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15
16 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
17 **FOR THE COUNTY OF LOS ANGELES**

18 KYNDAL CHRISTOFFERSON, NATALIE)
19 GERACE, AND ERIN RATELLE,)
20 individually and on behalf of all others)
similarly situated,)

21 Plaintiffs,)

22 v.)

23 CREATION ENTERTAINMENT, INC.,)

24 Defendant.)

Case No. 19STCV11000

**PLAINTIFFS' NOTICE OF MOTION
AND UNOPPOSED MOTION FOR AN
ORDER PRELIMINARILY
APPROVING CLASS ACTION
SETTLEMENT, DIRECTING NOTICE
AND SETTING FINAL APPROVAL
HEARING; MEMORANDUM OF
POINTS AND AUTHORITIES**

DATE: December 8, 2020
TIME: 11:00 a.m.
JUDGE: Hon. Elihu M. Berle
DEPT.: 6

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on December 8, 2020 at 11:00 a.m., or as soon thereafter as
3 the matter may be heard, in Department 006 of the Superior Court of California, County of Los
4 Angeles, located at 312 North Spring Street, Los Angeles, California 90012, Plaintiffs Kyndal
5 Christofferson, Natalie Gerace, and Erin Ratelle (collectively, “Plaintiffs”) will move without
6 opposition for an order:

- 7 1. Provisionally certifying the Settlement Class for purposes of settlement;
- 8 2. Appointing Plaintiffs as Class Representatives for purposes of settlement;
- 9 3. Preliminarily approving the class action settlement (the “Settlement”) as fair,
10 adequate, and reasonable based upon the terms set forth in the Settlement
11 Agreement;
- 12 4. Appointing CPT Group as the third-party Claims Administrator for distributing
13 notices and for claims administration;
- 14 5. Approving the proposed Class Notice, and ordering it be disseminated to the Settlement
15 Class as provided in the Settlement Agreement; and
- 16 6. Scheduling a hearing for final approval of the Settlement.

17 This unopposed motion is made pursuant to California Code of Civil Procedure section 382
18 and California Rules of Court, rule 3.769, on the grounds that the proposed Settlement is within the
19 range of possible final approval. The parties therefore desire to give notice of the proposed
20 Settlement to Settlement Class Members and request that the Court hold a Final Approval Hearing as
21 to whether the Settlement should be finally approved.

22 Plaintiffs also respectfully request that the Court impose the following schedule with respect
23 to the Settlement:

EVENT	DATE
Notice Date (the date on which the Class Notice to the Settlement Class Members is substantially complete)	No later than 60 days following the entry of the Preliminary Approval Order
Objection and Exclusion Deadlines (submission deadline for objections and requests for exclusion)	60 days after the Notice Date
Motion for Attorneys’ Fees, Reimbursement of Expenses, and Service Payments to be filed by Class Counsel	No later than 30 days prior to the Objection and Exclusion Deadline

1 2	Motion for Final Approval and Settlement Administrator to File Declaration re Notice Program and Opt-outs and Objections	16 court days prior to the Final Approval Hearing
3 4	Supplement in Support of Motions for Final Approval, Attorneys' Fees and Expenses, and Service Payments to be filed by Class Counsel	5 court days prior to Final Fairness Hearing
5 6	Final Approval Hearing	After Notice is completed and at least 25 days after the Opt Out Date, at the convenience of the Court
7 8	Final Accounting	90 days after the Claims Administrator completes stop payments on uncashed checks

9 This motion is based upon this Notice; the accompanying Memorandum of Points and
10 Authorities; the Joint Declaration of Rachele R. Byrd, Benjamin F. Johns, and Tina Wolfson,
11 Counsel for Plaintiffs ("Joint Decl."); the Declaration of Julie N. Green, the proposed claims
12 administrator ("Green Decl."); the Declaration of Fred Alumyan, the CEO of Biz-Tech Services
13 ("Alumyan Decl."); the Declaration of Jack Martirosian, the CEO of Alternate Network
14 Technologies ("Martirosian Decl."); the Settlement Agreement and all exhibits attached thereto; the
15 files and records in this action; and any argument and evidence which may be presented at the
16 hearing on this motion.

17 DATED: November 9, 2020

18 By: 
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Kyndal Christofferson, Natalie Gerace, and Erin Ratelle (collectively, “Plaintiffs”) submit this memorandum in support of their Unopposed Motion for an Order Preliminarily Approving Class Action Settlement, Directing Notice and Setting Final Approval Hearing. Plaintiffs allege that sensitive financial and personal non-public information, including but not limited to their (a) names; (b) addresses; (c) email addresses; and (d) payment card information (including, *inter alia*, card numbers, expiration dates, and security codes (“CVV numbers”) (collectively, “Personal Information”)) was accessed and captured from Defendant Creation Entertainment, Inc.’s (“Creation”) systems by unauthorized users during a period of time that ended on or around October 2018 (the “Security Incident”). For the reasons detailed below, the parties have agreed to settle the claims on a class-wide basis and seek the Court’s preliminary approval to send notice to the Settlement Class¹ to apprise them of the Settlement.

14 Plaintiffs and Creation (collectively, “the Parties”) have negotiated a proposed Settlement that provides substantial benefits to the Settlement Class in the form of a Settlement Fund of \$950,000. Under the Settlement Agreement, all Settlement Class Members (“Class Members”) may submit claims to receive one of two types of Settlement Payments to provide monetary compensation for damages incurred as a result of the Security Incident. *See* Settlement Agreement, § 2.2.

20 The Settlement was reached after an exchange of formal discovery and several months of arm’s-length, non-collusive bargaining between counsel, including an all-day mediation on October 29, 2019, with the Honorable Peter D. Lichtman (Ret.) at JAMS. *See* Joint Decl., ¶ 8. While the Parties were unable to reach agreement at the mediation, they continued to negotiate for several months, which culminated in an agreement between the Parties. *Id.*, ¶¶ 10-16. Plaintiffs respectfully

26 ¹ Unless otherwise indicated, the defined terms herein shall have the same definition as set forth in the Settlement Agreement and Release (the “Settlement” or “Settlement Agreement” or “SA”), dated November 9, 2020 and filed concurrently herewith as Exhibit 1 to the Joint Declaration of Counsel for Plaintiffs in Support of Unopposed Motion for an Order Preliminarily Approving Class Action Settlement, Directing Notice and Setting Final Approval Hearing.

1 submit that the terms of the Settlement are fair, reasonable and adequate and that the requirements
2 for final approval will ultimately be satisfied. However, for preliminary approval, the Court need
3 only assess whether the Settlement Agreement is within the range of what may be found to be fair,
4 adequate, and reasonable so that the Class Members can be notified of the proposed Settlement and a
5 Final Approval Hearing can be scheduled. Only after Class Members and others have had an
6 opportunity to receive notice and be heard at the Final Approval Hearing will the Court need to
7 render final judgment regarding the fairness of the proposed Settlement.

8 At this preliminary stage, Plaintiffs respectfully ask the Court to: (1) grant preliminary
9 approval of the Settlement; (2) provisionally certify the Settlement Class for settlement purposes
10 only; (3) approve the proposed notice to the Class Members; (4) appoint CPT Group as Claims
11 Administrator and direct it to commence the giving of notice; and (5) schedule a Final Approval
12 Hearing. Plaintiffs further request that the Court appoint Plaintiffs as Representative Plaintiffs, and
13 the undersigned as Class Counsel to the Settlement Class.

14 **II. SUMMARY OF THE LITIGATION**

15 On or about April 2, 2019, Kyndal Christofferson filed a complaint in the Los Angeles
16 County Superior Court, captioned as *Kyndal Christofferson v. Creation Entertainment, Inc.*, Case
17 No. 19STCV11000. On that same date, Erin Ratelle filed a complaint in the Los Angeles County
18 Superior Court, captioned *Erin Ratelle v. Creation Entertainment, Inc.*, Case No. 19STCV10998.
19 Plaintiff Ratelle voluntarily dismissed her complaint on April 25, 2019. On July 3, 2019, Plaintiffs
20 Kyndal Christofferson, Natalie Gerace and Erin Ratelle filed a First Amended Class Action
21 Complaint (“Complaint” or “FAC”) in Case No. 19STCV11000. The Complaint alleges that
22 Creation failed to implement or maintain adequate security measures to protect the confidential
23 personal information entrusted to it by Creation customers which resulted in a massive data breach
24 of Creation’s systems from approximately February 1, 2018 through October 10, 2018. FAC, ¶¶ 1-
25 12, 44-54. The Complaint brought claims against Creation for: (1) negligence; (2) breach of
26 implied contract; (3) violation of the California Data Breach Notification Act, Cal. Civ. Code
27 § 1798.80, *et seq.*; (4) violation of the California Unfair Competition Law, Cal. Bus. & Prof. Code
28 § 17200, *et seq.*; (5) violation of the California Consumers Legal Remedies Act, Cal. Civ. Code

1 § 1750, *et seq.*; (6) violation of the Maryland Consumer Protection Act, Md. Code Ann., Com. Law
2 § 13-101, *et seq.*; and (7) unjust enrichment. *Id.*, ¶ 87-159. Creation filed an Answer to the
3 Complaint on August 27, 2019.

4 The Parties thereafter engaged in formal discovery regarding the Security Incident,
5 Plaintiffs' claims, and Creation's defenses. Joint Decl., ¶ 11. On October 29, 2019, the parties
6 participated in good faith, arm's-length settlement discussions during an all-day mediation with the
7 Honorable Peter D. Lichtman (Ret.) of JAMS in Los Angeles. *Id.*, ¶ 8. The Parties failed to resolve
8 the matter during that mediation session, but agreed to continue settlement negotiations with the
9 ongoing assistance of Judge Lichtman. *Id.* Following mediation, the Parties continued to engage in
10 extensive discussions through which the basic terms of the Settlement were eventually negotiated
11 and finalized. *Id.*, ¶¶ 10-13. At a status conference on July 8, 2020, the Parties notified the Court of
12 the Settlement. *Id.*, ¶ 15. The Parties ultimately signed a Memorandum of Understanding on or
13 about August 31, 2020, and a Settlement Agreement on November 9, 2020. *Id.*, ¶ 14.

14 The Parties respectfully submit that the proposed Settlement is within the range of possible
15 final approval. They therefore desire to give notice of the proposed Settlement to Class Members
16 and request that the Court set a Final Approval Hearing as to whether the Settlement should be
17 finally approved.

18 **III. SUMMARY OF THE SETTLEMENT**

19 **A. The Settlement Class**

20 The Settlement Class consists of all individuals in the United States who used a debit or
21 credit card to make a purchase from Creation and whose Personal Information was accessed and/or
22 compromised by unauthorized individuals as part of the Security Incident. *Id.*, ¶ 17.

23 **B. Settlement Consideration**

24 The Parties have negotiated payment of a fixed sum of \$950,000.00 (the "Settlement Fund")
25 in exchange for a release of all claims that were or could have been asserted in the case. *Id.*, ¶ 18.
26 Notice and administration expenses will be deducted from the Settlement Fund, along with any
27 attorneys' fees, expense reimbursements and service awards approved by the Court. *Id.*, ¶ 19. The
28 balance will be applied to pay the claims of Class Members. *Id.* Plaintiffs will seek up to 33% of

1 the fund in attorneys' fees and reimbursement of reasonable expenses incurred, as well as a \$2,500
2 service award for each of the three Representative Plaintiffs. *Id.* Notice and administration expenses
3 are estimated to be approximately \$66,000. *Id.*, ¶ 20. If these deductions are allowed in full, the
4 Settlement will provide approximately \$545,000 to pay Class Member claims. *Id.*, ¶ 21.

5 Creation has also implemented enhanced data security measures at a cost of \$119,337.87,
6 which further benefits the Class. *Id.*, ¶ 35. Creation no longer has active physical servers for
7 transacting sales at any location as of June 1, 2019. Alumyan Decl., ¶ 3; Martirosian Decl., ¶ 3.
8 Creation currently uses cloud services provided by Amazon Web Services for transacting and saving
9 customer orders, the details of which are encrypted, processed through Magento Level 4 Security (e-
10 commerce platform) and sent securely to PAYA (Credit Card processing). *Id.* Once PAYA receives
11 the credit card information, it responds by sending a token ID which does not contain any sensitive
12 information. *Id.* Once the token ID is received, the credit card information is deleted off the Magento
13 server and is never stored anywhere within any of Creations' servers or domains. *Id.* This Level 4
14 security, in place since June 1, 2019, prevents hacking or other intrusion by a malicious threat actor.
15 Alumyan Decl., ¶ 4; Martirosian Decl., ¶ 4. Further, Creation migrated and decommissioned its old
16 server onto an encrypted secure environment, Creations' e-commerce system (Magento) and its
17 accounting and financial systems (Sage100) are not storing any credit card information, and any
18 other customer information is fully encrypted. Alumyan Decl., ¶ 5; Martirosian Decl., ¶ 5.

19 **C. Distribution of the Settlement Fund**

20 The distribution plan ensures that all Class Members are eligible to readily receive payment
21 from the Settlement Fund by submitting a claim for one of two types of Settlement Payments that
22 will be paid from the Settlement Fund, either (i) a Basic Settlement Payment or (ii) an Extraordinary
23 Reimbursement Settlement Payment, as follows:

24 (i) Basic Settlement Payment - Class Members who submit a claim for a Basic Settlement
25 Payment are eligible to receive \$200.00, regardless of whether they experienced any fraudulent or
26 unauthorized charges on their credit or debit cards used to make purchases from Creation and
27 regardless of whether they experienced any identity theft as a result of the Security Incident. If a
28 Settlement Class Member experienced any fraudulent or unauthorized charges on his or her credit or

1 debit card used to make a purchase from Creation, this Basic Settlement Payment includes expense
2 reimbursement for: (a) lost time spent dealing with replacement card issues or having fraudulent
3 charges reversed; (b) costs of credit reports, credit monitoring, and identity theft protection
4 purchased between February 1, 2018 and April 19, 2019 (the “Unauthorized Charge Period”); and
5 (c) other miscellaneous expenses (e.g., unreimbursed charges or fees from banks or credit card
6 companies related to reissuance of cards, overdrafts, unavailability of funds, late payments;
7 telephone/cell phone charges; postage; interest on payday loans related to card cancellation and
8 replacement issues.) Joint Decl., ¶ 22.

9 (ii) Extraordinary Reimbursement Settlement Payment - Class Members who submit a claim
10 for an Extraordinary Reimbursement Settlement Payment with sufficient documentation who—
11 (a) during the Unauthorized Charge Period experienced one or more fraudulent or unauthorized
12 charges that are claimed by the Class Member in good faith to be more likely than not caused by the
13 Security Incident on a credit or debit card he or she used to make a purchase from Creation, which
14 charges were not denied or reimbursed; (b) has made reasonable efforts to avoid or seek
15 reimbursement for his or her losses, including but not limited to exhaustion of all available credit
16 monitoring insurance and identity theft insurance; and (c) submits an Approved Claim for an
17 Extraordinary Reimbursement Settlement Payment—shall be eligible to receive reimbursement of up
18 to \$10,000.00 for unreimbursed losses related to the Security Incident, including: (i) unreimbursed
19 unauthorized charges during the Unauthorized Charge Period on a credit or debit card used to make
20 a purchase from Creation that more likely than not resulted from the Security Incident; (ii) over one
21 hour and up to three hours of lost time spent dealing with unauthorized charges due to the Security
22 Incident, at a rate of \$20.00 per hour, if such time can be documented with reasonable specificity by
23 answering questions on the Claim Form; and (iii) out of pocket expenses. *Id.*

24 Regardless of which option Class Members pursue, all Class Members seeking a Settlement
25 Payment must complete and submit a written Claim Form to the Claims Administrator, as discussed
26 further below. *Id.*, ¶ 23.

27 If, after the Claims Deadline has passed and the Attorneys’ Fees and Expenses Award and
28 the Representative Plaintiffs’ Awards have been paid in full out of the Settlement Fund, the total

1 dollar value of all Approved Claims is less than the amount remaining in the Settlement Fund, then
2 the Claims Administrator shall increase the payment amount for all Approved Claims *pro rata*
3 among all Class Members, up to a maximum of twice the total amounts set forth for the Basic or
4 Extraordinary Reimbursement Settlement Payments set forth in the Settlement Agreement, *i.e.*, up to
5 \$400.00 or \$20,000, respectively. *Id.*, ¶¶ 29, 30. If, however, the total dollar value of all Approved
6 Claims at the payment rates set forth in the Settlement Agreement exceeds the amount remaining in
7 the Settlement Fund, the payment amount for all Approved Claims shall be reduced *pro rata* among
8 all Class Members who submitted Approved Claims. *Id.*, ¶ 30.

9 Creation will deliver the Settlement Fund to the Claims Administrator within ten business
10 days following entry of the Preliminary Approval Order. *Id.*, ¶ 31. The Claims Administrator will
11 mail the Settlement Payment checks or electronically transfer funds for Approved Claims to Class
12 Members within the later of 90 days after the Effective Date or 30 days after all disputed claims have
13 been resolved. *Id.*, ¶ 32. If there is any balance remaining in the Settlement Fund Account 90 days
14 after the Claims Administrator completes the process for stopping payment on any Settlement
15 Payment checks that remain uncashed, the Claims Administrator shall donate the balance of the
16 Fund Account as a *cy pres* donation to Public Justice. *Id.*, ¶ 33.

17 **D. Proposed Form of Notice to the Class**

18 Creation shall prepare the list of Class Members and provide it to the Claims Administrator
19 within 10 business days after entry of the Preliminary Approval Order, including the name, email
20 address and/or mailing address of each Settlement Class Member. *Id.*, ¶ 38. Within 30 days of the
21 Preliminary Approval Order, the Claims Administrator shall provide Summary Notice to Class
22 Members via email and shall establish a dedicated settlement website that includes the Settlement
23 Agreement, the Long Notice, and the Claim Form approved by the Court *Id.*, ¶ 39. The settlement
24 website will be maintained and updated by the Claims Administrator throughout the Claims Period.
25 *Id.*, ¶ 41. Upon request, the Claims Administrator will also provide Class Members copies of the
26 Settlement Agreement, the Long Notice and the Claim Form. *Id.*, ¶ 42. Additionally, Class
27 Members can call a toll-free number to access interactive voice recognition FAQ's. *Id.*, ¶ 43. Also
28 within 30 days of the Preliminary Approval Order, Publication Notice shall be provided to Class

1 Members, and Creation shall prominently post a link to the settlement website on the Creation home
2 page for the entire claims period. *Id.*, ¶¶ 44-45.

3 The Notice program shall commence within 30 days of entry of the Preliminary Approval
4 Order and shall be completed within 60 days of entry of the Preliminary Approval Order, unless
5 otherwise provided in the Settlement Agreement. *Id.*, ¶ 46.

6 **E. The Claims Process**

7 As discussed above, in order to allocate the Settlement Fund equitably, verify eligibility,
8 obtain updated address information, and allow Class Members to choose a payment preference,
9 Class Members seeking a Settlement Payment under the Settlement must complete and submit a
10 written Claim Form to the Claims Administrator to receive either a Basic Settlement Payment or an
11 Extraordinary Reimbursement Settlement Payment. *Id.*, ¶¶ 22-23. The Claim Form must be
12 postmarked or submitted electronically on or before the Claims Deadline, which shall be 90 days
13 after the Notice Date. *Id.*, ¶ 24. Class Members may only submit a Settlement Claim for one type of
14 Settlement Payment; if a Settlement Class Member submits a Claim Form seeking more than one
15 type of Settlement Payment, the Claims Administrator shall pay the single Settlement Payment of
16 the highest dollar value supported by a valid Claim Form and any required documentation. *Id.*, ¶ 25.
17 Class Members may only submit one Settlement Claim, and only one Settlement Claim may be
18 submitted per credit or debit card used with Creation. *Id.*, ¶ 26.

19 All Class Members must sign the Claim Form and establish that they used a credit or debit
20 card to make a purchase from Creation by either submitting a receipt, bank statement or credit card
21 to reflect the purchase. *Id.*, ¶ 27. If no such documentation is available, Class Members shall attest
22 under penalty of perjury that he or she made a debit or credit card purchase from Creation,
23 identifying the approximate date and location of purchase, and provide the last four digits of his or
24 her credit or debit card number (or, if the credit card number is no longer available, the Settlement
25 Class Member shall attest under penalty of perjury that it is no longer available). *Id.* Failure to
26 provide such supporting documentation as requested on the Claim Form will result in denial of a
27 Settlement Claim. *Id.* Additional information and documentation will be required of Class Members
28 seeking Extraordinary Reimbursement Settlement Payments in order to show unauthorized charges

1 were denied or not reimbursed, time spent on tasks related to unauthorized charges or the Security
2 Incident, out-of-pocket expenses, and attestation of reasonable efforts to avoid or seek
3 reimbursement for the loss. *Id.* If a Class Member submits an incomplete or unsigned Claim Form,
4 or a Claim Form that is not accompanied by sufficient documentation to determine the validity of the
5 claim, the Claims Administrator shall request additional information and give the Class Member
6 thirty (30) days to cure any defect before rejecting the claim. *Id.*, ¶ 28.

7 **F. Opting Out and Objecting to the Settlement**

8 Class Members will have the opportunity to object to or opt out of the Settlement by
9 submitting a timely written notice meeting the prerequisites set forth in the Settlement Agreement of
10 their objection or their intent to opt out by the deadline to be stated in the Class Notice, which will
11 be 60 days after the Notice Date. SA, §§ 5.1-6.3. Class Members who do not timely opt out will be
12 bound by the terms of the Settlement Agreement and the Final Approval Order. *Id.*, § 5.4.

13 **G. Representative Plaintiffs' Awards and Attorneys' Fees and Expenses**

14 Representative Plaintiffs and Class Counsel will make written application to the Court for an
15 attorneys' fee award not to exceed thirty-three percent (33%) of the Settlement Fund, plus expenses.
16 *See* Joint Decl., ¶¶ 19, 49.

17 Representative Plaintiffs and Class Counsel will also make written application to the Court
18 for service awards to be paid to Representative Plaintiffs from the Settlement Fund for their service
19 as plaintiffs in the Action in an amount not to exceed \$2,500 to each of the Representative Plaintiffs.
20 *See id.*, ¶¶ 19, 49.

21 **IV. THE COURT SHOULD APPROVE THE CLASS SETTLEMENT**

22 **A. Standard for Approval of Class Action Settlements**

23 The law favors settlements. *See Bush v. Superior Court*, 10 Cal. App. 4th 1374, 1382 (1992).
24 This is particularly true in class actions where substantial resources can be conserved by avoiding
25 the time, cost, and rigors of formal litigation. The California Rules of Court set forth the procedures
26 for court approval of a class action settlement: (1) the Court preliminarily approves the settlement;
27 (2) class members receive notice as directed by the Court; and (3) the Court conducts a final fairness
28 hearing to inquire into the fairness of the proposed settlement. *See* Cal. R. Ct. 3.769(c), (e)-(g).

1 The decision to approve or reject a proposed settlement lies within the Court’s sound
2 discretion. See *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 234-35 (2001).
3 Nevertheless, in considering a potential settlement for approval, “[t]he inquiry ‘must be limited to
4 the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or
5 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a
6 whole, is fair, reasonable and adequate to all concerned.’” *Dunk v. Ford Motor Co.*, 48 Cal. App.
7 4th 1794, 1801 (1996) (quoting *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th
8 Cir. 1982) The Court’s ultimate duty is to determine whether the settlement is fair, adequate, and
9 reasonable. See *Dunk*, 48 Cal. App. 4th at 1801 (setting forth the “fair, adequate, and reasonable”
10 standard) (citing *Officers for Justice*, 688 F.2d at 625); *Cho v. Seagate Tech. Holdings, Inc.*, 177 Cal.
11 App. 4th 734, 742-43 (2009) (a trial court must approve a class action settlement agreement, but
12 only after determining that it is “fair, adequate and reasonable,” considering factors such as the
13 “risk, expense, [and] complexity” of continued litigation) (citations omitted).

14 The Court enjoys broad discretion in making its fairness determination and should consider
15 factors including, but not limited to:

16 [T]he strength of plaintiffs’ case, the risk, expense, complexity and likely duration of
17 further litigation, the risk of maintaining class action status through trial, the amount
18 offered in settlement, the extent of discovery completed and the stage of the
19 proceedings, the experience and views of counsel . . . and the reaction of the class
20 members to the proposed settlement.

21 *Dunk*, 48 Cal. App. 4th at 1801 (setting forth a non-exhaustive list of factors for the court’s
22 consideration at final approval) (citing *Officers for Justice*, 688 F.2d at 624). The above factors are
23 not exclusive, “and the court is free to engage in a balancing and weighing of factors depending on
24 the circumstances of each case.” *Wershba*, 91 Cal. App. 4th at 245. However, in doing so, the Court
25 must give “[due] regard to what is otherwise a private consensual agreement between the parties.”
26 *Id.* The inquiry must be limited “to the extent necessary to reach a reasoned judgment that the
27 agreement is not the product of fraud or overreaching by, or collusion between, the negotiating
28 parties.” *Id.* (citations and quotations omitted).

At the preliminary approval stage, the Court need only determine that the settlement falls
within the “range of possible judicial approval,” so that notice to the class and the scheduling of the

1 fairness hearing are worthwhile. *See* Herbert B. Newberg & Alba Conte, NEWBERG ON CLASS
2 ACTIONS (“Newberg”) § 13:13 (5th ed. 2014). Indeed, the Court should grant preliminary approval
3 if there are no “grounds to doubt its fairness or other obvious deficiencies . . . and [the settlement]
4 appears to fall within the range of possible approval.” MANUAL FOR COMPLEX LITIGATION (THIRD)
5 § 30.41 (1995). A “presumption of fairness exists where: (1) the settlement is reached through
6 arm’s-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court
7 to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of
8 objectors is small.” *Dunk*, 48 Cal. App. 4th at 1802 (citing Newberg, § 11:41).

9 As shown below, the Settlement falls well within the range of approval, and there are no
10 grounds to doubt its fairness.

11 **B. The Settlement is Fair, Reasonable, and Adequate**

12 **1. The Settlement is the Result of Serious, Informed, and Non-
13 Collusive Negotiations**

14 The Settlement was the product of extensive arm’s-length negotiations between counsel for
15 the Parties who are very experienced consumer class action practitioners. Joint Decl., ¶¶ 8, 52.
16 Though cordial and professional, the settlement negotiations were adversarial and non-collusive in
17 nature. *Id.*, ¶ 9. The Settlement reached is the product of substantial effort by the Parties and their
18 counsel and included an all-day mediation session on October 29, 2019 with the Honorable Peter D.
19 Lichtman (Ret.), an experienced and impartial mediator. *Id.*, ¶ 8; *see also Kullar v. Foot Locker*
20 *Retail, Inc.*, 168 Cal. App. 4th 116, 129 (2008) (“The court undoubtedly should give considerable
21 weight to the competency and integrity of counsel and the involvement of a neutral mediator in
22 assuring itself that a settlement agreement represents an arm’s-length transaction entered without
23 self-dealing or other potential misconduct.”). While the mediation did not result in a settlement on
24 that day, the Parties continued extensive discussions after the mediation through which the basic
25 terms of a settlement were negotiated and finalized. The Parties also engaged in formal discovery
26 which informed the settlement discussions. Joint Decl., ¶ 11. The Parties spent over ten months
27 negotiating every aspect of the Settlement, which culminated in execution of a Memorandum of
28 Understanding on or about August 31, 2020, and execution of a Settlement Agreement on November
9, 2020. *Id.*, ¶¶ 12, 14.

1 Although Plaintiffs and Class Counsel believe there is a possibility of ultimately prevailing
2 on their class claims, they recognize the potential risk, expense, and complexity posed by litigation,
3 including the need to overcome a number of hurdles including class certification, summary
4 judgment, trial and potentially an appeal that could take years to litigate, as well as potential
5 collectability issues. *See id.*, ¶ 52. As such, this factor weighs strongly in favor of preliminary
6 approval.

7 **2. The Extent of Discovery was More than Sufficient to Permit**
8 **Preliminary Approval of the Settlement**

9 The Parties thoroughly investigated and evaluated the factual and legal strengths and
10 weaknesses of this case before reaching the Settlement. *See id.*, ¶¶ 13, 52. The Settlement
11 Agreement was reached after extensive investigation and research, production of data by Defendant,
12 and a thorough evaluation of Plaintiffs' claims in light of such information. *Id.*, ¶ 13. Accordingly,
13 the Parties are now well aware of the strengths and weaknesses of their claims and defenses and
14 were well-equipped to negotiate the Settlement Agreement before the Court. This factor supports
15 preliminary approval.

16 **3. The Settlement is a Reasonable Compromise of Claims in Light of**
17 **the Significant Risks Inherent in Continued Litigation**

18 To assess the fairness, adequacy, and reasonableness of a class action settlement, the Court
19 also should consider “[t]he strength of plaintiff’s case, the risk, expense, complexity and likely
20 duration of further litigation, [and] the risk of maintaining class action status.” *See Dunk*, 48 Cal.
21 App. 4th at 1801.

22 Plaintiffs and their counsel believe that their claims are meritorious for the reasons
23 discussed *supra*. Despite this, there are significant obstacles to Plaintiffs obtaining a classwide
24 judgment, including persuading the Court to certify the proposed class and proving classwide
25 damages. Although nearly all class actions involve a high level of risk, expense, and complexity,
26 historically, data breach cases face substantial hurdles in surviving even past the pleading stage.
27 *See, e.g., Hammond v. The Bank of N.Y. Mellon Corp.*, No. 08 Civ. 6060 (RMB) (RLE), 2010 U.S.
28 Dist. LEXIS 71996, at *1 (S.D.N.Y. June 25, 2010) (collecting cases). Even cases of wide-spread
notoriety and implicating data far more sensitive than at issue here have been found wanting. *See,*

1 e.g., *In re U.S. Office of Pers. Mgmt. Data Sec. Breach Litig.*, 266 F. Supp. 3d 1, 19 (D.D.C. 2017)
2 (“The Court is not persuaded that the factual allegations in the complaints are sufficient to establish
3 . . . standing.”), reversed in part, 928 F.3d 42 (D.C. Cir. June 21, 2019) (holding that plaintiffs had
4 standing to bring a data breach lawsuit). For now, data breach cases are among the most risky and
5 uncertain of all class action litigation, making settlement the more prudent course when a
6 reasonable deal is available.

7 In light of the risks and uncertainties presented by continued litigation in this case, the
8 Settlement Agreement is an extraordinary result for the Settlement Class. “[T]he very essence of a
9 settlement is compromise, a yielding of absolutes and an abandoning of highest hopes,” and “it is
10 the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that
11 induce consensual settlements.” *Officers for Justice*, 688 F.2d at 624-25 (internal quotations and
12 citations omitted). “The proposed settlement is not to be judged against a hypothetical or
13 speculative measure of what *might* have been achieved by the negotiators.” *Id.* at 625 (citations
14 omitted). Rather, any analysis of a fair settlement amount must account for the risks of further
15 litigation and trial, as well as expenses and delays associated with continued litigation. *See Retta v.*
16 *Millennium Prods.*, No. CV15-1801 PSG AJWx, 2017 U.S. Dist. LEXIS 220288, at *14 (C.D. Cal.
17 Aug. 22, 2017).

18 The Settlement Fund provides the Settlement Class significant monetary compensation. The
19 Settlement Payments available to eligible Class Members are substantial given the risks and
20 uncertainties of continued litigation. This considerable classwide relief thus weighs heavily in
21 favor of preliminary approval. *See, e.g., Wren v. RGIS Inventory Specialists*, No. C-06-05778 JCS,
22 2011 U.S. Dist. LEXIS 38667, at *24 (N.D. Cal. Apr. 1, 2011) (“While settlement amounts that are
23 close to the plaintiffs’ estimate of damages provide strong support for approval of the settlement,
24 settlement offers that constitute only a fraction of the potential recovery do not preclude a court
25 from finding that the settlement offer is fair.”) (citing *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d
26 454, 459 (9th Cir. 2000)); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998) (holding
27 that the possibility that the settlement amount could have been greater “does not mean the
28 settlement presented was not fair, reasonable or adequate.”). Thus, district courts have found that

1 settlements for substantially less than the plaintiffs' claimed damages were fair and reasonable,
2 especially when taking into account the uncertainties involved with litigation. *See, e.g., Glass v.*
3 *UBS Fin. Servs., Inc.*, No. C-06-4068 MMC, 2007 U.S. Dist. LEXIS 8476, at *13 (N.D. Cal. Jan.
4 26, 2007) (finding settlement of wage and hour class action for 25% to 35% of the claimed damages
5 to be reasonable). In fact, the Settlement provides a choice of Settlement Payments for Class
6 Members depending upon whether or not the Settlement Class Member experienced any
7 unreimbursed fraudulent or unauthorized charges on his or her credit or debit card used to make
8 purchases from Creation. This ensures fairness because it takes into account the different types and
9 extent of each Settlement Class Member's injury due to the Security Incident.

10 Also, as a result of the Security Incident, Creation has already implemented enhanced
11 security protection measures which provide additional value to the Class.

12 Taking all the foregoing arguments and defenses into account, the Settlement represents a
13 realistic and fair value of the class claims. Proceeding with the litigation would impose significant
14 risk of no recovery as well as ongoing, substantial additional expenditures of time and resources.
15 By contrast, the Settlement will yield a prompt, certain, and substantial recovery for Class
16 Members, which also benefits Defendant and the Court.

17 **4. Class Counsel Experienced in Similar Consumer Protection**
18 **Litigation Fully Support the Settlement**

19 Class Counsel are highly qualified with substantial experience litigating complex class
20 actions of all kinds. Joint Decl., Exs. 2, 3, 4. Additionally, Plaintiffs, as the proposed Class
21 Representatives, have no conflicts with the Settlement Class, have participated actively in the case,
22 and are represented by attorneys experienced in class action litigation. *Id.*, ¶ 51.

23 Experienced counsel for the Parties, operating at arm's-length, have weighed the strengths
24 and risks of the case and endorse the proposed Settlement. The view of the attorneys actively
25 conducting the litigation is entitled to significant weight in deciding whether to approve the
26 settlement. *See Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980). Accordingly,
27 this factor weighs in favor of preliminary approval.

28 **C. The Scope of the Release is Proper**

A release must be broad enough to achieve its purpose—*i.e.*, releasing claims that the parties

1 are agreeing to settle, in order to prevent unfairly exposing a party to continuing litigation over the
2 same subject matter. It is well established that “[a] general release—covering ‘all claims’ that were
3 or could have been raised in the suit—is common in class action settlements.” *Carter v. City of Los*
4 *Angeles*, 224 Cal. App. 4th 808, 820 (2014). The Release contained in the Settlement Agreement is
5 narrowly tailored to provide that Plaintiffs and Class Members shall unconditionally release,
6 relinquish and discharge Creation, and its past or present parents, subsidiaries, divisions, and related
7 or affiliated entities of any nature whatsoever, from any claims that were asserted, or that could
8 reasonably have been asserted, in the action based upon and/or arising out of the facts alleged in the
9 Complaint, including, as to the Representative Plaintiffs, Unknown Claims that any of them do not
10 know or suspect to exist at the time of the release. *See* SA, §§ 1.23, 1.24, 1.36, 8.1-8.3.

11 As such, the Release is appropriate as it is limited to the claims stated in the Complaint and
12 those based on the facts alleged in the Complaint, and the Defendant named in the Complaint,
13 together with its officers, directors, employees and agents.

14 **V. PROVISIONAL CERTIFICATION OF THE SETTLEMENT CLASS FOR**
15 **SETTLEMENT PURPOSES IS APPROPRIATE**

16 California Rules of Court, rule 3.769(d) provides that the Court may make an order
17 approving certification of a provisional settlement class at the preliminary approval stage. Code of
18 Civil Procedure section 382 provides in part that “when the question is one of a common or general
19 interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all
20 before the court, one or more may sue . . . for the benefit of all.” Section 382 further authorizes a
21 class action when a plaintiff meets his or her burden to establish the existence of an ascertainable
22 class and a well-defined community of interest. *See Lockheed Martin Corp. v. Superior Court*, 29
23 Cal. 4th 1096, 1103-04 (2003) The California Supreme Court has held that the “community of
24 interest requirement embodies three factors: (1) predominant common questions of law or fact;
25 (2) class representatives with claims or defenses typical of the class; and (3) class representatives
26 who can adequately represent the class.” *Richmond v. Dart Indust., Inc.* 29 Cal. 3d 462, 470 (1981).

27 It is well-established that trial courts should use a “lesser standard of scrutiny” for
28 determining the propriety of certifying a settlement class, as opposed to a litigation class. *See, e.g.,*
Dunk, 48 Cal. App. 4th at 1807 n.19. This is appropriate because no trial is anticipated for a

1 settlement class, so the case management issues inherent in trying classwide claims need not be
2 confronted; and the trial court’s fairness review of the settlement protects the interests of the non-
3 representative class members. *See id.*; *see also Officers for Justice*, 688 F.2d at 633 (“Th[e]
4 relationship between the certification determination and the merits of the case is further attenuated
5 within the context of the settlement evaluation process [C]ertification issues raised by class
6 action litigation that is resolved short of a decision on the merits must be viewed in a different
7 light.”); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (“Confronted with a request for
8 settlement-only class certification, a district court need not inquire whether the case, if tried, would
9 present intractable management problems . . . for the proposal is that there be no trial.”). As
10 discussed below, for the purposes of settlement only, Plaintiffs ask the Court to provisionally certify
11 the Class under section 382 of the Code of Civil Procedure.

12 **A. Numerosity and Ascertainability**

13 Numerosity is met if a proposed class is so large that joinder of all members would be
14 impracticable. *See* Cal. Civ. Proc. Code § 382. Here, Defendant’s records show (and Defendant
15 does not dispute for the purposes of settlement) that the data breach of Creation’s systems resulted in
16 the theft of more than 56,955 consumers’ Personal Information. Therefore, the Settlement Class is
17 sufficiently numerous.

18 Additionally, a proposed settlement class is ascertainable if it is “defined in objective terms
19 that make the eventual identification of class members possible.” *Noel v. Thrifty Payless, Inc.*, 7
20 Cal. 5th 955, 980 (2019) (emphasis omitted). Under the Settlement Agreement, the Settlement Class
21 is defined as: All individuals residing in the United States who used a debit or credit card to make a
22 purchase from Creation and whose Personal Information was accessed and/or compromised by
23 unauthorized individuals as part of the Security Incident. *See* SA, § 1.30. Defendant will provide to
24 the Claims Administrator a list of Class Members and their mailing and email addresses. *See id.*, §
25 4.1. As such, the Class easily meets the ascertainability requirement for provisional class
26 certification.

27 ///

28 ///

1 **B. Well-Defined Community of Interest**

2 **1. Commonality and Superiority**

3 To justify class certification, the proponent must show that questions of law or fact common
4 to the class predominate over the questions affecting the individual members. *See Arenas v. El*
5 *Torito Rests., Inc.*, 183 Cal. App. 4th 723, 732 (2010) (citing *Wash. Mut. Bank v. Superior Court*, 24
6 Cal. 4th 906, 913 (2001)). The central questions behind the claims in this litigation are:
7 (1) whether Creation violated California state law—including but not limited to California Civil
8 Code, section 1798.82, the California Data Breach Notification Act—by failing to adequately secure
9 Plaintiffs’ and Class Members’ Personal Information and provide timely and accurate notice of the
10 Security Incident to Plaintiffs and the Class; (2) whether Plaintiffs and the Class would be entitled to
11 relief by reason of Defendant’s wrongful conduct; (3) what is the proper measure of damages; and
12 (4) whether Plaintiffs and the Class would be entitled to equitable relief by reason of Creation’s
13 wrongful conduct. The answers to these questions depend on common evidence that does not vary
14 from Class Member to Class Member, and so can be fairly resolved—whether through litigation or
15 settlement—for all Class Members at once. Given these common questions and the large number of
16 potential Class Members, each with relatively small amounts of damages, litigating this case as a
17 class action is superior to each having to file his or her own lawsuit. *See Lazar v. Hertz Corp.*, 143
18 Cal. App. 3d 128, 143 (1983) (“The class action has been held appropriate when numerous parties
19 suffer injury of insufficient size to warrant individual action and when denial of class relief would
20 result in unjust advantage to the wrongdoer.”).

21 **2. Typicality**

22 “[T]ypicality will be satisfied so long as the named representatives’ claims share the same
23 essential characteristics as the claims of the class at large.” Newberg, § 3:29 (quotations and citation
24 omitted). Here, typicality is satisfied because the claims of the Class arise from the same
25 misconduct that Plaintiffs seek to remedy: Plaintiffs and each member of the Class had their data
26 and Personal Information compromised in the same way by the same conduct by Creation. *See, e.g.,*
27 *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1118 (9th Cir. 2017) (“it is sufficient for typicality if the
28 plaintiff endured a course of conduct directed against the class”).

1 **3. Adequacy of Representation**

2 The proposed class representative and class counsel must establish that they will adequately
3 represent the proposed class. *See Barboza v. West Coast Digital GSM, Inc.*, 179 Cal. App. 4th 540,
4 546 (2009). As set forth *supra*, Class Counsel are highly experienced in litigating consumer
5 protection class actions. *See* Joint Decl., Exs. 2, 3, 4. Moreover, Plaintiffs, as the proposed Class
6 Representatives, have no conflicts with the Settlement Class and have participated actively in the
7 case. Joint Decl., ¶ 59; *see also Espinosa v. Ahearn (In re Hyundai & Kia Fuel Econ. Litig.)*, 926
8 F.3d 539, 566 (9th Cir. 2019) (adequacy satisfied if plaintiffs and their counsel lack conflicts of
9 interest and are willing to prosecute the action vigorously on behalf of the class); *Local Joint Exec.*
10 *Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001)
11 (class counsel adequacy may be established by the fact that counsel are experienced practitioners).

12 **VI. THE COURT SHOULD APPROVE THE CLASS NOTICE**

13 The content and manner of the Class Notice comply with California Rules of Court, rule
14 3.766(d), which requires that the notice provide:

- 15 (1) A brief explanation of the case, including the basic contentions or denials of the
16 parties;
17 (2) A statement that the Court will exclude a Class Member from the Class if the
18 Class Member so requests by a specified date;
19 (3) A procedure for the member to follow in requesting exclusion from the Class;
20 (4) A statement that the judgment, whether favorable or not, will bind all Class
21 Members who do not request exclusion; and
22 (5) A statement that any Class Member who does not request exclusion may, if the
23 Class Member so desires, enter an appearance through counsel.

24 The class notice should give “sufficient information to allow each class member to decide whether to
25 accept the benefit he or she would receive under the settlement, or to opt out and pursue his or her
26 own claim. [Citation.] No more than that [is] required.” *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43,
27 56 (2008).

28 The Class Notice, which shall include the Publication Notice, Long Notice and Summary
Notice, substantially in the form attached to the Settlement Agreement as Exhibits B, C and D,
respectively, meets each of these requirements. Creation has the names and e-mail addresses of
Class Member because the Class Members used their credit or debit cards to make purchases from

1 Creation, either online or in-person at Creation events, and thus had to input their billing addresses
2 and contact information. The Settlement Agreement provides that Summary Notice will be provided
3 by email to Class Members for whom Creation has email contact information. Class Notice will be
4 emailed to each Class Member for whom Creation has an email address and, for Class Members
5 with no such email address, or for whom the email notice is returned as undeliverable, the Settlement
6 Administrator shall mail a printed copy of the Class Notice. *See* Green Decl., ¶ 12.

7 In addition, the Claims Administrator shall maintain a website providing information and
8 documents concerning the Settlement during the Settlement process and throughout the Claims
9 Period. *See* Settlement Agreement, § 4.2.1; Green Decl., ¶ 17. A toll-free telephone number will
10 also be established to allow Class Members to call for additional information, listen to answers to
11 FAQs and request that a Notice be mailed to them. *See* Green Decl., ¶ 19.

12 Plaintiffs thus request that the Court approve the proposed Class Notice as the best notice
13 practicable under the circumstances. *See, e.g., In re Apple iPhone/iPod Warranty Litig.*, No. CV-10-
14 01610, 2014 U.S. Dist. LEXIS 64573, at *34 (N.D. Cal. May 8, 2014) (“Courts routinely approve
15 email notice campaigns and, inevitably, some email messages will end up in a spam folder—just as
16 some postal mail will never reach its intended recipient. Courts have consistently overruled
17 objections based on this fact.”); *Cohorst v. BRE Props.*, No. 3:10-CV-2666-JM-BGS, 2011 U.S.
18 Dist. LEXIS 151719, at *18 (S.D. Cal. Nov. 9, 2011) (“This Court has already determined in its
19 preliminary approval order that the notice program relying primarily on e-mail and publications was
20 the best practicable notice under the circumstances.”); *see also, e.g., De La Torre v. CashCall, Inc.*,
21 No. 08-cv-03174-MEJ, 2017 U.S. Dist. LEXIS 96041, at *32 (N.D. Cal. June 21, 2017) (finding that
22 “email notice is appropriate, given that email is [defendant’s] primary means of contacting
23 consumers”); *In re Netflix Privacy Litig.*, No.: 5:11-CV-00379 EJD, 2012 U.S. Dist. LEXIS 93284,
24 at *12-13 (N.D. Cal. Jul 5, 2012) (holding that email notice was especially appropriate given the
25 online nature of defendant’s business and the fact that class members were required to provide an
26 email address to receive defendant’s product). *See also* Green Decl., ¶ 22.

27 Moreover, it is Class Counsel’s belief that the Claim Form and Class Notice forms,
28 including the Summary Notice, Long Notice, and Publication Notice, are drafted in plain and

1 understandable terms likely to be readily understood by the members of the Settlement Class.

2 **VII. THE COURT SHOULD APPOINT CPT GROUP AS CLAIMS ADMINISTRATOR**

3 The Court should appoint CPT Group, an experienced and reputable national class action
4 administrator, to serve as Claims Administrator to provide notice, administer the claim process,
5 distribute payments, and provide other services necessary to implement the Settlement. SA, §§ 1.5,
6 1.6, 4.1, 7.1; *see also* Green Decl. ¶¶ 5-7.

7 **VIII. THE COURT SHOULD SCHEDULE A FINAL APPROVAL HEARING**

8 The last step in the approval process is the formal fairness hearing, whereby proponents of a
9 settlement may explain and describe its terms and conditions and offer argument in support of
10 approval, and class members or their counsel may be heard in support of or in opposition to the
11 settlement. Plaintiffs propose that the Court schedule the Final Approval Hearing after notice is
12 completed and at least 25 days after the Opt Out Date. *See* SA, § 3.3. Plaintiffs further propose that
13 their motion for attorneys' fees and costs and Representative Awards for Plaintiffs shall also be
14 heard by the Court at the Final Approval Hearing.

15 **IX. CONCLUSION**

16 For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for
17 preliminary approval of the Parties' Settlement in all respects.

18
19 DATED: November 9, 2020

20 By:


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