SUPERIOR COURT OF BIBB COUNTY
STATE OF GEORGIA

KATHY JACKSON-BATTLE
and
JESSICA RAMIREZ, *et al.*,

Plaintiffs,

vs.

NAVICENT HEALTH, INC.

Defendant.

Civil Action No. 2020-CV-072287

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

Plaintiffs Kathy Jackson-Battle and Jessica Ramirez ("Plaintiffs") submit this Motion for Preliminary Approval of Class Action Settlement and Memorandum in Support pursuant to O.C.G.A. § 9-11-23. Plaintiffs request this Court preliminarily approve the Settlement, certify the Settlement Class, approve the proposed plan of Notice, and schedule a Final Approval Hearing. With the Declaration of David Lietz filed herewith, Plaintiffs submit the executed Settlement Agreement (Ex. 1) as well as proposed Preliminary Approval Order jointly agreed to and approved by the Parties (Ex. 1-A).

I. INTRODUCTION

This case arises from a data incident that Plaintiffs allege compromised the security of their private identifying information ("PII") and private health information ("PHI"). After extensive arms-length negotiations, the Parties have negotiated a Settlement that provides significant relief for Plaintiffs and the Class Members they seek to represent. Because the Settlement is fair, reasonable, and adequate it should be preliminarily approved by the Court and notice should be provided to Settlement Class Members.

II. CASE SUMMARY

A. The Data Incident

Defendant Navicent Health, Inc. ("Navicent" or "Defendant") operates a regional healthcare system in the state of Georgia that has more than 1,000 beds for medical, surgical, rehabilitation, and hospice purposes, offers over 53 specialties in more than 50 facilities throughout the region, and hosts over 100 medical residents and fellows. *See* Decl. of David Lietz ¶ 12 ("Lietz Decl."), filed herewith. Navicent renders healthcare services, medical care, and treatment for the greater Macon/Bibb County area, including a broad range of community-based, outpatient diagnostic, primary care, extensive home health and hospice care, and comprehensive cancer and rehabilitation services spanning the full continuum of care. *Id.*

In the ordinary course of receiving treatment and health care services from Navicent, patients are required to provide Defendant with sensitive, personal and private information such as: names, addresses, phone numbers and email addresses; dates of birth; demographic information; Social Security numbers; information related to individual medical history; insurance information and coverage; information concerning an individual's doctor, nurse, or other medical providers; photo identification; employer information; and other information that may be deemed necessary to provide care. *Id.* All of Navicent's employees, staff, entities, clinics, sites, and locations may share patient information with each other for various purposes without written authorization, as disclosed in Navicent's Joint Notice of Privacy Practices. *Id.*

In July 2018, Navicent was the victim of a criminal cyberattack in which criminals, through phishing means, gained access to certain Navicent employee email accounts, which contained some individuals' PII or PHI, to attempt to facilitate a fraudulent wire transfer (hereinafter, the "Data Incident"). Lietz Decl. ¶ 10. As a result of the Data Incident, approximately 360,000

patients' PII and PHI was impacted and potentially compromised. *Id*. at ¶ 11. Upon learning of the incident, Navicent initiated an investigation, notified law enforcement, and retained forensic security firms to investigate and conduct a search for any Private Information in the impacted email accounts. *Id.* at ¶ 12.

B. Plaintiffs' Complaint

On April 29, 2020, Plaintiffs filed their Class Action Complaint alleging seven separate counts against Defendant: negligence; intrusion into private affairs / invasion of privacy; breach of express contract; breach of implied contract; negligence *per se*; breach of fiduciary duty; breach of confidence. *Id.* at ¶ 15.[1] Plaintiffs sought certification of a Class including "[a]ll persons who utilized Defendant Navicent's services whose Private Information was maintained on Defendant Navicent's email and computer system that was compromised in the Data Breach, and who received notice of the data breach. *Id*. at ¶ 16.

Plaintiffs sought equitable relief enjoining Navicent from engaging in the wrongful conduct complained of and compelling Navicent to utilize appropriate methods and policies with respect to consumer data collection, storage, and safety. *Id.* at ¶ 17. Plaintiffs also sought an award of actual, compensatory, and statutory damages as well as attorneys' fees and costs, and any such further relief as may be deemed just and proper. *Id.* at ¶ 18.

C. History of Negotiations

After Plaintiffs filed and served their Complaint, but prior to Navicent filing its Answer, the Parties—through their counsel—met and conferred on several occasions to discuss the merits of Plaintiffs' claims and Navicent's defenses, as well as the potential for early resolution. *Id.* at ¶ 19. Given Navicent's role as a primary healthcare provider and hospital system in south and central

[1] *See also,* Complaint ¶¶ 87–178, filed Apr. 29, 2020 ("Compl.").

Georgia, and its focus on providing emergency medical care during the novel coronavirus pandemic, the Parties agreed to early mediation before Rodney A. Max, a respected mediator and principal of Upchurch Watson White & Max in Miami, Florida. *Id.* at ¶ 20. Both Parties had an opportunity to fully brief the issues, and mediation went forward via Zoom Video Conference on October 22, 2020. *Id.* at ¶ 21. After a full day of arms-length negotiations, and significant exchange of information through Mr. Max, the Parties had reached an agreement in principle. *Id.* at ¶ 22. Over the next couple of months, the Parties continued negotiations and drafting of the Settlement Agreement. *Id.* at ¶ 23.

III. SUMMARY OF SETTLEMENT

The Settlement negotiated on behalf of the Class provides for two categories of relief for Settlement Class Members: (1) expense and time reimbursements; and (2) remedial measures carried out by Navicent to increase its data security and better protect the PII and PHI of Class Members and future patients. *Id*. at ¶ 27. The Settlement Class includes approximately 360,000 individuals and is defined as: "all persons who were notified by or on behalf of Navicent regarding the Data Incident." *Id*. at ¶¶ 25, 26. It specifically excludes (i) Navicent and its officers and directors; (ii) all Settlement Class Members who timely and validly request exclusion from the Settlement Class; (iii) the Judge assigned to evaluate the fairness of this settlement; and (iv) any other Person found by a court of competent jurisdiction to be guilty under criminal law of initiating, causing, aiding or abetting the criminal activity occurrence of the Data Incident or who pleads *nolo contendre* to any such charge. *Id.* at ¶ 25.

A. Settlement Benefits

1. Settlement Payments

i. Ordinary Expense and Time Reimbursements

The first category of benefits provides that Settlement Class Members who submit a valid claim may receive up to $200 per person for reimbursement of ordinary expenses incurred as a result of the Data Incident including: bank fees, long distance phone charges, cell phone charges (only if charged by the minute), data charges (only if charged based on the amount of data used), postage, or gasoline for local travel incurred between July 1, 2018 and the Claims Deadline; and fees for credit reports, credit monitoring, or other identity theft insurance product purchased between March 22, 2019 and the Claims Deadline. *Id*. at ¶ 28.

Additionally, Settlement Class Members who submit a valid claim may receive compensation at $15 per hour for up to four hours spent dealing with the Data Incident such as time spent dealing with replacement card issues, reversing fraudulent charges, rescheduling medical appointments and/or finding alternative medical care and treatment, retaking or submitting to medical tests, locating medical records, retracing medical history, and any other demonstrable form of disruption to medical care and treatment. *Id*

ii. Extraordinary Expense Reimbursements

The second category of benefits provides Settlement Class Members who submit a valid claim up to $2,500 per person for reimbursement of extraordinary expenses, given that they were more likely than not incurred as a result of the Data Incident. *Id.* at ¶ 29.

2. Equitable and Prospective Relief

As a part of the Settlement Agreement, Navicent has also agreed to implement enhanced data security measures to ensure that the PII and PHI of Settlement Class Members and future

patients will be better protected. *Id*. at ¶ 30. The enhancements include third party security monitoring, third party logging, network monitoring, firewall enhancements, email enhancements, and equipment upgrades that will continue to be made throughout 2021 and 2022. *Id.*

2. Release

The release in this case is tailored to the claims that have been plead or could have been plead in this case. *Id*. at ¶ 31. Settlement Class Members who do not exclude themselves from the Settlement Agreement will release claims against Defendant related to the Data Incident. *Id*. ¶ 32.

B. The Notice and Claims Process

1. Notice

Navicent has agreed to pay for the cost of providing notice, separate and apart from the payments available to Settlement Class Members. *Id.* at ¶ 32. The Parties agreed to use Postlewaite & Netterville ("P&N") as the Claims and Settlement Administrator. *Id.* at ¶ 33.

The Notice plan provides for individual notice to be sent to Settlement Class Members directly via first-class mail, to the last postal address that Navicent has on record for each Settlement Class Member. *Id.* at ¶ 35. Within 30-days of entry of the Preliminary Approval Order, the postcard notice (or Short Notice) shall be mailed to Settlement Class Members. *Id.* at ¶ 36. The Short Notice is clear and concise, and provides information about the Settlement as well as the sources Settlement Class Members can go to for additional information. *Id.* at ¶ 36; *see also* Agr., Ex. B.

In addition to the individual direct notice provided, P&N will establish and maintain a dedicated settlement website that will be updated throughout the claims period with the forms of Short Notice, Long Notice, and Claim Form approved by the Court, as well as this Settlement Agreement. *Id*. at ¶ 37. The Long Form Notice, available at the Settlement Website, explains the

terms of the Settlement Agreement, provides contact information for Proposed Class Counsel, and explains the different options available. *Id.* at ¶ 38; *see also,* Agr., Ex. C. P&N will also establish and maintain a toll-free help line to provide Settlement Class Members with additional information about the settlement. *Id.*

2. Claims

The timing of the claims process is structured to ensure that all Class Members have adequate time to review the terms of the Settlement Agreement, make a claim or decide whether they would like to opt-out or object. *Id.* at ¶ 40. Class Members will have ninety (90) days from the completion of Notice to complete and submit a claim to P&N. *Id.* at ¶ 41. The Claim Form, attached to the Settlement Agreement at Exhibit A, is written in plain language to facilitate Settlement Class Members' ease in completing it. *Id.* at ¶ 42; *see also,* Agr., Ex. A.

3. Requests for Exclusion and Objections

Settlement Class Members will have up to and including sixty (60) days following entry of the Preliminary Approval Order to object to or exclude themselves from the Settlement. *Id.* at ¶¶ 43, 46. Similar to the timing of the claims process, the timing with regard to objections and exclusions is structured to give Settlement Class Members sufficient time to review the Settlement documents—including Plaintiffs' Motion for Attorneys' Fees, Costs, and Service Awards, which will be filed fifteen (15) days prior to the deadline for Settlement Class Members to object or exclude themselves from the Settlement. *Id.* at ¶ 47; *see also* Proposed Preliminary Approval Order at Agr., Ex. D.

Any Settlement Class Member who wishes to be excluded from the Settlement must make the request in writing. To be considered valid, the request for exclusion must be timely mailed to the Post Office box established by P&N, and must clearly express the individual Class Member's

intent to be excluded from the Settlement Class. *Id.* at ¶ 44. Any Member of the Settlement Class who elects to be excluded shall not (i) be bound by any order or the Judgment; (ii) be entitled to relief under the Settlement Agreement; (iii) gain any rights by virtue of the Settlement Agreement; or (iv) be entitled to object to any aspect of the Settlement Agreement. *Id.* at ¶ 45.

Any Settlement Class Member who wishes to object shall timely file notice of his/her intention to do so and at the same time: (i) file his/her written objection with the Clerk of the Court; and (ii) send copies of such papers to both Class Counsel and Defendant's Counsel. *Id.* at ¶ 48. The objection to the Settlement Agreement must include: (i) the objector's full name, address, telephone number, and e-mail address; (ii) information identifying the objector as a Settlement Class Member, including proof that the objector is a member of the Settlement Class; (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) a statement whether the objector and/or his or her counsel will appear at the Final Fairness Hearing; (vi) the objector's signature and the signature of the objector's duly authorized attorney or other duly authorized representative; and (vii) a list, by case name, court, and docket number, of all other cases in which the objector and/or the objector's counsel has filed an objection to any proposed class action settlement within the last three (3) years. *Id*. at ¶ 49.

4. Fees, Costs, and Service Awards

The Settling Parties did not discuss the payment of attorneys' fees, costs, expenses and/or service award to Representative Plaintiff until after the substantive terms of the settlement had been agreed upon. *Id*. at ¶ 50.

The Settlement Agreement calls for a reasonable service award to Plaintiffs in the amount of $1,000 per Plaintiff, subject to approval of the Court. *Id*. at ¶ 51. The Service Award is meant

to compensate Plaintiffs for their efforts on behalf of the Settlement Class, including maintaining contact with counsel, assisting in the investigation of the case, remaining available for consultation throughout the mediation and answering counsel's many questions. *Id.* at ¶ 52.

Navicent has also agreed to pay, subject to Court approval, up to $250,000 to Proposed Settlement Class Counsel for combined attorneys' fees and costs *Id.* at ¶ 53. Class Counsel will submit a separate motion seeking attorneys' fees, costs, and Plaintiffs' Service Awards prior to prior to Settlement Class Members' deadline to exclude themselves from or object to the Settlement Agreement. *Id.* at ¶ 54.

IV. LEGAL AUTHORITY

O.C.G.A. § 9-11-23, which governs class action litigation in Georgia, provides "[a] class action shall not be dismissed or compromised without the approval of the court and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." O.C.G.A. § 9-11-23(e).

Since its enactment, Georgia courts have read the statute to track Federal Rule 23. In 2003 the state legislature shored up this interpretation, modifying O.C.G.A. § 9-11-23 to actually conform to the Federal Rule. Thus, and in acknowledgement of the few definitive holdings in Georgia on the subject, Georgia courts rely on federal cases interpreting Federal Rule 23(e) when interpreting O.C.G.A. § 9-11-23(e). *See Sta-Power Indus., Inc. v. Avant*, 134 Ga. App. 952, 953 (1975); *Brenntag Mid South, Inc. v. Smart*, 308 Ga. App. 899, 903 (2011).

The approval of a class action settlement is a two-step process. First, the Court must conduct a preliminary review to determine whether the proposed class settlement "is within the range of possible approval." *Fresco v. Auto Data Direct, Inc.*, 2007 WL 2330895, at *4 (S.D. Fla. May 11, 2007) (internal citations omitted); *see also See Manual for Complex Litigation* § 30.41

(3d ed. 1995). This first step involves both preliminary certification of the class and an initial assessment of the proposed settlement. *Id.* It is only after a court has preliminary approved a settlement, and notice has been provided to the Class, that the Court makes a final determination of the fairness, adequacy and reasonableness of a Settlement.

There is a strong judicial and public policy favoring the voluntary conciliation and settlement of complex class action litigation. *In re U.S. Oil & Gas Litig*., 967 F.2d 489, 493 (11th Cir. 1992) ("Public policy strongly favors the pretrial settlement of class action lawsuits"). This is because class action settlements ensure class members a benefit, as opposed to the "mere possibility of recovery at some indefinite time in the future." *In re Domestic Air Transp*., 148 F.R.D. 297, 306 (N.D. Ga. 1993).

V. ARGUMENT

A. Certification of the Settlement Class is Warranted.

Prior to granting preliminary approval of a proposed settlement, the Court should first determine the proposed Settlement Class is appropriate for certification. *See Manual for Complex Litigation* § 21.632 (4th ed. 2013); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Class certification is proper if the proposed class, proposed class representative, and proposed class counsel satisfy the numerosity, commonality, typicality, and adequacy of representation requirements of O.C.G.A. § 9-11-23. Additionally, where (as in this case), certification is sought under O.C.G.A § 9-11-23(b)(3), the Plaintiffs must demonstrate that common questions of law or fact predominate over individual issues and that a class action is superior to other methods of adjudicating the claim. O.C.G.A § 9-11-23(b)(3); *Amchem Prods. Inc. v. Windsor*, 521 U.S. at 615–16.

"A class may be certified 'solely for purposes of settlement where a settlement is reached before a litigated determination of the class certification issue.'" *Burrows v. Purchasing Power, LLC*, No. 1:12-CV-22800, 2013 WL 10167232, at *1 (S.D. Fla. Oct. 7, 2013) (quoting *Lipuma v. Am. Express Co*., 406 F. Supp. 2d 1298. 1314 (S.D. Fla. 2005)). Because a court evaluating certification of a class action that settled is considering certification only in the context of settlement, the court's evaluation is somewhat different than in a case that has not yet settled. *Amchem Prods., Inc. v. Windsor*, 521 U.S. at 620. In some ways, the court's review of certification of a settlement-only class is lessened: as no trial is anticipated in a settlement-only class case, the case management issues inherent in the ascertainable class determination need not be confronted. *See id; see also Columbus Drywall & Insulation, Inc. v. Masco Corp.*, 258 F.R.D. 545, 557 (N.D. Ga. July 20, 2007). Other certification issues however, such as "those designed to protect absentees by blocking unwarranted or overbroad class definitions" require heightened scrutiny an active role as a guardian of the interests of the absent class members. *Amchem Prods., Inc. v. Windsor*, 521 U.S. at 620. "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Id*. Even under the heightened scrutiny required, this case meets all of the requirements set O.G.C.A. § 29-1-23 prerequisites, and for the reasons set forth below, certification is appropriate.

Class actions are regularly certified for settlement. In fact, similar data breach cases have been certified—on a *national* basis—including most recently the record-breaking settlement in *In re Equifax. See In re Equifax, Inc. Customer Data Sec. Breach Litig.*, No. 1:17-md-2800-TWT (N.D. Ga. July 25, 2019); *see, also, e.g., In re Target*, 309 F.R.D. 482 (D. Minn. 2015); *In re*

Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig., 851 F. Supp. 2d 1040 (S.D. Tex. 2012). This case should be similarly certified.

1. The Proposed Settlement Class Meets the Requirements of O.G.C.A. § 19-11-23(a).

i. The Class is so numerous that joinder of all members is impracticable.

Numerosity requires the members of the class be so numerous that separate joinder of all members is impracticable. O.C.G.A. § 9-11-23(a)(1). To demonstrate numerosity, "plaintiffs need not prove that joinder is impossible; rather, plaintiffs 'need only show that it would be extremely difficult or inconvenient to join all members of the class.'" *Columbus Drywall & Insulation, Inc. v. Masco Corp.*, 258 F.R.D. 545, 557 (N.D. Ga. July 20, 2007) (quoting *Anderson v. Garner*, 22 F. Supp. 2d 1379, 1384 (N.D. Ga. 1997)).

Here, the Parties have identified approximately 360,000 people in the proposed Settlement Class.Joinder of so many parties would certainly be impracticable. Thus, the numerosity requirement is easily satisfied.

ii. Questions of law and fact common to the Class.

The second prerequisite to certification is that there exist questions of law or fact common to the class. O.C.G.A. § 19-11-23(a)(2). To demonstrate commonality, plaintiffs must demonstrate class members have suffered the same injury such that their claims can be productively litigated at once. *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 220 WL 256132, at *11 (Mar. 17, 2020) (citing *Sellers v. Rushmore Loan Mgmt. Servs., LLC*, 949 F.3d 1031, 1039 (11th Cir. 2019)). Courts have previously addressed this requirement in the context of data breach class actions and found it readily satisfied. *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 220 WL 256132, at *11 (citing *In re the Home Depot, Inc., Customer Data Sec. Breach Litig.*, 2016 WL 6902351, at *2 (N.D. Ga. Aug. 23, 2016) (finding that multiple common issues center on the defendant's

conduct, satisfying the commonality requirement); *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 308 (N.D. Cal. Aug. 15, 2018) (noting that the data breach complaint contains a common contention capable of class-wide resolution—one type of injury claimed to have been inflicted by one actor in violation of one legal norm).

Here also, the commonality requirement is readily satisfied, as the Plaintiffs and Settlement Class Members all have common questions of law and fact that arise out of the same event—the July 2018 Data Incident. Specifically, Plaintiffs have alleged that the following questions of law and fact are common to the class:

- whether Defendant unlawfully used, maintained, lost, or disclosed Plaintiffs' and Class Members' Private Information;
- whether Defendant failed to implement and maintain reasonable security procedures and practices appropriate to the nature and scope of the information compromised in the Data Breach;
- whether Defendant's data security systems prior to and during the Data Breach complied with applicable data security laws and regulations including, e.g., HIPAA;
- whether Defendant's data security systems prior to and during the Data Breach were consistent with industry standards;
- whether Defendant owed a duty to Class Members to safeguard their Private Information;
- whether Defendant breached its duty to Class Members to safeguard their Private Information;
- whether computer hackers obtained Class Members' Private Information in the Data Breach; and
- whether Defendant knew or should have known that its data security systems and monitoring processes were deficient.[2]

[2] *See* Compl. ¶ 81, *supra* note 1.

Like in other data breach cases, these common issues all center on Defendant's conduct, or other facts and law applicable to all Class Members, thus satisfying the commonality requirement. *See, e.g., In re Countrywide Fin. Corp. Cust. Data Sec. Breach Litig*., No. 3:08-MD-01998, 2009 WL 5184352, at *3 (W.D. Ky. Dec. 22, 2009) ("All class members had their private information stored in Countrywide's databases at the time of the data breach"); *In re Heartland Payment Sys., Inc. Cust. Data Sec. Breach Litig*., 851 F. Supp. 2d 1040, 1059 (S.D. Tex. 2012) ("Answering the factual and legal questions about Heartland's conduct will assist in reaching class wide resolution.").

iii. The claims and defenses of Plaintiffs are typical of the claims and defenses of the Class.

The next prerequisite to certification, typicality, measures whether the claim or defense of the representative party is typical of the claim or defense of each member of the class. O.C.G.A. § 19-11-23(a)(3). "[T]ypicality measures whether a significant nexus exists between the claims of the named representative and those of the class at large. *Hines v. Widnall,* 334 F.3d 1253, 1256 (11th Cir. 2003) (internal quotation omitted). Like the commonality requirement, typicality does not require all putative class members share identical claims; factual difference amongst the claims will not necessarily defeat certification. *Cooper v. Southern Co.*, 390 F.3d 695, 714 (11th Cir. 2004). The named representatives need only share the same "essential characteristics" of the larger class. *Id.* The typicality requirement is regularly met in data breach class actions. *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 220 WL 256132, at *12.

Here, the typicality requirement is satisfied for the same reasons that Representative Plaintiffs' claims meet the commonality requirement. Specifically, Plaintiffs' claims are typical of those of the other Settlement Class Members because they arise from the same Data Incident. They are also based on the same legal theory, *i.e.*, that Defendant had a legal duty to protect Plaintiffs'

and Settlement Class Members' PII and PHI. Because there is a "strong similarity of legal theories" between Representative Plaintiffs' claims and the claims of the Settlement Class Members, the typicality requirement is satisfied.

iv. Plaintiffs will fairly and adequately protect the interests of the Class.

O.C.G.A. § 19-11-23(a)(4) requires that Plaintiffs—the Representative Parties—will fairly and adequately protect the interest of the Class. This requirement involves a two-part test that asks: (1) whether plaintiffs have interests antagonistic to the interests of the other class members; and (2) whether the proposed class' counsel has the necessary qualifications and experience to lead the litigation. *In re Tri-State Crematory Litig.*, 215 F.R.D. 660, 690–91 (N.D. Ga. Mar. 17, 2013).

As for the first prong, there is nothing to suggest that this requirement has not been satisfied in this case. The Representative Plaintiffs are Members of the Settlement Class and do not possess any interests antagonistic to the Settlement Class. They provided their PII and PHI to Defendant and allege that their PII and PHI were compromised as a result of the Data Incident, as the PII and PHI of the Settlement Class was also allegedly compromised. Indeed, Plaintiffs' claims coincide identically with the claims of the Settlement Class, and Plaintiffs and the Settlement Class desire the same outcome of this litigation. Plaintiffs have vigorously prosecuted these cases for the benefit of all Settlement Class Members. Plaintiffs have participated in the litigation, reviewed pleadings, and participated in the factual investigation of the case.

The second prong is also met. Proposed Class Counsel has extensive experience in class actions generally, and in data breach cases in particular. *See* Lietz Decl. ¶¶ 2–9. Because Plaintiffs and their counsel possess substantial experience and track records in similar litigation and have vigorously prosecuted the case at hand to get the best result for Plaintiffs and Class Members, the adequacy requirement is satisfied.

2. The Proposed Settlement Class Meets the Requirements of O.C.G.A. § 19-11-23(b)(3).

In addition to the requirements discussed at length above, Plaintiffs must demonstrate that one of the requirements of O.C.G.A. § 19-11-23(b) are met. Here, questions of law or fact common to Class Members predominate over any individual issues, making class treatment superior to other available methods of adjudication. *See* O.C.G.A. § 19-11-23(b)(3).

i. Common issues predominate over individualized ones in this matter.

The predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. at 623. "Common issues of fact and law predominate if they have a direct impact on every class member's effort to establish liability and on every class member's entitlement to . . . relief." *In re Equifax, Inc. Customer Data Sec. Breach Litig.*, 2020 WL 256132, at *13 (quoting *Carriuolo v. Gen. Motors Co*., 823 F.3d 977, 985 (11th Cir. 2016)).

Common issues readily predominate here because the central liability question in this case—whether Defendant failed to safeguard Plaintiffs' information, like that of every other Class Member—can be established through generalized evidence. *See, Klay v. Humana, Inc*., 382 F.2d 1241, 1264 (2004) ("When there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position, the predominance test will be met.") Several case-dispositive questions could be resolved identically for all Members of the Settlement Class, such as whether Defendant had a duty to exercise reasonable care in safeguarding, securing, and protecting the PII and PHI of Plaintiffs and Settlement Class Members and whether Defendant breached that duty. The many common questions of fact and law that arise from Defendant's conduct predominate over any individualized issues.

Other courts have recognized that these types of common issues arising from a data breach predominate over individualized issues. *See, e.g. In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig*., 2009 U.S. Dist. LEXIS 119870 (W.D. Ky. 2009) (finding predominance where proof would focus on data breach defendant's conduct both before and during the theft of class members' personal information); *In re Heartland Payment Sys., Inc. Cust. Data Sec. Breach Litig*., 851 F. Supp. 2d 1040, 1059 (S.D. Tex. 2012) (finding predominance where "several common questions of law and fact ar[ose] from a central issue: Heartland's conduct before, during, and following the data breach, and the resulting injury to each class member from that conduct").

ii. Class treatment is superior to individual litigation.

Finally, a class action is superior to other methods available to fairly, adequately, and efficiently resolve the claims of the Proposed Settlement Class. A superiority analysis involves an examination of "the relative advantages of a class action suit over whatever other forms of litigation might be realistically available to the plaintiffs." *Sacred Heart Health Sys., Inc. v. Humana Mil. Healthcare Servs., Inc.*, 601 F.3d 1159, 1183–84 (11th Cir. 2010) (internal quotation omitted). The focus is efficiency. *In re Equifax, Inc. Customer Data Sec. Breach Litig.*, 2020 WL 256132, at *14.

Here, resolution of numerous claims in one action is far superior to individual lawsuits, because it promotes consistency and efficiency of adjudication. Indeed, absent class treatment in the instant case, each Settlement Class Member will be required to present the same or essentially the same legal and factual arguments, in separate and duplicative proceedings, the result of which would be a multiplicity of trials conducted at enormous expense to both the judiciary and the litigants. Moreover, there is no indication that Settlement Class Members have an interest in individual litigation or an incentive to pursue their claims individually, given the amount of

damages likely to be recovered, relative to the resources required to prosecute such an action. *See Dickens v. GC Servs. Ltd. P'ship*, 706 F. App'x 529, 538 (11th Cir. 2017) (describing "the ways in which the high likelihood of a low per-class-member recovery militates in favor of class adjudication").

Additionally, the proposed Settlement will give the Parties the benefit of finality, and because this case has now been settled pending Court approval, the Court need not be concerned with issues of manageability relating to trial. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. at 620 ("[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case . . . would present intractable management problems . . . ."). Class certification—and class resolution—guarantee an increase in judicial efficiency and conservation of resources over the alternative of individually litigating hundreds of thousands of individual data breach cases arising out of the *same* Data Incident.

As the superiority requirement is satisfied, along with all other requirements of O.C.G.A. § 19-11-23, the Court should certify the Settlement Class.

B. Plaintiffs' Counsel should be appointed Settlement Class Counsel.

As discussed above, and as fully explained in Counsel's declarations, proposed Settlement Class Counsel have extensive experience prosecuting similar class actions and other complex litigation. *See* Lietz Decl. ¶¶ 2–9. Further, proposed Settlement Class Counsel have diligently investigated and prosecuted the claims in this matter, have dedicated substantial resources to the investigation and litigation of those claims, and have successfully negotiated the Settlement of this matter to the benefit of Plaintiffs and the Settlement Class. *See generally*, Lietz Decl. Accordingly,

the Court should appoint Gary E. Mason, David Lietz, and Gary M. Klinger of Mason Lietz & Klinger, LLP, as Settlement Class Counsel.[3]

C. The Proposed Settlement Should be Preliminarily Approved Because it is Fair, Reasonable, Adequate, and Free of Collusion.

After determining that certification of the Settlement Class is appropriate, the court must determine whether the Settlement Agreement itself is worthy of preliminary approval and of providing notice to the class. Some courts in the Eleventh Circuit find preliminary approval appropriate "where the proposed settlement is the result of the parties' good faith negotiations, there are no obvious deficiencies, and the settlement falls within the range of reason." *In re Checking Acct. Overdraft Litig.*, 275 F.R.D. 654, 661 (S.D. Fla. 2011) (internal quotations omitted). Other courts take a preliminary look at the factors considered fully at the second—or final approval—stage, known as the *Bennett* factors. The *Bennett* factors include:

> "(1) the likelihood of success at trial; (2) the range of possible recoveries; (3) the point on or below the range of possible recoveries at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and degree of opposition to the settlement; and (6) the stage of the proceedings at which the settlement was achieved."

Columbus Drywall & Insulation, Inc. v. Masco Corp., 258 F.R.D. 545, 557 (N.D. Ga. July 20, 2007) (quoting *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir 1984)). In either case, courts consider the relevant factors "informed by the strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement." *Bennett v. Behring Corp.*, 737 F.2d at 986; *see also Meyer v. Citizens & S. Bank*, 677 F. Supp. 1196, 1200 (M.D. Ga. 1988).

The proposed Settlement warrants preliminary approval under each approach.

[3] Motions for admission *pro hac vice* will be filed shortly for Gary M. Klinger and Gary E. Mason.

1. The proposed Settlement is the result of good faith negotiations, is not obviously deficient, and falls within the range of reason.

Here, the Settlement is the result of intensive, arms-length negotiations between experienced attorneys who are familiar with class action litigation and with the legal and factual issues in these cases. Lietz Decl. ¶¶ 2–9, 20–23. As discussed above, the Parties engaged in formal mediation with an experienced and respected mediator, Rodney A. Max, ensuring the Settlement was not collusive. *Id.* ¶¶ 20–23; *see also Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1384 (S.D. Fla. 2007) (concluding that class settlement was not collusive in part because it was overseen by "an experienced and well-respected mediator"). Moreover, as discussed at greater length below, the Settlement provides real value to valid claimants who have been harmed—where continued litigation would provide significant risks.

2. The *Bennett* factors support preliminary approval.

Here, when preliminarily considering the *Bennett* factors examined in depth at final approval, there is no question that the proposed Settlement is well "within the range of possible approval," fair, reasonable, and adequate, and should be approved. While the Court cannot yet consider class approval before notice has been provided, an initial examination of the merits of the case, risks of litigation, and the benefits obtained by the Settlement Agreement wholly support preliminary approval.

i. The benefits of settlement outweigh the risks at trial.

Settlement Class Members who submit valid claims are eligible to receive up to $200 in ordinary loss reimbursements and payments for lost time, up to $2,500 in extraordinary loss reimbursements, and will be the beneficiaries of extensive data security enhancements implemented by Defendant. Lietz Decl. ¶¶ 28–30. The value achieved through the Settlement Agreement is guaranteed, where chances of prevailing on the merits are uncertain.

While Plaintiffs strongly believe in the merits of their case, they also understand that Defendant will assert a number of potentially case-dispositive defenses. In fact, should litigation continue, Plaintiffs would likely have to survive a motion to dismiss filed by Defendant in order to proceed with litigation. Due at least in part to their cutting-edge nature and the rapidly evolving law, data breach cases like this one generally face substantial hurdles—even just to make it past the pleading stage. *See Hammond v. The Bank of N.Y. Mellon Corp*., 2010 WL 2643307, at *1 (S.D.N.Y. June 25, 2010) (collecting data breach cases dismissed at the Rule 12(b)(6) or Rule 56 stage). Class certification is another hurdle that would have to be met—and one that been denied in other data breach cases. *See, e.g., In re Hannaford Bros. Co. Customer Data Sec. Breach Litig*., 293 F.R.D. 21 (D. Me. 2013).

While Plaintiffs are confident in the strength of their claims, they are also pragmatic in their awareness of the various defenses available to Defendant, as well as the risks inherent to continued litigation. Defendant has consistently denied the allegations raised by Plaintiffs and made clear at the outset that they would vigorously defend the case. Through the Settlement, Plaintiffs and Class Members gain significant benefits without having to face further risk of not receiving any relief at all.

ii. The Settlement is within the range of possible recoveries and is fair, adequate, and reasonable.

The second and third *Bennett* factors are often considered together. *See Burrows v. Purchasing Power, LLC*, 2013 WL 10167232, at *6 (S.D. Fla. Oct. 7, 2013). In evaluating the range of possible recoveries and the fairness, reasonableness, and adequacy of the settlement, "[t]he Court's role is not to engage in a claim-by-claim, dollar-by-dollar evaluation, but to evaluate the proposed settlement in its totality. *Lipuma v. Am. Express Co.,* 406 F. Supp. at 1323. Here, Settlement Class Members can receive up to $2,700 in reimbursements for expenses incurred and

time expended related to the Data Incident. These payments are without cap; all 360,000 Settlement Class Members could each recover the maximum if they had in fact incurred such damages and timely submit valid claims. Unlike many, this Settlement does not provide for *pro rata* reductions—just payments of valid claims. Moreover, it provides an immediate and substantial benefit to Class Members. *See Columbus Drywall & Insulation, Inc. v. Masco Corp.*, 258 F.R.D. at 559 (court found settlement fair, reasonable, and adequate, and preliminary approval warranted where the there was an immediate and substantial benefit to the class). Accordingly, this settlement is eminently reasonable, especially considering that it avoids the potential contingencies of continued litigation.

iii. Continued litigation would be lengthy and expensive.

As discussed above, data breach litigation is difficult, complex, and the rapid evolution of caselaw make outcomes uncertain. While early settlement has allowed costs to stay modest, and the Settlement Agreement provides for such costs to paid for separate and apart from the funds available to the Class—protracted litigation would only serve to increase costs and have a potentially negative affect on class recovery, which is itself far from certain. Continued litigation would also increase the burden on the court, without any guaranteed benefit to Plaintiffs or Settlement Class Members. "Complex litigation . . . 'can occupy a court's docket for years on end, depleting the resources of the parties and the taxpayers while rendering meaningful relief increasingly elusive.'" *Woodward v. NOR–AM Chem. Co.,* No. Civ-94-0870, 1996 WL 1063670, at *21 (S.D. Ala. May 23, 1996) (quoting *In re U.S. Oil & Gas Litig.,* 967 F.2d 489, 493 (11th Cir. 1992)). Where a settlement, like here, "will alleviate the need for judicial exploration of . . . complex subjects [and[reduce litigation costs" this factor weighs in favor of approval. *See Lipuma v. Am. Express Co.,* 406 F. Supp. 2d at 1324.

iv. There has not been any opposition to the Settlement.

Plaintiffs have no reason to believe there will be opposition to the Settlement. This factor however, is better considered after notice has been provided to Settlement Class Members and they are given the opportunity to object. *See Columbus Drywall & Insulation, Inc. v. Masco Corp.*, 258 F.R.D. at 561.

v. Plaintiffs had sufficient information to evaluate the merits and negotiate a fair, adequate, and reasonable Settlement.

The final *Bennett* factor allows a Court to consider whether "plaintiffs had access to sufficient information to adequately evaluate the merits of the case and weigh the benefits of settlement against further litigation. *Lipuma v. Am. Express Co.,* 406 F. Supp. 2d at 1324. Vast formal discovery is not a requirement. *Id. (*quoting *Cotton v. Hinton*, 559 F.2d 1326, 1332 (5th Cir. 1977).

This case, though at an early stage when settled, has been thoroughly investigated by counsel experienced in data breach litigation. Lietz Decl. ¶ 2–9. Counsel's experience and investigation, combined with the informal exchange of information that occurred at mediation put Plaintiffs in a position to proficiently evaluate the case and negotiate a settlement they view as fair, reasonable, and adequate, and worthy of preliminary approval. *Id*. at ¶ 55.

D. The Proposed Notice Plan Should be Approved.

O.C.G.A. § 9-11-23(e) provides "notice of the proposed . . . compromise shall be given to all members of the class in such a manner as the court directs." Due process requires provision of the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. *See* Fed. R. Civ. P. 23(c)(2)B). The best practicable notice is that which "is reasonably calculated, under all of the circumstances, to apprise

interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950).

The Notice provided for by the Settlement Agreement is designed to be the best practicable and to meet all the criteria set forth by the Manual for Complex Litigation. *See* Lietz Decl. ¶¶ 33–39, Exs. B, C. Here, Notice shall be provided to Settlement Class Members via direct mail to the postal address provided when the Settlement Class Members conducted transactions with Navicent or other reasonable alternative means. *Id.* at ¶ 35. In addition to this individualized and direct mailing, Navicent has also agreed to have the Settlement Administrator establish and maintain a settlement website and toll-free helpline through which Settlement Class Members can receive additional information about the Settlement.

The Notices are clear and straightforward. They define the Class; clearly describe the options available to Settlement Class Members and the deadlines for taking action; describe the essential terms of the Settlement; disclose the requested service award for the Class Representatives as well as the amount that proposed Settlement Class Counsel intends to seek in fees and costs; explain procedures for making claims, objections, or requesting exclusion; provide information that will enable Settlement Class Members to calculate their individual recovery; describe the date, time, and place of the Final Fairness Hearing; and prominently display the address and phone number of Class Counsel. *See* Lietz Decl. Exs. B, C.

The Notice here is designed to be the best practicable under the circumstances, apprises Settlement Class Members of the pendency of the action, and gives them an opportunity to object or exclude themselves from the settlement. *See Agnone v. Camden Cnty.*, 2019 WL 1368634, at *9 (S.D. Ga. Mar. 26, 2019) (finding class notice mailed directly to settlement class members was the best practicable and satisfied concerns of due process); *Barkwell v. Sprint Comms. Co.*, 2014

WL 12704984, at *6 (M.D. Ga. Apr. 18, 2014) (finding a notice program that involved direct mail notice to satisfy due process). Accordingly, the Notice process should be approved by this Court.

VI. CONCLUSION

Plaintiffs have negotiated a fair, adequate, and reasonable Settlement that guarantees Settlement Class Members significant relief in the form direct reimbursements for expenses incurred and time spent relevant to the Data Incident and equitable relief in the form of data security enhancements that will better protect their sensitive information in the future. For these and the above reasons, Plaintiffs respectfully request this Court grant their Motion for Preliminary Approval of Class Action Settlement.

Dated: January 27, 2021

Respectfully submitted,

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