CAUSE NO. 202184322

CLIFF LEE, DANIEL FLADING, AND CAROLYN TOEPFER individually and on behalf of all others similarly situated,	:	IN THE DISTRICT COURT OF
Plaintiff,	:	HARRIS COUNTY, TEXAS
v.	:	
TEXAS EAR, NOSE & THROAT SPECIALISTS, PLLC	:	
Defendant.	:	295TH JUDICIAL DISTRICT

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

I. INTRODUCTION

On June 7, 2023, this Court preliminarily approved a proposed class action settlement between Plaintiffs Cliff Lee, Daniel Flading, and Carolyn Toepfer ("Plaintiffs" or "Representative Plaintiffs") and Defendant Texas Ear, Nose & Throat Specialists, PLLC ("Texas ENT" or "Defendant"). *See* Preliminary Approval Order ("PA Order"). Class Counsel's efforts created a settlement valued at over $1,195,000—including recovery for the Settlement Class, attorneys' fees and costs, and the costs of notice and settlement administration.

Settlement Class Counsel have zealously prosecuted Plaintiffs' claims, achieving the Settlement only after extensive research and informal exchange of information; protracted negotiations; participation in an all-day mediation with respected mediator Bruce E. Friedman of JAMS; and months of subsequent drafting and finalizing of the agreement. After this Court granted preliminary approval, the Settlement Administrator—with the help of the Parties—disseminated Notice by direct mail to the Settlement Class as ordered by the Court. The Notice provided Settlement Class Members with information regarding the terms of the Settlement Agreement, the

Settlement Website, how to make a claim, and how to object to or request exclusion from the Settlement.

Out of approximately 548,553[1] Settlement Class Members, only 19 have validly sought exclusion, and *zero* have objected. The individuals who sought exclusion will *not* be bound by the terms of the Settlement.

Plaintiffs moved for attorneys' fees, costs, and service awards on October 6, 2023, and here move for final approval of this class action settlement. Because the Notice satisfies due process and was the best practicable—and because the Settlement is fair, adequate, and reasonable, this Court should grant final approval.

II. CASE SUMMARY

A. The Data Incident[2]

Texas ENT is a comprehensive ear, nose, throat, hearing and allergy health care provider that services the communities of the Greater Houston Area, with fifteen or more treatment locations. Dec. of Danielle L. Perry in Supp. of Pl.s' Unopp. Mot. for Prelim. Approval of Class Action Settlement ("Perry MPA Dec."), ¶ 16.a. In the ordinary course of receiving healthcare services from Texas ENT, patients provide Texas ENT with sensitive, personal and private information such as their: name, address, phone number and email address; date of birth; social security number; information relating to individual medical history; medical record information; insurance information and coverage; and treatment details. *Id.* ¶ 16.b. Texas ENT also creates and

[1] While parties originally estimated 536,127 class members, the final class contact listed provided to Settlement Administrator by Texas ENT showed there are 548,553 class members.

[2] This section has been adopted, in large part, from the memorandum in Support of Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement, filed on or about April 14, 2023 ("MPA Memo.") and the Memorandum in Support of Plaintiffs' Motion for Attorneys' Fees, Costs, and Service Awards, filed on October 6, 2023 ("Fee Mot.")

stores medical records and other protected health information for its patients, including records of treatments and diagnoses. *Id.* ¶ 16.c.

All of Texas ENT's employees, staff, entities, sites, and locations may share patient information with each other for various purposes, as disclosed in the HIPAA compliant privacy notice that Texas ENT is required to maintain. *Id.* ¶ 16.d. Texas ENT agreed to and undertook to maintain the protected health information entrusted to it by Plaintiff and Class Members safely, confidentially, and in compliance with all applicable laws. *Id.* ¶ 16.e. The information held by Defendant in its computer system and network included the Private Information of Plaintiff and Class Members. *Id.* ¶ 16.f.

On October 19, 2021, Defendant learned that an unauthorized actor had gained access to its system to deploy ransomware, encrypt its system and copy files (the "Data Incident"). *Id.* ¶ 16.g. Defendant's investigation further determined that, as a result of this incident, certain personal or protected health information was potentially compromised, including names, dates of birth, medical record numbers, procedure codes used for billing purposes, and Social Security Numbers (the "Private Information"). *Id.* ¶ 16.j.

On or about December 13, 2021, Texas ENT notified all potentially affected persons of the Data Incident. *Id.* ¶ 15.k.

B. The Petition and Procedural Posture

On December 30, 2021, Plaintiff Cliff Lee filed his original class action petition in the District Court for Harris County, Texas. *Id.* ¶ 19. Texas ENT filed a Plea to the Jurisdiction, Special Exceptions, Original Answer, and Affirmative Defenses on March 4, 2022. *Id.* ¶ 20. On January 23, 2023, Plaintiff Lee—now joined by Plaintiff Flading and Plaintiff Toepfer—filed their operative and amended class action petition, alleging six causes of action: negligence; breach of

implied contract; negligence *per se*; breach of fiduciary duty; intrusion upon seclusion / invasion of privacy; and unjust enrichment. *Id.* ¶ 21. Plaintiffs sought certification of a class of persons including "[a]ll persons whose Private Information was compromised as a result of the Data Breach announced by Texas ENT on or about December 10, 2021." *Id.* ¶ 22.

By their operative and amended petition, Plaintiffs sought equitable relief enjoining Texas ENT from engaging in the wrongful conduct complained of and compelling Texas ENT to utilize appropriate methods and policies with respect to consumer data collection, storage, and safety. *Id.* ¶ 23. Plaintiffs further sought an order requiring Texas ENT to provide credit monitoring services to themselves and the rest of the Class. *Id.* ¶ 24. Finally, Plaintiffs sought an award of actual and compensatory damages as well as attorneys' fees and costs, and any such further relief as may be deemed just and proper. *Id.* ¶ 25.

Plaintiff and Texas ENT agreed that an early mediation of the above-captioned litigation (the "Litigation") was warranted. *Id.* ¶ 28. On or about November 16, 2022, the Settling Parties confirmed, via correspondence to the Court, that they agreed to a litigation stay pursuant to Rule 11 and had scheduled a mediation. *Id.* ¶ 27.

On December 5, 2022, a virtual mediation was conducted before Bruce E. Friedman of JAMS. *Id.* ¶ 29. Bruce Friedman, a respected mediator with extensive experience with data breach class actions, was instrumental in bringing the Parties to resolution. Arms' length settlement discussions continued following the virtual mediation session, and a Confidential Settlement Term Sheet was fully executed on December 6, 2022. *Id.* ¶ 30. Over the next few months, the Parties continued to diligently negotiate, draft, and finalize the settlement agreement, notice forms, and came to an agreement on a claims process and administrator. *Id.* ¶ 31. The Settlement Agreement was finalized by the Parties in March 2023. *Id.* ¶ 33, Ex. 1.

III. SUMMARY OF SETTLEMENT[3]

The Settlement negotiated on behalf of the class provides for four separate types of relief: up to $300 per claimant in ordinary expense reimbursements and compensation for lost time; up to $3,000 in extraordinary expense reimbursements; identity monitoring services; and equitable relief in the form of data security enhancements. Perry MPA Dec. ¶ 36. The Settlement Class includes approximately 548,533 people and is defined as:

> [a]ll individuals residing in the United States who were sent written notification by Texas ENT that their Personal Information was or may have been compromised in the data breach that is the subject of the data security incident notice sent to Plaintiffs and others in substantially the same form on or around December 10, 2021.

Id. ¶¶ 37-38. The Settlement Class specifically excludes: (i) Texas ENT 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.* ¶ 37. Included within the Settlement Class is a Social Security Number Subclass comprised of approximately 29,506 individuals and defined as:

> [a]ll individuals residing in the United States who were sent written notification by Texas ENT that their Personal Information, including their Social Security Number, was or may have been compromised in the data breach that is the subject of the data security incident notice sent to Plaintiffs and others in substantially the same form on or around December 10, 2021."
>
> *Id.* ¶¶ 39-40.

A. Settlement Benefits

1. Ordinary Expense Reimbursements and Lost Time

[3] The Settlement Agreement ("Agr".), is available in full at Perry MPA Dec., Ex. 1.

The first category of benefits provides Settlement Class Members who submit a valid claim may receive up to $300 per person for reimbursement of out-of-pocket expenses incurred as a result of the Data Incident including: unreimbursed losses relating to fraud or identity theft; professional fees including attorneys' fees, accountants' fees, and other fees for credit repair or similar services; costs associated with freezing or unfreezing credit with any credit reporting agency; credit monitoring costs that were incurred as a result of the Data Incident; costs of credit reports purchased between August 9, 2021 and the claim Deadline; and miscellaneous associated expenses such as notary, fax, postage, copying, mileage, and long-distance phone calls. Unreimbursed losses must: (i) be actual, documented, and unreimbursed monetary loss; (ii) more likely than not been caused by the Data Incident; (iii) have occurred in 2021 or 2022; (iv) not already be covered by the Extraordinary Expense Reimbursement category; and (v) the claimant is required to have made reasonable efforts to avoid, or seek reimbursement for the loss, including but not limited to exhaustion of all available credit monitoring insurance and identity theft insurance. Perry MPA Dec. ¶ 42.

Additionally, included within the $300, each Settlement Class Member with documented expenses can also claim up to three (3) hours of documented lost time spent in response to the Data Incident, e.g., time spent dealing with replacement card issues, reversing fraudulent charges, (calculated at the rate of Twenty Dollars and Zero Cents ($20.00) per hour), but only if at least one full hour was spent. *Id*.

2. Extraordinary Expense Reimbursements

The second category of benefits allows Settlement Class Members to submit a claim for reimbursement of up to $3,000 in extraordinary expenses, incurred as a result of the Data Incident. *Id.* ¶ 43.

3. Identity Monitoring Services

In addition to the monetary compensation available, each Settlement Class Member is eligible to claim identity and/or credit monitoring services. The approximately 29,506 Settlement Class Members whose Social Security Numbers were involved in the Data Incident, can claim and elect to enroll in two years of three-bureau credit monitoring services. *Id.* ¶ 44. Remaining Settlement Class Members who did NOT have Social Security Numbers involved in this Incident, those class members can elect to enroll in two years of Identity Force Rapid Response ID (or a similar product). *Id.* These services are tailored to the information potentially impacted by the breach. The credit monitoring services provide those whose Social Security Numbers were put at risk are provided comprehensive credit monitoring services, while those whose Social Security Numbers were not put at risk are still provided deep protections including: advanced fraud monitoring; dark web ID monitoring; a convenient app and two factor authentication; fully managed restoration services; and stolen funds reimbursement, tax fraud coverage and importantly, medical identity theft coverage. Both services include identity theft insurance up to $1,000,000. *Id.* ¶ 45. All Settlement Class Members can claim these services regardless of whether they had incurred or submitted a claim for monetary reimbursements or compensation for lost time. *Id.* ¶ 46.

Texas ENT will pay up to $1,000,000 (less costs of Settlement Administration) to compensate Settlement Class Members and provide identity monitoring services. *Id.* ¶ 48.

4. Equitable Relief

For a period of one year following the execution of this Settlement Agreement, Texas ENT agrees to implement and maintain various data security procedures and the actual costs for

implementation and maintenance of those Information Security Improvements will be paid by Texas ENT separate and apart from the Settlement Benefits described above. *Id.* ¶ 41.

5. Release

The release in this case is tailored to the claims that have been plead or could have been plead in this case. *Id.* ¶ 49. Settlement Class Members who do not exclude themselves from the Settlement Agreement will release claims against Texas ENT and Related Persons. *Id.* ¶ 50. Those who do request exclusion will not be bound by the Settlement. *Id.* ¶ 50.

B. The Notice and Claims Process

1. Court-Approved Notice

The Court approved Epiq Class Action and Claims Solutions, Inc. ("Epiq") to serve as the notice and claims administrator in this case. *See* PA Order. The Notices and Claim Forms negotiated by the Parties are clear and concise, and inform Settlement Class Members of their rights and options under the Settlement, including detailed instructions on how to make a claim, object to the Settlement, or opt-out of the Settlement. *See* Settlement Agreement, Exs. 1-A, 1-B, and 1-C; *see also* Dec. of Kevin E. James Regarding Notice and Settlement Administration ("James Dec."), filed herewith, Ex. 1. The Notice Plan called for direct and individual Notice to be provided to Settlement Class Members mailed to the postal address of record with Texas ENT. *Id*.; *see also*, PA Order ¶ 7. Notice in this case has been provided as agreed upon and as approved in this Court's Preliminary Approval Order.

i. Class List

On June 13, 2023, Defendant provided Epiq with one electronic file containing class members' names and physical addresses. James Dec. ¶ 5. After deduplicating the data provided, the list contained relevant contact information for 548,553 unique class members. James Dec. ¶ 6.

ii. Individual Notice by Mail

On July 24, 2023, Epiq caused the Short-Form Notice to be sent via First Class U.S. Mail to all persons on the Class List with a valid mailing address. *Id.* ¶ 10. Prior to the mailing, all mailing addresses were checked against the National Change of Address (NCOA) database maintained by the United States Postal Service ("USPS"). *Id.* ¶ 8. In addition, the addresses were certified via the Coding Accuracy Support System (CASS) to ensure the quality of the zip code and verified through Delivery Point Validation (DPV) to verify the accuracy of the addresses. *Id.* Of the 548,553 Class Member records with a mailing address, a total of 37,493 records were updated. *Id.* After the initial mailing, 514 mailings were returned with forwarding addresses and re-mailed. *Id.* ¶ 11. As of November 20, 2023, 91,305 Postcard Notices were returned without forwarding addresses. *Id.* ¶ 12. Epiq performed skip trace searches using a third-party look-up service and was able to re-mail 52,233 Postcard Notices. *Id.*

The Postcard Notice included (a) the web address to the case website for access to online Claim Form and additional information, (b) rights and options as a Class Member and the dates by which to act on those options, and (c) the date of the Final Approval Hearing. *Id.* Notice was completed on or before July 24, 2023 in accordance with the Preliminary Approval Order. *Id.* ¶ 10, Ex. 1. In all, 509,465 notices were not returned as undeliverable—reaching an estimated 92.8% of the settlement class. *Id.* ¶ 13.

iii. Settlement Website, Toll-Free Telephone Number, E-mail Support

As per the terms of the Settlement Agreement and the Court's Preliminary Approval Order, Epiq also activated and continues to maintain a case-specific website, **www.TXENTSettlement.com** (the "Settlement Website"), where Settlement Class Members were and are able to file a claim directly on the website or download and print the Claim Form to

be completed and mailed via the USPS. *Id.* ¶ 14. Visitors to the Settlement Website can download the Long Form Notice, the Claim form, as well as Court Documents, such as the Settlement Agreement, Motions filed by Class Counsel, and Orders of the Court. *Id.* Visitors are also able to submit claims electronically, and find answers to frequently asked questions (FAQs), important dates and deadlines, and contact information for the Settlement Administrator. *Id.* This case-specific Settlement Website was designed to be user-friendly and makes it easy for Settlement Class Members to find information about the case. As of November 20, 2023, the Settlement Website has received 13,554 unique visitors and 44,920 page views. *Id.*

Epiq also caused a toll-free number, 1-877-685-2830, to be activated. *Id.* ¶ 16. The toll-free interactive voice recorded hotline is available twenty-four hours per day. *Id.* Settlement Class Members can call and interact with an interactive voice response ("IVR") system that provides important settlement information and offers the ability to leave a voicemail message to address specific requests or issues. *Id.* ¶ 17. The Toll-Free Number appeared in all Notices, as well as in multiple locations on the Settlement Website. *Id.* As of November 20, 2023, Epiq has received 2,733 calls representing 17,662 minutes of use to the toll-free number. Call center representatives have handled 667 inbound calls representing 6,902 minutes of use and 105 outbound calls representing 290 minutes of use. *Id.*

And finally, P&N established an Email address, info@TXENTSettlement.com, as well as P.O. Office Box, to provide an additional option for Settlement Class Members to address specific questions and requests to the Settlement Administrator for support. *Id.* ¶¶ 11, 18.

2. Claims for Benefits, Limited Requests for Exclusion, and Zero Objections.

a. Claims

The timing of the claims process was 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. Perry PA Dec. ¶ 61. Class Members had until October 23, 2023 to submit their claim, either by mail or online. James Dec. ¶ 21 *see also,* PA Order. As of November 20, 2023, Epiq received 4,134 claim submissions. *Id*.

b. Requests for Exclusion

Any Class Member who wished to opt-out of the Settlement had until ninety (90) days after notice commencement—October 23, 2023—to provide written Notice that they would like to be excluded from the Settlement Class. *See* PA Order. The Request for Exclusion was required only to include a clear statement of intent to be excluded from the Settlement, and be signed by the individual requesting it. Agr. § 4. As of the November 20, 2023, Epiq had received 19 valid and 21 timely requests for exclusion from the Settlement. James Dec. ¶ 19. Two requestors sought exclusion for Settlement Class Members other than themselves, and failed to respond to a written request for proof of their authority to do so. *Id.*

c. Objections

Similarly, Class Members who wished to object to the terms of the Settlement Agreement were required to do so in writing by ninety (90) days from the date on which Notice was completed. *See* PA Order. The deadline to object to the settlement was October 23, 2023. James Dec. ¶ 20. As of November 20, 2023 neither Epiq nor Class Counsel have received any objection from Settlement Class Members. James Dec. ¶ 20; Dec. of Danielle L. Perry in Supp. of Pl.'s Mot. for Final Approval, submitted herewith ("Perry FA Dec.") ¶ 2.

C. Plaintiffs' Service Awards, Attorneys' Fees and Costs

Plaintiffs moved separately for an award of Service Awards in the amount of $1,500 for each Representative Plaintiff, as well as attorneys' fees and costs in the amount of $195,000 (or approximately 15.6% of the benefit negotiated, representing a modest lodestar multiplier of approximately 1.4), to be paid separate and apart from the amount available to Settlement Class Members. *See* Fees Motion. The Service Award is meant to compensate Plaintiffs for their efforts on behalf of the class. The requested fee is well within the range of those typically accepted by Texas and Fifth Circuit Courts, and the factors set forth by Rule 1.04(b) of the Texas Disciplinary Rules of Professional Conduct weigh in favor of approval.[4] No Settlement Class Members have objected to the request for fees, costs, and service awards. James Dec. ¶ 20; Perry FA Dec. ¶ 2.

IV. LEGAL AUTHORITY

Plaintiffs bring this motion pursuant to Texas Rule of Civil Procedure 42(e). The Rule reads, in pertinent part, "[t]he Court must approve any settlement, dismissal, or compromise of the claims, issues, or defenses of a certified class," and requires "[n]otice of the material terms of the proposed settlement, dismissal or compromise, together with an explanation of when and how the members may elect to be excluded from the class" to be provided to all class members as the Court directs. Tex. R. Civ. P. 42(e)(1). The Court may then give final approval to a settlement only after notice has been provided, a hearing has been held, and the Court has found that the settlement is fair, reasonable, and adequate. *Id.*

[4] For a detailed discussion regarding the request for fees, costs, and service awards, see Plaintiff's Fee Motion, filed October 6, 2023.

Texas law regarding class actions largely mirrors its federal counterpart, making federal cases regarding class action certification and settlement highly persuasive authority. *See Glassell v. Ellis,* 956 S.W.2d 676, 682 (Tex. Ct. App. 1997).[5]

V. ARGUMENT

A. Certification is Warranted under Texas Rule 42.

Plaintiffs here seek certification of a Settlement Class consisting of "[a]ll individuals residing in the United States who were sent written notification by Texas ENT that their Personal Information was or may have been compromised in the data breach that is the subject of the data security incident notice sent to Plaintiffs and others in substantially the same form on or around December 10, 2021." with specific and limited exclusions. *See* Section III, *supra*. Plaintiffs also seek certification of a subclass consisting of "[a]ll individuals residing in the United States who were sent written notification by Texas ENT that their Personal Information, *including their Social Security Number*, was or may have been compromised in the data breach that is the subject of the data security incident notice sent to Plaintiffs and others in substantially the same form on or around December 10, 2021." *Id.* (emphasis added). The *Manual for Complex Litigation* advises that in cases presented for both preliminary approval and class certification, the "judge should make a preliminary determination that the proposed class satisfies the criteria". MCL 4th, § 21.632.

Because a court evaluating certification of a class action that settled is considering certification only in the context of settlement, the court's analysis is somewhat different than in a case that has not yet settled. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997). In some ways, the court's review of certification of a settlement-only class is lessened: as no trial is

[5] While Rule 42 has not been amended to reflect the December 2018 additions regarding class action settlement made to Federal Rule 23(e), most of the factors codified in Rule 23(e) are considered by Texas Courts pursuant to relevant caselaw.

anticipated in a settlement-only class case, the case management issues inherent in the ascertainable class determination need not be confronted. *See id.* Other certification issues however, such as "those designed to protect absentees by blocking unwarranted or overbroad class definitions" require heightened scrutiny in the settlement-only class context "for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold." *Id*.; *see also McAllen Medical Center, Inc. v. Cortez,* 66 S.W.3d 227 (Tex. 2001). Texas courts specifically require a rigorous analysis of the scope of the class definition and the typicality and adequacy prongs of the class action assessment at the preliminary approval stage—as "the trial court's ability to later adjust the class at the fairness hearing and still protect all class members' interest may be severely limited. *McAllen Medical Center, Inc. v. Cortez,* 66 S.W.3d at 232.

Despite the necessarily rigorous analysis of certain prongs at the preliminary certification stage, 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.*, Case No. 1:17-md-2800-TWT (N.D. Ga. 2019); *see, also, e.g., In re Target*, 309 F.R.D. 482 (D. Minn. 2015); *In re Heartland Payment Systems, Inc. Customer Data Sec. Breach Litig*., 851 F.Supp.2d 1040 (S.D. Tex. 2012). This case is no different.

Texas law regarding class actions largely mirrors its federal counterpart, making federal cases regarding the certification of class actions highly persuasive authority. *See Glassell v. Ellis,* 956 S.W.2d 676, 682 (Tex. Ct. App. 1997). Under Rule 42, a class action may be maintained where the movants demonstrate (1) the class is so numerous that joinder is impracticable; (2) the class has common questions of law or fact; (3) the representatives' claims are typical of the class claims;

and (4) the representatives will fairly and adequately protect class interests. *St. Louis Southwestern Ry. Co. v. Voluntary Purchasing Groups, Inc.,* 929 S.W.2d 25, 31 (May 13, 1996), *citing* Tex. R. Civ. P. 42 (a). A proposed class must also meet one of the prongs of Rule 42(b) to be maintained. Here, questions of law or fact common to the class predominate over individualized issues, and a class action is superior to other means of adjudication. *See* Rule 42(b)(3).

1. The Settlement Class and Subclass Should be Certified Because they Satisfy the Requirements of Rule 42(a): numerosity, commonality, typicality, and adequacy.[6]

a) The classes are so numerous that joinder is impracticable.

Numerosity requires "the class [be] so numerous that joinder of all members is impractical." Tex. R. Civ. P. 42(a)(1). This determination is not always based on numbers alone, but rather considers numbers as well as the nature of the action, judicial economy, geographical locations of the class members, and the likelihood that class members would be unable to prosecute individual lawsuits. *Weatherly v. Deloitte & Touche*, 905 S.W.2d 642, 653 (Ct. App Tex. 1995). Here, the numbers alone are sufficient to demonstrate the numerosity prong has been met. As the proposed Settlement Class here numbers approximately 548,553 individuals, approximately 29,506 of whom are members of the Social Security Number Subclass, judicial economy would be well-served by certification. Despite the likelihood that most proposed class members live in and around the State of Texas, and any attempt at joinder of such a large number of individual suits would be impractical. Accordingly, the Settlement Class and Subclass are sufficiently numerous to justify certification.

b) There are questions of law and fact common to the Settlement Class and Subclass.

[6] This section is adopted in large part from Plaintiffs' MPA Mem.

Commonality requires plaintiffs to demonstrate "questions of law or fact common to the class." Tex. R. Civ. P. 42(a)(2). The threshold for meeting this prong is not high—commonality does not require that every question be common to every member of the class, but rather that the questions linking class members are substantially related to the resolution of the litigation and capable of generating common answers "apt to drive the resolution of the litigation" even where the individuals are not identically situated. *In re Heartland Payment Systems, Inc. Customer Data Sec. Breach Litig.*, 951 F.Supp.2d at 1052, *citing Wal-Mart Stores v. Dukes,* 564 U.S. 338, 347 (2011).

Here, the commonality requirement is met because Plaintiffs contend that they can demonstrate numerous common issues exist. For example, Plaintiffs assert that whether Texas ENT failed to adequately safeguard the records of Plaintiffs and other Settlement Class Members and Subclass Members is a question common across the entire class. Plaintiffs further assert that Texas ENT's data security safeguards were common across the Class, and those applied to the data of one Settlement Class Member did not differ from those safeguards applied to another.

Plaintiffs contend that other specific common issues include (but are not limited to):

- Whether Texas ENT unlawfully lost or disclosed Plaintiffs' and Settlement Class Members' private information;
- Whether Texas ENT failed to implement and maintain reasonable security procedures and practices appropriate to the nature and scope of information compromised in the Data Breach;
- Whether Texas ENT's data security systems prior to and during the Data Incident complied with applicable data security laws and regulations including, *e.g.* HIPPA; and
- Whether Texas ENT's conduct rose to the level of negligence.

These common questions, and others alleged by Plaintiffs in their operative petition, are central to the causes of action brought here, will generate common answers, and can be addressed on a class-wide basis. Thus, Plaintiffs have met the commonality requirement of Rule 42.

c) The claims and defenses of representative parties are typical of the claims and defenses of the class.

Under Rule 42, the typicality requirement is satisfied where "the claims or defenses of the class representatives have the same essential characteristics as those of the class as a whole." *Peters v. Blockbuster, Inc.*, 65 S.W.3d 295, 307 (Tex. Ct. App. 2001), *citing Chevron U.S.A. v. Kennedy,* 808 S.W.2d 159, 162 (Tex. Ct. App. 1991). "The claims need not be identical or perfectly coextensive, only substantially similar." *Peters v. Blockbuster, Inc.*, 65 S.W.3d at 307.

Here, Plaintiffs' and Settlement Class Members' claims all stem from the same event—the cybersecurity attack on Texas ENT's system—and the cybersecurity protocols that Texas ENT had (or did not have) in place to protect Plaintiffs' and Settlement Class Members' data. Thus, Plaintiffs' claims are typical of the Settlement Class Members' and the typicality requirement is satisfied.

d) The Representative Plaintiffs have fairly and adequately protected the interests of the class.

Representative Plaintiffs must be able to provide fair and adequate representation for the class. To satisfy the adequacy of representation requirement, plaintiffs must establish that: (1) the there is no antagonism or conflict of interest between the class representatives and other members of the class; and (2) the assurance that through class counsel, the representative will vigorously prosecute the class's claims. *Glassell v. Ellis,* 956 S.W.2d at 683.

Here, Plaintiffs' interests are aligned with those of the Settlement Class in that they seek relief for alleged injuries arising out of the same Data Incident. Plaintiffs' and Settlement Class

Members' data was all allegedly compromised by Defendant in the same manner. Under the terms of the Settlement Agreement, Plaintiffs and Settlement Class Members will all be eligible for the same monetary relief based on the type of injury they have experienced. While Social Security Subclass Members will be eligible for a slightly different identity/credit monitoring product, that product is tailored to the information impacted.

Further, counsel for Plaintiffs have decades of combined experience as vigorous class action litigators and are well suited to advocate on behalf of the class. *See* Perry MPA Dec. ¶¶ 3-12. Moreover, they have put their collective experience to use in negotiating an early-stage settlement that guarantees immediate relief to class members. Thus, the requirements of Rule 42(a) are satisfied.

2. The Settlement Class and Subclass Also Meet Certification Requirements Under Rule 42(b)(3).

The proposed Settlement Class and Subclass also meet the requirements of Rule 42(b)(3) because common issues predominate over individualized ones, and class treatment is superior. For a class action to be "superior to other available methods," under Rule 42(b)(3), the class action must "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." *Canyon Lake Island Property Owners Association v. Sterling/Suggs Limited* Partnership, 2015 WL 3543125, *5, *citing Amchem v. Windsor Prods.,* 521 U.S. at 614 (internal quotations omitted).

In evaluating predominance of common issues, Texas courts do not focus on whether the common issues outnumber the individual ones, but rather whether the common issues "will be the object of most of the efforts of litigation." *Weatherly v. Deloitte & Touche*, 905 S.W.2d 642, 648

(Tex. Ct. App. 1996); *National Gypsum Co. v. Kirbyville Independent School Dist.*, 770 S.W.2d 621, 625 (Tex. Ct. App. 1989). Factors to be considered include:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Tex. R. Civ. P. 42(b)(3).

Here, no facts suggest that the Settlement Class Members have an interest in controlling the prosecution or defense of separate actions. No other actions filed against Texas ENT pertaining to the Data Incident have been brought to proposed Class Counsel's knowledge. Concentration of litigation in this court is appropriate because the transactions and occurrences that led to the Data Incident, as well as members of the Settlement Class are primarily located in this county. And finally, because Plaintiffs are seeking certification for purposes of settlement, the manageability of the class action need not be considered. *Amchem*, 521 U.S. at 620 ("Confronted with a request for settlement-only 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.")

In this case, Plaintiffs assert that key predominating questions are whether Texas ENT had a duty to exercise reasonable care in safeguarding, securing, and protecting the personal information of Plaintiffs and the Settlement Class, and whether Texas ENT breached that duty. Plaintiffs contend that the common questions that arise from Texas ENT's conduct predominate over any individualized issues. Other courts have recognized that the types of common issues arising from data breaches predominate over any individualized issues. *See, e.g., In re Heartland*, 851 F. Supp. 2d at 1059 (finding predominance satisfied in data breach case despite variations in state laws at issue, concluding such variations went only to trial management, which was inapplicable for settlement class); *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 312–315

(N.D. Cal. Aug. 15, 2018) (finding predominance was satisfied because "Plaintiffs' case for liability depend[ed], first and foremost, on whether [the defendant] used reasonable data security to protect Plaintiffs' personal information," such that "the claims rise or fall on whether [the defendant] properly secured the stolen personal information," and that these issues predominated over potential individual issues); *see also Hapka v. CareCentrix, Inc.*, 2018 WL 1871449, at *2 (D. Kan. Feb. 15, 2018) (finding predominance was satisfied in a data breach case, stating "[t]he many common questions of fact and law that arise from the E-mail Security Incident and [Defendant's] alleged conduct predominate over any individualized issues"); *In re The Home Depot, Inc., Customer Data Sec. Breach Litig.*, 2016 WL 6902351, at *2 (N.D. Ga. Aug. 23, 2016) (finding common predominating questions included whether Home Depot failed to reasonably protect class members' personal and financial information, whether it had a legal duty to do so, and whether it failed to timely notify class members of the data breach).

Here, the resolution of tens of thousands of claims in one action is far superior to litigation via individual lawsuits. Class certification—and class resolution—guarantee an increase in judicial efficiency and conservation of resources over the alternative of individually litigating tens of thousands of individual data breach cases arising out of the *same* Data Incident. Plaintiffs assert that the common questions of fact and law that arise from Defendant's conduct predominate over any individualized issues, a class action is the superior vehicle by which to resolve these issues, and the requirements of Rule 42(b)(3) are met. Accordingly, the class should be certified for settlement purposes.

B. Notice was Provided in Accordance with the Court's Order, and More Than Satisfies the Requirements of Due Process.

Under Rule 42, the quality and breadth of notice that must be provided differs depending on the subsection under which the Class is certified. For classes certified under Rule 42(b)(3), the

court *must* direct the best possible notice practicable under the circumstances. Tex. R. Civ. P. 42(c)(2)(B). When a class action has reached settlement, Rule 42(e)(1)(B) provides that "[n]otice of the material terms of the settlement, dismissal, or compromise, together with an explanation of when and how the members may elect to be excluded from the class, shall be given to all members in such manner as the court directs." Tex. R. Civ. P. 42(e)(1)(B). Here, Plaintiffs seek certification for purposes of Settlement under Rule 42(b)(3): the notice provided to the Class complies with the Court's June 7, 2023 Preliminary Approval Order and is the best possible practicable under the circumstances. Thus, it more than satisfies the requirements of due process.

As discussed in detail above, the Settlement Administrator caused Notice to be provided consistent with this Court's Preliminary Approval Order. In July, the Settlement Administrator caused notice of the Settlement to be mailed directly to each Settlement Class Member for whom GCPA provided a mailing address. James Dec. ¶ 10. Through USPS and third-party skip tracing sources, the Settlement Administrator performed address searches for undeliverable notices, and re-mailed them where the searched yielded results. *Id.* ¶ 12. Direct mail notice is the gold-standard of notice programs, and is regularly approved by Courts. *See Barkley v. Texas Windstrom Ins. Ass'n.,* 2013 WL 5434171(finding direct mail notice in class action complied with due process). The mail notice program had exceptional reach, with an estimated 92.8% of the class receiving direct and individualized notice by mail—a program that was further supplemented by the maintenance of a settlement website and toll-free telephone number. James Dec. ¶ 13. This far exceeds the 70% reach found to be a "high percentage" and the "norm" of class action notices. *See* Barbara J. Rothstein & Thomas E. Willging, Federal Judicial Center, "Managing Class Action Litigation: A Pocket Guide or Judges", at 27 (3d Ed. 2010).

The Notice mailed to Settlement Class Members provide details such as the definition of the Settlement Class, a description of the benefits, the amount sought by counsel and for service awards, relevant deadlines, and prominently displays the web address for a Settlement Website and a toll-free hotline by which Settlement Class Members could seek additional information, review the Long Form Notice and various Court Filings, and/or make a claim. *See* James Dec. Ex. 1. The Long Notice, available at the web address provided in the mail notice, provides even more details to Settlement Class Members. *Id.*

In addition to complying with the Court's direction, the Notice also meets the requirements of Rule 42(c)(2)(B)(i)-(vi). The Notice provided by the Settlement Administrator explains clearly and in plain language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues or defenses; (iv) that a class member may enter an appearance through counsel if the member so desires; (v) that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and (vi) the binding effect of a class judgment on class members under Rule 42(c)(3). *See* James Dec., Ex. 1. The Notice also meets the requirements of Rule 42(e)(1)(B): it explains the material terms of the Settlement, provides instructions on how class members may exclude themselves, and was provided as directed by the Court in its Preliminary Approval Order. *Id.*

Accordingly, Notice here satisfied due process and requirements of Texas Rules of Civil Procedure.

C. Settlement is Fair, Reasonable, and Adequate.

Rule 42(e)(2) permits approval of a class action settlement after a determination that the Settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(1). In determining whether a proposed class settlement is fair, adequate, and reasonable, a trial court is required to consider six

factors: (1) whether the settlement was negotiated at arms' length or was a product of fraud or collusion; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of proceedings, including the status of discovery; (4) the factual and legal obstacles that could prevent the plaintiffs from prevailing on the merits; (5) the possible range of recovery and the certainty of damages; (6) the respective opinions of the participants, including class counsel, class representatives, and the absent class members. *Johnson v. Scott*, 113 S.W.3d 366 (Tex. Ct. App. 2003), *citing General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 955 (Tex. 1996). "Put another way, the trial court must examine both substantive and procedural elements of the settlement: (1) whether the terms of the settlement are fair, adequate, and reasonable; and (2) whether the settlement was the product of honest negotiations or collusion." *General Motors Corp. v. Bloyed*, 916 S.W.2d at 954 *citing Pettway v. American Cast Iron Pipe Co.,* 576 F.2d 1157, 1169 (5th Cir. 1978) (*cert denied*).

1. The Settlement Agreement was the result of honest arm's length negotiations between the Parties.

"A settlement reached after a supervised mediation receives a presumption of reasonableness and the absence of collusion." 2 McLaughlin on Class Actions § 6:7 (8th ed. 2011); *see also Wal-Mart Stores,* 396 F.3d at 116 (internal quotation omitted). Here, the Parties reached settlement only after a full-day mediation with respected mediator Bruce E. Friedman. Perry MPA Dec. ¶ 29. Arms' length settlement discussions continued following the virtual mediation session, and a Confidential Settlement Term Sheet was fully executed on December 6, 2022. *Id.* ¶ 30. Over the next few months, the parties continued to diligently negotiate, draft, and finalize the settlement agreement, notice forms, and came to an agreement on a claims process and administrator. *Id.* ¶ 31. Accordingly, and in absence of any facts suggesting negotiations were at all improper, the

presumption of reasonableness should apply here, and Plaintiffs should be found to have met this requirement.

2. The terms of the Settlement Agreement are fair, reasonable, and adequate.

a) Continued litigation is likely to be extensive, complicated and expensive.

The costs, risks, and delay of continued litigation weigh in favor of settlement approval. Data breach cases like the one at hand involve extremely complex issues of liability and damages, the determination of which would consume considerable resources. In fact, 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). Should litigation continue, Plaintiffs would likely need to defeat Defendant's motion to dismiss, counter a later motion for summary judgment, and both gain and maintain certification of the class. The level of additional costs would significantly increase as Plaintiffs began preparations for the certification argument and if successful, a near inevitable interlocutory appeal attempt.

Of particular importance here, extended litigation leads to extensive additional costs—for both Parties. In light of the very likely complexity and expense of continued litigation, it is clear that this factor weighs in favor of settlement approval and guaranteeing a benefit to the class.

b) Plaintiffs were sufficiently informed about the facts and legal issues involved in the case to negotiate a fair and adequate settlement.

Despite the early stage of litigation, Plaintiffs here were able to complete an independent investigation of the facts to reach a full understanding of the value of the case, as well as the attendant risks of continued litigation. Perry MPA Dec., ¶¶ 14-16, 19, 28-29. Moreover, Settlement Class Counsel came to mediation armed with years of extensive experience in litigating data breach cases. *Id.* ¶¶ 3-11, Ex. 2. The completion of vast formal discovery is not a prerequisite to settlement approval. *Cotton v. Hinton,* 559 F.2d 1326,1332 (5th Cir. 1977). Despite the early stage of litigation, Plaintiffs here were able to complete an independent investigation of the facts to reach a full understanding of the value of the case, as well as the attendant risks of continued litigation. Perry MPA Dec. ¶ 12. As such, they counsel was able to negotiate a fair and adequate settlement that provides monetary relief and ensures protections for Settlement Class Members from the very harm that could come about from the Data Incident—the misuse of their personal identifying information and private health information.

c) Significant obstacles could potentially block Plaintiffs from prevailing on the merits.

As discussed above, due in part to the rapidly evolving nature of data security statutes and caselaw, Plaintiffs would encounter significant difficulties in overcoming motions to dismiss, motions for summary judgment, and obtaining and maintaining certification. The crucial factor in evaluating the fairness of a settlement is the strength of the Plaintiff's case is balanced against the amount offered. *General Motors Corp. v. Bloyed*, 916 S.W.2d at 956, *quoting In re General Motors Corp. Engine Interchange Litig.,* 594 F.2d 1106, 1132 n.44 (7th Cir. 1979) (cert. denied).

Although Plaintiffs dispute the defenses it anticipates Texas ENT will likely assert—it is obvious that their success at trial is far from certain. Through the Settlement, Plaintiffs and Settlement Class Members gain significant benefits, tailored to the risk allegedly caused by the Data Incident, without having to face further danger of not receiving any relief at all.

d) The Settlement provides for guaranteed relief within the range of recovery.

The Settlement guarantees Settlement Class Members real relief for harms. Settlement Class Members can claim up to an aggregate of $1,000,000 of 1) $300 in ordinary expense reimbursements including up to $60 for lost time; (2) up to $3,000 in extraordinary expense reimbursements; and (3) credit/identity monitoring services. Additionally, Texas ENT has agreed to implement and maintain various data security procedures and the actual costs for implementation and maintenance of those Information Security Improvements will be paid by Texas ENT separate and apart from the Settlement Benefits described above. *Id.*

The value obtained is well within the range of approved data breach class action settlements in Texas and throughout the country. *See, e.g. North et al. v. Hunt Memorial Hospital District*, Case No. 89642 (196th Judicial District for Hunt County, Texas) (data breach class of 284,000 people, final approval granted December 2021. Settlement benefits providing for up to $1,000 per claimant subject to an aggregate cap of $225,000 minus costs of settlement administration); *Dekenipp v. Gastroenterology Consultants*, Case No. 202161470 (295th Judicial District for Harris County, Texas) (data breach class of 166,000 people, final approval granted October 2022. Settlement benefits capped at $400,000, including up to $500 in ordinary expenses including 3 hours at $20 per hour, reimbursement of extraordinary losses up to $4,000, 1.5 years of 3B credit monitoring; and notice and administration costs).

The value achieved through the Settlement Agreement is guaranteed, where chances of prevailing on the merits—and securing any amount of damages—are uncertain. While Plaintiffs strongly believe in the merits of his case, they also understand that Texas ENT will assert a number of potentially case-dispositive defenses. Proceeding with litigation would open up Plaintiffs to the

risks inherent in trying to achieve and maintain class certification and prove both liability and damages. As such, this factor weighs in favor of approval.

e) The complete lack of objections, low number requests for exclusion, and the opinion of experienced counsel support approval.

The final factor to be considered is the response to the Settlement, including the response of Plaintiffs, Counsel, and Class. Here, the response received clearly supports final approval. It is the strong opinion of proposed Settlement Class Counsel that the Settlement presents a favorable result for the Class. Perry MPA Dec. ¶ 36; Perry FA Dec. ¶ 3. And, importantly, as of November 20, 2023, the Settlement Administrator has received only 19 valid requests for exclusion and zero objections to the Settlement Agreement. James Dec. ¶¶ 19-20; *see also* Perry FA Dec. ¶ 2. While the support of Plaintiffs and Class Counsel can be reasonably expected, the complete lack of objection to and low exclusions from the Class is a testament to the strength of the Settlement. Even in class actions where objections are lodged, Courts regularly still find settlements to be fair, reasonable, and adequate. *See for example, Johnson v. Scott*, 113 S.W. 3d 366, 374 (Tex. Ct. App. 2003) (upholding approval of a class action settlement wherein 500 individuals requested exclusion and 54 individuals objected); *Hall v. Pedernales Elec. Co-op., Inc.*, 278 S.W. 3d 536, 552 (Tex. Ct. App. 2009) (affirming approval of class action settlement despite 268 objections). As such, this factor, like those above, weighs in favor of final approval.

VI. CONCLUSION

Settlement Class Counsel, with the help of Plaintiffs, have made significant benefits available to class members during a time where the law surrounding data breaches is evolving and uncertain. The Settlement Class Members have been provided notice of the Settlement, and have been provided additional resources by which they can get more information about the Settlement

Agreement. No Settlement Class Members have objected to either the Settlement Agreement or to Plaintiffs' request for fees, costs, and service awards. For these reasons, for the arguments set forth above, and because the Settlement Agreement is fair, adequate, and reasonable, Plaintiffs respectfully request this Court grant their motion for final approval.

Dated: November 21, 2023

Respectfully submitted,

/s/ Danielle L. Perry

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CERTIFICATE OF SERVICE

I, Jarrett L. Ellzey, an attorney of record in this case, hereby certify that on November 21, 2023, I served *PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND MEMORANDUM IN SUPPORT*, by causing a true and accurate copy of such papers to be filed and served on all counsel of record via electronic mail.

/s/ Jarrett L. Ellzey
Jarrett L. Ellzey (Tex. Bar No. 24040864)