IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ANDRE KYLES and DIANE TAYLOR, on behalf of themselves and all others similarly situated, Plaintiffs, v. STEIN MART , INC., a Florida corporation, and SOCIAL ANNEX, INC. (d/b/a, ANNEX CLOUD), a Delaware corporation, Defendants.	CASE NO. 1:19-cv-00483-CFC **JURY TRIAL DEMANDED**

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF THE CLASS ACTION SETTLEMENT

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Plaintiffs Ande Kyles and Diane Taylor ("Plaintiffs") submit this Brief in support of their Unopposed Motion for Preliminary Approval of the Class Action Settlement with Defendants Stein Mart, Inc. ("Stein Mart") and Social Annex, Inc. (d/b/a Annex Cloud) ("Annex") (collectively, "Defendants"). This is a class action brought by Plaintiffs, individually and on behalf of similarly situated consumers (the "Class"), who made purchases from Stein Mart's online store, and whose credit/debit card information was potentially accessed and captured from Stein Mart's and/or Annex's systems by unauthorized users between December 28, 2017 and July 9, 2018 (the "Data Breach"). ¶ 1.[1] The proposed settlement reached by the parties will, if approved by the Court, provide immediate and significant benefits to all persons affected by the Data Breach and result in the dismissal of this case with prejudice. As detailed below, the Court should preliminarily approve the Settlement because it will provide fair, reasonable, and adequate relief for the Class, includes a comprehensive Notice Plan that is the best means of providing notice under the circumstances, and satisfies the requirements of FED. R. CIV. P. 23(e). Defendants do not oppose the relief requested in this motion.

I. NATURE AND STAGE OF THE PROCEEDINGS

On March 8, 2019, Plaintiffs filed their Complaint alleging that Defendants failed to (1) take adequate measures to protect their Personal Information (*see, e.g.*, ¶¶ 4-7, 39, 41, 58, 60, 69-70, 92, 102, 110, 120, 123, 145, 152); (2) disclose that their systems and/or websites were susceptible to a cyber-attack (*id.*); and (3) inform Plaintiffs and the Class that their information was compromised for months after learning of the Data Breach (*see, e.g.*, ¶¶ 42, 46-47, 55). Defendants reported that between at least December 28, 2017 and July 9, 2018, unauthorized users were able to access Annex's system on at least five different dates (May 19, June 1, June 5,

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[1] Unless otherwise indicated, all references herein to "¶ __" refer to the enumerated paragraphs of Plaintiffs' Class Action Complaint (D.I. 1) ("Complaint" and/or "Compl.").

and July 8-9 2018), and had the ability to access, view, and download Plaintiffs and the Class' Personal Information. ¶¶ 1, 42-57, 51. Thus, Plaintiffs and Class members are consumers whose personal and non-public Personal Information was allegedly compromised in the Data Breach.

On May 10, 2019, Annex filed a Motion to Dismiss Plaintiffs' Class Action Complaint (D.I. 14) and supporting brief (D.I. 15) arguing that Plaintiff Kyles lacks Article III standing, the Economic Loss Rule barred Plaintiffs' negligence claims, and Plaintiffs' state statutory claims were deficient. Stein Mart also filed a Motion to Dismiss Class Action Complaint (D.I. 16) and supporting brief (D.I. 17) arguing that the Court lacked personal jurisdiction, Plaintiffs failed to allege actual damages, and that the Economic Loss Rule barred Plaintiffs' negligence claims. On June 7, Plaintiffs filed a single omnibus brief in response to both Defendants' motions to dismiss (D.I. 20). On July 1, 2019, both Defendants filed separate reply briefs in support of their respective motions to dismiss. (D.I. 21 (Annex reply); D.I. 22 (Stein Mart reply)). On January 29, 2020, the Court denied Defendants' motions to dismiss without prejudice to renew. (D.I. 24).[2]

II. STATEMENT OF FACTS

A. Settlement Negotiations

All negotiations regarding settlement in this case have been conducted at arm's length, in good faith, and absolutely free of any collusion. *See* Declaration of Benjamin F. Johns in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of the Class Action Settlement ("Johns Decl.") at ¶¶ 4-16, attached to the Motion as Exhibit 2. Subsequent to the filing of Defendants' Motions to Dismiss and Plaintiffs' Opposition thereto, but prior to

[2] On December 13, 2019, the parties advised the Court that they had participated in a mediation and reached an agreement in principle to settle all claims, and would be working to execute a settlement agreement that memorializes the parties' agreement.

Defendants' Replies, the parties commenced discussions regarding the possibility of a negotiated settlement on behalf of Plaintiffs and the Class. *Id*. ¶ 5. On July 1, counsel for all parties conducted a conference call to begin discussions of a possible resolution. *Id*. ¶ 6. During that call, Plaintiffs' counsel advised that they would send defense counsel a letter containing Plaintiffs' proposed settlement terms. *Id.* Thereafter, on July 3, Plaintiffs' counsel sent a written settlement demand to defense counsel. *Id*. ¶ 7. On September 6, defense counsel sent a settlement counterproposal to Plaintiffs' counsel. *Id*. ¶ 8. Shortly thereafter, in early September 2019, the parties agreed to seek the aid of private mediator Bennett Picker of Stradley Ronon Stevens & Young LLP, in Philadelphia to continue settlement negotiations. *Id*. ¶ 9.

In anticipation of mediation, on November 6, 2019, Plaintiffs served a narrowed set of document requests upon both Defendants, requesting documents that would aid Plaintiffs in evaluating a possible resolution of their claims. *Id.* ¶ 11. In response thereto, both Defendants produced to Plaintiffs certain relevant information, including but not limited to: an Investigation Report on Annex's investigation of the Data Breach, Stein Mart's insurance policy providing coverage for data breach incidents, Stein Mart's factual timeline of the Data Breach, documents indicating the number of orders placed and payment cards transacted on Stein Mart's online store during the Data Breach period, and documents identifying 108,335 individuals who Stein Mart notified of the breach. *Id*. ¶ 12.

On November 14, 2019, the parties engaged in a full-day mediation session with Mr. Picker, beginning at approximately 9:00 a.m. The mediation session concluded at approximately 6:00 p.m. *Id*. ¶ 13. With the assistance of the mediator, the parties reached agreement on the material terms of the settlement, with the exception of the amount of Plaintiffs' attorneys' fees and expenses. *Id*. ¶ 14. This issue was not discussed until after the parties had reached agreement

on the material terms of the settlement. *Id.* Following the mediation, however, counsel for both parties continued to directly negotiate the amount of Plaintiffs' attorneys' fees and expenses, and were ultimately able to reach an agreement on that term on December 13, 2019. *Id.* ¶ 15.

B. The Proposed Settlement

As discussed in more detail below, the Settlement provides for cash payments to Class Members for a variety of expenses incurred (and inconvenience suffered) as a result of the Data Breach. *See* Settlement Agreement, attached as Exhibit 1 ("Settlement Agreement") to Plaintiffs' Unopposed Motion for Preliminary Approval of the Class Action Settlement ("Preliminary Approval Motion") filed contemporaneously herewith, at ¶¶ 2.1-2.2. In addition, as part of settlement negotiations, Defendants made certain representations to Plaintiffs' counsel regarding the measures taken following the Data Breach to increase their data security measures and consumer information protection procedures. *Id.* at ¶ 2.3; Johns Decl. at ¶ 16.

In exchange for this consideration, Plaintiffs agree to provide both Defendants with a release of claims relating in any way to the alleged conduct that gave rise to this action. Settlement Agreement at ¶ 6. Final approval of the Settlement will also result in the dismissal with prejudice of Plaintiffs' claims against Defendants. *Id*. at ¶ 4.

C. The Settlement Class

The proposed settlement class (the "Settlement Class") is defined as:

> All persons who were notified by Stein Mart that they made purchases on Stein Mart's online store using their credit, debit, or other payment card on certain dates between December 28, 2017 and July 9, 2018.

Id. at ¶ 1.25.

D. Compensation to Class Members

As more fully explained in the Settlement Agreement, all Class Members who submit a valid claim during the claim period (which will run until forty-five (45) days after entry of the Preliminary Approval Order) will be entitled to expense reimbursement of up to $220 for the following categories of potential expenses incurred as a result of the Data Breach:

- between one and three hours of lost time spent dealing with replacement card issues or in reversing fraudulent charges (calculated at the rate of $15 per hour);
- costs of credit report(s) purchased by Settlement Class Members between September 7, 2018 and the date of the Preliminary Approval Order;
- costs of credit monitoring and identity theft protection between September 7, 2018 and the date on which notice of the settlement is emailed to the Settlement Class Members; and
- miscellaneous other specified expenses (i.e., unreimbursed charges from banks or credit card companies, bank fees, card reissuance fees, overdraft fees, charges related to unavailability of funds, late fees, and/or over-limit fees; long distance telephone charges; cell minutes, Internet usage charges, and text messages; postage; interest on payday loans due to card cancelation or due to over-limit situation).

Settlement Agreement at ¶ 2.1.

Any Class Members who experienced documented extraordinary expenses will be eligible for reimbursement in the amount up to $4,000 per claim. *Id.* at ¶ 2.2.

In addition, and separate from any payment to Class Members under the provisions described above, Defendants shall pay any and all notice and administration costs associated with the settlement. *Id*. at *¶* 2.5.

E. Notification to Settlement Class Members

The Notice Plan was designed to reach the greatest practicable number of members of the Settlement Class.

Defendants will cause the notice administrator to send notice to all 108,335 (approximate) individuals who they originally notified of the Data Breach. The Notice Plan has direct email and direct mail components intended to reach potential Class Members. *Id.* Direct notice will be emailed to all Class Members for whom Defendants have an email address on file, which is believed to be the case for all Class Members. For those Class Members, if any, for whom Defendants do not have an email address on file, direct mail notices will be utilized.

Copies of the proposed Class Notice are attached to the Johns Declaration as Exhibits A, B, and C. These notice forms are designed to be easily understood and include information concerning: the nature of the action and Plaintiffs' claims; the definition of the Settlement Class; the class claims, issues, or defenses; that a Class Member may object to the Settlement Agreement; that any Settlement Class Member may appear in the action and be heard; that the Court will exclude from the Class any member who requests exclusion and the time and manner of requesting exclusion; the binding effect of a class judgment on members of the Class, as well as a toll-free number and web address to obtain more information and file a claim. Johns Decl. Exs. A, B, and C.

F. Plaintiffs' Incentive Awards and Attorneys' Fees

As noted above, the Parties did not discuss the payment of attorneys' fees, costs, expenses and/or incentive award to the Class Representatives until after the substantive terms of the settlement had been agreed upon. Johns Decl. at ¶¶ 14-15; *see also* Settlement Agreement at ¶ 7.1. Only after reaching agreement on all substantive terms did Defendants' and Plaintiffs' counsel reach agreement that Defendants would pay (subject to Court approval) Plaintiffs' attorneys' fees and costs in the amount of $300,000 and incentive awards to the Class Representatives in the amount of $2,500 each. Settlement Agreement at ¶¶ 7.2-7.3. Payment of

Plaintiffs' attorneys' fees and the incentive awards is to be separate from any and all class-wide compensation Class Members are entitled to under the Settlement Agreement and will not diminish or alter the benefits Class Members are entitled to in any way. *Id.* at ¶ 7.5.

III. SUMMARY OF THE ARGUMENT

(1) The Court should certify the Settlement Class for purposes of the Settlement because the Settlement satisfies the requirements of Rules 23(a) and (b).

(2) The Settlement is fair, adequate and reasonable under Rule 23(e)(2).

(3) The Settlement also satisfies all of the *Girsh* factors, which this Court has previously held guide its evaluation of proposed class action settlements.

(4) The proposed Notice Program satisfies the criteria of 23(e)(1)(B).

(5) For all of these reasons, the Court should grant preliminary approval of the Settlement.

IV. ARGUMENT

The Third Circuit has stated that "there is an overriding public interest in settling class action litigation, and it should therefore be encouraged." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004). Where, as here, the parties propose to resolve class action litigation through a class-wide settlement, they must obtain the Court's approval. *See* FED. R. CIV. P. 23(e). This analysis happens in two phases commonly referred to as preliminary approval and final approval. *See Vinh Du v. Blackford*, No. 17-cv-194, 2018 U.S. Dist. LEXIS 167103, at *6 (D. Del. Sep. 28, 2018). The recent amendments to FED. R. CIV. P. 23 revised the approval process for class action settlements. "Under the new Rule 23(e), in weighing a grant of preliminary approval, district courts must determine whether 'giving notice is justified by the parties' showing that the court *will likely be able to*: (i) approve the proposal under Rule

23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig*., No. 05-MD-1720 (MKB) (JO), 2019 WL 35998 1, at *12 (E.D.N.Y. Jan. 28, 2019) (emphasis in original). Plaintiffs respectfully submit that all of the requirements for preliminary approval are met in this case

A. Certification of the Proposed Settlement Class for Settlement Purposes is Appropriate

In granting preliminary settlement approval, the Court should also certify the Settlement Class for purposes of the Settlement under Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure. Courts have long acknowledged the propriety of a settlement class. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619-22 (1997). A settlement class, like other certified classes, must satisfy all the requirements of Rules 23(a) and (b), although the manageability concerns of Rule 23(b)(3) are not at issue. *See id.* at 593. As demonstrated below, the proposed Settlement Class satisfies all of the requirements of Rule 23(a) and Rule 23(b)(3).

1. *The Settlement Class Satisfies the Requirements of Rule 23(a)*

Certification is appropriate under Rule 23(a) if: (1) the class is so numerous that joinder of all members is impracticable ("numerosity"); (2) there are questions of law or fact common to the class ("commonality"); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ("typicality"); and (4) the representative parties will fairly and adequately protect the interests of the class ("adequacy"). FED. R. CIV. P. 23(a); *see also Amchem*, 521 U.S. at 613. As discussed below, the proposed settlement class meets each of these requirements.

a. The numerosity requirement is satisfied

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). "No minimum number of plaintiffs is required to

maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds forty, the numerosity prong has been met." Blackford, 2018 U.S. Dist. LEXIS 211796, at *7-8. Here, the numerosity requirement is plainly satisfied as more than 100,000 payment cards were potentially compromised by the Data Breach.

b. The commonality requirement is satisfied

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). "A finding of commonality does not require that all class members share identical claims, and factual differences among the claims of the putative class members do not defeat certification." *In re Prudential Ins. Co. Sales Litig*., 148 F.3d 283, 310 (3d Cir. 1998). "This commonality element requires that the plaintiffs 'share at least one question of fact or law with the grievances of the prospective class.'" *Blackford*, 2018 U.S. Dist. LEXIS 211796, at *8 (quoting *Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 382 (3d Cir. 2013)). Commonality requirement is satisfied where the plaintiffs assert claims that "depend upon a common contention" that is "of such a nature that it is capable of classwide resolution -- which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556 (2011). In this case, there are myriad common questions of law and fact, including but not limited to:

- whether Defendants owed a duty to Plaintiffs and members of the Class to adequately protect their Personal Information;
- whether Defendants breached these duties;
- whether Defendants violated federal and state laws;
- whether Defendants knew or should have known that their computer and network systems were vulnerable to attack from hackers;
- whether Defendants' conduct, including their failure to act, was the proximate cause of the breach of their computer and network systems resulting in the loss of customers' Personal Information;

- whether Defendants wrongfully failed to inform Plaintiffs and members of the Class that they did not maintain security procedures sufficient to reasonably safeguard their financial and personal data;
- whether Plaintiffs and members of the Class suffered injury as a proximate result of Defendants' conduct or failure to act; and
- whether Plaintiffs and the Class are entitled to recover damages and other relief from Defendants.

Resolving the allegations surrounding Defendants' alleged conduct relating to the Data Breach will resolve issues that are "central to the validity of each of the claims in one stroke." *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2551. Commonality is therefore satisfied.

c. The typicality requirement is satisfied

Rule 23(a)(3) requires that representative plaintiffs' claims be "typical" of those of other class members. FED. R. CIV. P. 23(a)(3). "The typicality threshold is low," and "where claims of the representative plaintiffs arise from the same alleged wrongful conduct on the part of the defendant, the typicality prong is satisfied." *Blackford*, 2018 U.S. Dist. LEXIS 211796, at *9 (citing *In re Warfarin Sodium Antitrust Litig*., 391 F.3d 516, 532 (3d Cir. 2004)). Here, the Plaintiffs' and Class Members' claims all arise from the same Data Breach and same alleged course of conduct by Defendants, such that typicality is satisfied.

d. The adequacy requirement is satisfied

The final requirement of Rule 23(a) is that "the representative part[y] will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). This Court has previously explained:

> The Third Circuit applies a two-prong test to assess the adequacy of the proposed class representatives. First, the court must inquire into the "qualifications of counsel to represent the class," and second, it must assess whether there are "conflicts of interest between named parties and the class they seek to represent." "Regarding the qualifications of counsel, Fed. R. Civ. P. 23(g) provides that, in appointing class counsel, the court must consider: (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel's

> experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources that counsel will commit to representing the class.

Blackford, 2018 U.S. Dist. LEXIS 211796, at *10 (quoting *Prudential Ins. Co.*, 148 F.3d at 312); FED. R. CIV. P. 23(g)(1)(A)). Here, both of the named Plaintiffs are adequate class representatives. They made purchases on Stein Mart's online store during the period of the Data Breach using a payment card, had their Personal Information potentially exposed as a result of and were victimized by the Data Breach, and allege to have suffered palpable fraud as a result of the Data Breach. D.I. 1. The Plaintiffs frequently communicate with their attorneys regarding the litigation, and neither has interests that are antagonistic to those of the Class. As for Plaintiffs' Counsel, they have invested considerable time and resources into the prosecution of this action. Johns Decl. at ¶2. Plaintiffs' Counsel was able to negotiate an outstanding Settlement for the Class in this case over weeks of negotiation and as a result of an intensive, successful full-day mediation session. *See* Johns Decl. at ¶¶ 4-16. The adequacy requirement is satisfied.

2. *The Requirements of Rule 23(b)(3) Are Satisfied*

Plaintiffs also seek certification of the Settlement Class pursuant to Rule 23(b)(3). A class action seeking an award of damages is appropriate under Rule 23(b)(3) if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Skeway v. China Nat. Gas, Inc.*, 304 F.R.D. 467, 475 (D. Del. 2014) (quoting FED. R. CIV. P. 23(b)(3)). When assessing predominance and superiority, the court may consider that the class will be certified for settlement purposes only, and that a showing of manageability at trial is not required. *See Amchem*, 521 U.S. at 618.

a. Common legal and factual questions predominate individual ones

Under the first criterion of Rule 23(b)(3), the court must find that "questions of law or fact common to class members predominate over any questions affecting only individual members." *Skeway*, 304 F.R.D. at 475 (quoting FED. R. CIV. P. 23(b)(3)). Plaintiffs have satisfied the predominance requirement because questions common to all Settlement Class Members substantially outweigh any possible issues that are individual to the Class Members. For example, each Settlement Class Member's relationship with Defendants is the same or substantially similar in all relevant respects to other Class Members—the Plaintiffs and each Class Member made purchases through Stein Mart's online store during the period of the Data Breach and had their private and sensitive financial information potentially exposed to cyber-criminals. Here, the same alleged course of conduct by Defendants form the basis of all Settlement Class Members' claims. As set forth above, there are numerous common issues relating to Defendants' liability at the core of this action, which predominate over any individualized issues. The predominance requirement of Rule 23(b)(3) is therefore satisfied.

b. A class action is superior to other methods of adjudication

Rule 23(b)(3) sets forth the following non-exhaustive factors to be considered in making a determination of whether class certification is the superior method of litigation:

> (A) the class members' interests in individually controlling the prosecution . . . of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by . . . class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action."

FED. R. CIV. P. 23(b)(3). The superiority requirement is easily satisfied. Indeed, courts in the Third Circuit have concluded that the class action device is usually the superior method by which to redress injuries to a large number of individuals in light of, e.g., the inefficiency of multiple lawsuits and the size of individual recoveries in comparison to the costs of litigations. S*ee, e.g., In re Heckmann Corp. Sec. Litig.*, No. 10–378–LPS–MPT, 2013 WL 2456104, at *8 (D. Del.

June 6, 2013) (superiority requirement "easily satisfied" in cases where there are large numbers of potential claimants who suffer damages too small to justify a suit against a large corporate defendant) (internal quotation marks omitted).

The Settlement Agreement and Notice Plan provide members of the Settlement Class with the ability to obtain prompt, predictable, and certain relief, and there are well-defined administrative procedures to assure due process. This includes the right of any Class Member dissatisfied with the Settlement to object to it, or to exclude themselves. The Settlement also would relieve the substantial judicial burdens that would be caused by repeated adjudication of the same issues in thousands of individualized trials against Defendants, by going forward with this case as a class action. And because the parties seek to resolve this case through a settlement, any manageability issues that could have arisen at trial are marginalized. *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 302-303 (3d Cir. 2011); *In re Ins. Brokerage Antitrust Litig*., 579 F.3d 241, 269 (3d Cir. 2009). Finally, the complexity of the claims asserted against Defendants and the high cost of individualized litigation make it unlikely that the vast majority of Settlement Class Members would be able to obtain relief without class certification.

In sum, because the requirements of Rule 23(a) and Rule 23(b)(3) are satisfied, certification of the proposed Settlement Class is appropriate.

B. The Settlement is Fair, Adequate and Reasonable Under Rule 23(e)(2)

"Rule 23(e)(2) sets forth the factors a court must consider in determining the fairness of a class action settlement." *Blackford*, 2018 U.S. Dist. LEXIS 211796, at *12-13.

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

> 23(e)(3); and (D) the proposal treats class members equitably relative to each other.

Id. at *13-14 (citing Fed. R. Civ. P. 23(e)(2)). As in *Blackford*, the proposed settlement readily satisfies all of the foregoing Rule 23(e)(2) factors.

1. *Class Representatives and Class Counsel Have Adequately Represented the Class*

As to be more fully explained at the final approval stage, Class counsel, Chimicles Schwartz Kriner & Donaldson-Smith LLP and Abington Cole + Ellery, are highly experienced in consumer class action litigation, particularly data breach class action lawsuits. Both firms submit that the settlement is in the best interest of Plaintiffs and the Class, and also respectfully submit that their judgment in this regard should be given weight. *See Alves*, 2012 WL 6043272, at *22 ("[C]ourts in this Circuit traditionally attribute significant weight to the belief of experienced counsel that settlement is in the best interest of the class." (internal quotations omitted)).

Moreover, Plaintiffs' counsel engaged in sufficient investigation and discovery to make an informed judgment concerning the merits of their claims. Class Counsel here had a deep appreciation of the merits before reaching the proposed settlement. The Parties and their counsel were knowledgeable about the strengths and weaknesses of the case prior to reaching the agreement to settle. Among other things, lead Plaintiffs: (i) conducted an extensive investigation prior to filing the Complaint; (ii) opposed Defendants' motions to dismiss; (iii) served discovery requests on Defendants; (iv) reviewed and analyzed information provided by Defendants in response to Plaintiffs' request in advance of the mediation; and (v) participated in a mediation process that provided lead Plaintiffs with a thorough understanding of Defendant's arguments on liability, class certification, and damages. Johns Decl. at ¶¶ 1-16. This universe provided a sufficient basis for Plaintiffs' counsel to conclude that the settlement was in the best interests of

Plaintiffs and the Class. *See, e.g.*, *Schuler v. Meds. Co*., Civil Action No. 14-1149 (CCC), 2016 U.S. Dist. LEXIS 82344, at *18-19 (D.N.J. June 23, 2016) (noting that "[a]lthough there has been no formal discovery, Lead Counsel had ample information to evaluate the prospects for the Class and to assess the fairness of the Settlement" and had reviewed publicly-available information, conducted an extensive investigation, consulted with an expert, drafted the initial complaint, briefed an opposition to defendants' motion to dismiss, and engaged in mediation). As such, this factor supports preliminary approval.

2. *The Proposed Settlement was Negotiated at Arm's Length*

The negotiations in this matter occurred at arm's length. Settlements negotiated by experienced counsel that result from arm's length negotiations are entitled to deference. *In re Auto. Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2004 U.S. Dist. LEXIS 29163, at *6-7 (E.D. Pa. May 11, 2004). This deference reflects the understanding that vigorous negotiations between seasoned counsel protect against collusion and advance the fairness consideration of Rule 23(e). The parties reached an agreement on all material terms after months of negotiation, commencing with email, letter, and teleconference communications, and culminating with an all-day mediation on November 14, 2019. Johns Decl. at ¶¶ 4-16.

Moreover, following the mediation, counsel for both parties continued to negotiate at arm's length for an additional month on the amount of Plaintiffs' attorneys' fees and expenses, and were ultimately able to reach an agreement thereon. *Id.* at ¶¶ 14-15. The arm's-length nature of the settlement negotiations and the involvement of an experienced mediator like Mr. Picker supports the conclusion that the Settlement was achieved free of collusion, and merits preliminary approval. *See Alves v. Main*, No. 01-cv-789 (DMC), 2012 WL 6043272, at *22 (D.N.J. Dec. 4, 2012) (internal quotations omitted) ("The participation of an independent

mediator in settlement negotiations virtually insures that the negotiations were conducted at arm's length and without collusion between the parties.").

3. *The Relief Provided to the Class is Adequate Under Rule 23(e)(2)(c)(i)-(iv)*

The parties must also show:

> the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3);

Blackford, 2018 U.S. Dist. LEXIS 211796, at *14. All of these factors are met here. The proposed Settlement creates a claims-made procedure that will confer a significant benefit to Class Members. Plaintiffs and Class Counsel recognize the expense and length of continued proceedings necessary to prosecute the litigation against Defendants through motion practice, discovery, class certification, summary judgment, trial, and potential appeals. Class Counsel believe that the claims asserted in the litigation have merit. However, Class Counsel have taken into account the uncertain outcome and the risk of further litigation.[3] Defendants deny the claims and contentions alleged against it in this litigation, and it has additional defenses (such as those going to class certification) that have not yet been resolved by the Court. It is almost assured that any future decisions on the merits would be appealed, which would then cause further delay.

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[3] For instance, Plaintiffs recognize that there are significant risks associated with obtaining class certification and prevailing on a motion for summary judgment. *See, e.g.*, *Hammond v. Bank of N.Y. Mellon Corp*., No. 08-cv-6060(RMB)(RLE), 2010 U.S. Dist. LEXIS 71996, at *6 (S.D.N.Y. June 25, 2010) (granting defendant's motion for summary judgment in a consumer data breach case); *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig*., 293 F.R.D. 21, 35 (D. Me. 2013) (denying class certification in data-breach case); *In re TJX Companies Retail Sec. Breach Litig*., 246 F.R.D. 389, 401 (D. Mass. 2007) (same).

In contrast, the Settlement will promptly make available significant benefits for the members of Settlement Class. Furthermore, the parties reached an amicable agreement on the amount of Plaintiffs' attorneys' fees, all of which will be paid separate from—and will have no impact on—the settlement funds available for the Class. Johns Decl. at ¶ 15. Due to the significant risks in this litigation and the uncertainty of prevailing on the merits and of establishing damages, this factor favors preliminary approval of the Settlement Agreement. *See Blackford*, 2018 U.S. Dist. LEXIS 211796, at *14-15 ("The relief is adequate in that it addresses Plaintiff's claims and provides protections against future issues. Since all of the relief is intuitional, there is no concern regarding distribution to the class. As discussed below, the attorney's fees sought are reasonable and do not impact the class' relief. Finally, the settlement treats all relevant class members equally. Thus, Rule 23(e) is satisfied.").

C. The *Girsh* Factors Are Also Satisfied

This Court has previously explained that the foregoing "[23(e)(2)] factors are in many respects a codification of various factors set forth in *Girsh* …." *Id.* at *14 (citing *Girsh*, 521 F.2d at 156). Thus, the foregoing analysis addresses the *Girsh* factors. Furthermore, although this Court has previously explained that the *Girsh* factors "are relevant to guide the Court at the preliminary [approval] stage," it has previously deferred from "engag[ing] in a more fulsome analysis of the *Girsh* factors … [until] the final approval [stage]."[4] *Id.* Neighboring courts have consistently held that because "the standard for preliminary approval is far less demanding,"

[4] The *Girsh* factors are: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *Id.* at *14 n.3 (citing *Girsh*, 521 F.2d at 157).

"[a]t the preliminary approval state … [the court] need not address all of the *Girsh* factors." *Curiale v. Lenox Grp., Inc*., 2008 U.S. Dist. LEXIS 92851, 2008 WL 4899474, at *9 n.4 (E.D. Pa. Nov. 14, 2008).[5] Nonetheless, as in *Blackford*, Plaintiffs briefly address each of the *Girsh* factors below.

1. Girsh *Factors 1, 4-6 and 8-9 Favor Granting Preliminary Approval*

"The first *Girsh* factor is the complexity, expense, and likely duration of the litigation, which aims to take into account the 'probable costs, in both time and money, of continued litigation.'" *Blackford*, 2018 U.S. Dist. LEXIS 211796, at *16 (quoting *In re Cendant Corp. Litig*., 264 F.3d 201, 233 (3d Cir. 2001)). Relatedly, *Girsh* factors 4-6 "are the risks of establishing liability, the risks of establishing damages, and the risks of maintaining the class action throughout the trial." *Id*. at *17. And "[t]he eighth and ninth factors are the range of reasonableness of the settlement fund in light of the best possible recovery and the attendant risks of litigation." *Id*. at *19-20.

At least one other court within the Third Circuit has held that data breach class actions are so complex, expensive, risky, and lengthy if litigated as to satisfy the foregoing factors.[6] As discussed in *supra* §III.B.3., Plaintiffs and Class Counsel recognize the expense and length of continued proceedings necessary to prosecute the litigation against Defendants through motion practice, discovery, class certification, summary judgment, trial, and potential appeals, as well as

[5] *See also Gregory v. McCabe, Weisberg & Conway, P.C.*, No. 13-6962 (AMD), 2014 U.S. Dist. LEXIS 79795, at *8 n.6 (D.N.J. June 12, 2014) ("The Court need not, however, consider the Girsh factors in the context of the pending motion, in light of the far less demanding standard applicable to preliminary approval); *Gates v. Rohm & Haas Co*., 248 F.R.D. 434, 444 n.7 (E.D. Pa. 2008) ("At the preliminary approval stage, however, the Court need not address these factors, as the standard for preliminary approval is far less demanding.").

[6] *See, e.g.*, *Fulton-Green v. Accolade, Inc.*, 2019 U.S. Dist. LEXIS 164375, at *26 (E.D. Pa. Sep. 23, 2019) ("the parties claim that continued litigation would entail a lengthy and expensive legal battle that may result in no relief or substantially delayed relief to the Settlement Classes. They also argue that appeals would likely follow any trial on the merits. This far weighs in favor of the settlement.").

the likelihood that either party would file appeals if they experienced adverse rulings at any of these stages, causing immense delay. In light of the prodigious expense and risk associated with continuing to litigate this case, *Girsh* factors 1, 4, 5, 6, 8 and 9 weigh in favor of granting preliminary approval. *See, e.g.*, *id*. at *20 ("this is a complex case that would require difficult factual determinations. Settling now saves money, provides the relief sought, and avoids the uncertainty of trial. This factor also weighs in favor of settlement. It is clear that upon balancing of the Girsh factors, they tip strongly in favor of the settlement.").

2. *The Remaining* Girsh *Factors Also Favor Approval*

As an initial matter, the third *Girsh* factor "requires the Court to evaluate whether Plaintiffs had an adequate appreciation of the merits of the case before negotiating settlement." *Id*. at *17. Plaintiffs already discussed this in *supra* § III.B.1; therefore, they do not repeat that discussion here. With respect to the last remaining *Girsh* factors (i.e., second and seventh), "[t]he second *Girsh* factor to be considered is the reaction of the class to the settlement. *Id.* at *16. Because "no [class member] has objected to the settlement, this factor weighs heavily in favor of settlement." *Id*. at *16. Finally, the seventh *Girsh* factor is "most clearly relevant where a settlement in a given case is less than would ordinarily be awarded but the defendant's financial circumstances do not permit a greater settlement." *Id*. at *19. The proposed settlement was not reduced in any way based upon either Defendant's financial circumstances, so this factor is inapplicable.

D. The Proposed Notice Plan Should Be Approved

"Rule 23(e)(1)(B) requires the court to direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or (b)(3)." MCL, § 21.312 (internal quotation marks omitted). The best practicable notice is that which 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. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see also* MCL, § 21.312 (listing relevant information).

The proposed Notice Program satisfies all of these criteria. The Notice will inform Settlement Class Members of the substantive terms of the Settlement, their options for opting-out or objecting to the Settlement, and how to obtain additional information about the Settlement. *See* Johns Decl. Exs. A, B, and C. Specifically, the Notice will advise Settlement Class Members of: (i) the pendency of the class action; (ii) the essential terms of the Settlement; and (iii) information regarding Plaintiffs' Counsel's motion for attorneys' fees and reimbursement of Litigation Expenses. The Notice will also provide specifics on the date, time and place of the Settlement Hearing and set forth the procedures, as well as deadlines, for opting out of the Settlement Class, for objecting to the Settlement and/or the motion for attorneys' fees and reimbursement of Litigation Expenses, and for submitting a Claim Form.

V. CONCLUSION

Based on the foregoing, Plaintiffs and Class Counsel respectfully request that the Court: (1) grant preliminary approval to the Settlement; (2) certify for settlement purposes the proposed Settlement Class, pursuant to Rule 23(b)(3) and 23(e) of the Federal Rules of Civil Procedure; (3) approve the Notice Program; (4) approve, set deadlines for, and order the opt out and objection procedures set forth in the Agreement; (5) appoint Plaintiffs as class representatives; (6) appoint as Class Counsel Benjamin F. Johns of Chimicles Schwartz Kriner & Donaldson-Smith LLP and Cornelius Dukelow of Abington Cole + Ellery; (7) stay the Action against

Defendants pending Final Approval of the Settlement; and (8) schedule a Final Fairness Hearing.

A proposed order has been attached to the motion as Exhibit 3.

Dated: March 19, 2020

Respectfully submitted,

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