settlement Administrator. *Id*. ¶¶9-10. The Settlement was finalized and executed on January 26, 2024.

c. Preliminary Approval

In February 2024, the Court "preliminarily" approved the parties' settlement January 2024 as "fair, reasonable, and adequate." (Dkt. 32). In so doing, it found that Plaintiff "will likely be able to certify the Settlement Class for purposes of judgment on the Settlement because it meets all of the requirements of FRCP Rules 23(a) and 23(b)(3)." *Id.* ¶ 1. The Court further appointed Plaintiff as the Settlement Class Representative and found that Plaintiff's Counsel "will likely satisfy the requirements of FRCP Rule 23(e)(2)(A) and should be appointed as Settlement Class Counsel…" *Id.* ¶ 2. Furthermore, it appointed RG/2 as the settlement administrator, ordering RG/2 and the parties to notify the class about settlement. *Id*. ¶¶ 6-7. In addition, the Court approved the procedures for Settlement Class Members to opt out from the Settlement or to object to the Settlement. *Id.* ¶¶ 9-10.

Finally, the Court set a hearing on final approval of the Settlement for June 20, 2024, at 12:30 p.m. *Id.* ¶ 5.

d. Notice Program & Claims Activity

On approximately February 12, 2024, RG/2 received the Settlement Class List from counsel for Defendant with the names and contact information for 527 unique Settlement Class Members. RG/2 Decl., ¶6. But before notifying the Settlement Class using those records, RG/2 processed them through USPS's "National Change of Address" database. *Id*. ¶8. On March 6, 2024, RG/2 sent the Short-Form Notice (Ex. B to RG/2 Decl.) via First Class U.S. Mail. *Id.* ¶7. That notice included a link to the Settlement Website and a unique username and password to be used to submit a Claim Form electronically. *Id.* USPS returned only 27 of the notices as "undeliverable," and as a result of RG/2's efforts to update the class member's addresses, another 25 of the 27 notices were remailed. *Id.* ¶11. In the end, more than 99% of the Settlement Class received direct notice. *Id.*

Once notified, Settlement Class Members started accessing the website set up by RG/2 at www.TaroDataIncidentSettlement.com. *Id.* ¶9. The site hosted all documents at issue in this settlement and allowed Settlement Class Members to claim benefits directly through the website. *Id*. Finally, RG/2 hosted a toll-free hotline dedicated to answering questions about the settlement and updating contact information for Settlement Class Members if needed. *Id*. ¶10. Therefore, RG/2 exhausted all "reasonable" means to contact Settlement Class Members about the settlement and succeeded in doing so. The deadline to claim benefits was May 6, 2024. *Id.* ¶14. RG/2 continues to evaluate the claims received. *Id.*

IV. ARGUMENT

a. The Court Should Approve the Settlement Under Rule 23 and the *Grinnell* Factors

Courts encourage parties to settle class actions given their potential for costs, delays, complexity, and risks: "Class action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation. There is a strong public interest in quieting any litigation; this is 'particularly true in class actions.'" *In re Luxottica Group S.p.A. Sec. Litig.* (In re Luxottica Group Litig.), 233 F.R.D. 306, 310 (E.D.N.Y. 2006); *see also Cohen v. J.P. Morgan Chase & Co.*, 262 F.R.D. 153, 157 (E.D.N.Y 2009) ("There is a strong judicial policy in favor of settlement, particularly in the class action context. The compromise of complex litigation is encouraged by the courts and favored by public policy."). And this is not only a "complex" case — "it lies within an especially risky field of litigation: data breach." *Desue v. 20/20 Eye Care Network, Inc.*, No. 21-CIV-61275-RAR, 2023 U.S. Dist. LEXIS 117355, at *24 (S.D. Fla. July 8, 2023). This is why courts favor settling data breach cases, as "proceeding through the litigation process[…] is unlikely to produce the plaintiffs' desired results." *In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.*, No. 3:08-MD-01998, 2010 U.S. Dist. LEXIS 87409, 2010 WL 3341200, at *6 (W.D. Ky. Aug. 23, 2010).

Courts approve settlements under these principles in two steps. First, the "preliminary stage," that the parties completed under this approval order. *Chang v. Philips Bryant Park LLC*, No. 17 Civ. 8816 (LTS) (SLC), 2019 U.S. Dist. LEXIS 185297, 2019 WL 8105999, at *7 (S.D.N.Y. Oct. 23, 2019). Second, after the parties notify the class, the Court must decide whether to "finally" approve the settlement under precedent and Rule 23.

The Second Circuit has developed factors governing whether to approve settlements, and this settlement meets them. Those factors are: (i) the case's complexity and "likely duration;" (ii) how the class has reacted to settlement; (iii) the case's litigation stage; (iv) the case's risks in proving liability; (v) the risks in proving damages; (vi) the risks in maintaining a case through trial;

(vii) defendant's ability to pay a "greater judgment;" (viii) the "range of reasonableness" for the case. *In re Initial Pub. Offering Sec. Litig.*, 260 F.R.D. 81, 88 (S.D.N.Y. June 10, 2009) (citing *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974). Altogether, those factors determine whether the settlement results from "serious, informed, non-collusive ('arm's length') negotiations, where there are no grounds to doubt its fairness and no other obvious deficiencies[.]" *See Cohen*, 262 F.R.D. at 157.

Rule 23 lists its own criteria for approving settlements, but factors that do not supplant the *Grinnell* factors. *Soler v. Fresh Direct, LLC*, 2023 U.S. Dist. LEXIS 42647, at *8 (S.D.N.Y. Mar. 14, 2023) ("This [Rule 23] inquiry overlaps with the Grinnell factors"). Instead, Rule 23's criteria focuses "the court and the lawyers on the core concerns of procedure and substance" under four factors: (i) "adequacy of representation;" (ii) whether there were "arm's length" negotiations; (iii) "adequacy of relief;" and (iv) equity between class members. *Id*; *See* Rule 23(e). Within the third factor, "adequacy of relief," the Court considers the case's risks, how the parties propose distributing relief, attorney's fees terms, and any other agreements impacting settlement. *Id*.

Because the *Grinnell* and Rule 23(e) factors "overlap," Plaintiff condenses the analysis below to reflect that principle. *Soler*, 2023 U.S. Dist. LEXIS 42647, at *8 (applying a condensed analysis); *In re Hudson's Bay Co. Data Sec. Incident Consumer Litig.*, No. 18-cv-8472 (PKC), 2022 U.S. Dist. LEXIS 102805, at *28 (S.D.N.Y. June 8, 2022) (same).

i. Plaintiff and counsel represented the class "adequately"

The settlement satisfies Rule 23(e)(2)(A) because Plaintiff and his counsel represented the class "adequately" when negotiating it. Meeting this factor entails determining whether Plaintiff's interests are "antagonistic" to class members' interests and whether Plaintiff's counsel is qualified and experienced in the litigation. *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d

91, 99 (2d Cir. 2007) (quoting *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000)). Plaintiffs have satisfied this inquiry.

There is no antagonism between Plaintiff, his counsel, and the Settlement Class because Plaintiff is accepting the same relief on the same terms as all other Settlement Class Members. Although he requests a service award, such an award is not guaranteed, and the class will receive the settlement's benefits no matter how the Court rules on Plaintiff's request. To achieve the service award, Plaintiff helped his attorneys investigate the breach, supplied the facts supporting his complaint, and was available throughout the settlement process to answer questions and represent the interests of the Settlement Class. Dkt. 36 (Decl. of Jae Lee). What's more, Plaintiff and his counsel withheld negotiating attorney's fees and costs and a service award until after the parties agreed on the settlement's core terms, thus removing any conflict that may result from concurrent negotiation. Borrelli Prelim. Approval Decl. ¶ 8.

Plaintiff's counsel also has the experience needed to represent the Settlement Class and secure relief. Decl. of Raina Borrelli in Support of Unopposed Motion for Final Approval ("Borrelli Final Approval Decl."), Ex. 1. Counsel has represented data breach victims across the country and reached settlements that courts routinely approve. And that experience served Plaintiff and the putative class considering the results achieved in the settlement. *See In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 122 (S.D.N.Y. 2009), *aff'd*, *Priceline.com, Inc. v. Silberman*, 405 F. App'x 532 (2d Cir. 2010) (noting "extensive" experience of counsel in granting final approval); *see also Shapiro v. JPMorgan Chase & Co.*, No. 11 Civ. 8331-CM-MHD, 2014 WL 1224666, at *2 (S.D.N.Y. Mar. 24, 2014) (giving "great weight" to experienced class counsel's opinion that the settlement was fair). At all times, Class Counsel was fully informed

about the facts, risks, and challenges of this novel action and had a sufficient basis on which to negotiate a very significant settlement.

As a result, the Court should find Plaintiff has satisfied this factor.

ii. <u>The Court should presume the Settlement is "approvable"</u>

To achieve the "fairness" that Rule 23(e)(2)(B) demands, plaintiffs must show their proposal was negotiated at "arm's length." That exists if plaintiffs reached their agreement "experienced, capable counsel knowledgeable in complex class litigation." *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 693 (S.D.N.Y. 2019). In fact, if the parties satisfy this factor, "the Settlement will enjoy a presumption of fairness." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 173-74 (S.D.N.Y. 2000); *In re Facebook, Inc., IPO Secs. & Deriv. Litig.*, 343 F. Supp. 3d 394, 408 (S.D.N.Y. 2018) ("When a settlement is the product of arms-length negotiations between experienced, capable counsel after meaningful discovery, it is afforded a presumption of fairness, adequacy, and reasonableness.") (cleaned up). That presumption applies here.

As detailed above, Plaintiff's counsel litigates privacy cases like data breaches in state and federal actions, meaning they understand how this settlement compares to other data breach settlements. Borrelli Final Approval Decl., Ex. 1. This allowed Plaintiff's counsel to evaluate the value of this case, including the risks with proceeding in litigation compared to the relief that could be achieved. Armed with this knowledge, Plaintiff's counsel negotiated the Settlement terms aggressively, receiving an excellent result for a case of this size. Borrelli Prelim. Approval Decl. ¶¶ 6-7, 12.

Although the parties settled this matter before formal discovery started, that is no bar to approving their agreement's terms as Plaintiff's counsel insisted on informal discovery to inform the value of this case and provide information about the strengths and risks involved in proceeding

with litigation. *D'Amato v. Deutsche Bank*, 236 F.3d 78, 87 (2d Cir. 2007) ("although no formal discovery had taken place, the parties had engaged in an extensive exchange of documents and other information"); *Castagna v. Madison Square Garden, L.P.*, No. 09-cv- 10211 (LTS)(HP), 2011 U.S. Dist. LEXIS 64218, 2011 WL 2208614, *6 (S.D.N.Y. June 7, 2011) (counsel had "completed enough investigation to agree on a reasonable settlement" even without discovery). Indeed, the "pertinent question" is not whether plaintiffs conducted Rule 26 discovery, but "whether counsel had an adequate appreciation of the merits of the case before negotiating" *Willix v. Healthfirst, Inc.*, No. 07–cv–1143, 2011 WL 754862, at *4 (E.D.N.Y. Feb. 18, 2011). Because Plaintiff gathered the facts needed before negotiating the Settlement, he understood the landscape affecting settlement just as if he had conducted discovery. Moreover, early settlement where, as here, the Parties are adequately informed to negotiate is to be commended. *Castagna v. Madison Square Garden, L.P.*, 2011 WL 2208614, at *6 (S.D.N.Y. June 7, 2011) (commending Plaintiffs' attorneys for negotiating early settlement an avoiding hundreds of hours of legal fees); *In re Interpublic Sec. Litig.*, No. 02 Civ. 6527, 2004 WL 2397190, *12 (S.D.N.Y. Oct. 26, 2004) (early settlements should be encouraged when warranted by the circumstances of the case).

For these reasons, the court should find Plaintiff has satisfied this factor and the third *Grinnell* factor.

iii. <u>The Settlement's relief is "adequate" considering this case's complexity and risks and the relief this settlement achieves</u>

Without settling, this case faced risks that would have delayed or doomed Plaintiff's chances at recovery. Almost "all class actions involve a high level of risk, expense, and complexity[.]" *Desue*, 2023 U.S. Dist. LEXIS 117355, at *24. And this is not only a "complex" case—"it lies within an especially risky field of litigation: data breach." *Id*. This is why courts favor settling breach cases, as "proceeding through the litigation process[…] is unlikely to produce

the plaintiffs' desired results." *In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.*, No. 3:08-MD-01998, 2010 U.S. Dist. LEXIS 87409, 2010 WL 3341200, at *6 (W.D. Ky. Aug. 23, 2010); *see, e.g., In re Sonic Corp. Customer Data Sec. Breach Litig.*, No. 1:17-md-2807, 2019 U.S. Dist. LEXIS 135573, at *13 (N.D. Ohio Aug. 12, 2019) ("[D]ata breach litigation is complex and largely undeveloped."); *Fulton-Green v. Accolade, Inc.*, 2019 U.S. Dist. LEXIS 164375, at *21 (E.D. Pa. Sep. 23, 2019) ("This is a complex case in a risky field of litigation because data breach class actions are uncertain and class certification is rare.").

To start, data breach cases do not always clear the motion-to-dismiss stage. *See, e.g., Hammond v. The Bank of N.Y. Mellon Corp., No. 08 Civ. 6060 (RMB)(RLE)*, 2010 WL 2643307, at *1 (S.D.N.Y. June 25, 2010) (collecting dismissed data breach cases at the Rule 12(b)(6) stage). And when they do, Courts will still sometimes dismiss them at summary judgment or refuse to certify them. *In re TJX Cos. Retail Sec. Breach Litig.*, 246 F.R.D. 389, 397 (D. Mass. 2007) (refusing to certify data breach class action); *Stollenwerk v. TriWest Healthcare All.*, No. CV–03–0185–PHX–SRB, Slip Op. at 5–6 (D. Ariz. June 10, 2008) (same); *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 293 F.R.D. 21 (D. Me. 2013) (same). Although Plaintiff believes he would have overcome these hurdles given the facts in issue, they presented risks that justified settling at the stage Plaintiff did.

Moreover, to justify taking this case to trial, Plaintiff would need to clear these hurdles and achieve a better result when there are no grounds to believe trial would yield one. The Court and parties cannot estimate the upside in litigating this case through to trial because breach victims have yet to try a case, so there is no verdict to measure their result against. There is no evidence Defendant could "withstand a greater judgment," and would that factor defeat settlement if it

could.[3] Nor is this case the right candidate for trial given the relief the Agreement delivers. Again, the Agreement achieves what Plaintiff wanted in his complaint—compensation for the putative class's losses. There is no reason to risk losing recovery entirely by refusing to settle on those terms.

Last, Plaintiff petitioned the Court to approve his attorney fees, costs, and service award requests, which fall within what district courts approve. Dkt. 33, 34; *see Hart v. BHH, LLC*, No. 15cv4804, 2020 U.S. Dist. LEXIS 173634, at *30 (S.D.N.Y. Sep. 22, 2020) (in a claims based class settlement, awarding 51.75% of the total benefit to the class as attorneys' fees); *In re Telik*, 576 F. Supp. 2d 570, 590 (S.D.N.Y. 2008) ("[i]n contingent litigation, lodestar multiples of over 4 are routinely awarded by courts") (citation omitted); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481-83 (S.D.N.Y. 2013) (granting an award of $5,000 to $7,500 to Plaintiffs); *Dornberger v. Metropolitan Life Ins.,* 203 F.R.D. 118 (S.D.N.Y. 2001) (noting in class actions representative plaintiff awards from $2,500 to $85,000 are commonly accepted).

As a result, the Court should find this factor supports approval under this factor and the first, fourth, fifth, and sixth *Grinnell* factors.

iv. The settlement treats class members equitably and is within the "range of reasonableness"

The results the Agreement secures exceeds those won in other data breach settlements. Indeed, this settlement provides class members an "alternative cash payment" of $30.00 (subject to a pro rata increase or decrease) that they could claim without needing to prove any out-of-pocket losses. S.A. ¶43; *see In re Hudson's Bay Co. Data Sec. Incident Consumer Litig.*, No. 18-cv-8472 (PKC), 2022 U.S. Dist. LEXIS 102805, at *29-30 (S.D.N.Y. June 8, 2022) ("Comparable data-

[3] *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 178 n.9 ("ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair.").

breach cases have provided lower settlement payments to class members, with relief that includes a payment of $10 or merchant coupons"); *In re Canon United States Data Breach Litig.*, No. 20-CV-6239-AMD-SJB, 2023 U.S. Dist. LEXIS 206513, at *14 (E.D.N.Y. Nov. 15, 2023) (reimbursing out-of-pocket losses and offering credit monitoring, but no cash payments); *Brady v. Due N. Holdings, LLC*, No. 17-cv-1313, Doc. No. 59, at 4 & Doc. No. 65, at 2 (S.D. Ind. Oct. 16, 2018) (same); *Torretto v. Donnelley Fin. Sols., Inc.*, No. 1:20-cv-02667-GHW, 2023 U.S. Dist. LEXIS 5440, at *5 (S.D.N.Y. Jan. 5, 2023) (same); *Reynolds v. Marymount Manhattan Coll.*, No. 1:22-CV-06846-LGS, 2023 U.S. Dist. LEXIS 191993, at *6 (S.D.N.Y. Oct. 23, 2023) (same). This is not to mention that class members may also claim compensation for out-of-pocket losses, lost time, and credit monitoring. S.A. ¶¶ 43, 44(a), 44(b).

On equity, Rule 23 considers "whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment. In other words, the purpose is "equity," not "equality" in treatment. This settlement advances equity because it allowed claimants to claim "actual" losses from the breach, including claims for "out-of-pocket" expenses, and claims for "lost time." S.A. ¶ 44. Such provisions ensure the settlement accounts for any differences among the class member's claims.

v. The class's reaction to the settlement

It is "well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002); *Grinnell*, 495 F.2d at 462-63. Here, no Settlement Class Members opted out of the settlement and no Settlement Class Members objected to the settlement, meaning there is no evidence the Settlement Class disapproves of it in any way. RG/2

Decl., ¶¶12-13. As a result, "the reaction of the class to the settlement also weighs in favor of final approval of the Settlement Agreement." *In re Nano-X Sec. Litig.*, No. 21-CV-5517 (RPK) (PK), 2024 U.S. Dist. LEXIS 71340, at *10 (E.D.N.Y. Apr. 17, 2024).

b. The Court Should Certify the Settlement Class for Settlement Purposes

Certifying a settlement class "has been recognized throughout the country as the best, most practical way to effectuate settlements involving large numbers of claims by relatively small claimants." *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 658 (S.D.N.Y. 2015) (quoting *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 205 (S.D.N.Y. 1995)). The Court certified the Settlement Class in its preliminary approval order and the reasons justifying the order have not changed. *See* Dkt. 32. For that reason, the Court can rely on its order without analyzing Rule 23's factors again. *See In re Bear Stearns Cos., Inc. Sec., Derivative and ERISA Litig.*, 909 F. Supp. 2d 259, 264 (S.D.N.Y. 2012) (finally approving settlement where there "have been no material changes to alter the proprietary of [the court's] findings" at the preliminary approval stage).

For completeness, the Court certified the class for four reasons, each of which is discussed in detail in Plaintiff's Motion for Preliminary Approval (Dkt. 28). First, it found the Settlement Class was "numerous" because "joinder of all Settlement Class Members would be impracticable[.]" Dkt. 32, ¶ 1; Rule 23(a). With over 500 Settlement Class Members, the facts supporting that finding has not changed. Second, Plaintiff is an adequate Settlement Class Representative, having experienced the same injuries as the rest of the Settlement Class stemming from the Security Incident and having retained counsel experienced in data breach class action litigation. Third, typicality and commonality remain the same, as the same issues that affect Plaintiff affect the Settlement Class, and those issues have not changed. And fourth, all issues

impacting the Settlement Class predominate over any "individualized" issues. Any differences between Settlement Class members did not impact the analysis here, as only three opted out and none objected. As a result, the Court should apply the same analysis it applied in its preliminary approval order to certify the Settlement Class under Rule 23.

c. The Court Should Find the Notice Program Satisfied Rule Due Process

The Court should approve the notice program because it succeeded. Settlement Class Members are entitled to the "best notice that is practicable under the circumstances" of any proposed settlement before it is finally approved by the Court. Rule 23(c)(2)(B). "The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means." *Id*. To comply with due process, notice must be "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997). Notice must explain: (i) the action; (ii) how the class is defined; (iii) the class claims, issues, or defenses; (iv) that a class member appear through an attorney; (v) that the court will exclude from the class any member who requests it; (vi) the time and manner for requesting exclusion; and (vii) the binding effect that class judgment has on members. Fed. R. Civ. P. 23(c)(2)(B).

As discussed above, RG/2 sent direct notice via U.S. Mail to more than 99% of the Settlement Class. Additionally, the settlement website and telephone line maintained by RG/2 provided the Settlement Class with ample opportunity to obtain information about the Settlement and file a claim. As a result, the notice program here satisfies due process. It was the "best notice that [was] practicable under the circumstances" and succeeded at what it aimed to do. Rule 23(c).

V. CONCLUSION

For the reasons above, the Court should finally approve the parties' settlement, certify the Settlement Class, and enter the proposed final approval order.

Dated: June 6, 2024

By: */s/ Raina C. Borrelli*

Raina C. Borrelli
STRAUSS BORRELLI PLLC
One Magnificent Mile
980 N. Michigan Avenue, Suite 1610
Chicago IL, 60611
Telephone: (872) 263-1100
Facsimile: (872) 263-1109
raina@straussborrelli.com

James J. Bilsborrow (NY Bar # 519903)
WEITZ & LUXENBERG, PC
700 Broadway
New York, NY 10003
Telephone: (212) 558-5500
jbilsborrow@weitzlux.com

Attorneys for Plaintiff and the Proposed Class

CERTIFICATE OF SERVICE

I, Raina C. Borrelli, hereby certify that on June 6, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel of record, below, via the ECF system.

DATED this 6th day of June, 2024.

STRAUSS BORRELLI PLLC

By: */s/ Raina C. Borrelli*

Raina C. Borrelli
raina@straussborrelli.com
STRAUSS BORRELLI PLLC
One Magnificent Mile
980 N Michigan Avenue, Suite 1610
Chicago IL, 60611
Telephone: (872) 263-1100
Facsimile: (872) 263-1109