

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

DEMI KOSTKA , *et al.*, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

DICKEY'S BARBECUE
RESTAURANTS, INC., *et al.*,

Defendants.

No. 3:20-cv-3424-K

Hon. Ed Kinkeade

Consolidated with:

Civil Action No. 3:20-cv-3603-K

Civil Action No. 3:21-cv-0137-K

Civil Action No. 3:21-cv-0769-K

**MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND
PLAINTIFFS' BRIEF IN SUPPORT**

TABLE OF CONTENTS

I.	FACTUAL AND PROCEDURAL BACKGROUND	2
	A. Factual Background	2
	B. Procedural History	2
	C. Settlement Negotiations	3
II.	THE SETTLEMENT	4
	A. The Settlement Class	4
	B. The Settlement Relief	5
	1. Reimbursement of Out-of-Pocket Losses	5
	2. Cash Option	6
	3. Credit Monitoring Services	6
	C. Business Practices Changes	6
	D. Notice to the Class and Settlement Administration	7
	E. Attorneys' Fees, Costs, and Expenses and Representative Plaintiff Service Awards ...	7
III.	THE SETTLEMENT MERITS PRELIMINARY APPROVAL	7
	A. Legal Standard and Six-Factor Test	7
	B. The Settlement Satisfies the Standards for Preliminary Approval	9
	1. The Settlement Class Is Adequately Represented	9
	2. The Settlement is the Result of Arm's Length Negotiations and There is No Fraud or Collusion	12
	3. The Settlement Benefits Being Made Available to the Settlement Class Members are Excellent in Comparison to the Range of Possible Recovery and Considering the Plaintiffs' Likelihood of Success on the Merits	13
	4. The Proposed Method of Distributing Relief Supports Preliminary Approval of the Settlement	15

5. The Terms of the Proposed Award of Attorneys' Fees, Costs, and Expenses Supports Preliminary Approval of the Settlement	16
6. The Settling Parties' Agreements	17
7. The Settlement Treats Settlement Class Members Equitably	17
8. The Stage of the Proceedings and the Amount of Discovery Completed.....	18
9. The Opinion of Experienced Class Counsel	18
IV. THE PROPOSED CLASS SHOULD BE CERTIFIED	19
A. Rule 23(a) Requirements Are Satisfied	19
1. The Settlement Class Is Numerous	20
2. There Are Common Questions of Law and Fact	20
3. The Proposed Representative Plaintiffs' Claims Are Typical.....	21
4. The Proposed Representative Plaintiffs and Class Counsel Will Fairly and Adequately Protect the Interests of the Settlement Class	21
B. The Requirements of Rule 23(b)(3) Are Satisfied.....	22
1. Common Questions Predominate	22
2. Class Treatment Is Superior to Other Forms of Adjudication	23
V. THE CLASS NOTICE PROGRAM SHOULD BE PRELIMINARILY APPROVED	24
VI. CONCLUSION.....	25

TABLE OF AUTHORITIES

CASES

<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591(1997).....	19, 22-24
<i>In re Austrian & German Bank Holocaust Litig.</i> , 80 F. Supp. 2d 164 (S.D.N.Y. 2000)	14
<i>Bywaters v. United States</i> , 196 F.R.D. 458 (E.D. Tex. 2000).....	21
<i>Collins v. Sanderson Farms, Inc.</i> , 568 F. Supp. 2d 714 (E.D. La. 2008).....	13
<i>In re Corrugated Container Antitrust Litig.</i> , 643 F.2d 195 (5th Cir. 1981)	7, 18
<i>Cotton v. Hinton</i> , 559 F.2d 1326 (5th Cir. 1977)	18
<i>DeHoyos v. Allstate Corp.</i> , 240 F.R.D. 269, 291-92 (W.D. Tex. 2007).....	15
<i>Feder v. Elec. Data Sys. Corp.</i> , 429 F.3d 125, 129-130 (5th Cir. 2005)	21
<i>Garza v. Sporting Goods Props.</i> , No. SA-93-CA-1082, 1996 U.S. Dist. LEXIS 2009 (W.D. Tex. Feb. 6, 1996)	14
<i>Grant v. Capital Mgmt. Servs., L.P.</i> , No. 10-CV-WQH BGS, 2014 U.S. Dist. LEXIS 29836 (S.D. Cal. Mar. 5, 2014)	15
<i>Jones v. Singing River Health Servs. Found.</i> , 865 F.3d 285 (5th Cir. 2017)	13
<i>Kemp v. Tower Loan of Miss., LLC</i> , No. 3:15-CV-499-CWR-LRA, 2017 U.S. Dist. LEXIS 209085 (S.D. Miss. Dec. 20, 2017).....	13
<i>Klein v. O'Neal, Inc.</i> , 705 F. Supp. 2d 632 (N.D. Tex. 2010)	12, 13
<i>Lucas v. Kmart Corp.</i> , 234 F.R.D. 688 (D. Colo. 2006)	12

<i>Maheer v. Zapata Corp.</i> , 714 F.2d 436 (5th Cir. 1983)	7
<i>McNamara v. Bre-X Minerals Ltd.</i> , 214 F.R.D. 424 (E.D. Tex. 2002).....	8, 19
<i>Morrow v. Washington</i> , 277 F.R.D. 172 (E.D. Tex. 2011).....	21
<i>Mullen v. Treasure Chest Casino, LLC</i> , 186 F.3d 620 (5th Cir. 1999)	20, 21
<i>In re Oil Spill by Oil Rig Deepwater Horizon</i> , 910 F. Supp. 2d 891 (E.D. La. 2012).....	23
<i>In re PaineWebber Ltd. P'ships Litig.</i> , 147 F.3d 132 (2nd Cir. 1998).....	7
<i>Parker v. Anderson</i> , 667 F.2d 1204 (5th Cir. 1982)	14
<i>Peters v. Nat'l R.R. Passenger Corp.</i> , 966 F.2d 1483 (D.C. Cir. 1992).....	24
<i>Reed v. General Motors Corp.</i> , 703 Fed.2d 170 (5th Cir. 1983).....	8
<i>In re Shell Oil Refinery</i> , 155 F.R.D. 552 (E.D. La. 1993).....	9
<i>Telles v. Midland Coll.</i> , No. MO:17-CV-00083-DC, 2018 U.S. Dist. LEXIS 227812 (W.D. Tex. Apr. 30, 2018)	19
<i>Twigg v. Sears, Roebuck & Co.</i> , 153 F.3d 1222 (11th Cir. 1998)	24
<i>Vaughn v. Am. Honda Motor Co.</i> , 627 F. Supp. 2d 738 (E.D. Tex. 2007).....	21-23
<i>Wal-Mart Stores, Inc. v. Dukes</i> , 131 S. Ct. 2541 (2011).....	20
<i>Walton v. Franklin Collection Agency</i> , 190 F.R.D. 404 (N.D. Miss. 2000)	20

STATUTES

Cal. Civ. Code § 1798.100, <i>et seq.</i>	6
---	---

OTHER AUTHORITIES

FED. R. CIV. P. 1	18
FED. R. CIV. P. 23(a)	19-21
FED. R. CIV. P. 23(b)(3)	22-24
FED. R. CIV. P. 23(e)(1).....	8, 19, 24
FED. R. CIV. P. 23(e)(2).....	8, 16

Plaintiffs Demi Kostka, Vincent Jear, Latorsha Adams, Robert Stroman, Veronica Snyder, and Lashawn Parker (“Plaintiffs”) submit this brief in support of their Motion for Preliminary Approval of Class Action Settlement with Defendants Dickey’s Barbeque Restaurants, Inc. and Dickey’s Capital Group (collectively “Dickey’s” or “Defendants”).

After hard-fought negotiations, the parties reached the settlement agreement (the “Settlement” or “SA”) attached as Exhibit 1. The Settlement is tailored to the facts of this litigation and designed to provide timely and significant benefits to Settlement Class Members. The Settlement compares favorably to settlements in similar data breach litigation and was reached after intensive arm’s length negotiations before a skilled mediator. As shown herein, the Settlement readily satisfies the preliminary approval standard of being fair, reasonable, and adequate; the comprehensive Notice Plan is the best practicable means of providing notice under the circumstances; and the Settlement Class is likely to be certified for Settlement purposes at the final approval stage. Accordingly, Plaintiffs respectfully request that the Court enter an order: 1) certifying the proposed class for settlement purposes; 2) preliminarily approving the Settlement; 3) appointing Co-Lead Class Counsel Ben Barnow, Barnow and Associates, P.C.; Benjamin F. Johns, Chimicles Schwartz Kriner & Donaldson-Smith LLP; and John A. Yanchunis, Morgan & Morgan Complex Litigation Group; appointing Additional Class Counsel consistent with the proposed Preliminary Approval Order (filed herewith); 4) appointing Plaintiffs as Representative Plaintiffs; 5) appointing Epiq as the Settlement Administrator; 6) approving the proposed Notice Plan; and 7) setting a Fairness hearing for final approval of the Settlement and to consider any application for attorneys’ fees, service awards, and reimbursement of costs, and expenses. Dickey’s does not oppose the relief sought in this motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

Dickey's is a franchisor of a chain of barbeque restaurants located throughout the United States. Plaintiffs are consumers whose private and confidential financial information consisting of credit and debit card numbers, expiration dates, cardholder names, internal card verification codes, and other payment card information (collectively, "Card Information") was compromised in a security breach of Dickey's computer servers and payment card environment commencing on or around April 23, 2019, and continuing through approximately October 29, 2020 (the "Security Incident").

B. Procedural History

On November 16, 2020, Plaintiff Demi Kostka filed a class action complaint against Dickey's in this Court. On December 4, 2020, Plaintiffs Demi Kostka and Vincent Jear filed an Amended Complaint on behalf of a nationwide Class and California and Florida Sub-Classes, asserting claims for Negligence, Negligence *Per Se*, Breach of Implied Contract, Violations of the California Consumer Privacy Act of 2018 (the "CCPA"), California Unfair Competition Law (the "UCL"), and Unjust Enrichment.

On December 3, 2020, Latorsha Adams filed a complaint in the Dallas County Court, which was removed to the Northern District of Texas on December 9, 2020. No. 3:20-cv-3603-K (N.D. Tex.) (hereinafter, "*Adams*"). *Adams* asserted similar class action claims as the *Kostka* Plaintiffs. On January 20, 2021, *Jeary* was filed in this Court. No. 3:21-cv-0137-L (N.D. Tex.) (hereinafter "*Jeary*"). On March 8, 2021, Dickey's filed a motion to dismiss the *Adams* complaint, followed by motions to dismiss the *Kostka* and *Jeary* complaints on March 23, 2021. A fourth case, *Stroman*, was transferred to this Court from the Central District of California. No. 3:21-cv-

0769-K (N.D. Tex.). On March 12, 2021, Plaintiffs filed a Motion to Consolidate Cases and to Appoint Counsel. ECF No. 36. The four cases pending in this Court have been consolidated. ECF Nos. 37 and 54. Two additional cases are currently pending in United States District Court for the Southern District of California. *See Diczhazy v. Dickeys*, No. 3:20-cv-02189 L (MDD) (S.D. Cal.), *Marhefka v. Dickey's Barbecue Restaurants, Inc.*, 21-cv-00585-L-MDD (S.D. Cal.).

On November 20, 2020, Plaintiffs in the *Diczhazy* action moved under 28 U.S.C. § 1407 to centralize this litigation in the Southern District of California. Plaintiffs in the *Kostka* action and Dickey's opposed the motion. The Judicial Panel on Multidistrict Litigation denied the motion to centralize the actions on the basis that the feasibility of voluntary cooperation and coordination among the parties eliminated the need for centralization. *In re Dickey's Barbeque Restaurant, Inc. Consumer Data Security Breach Litigation*, MDL No. 2983, ECF No. 36.

C. Settlement Negotiations

The Settlement is the result of the voluntary and informal coordination of counsel representing plaintiffs in three of the six actions pending against Dickey's: counsel for *Kostka*, *Adams*, and *Stroman*. The lawyers in these cases worked together to negotiate an excellent settlement on behalf of the proposed class.

All negotiations regarding settlement in this case have been conducted at arm's length, in good faith, and free of any collusion. *See* Declaration of Benjamin F. Johns ("Johns Decl.") ¶ 10, attached as Exhibit 3, Declaration of Ben Barnow ("Barnow Decl.") ¶ 11, attached as Exhibit 2, Declaration of John A. Yanchunis ("Yanchunis Decl.") ¶ 13, attached as Exhibit 3.

After consolidation and the filing of Defendants' Motions to Dismiss in *Adams*, counsel for Plaintiffs filing this motion (i.e., in *Kostka*, *Adams*, and *Stroman*) and counsel for Defendants commenced discussions regarding the possibility of reaching a negotiated settlement on behalf of

Plaintiffs and the Settlement Class. After informal discussions, the parties agreed to enlist the aid of a private mediator to continue settlement negotiations. The parties exchanged factual information necessary to meaningfully explore the possibility of settlement and submitted mediation statements to the mediator describing their respective positions. Barnow Decl. ¶ 9.

On June 30, 2021, the parties engaged in a full-day mediation session with private mediator the Honorable United States District Judge Wayne Andersen (Ret.) via video conference. *Id.* ¶ 10. Judge Andersen (Ret.), a Federal District Court judge for 20 years, has successfully mediated numerous class action settlements that have been approved by various district courts.¹ With the assistance of Judge Andersen (Ret.), the parties reached the proposed Settlement summarized below.

II. THE SETTLEMENT

A. The Settlement Class

The proposed Settlement Class is defined as: All residents of the United States who used a payment card to make a purchase at a “Dickey’s Barbecue Pit®” restaurant identified in Exhibit B to the Settlement Agreement between April 23, 2019, and October 29, 2020. The Settlement Class specifically excludes: (i) Dickey’s and its officers and directors; (ii) all Settlement Class Members who timely and validly request to opt-out from the Settlement Class; (iii) any Person who has agreed to release his or her claim(s) against Dickey’s arising out of or related to the Security Incident; and (iv) the Judge assigned to evaluate the fairness of this settlement and all court personnel directly involved therewith.

¹ <https://www.jamsadr.com/andersen/>

B. The Settlement Relief

The parties negotiated a \$2,350,000 all-cash, non-reversionary Qualified Settlement Fund in exchange for a release of all claims that were or could have been alleged in this case based on the facts of the Security Incident. Notice and administrative expenses will be paid from the Qualified Settlement Fund, along with any attorneys' fees and expense reimbursements approved by the Court. Co-Lead Class Counsel intend to seek and will separately apply for up to one-third of the settlement fund in attorneys' fees, plus reimbursement of expenses, as well as a \$1,500 service award for each of the class representatives. Notice and administration expenses are expected not to exceed \$363,000.

Plaintiffs believe that the \$2,350,000 settlement is a very favorable result in relation to their potential aggregate recoverable damages had they obtained class certification and prevailed at trial and considering the risks in continuing to litigate. The distribution plan is also targeted to compensate Class Members fairly based on their actual and recoverable damages.

The Settlement Agreement sets forth a straightforward claims process with the use of a simple Claim Form. *See* Claim Form, attached as Exhibit C to Exhibit 1. Class Members will be entitled to relief in their chosen category. Class Members will be given an opportunity to cure any deficiencies in their claim submissions.

Class Members may choose from the following three options:

1. Reimbursement of Out-of-Pocket Losses: Class Members who suffered out-of-pocket losses as a result of the Security Incident may file a claim seeking reimbursement of those expenses. Specifically, a Class Member may choose to receive compensation for unreimbursed losses upon submission of a valid and timely Claim and supporting documentation

for out-of-pocket losses more likely than not resulting from the Security Incident, up to a maximum amount of \$5,000.

2. Cash Option: Class Members may select to receive a cash payment. The parties estimate that California Class Members will receive approximately \$100 and non-California Class Members will receive approximately \$50. The difference between California and non-California Class Members is to account for the damages under the CCPA, which if the case was to be litigated, would likely be the strongest claim and the claim with the most significant damages.²

The exact value of Cash Option claims will be calculated pursuant to the provisions of SA ¶ 3.6.

3. Credit Monitoring Services: Class Members may file a claim to receive free Credit Monitoring Services. The Credit Monitoring Services will consist of a 24-month plan providing: (i) three-bureau credit monitoring, (ii) identity restoration services that provide professional fraud resolution assistance to Settlement Class Members who experience identity theft or fraud, helping them with identity recovery and restoration, and (iii) \$1,000,000 of identity theft insurance coverage. Credit Monitoring Services are valid to be activated within twelve months from the mailing or emailing of the activation code.

C. Business Practices Changes

In addition to the Qualified Settlement Fund, the Settlement provides that Dickey's must adopt certain business practice changes designed to safeguard payment card information for a period of at least three years. SA ¶ 11. The cost of these business practices changes will not be

² The CCPA provides for the recovery of, *inter alia*, "damages in an amount not less than one hundred dollars (\$100) and not greater than seven hundred and fifty (\$750) per consumer per incident or actual damages, whichever is greater." Cal. Civ. Code § 1798.150(a)(1)(A).

drawn from the Qualified Settlement Fund. *Id.* These changes provide meaningful non-monetary relief that substantially reduce the risk that Settlement Class Members will suffer the same harm in the future.

D. Notice to the Class and Settlement Administration

The cost of notice and claims administration shall be paid from the Qualified Settlement Fund.

E. Attorneys' Fees, Costs, and Expenses and Representative Plaintiff Service Awards

Co-Lead Class Counsel will apply for an award of attorneys' fees and reimbursement of litigation costs and expenses together with service awards for the class representatives. The fee application will be posted promptly on the Settlement website. As noted above, Co-Lead Class Counsel intend to apply for a fee of up to one-third of the common fund, and will file a motion detailing this request. Class Counsel further intend to apply for service awards of up to \$1,500 for each of the Proposed Representative Plaintiffs.

III. THE SETTLEMENT MERITS PRELIMINARY APPROVAL

A. Legal Standard and Six-Factor Test

There is a "strong judicial policy in favor of settlements, particularly in the class action context." *In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2nd Cir. 1998); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 207 (5th Cir. 1981). The "court should approve a settlement if it is fair, reasonable, and adequate, and consistent with the public interest." *Vaughn v. Am. Honda Motor Co.*, 627 F. Supp. 2d 738, 746 (E.D. Tex. 2007). There is a strong presumption that the compromise is fair and reasonable. *Maher v. Zapata Corp.*, 714 F.2d 436, 455 n.31 (5th Cir. 1983) ("[N]either the district court nor the appellate court on review, should reach ultimate conclusions on the issues of fact and law underlying the dispute.").

Rule 23(e) sets forth a two-step process for preliminary and final approval. “First, the Court makes a preliminary fairness evaluation of the proposed terms of settlement submitted by counsel.” *McNamara v. Bre-X Minerals Ltd.*, 214 F.R.D. 424, 426 (E.D. Tex. 2002). “Second, if the Court determines that the settlement is fair, the Court directs that notice pursuant to Rule 23(e) be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement.” *Id.*

At the preliminary approval stage, the Court must ascertain whether the proposed settlement is likely to be approved as fair, reasonable, and adequate, and whether the Settlement Class is likely to be certified for settlement purposes at the final approval stage. FED. R. CIV. P. 23(e)(1)(B). Rule 23(e)(2), as recently amended, provides that in determining whether a settlement is fair, reasonable, and adequate at the final approval stage, a Court must consider 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.

FED. R. CIV. P. 23(e)(2).

The Fifth Circuit also provides guidance for courts to consider in determining whether to approve a settlement, including: (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the probability of plaintiffs’ success on the merits; (4) the range of possible recovery compared to the probability of plaintiffs’ success on the merits; (5) the stage of the proceedings and the amount of discovery completed; and (6) the opinions of class counsel, class representatives, and absent class members. *Reed v.*

General Motors Corp., 703 Fed.2d 170, 172 (5th Cir. 1983). These factors overlap substantially with the Rule 23 factors.

In sum, a settlement process is fair when “the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible judicial approval.” *In re Shell Oil Refinery*, 155 F.R.D. 552, 555 (E.D. La. 1993) (quoting *Manual for Complex Litigation, Second* § 30.44 (1985)).

B. The Settlement Satisfies the Standards for Preliminary Approval

1. The Settlement Class is Adequately Represented

Proposed Co-Lead Class Counsel are among the most highly experienced data breach class action attorneys in the United States. *See generally*, Barnow Decl., Johns Decl., Yanchunis Decl. Proposed Co-Lead Class Counsel are well-informed of the legal claims at issue and the risks of this case. Since the inception of this litigation, they have worked diligently to advance Proposed Representative Plaintiffs’ and other Settlement Class Members’ interests. They successfully consolidated the cases pending in this Court, organized and worked together cooperatively with counsel from several cases, negotiated a nationwide class settlement, and engaged in confirmatory discovery. Proposed Co-Lead Class Counsel were able to reach this excellent result for the Class efficiently and before significantly more time and expense was incurred at later stages of the litigation.

Ben Barnow is nationally recognized for his experience in leading some of the nation’s largest consumer class actions and has been recognized as a Titan of the Plaintiffs Bar.³ As a court-

³ See Sindhu Sundar, *Titan of the Plaintiffs Bar: Ben Barnow*, LAW360(Oct. 8, 2014, 7:40 PM), www.law360.com/articles/585655/titan-of-the-plaintiffs-bar-ben-barnow

appointed lead counsel or equivalent designation, he has successfully led over forty major class actions (including MDLs) where class-wide recoveries were achieved, resulting in benefits valued in excess of five billion dollars being made available to class members. This includes leading high profile privacy class actions where class settlements were achieved, including, *inter alia*, *In Re: Sony Gaming Networks and Customer Data Security Breach Litigation*, MDL 2258, *In Re: TJX Retail Security Breach Litigation*, MDL No. 1838, *In Re: Countrywide Fin. Corp. Customer Data Security Breach Litigation*, MDL No. 1998, *Lockwood v. Certegy Check Services, Inc.*, 07-cv-01434 (M.D. Fla.), *Rowe v. Unicare Life and Health Insurance Co.*, 2009cv2286 (N.D. Ill.), *Orr v. InterContinental Hotels Group, PLC.*, 17-cv-1622 (N.D. Ga.), *In re: Zappos.com Inc. Customer Data Security Breach Litigation*, 12-cv-325 (D. Nev.) and *Winstead v. ComplyRight*, No. 1:18-cv-4990 (N.D. Ill.).

Mr. Johns has extensive experience in litigating data breach class action lawsuits. Mr. Johns was appointed as co-lead class counsel for plaintiffs in the data breach action, *In re Wawa, Inc. Data Breach Litig.*, No. 19-6019 (E.D. Pa.), wherein the court recently granted preliminary approval of a class action settlement (ECF No. 234). In *Gordon et al. v. Chipotle Mexican Grill, Inc.*, the court granted final approval of a data breach settlement where Mr. Johns was appointed as one of three co-lead class counsel firms. No. 17-cv-01415-CMA-SKC, 2019 U.S. Dist. LEXIS 215430, at *2 (D. Colo. Dec. 16, 2019). And in *Bray et al. v. GameStop Corp.*, final approval of a class-wide settlement has been granted. No. 1:17-cv-01365-JEJ, 2018 U.S. Dist. LEXIS 226221, at *1-2 (D. Del. Dec. 19, 2018). There, too, Mr. Johns was appointed by the Court as co-lead class counsel. *Id.* at *8. These settlements afforded consumers affected by a data breach with significant benefits. Mr. Johns is also appointed as interim co-lead counsel in *In re Rutter's Inc. Data Security Breach Litigation*, No. 1:20-cv-382 (M.D. Pa.). In *Perdue v. Hy-Vee, Inc.*, No. 1:19-cv-01330-

MMM-JEH, 2021 U.S. Dist. LEXIS 135441, at *9 (C.D. Ill. July 21, 2021), a data breach class action, the court recently granted final approval of a class action settlement appointing Mr. Johns as co-lead class counsel along with Mr. Barnow.

John Yanchunis leads the class action practice group at Morgan & Morgan, a firm of over 700 lawyers representing plaintiffs only in a contingent based practice. The law firm maintains offices throughout the United States, including Texas.

Mr. Yanchunis began the practice of law in 1982 following the completion of a two-year clerkship with the Honorable Carl O. Bue, Jr., United States District Judge, Southern District of Texas, Houston Division (deceased). The vast majority of his practice, spanning more than 38 years, has concentrated on complex litigation, including consumer class actions for over 25 of those years. He has represented consumers in many class action cases, including as co-lead counsel in the successful prosecution and settlement of two of the largest class action cases in the United States: *Fresco v. Automotive Directions, Inc.*, No. 03-61063-JEM, and *Fresco v. R.L. Polk*, No. 07-cv-60695-JEM (S.D. Fla.).

Mr. Yanchunis has served in leadership positions in many of the largest data breach cases filed: *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 16-md-02752-LHK (N.D. Cal.) (Lead Counsel) (a data breach involving 2.9 billion users worldwide -final approval of a settlement of a class of over 97 million US Consumers and over 200,000 Israeli citizens with a common fund of \$117,500,000 entered in May 2020, now on appeal to the 9th Circuit); *In re Equifax, Inc. Customer Data Sec. Breach Litig.*, No. 17-md-2800-TWT (N.D. Ga.) (member of the Plaintiffs' Steering Committee) (a data breach involving 145 million consumers-final judgment approving largest data breach settlement in history was affirmed by the 11th Circuit); *Adkins v. Facebook, Inc.*, No. 18-cv-5982-WHA (N.D. Cal.) (co-lead counsel) (a data breach involving 40 million worldwide- 8 million

of whom are US residents-obtained one of the few contested certifications of a Rule 23(b)(2) injunction class, final approval of a class action settlement has been entered); *In re U.S. Office of Pers. Mgmt. Data Sec. Breach Litig.*, No. 15-mc-01394-ABJ (D.D.C.) (a data breach involving 22 million individuals including all federal judges-consumers-member of the Executive Committee) (dismissal on standing grounds reversed on appeal to the D.C. Circuit, litigation pending); *In re The Home Depot, Inc. Consumer Data Sec. Data Breach Litig.*, No. 14-md-02583-TWT (N.D. Ga.) (co-Lead Counsel) (final judgment entered approving a settlement on behalf of a class of 40 million consumers with total value of \$29,025,000); *In re Target Corp. Customer Data Sec. Breach Litig.*, MDL No. 2522 (D. Minn.) (Executive Committee member) (final judgment approving a settlement on behalf of a class of approximately 100 million consumers upheld by the 8th Circuit). Aside from the cases identified above, Mr. Yanchunis has litigated and settled a significant number of other data breach, data compromise and privacy class cases.

Proposed Representative Plaintiffs have worked diligently on behalf of the Settlement Class. They stepped forward to prosecute this action on behalf of all Settlement Class Members, provided input in connection with the drafting of the consolidated complaint, were prepared to respond to discovery, and reviewed and approved the Settlement.

This factor favors preliminary approval.

2. The Settlement is the Result of Arm's Length Negotiations and There is No Fraud or Collusion

"The Court may presume that no fraud or collusion occurred between counsel, in the absence of any evidence to the contrary." *Klein v. O'Neal, Inc.*, 705 F. Supp. 2d 632, 651 (N.D. Tex. 2010). The negotiations in this matter occurred at arm's length with the assistance of an experienced mediator. Settlements negotiated by experienced counsel that result from arm's length negotiations are presumed to be fair, adequate, and reasonable. *Lucas v. Kmart Corp.*, 234 F.R.D.

688, 693 (D. Colo. 2006). This deference reflects the understanding that vigorous negotiations between seasoned counsel protect against collusion and advance the fairness consideration of Rule 23(e). As discussed above, the parties reached an agreement on all material terms after weeks of negotiation, including an all-day mediation before the Hon. Wayne Andersen (Ret). The arm's-length nature of the settlement negotiations and the involvement of an experienced mediator such as Judge Andersen (Ret.) supports the conclusion that the Settlement was achieved free of collusion, and merits preliminary approval. *See Jones v. Singing River Health Servs. Found.*, 865 F.3d 285, 295 (5th Cir. 2017) ("The involvement of an experienced and well-known mediator is also a strong indicator of procedural fairness."). This factor favors preliminary approval.

3. The Settlement Benefits Being Made Available to the Settlement Class Members are Excellent in Comparison to the Range of Possible Recovery and Considering the Plaintiffs' Likelihood of Success on the Merits

A settlement must take "into account the uncertainty and risks involved in litigation" as well as "the strength of the claims and possible defenses." *Collins v. Sanderson Farms, Inc.*, 568 F. Supp. 2d 714, 727 (E.D. La. 2008); *see also Klein*, 705 F. Supp. 2d at 656. "In determining whether a settlement is fair given the potential range of recovery, the Court is guided by 'the fact that a proposed settlement only amounts to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.'" *Kemp v. Tower Loan of Miss., LLC*, No. 3:15-CV-499-CWR-LRA, 2017 U.S. Dist. LEXIS 209085, at *18 (S.D. Miss. Dec. 20, 2017).

Balancing the risks of continued litigation, the benefits of the Settlement, and the immediacy and certainty of the significant recovery provided for by the Settlement, supports that the Settlement should be preliminarily approved.

Proposed Representative Plaintiffs and Proposed Class Counsel believe the claims asserted in the litigation have merit. They would not have fought so hard to advance the claims if it were otherwise. But they also recognize the substantial risks involved in continuing this litigation. Dickey's has aggressively maintained its positions that the case should be dismissed, a litigated class could not be certified, that Dickey's would not be found liable at trial, and that Proposed Representative Plaintiffs would not be able to prove damages resulting from the Security Incident. While they disagree with Dickey's' views, Proposed Class Counsel are mindful of the inherent problems of proof and possible defenses to the claims asserted in the litigation. They also recognize the difficulties in establishing liability on a class-wide basis through summary judgment or even at trial and in achieving a result better than that offered by the Settlement here. *See Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982) (one of the most important factors in assessing a class settlement is the probability of the plaintiffs' success on the merits).

Prosecuting this litigation through trial and appeal would likely be lengthy, complex, and impose significant costs on all parties. *See, e.g., In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000) (recognizing that "[m]ost class actions are inherently complex and settlement avoids the costs, delays, and multitude of other problems associated with them"). Continued proceedings necessary to litigate this matter to final judgment would likely include substantial motion practice, extensive fact discovery, class certification proceedings, further dispositive motions and, of course, a trial and appeal. Given the complex nature of the Security Incident at issue, a battle of the experts at trial is almost a certainty and, as such, continued proceedings would likely include substantial expert discovery and significant motion practice. Also, considering the size of the Settlement Class and the amount of money at stake, any decision on the merits would likely be appealed, causing further delay. *See, e.g., Garza v. Sporting Goods*

Props., No. SA-93-CA-1082, 1996 U.S. Dist. LEXIS 2009, at *56 (W.D. Tex. Feb. 6, 1996) (approving class settlement and observing “if the plaintiffs were to continue with the litigation and prevail at trial, and even if the damages awarded were in excess of the amount of the settlement obtained, there is no doubt lengthy appeals would follow as would enormous costs and expenses”).

The Settlement, in contrast, provides certainty of recovery for Class Members. *See DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 291-92 (W.D. Tex. 2007) (guaranteed recovery obviates the risk and delay of continued litigation, trial, and appeal, which are significant factors considered in evaluating a settlement). As discussed above, all Settlement Class Members are eligible for a cash payment. Those Settlement Class Members from California are eligible for a higher payment to account for their higher potential recovery under the CCPA, in line with Rule 23 and the factors set forth by the Fifth Circuit. The Settlement also provides Settlement Class Members who suffered significant out-of-pocket losses resulting from the Security Incident the opportunity to seek reimbursement. Likewise, Settlement Class Members who would prefer to receive two years of free credit monitoring instead have that option. In sum, the Settlement provides excellent benefits. In order to receive the benefits of the Settlement, Settlement Class Members need only log on to the Settlement Website and complete a simple Claim Form.

This factor favors approval of the settlement. *See Grant v. Capital Mgmt. Servs., L.P.*, No. 10-CV-WQH BGS, 2014 U.S. Dist. LEXIS 29836, at *3 (S.D. Cal. Mar. 5, 2014) (“The court shall consider the vagaries of the litigation and compare the significance of immediate recovery by way of compromise to the mere possibility of relief in the future, after protracted and expensive litigation. In this respect, it has been held proper to take the bird in hand instead of a prospective flock in the bush”) (citations and quotations omitted).

4. The Proposed Method of Distributing Relief Supports Preliminary Approval of the Settlement

Rule 23(e)(2)(C)(ii) requires consideration of “the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims.” The advisory committee’s notes to this recently enacted provision instruct: “Often it will be important for the court to scrutinize the method of claims processing to ensure that it facilitates filing legitimate claims. A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding.” FED. R. CIV. P. 23(e) advisory committee’s note to 2018 amendment.

As discussed above, Settlement Class Members will be given several options for relief, which were carefully crafted to account for different levels of harm, the value of potential claims, and personal preference. Providing Settlement Class Members with a choice of benefits allows them to select whichever benefit they value most, thus maximizing the value of the Qualified Settlement Fund to the Settlement Class and the Class Member. The Settlement and Claim Form are designed to facilitate the filing of valid claims by Settlement Class Members. To file a claim, Settlement Class Members need only complete a simple Claim Form and submit it along with supporting documentation (if applicable). All claims will be processed by an experienced and nationally recognized class action administrator.

The methods of distributing relief to Settlement Class Members further support preliminary approval of the Settlement.

5. The Terms of the Proposed Award of Attorneys’ Fees, Costs, and Expenses Supports Preliminary Approval of the Settlement

Rule 23(e)(2)(C)(ii) requires consideration of “the terms of any proposed award of attorney’s fees, including timing of payment.” The advisory committee’s notes instruct:

“Examination of the attorney-fee provisions may also be valuable in assessing the fairness of the proposed settlement. Ultimately, any award of attorney’s fees must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class can be a significant factor in determining the appropriate fee award.” FED. R. CIV. P. 23(e) advisory committee’s note to 2018 amendment.

The terms of the proposed attorneys’ fee award are consistent with class action best practices. The parties did not discuss attorneys’ fees, costs, and expenses until after all substantive elements of the Settlement were agreed upon. Additionally, the amount of any attorneys’ fee award is intended to be considered by the Court separately from consideration of the fairness, reasonableness, and adequacy of the Settlement. SA ¶ 9.3.

Proposed Class Counsel intend to seek an attorneys’ fee award of up to one-third of the Qualified Settlement Fund, in addition to also seeking reasonable litigation costs and expenses. In compliance with Rule 23(h), Proposed Representative Plaintiffs will file a motion and supporting memorandum of law seeking this relief with the Court (and will upload to the Settlement website) not less than fourteen days prior to the deadline for Settlement Class Members to file objections to the Settlement.

6. The Settling Parties’ Agreements

The parties executed the Settlement Agreement on August 11, 2021. This is the only agreement made in connection with the proposal.

7. The Settlement Treats Settlement Class Members Equitably

The Settlement provides all Settlement Class Members with the option of filing claims and gives them each several options. As discussed above, the difference in cash payment amounts between California Class Members and non-California Class Members is to account for the fact

that California Class Members have stronger potential claims because of the CCPA. *See In re Premiera Blue Cross Customer Data Security Breach Litig.*, (D. Or.) Case No. 3:15-md-2633-SI, Pls.’ Motion for Final App. 30, ECF No. 281 (Providing extra settlement funds to California class members due to the “strength of their claims” under the California Confidentiality of Medical Information Act).

8. The Stage of the Proceedings and the Amount of Discovery Completed

The purpose of this factor is to ensure there is not an imbalance of information between the parties and to prevent uneducated guesswork. *Corrugated Container Antitrust Litig.*, 643 F.2d at 211. Here, although the parties settled prior to formal discovery, they engaged in pre-mediation exchange of information in addition to targeted confirmatory discovery to verify the underlying facts and the adequacy of the Settlement. This included receiving and reviewing key documents from Dickey’s, including the forensic report on the Security Incident. Leveraging their experience in the area and adhering to the directive of FED. R. CIV. P. 1 (directing parties “to secure the just, speedy, and inexpensive determination of every action and proceeding.”), Co-Lead Class Counsel were able to secure an excellent settlement at an early stage. This factor thus supports preliminary approval of the Settlement.

9. The Opinion of Experienced Class Counsel

Lastly, in evaluating the fairness of consideration offered in settlement, courts should give significant weight to the negotiated resolution of the parties. *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977). Absent fraud or collusion, the court “should be hesitant to substitute its own judgment for that of counsel.” *Id.* The issue is not whether the settlement could have been better in some fashion, but whether it is fair: “The trial court should not make a proponent of a proposed settlement justify each term of settlement against a hypothetical or speculative measure of what

concessions might have been gained; inherent in compromise is a yielding of absolutes and an abandoning of highest hopes.” *Id.*

As discussed above, proposed Co-Lead Class Counsel have substantial experience serving as class counsel in consumer fraud class actions, and they endorse the Settlement as fair, reasonable, and adequate.

As the foregoing analysis demonstrates, the Settlement is likely to be approved as fair, reasonable, and adequate, and should be preliminarily approved.

IV. THE PROPOSED CLASS SHOULD BE CERTIFIED

At the preliminary approval stage, the Court must address whether it “will likely be able to . . . certify the class for purposes of judgment on the proposal.” FED. R. CIV. P. 23(e)(1)(B)(ii). Certification of a settlement class is proper if the four requirements in Rule 23(a) and one of the subsections of Rule 23(b) are met. *McNamara*, 214 F.R.D. at 428. The Court should evaluate certification in the context of the settlement because questions regarding the manageability of the case at trial are no longer relevant. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Here, preliminary certification is proper because it “serves the primary goals of Rule 23, namely economies of time, effort, and expense without sacrificing fairness” to the settlement class. *Telles v. Midland Coll.*, No. MO:17-CV-00083-DC, 2018 U.S. Dist. LEXIS 227812, at *8 (W.D. Tex. Apr. 30, 2018).

A. Rule 23(a) Requirements Are Satisfied

Rule 23(a) sets forth the following prerequisites for certifying a class: “(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the

claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.” FED. R. CIV. P. 23(a). These requirements are satisfied here.

1. The Settlement Class Is Numerous

Rule 23(a)(1) requires that “the class is so numerous that joinder of all members is impracticable.” The Settlement Class consists of approximately 725,000 individuals. Thus, it would be impracticable to join all members of the Settlement Class, and numerosity is met. *See, e.g., Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (100 to 150 members “is within the range that generally satisfies the numerosity requirement”).

2. There Are Common Questions of Law and Fact

Rule 23(a)(2) requires the existence of a question of law or fact that is common to all Settlement Class Members and capable of class-wide resolution, the determination of which is central to the validity of all class members’ claims. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). “[E]ven a single common question will do.” *Id.* “The test for commonality is not demanding and is met ‘where there is at least one issue, the resolution of which will affect all or a significant number of the putative class members.’” *Mullen*, 186 F.3d 620 at 625 (quoting *Lightbourn v. County of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997)). “The Fifth Circuit has held that the threshold of commonality is not a high one.” *Walton v. Franklin Collection Agency*, 190 F.R.D. 404, 408 (N.D. Miss. 2000).

Several questions of law and fact common to all Settlement Class Members exist, including: (i) whether Dickey’s violated common law duties, prohibitions on unfair and deceptive trade practices, other legal obligations, and industry standard practices in causing the Security Incident; (ii) whether Dickey’s failed to properly secure and protect Settlement Class Members’ Card Information, and (iii) whether Settlement Class Members are entitled to damages, injunctive

relief, or other equitable relief, and the measure of such damages and relief. These legal and factual questions are common to each member of the Settlement Class. The commonality requirement is satisfied.

3. The Proposed Representative Plaintiffs' Claims Are Typical

Rule 23(a)(3) typicality is satisfied where the class representatives' claims arise from a common course of conduct and are based on similar legal theories as absent class members. *Vaughn*, 627 F. Supp. 2d at 745. "[E]ven if there are factual distinctions between the claims of the named plaintiffs and those of other class members[,]" typically may be met. *Bywaters v. United States*, 196 F.R.D. 458, 467 (E.D. Tex. 2000). Typicality seeks to protect conflicts between the named plaintiffs' interests and the class. *Mullen*, 186 F.3d at 625-26.

Proposed Representative Plaintiffs and all other Settlement Class Members' claims arise from Dickey's' alleged failure to implement and maintain reasonable security measures and the resulting Security Incident, and their claims are based on the same legal theories. As a result, Rule 23(a)(3)'s typicality requirement is satisfied.

4. The Proposed Representative Plaintiffs and Class Counsel Will Fairly and Adequately Protect the Interests of the Settlement Class

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Adequacy is satisfied where (i) counsel for the class is qualified and competent to prosecute the action, and (ii) the interests of the proposed class representatives do not conflict with the interests of the class. *See Morrow v. Washington*, 277 F.R.D. 172, 195 (E.D. Tex. 2011). The adequacy of the proposed representatives and class counsel is presumed in the absence of specific proof to the contrary. *Feder v. Elec. Data Sys. Corp.*, 429 F.3d 125, 129-130 (5th Cir. 2005).

Proposed Representative Plaintiffs have demonstrated that they are well-suited to represent the Settlement Class. They each have been involved in this matter since prior to the filings of their initial pleadings, including participating in approving the terms of the settlement agreement and being prepared to participate in discovery. Their interests are aligned with those of the other Settlement Class Members. Additionally, Proposed Class Counsel are well-qualified to represent the Settlement Class, as they each possess significant experience leading the prosecution of complex class action matters, including payment card data breaches. *See* III(B)(1), *supra*. The adequacy requirement is satisfied.

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

Rule 23(b)(3) requires that “questions of law or fact common to the members of the class predominate over any questions affecting only individual members of the class, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” FED. R. CIV. P. 23(b)(3). These requirements were added “to cover cases ‘in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.’” *Amchem*, 521 U.S. at 615 (quoting FED. R. CIV. P. 23(b)(3) advisory committee notes to 1966 Amendment).

Both of these requirements are satisfied here.

1. Common Questions Predominate

“Predominance examines whether ‘proposed classes are sufficiently cohesive to warrant adjudication by representation.’” *Vaughn*, 627 F. Supp. 2d at 745-46 (quoting *Amchem*, 521 U.S. at 623). The predominance test is readily met in cases alleging consumer fraud. *Amchem*, 521 U.S. at 625. “Where ‘defendants’ liability predominates over any individual issues involving plaintiffs,

and the Settlement Agreement will insure that funds are available’ to compensate plaintiffs, predominance is satisfied.” *In re Oil Spill by Oil Rig Deepwater Horizon*, 910 F. Supp. 2d 891, 921 (E.D. La. 2012), *aff’d sub nom. In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014).

Proposed Representative Plaintiffs assert claims for Negligence, Negligence *Per Se*, Breach of Implied Contract, and violations of state statutes prohibiting unfair and deceptive trade practices. The key questions in this litigation are Dickey’s failed to take reasonable and adequate measures to prevent the Security Incident, detect the Security Incident once initiated, remedy and mitigate the effects of the Security Incident, and to timely notify affected persons of the Security Incident in its aftermath. These questions predominate over any individual issues. The predominance requirement is satisfied.

2. Class Treatment Is Superior to Other Forms of Adjudication

“Class actions are superior when individual suits would be wasteful, duplicative, present managerial difficulty, and would be adverse to judicial economy.” *Id.* (citing *Mullen*, 186 F.3d at 627). Because this is a settlement Class, issues relating to the manageability of a class trial are irrelevant. *Vaughn*, 627 F. Supp. 2d at 746 (citing *Amchem*, 521 U.S. at 620).

Rule 23(b)(3) requires a class action to be “superior to other available methods for the fair and efficient adjudication of the controversy,” and sets forth the following factors:

The matters pertinent to the findings include: (A) the class members’ interest in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against 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). “Class actions are superior when individual suits would be wasteful, duplicative, present managerial difficulty, and would be adverse to judicial economy.” *Vaughn*, 627 F. Supp. 2d at 746 (citing *Mullen*, 186 F.3d at 627). Because this is a settlement Class,

issues relating to the manageability of a class trial are irrelevant. *Id.* (citing *Amchem*, 521 U.S. at 620).

A class action is the only viable method to adjudicate the claims at issue and provides the only viable method of resolving the dispute. Each individual Class Member's damages are too small to justify individual litigation. It is neither economically feasible nor judicially efficient for Class Members to pursue their claims against Defendants on an individual basis. *Amchem*, 521 U.S. at 617 ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."). The requirements of Rule 23(b)(3) are satisfied.

V. THE CLASS NOTICE PROGRAM SHOULD BE PRELIMINARILY APPROVED

Notice serves to "afford members of the class due process which, in the context of the Rule 23(b)(3) class action, guarantees them the opportunity to be excluded from the class action and not be bound by any subsequent judgment." *Peters v. Nat'l R.R. Passenger Corp.*, 966 F.2d 1483, 1486 (D.C. Cir. 1992) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173–74 (1974)). The Court must "direct notice in a reasonable manner to all class members who would be bound by the proposal." FED. R. CIV. P. 23(e)(1). And, notice must fairly describe the litigation and the proposed settlement and its legal significance. *See, e.g., Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1227 (11th Cir. 1998)) ("[The notice] must also contain an adequate description of the proceedings written in objective, neutral terms, that, insofar as possible, may be understood by the average absentee class member[.]").

The proposed Notice Program, as detailed in the Declaration of Cameron R. Azari, attached as Exhibit 5, ¶¶ 16-38, satisfies all of these criteria. The Notice Plan was devised by one of the leading experts in designing and implementing class action notice. The Notice Plan will inform

Settlement Class Members, in plain language so that it will be understood, of the substantive terms of the Settlement, their options for obtaining benefits, opting-out of, or objecting to the Settlement, and how to obtain additional information about the Settlement. The Notice Plan relies on a combination of direct emailing and targeted media notice to reach not less than 70% of the proposed Settlement Class. *Id.* ¶ 17. Epiq will establish a dedicated Settlement Website and shall maintain and update the website throughout the claim period with relevant documents and Court filings. *Id.* ¶ 33. A toll-free help line shall be made available to allow Class Members to listen to answers to FAQs or request that a claim form be mailed to them. *Id.* ¶ 34. The notice plan meets the requirements of FED. R. CIV. P. 23 and constitutional due process. Dickey's will also be fulfilling the notification requirements under the Class Action Fairness Act pursuant to 28 U.S.C. § 1715.

VI. CONCLUSION

The Settlement readily meets the standard for preliminary approval. Representative Plaintiffs therefore respectfully request that this Court enter the proposed order submitted herewith, 1) certifying the proposed class for settlement purposes, 2) preliminarily approving the Settlement, 3) appointing Co-Lead Class Counsel and Additional Class Counsel as requested in the proposed Preliminary Approval Order, 4) appointing Plaintiffs as Representative Plaintiffs, 5) appointing Epiq as the Settlement Administrator, 5) approving the proposed Notice Plan, and 6) setting a Fairness hearing for final approval of the Settlement and to consider the application for attorneys' fees, service awards, and reimbursement of costs and expenses.

Plaintiffs respectfully request that the Final Fairness Hearing be scheduled no earlier than 170 days after entry of the Preliminary Approval Order.

Dated: August 13, 2021

Respectfully submitted,

/s/ Ben Barnow

Ben Barnow (*pro hac vice*)

Anthony L. Parkhill (*pro hac vice*)

BARNOW AND ASSOCIATES, P.C.

205 W. Randolph St., Suite 1630

Chicago, IL 60606

Tel: (312) 621-2000

Fax: (312) 641-5504

b.barnow@barnowlaw.com

aparkhill@barnowlaw.com

Benjamin F. Johns (*pro hac vice*)

Samantha E. Holbrook (*pro hac vice*)

Alex M. Kashurba (*pro hac vice*)

CHIMICLES SCHWARTZ KRINER

& DONALDSON-SMITH LLP

One Haverford Centre

361 Lancaster Avenue

Haverford, PA 19041

(610) 642-8500

bfj@chimicles.com

seh@chimicles.com

amk@chimicles.com

John A. Yanchunis

Ryan J. McGee

Francesca Kester

MORGAN & MORGAN COMPLEX

LITIGATION GROUP

201 N. Franklin Group, 7th Floor

Tampa, Florida 33602

Tel: (813) 223-5505

Facsimile: (813) 223-5405

jyanchunis@forthepeople.com

rmcgee@forthepeople.com

fkester@forthepeople.com

Bruce W. Steckler
State Bar No. 00785039
Austin P. Smith
State Bar No. 24102506
STECKLER WAYNE COCHRAN PLLC
1270 Hillcrest Road, Suite 1045
Dallas, TX 75230
Tel: 972-387-4040
Fax: 972-387-4041
bruce@swclaw.com
austin@swclaw.com

Cory S. Fein (State Bar No. 06879450)
CORY FEIN LAW FIRM
712 Main Street, Suite 800
Houston, TX 77002
Tel.: (281) 254-7717
Fax: (530) 748-0601
cory@corfeinlaw.com

Paul D. Stickney
State Bar No. 00789924
12720 Hilcrest Road, Suite 1045
Dallas, TX 75230
Tel: 972-387-4040
judgestick@gmail.com

Brian P. Murray
GLANCY PRONGAY & MURRAY LLP
230 Park Avenue Rm 530
New York, NY 10169
Tel: (212) 682-5340
Fax: (212) 884-0988
bmurray@glancylaw.com

Paul C. Whalen
**LAW OFFICE OF PAUL C. WHALEN,
P.C.**
61 Spray Falls Road
Haines Falls, NY 12436
Tel: (516) 426-6870
pcwhalen@protonmail.com

CERTIFICATE OF CONFERENCE

On August 13, 2021, I conferred with Christopher S. Dodrill, one of the attorneys for Defendant Dickey's Barbecue Restaurants, Inc., and Dickey's Capital Group, Inc. regarding Plaintiffs' Motion for Preliminary Approval of Class Action Settlement. Mr. Dodrill does not oppose the motion.

Also on August 13, 2021, I conferred with Andrew K. York, counsel for plaintiffs in *Jeary* (3:21-cv-0137-L). I, along with my colleague, Bruce W. Steckler, advised him that we had obtained a settlement and were filing a motion for preliminary approval of the Settlement and that the terms of the Settlement are confidential until it is publicly filed. He advised that he could not take a position on the Motion at this time. Proposed Co-Lead Class Counsel are hopeful that counsel in *Jeary* will support the Settlement. In any event, I look forward to working with them in an amicable and productive manner.

By: /s/ Ben Barnow

Proposed Co-Lead Class Counsel

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on counsel of record through the Court's CM/ECF system on August 13, 2021.

By: /s/ Ben Barnow

Proposed Co-Lead Class Counsel

Exhibit 1

This Settlement Agreement, dated as of the Effective Date, is made and entered into by and among the following Settling Parties (defined below): (i) Robert Stroman, Veronica Snyder, Lashawn Parker, Demi Kostka, Vincent Jear, and Latorsha Adams (“Representative Plaintiffs”), individually and on behalf of the Settlement Class (defined below), by and through their counsel of record, Ben Barnow, Barnow and Associates, P.C.; Benjamin F. Johns, Chimicles Schwartz Kriner & Donaldson-Smith LLP; and John A. Yanchunis, Morgan & Morgan Complex Litigation Group (collectively, “Proposed Co-lead Class Counsel”) and Bruce W. Steckler and Paul D. Stickney, Steckler Wayne Cochran PLLC, Anthony L. Parkhill, Barnow and Associates, P.C.; Samantha E. Holbrook, Chimicles Schwartz Kriner & Donaldson-Smith LLP; and Brian P. Murray, Glancy Prongay & Murray LLP (collectively, “Proposed Additional Class Counsel”) on the one hand; and (ii) Dickey’s Barbecue Restaurants, Inc. and Dickey’s Capital Group, Inc. (together, “Dickey’s” or “Defendant”), by and through its counsel of record, Ian C. Ballon and Christopher S. Dodrill of Greenberg Traurig, LLP (“Dickey’s Counsel”) on the other hand. This Settlement Agreement is subject to Court approval and is intended by the Settling Parties to fully, finally, and forever resolve, discharge, and settle the Litigation (defined below) and Released Claims (defined below), upon and subject to the terms and conditions herein.

RECITALS

WHEREAS, in October 2020, Dickey’s became aware of a report mentioning a Security Incident (defined below) carried out by a malicious third-party who had targeted and installed unauthorized code on the point-of-sale software of certain “Dickey’s Barbecue Pit®” restaurants in various states, which, save for one location, were individually owned and operated by franchisees;

WHEREAS, after promptly undertaking an investigation, Dickey’s determined that certain payment card information belonging to customers of impacted Dickey’s Barbecue Pit® restaurants may have been compromised in the Security Incident;

WHEREAS, upon becoming aware of the Security Incident, Dickey’s acted swiftly to contain the Security Incident, remove the unauthorized code, and implement additional measures to further enhance payment card security;

WHEREAS, Dickey’s conspicuously posted public notice about the Security Incident on its website, which explained what happened, detailed the type of information involved, provided a store locator identifying which restaurants may have been affected and when, and offered what steps customers should take in response;

WHEREAS, on October 26, 2020, the civil action of *Stroman v. Dickey’s Barbecue Restaurants, Inc.*, No. 20STCV40974 (“*Stroman*”), was filed in the Superior Court of Los Angeles County, California, asserting claims individually and on behalf of a California class, and thereafter removed to the United States District Court for the Central District of California and transferred under 28 U.S.C. § 1404(a) to the United States District Court for the Northern District of Texas;

WHEREAS, on November 16, 2020, the civil action of *Kostka v. Dickey’s Barbecue Restaurants, Inc.*, No. 3:20-cv-3424-K (“*Kostka*”), was filed in the United States District Court for

the Northern District of Texas, asserting claims individually and on behalf a nationwide class, and later amended to add claims on behalf of a California class;

WHEREAS, on December 3, 2020, the civil action of *Adams v. Dickey's Barbecue Restaurants, Inc.*, No. CC-20-05241-B ("*Adams*"), was filed in the County Court of Law No. 2 of Dallas County, Texas, asserting claims individually and on behalf of a nationwide class, and then subsequently removed to the United States District Court for the Northern District of Texas;

WHEREAS, on April 14, 2021, the United States District Court for the Northern District of Texas consolidated the *Stroman*, *Kostka*, and *Adams* civil actions, along with one other civil action, under a single civil action number, No. 3:20-cv-3424-K;

WHEREAS, Dickey's disputes the claims and allegations set forth in the civil actions filed against it, any and all liability or wrongdoing of any kind to the Representative Plaintiffs, the Settlement Class, and any other individuals or putative class members described in the pleadings, and further denies any violation of law whatsoever;

WHEREAS, the Settling Parties have concluded that further litigation would be protracted and expensive, have considered the uncertainty and risks inherent in litigation, and have determined that it is desirable to effectuate a full and final settlement of the claims asserted in the above-referenced actions on the terms set forth below to avoid the associated burdens, risks, and extensive costs;

WHEREAS, on June 30, 2021, the Settling Parties engaged in an arm's-length, remote, full-day mediation session under the direction of the Honorable Wayne Andersen (Ret.) and reached an agreement in principle to resolve the Litigation as outlined herein;

WHEREAS, Dickey's provided Proposed Co-lead Class Counsel with certain additional factual information to aid in the mediation;

WHEREAS, Dickey's denies any wrongdoing whatsoever, and this Agreement shall in no event be construed or deemed to be evidence of or an admission or concession on the part of Dickey's with respect to any claim of any fault or liability or wrongdoing or damage whatsoever, any infirmity in the defenses that Dickey's has asserted or would assert, or the requirements of Federal Rule of Civil Procedure 23 and whether the Representative Plaintiffs satisfy those requirements;

WHEREAS, based upon their substantial investigation and discovery as set forth above, and their substantial experience in data breach cases, Proposed Class Counsel have concluded that the terms and conditions of this Agreement are fair, reasonable, and adequate to Settlement Class Members (defined below) and are in their best interests, and have agreed to settle the claims that were asserted or could have been asserted in the Litigation arising out of or relating to the Security Incident pursuant to the terms and provisions of this Agreement after considering (a) the substantial benefits that Settlement Class Members will receive from the Settlement, (b) the uncertain outcome and attendant risks of litigation, (c) the delays inherent in litigation, and (d) the desirability of permitting the settlement of this litigation to be consummated as provided by the terms of this Agreement;

WHEREAS, pursuant to these terms, which are set forth fully below, this Settlement Agreement provides for the resolution of all claims and causes of action asserted, or that could have been asserted, against Dickey's and the Released Persons (defined below) arising out of or relating to the Security Incident, by and on behalf of the Representative Plaintiffs and Settlement Class Members (defined below), and any other such actions by and on behalf of any other consumers and putative classes of consumers originating, or that may originate, in jurisdictions in the United States against Dickey's relating to the Security Incident (collectively, the "Litigation");

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by and among Representative Plaintiffs, individually and on behalf of the Settlement Class, Class Counsel, and Dickey's that, subject to the Court's approval, when Judgment becomes Final as defined herein, the Litigation and the Released Claims shall be finally and fully compromised, settled, and released, and the Litigation shall be dismissed with prejudice as to the Settling Parties, the Settlement Class, and the Settlement Class Members, except those Settlement Class Members who lawfully opt-out of the Settlement Agreement, and subject to the terms and conditions of this Settlement Agreement.

I. DEFINITIONS

As used in the Settlement Agreement, the following terms have the meanings specified below:

1.1 "Agreement" or "Settlement Agreement" means this agreement.

1.2 "Approved Claims" means Settlement Claims in an amount approved by the Notice and Claims Administrator or found to be valid through the Dispute Resolution process, as set forth in this Agreement.

1.3 "Attorneys' Fees and Expenses" means the attorneys' fees, costs, and expenses incurred by Class Counsel in connection with commencing, prosecuting, and settling the Litigation.

1.4 "Class Counsel" means Co-lead Class Counsel and Additional Class Counsel.

1.5 "Claims Administration" means the processing and payment of claims received from Settlement Class Members by the Notice and Claims Administrator.

1.6 "Claims Deadline" is defined in ¶ 3.1.

1.7 "Claim Form" means the document made available pursuant to the provisions of the notice plan that Settlement Class Members must submit, subject to the provisions of this Settlement Agreement, to obtain benefits under this Settlement Agreement.

1.8 "Costs of Claims Administration" means all actual costs associated with or arising from Claims Administration.

1.9 "Court" means the United States District Court for the Northern District of Texas.

1.10 “Effective Date” means the date on which all Parties have signed this Agreement.

1.11 “Fee Application” means any motion for a Fee Award and Costs.

1.12 “Fee Award and Costs” means the payment of attorneys’ fees, costs, and expenses award by the Court to Class Counsel, to be paid from the Qualified Settlement Fund.

1.13 “Final” means the occurrence of all of the following events: (i) the settlement pursuant to this Settlement Agreement receives final approval by the Court; (ii) the Court has entered a Judgment; and (iii) the time to appeal or seek permission to appeal from the Judgment has expired or, if appealed, the appeal has been dismissed in its entirety, or the Judgment has been affirmed in its entirety by the court of last resort to which such appeal may be taken, and such dismissal or affirmance has become no longer subject to further appeal or review. Notwithstanding the above, any order modifying or reversing any attorneys’ fee award made in this case shall not affect whether the Judgment is “Final” as defined herein or any other aspect of the Judgment.

1.14 “Judgment” means a judgment rendered by the Court.

1.15 “Notice and Claims Administrator” means the notice and claims administrator with recognized expertise in class action notice and claims generally and data security litigation specifically, as jointly agreed upon by the Settling Parties and approved by the Court.

1.16 “Opt-Out Date” means the date by which Settlement Class Members must mail their requests to be excluded from the Settlement Class for that request to be effective. The postmark date shall constitute evidence of the date of mailing for these purposes.

1.17 “Out-of-Pocket Losses” means documented out-of-pocket costs or expenditures that a Settlement Class Member actually and reasonably incurred that are fairly traceable to the Security Incident, and that have not already been reimbursed by a third party.

1.18 “Person” means an individual, corporation, partnership, limited partnership, limited liability company or partnership, association, joint stock company, estate, legal representative, trust, unincorporated association, government or any political subdivision or agency thereof, and any business or legal entity, and their respective spouses, heirs, predecessors, successors, representatives, or assignees.

1.19 “Payment Card Information” means any and all information that may have been compromised or otherwise exposed without authorization in the Security Incident, including but not limited to cardholder name, payment card number, expiration date, and internal verification value.

1.20 “Preliminary Approval Order” means the order preliminarily approving the Settlement Agreement and ordering that notice be provided to the Settlement Class. The Settling Parties’ proposed form of Preliminary Approval Order is attached as **Exhibit A**.

1.21 “Proposed Co-lead Class Counsel” or “Co-lead Class Counsel” means Ben Barnow, Barnow and Associates, P.C.; Benjamin F. Johns, Chimicles Schwartz Kriner & Donaldson-Smith LLP; and John A. Yanchunis, Morgan & Morgan Complex Litigation Group.

1.22 “Proposed Additional Class Counsel” or “Additional Class Counsel” means Bruce W. Steckler and Paul D. Stickney, Steckler Wayne Cochran PLLC; Anthony L. Parkhill, Barnow and Associates, P.C.; Samantha E. Holbrook, Chemicles Schwartz Kriner & Donaldson-Smith LLP; and Brian P. Murray, Glancy Prongay & Murray LLP.

1.23 “Qualified Settlement Fund” means the common settlement fund established by the Notice and Claims Administrator or Class Counsel pursuant to 26 C.F.R. § 1.468B01 at a qualified bank agreed upon by the Settling Parties, in which Dickey’s will deposit \$2,350,000 in settlement funds and from which all monetary compensation to the Settlement Class and certain other expenses shall be paid.

1.24 “Related Entities” means Dickey’s past or present parents, subsidiaries, affiliates, divisions, franchisees, and related or affiliated entities of any nature whatsoever, whether direct or indirect, as well as each of Dickey’s and these entities’ respective predecessors, successors, directors, managers, officers, employees, principals, agents, attorneys, insurers, and reinsurers, and includes, without limitation, any Person related to any such entity who is, was or could have been named as a defendant in any of the actions in the Litigation.

1.25 “Released Claims” shall collectively mean any and all claims and causes of action, both known and unknown (including Unknown Claims), including, without limitation, any causes of action under California Civil Code § 1798.150 or § 17200 *et seq.* and all similar statutes in effect in any states in the United States as defined herein; negligence; negligence per se; breach of contract; breach of implied contract; breach of fiduciary duty; breach of confidence; invasion of privacy; misrepresentation (whether fraudulent, negligent, or innocent); unjust enrichment; bailment; wantonness; failure to provide adequate notice pursuant to any breach notification statute or common law duty; breach of any consumer protection statute; and including, but not limited to, any and all claims for damages, injunctive relief, disgorgement, declaratory relief, equitable relief, attorneys’ fees and expenses, pre-judgment interest, credit monitoring services, the creation of a fund for future damages, statutory damages, punitive damages, special damages, exemplary damages, restitution, the appointment of a receiver, and any other form of relief that either has been asserted, or could have been asserted, by any Settlement Class Member against any of the Released Persons (defined below) based on, relating to, concerning or arising out of the Security Incident and alleged theft of Payment Card Information before the Effective Date or the allegations, facts, or circumstances described in the Litigation. Released Claims shall not include the right of any Settlement Class Member or any of the Released Persons to enforce the terms of the settlement contained in this Settlement Agreement, and shall not include the claims of Settlement Class Members who have timely excluded themselves from the Settlement Class.

1.26 “Released Persons” means Dickey’s and its Related Entities.

1.27 “Representative Plaintiffs” means Robert Stroman, Veronica Snyder, Lashawn Parker, Demi Kostka, Vincent Jear, and Latorsha Adams.

1.28 “Security Incident” or “Incident” means the access by unauthorized actors to the point-of-sale systems belonging to “Dickey’s Barbecue Pit®” restaurants on or after April 23, 2019, as further described in the Recitals, and any and all facts, actions and circumstances related thereto, whether occurring or arising before, on or after the date of this Agreement.

1.29 “Settlement Claim” means a claim for settlement benefits made under the terms of this Settlement Agreement.

1.30 “Settlement Class” means: All residents of the United States who used a payment card or whose card was used to make a purchase at a “Dickey’s Barbecue Pit®” restaurant identified in **Exhibit B** between April 23, 2019, and October 29, 2020. The Settlement Class specifically excludes: (i) Dickey’s and its officers and directors; (ii) all Settlement Class Members who timely and validly request to opt-out from the Settlement Class; (iii) any Person who has agreed to release his or her claim(s) against Dickey’s arising out of or related to the Security Incident; and (iv) the Judge assigned to evaluate the fairness of this settlement and all court personnel directly involved therewith.

1.31 “Settlement Class Member” means any Person who falls within the definition of the Settlement Class.

1.32 “Settlement Website” means the website that the Notice and Claims Administrator will establish as soon as practicable following entry of the Preliminary Approval Order as a means for Settlement Class Members to obtain notice of and information about the Settlement and relevant case documents and deadlines. The Settlement Website shall contain relevant documents, including, but not limited to, a downloadable version of a customary form of short notice (the “Short Notice”), a customary long form of notice (“Long Notice”), and a publication notice form (“Publication Notice”), which together shall include a fair summary of the Settling Parties’ respective litigation positions, the general terms of the settlement, instructions for how to object or opt-out of the settlement, the process and instructions for making claims, and the date, time and place of the Final Fairness Hearing; this Agreement; Plaintiffs’ motion for preliminary approval of the Settlement; the Preliminary Approval Order; and the Fee Application. The Settlement Website shall also include a toll-free telephone number, email address, and mailing address through which Settlement Class Members may contact the Notice and Claims Administrator directly. The Settlement Website shall not include any advertising and shall remain operational until at least 60 days after all settlement payments have been distributed.

1.33 “Settling Parties” means, collectively, Dickey’s and Representative Plaintiffs, individually and on behalf of the Settlement Class.

1.34 “Taxes and Tax-Related Expenses” means: (i) any and all applicable taxes, duties and similar charges imposed by a government authority (including any estimated taxes, interest or penalties) arising in any jurisdiction, if any, with respect to the income or gains earned by or in respect of the Qualified Settlement Fund, including, without limitation, any taxes that may be imposed upon Dickey’s or its counsel with respect to any income or gains earned by or in respect of the Settlement Fund for any period while it is held in the Qualified Settlement Fund account; (ii) any other taxes, duties and similar charges imposed by a government authority (including any estimated taxes, interest or penalties) relating to the Qualified Settlement Fund that the Notice and Claims Administrator determines are or will become due and owing, if any; and (iii) any and all expenses, liabilities and costs incurred in connection with the taxation of the Qualified Settlement Fund (including without limitation, expenses of tax attorneys and accountants).

1.35 “Unknown Claims” means any of the Released Claims that any Settlement Class Member, including any of the Representative Plaintiffs, does not know or suspect to exist in his or her favor at the time of the release of the Released Persons that, if known by him or her, might have affected his or her settlement with, and release of, the Released Persons, or might have affected his or her decision not to object to and/or participate in this Settlement Agreement. With respect to any and all Released Claims, including Unknown Claims, the Settling Parties stipulate and agree that upon the date the Judgment becomes Final, the Representative Plaintiffs expressly shall have, and each of the other Settlement Class Members shall be deemed to have, and by operation of the Judgment shall have, waived the provisions, rights, and benefits conferred by California Civil Code § 1542, and also any and all provisions, rights, and benefits conferred by any law of any state, province, or territory of the United States which is similar, comparable, or equivalent to California Civil Code § 1542, which provides:

A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.

Settlement Class Members, including the Representative Plaintiffs, and any of them, may hereafter discover facts in addition to, or different from, those that they now know or believe to be true with respect to the subject matter of the Released Claims, including Unknown Claims, but the Representative Plaintiffs expressly shall have, and each other Settlement Class Member shall be deemed to have, and by operation of the Judgment shall have, upon the date the Judgment becomes Final, fully, and finally and forever settled and released any and all Released Claims, including Unknown Claims. The Settling Parties acknowledge, and Settlement Class Members shall be deemed by operation of the Judgment to have acknowledged, that the foregoing waiver is a material element of the Settlement Agreement of which this release is a part.

II. THE QUALIFIED SETTLEMENT FUND

2.1 The Notice Claims Administrator shall establish an interest-bearing escrow account to serve as the Qualified Settlement Fund, at a financial institution approved by Co-lead Class Counsel and Dickey’s Counsel, which shall be maintained pursuant to Treasury Regulation § 1.468B-1, *et seq.*

2.2. No later than 21 days after the Court grants the Motion for Preliminary Approval of this Settlement, Dickey’s will deposit \$2,350,000 into the Qualified Settlement Fund escrow account.

2.3 As further described in this Agreement, the Qualified Settlement Fund shall be the sole source of monetary funds for all relief referenced below and shall be used by the Notice and Claims Administrator to pay for:

- (a) Taxes and Tax-Related Expenses;
- (b) Monetary compensation;
- (c) Credit Services;

(d) Notice and Administrative Expenses;

(e) Attorneys' Fees, Costs, and Expenses; and Service Awards to the representative Plaintiffs; and

(f) Any other remuneration called for by this Agreement, other than Dickey's expenses and attorneys' fees, costs, and expenses related to the Litigation.

2.4 No amounts may be withdrawn from the Qualified Settlement Fund unless: (i) expressly authorized by this Agreement; or (ii) approved by the Court, except that up to the agreed upon amount in writing may be used to provide notice to Settlement Class Members under the notice plan approved by the Court and to pay for approved administrative expenses. In no event will any amount deposited in the Qualified Settlement Fund revert, be refunded, or otherwise be credited to Dickey's. The Notice and Claims Administrator shall be frugal and prudent in incurring notice and administrative expenses.

2.5 The Notice and Claims Administrator, subject to such supervision and direction of the Court and/or Co-lead Class Counsel as may be necessary or as circumstances may require, shall administer and/or oversee distribution of the Qualified Settlement Fund to Settlement Class Members pursuant to this Agreement.

2.6 The Notice and Claims Administrator and Class Counsel are responsible for communicating with Settlement Class Members regarding the distribution of the Qualified Settlement Fund and amounts paid under the Settlement.

2.7 All funds held in the Qualified Settlement Fund shall be deemed to be in the custody of the Court upon the deposit of those funds until such time as the funds shall be distributed to Settlement Class Members or used as otherwise disbursed pursuant to this Agreement and/or further order of the Court.

2.8 The Settling Parties agree that the Qualified Settlement Fund is intended to be maintained within the meaning of Treasury Regulation § 1.468B-1, and that the Notice Claims Administrator, within the meaning of Treasury Regulation § 1.468B-2(k)(3), shall be responsible for filing tax returns and any other tax reporting for or in respect of the Qualified Settlement Fund and paying from the Qualified Settlement Fund any Taxes and Tax-Related Expenses owed with respect to the Settlement Fund. The Settling Parties agree that the Qualified Settlement Fund shall be treated as an escrow account from the earliest date possible, and they agree to any relation-back election required to treat the Qualified Settlement Fund as an escrow account from the earliest date possible.

2.9 All Taxes and Tax-Related Expenses shall be paid out of the Qualified Settlement Fund and shall be timely paid by the Notice and Claims Administrator without prior order of the Court. Further, the Notice and Claims Administrator shall indemnify and hold harmless the Settling Parties and their counsel for Taxes and Tax-Related Expenses (including, without limitation, taxes payable by reason of any such indemnification payments).

2.10 The Settling Parties and their respective counsel have made no representation or warranty with respect to the tax treatment by any Representative Plaintiff or any Settlement Class

Member of any payment or transfer made pursuant to this Agreement or derived from or made pursuant to the Qualified Settlement Fund.

2.11 Each Representative Plaintiff and Settlement Class Member shall be solely responsible for the federal, state, and local tax consequences to him, her, or it of the receipt of funds from the Qualified Settlement Fund pursuant to this Agreement.

2.12 Dickey's and its counsel shall not have any responsibility for or liability whatsoever with respect to: (i) any act, omission, or determination of Class Counsel, the Notice and Claims Administrator, or any of their respective designees or agents, in connection with the administration of the Settlement or otherwise; (ii) the management, investment, or distribution of the Qualified Settlement Fund; (iii) the formulation, design, or terms of the disbursement of the Qualified Settlement Fund; (iv) the determination, administration, calculation, or payment of any claims asserted against the Qualified Settlement Fund; (v) any losses suffered by, or fluctuations in the value of the Qualified Settlement Fund; or (vi) the payment or withholding of any Taxes and Tax-Related Expenses incurred in connection with the taxation of the Qualified Settlement Fund or the filing of any returns. Dickey's also shall have no obligation to communicate with Settlement Class Members and others regarding amounts paid under the settlement.

2.13 The Representative Plaintiffs and Class Counsel, and their respective firms, shall not have any liability whatsoever with respect to any acts taken pursuant to the terms of this Agreement, including, but not limited to: (i) any act, omission or determination of the Notice and Claims Administrator, or any of their respective designees or agents, in connection with the administration of the Settlement or otherwise; (ii) the management, investment, or distribution of the Qualified Settlement Fund; (iii) the formulation, design, or terms of the disbursement of the Qualified Settlement Fund; (iv) the determination, administration, calculation, or payment of any claims asserted against the Qualified Settlement Fund; (v) any losses suffered by, or fluctuations in the value of the Qualified Settlement Fund; or (vi) the payment or withholding of any Taxes and Tax-Related Expenses incurred in connection with the taxation of the Qualified Settlement Fund or the filing of any returns.

III. SETTLEMENT BENEFITS

3.1 All Settlement Class Members who submit a valid claim using the Claim Form, which is attached as **Exhibit C** to this Settlement Agreement, may request one of the following: (i) Expense Reimbursement Option, (ii) Cash Option, or (iii) Credit Services Option by submitting a Claim Form selecting one of the above to the Notice and Claims Administrator no later than 135 days after Preliminary Approval, or other deadline approved by the Court (the "Claims Deadline").

3.2 The Notice and Claims Administrator shall verify that each Person who submits a Claim Form is a Settlement Class Member. No Settlement Class Member may have more than one valid Claim Form. Ambiguities or deficiencies on the face of the Claim Form shall be resolved by the Notice and Claims Administrator.

3.3 Expense Reimbursement Option. Settlement Class Members may submit Claim Forms selecting the Expense Reimbursement Option. Claims will be subject to review for completeness and plausibility by the Notice and Claims Administrator.

- (a) Compensation for unreimbursed losses upon submission of a valid and timely Claim and supporting documentation, for Out-of-Pocket Losses more likely than not resulting from the Security Incident, up to a maximum amount of \$5,000.
- (b) The Notice and Claims Administrator shall have the sole discretion and authority to determine whether the prerequisites have been met to award payments for Out-of-Pocket Losses.

3.4 Cash Option. Settlement Class Members may select a cash payment, estimated in the amount of \$100 for California Class Members and \$50 for non-California Class Members. Residency shall be determined by the Settlement Class Member's primary residence during the time of the Security Incident. The amount of the Cash Option payment will be calculated in accordance with ¶ 3.6 below.

3.5 Credit Services Option. Settlement Class Members may select Credit Services on the Claim Form. The Credit Services will consist of a 24-month plan providing: (i) three-bureau credit monitoring, (ii) identity restoration services that provide professional fraud resolution assistance to Settlement Class Members who experience identity theft or fraud, helping them with identity recovery and restoration, and (iii) \$1,000,000 of identity theft insurance coverage. Credit Services are valid to be activated within twelve months from the mailing or emailing of the activation code.

3.6 The Qualified Settlement Fund shall be used to pay, in the following order: (i) all Costs of Claims Administration; (ii) Fee Award and Costs; (iii) the costs of providing the Credit Services; (iv) approved Claims for Expense Reimbursement; (v) approved Cash Option claims. The value of Cash Option claims will be calculated by subtracting from the Qualified Settlement Fund the expenses listed as (i)-(iv) in the preceding sentence ("Remaining Fund"). The Remaining Fund will be divided by the total of double the number of valid claims submitted by California residents plus the number of valid claims submitted by non-California residents. The resulting amount will equal the "Base Amount" to be distributed to non-California Class Members; California Class Members will receive twice the Base Amount (i.e. $\text{Base Amount} = \text{Remaining Fund} \div ((2 \times \# \text{ of valid CA claims}) + (\# \text{ of valid non-CA claims}))$).

3.7 The Qualified Settlement Fund shall be the sole source of monetary funds for the relief set forth herein.

3.8 For any payments returned to the Notice and Claims Administrator as undeliverable (including, but not limited to, when the intended recipient is no longer located at the address), the Notice and Claims Administrator shall make reasonable efforts to locate a valid address and resend the payment within 30 days after the payment is returned to the Notice and Claims Administrator as undeliverable. In attempting to locate a valid address, the Notice and Claims Administrator is authorized to send an email and/or place a telephone call to that Settlement Class Member to obtain updated address information. Only one replacement payment may be issued per Settlement Class Member.

3.9 If the Notice and Claims Administrator is notified that a Settlement Class Member is deceased, the Notice and Claims Administrator is authorized to reissue payment to the

Settlement Class Member's estate upon receiving proof that the Settlement Class Member is deceased and after consultation with Class Counsel.

3.10 Residual Funds. If any monies remain in the Qualified Settlement Fund more than one hundred fifty (150) days after the distribution of Settlement Payments to the Settlement Class Members is complete, a subsequent payment will be evenly made to all Settlement Class Members with Approved Claims who cashed or deposited the initial payment they received, provided that the average check amount is equal to or greater than Three Dollars and No Cents (\$3.00). The distribution of this remaining Qualified Settlement Fund shall continue until the average check amount in a distribution is less than Three Dollars and No Cents (\$3.00). If the average check amount in a distribution would be less than Three Dollars and No Cents (less than \$3.00), then, if possible, the remaining Qualified Settlement Fund will be used to extend the Credit Services to Settlement Class Members receiving that benefit for as long as reasonably possible. Any amount remaining in the Qualified Settlement Fund after said extension is accomplished, if any, shall be distributed to a Non-Profit Residual Recipient subject to court approval.

3.11 Business Practices Changes. The parties agree that as part of the settlement consideration, Dickey's, at its sole and separate expense, shall adopt, pay for, implement, and maintain the following business practices changes related to information security to safeguard customers' and Settlement Class Members' payment card information for a period of no less than three years from the time when the applicable business practice change is initiated. The cost of the measures in this Section will not be paid from the Qualified Settlement Fund.

- (a) Multi-Factor Authentication. Dickey's will protect remote access credentials to franchisee servers behind Multi-Factor Authentication.
- (b) Firewall Rules. Dickey's will update firewall rules at Dickey's Barbecue Pit® locations protected by NuArx-managed firewalls to restrict all inbound and outbound traffic not explicitly permitted.
- (c) EMV Point of Sale Systems. Dickey's will continue to mandate through its agreements with franchisees that franchised restaurants migrate to an EMV (Europay, MasterCard and Visa) point of sale system.
- (d) Annual Security Awareness Training. Dickey's will provide annual security awareness training for its employees.
- (e) Information Security Program. Dickey's will maintain a reasonable Written Information Security Program ("WISP") that is updated from time to time and distributed to all employees as part of the Annual Security Awareness Training in ¶ 3.11(d). This WISP will address, among other things, implementing and maintaining reasonable safeguards to protect the security of company, employee, and customer information and address data privacy risks and threats posed to that information. Dickey's will also identify internal and external risks to the security of its customers' payment card information that could result in unauthorized access to the company's system, and periodically review the sufficiency of any safeguards in place to control these risks. Dickey's will develop security metrics that measure

its security program and will ensure that such metrics are periodically reviewed and approved by senior leadership. All Dickey's employees, including new hires, must review, and agree to maintain and uphold, the policies, practices and procedures that encompass the WISP.

- (f) Network Monitoring and Threat Management. Dickey's will maintain, regularly review, and revise as necessary, a process to conduct risk-based monitoring of security events on Dickey's network and require that tools used to perform network monitoring be appropriately monitored and tested to assess proper configuration and maintenance. The process shall include an assessment of the security events and appropriate remediation timelines based on severity.
- (g) Identity and Access Management. Dickey's will implement and maintain an identity access management solution to appropriately manage users of its internal applications and the services they can or cannot access and implement and maintain a policy to protect who has rights to access and use different information resources and guard against unauthorized use.
- (h) Patch Management. Dickey's will maintain a process to keep up-to-date operating system security patches on all company owned and managed workstations and servers.
- (i) Enhanced Password Protection. Dickey's has increased the frequency of salting and hashing of user passwords vs. the frequency in place at the time of the Security Incident and will require users to employ more complex account passwords. Dickey's will migrate user passwords to a third-party authentication platform that is rated as ISO 27001 compliant to enable enhanced anomaly detection and monitoring and protection against bot, brute force, and other types of attacks.
- (j) At the Final Fairness Hearing, Dickey's shall file a report with the Court, with a copy to Class Counsel, detailing the status of its compliance with the business practices changes set forth in this paragraph. The report shall be certified by Dickey's Chief Technology Officer, who has responsibility for overseeing the business practices changes set forth herein.

IV. CLAIM RESOLUTION

4.1 Upon receipt of an incomplete or unsigned Claim Form or a Claim Form that is not accompanied by sufficient documentation to determine whether the claimant is a Settlement Class Member, the Notice and Claims Administrator shall request additional information ("Claim Supplementation") and give the claimant 30 days to cure the defect before rejecting the claim. If the defect is not timely cured, then the claim will be deemed invalid and there shall be no obligation to pay the claim.

4.2 Following receipt of additional information requested as Claim Supplementation, the Notice and Claims Administrator shall have 30 days to accept or reject each claim. If, after review of the claim and all documentation submitted by the claimant, the Notice and Claims Administrator determines that such a claim is valid, either in whole or in part, then the claim shall

be paid, to the extent that the Notice and Claims Administrator finds the claim to be valid. If the claim is not valid because the claimant has not provided all information needed to complete the Claim Form and evaluate the claim, then the Notice and Claims Administrator may reject the claim without any further action, subject to the provisions of ¶ 4.1.

4.3 A Settlement Class Member shall have 30 days thereafter to appeal the Notice and Claims Administrator's determination.

4.4 If there is any ambiguity with respect to a Settlement Class Member's election of monetary compensation or Credit Services and the Notice and Claims Administrator cannot resolve the ambiguity, the ambiguous Claim Form shall default to providing a Cash Option payment under ¶ 3.4.

V. PRELIMINARY APPROVAL AND NOTICE OF FAIRNESS HEARING

5.1 Within 14 days after the execution of the Settlement Agreement, Co-lead Class Counsel shall prepare a Motion for Preliminary Approval and provide it to Dickey's Counsel for review. No later than five business days after that, Co-lead Class Counsel and Dickey's Counsel shall jointly submit this Settlement Agreement to the Court and file a Motion for Preliminary Approval of the settlement with the Court, requesting entry of a Preliminary Approval Order in the form attached hereto as **Exhibit A**, or an order substantially similar to such form in both terms and cost, requesting, among other things:

- (a) certification of the Settlement Class for settlement purposes only;
- (b) preliminary approval of the Settlement Agreement as set forth herein;
- (c) appointment of Proposed Co-lead Lead Class Counsel and Additional Class Counsel;
- (d) appointment of the Representative Plaintiffs as the Class representatives;
- (e) appointment of the Notice and Claims Administrator;
- (f) as soon as practicable, the Notice and Claims Administrator shall establish the Settlement Website. The Parties shall meet and confer and choose a mutually acceptable URL for the Settlement Website; and
- (g) approval of a Claim Form substantially similar to that attached hereto as **Exhibit C**.

The Short Notice, Long Notice, Publication Notice, and Claim Form shall be reviewed by the Notice and Claims Administrator and may be revised as agreed upon by the Settling Parties prior to such submission to the Court for approval.

5.2 The cost of notice to the Settlement Class in accordance with the Preliminary Approval Order, together with the Costs of Claims Administration, shall be paid from the Qualified Settlement Fund. Attorneys' fees, costs, and expenses of Class Counsel shall also be paid from the Qualified Settlement Fund. Notice shall be provided to Settlement Class Members by a nationally recognized notice provider and in a manner that satisfies constitutional requirements and due

process. The notice plan shall be subject to approval by the Court as meeting the requirements of Fed. R. Civ. P. 23 and constitutional due process requirements. The Notice and Claims Administrator shall establish a dedicated Settlement Website and shall maintain and update the website throughout the claim period, with the forms of Short Notice, Long Notice, and Claim Form approved by the Court, as well as this Settlement Agreement. A toll-free help line staffed with a reasonable number of live operators shall be made available to address Settlement Class Members' inquiries (with the cost of any such help line and live operators to be paid from the Qualified Settlement Fund). The Notice and Claims Administrator also will provide copies of the forms of Short Notice, Long Notice, Publication Notice, and Claim Form approved by the Court, as well as this Settlement Agreement, upon request. Prior to the Final Fairness Hearing, Proposed Co-lead Class Counsel shall cause to be filed with the Court an appropriate affidavit or declaration with respect to complying with this provision of notice. The Short Notice, Long Notice, Publication Notice, and Claim Form approved by the Court may be adjusted by the Notice and Claims Administrator, respectively, in consultation and agreement with the Settling Parties, as may be reasonable and necessary and not inconsistent with such approval. The Notice Program shall commence within 15 days of the entry of the Preliminary Approval Order and shall be completed within 45 days of the entry of the Preliminary Approval Order.

5.3 Proposed Co-lead Class Counsel and Dickey's Counsel shall request the Court hold a hearing (the "Final Fairness Hearing") after Notice is completed and grant final approval of the Settlement set forth herein. The requested date for the Final Approval hearing shall be approximately six months from the date of preliminary approval.

VI. OPT-OUT PROCEDURES

6.1 Each Person wishing to opt-out of the Settlement Class shall individually sign and timely submit written notice of such intent to the designated postal address established by the Notice and Claims Administrator. The written notice must clearly manifest a Person's intent to be excluded from the Settlement Class, which intent shall be determined by the Notice and Claims Administrator. Written notice must be postmarked by the Claims Deadline to be effective. Settlement Class Members may only opt-out on behalf of themselves; mass or class opt-outs will not be valid.

6.2 All Persons who submit valid and timely notices of their intent to be excluded from the Settlement Class, as set forth in ¶ 6.1 above, referred to herein as "Opt-Outs," shall not receive any benefits of and/or be bound by the terms of this Settlement Agreement. All Persons falling within the definition of the Settlement Class who do not request to be excluded from the Settlement Class in the manner set forth in ¶ 6.1 above shall be bound by the terms of this Settlement Agreement and Judgment entered thereon.

6.3 Commencing one week from the date Notice commences, the Notice and Claims Administrator will notify Dickey's Counsel and Co-lead Class Counsel regarding the number of potential Settlement Class Members that have elected to opt-out of the Settlement Class and will continue to provide weekly updates. No later than 10 days after the Claims Deadline, the Notice and Claims Administrator shall provide a final report to Co-lead Class Counsel and Dickey's Counsel that summarizes the number of written notifications of Opt-Outs received to date, and other pertinent information as requested by Co-lead Class Counsel and Dickey's Counsel.

6.4 In the event that 750 potential Settlement Class Members have elected to Opt-Out of the Settlement Class, Dickey's may terminate this Settlement Agreement and any settlement terms or agreements then in effect subject to ¶ 12.2. In this event, Dickey's shall be obligated to pay all settlement expenses already incurred, excluding any attorneys' fees, costs, and expenses of Class Counsel.

VII. OBJECTION PROCEDURES

7.1 Each Settlement Class Member desiring to object to the Settlement Agreement shall submit a timely written notice of his or her objection. Such notice shall state: (i) the objector's full name, address, telephone number, and email address (if any); (ii) information identifying the objector as a Settlement Class Member, including proof that the objector is a member of the Settlement Class (e.g., copy of notice or copy of original notice of the Security Incident); (iii) a written statement of all grounds for the objection, accompanied by any legal support for the objection the objector believes applicable; (iv) the identity of all counsel representing the objector; (v) the identity of all counsel representing the objector who will appear at the Final Fairness Hearing; (vi) a list of all Persons who will be called to testify at the Final Fairness Hearing in support of the objection; (vii) a statement confirming whether the objector intends to personally appear and/or testify at the Final Fairness Hearing; and (viii) the objector's signature and the signature of the objector's duly authorized attorney or other duly authorized representative, along with documentation setting forth such representation. To be timely, written notice of an objection in the appropriate form must be filed with the Clerk of the Court no later than the Claims Deadline, and served concurrently therewith upon the Notice and Claims Administrator at the address provided in the Notice; and Dickey's Counsel, Ian C. Ballon, Esq., Greenberg Traurig, LLP, 1900 University Avenue, 5th Floor, East Palo Alto, CA 94303.

7.2 Except upon a showing of good cause, any Settlement Class Member who fails to comply with the requirements for objecting in ¶ 7.1 shall waive and forfeit any and all rights he or she may have to appear separately and/or to object to the Settlement Agreement, and shall be bound by all the terms of the Settlement Agreement and by all proceedings, orders and judgments in the Litigation. The exclusive means for any challenge to the Settlement Agreement shall be through the provisions of ¶ 7.1.

7.3 Submitting an objection notice under this Section shall constitute the objecting Settlement Class Member's consent to jurisdiction of the Court and to accept service of process, including subpoenas for testimony, at the email address provided in the objection notice.

7.4 A Settlement Class Member who files an objection waives the right to Opt-Out, and vice versa.

VIII. RELEASE

8.1 Upon the date the Judgment becomes Final, each Settlement Class Member, including Representative Plaintiffs, shall be deemed to have, and by operation of the Judgment shall have, fully, finally, and forever released, relinquished, and discharged all Released Claims against all Released Persons. Further, upon the date the Judgment becomes Final, and to the fullest extent permitted by law, each Settlement Class Member, including Representative Plaintiffs, shall,

either directly, indirectly, representatively, as a member of or on behalf of the general public or in any capacity, be permanently barred and enjoined from commencing, prosecuting, or participating in any recovery in any action in this or any other forum (other than participation in the settlement as provided herein) in which any of the Released Claims is asserted.

IX. PROPOSED CLASS COUNSEL'S ATTORNEYS' FEES, COSTS, AND EXPENSES

9.1 The Settling Parties did not negotiate the payment of the Representative Plaintiffs' attorneys' fees, costs, expenses. Co-lead Class Counsel may make a Fee Application to the Court. Proposed Co-lead Class Counsel will do so and advise that they will seek one-third of the Qualified Settlement Fund for fees and, additionally, a reasonable amount for out-of-pocket costs and expenses, as well as Representative Plaintiffs' awards of \$1,500 for each.

9.2 Co-lead Class Counsel will request that the Court approve up to one-third of the Qualified Settlement Fund for their attorneys' fees, reasonable costs and expenses of the Litigation. Co-lead Class Counsel, in their sole discretion, shall allocate and distribute attorneys' fees, costs, and expenses awarded by the Court among Class Counsel. The amount of attorneys' fees, costs, and expenses to be awarded shall be a matter of complete discretion of the Court upon consideration of the complete factual record before the Court at the Final Fairness Hearing.

9.3 The Fee Award and Costs are intended to be considered by the Court separately from the Court's consideration of the fairness, reasonableness, and adequacy of the settlement. No order of the Court, or modification or reversal or appeal of any order of the Court, concerning the amount of any attorneys' fees, costs, expenses shall affect whether the Judgment is Final or constitute grounds for cancellation or termination of this Settlement Agreement.

X. ADMINISTRATION OF CLAIMS

10.1 The Notice and Claims Administrator shall administer and calculate the claims submitted by Settlement Class Members. Co-lead Class Counsel and Dickey's Counsel shall be given reports as to both claims and distribution periodically or as requested, and have the right to review and obtain supporting documentation and challenge such reports if they believe them to be inaccurate or inadequate. Any determination by the Notice and Claims Administrator regarding the validity or invalidity of any such claims shall be binding, subject to the Claim Resolution process set forth in Section 4.

10.2 Checks, digital payments (as made optionally available at the discretion of the Notice and Claims Administrator), and/or activation codes for Credit Services for approved claims shall be transmitted or mailed and postmarked within 60 days of the date the Judgment becomes Final.

10.3 All Settlement Class Members who fail to timely submit a claim for any benefits hereunder within the time frames set forth herein, or such other period as may be ordered by the Court, or otherwise allowed, shall be forever barred from receiving any payments or benefits pursuant to the settlement set forth herein, but will in all other respects be subject to, and bound by, the provisions of the Settlement Agreement, the releases contained herein and the Judgment.

10.4 No Person shall have any claim against Dickey's, Proposed Co-lead Class Counsel, Proposed Class Counsel, Additional Plaintiffs' Counsel, Dickey's Counsel, any of the Released Parties and the Representative Plaintiffs based on distributions of benefits to Settlement Class Members or any alleged failure by Dickey's to implement the Business Practices Changes in ¶ 3.11.

10.5 Information submitted by Settlement Class Members pursuant to this Settlement Agreement shall be deemed confidential and protected as such by Dickey's and the Notice and Claims Administrator.

XI. DUTIES OF NOTICE AND CLAIMS ADMINISTRATOR

11.1 The Notice and Claims Administrator shall perform the functions specified in this Agreement and its Exhibits, including, but not limited to:

- (a) Providing notice of this Settlement, to the extent reasonably available, to Settlement Class Members;
- (b) Obtaining information, to the extent reasonably available, to establish a reasonably practical procedure to verify Settlement Class Members;
- (c) Effecting the notice plan as approved by the Court;
- (e) Establishing and maintaining a Post Office box or other mailing address for mailed written notifications of Opt-Out from the Settlement Class;
- (f) Establishing and maintaining the settlement website that, among other things, allows Settlement Class Members to submit claims electronically;
- (g) Establishing and maintaining a toll-free telephone line for Settlement Class Members to call with settlement-related inquiries, and answering the questions of Settlement Class Members who call with or otherwise communicate such inquiries;
- (h) Responding to any mailed or emailed Settlement Class Member inquiries;
- (i) Mailing paper copies of the Notice and/or Claim Forms to Settlement Class Members who request them;
- (j) Processing all written notifications of Opt-Outs from the Settlement Class;
- (k) Providing reports on Opt-Out notices received;
- (l) In advance of the Final Fairness Hearing, preparing affidavits to submit to the Court that: (i) attest to implementation of the notice plan in accordance with the Preliminary Approval Order; and (ii) identify each Settlement Class Member who timely and properly provided written notification of Opt-Out;

(m) Within 60 days after the date the Judgment becomes Final, provide activation instructions and/or payment via paper checks or digital payment, either electronically or by U.S. or International Mail, to Settlement Class Members who have submitted valid claims for: (i) Credit Services or (ii) monetary compensation as set forth herein;

(n) Providing weekly reports and a final report to Co-lead Class Counsel and Dickey's Counsel that summarize the number and amount of claims and Opt-Outs since the prior reporting period, the total number and amount of claims and Opt-Outs received to date, the number and amount of any claims approved and denied since the prior reporting period, the total number and amount of claims approved and denied to date, and other pertinent information as requested by Co-lead Class Counsel and Dickey's Counsel;

(o) Paying all Taxes and Tax-Related Expenses from the Qualified Settlement Fund;

(p) Performing any function related to settlement administration at the agreed upon instruction of both Co-lead Class Counsel and Dickey's Counsel in a frugal and prudent manner, including, but not limited to, verifying that cash payments have been distributed;

(q) Determining the validity of, and processing all claims submitted by Settlement Class Members; and

(r) Overseeing administration of the Qualified Settlement Fund.

11.2 All expenses incurred by the Notice and Claims Administrator shall be paid solely from the Qualified Settlement Fund.

XII. CONDITIONS OF SETTLEMENT, EFFECT OF DISAPPROVAL, CANCELLATION, OR TERMINATION

12.1 In the event any of the following events, this Settlement Agreement shall be canceled and terminated subject to ¶ 12.2 unless Class Counsel and Dickey's Counsel mutually agree in writing to proceed with the Settlement Agreement: (i) the Court declines to enter an Order of Preliminary Approval and Publishing of Notice of a Final Fairness Hearing as set forth in ¶ 5.1; (ii) a Party has exercised any option to terminate the Settlement Agreement provided by this Agreement or its Exhibits; or (iii) the Court declines to enter the Judgment granting final approval to the settlement as set forth herein.

12.2 In the event that (i) the Settlement Agreement is not approved by the Court and one or both parties decide not to revise the terms of the Settlement Agreement to address the Court's concerns and seek approval of a revised agreement, or (ii) the settlement set forth in the Settlement Agreement is terminated in accordance with its terms, including ¶ 6.4, then (a) the Settling Parties shall be restored to their respective positions in the Litigation as if the Agreement had never been entered into, any remaining funds in the Qualified Settlement Fund shall immediately be returned to Dickey's within seven business days, and the Settling Parties shall jointly request that all scheduled litigation deadlines be reasonably extended by the Court so as to avoid prejudice to any Settling Party or Settling Party's counsel, and (b) the terms and provisions of the Settlement Agreement and statements made in connection with seeking approval of the Agreement shall have no further force and effect with respect to the Settling Parties and shall not be used in the Litigation

or in any other proceeding for any purpose, and any judgment or order entered by the Court in accordance with the terms of the Settlement Agreement shall be treated as vacated, *nunc pro tunc*. Notwithstanding any statement in this Settlement Agreement to the contrary, no order of the Court or modification or reversal on appeal of any order reducing attorneys' fees, costs, and expenses shall constitute grounds for cancellation or termination of the Settlement Agreement.

12.3 The Settling Parties agree, for purposes of this settlement only, to the certification of the Settlement Class. If the settlement set forth in this Settlement Agreement is not approved by the Court, or if the Settlement Agreement is terminated or cancelled pursuant to the terms of this Settlement Agreement, this Settlement Agreement, and the certification of the Settlement Class provided for herein, will be vacated and the Litigation shall proceed as though the Settlement Class had never been certified, without prejudice to any Person's or Settling Party's position on the issue of class certification or any other issue. The Settling Parties' agreement to the certification of the Settlement Class is also without prejudice to any position asserted by the Settling Parties in any other proceeding, case or action, as to which all of their rights are specifically preserved. Any agreements between the Parties or motions in support of certification of a settlement class and/or approval of the settlement filed with the Court shall be inadmissible in connection with any subsequent motion in support of or in opposition to class certification made in the Litigation.

12.4 Dickey's will cooperate to provide reasonable and adequate information to Co-lead Class Counsel so that they can perform sufficient due diligence to be able to move for preliminary approval of this settlement and class certification in good faith.

12.5 Co-Lead Class Counsel will use their reasonable efforts to gain support from plaintiffs in all actions presently pending against Dickey's related to the underlying Security Incident.

XIII. MISCELLANEOUS PROVISIONS

13.1 The Settling Parties (i) acknowledge that it is their intent to consummate this Agreement; and (ii) agree to cooperate to the extent reasonably necessary to effectuate and implement all terms and conditions of this Settlement Agreement, and to exercise their best efforts to accomplish the terms and conditions of this Settlement Agreement.

13.2 The Settling Parties intend this settlement to be a final and complete resolution of all disputes between them with respect to the Litigation and the Released Claims. The settlement compromises any and all claims that are contested and shall not be deemed an admission by any Settling Party as to the merits of any claim or defense. The Settling Parties each agree that the settlement was negotiated in good faith by the Settling Parties and reflects a settlement that was reached voluntarily after consultation with competent legal counsel. The Settling Parties reserve their right to rebut, in a manner that such party determines to be appropriate, any contention made in any public forum that the Litigation was brought or defended in bad faith or without a reasonable basis.

13.3 Neither this Settlement Agreement, nor the settlement contained herein, nor any act performed or document executed pursuant to or in furtherance of this Settlement Agreement or the settlement (i) is or may be deemed to be or may be used as an admission of, or evidence of, the

validity or lack thereof of any Released Claim, or of any wrongdoing or liability of any of the Released Persons; (ii) is or may be deemed to be or may be used as an admission of, or evidence of, any fault or omission of any of the Released Persons in any civil, criminal or administrative proceeding in any court, administrative agency or other tribunal; or (iii) may be cited or relied upon to support any private cause of action or claim in any court, administrative agency or other tribunal. Any of the Released Persons may file this Settlement Agreement and/or the Judgment in any action that may be brought against them or any of them in order to support a defense or counterclaim based on principles of res judicata, collateral estoppel, release, good faith settlement, judgment bar, or reduction or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim.

13.4 This Settlement Agreement may be amended or modified only by a written instrument signed by or on behalf of all Settling Parties or their respective successors-in-interest.

13.5 This Settlement Agreement, together with the Exhibits attached hereto, constitutes the entire agreement among the Settling Parties, and no representations, warranties or inducements have been made to any party concerning this Settlement Agreement other than the representations, warranties and covenants contained and memorialized in such document. Except as otherwise provided herein, each party shall bear its own costs. This Settlement Agreement supersedes all previous agreements made by the Settling Parties, except that all agreements made and orders entered during the course of the Litigation relating to the confidentiality of information shall survive this Settlement Agreement.

13.6 Proposed Co-lead Class Counsel, on behalf of the Settlement Class, are expressly authorized by Representative Plaintiffs to take all appropriate actions required or permitted to be taken by the Settlement Class pursuant to the Settlement Agreement to effectuate its terms, and also are expressly authorized to enter into any modifications or amendments to the Settlement Agreement on behalf of the Settlement Class which they deem appropriate in order to carry out the spirit of this Settlement Agreement and to ensure fairness to the Settlement Class.

13.7 Each of the undersigned attorneys represents that he or she is fully authorized to enter into the terms and conditions of, and to execute, this Agreement, subject to Court approval.

13.8 The Settlement Agreement may be executed in one or more counterparts. All executed counterparts and each of them shall be deemed to be one and the same instrument. A complete set of original executed counterparts shall be filed with the Court.

13.9 The Settlement Agreement shall be binding upon, and inure to the benefit of, the successors and assigns of the Settling Parties.

13.10 The Court shall retain jurisdiction with respect to implementation and enforcement of the terms of the Settlement Agreement, and all Settling Parties submit to the jurisdiction of the Court for purposes of implementing and enforcing the settlement embodied in the Settlement Agreement.

13.11 The Settlement Agreement shall be considered to have been negotiated, executed, and delivered, and to be wholly performed, in the State of Texas, and the rights and obligations of

the Settling Parties shall be construed and enforced in accordance with, and governed by, the internal, substantive laws of the State of Texas without giving effect to choice of law principles.

13.12 All dollar amounts are in United States dollars.

13.14 Within 10 days of the filing of Plaintiffs' Motion for Preliminary Approval, Dickey's shall provide CAFA notice required by 28 U.S.C. § 1715(b).

IN WITNESS WHEREOF, the parties hereto have caused the Settlement Agreement to be executed, by their duly authorized attorneys.

Proposed Co-Lead Class Counsel:



Ben Barnow
Barnow and Associates, P.C.

Date: August 11, 2021



Benjamin F. Johns
Chimicles Schwartz Kriner & Donaldson-Smith LLP

Date: August 10, 2021



John A. Yanchunis
Morgan & Morgan Complex Litigation Group

Date: August 11, 2021

Dickey's Counsel:



Ian C. Ballon
Greenberg Traurig, LLP

Date: August 11, 2021



Christopher S. Dodrill
Greenberg Traurig, LLP

Date: August 11, 2021

Exhibit A

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

DEMI KOSTKA, et al., individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

DICKEY'S BARBECUE
RESTAURANTS, INC., et al.,

Defendants.

No. 3:20-cv-3424-K

Hon. Ed Kinkeade

Consolidated with:

Civil Action No. 3:20-cv-3603-K

Civil Action No. 3:21-cv-0137-K

Civil Action No. 3:21-cv-0769-K

**[PROPOSED] ORDER CONDITIONALLY CERTIFYING A SETTLEMENT
CLASS, GRANTING PRELIMINARY APPROVAL OF THE CLASS
ACTION SETTLEMENT, APPROVING THE FORM AND MANNER
OF NOTICE, AND SCHEDULING FINAL APPROVAL HEARING**

This cause is before the Court on Plaintiffs' Motion for Preliminary Approval of the Class Action Settlement (the "Motion"). The Court, having considered the Motion, the supporting memorandum of law, the parties' Settlement Agreement (the "Settlement Agreement"), the proposed forms of notice to the Settlement Class, the pleadings and other papers filed in this Action, and the statements of counsel and the parties, has determined that the proposed Settlement satisfies the criteria for preliminary approval, the proposed Settlement Class should be preliminarily certified, and the proposed Notice Plan should be approved. Accordingly, good cause appearing in the record, Plaintiffs' Motion is **GRANTED as set forth below**:

Preliminary Approval of Settlement Agreement

1. Unless otherwise defined herein, all terms that are capitalized herein shall have the meanings ascribed to those terms in the Settlement Agreement.

2. This Court has jurisdiction over the Litigation, Plaintiffs, all Settlement Class Members, Defendants Dickey's Barbecue Restaurants, Inc. and Dickey's Capital Group, Inc.

(“Dickey’s” or “Defendants”), and any party to any agreement that is part of or related to the Settlement.

3. The Court finds that the proposed Settlement with Dickey’s set forth in the Settlement Agreement is fair, reasonable, and adequate, and warrants issuance of notice to the Settlement Class. Accordingly, the proposed Settlement is preliminarily approved.

Provisional Certification of the Settlement Class

4. Solely for purposes of the Settlement, the Court conditionally certifies the following class pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3) (“Settlement Class”):

All residents of the United States who used a payment card to make a purchase at a “Dickey’s Barbecue Pit®” restaurant identified in Exhibit B [of the Settlement Agreement] between April 23, 2019, and October 29, 2020. The Settlement Class specifically excludes: (i) Dickey’s and its officers and directors; (ii) all Settlement Class Members who timely and validly request to opt-out from the Settlement Class; (iii) any Person who has agreed to release his or her claim(s) against Dickey’s arising out of or related to the Security Incident; and (iv) the Judge assigned to evaluate the fairness of this settlement and all court personnel directly involved therewith.

5. Subject to final approval of the Settlement, the Court finds and concludes for settlement purposes only that the prerequisites to a class action, as set forth in Federal Rule of Civil Procedure 23(a) and (b), are satisfied in that:

- (a) the Settlement Class is so numerous that joinder of all members is impracticable;
- (b) there are questions of law or fact common to the Settlement Class;
- (c) Plaintiffs and Class Counsel (each defined below) fairly and adequately represent the Settlement Class;
- (d) the claims of Plaintiffs are typical of those of Settlement Class Members;
- (e) common issues predominate over any individual issues affecting the members of the Settlement Class;

- (f) Plaintiffs fairly and adequately protect and represent the interests of all members of the Settlement Class, and Plaintiffs' interests are aligned with the interests of all other members of the Settlement Class; and
- (g) settlement of the Actions on a class action basis is superior to other means of resolving this matter.

6. The Court appoints as Co-Lead Class Counsel Ben Barnow, of Barnow and Associates, P.C.; Benjamin F. Johns, of Chimicles Schwartz Kriner & Donaldson-Smith LLP; and John A. Yanchunis, of Morgan & Morgan Complex Litigation Group having determined that the requirements of Rule 23(g) of the Federal Rules of Civil Procedure are fully satisfied by this appointment. It also appoints as Additional Class Counsel Bruce W. Steckler and Paul D. Stickney, of Steckler Wayne Cochran PLLC, Anthony L. Parkhill, of Barnow and Associates, P.C.; Samantha E. Holbrook, of Chimicles Schwartz Kriner & Donaldson-Smith LLP; and Brian P. Murray, of Glancy Prongay & Murray LLP.

7. The Court appoints Plaintiffs Demi Kostka, Vincent Jear, Latorsha Adams, Tammy Jeary, Gabrielle McGuird, Jennifer Roy, Robert Stroman, Veronica Snyder, and Lashawn Parker to serve as Representative Plaintiffs for settlement purposes only on behalf of the Settlement Class.

Notice to Settlement Class Members

8. The Court approves the Notices of Pendency and Proposed Settlement of Class Action (the "Settlement Notices") and finds that the dissemination of the Notices substantially in the manner and form set forth in the Notice Plan attached to the Motion complies fully with the requirements of Federal Rule of Civil Procedure 23 and due process of law and is the best notice practicable under the circumstances. Non-material modifications to the Settlement Notices may be made without further order of the Court.

9. The notice procedures described in the Notice Plan attached to the Motion are hereby found to be the best means of providing notice under the circumstances; are reasonably calculated to apprise Settlement Class Members of the pendency of the action, the terms of the proposed Settlement, and their rights under the proposed Settlement, including but not limited to their rights to object to or exclude themselves from the proposed Settlement; and, when completed, shall constitute due and sufficient notice of the proposed Settlement Agreement and the Final Approval Hearing to all persons affected by and/or entitled to participate in the Settlement Agreement, in full compliance with the notice requirements of Rule 23 of the Federal Rules of Civil Procedure and due process of law.

10. The Claims Administrator is directed to carry out the Notice Plan, which shall be completed in the manner set forth in the Settlement Agreement. No later than forty-five (45) days from the date of this Order preliminarily approving the Settlement, the Claims Administrator shall initiate the Notice Plan, which shall be completed in the manner set forth in the Settlement Agreement.

11. All costs incurred in disseminating and otherwise in connection with the Settlement Notices shall be paid from the Qualified Settlement Fund.

12. The claim form attached to the Settlement Agreement satisfies the requirements of due process and of Rule 23(e) of the Federal Rules of Civil Procedure and thus is approved for dissemination to the Settlement Class. The claim form shall be made available to the Settlement Class as set forth on the Notice Plan and shall be made available to any potential Class member that requests one.

Responses by Class Members and the Scheduling of a Final Approval Hearing

13. Settlement Class Members may opt-out (the “Opt-Out Deadline”) or object up to 135 days from the date of this order.

14. Any member of the Settlement Class that wishes to be excluded (“opt out”) from the Settlement Class must send a written Request for Exclusion to Counsel for Dickey’s and to the designated Post Office box established by the Claims Administrator on or before the close of the Opt-Out Deadline. Members of the Settlement Class may not exclude themselves by filing Requests for Exclusion as a group or class, but must in each instance individually and personally execute a Request for Exclusion. All Settlement Class Members that exclude themselves from the Settlement Class will not be eligible to receive any benefits under the Settlement, will not be bound by any further orders or judgments entered for or against the Settlement Class, and will preserve their ability to independently pursue any claims they may have against Defendants.

15. Any member of the Settlement Class that does not properly and timely request exclusion from the Settlement Class shall, upon entry of the Order and Final Judgment, be bound by all the terms and provisions of the Settlement Agreement and Release, whether or not such Class member objected to the Settlement and whether or not such Class member received consideration under the Settlement Agreement.

16. A hearing on the Settlement (the “Final Approval Hearing”) shall be held before this Court on _____, 2022 at _____ Courtroom ____ of the United States Courthouse, 1100 Commerce Street, Dallas, Texas 75242.

17. At the Final Approval Hearing, the Court will consider (a) the fairness, reasonableness, and adequacy of the proposed class settlement and whether the settlement should be granted final approval by the Court; (b) dismissal with prejudice of the Action; (c) entry of an order including the Release; (d) entry of the Final Approval Order; and (e) entry of final judgment in this Action. Class Counsel’s application for award of attorney’s fees and costs, and request for

the Court to award a service award to the Representative Plaintiffs, shall also be heard at the time of the hearing.

18. The date and time of the Final Approval Hearing shall be subject to adjournment by the Court without further notice to the members of the Settlement Class, other than that which may be posted by the Court. Should the Court adjourn the date for the Final Approval Hearing, that shall not alter the deadlines for mailing and publication of notice, the Opt-Out deadline, or the deadlines for submissions of settlement objections, claims, and notices of intention to appear at the Final Approval Hearing unless those dates are explicitly changed by subsequent Order.

19. Any person or entity who or which does not elect to be excluded from the Settlement Class may, but need not, enter an appearance through his, her, or its own attorney. Settlement Class Members that do not timely object or opt out and that do not have an attorney enter an appearance on their behalf will be represented by Class Counsel.

20. Any person or entity who or which does not elect to be excluded from the Settlement Class may object to the proposed Settlement. Any Class member may object to, *inter alia*, (a) the proposed Settlement, (b) entry of Final Approval Order and the judgment approving the Settlement, (c) Class Counsel's application for fees and expenses, or (d) service award requests, by serving a written objection upon Class Counsel, Dickey's counsel, and the Court.

21. Each Settlement Class Member desiring to object to the Settlement Agreement shall submit a timely written notice of his or her objection. Such notice shall state: (i) the objector's full name, address, telephone number, and email address (if any); (ii) information identifying the objector as a Settlement Class Member, including proof that the objector is a member of the Settlement Class (e.g., copy of notice or copy of original notice of the Security Incident); (iii) a written statement of all grounds for the objection, accompanied by any legal support for the

objection the objector believes applicable; (iv) the identity of all counsel representing the objector; (v) the identity of all counsel representing the objector who will appear at the Final Fairness Hearing; (vi) a list of all Persons who will be called to testify at the Final Fairness Hearing in support of the objection; (vii) a statement confirming whether the objector intends to personally appear and/or testify at the Final Fairness Hearing; and (viii) the objector's signature and the signature of the objector's duly authorized attorney or other duly authorized representative, along with documentation setting forth such representation. To be timely, written notice of an objection in the appropriate form must be filed with the Clerk of the Court no later than the Claims Deadline, and served concurrently therewith upon the Notice and Claims Administrator at the address provided in the Notice; and Dickey's Counsel, Ian C. Ballon, Esq., Greenberg Traurig, LLP, 1900 University Avenue, 5th Floor, East Palo Alto, CA 94303. If an Objector intends to appear at the hearing, personally or through counsel, the Objector must include with the objection a notice of the Objector's intent to appear at the hearing. If counsel is appearing on behalf of more than one Settlement Class member, counsel must identify each such Settlement Class member and each Settlement Class member must have complied with the requirements of this Order. No Objector may appear at the hearing unless the Objector indicates an intent to appear.

22. Objections, along with any notices of intent to appear and any supporting documents, must be filed with the Clerk of the Court no later than one hundred and thirty-five (135) days after the Preliminary Approval Order is entered. These documents must be filed with the Clerk of the Court electronically or at the following address:

U.S. District Court for the Northern District of Texas
Office of the Clerk of Court
Room 1452
1100 Commerce Street
Dallas, TX 75242

23. Only Settlement Class Members that have filed and served valid and timely notices of objection shall be entitled to be heard at the Final Approval Hearing. Any Settlement Class member that does not timely file and serve an objection in writing in accordance with the procedure set forth in the Class Notice and mandated in this Order shall be deemed to have waived any objection to (a) the Settlement; (b) the Release; (c) entry of Final Approval Order or any judgment; (d) Class Counsel’s application for fees, costs, and expenses; or (e) service award requests for the named Plaintiffs, whether by appeal, collateral attack, or otherwise.

24. Settlement Class Members need not appear at the hearing or take any other action to indicate their approval.

25. Upon entry of the Order and Final Judgment all members of the Settlement Class that have not personally and timely requested to be excluded from the Settlement Class will be enjoined from proceeding against Defendants with respect to all of the Released Claims.

26. Dickey’s shall prepare and send, at the expense of Dickey’s, all notices that are required by the Class Action Fairness Act of 2005 (“CAFA”) as specified in 28 U.S.C. § 1715. Class Counsel and Counsel for Dickey’s shall cooperate promptly and fully in the preparation of such notices, including providing Dickey’s with any and all information in their possession necessary for the preparation of these notices. Dickey’s shall provide courtesy copies of the notices to Class Counsel for the purpose of implementing the settlement. Defendants shall provide notice to Class Counsel and the Court of compliance with the CAFA requirements within ten (10) days of providing notice to Attorneys General under CAFA.

27. The schedule by which the events referenced above should occur is as follows:

Event	Date
-------	------

Dickey's provides CAFA notice required by 28 U.S.C. § 1715(b)	Within 10 days after the filing of Plaintiffs' Motion for Preliminary Approval of the Class Action Settlement
Dickey's provides notice to Class Counsel and the Court of compliance with CAFA requirements	Within 10 days of providing notice to Attorneys General under CAFA
Class notice program commences	Within 45 days after entry of this Preliminary Approval Order
Compliance with CAFA waiting period under 28 U.S.C. § 1715(d)	90 days after the appropriate governmental officials are served with CAFA notice
Motion for Attorney's Fees, Reimbursement of Costs and Expenses, and Service Awards to be filed by Class Counsel	At least 14 days before the objection deadline
Postmark deadline for requests for exclusion (Opt-Out) or objections	135 days after entry of this Preliminary Approval Order
Postmark/filing deadline for filing claims	135 days after entry of this Preliminary Approval Order
Motion for Final Approval to be filed by class counsel	At least 21 days before the Final Approval Hearing
Final Approval Hearing	No earlier than 170 days after entry of the Preliminary Approval Order

Administration of the Settlement

28. The Court hereby appoints the claims administrator proposed by the parties, Epig (the "Claims Administrator"). Responsibilities of the Claims Administrator shall include: (a) Providing notice of this Settlement, to the extent reasonably available, to Settlement Class Members; (b) Obtaining information, to the extent reasonably available, to establish a reasonably practical procedure to verify Settlement Class Members; (c) Effecting the notice plan as approved by the Court; (e) Establishing and maintaining a Post Office box or other mailing address for mailed written notifications of Opt-Out from the Settlement Class; (f) Establishing and

maintaining the settlement website that, among other things, allows Settlement Class Members to submit claims electronically; (g) Establishing and maintaining a toll-free telephone line for Settlement Class Members to call with settlement-related inquiries, and answering the questions of Settlement Class Members who call with or otherwise communicate such inquiries; (h) Responding to any mailed or emailed Settlement Class Member inquiries; (i) Mailing paper copies of the Notice and/or Claim Forms to Settlement Class Members who request them; (j) Processing all written notifications of Opt-Outs from the Settlement Class; (k) Providing reports on Opt-Out notices received; (l) In advance of the Final Fairness Hearing, preparing affidavits to submit to the Court that: (i) attest to implementation of the notice plan in accordance with the Preliminary Approval Order; and (ii) identify each Settlement Class Member who timely and properly provided written notification of Opt-Out; (m) Within 60 days after the date the Judgment becomes Final, provide activation instructions and/or payment via paper checks or digital payment, either electronically or by U.S. or International Mail, to Settlement Class Members who have submitted valid claims for: (i) Credit Services or (ii) monetary compensation as set forth herein; (n) Providing weekly reports and a final report to Co-lead Class Counsel and Dickey's Counsel that summarize the number and amount of claims and Opt-Outs since the prior reporting period, the total number and amount of claims and Opt-Outs received to date, the number and amount of any claims approved and denied since the prior reporting period, the total number and amount of claims approved and denied to date, and other pertinent information as requested by Co-lead Class Counsel and Dickey's Counsel; (o) Paying all Taxes and Tax-Related Expenses from the Qualified Settlement Fund; (p) Performing any function related to settlement administration at the agreed upon instruction of both Co-lead Class Counsel and Dickey's Counsel in a frugal and prudent manner, including, but not limited to, verifying that cash payments have been distributed; (q)

Determining the validity of, and processing all claims submitted by Settlement Class Members; and (r) Overseeing administration of the Qualified Settlement Fund.

Claims Process and Distribution and Allocation Plan

29. The parties have created a process for assessing and determining the validity and value of claims and a payment methodology to Settlement Class Members who submit a timely, valid claim form. The Court preliminarily approves the plan for remuneration described in Section 2.3 of the Settlement Agreement and directs that the Claims Administrator effectuate the distribution of settlement consideration according to the terms of the Settlement Agreement, should the Settlement be finally approved. Settlement Class Members who qualify for and wish to submit a claim form shall do so in accordance with the requirements and procedures specified in the notice and the Claim Form. If final Judgment is entered, all Settlement Class Members who qualify for any benefit under the Settlement but fail to submit a claim in accordance with the requirements and procedures specified in the notice and the Claim Form shall be forever barred from receiving any such benefit, but will in all other respects be subject to and bound by the provisions in the Settlement Agreement, the releases included in that Agreement, and the final Judgment.

Additional Provisions

30. In the event the Settlement Agreement and the proposed settlement are terminated in accordance with the applicable provisions of the Settlement Agreement, the Settlement Agreement, the proposed Settlement, and all related proceedings shall, except as expressly provided to the contrary in the Settlement Agreement, become null and void, shall have no further force and effect; Settlement Class Members shall retain all of their current rights to assert any and all claims against Defendants and any other released party; and the Defendants and any other released parties shall retain any and all of their current defenses and arguments thereto (including

but not limited to arguments that the requirements of Federal Rule of Civil Procedure 23(a) and (b)(3) are not satisfied for purposes of continued litigation). These Actions shall thereupon revert forthwith to their respective procedural and substantive status prior to the date of execution of the Settlement Agreement and shall proceed as if the Settlement Agreement and all other related orders and papers had not been executed.

31. Neither this Order nor the Settlement Agreement nor any other settlement-related document nor anything contained herein or therein or contemplated hereby or thereby nor any proceedings undertaken in accordance with the terms set forth in the Settlement Agreement or herein or in any other settlement-related document, shall constitute, be construed as, or be deemed to be evidence of or an admission or concession by Dickey's as to the validity of any claim that has been or could have been asserted against it or as to any liability by it as to any matter set forth in this Order, or as to the propriety of class certification for any purposes other than for purposes of the current proposed settlement.

32. Except as necessary to effectuate this Order, all proceedings and deadlines in this matter are stayed and suspended pending the Final Approval Hearing and issuance of the final Judgment, or until further order of this Court.

33. The Court reserves the right to adjourn or continue the Final Approval Hearing and related deadlines without further written notice to the Class. If the Court alters any of those dates or times, the revised dates and times shall be posted on the website maintained by the Claims Administrator.

IT IS SO ORDERED.

Dated: _____

Hon. Ed Kinkeade
United States District Judge

Exhibit B

Store Number	Address	City	State	Zip
AL-0937	6886 Governors W. Suite 112	HUNTSVILLE	AL	35806
AL-1364	2115 E Main St	Dothan	AL	36301
AL-1012	7721 Airport Blvd #E100	MOBILE	AL	36608
AL-0953	13544 HWY 43 North	NORTHPORT	AL	35475
AR-0239	105 S. Dixieland Rd Ste A	LOWELL	AR	72745
AR-0706	3213 Main St Suite 1	ALEXANDER	AR	72022
AR-0656	407 S MAIN ST	SEARCY	AR	72143
AZ-0874	402 E Greenway Pkway Ste 2	PHOENIX	AZ	85022
AZ-1183	7077 N. Thornydale RD. A1	MARANA	AZ	85741
AZ-1413	16581 BELL RD	SURPRISE	AZ	85374
AZ-1415	15525 W ROOSEVELT ST STE108	GOODYEAR	AZ	85338
AZ-0403	1914 S Power Rd	Mesa	AZ	85206
AZ-0515	7919 E Thomas Rd	Scottsdale	AZ	85251
AZ-1417	10005 W McDowell Rd Ste 101	AVONDALE	AZ	85392
AZ-1418	2815 West Peoria Ave #101	PHOENIX	AZ	85051
AZ-1449	3125 E INDIAN SCHOOL RD	PHOENIX	AZ	85016
AZ-1545	195 South Hwy 92 Suite E	SIERRA VISTA	AZ	85635
AZ-1577	4722 E CACTUS RD	PHOENIX	AZ	85032
AZ-1644	1877 E WILLIAMS FIELD RD S1	GILBERT	AZ	85295
AZ-1645	1208 S Ellsworth Rd	MESA	AZ	85209
CA-0201	16391 Sierra Lakes Parkway	FONTANA	CA	92336
CA-0650	2363 East Colorado Blvd	PASADENA	CA	91107
CA-0700	1586 GATEWAY BLVD. STE C-7	FAIRFIELD	CA	94533
CA-0739	1668 E. 2ND ST. STE H	BEAUMONT	CA	92223
CA-0829	227 E. Main St.	VISALIA	CA	93291
CA-0954	5606 Balboa Ave #105 & 106	SAN DIEGO	CA	92111
CA-1000	2959 JAMACHA RD. #2959C	EL CAJON	CA	92021
CA-1112	13403 TELEGRAPH RD.	WHITTIER	CA	90605
CA-1163	1054 W AVE K	LANCASTER	CA	93534
CA-1200	29273 CENTRAL AVE STE B	LAKE ELSINORE	CA	92532
CA-1247	1459 Martin King Jr Way	MERCED	CA	95340
CA-1248	1197 Sanguinetti Rd	SONORA	CA	95370
CA-1250	8855 APOLLO WAY STE 208	DOWNEY	CA	90242
CA-1604	116 E Compton Blvd	COMPTON	CA	90220
CA-1075	18742 SOLEDAD CANYON RD	SANTA CLARITA	CA	91351
CA-1085	19201 Bear Valley Road #I-C	APPLE VALLEY	CA	92308
CA-1263	1090 Huntington Drive	DUARTE	CA	91010
CA-1305	5200 E Ramon Rd, G5&6	PALM SPRING	CA	92264
CA-0777	3540 Riverside Plaza Dr	Riverside	CA	92506
CA-0975	15338 South Harlan Road	LATHROP	CA	95330
CA-0568	40315 WINCHESTER RD STE D	TEMECULA	CA	92591
CA-0723	12569 LIMONITE AVE #330	EASTVALE	CA	91752
CA-1086	12699 MAIN STREET, STE 100	HESPERIA	CA	92344
CA-1249	42452-4 Bob Hope Drive	RANCHO MIRAGE	CA	92270
CA-1353	344 S. TWIN OAKS VALLEY RD.	SAN MARCOS	CA	92078

CA-1384	12620 Day St STE E	MORENO VALLEY	CA	92553
CA-1493	21 FAIR LN	PLACERVILLE	CA	95667
CA-1614	1725 NORTHPARK BLVD	SAN BERNARDINO	CA	92407
CA-1716	1335 W Imola Ave	NAPA	CA	94559
CA-1512	2517 184TH ST	REDONDO BEACH	CA	90278
CA-1591	12270 BASE LINE RD #159	RANCHO CUCAMONGA	CA	91730
CA-0370	9035 Reseda Blvd.	LOS ANGELES	CA	91324
CA-0428	5434 YGNACIO VALLEY RD	CONCORD	CA	94521
CA-0571	1212 El Camino Real Ste C-D	SAN BRUNO	CA	94066
CA-0669	3140 Countryside Drive	TURLOCK	CA	95380
CA-0778	1125 W Rancho Vista Blvd #B	PALMDALE	CA	93551
CA-1009	1941 W. Malvern	FULLERTON	CA	92833
CA-1067	2063 RANCHO VALLEY DR #340	POMONA	CA	91766
CA-1088	9359 Central Ave #A	MONTCLAIR	CA	91763
CA-1169	2207 Claribel Rd STE D	RIVERBANK	CA	95367
CA-1170	2435 E. Emperial HWY STE E	BREA	CA	92821
CA-1174	2165 Arnold Way	ALPINE	CA	91901
CA-1239	30451 Avenida De Las Flores	RANCHO SANTA MARGA	CA	92688
CA-1283	79775 Ca-111	LA QUINTA	CA	92253
CA-1319	1950 XIMENO AVE	LONGBEACH	CA	90815
CA-1336	4415 Howard Rd	WESTLEY	CA	95387
CA-1358	713 Woollomens Ave	DELANO	CA	93215
CA-1480	5125 CANDLEWOOD RD	LAKEWOOD	CA	90712
CA-1580	2620 FISHER BLVD	BARSTOW	CA	92311
CO-0020	10230 E. ARAPAHOE ROAD	CENTENNIAL	CO	80112
CO-0124	459 S. MCCASLIN BLVD #6	LOUISVILLE	CO	80027
CO-0589	117 W 4TH STREET	RIFLE	CO	81650
CO-0634	2721 SOUTH COLLEGE AVENUE	FT. COLLINS	CO	80525
CO-1149	6628 W 10th St Unit 102	GREELEY	CO	80631
CO-1167	104 E 29TH ST UNIT C	LOVELAND	CO	80538
CO-1359	1935 Main St #A	LONGMONT	CO	80501
CO-1343	29 N. 42nd Ave.	BRIGHTON	CO	80601
DE-1579	2830 Pulaski Hwy	NEWARK	DE	19702
FL-0784	2119 TYRONE BLVD NORTH	ST PETERSBURG	FL	33710
FL-1132	19348 Cortez Blvd	BROOKSVILLE	FL	34601
FL-1151	Pier Park West # 7020	PANAMA CITY BEACH	FL	32413
FL-1154	2070 HIGHWAY 71	MARIANNA	FL	32448
FL-1003	7175 N DAVIS HWY SHOP #31	PENSACOLA	FL	32504
FL-1640	23020 state rd 54	LUTZ	FL	33549
FL-1756	1480 TIGER PARK LANE	GULF BREEZE	FL	32563
FL-1526	10071 W FLAGLER ST. STE 110	MIAMI	FL	33174
GA-0392	1109 US HWY 80 EAST UNI	POOLER	GA	31322
GA-1055	4005 Winder Hwy #160	FLOWERY BRANCH	GA	30542
GA-1768	5369 LAUREL ISLAND PKWY	KINGSLAND	GA	31548
GA-0401	1610 Ridenour Blvd Ste 105	KENNESAW	GA	30144

GA-1684	3350 Buford Dr #A150	BUFORD	GA	30519
GA-1378	2730 SPOT RD	CUMMING	GA	30040
HI-1634	91-710 Farrington Hwy	Kapolei	HI	96707
ID-1982	2845 E OVERLAND RD. #190	MERIDIAN	ID	83642
ID-1318	327 W. Hanley Ave	COEUR D'ALENE	ID	83815
IL-1686	2951 Centerpoint Way	ELWOOD	IL	60421
IL-1389	6681 Grand Ave Suite A-1	GURNEE	IL	60031
KY-0914	1301 WINCHESTER RD STE 325	LEXINGTON	KY	40505
KY-1164	12 Carol Rd.	WINCHESTER	KY	40391
LA-0870	61103 AIRPORT RD STE B-C	SLIDELL	LA	70460
LA-1173	111 OLD CAMP RD #106	LAFAYETTE	LA	70508
LA-1361	3020 Veterans Blvd.	METAIRIE	LA	70002
LA-1471	1736 W Prien Lake Rd	LAKE CHARLES	LA	70601
LA-1472	227 NORTH HWY 171	LAKE CHARLES	LA	70611
MD-1117	15904 CRAIN HWY	BRANDYWINE	MD	20613
MI-1136	20755 HALL ROAD	MACOMB	MI	48044
MI-1309	4761 S Baldwin Rd	LAKE ORION	MI	48359
MI-0781	44741 Five Mile Rd	Plymouth	MI	48170
MI-0582	4825 Carroll Lake Rd	COMMERCE TOWNSHIP	MI	48382
MI-1172	36669 VAN DYKE	STERLING HEIGHTS	MI	48312
MI-1390	48975 Grand River Ave.	NOVI	MI	48374
MI-1600	3694 Hereford Rd	SALINE	MI	48176
MN-0429	5466 ST. CROIX TRAIL #100	NORTH BRANCH	MN	55056
MN-0871	4960 MILLER TRUNK HWY	HERMANTOWN	MN	55811
MO-0454	1360 Republic Rd.	SPRINGFIELD	MO	65804
MO-0455	111 N MASSEY BLVD	NIXA	MO	65714
MO-0775	233 ILLINOIS AVE, STE 2	FORT LEONARD WOOD	MO	65473
MO-1696	1040 Kingshighway	ROLLA	MO	65401
MO-0326	1912 S BRENTWOOD BLVD	BRENTWOOD	MO	63144
MO-0764	1736 NW CHIPMAN RD	LEE'S SUMMIT	MO	64081
MO-0965	600 S. Hwy 291	LIBERTY	MO	64068
MO-1137	1348 S. Noland Rd	INDEPENDENCE	MO	64055
MO-1138	2510 NE VIVION RD	KANSAS CITY	MO	64118
MS-1432	1542 HIGHWAY 1 SOUTH	GREENVILLE	MS	38701
MS-0427	175 GRANDVIEW BLVD #910	MADISON	MS	39110
MS-0444	1323 W Government St	BRANDON	MS	39042
MS-0640	11240 HWY 49N UNIT B	GULFPORT	MS	39503
MS-0618	1201 Hwy 49 South Ste 5	RICHLAND	MS	39218
MT-0619	2519 MONTANA AVE	BILLINGS	MT	59101
MT-1368	175 Hutton Ranch Rd Ste 115	KALISPELL	MT	59901
NC-0570	1636 Hendersonville Rd #125	ASHEVILLE	NC	28803
NC-0296	10564 S HWY 15 501	SOUTHERN PINES	NC	28387
NC-1496	7119 O'Kelly Chapel Rd Unit	CARY	NC	27519
ND-0891	4524 Memorial Hwy #103	MANDAN	ND	58554
NE-0834	117 E 17TH STREET	FALLS CITY	NE	68355

NE-0956	3525 South Lincoln Ave	YORK	NE	68467
NM-1369	1410 C-D Wyoming Blvd NE	ALBUQUERQUE	NM	87112
NM-1282	1501 Sudderth Drive	RUIDOSO	NM	88345
NY-1404	3186-3220 Sheridan Drive	AMHERST	NY	14226
OH-1147	9540 MASON MONTGOMERY RD.	MASON	OH	45040
OH-0789	7769 Day Drive	PARMA	OH	44129
OH-1292	752 Gardner Road	SPRINGBORO	OH	45066
OH-1444	3915 BRITTON PARKWAY	HILLIARD	OH	43026
OH-1749	1081 North 21st Street	NEWARK	OH	43055
OR-1160	18021 NW Evergreen Pkwy #16	BEAVERTON	OR	97006
OR-1008	14700 SW Murray Scholls Dr. Ste 102	Beaverton	OR	97007
OR-1438	2201 LLOYD CENTER	PORTLAND	OR	97232
OR-1439	12000 SE 82nd Ave	Happy Valley	OR	97086
OR-1439	12000 SE 82ND AVE	HAPPY VALLEY	OR	97086
PA-0165	3221 SCHOENERSVILLE RD	BETHLEHEM	PA	18017
PA-1350	3401 Hartdale Dr.	CAMP HILL	PA	17011
PA-1329	330 Town Center Dr	YORK	PA	17408
SC-0473	10136 TWO NOTCH ROAD #100A	COLUMBIA	SC	29229
SC-0715	2003 West Lucas	FLORENCE	SC	29503
SC-0917	1416 HWY 17 NORTH #6	NORTH MYRTLE BEACH	SC	29852
SD-0295	2200 N MAPLE AVENUE UNIT 330	RAPID CITY	SD	57701
TN-0905	8113 MOORES LANE, STE 1900	BRENTWOOD	TN	37027
TN-1578	115 S. HARTMANN DRIVE	LEBANON	TN	37087
TN-1429	3784 Parkway, Suite 101	PIGEON FORGE	TN	37863
TX-0010	3700 GUS THOMASSON	MESQUITE	TX	75150
TX-0060	5530 S Cooper	Arlington	TX	76017
TX-0062	1801 BALLPARK WAY	ARLINGTON	TX	76006
TX-0077	1003 Hwy 77 N	WAXAHACHIE	TX	75165
TX-0079	3254 Irving Blvd	DALLAS	TX	75247
TX-0080	1301 CENTURY WAY	WYLIE	TX	75098
TX-0548	8006 Cedar Springs #C2190	DALLAS	TX	75205
TX-0013	1150 N Plano Rd	Richardson	TX	75081
TX-0043	801 S Denton Tap Rd	Coppell	TX	75019
TX-0074	7070 Preston Rd.	FRISCO	TX	75034
TX-0006	2445 W Northwest Hwy #106	DALLAS	TX	75220
TX-0009	14999 Preston Rd #C100	DALLAS	TX	75254
TX-0877	13605 Midway Rd Suite 120	FARMERS BRANCH	TX	75244

Exhibit C

DICKEY'S BARBECUE SETTLEMENT CLAIM FORM

This Claim Form should be filled out by submitting this form electronically by mail if you used a credit or debit card to make a purchase at an affected Dickey's Barbecue Pit® location ("Dickey's") at any time during the Security Incident Period of April 23, 2019 to October 29, 2020 ("Security Incident"). You may receive monetary reimbursement, a lump sum cash payment, or credit monitoring services if you fill out this Claim Form, if the Settlement is approved, and if you are found to be eligible for a benefit.

The Settlement Notice describes your legal rights and options. To obtain the Settlement Notice and find more information regarding your legal rights and options, please visit the official Settlement website, XXX, or call toll-free XXX. Claim forms must be submitted online or be **postmarked by XXX.**

You can submit your claim electronically below or mailing a hard copy to the Settlement Administrator at:

[Insert]

Only one Settlement Claim may be submitted per Settlement Class Member, and only one Settlement Claim may be submitted per credit or debit card.

1. CLASS MEMBER INFORMATION

Required Information (by completing this section you attest that you used a credit or debit card to make a purchase at a Dickey's Barbecue Pit® location listed here (INSERT URL/HYPERLINK) at any time during the Security Incident Period of April 23, 2019 to October 29, 2020):

First: _____ M: _____ Last: _____

Address: _____

City: _____ State: _____ ZIP: _____

Phone: _____

Email Address: _____

Any information that you provide as part of this settlement - including your name, e-mail address, mailing address, or any other contact information - will not be used by Dickey's or any third party for any marketing purpose, or for any other reason that is unrelated to the administration of this settlement.

2. PAYMENT ELIGIBILITY INFORMATION

Please review the Settlement Notice and Section III of the Settlement Agreement, available at [settlement website], for more information on the types of benefits available and rules for receiving

benefits.

There are three types of relief available to Settlement Class Members: (A) Expense Reimbursement (up to a maximum of \$5,000); (B) Cash Payment Option (estimated to be \$100 for California residents and \$50 for other Class Members), and (C) Credit Services Option. You are entitled to compensation in only one category and are required to select one option below. In order to claim a reimbursement under the Expense Reimbursement category, you must provide related documentation with your Claim Form as set forth below. You do not need to provide any documentary proof beyond this claim form if you are electing to receive a Cash Payment or the Credit Services Option.

Please indicate which type of award you are making a Claim for, and complete *only* that section below:

- ☐ Expense Reimbursement
☐ Cash Payment
☐ Credit Services Option

If you checked Expense Reimbursement or Cash Payment above, please indicate below whether you would like to receive a payment by a paper check or receive a digital payment if your claim is approved:

- ☐ Paper Check
☐ Digital Payment

A. Expense Reimbursement

I attest as follows:

☐ (**Required**): I experienced an out-of-pocket monetary loss in connection with an actual or attempted fraudulent transaction reasonably attributable to the Security Incident.

DATE	DESCRIPTION	AMOUNT

Expenses listed must be supported by reasonable documentation submitted along with this claim form.

The total amount of out-of-pocket loss that I am claiming is \$_____.

Examples: Out-of-pocket expenses may include, but are not limited to actual money spent or lost because of unreimbursed fraud charges, bank fees, replacement card fees, late fees from transactions with third parties that were delayed due to fraud or card replacements, credit freeze fees, parking expenses or transportation expenses for trips to a financial institution to address fraudulent charges or receive a replacement payment card, and other expenses reasonably

attributable to the Security Incident.

Instructions: You can upload reasonable proof of out-of-pocket expenses by first saving one of the above forms of documentation as a document or photo to your computer or smartphone (as a screenshot, .pdf, .jpg, .jpeg or other compatible file). Then, click the link below and search for and select the file from your device to upload that file as an attachment to your claim form.

Upload Documents

B. Cash Payment

I attest that at the time of the Security Incident I was (**Required**):

- ☐ A resident of the state of California.
- ☐ Not a resident of the state of California.

C. Credit Services Option

I elect to receive my Credit Services activation code at the following address (**select one**):

- ☐ Via email: _____
- ☐ Via postal mail: _____

3. CERTIFICATION

I declare that the information supplied in this Claim Form by the undersigned is true and correct to the best of my recollection, and that this form was signed and executed on the date set forth below.

I understand that all information provided on this Claim Form is subject to verification and that I may be asked to provide supplemental information by the Settlement Administrator before my claim will be considered complete and valid.

Print Name: _____

Signature: _____

Date: _____

Once you've completed all applicable sections, please submit the Claim Form and upload all supporting documentation or print and mail this Claim Form and all required supporting

documentation to the address provided below, postmarked by **XXXXX.**

[Insert Settlement Administrator]

SUBMIT