SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

KEVIN VANDERMARK individually and on behalf of all others similarly situated, Plaintiffs, v. MASON TENDERS DISTRICT COUNCIL WELFARE FUND; MASON TENDERS DISTRICT COUNCIL ANNUITY FUND; and MASON TENDERS DISTRICT COUNCIL OF GREATER NEW YORK Defendant.	**Index No. 153365/2023**

PLAINTIFF'S MEMORANDUM OF LAW
IN SUPPORT OF HIS UNOPPOSED MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

This class action lawsuit brought by Plaintiff Kevin Vandermark ("Plaintiff" or "Class Representative") against Defendants Mason Tenders' District Council Welfare Fund, Mason Tenders' District Council Pension Fund, and Mason Tenders' District Council Annuity Fund ("MTDC" or "Defendants," and together with Plaintiff, the "Parties") arises from a cyberattack perpetrated against MTDC, a labor organization with nearly 15,000 members including construction workers, hazardous materials handlers, recycling/waste handlers, and others. *See* Class Action Complaint ("Complaint" or "Comp."), ¶¶ 1-2.[1] On April 17, 2022, MTDC became aware of suspicious activity related to certain of MTDC's computer systems. A subsequent investigation by MTDC, with the assistance of third-party forensic specialists revealed that, between December 2, 2021 and April 18, 2022, an unauthorized third-party cybercriminal accessed MTDC's computer systems, including certain directories stored therein, and data containing Plaintiff's and Settlement Class Members'[2] personally identifiable information ("PII") and protected health information[3] ("PHI"), including names, dates of birth, and Social Security Numbers, and medical information, such as health insurance information. *See id.* ¶¶ 3, 24, 26, 29-32. MTDC began notifying affected individuals about the Data Breach until July 7, 2022. *See id.* ¶¶ 2, 24.

After extensive, arms' length, good faith negotiations, Plaintiff and MTDC reached a Settlement that provides significant relief for Plaintiff and Settlement Class Members. Because the

[1] The factual allegations set forth in this Motion are those set forth in the Complaint. Defendants do not make any admission as to the facts alleged in the Complaint, and reserve their right to challenge the alleged facts should the Court deny this Motion, in whole or in part.
[2] All capitalized terms have the same meanings as set forth in the Settlement Agreement between the Parties, unless otherwise indicated herein.
[3] "PHI" is as defined by the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. §§ 1320d *et seq.*

Settlement is fair, reasonable, and adequate and within the range of possible approval, it should be preliminarily approved by the Court, and Notice should be provided to Settlement Class Members.

II. CASE SUMMARY

On August 11, 2022, Plaintiff filed a Class Action Complaint ("Complaint" or "*Comp.*") against MTDC in the United States District Court for the Southern District of New York. Plaintiff alleged causes of action for: (1) Negligence; (2) Breach of Implied Contract; and (3) Unjust Enrichment. On January 31, 2023, Plaintiff voluntarily dismissed the action in the United States District Court for the Southern District of New York pursuant to Fed. R. Civ. P. 41(a) without prejudice and, on April 13, 2023, refiled the action presently pending in this Court. Shortly after Plaintiff commenced litigation in the District Court, the Parties concluded that early settlement of this litigation may be warranted, and began arm's length discussions regarding the same.

This Settlement came about as the result of protracted, arms' length negotiations *See* Declaration of David K. Lietz ("Lietz Decl."), attached hereto as **Exhibit A,** ¶ 24. The Parties participated in a mediation session before Hon. Wayne Andersen (Ret.) and were able to reach an agreement on all the principal terms of settlement for this matter. *See id.* ¶ 25. Following conclusion of the mediation, the Parties executed a term sheet, and since then, the Parties continued to negotiate, in good faith and at arms' length, the finer points of the settlement and drafted the Settlement Agreement and accompanying Notice documents and other exhibits. *See id.* While negotiations were always collegial and professional between the Parties, there is no doubt that the negotiations were also adversarial in nature, with both Parties strongly advocating their respective client's positions. *See id.* ¶ 27. The Settlement Agreement and the various exhibits thereto ("S.A.") were ultimately finalized and signed in May, 2023. *See id.* ¶ 28.

III. SUMMARY OF SETTLEMENT

A. Settlement Class Definitions

The Settlement Class is defined as: "All persons who were sent written notification by MTDC that their personal information was potentially compromised as the result of the Data Incident." *See* S.A. ¶ 6. The Settlement Class is comprised of approximately 40,349 individuals (each, a "Settlement Class Member"). *See* Lietz Decl. ¶ 29. Excluded from the Settlement Class definition are:

> (i) all Class Members who timely and validly request exclusion from the Settlement Class; (ii) the Judge assigned to evaluate the fairness of this settlement; and (iii) 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 contendere to any such charge.

See S.A. ¶ 6.

B. Settlement Benefits

1. Monetary Compensation for Losses

Each Settlement Class Member will be eligible to receive reimbursement for documented monetary losses incurred by him or her as a result of the Data Breach. *See* S.A. ¶ 34(b).

a. Ordinary Losses

Settlement Class Members who submit timely, valid claims, with supporting documentation (other than claims for Lost Time (defined below)), are eligible to receive reimbursement for ordinary losses for up to a total of $450.00 per Settlement Class Member. *See* S.A. ¶ 34(b). Ordinary losses may include: (i) unreimbursed costs, expenses, losses or charges incurred a result of identity theft or identity fraud, falsified tax returns, or other possible misuse of class member's personal information; (ii) costs incurred on or after December 2, 2021, associated with purchasing or extending additional credit monitoring or identity theft protection services

and/or accessing or freezing/unfreezing credit reports with any credit reporting agency; and (iii) other miscellaneous expenses incurred related to any Ordinary Out-of-Pocket Loss such as notary, fax, postage, copying, mileage, and long-distance telephone charges. See S.A. ¶ 34(b)(i).

b. Extraordinary Losses

Settlement Class Members who submit timely, valid claims, with supporting documentation, are eligible to receive reimbursement of up to $2,500.00 per Settlement Class Member for proven monetary losses ("Extraordinary Losses") if: (1) the loss is an actual, documented, and unreimbursed monetary loss; (2) the loss was more likely than not caused by the Data Incident; (3) the loss occurred on or after December 2, 2021;(4) the loss is not already covered by one or more of the normal reimbursement categories provided under this Settlement Agreement; and (5) the Settlement Class Member has made reasonable efforts to avoid, or seek reimbursement for, the loss, including but not limited to exhaustion of the benefits made available to the Settlement Class Member under the TransUnion myTrueIdentity identity theft insurance or any other credit card, credit monitoring/identity protection or financial service. *See* S.A. ¶ 34(c)(iii).

c. Lost Time

Settlement Class members are also able to make a claim for compensation for attested lost time for up to three (3) hours of lost time ("Lost Time"), calculated at $20/hour, provided that the Settlement Class Member attests that the claimed lost time was spent responding to issues raised by the Data Breach. *See* S.A. ¶ 34(d). Claims for Lost Time are subject to the same $450.00 cap on ordinary losses. *See* S.A. ¶ 34(d)(iii).

d. Credit Monitoring

Settlement Class Members can elect to enroll in TransUnion myTrueIdentity credit monitoring and identity protection services, or other comparable service, for a period of one year

by submitting the Claim Form by the Claim Deadline. *See* S.A. ¶ 34(a). The service shall include credit monitoring from all three bureaus, access to credit reports, and $1 million in identity theft insurance. *See* S.A. ¶ 34(a). This is a significant benefit to the Class.

2. Confirmatory Discovery

Plaintiff also negotiated for and received commitments from MTDC that it has adopted and implemented additional security measures to further strengthen the security of its systems. *See* Lietz Decl. ¶ 35. MTDC has agreed to provide confirmatory discovery to Plaintiff's Counsel regarding these additional security measures within thirty (30) days of the Preliminary Approval Order. *See* S.A. ¶ 34(e).

3. Release

The relief provided to Settlement Class Members in the Lawsuit is tailored to the claims that have been pleaded or could have been pleaded that are related in any way to the activities stemming from the Data Breach. *See* Lietz Decl. ¶ 37. Settlement Class Members who do not exclude themselves from the Settlement Agreement will release claims related to the Data Breach. *See* Lietz Decl. ¶ 38.

B. Notice and Claims Process

1. Notice

The Notice Program and Claims Administration will be administered by Postlethwaite & Netterville ("P&N")—a company that specializes in class action notice plans and claims administration (the "Settlement Administrator"). MTDC has agreed to pay for the Costs of the Notice and Claims Administration, separate and apart from the benefits to the Settlement Class Members, which, is in and of itself, a benefit to the Settlement Class. Lietz Decl. ¶ 40.

Within seven (7) Days of entry of the Preliminary Approval Order and engagement of a Settlement Administrator, MTDC will provide the Settlement Administrator with a list of names and last known addresses of the Settlement Class Members. SA, ¶ 40(a). The Settlement Administrator will, by using the National Change of Address ("NCOA") database maintained by the U.S Postal Service ("Postal Service") obtain updates, if any, to the mailing addresses. *See* Lietz Decl., ¶ 42.

Within thirty (30) Days of entry of the Preliminary Approval Order (the "Notice Deadline"), the Settlement Administrator shall send the Short Form Notice in forms substantially similar to those attached to the Settlement Agreement as **Exhibit C** to all Settlement Class Members. *See* SA., ¶ 17, 40(b). Where the undeliverable Notice is returned without a forwarding address, the Settlement Administrator shall make reasonable efforts to ascertain the correct address of the Settlement Class Member and remail the Notice. *See* Lietz Decl. ¶ 44.

Prior to the mailing of the Short Form Notice, the Settlement Administrator will establish and maintain a dedicated Settlement Website. SA., ¶ 40(d). The Settlement Administrator will make available the Settlement Agreement, Complaint, Short Form Notice, Long Form Notice in a form substantially similar to that attached to the Settlement Agreement as **Exhibit B**, and the Claim Form in a form substantially similar to that attached to the Settlement Agreement as **Exhibit A**, as well as other relevant filings, including Plaintiff's Motion for Attorneys' Fees, Costs, and Service Awards for Class Representatives and Plaintiff's Motion for Final Approval of the Class Action Settlement, on the Settlement Website. *Id.*.

The Settlement Website will allow Settlement Class Members to submit a Claim Form electronically by the Claim Deadline, or to download the Claim Form and submit it by mail to the Settlement Administrator postmarked by the Claim Deadline. Lietz Decl., ¶ 46. The website

address and the fact that the Long Form Notice and the Claim Form are available through the Settlement Website will be included in the Notice mailed to Settlement Class Members. *Id.* The Short Form Notice provides clear, concise information about the Settlement. *Id.*. The Long Form Notice explains the terms of the Settlement Agreement and provides contact information for proposed Settlement Class Counsel, understandable information about the Settlement, including explanations for the different options available to Settlement Classes. *Id*. The Settlement Website will be maintained and updated until at least thirty (30) days after the Effective Date. *Id.*

2. Claims

The timing of the claims process is structured to ensure that all Settlement Class Members have adequate time to review the terms of the Settlement Agreement, submit a claim, or decide whether they would like to opt-out or object. Settlement Class Members will have ninety (90) Days from the date Notice is mailed to the Settlement Class Members to complete and submit a claim to the Settlement Administrator. Lietz Decl. ¶ 49. The Claim Form, attached to the Settlement Agreement as **Exhibit A**, is written in plain language to facilitate Settlement Class Members' ease in completing it. Lietz Decl. ¶ 50.

Claims will be subject to review for completeness and plausibility by the Settlement Administrator, and any disputes will be resolved by the Settlement Administrator, subject to an appeal process. SA. ¶ 44. In the unlikely event any disputes cannot be resolved before the Settlement Administrator and among the Parties, Settlement Class Members will have the opportunity to seek review by a third-party Claims Referee, at MDTC's expense, if they dispute the Settlement Administrator's determination. *Id.*

3. Requests for Exclusion and Objections

To be timely, Settlement Class Members will have up to and including sixty (60) Days from the date Notice is scheduled to be mailed by the Settlement Administrator (the "Objection Date") to decide whether to object to or exclude themselves from the Settlement. SA. ¶¶ 18. 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 Plaintiff's Motion for Attorneys' Fees, Costs, and Service Awards to Class Representatives, which will be filed fourteen (14) Days prior to the deadline for Settlement Class Members to object or exclude themselves from the settlement. Lietz Decl. ¶ 53.

a. Requests for Exclusion.

Any Settlement Class Member wishing to opt out of the Settlement Class must personally sign and timely submit, complete, and mail a request for exclusion ("Opt-Out Request") to the Settlement Administrator at the address set forth in the Notice. SA. ¶ 46. To be effective, an Opt-Out Request must be postmarked no later than the final date of the Opt-Out Period (the "Opt-Out Date"). *Id.* The Parties will recommend to the Court that the Opt-Out Period be the sixty (60) Day period beginning on the date Notice is scheduled to be mailed by the Settlement Administrator. *Id.*.

A written opt-out notice must: (a) the case name, *Vandermark v. Mason Tenders District Council*; (b) the Settlement Class Member's full name, address, and telephone number; (c) the words "Request for Exclusion" at the top of the document; and (d) a declaration stating "I request that I be excluded from the Settlement Class in *Vandermark v. Mason Tenders District Council*, and do not wish to participate in the settlement. I understand that by requesting to be excluded from the Settlement Class, I will not receive any benefits under the Settlement." SA. ¶ 46. An Opt-

Out Request or other request for exclusion that does not fully comply with these requirements, which is not timely postmarked, or that is sent to an address other than that set forth in the Notice, will be invalid, and the Settlement Class Member will be bound by the Settlement Agreement, including the Release, and any judgment thereon. Lietz Decl. ¶ 56.

Settlement Class Members who opt-out of the class shall not be eligible to receive any Settlement Benefits and shall not be bound by the terms of the Settlement Agreement. Lietz Decl. ¶ 57. They also waive and forfeit any and all rights they may have to object to the Settlement or to participate at the Final Approval Hearing. *Id.* Requests for exclusion may only be made on an individual basis, and no person may request to be excluded from the Settlement Class through "mass," "group," or "class" opt-outs. Lietz Decl. ¶ 58.

b. Objections.

Any Settlement Class Member who wishes to object to the Settlement Agreement must submit a timely written notice of his or her objection ("Objection") by the Objection Date (defined below). Lietz Decl. ¶ 59. The Objection shall: (i) state the case name, *Vandermark v. Mason Tenders District Council*, (ii) the objecting Settlement Class Member's full name, current address, and telephone number; (iii) a statement of the specific grounds for the objection, as well as any documentation supporting the objection; (iv) the identity of any attorneys representing the objector; and the signature of the Settlement Class Member or the Settlement Class Member's attorney. SA. ¶ 45.

To be timely, an Objection in the appropriate form must be filed with the Clerk of the Court no later than sixty (60) Days from the date Notice is scheduled to be mailed by the Settlement Administrator (the "Objection Date") and mailed or hand delivered concurrently upon Settlement Class Counsel and MTDC Counsel at addresses set forth in the Notice. SA. ¶ 18, 45.

Any Settlement Class Member who fails to comply in full with the requirements for objecting shall forever waive and forfeit any and all rights he or she may have to raise any objection to the Settlement Agreement, shall not be permitted to object to the approval of the Settlement at the Final Approval Hearing, shall be foreclosed from seeking any review of the Settlement or the terms of the Settlement Agreement by appeal or other means, and shall be bound by the Settlement Agreement and by all proceedings, orders, and judgments in the Lawsuit. Lietz Decl. ¶ 62.

4. Fees, Costs, and Service Awards

MTDC agrees not to oppose an application by Plaintiff's counsel for an award of attorneys' fees, costs, and expenses not to exceed $175,000. Lietz Decl. ¶ 63. This amount was negotiated after the primary terms of the Settlement were negotiated. *Id*. MTDC shall pay the attorneys' fees, costs, and expenses in addition to any other benefits provided to Settlement Class Members and the Costs of Notice and Claims Administration. *Id.*.

Plaintiff shall seek and MTDC agrees not to oppose a Service Award of $1,500 ("Service Award"). SA. ¶ 36. The Service Award is meant to recognize Plaintiff for his efforts on behalf of the Settlement Class, including assisting in the investigation of the case, reviewing the pleadings, remaining available for consultation throughout the mediation and settlement negotiations, answering counsel's many questions, and reviewing the terms of the Settlement Agreement. Lietz Decl. ¶ 64. The Service Award was negotiated after the primary terms of the Settlement were negotiated. *Id.* The Service Award will be paid separately and apart from any other sums agreed upon under this Settlement Agreement. *Id*.

Proposed Settlement Class Counsel will submit a separate motion seeking Plaintiff's Award of Attorneys' Fees, Costs, Expenses, and Service Awards for Class Representative fourteen

(14)-Days prior to Settlement Class Members' deadline to exclude themselves from the Settlement Class or to object to the Settlement Agreement. *See* Lietz Decl. ¶ 65.

IV. LEGAL AUTHORITY

Plaintiff brings this motion pursuant to C.P.L.R. 908 ("Rule 908"), under which court approval is required to compromise a class action. *See* C.P.L.R. § 908; *see also In re Colt Inds. Shareholder Litig.*, 155 A.D.2d 154, 160 (1st Dep't 1990) ("Court approval is required for settlement of a class action."), *aff'd as mod. by Colt Inds. Shareholder Litig.*, 77 N.Y. 2d 185 (1991). Courts have discretion to approve a proposed settlement of a class action lawsuit. *See Illoldi v. Koi NY LLC*, No: 1:15-cv-6838 (VEC), 2016 WL 3099372, at *1 (S.D.N.Y. May 31, 2016).[4] "In exercising this discretion, courts should give weight to the parties' consensual decision to settle class action cases because they and their counsel are in unique positions to assess potential risks." *Gonqueh v. Leros Point to Point, Inc.*, No 14-CV-5883 (GHW), 2015 WL 9256932, at *1 (S.D.N.Y. Sept. 2, 2015) (quoting *Yuzary v. HSBC Bank USA, N.A.*, No. 12 Civ. 3693 (PGG), 2013 WL 1832181, at *1 (S.D.N.Y. April 30, 2013)).

Approval of a class action settlement is a two-step process: *First*, "[p]reliminary approval of a proposed settlement is the first in a two–step process required before a class action may be settled." *In re Nasdaq-Market Makers Antitrust Litig*., 176 F.R.D. 99, 102 (S.D.N.Y. 1997) (citing *Manual for Complex Litig., Third*, § 30.41 (West 1995); F.R.C.P. 23(e)). When considering preliminary approval, courts evaluate the fairness of a settlement, prior to providing notice to the

[4] In addition to citing New York state case law authority, this Memorandum will cite to federal case law authority for class certification and preliminary approval of class action settlements under Federal Rules of Civil Procedure 23. *See Vasquez v. National Secs. Corp.*, 9 N.Y.S.3d 836, 837-38 (Sup. Ct. N.Y. Cnty. 2015) ("[I]t is well established that our state courts look to Rule 23 of the Federal Rules of Civil Procedures to inform New York's class action law."); *Colt Inds. Shareholder Litig. v. Colt Inds., Inc.*, 77 N.Y. 2d 185, 194 (1991) ("New York's class action statute (CPLR 901-909) has much in common with Federal rule 23."); *Brandon v. Chefetz*, 106 A.D,2d 162, 168 (1st Dep't 1985) ("CPLR Article 9 is modeled on rule 23 of the Federal Rules of Civil Procedure (in U.S. Code, tit. 28, Appendix).").); *Friar v. Vanguard Holding Corp.*, 78 A.D. 2d 83, 93 (2d Dep't 1980) (same).

class members. *See id.* "Where the proposed settlement appears to be the product of serious, informed, non–collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted." *Id.; Gonqueh v. Leros Point to Point, Inc.*, No 14-CV-5883 (GHW), 2015 WL 9256932, at *1 (S.D.N.Y. Sept. 2, 2015) (The court must conduct a preliminary review to determine whether the proposed class settlement "appears to fall within the range of possible approval."). After preliminary approval is granted, "the second step of the process ensues: notice is given to the class members of a hearing, at which time class members and the settling parties may be heard with respect to final court approval." *Id.; see generally Saska v. Metropolitan Museum of Art*, 54 N.Y.S. 3d 566 (Sup. Ct. N.Y. Cnty. 2017) (granting final approval after court preliminarily approved settlement as fair, reasonable, and adequate, and in best interests of settlement class).

There is a strong judicial and public policy favoring the voluntary conciliation and settlement, particularly in class actions and other complex matters where inherent costs, delays and risks of continued litigation might otherwise outweigh any potential benefit the individual Plaintiff—or the class—could hope to obtain. *See Cohen v. J.P. Morgan Chase & Co.*, 262 F.R.D. 153, 157 (E.D.N.Y. 2009) ("There is a strong judicial policy in favor of settlement, particularly in the class action context. The compromise of complex litigation is encouraged by the courts and favored by public policy.") (quoting *Denney v. Jenkens & Gilchrist*, 230 F.R.D. 317, 328 (S.D.N.Y. 2005), *aff'd in part and vacated in part*, 443 F.3d 253 (2nd Cir. 2006)). "Class action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation. There is a strong public interest in quieting any litigation; this is 'particularly true in class actions.'" *In re Luxottica Group S.p.A. Sec. Litig.*,

233 F.R.D. 306, 310 (E.D.N.Y. 2006). "Courts encourage early settlement of class actions, when warranted, because early settlement allows class members to recover without unnecessary delay and allows the judicial system to focus resources elsewhere." *Illoldi*, 2016 WL 3099372, at *2. Class action settlements also ensure class members recover a benefit, as opposed to the "mere possibility of recovery at some indefinite time in the future." *In re Domestic Air Transp*. *Antitrust Litig.*, 148 F.R.D. 297, 306 (N.D. Ga. 1993).

V. ARGUMENT

A. Certification of the Class Is Warranted

Prior to granting preliminary approval of a proposed settlement, the Court should first determine if the proposed settlement class is appropriate for conditional certification settlement purposes only. *See Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620-32 (1997); *Manual for Complex Litigation.,* Sec. 21.632 (4th ed. 2013). 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 C.P.L.R. Rule 901 ("Rule 901"). *See* C.P.L.R. § 901(a)(1)-(4). The class action also must be "superior to other available methods for the fair and efficient adjudication of the controversy." *Id.* § 901(a)(5). Certification is also proper of the Settlement Class meets the factors set forth in C.P.L.R. Rule 902. *Id.* § 902(1)-(5).

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. S*ee Amchem Prods., Inc.*, 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*. 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.* Courts have found that, "[i]n deciding certification, 'courts must take a liberal rather than restrictive approach in determining whether the plaintiff satisfies these requirements and may exercise broad discretion in weighing the propriety of a putative class.'" *Cohen v. J.P. Morgan Chase & Co.,* 262 F.R.D. at 158 (quoting *Steinberg v. Nationwide Mut. Ins. Co.*, 224 F.R.D. 67, 72 (E.D.N.Y. 2004); *see also Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir.1997) ("Rule 23 is given a liberal rather than restrictive construction, and courts are to adopt a standard of flexibility" in deciding whether to grant certification.). Because the Settlement Class meets all requirements for certification under Rules 901 and 902, this Court should grant Plaintiff's request.

Indeed, class actions are regularly certified for settlement purposes. In fact, cybersecurity incident cases similar to this case have been regularly certified—on a *national* basis. *See, e.g, In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig.*, No. 19-MD-2879, 2022 WL 1396522, at *1 (D. Md. May 3, 2022); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1274-75 (11th Cir. 2021); *In re Brinker Data Breach Litig*., No. 3:18-CV-686-TJC-MCR, 2021 WL 1405508, at *1 (M.D. Fla. Apr. 14, 2021); *In re Target Corp. Customer Data Sec. Breach Litig*, 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 likewise be certified, and the settlement should similarly be preliminarily approved.

1. <u>The Proposed Settlement Class Meets the Requirements of Rule 901</u>

a. The class is so numerous that joinder of all members is impracticable.

Numerosity requires the members of the class to be "so numerous that joinder of all members, whether otherwise required or permitted, is impracticable." C.P.L.R. § 901(a)(1). Indeed, while there is no numerical requirement for satisfying the numerosity requirement, forty class members generally satisfies the numerosity requirement. S*ee Alcantara v. CNA Mgmt., Inc.,* 264 F.R.D. 61, 64 (S.D.N.Y. 2009); *Iglesias-Mendoza v. La Belle Farm, Inc.,* 239 F.R.D. 363, 370 (S.D.N.Y. 2007); *see Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (numerosity is presumed at a level of forty). Here, the Parties have identified approximately 40,349 individuals in the proposed Settlement Class. Joinder of so many individuals would certainly be impracticable. *See Friar*, 78 A.D. 2d at 96 (finding numerosity satisfied where class of at least 300 members); *Guadagno v. Diamond Tours & Travel, Inc.*, 392 N.Y.S. 2d 783, 785 (Sup. Ct. N.Y. Cnty. Spec. Term. 1976) (holding 400 class members was sufficient to meet numerosity requirement); *Vickers v. Home Fed. Sav. & Loan Ass'n of East Rochester*, 386 N.Y.S. 2d 291, 296 (Sup. Ct. Monroe Cnty. 1976) (holding 399 persons was sufficient to meet numerosity requirement). Accordingly, the numerosity requirement is easily satisfied.

b. Questions of law and fact common to the class predominate over any questions affecting only individual members.

Rule 901(a)(2) requires that "[t]here are questions of law or fact common to the class which predominate over any questions affecting only individual" class members. C.P.L.R. § 901(a)(2). If individualized proof is required for the claims alleged by the plaintiff, or if individual factual questions with respect to individual class members preponderate, the court cannot find commonality. *See Pludeman v. Northern Leasing Sys., Inc.*, 74 A.D.3d 420, 422-23 (1st Dep't 2010) (citing *CLC/CFI Liquidating Trust v. Bloomingdale's, Inc.*, 50 A.D. 3d 446, 447 (1st Dep't

2008); *DeFilippo v. Mut. Life Ins. Co. of N.Y.*, 13 A.D. 3d 178, 180-81 (1st Dep't 2004), *lv. dismissed* 5 N.Y. 3d 746 (2005); *Banks v. Carroll & Graf Publs.*, 267 A.D. 2d 68, 69 (1st Dep't 1999). However, "the rule requires predominance not identity or unanimity among class members." *Friar*, 78 A.D. 2d at 98 (internal citation omitted). "Commonality" is not only whether common issues outweigh individualized issues, but also "whether the use of a class action would 'achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated.'" *Id.* at 97 (internal citations omitted); *see In re Nassau County Strip Search Cases*, 461 F.3d 219, 225 (2d Cir. 2006); *Pludeman*, 74 A.D. 3d at 423. Certification of a class is appropriate even if questions of law or fact not common to the class exist. *See Pludeman*, 74 A.D. 3d at 423.

Courts have previously addressed the commonality issue in the context of cybersecurity incident class actions and found it readily satisfied. *See In re Hannaford Bros. Co. Customer Data Breach Litig.*, 293 F.R.D. at 26; *see also In re the Home Depot, Inc., Cust. 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 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, the commonality requirement is easily met, as Plaintiff and the Settlement Class Members all have common questions of law and fact that arise out of the *same* event—the Data Breach. Specifically, some of the questions of law and fact that are common to the class are:

i. Whether MTDC unlawfully used, maintained, lost, or disclosed Plaintiff's and Class Members' PII and PHI;

ii. Whether MTDC failed to implement and maintain reasonable security procedures and practices appropriate to the nature and scope of the information compromised in the cyberattack and Data Breach;

iii. Whether MTDC's data security systems prior to and during the cyberattack and Data Breach complied with applicable data security regulations;

iv. Whether MTDC's data security systems prior to and during the Data Breach were consistent with industry standards;

v. Whether MTDC owed a duty to Settlement Class Members to safeguard their Private Information;

vi. Whether MTDC breached its duty to Settlement Class Members to safeguard their Private Information;

vii. Whether computer hackers and data thieves obtained Settlement Class Members' Private Information in the Data Breach;

viii. Whether MTDC knew or should have known that its data security systems and monitoring processes were deficient;

ix. Whether MTDC owed a duty to provide Plaintiff and Settlement Class Members notice of the Data Breach, and whether MTDC breached that duty to provide timely notice;

x. Whether Plaintiff and Settlement Class Members suffered legally cognizable damages as a result of MTDC's misconduct;

xi. Whether MTDC's conduct was negligent;

xii. Whether MTDC's conduct violated state law; and

xiii. Whether Plaintiff and Settlement Class Members are entitled to damages, punitive damages, and/or injunctive relief.

As in other cybersecurity incident cases, these common issues all center on MTDC'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.").

Accordingly, the commonality requirement for class certification has been satisfied.

c. The claims and defenses of Plaintiff are typical of the claims and defenses of the class.

Typicality measures whether "the claims or defenses of the representative parties are typical of the claims or defenses of the class." C.P.L.R. § 901(a)(3). If "a plaintiff's claims 'derive from the same practice or course of conduct that gave rise to the remaining claims of other class members and is based upon the same legal theory … [the typicality] requirement is satisfied.'" *Pludeman*, 74 A.D. 3d at 423 (quoting *Friar*, 78 A.D. 2d at 98); *see Freeman v. Great Lakes Energy Partners, L.L.C.*, 12 A.D. 3d 1170, 1171 (4th Dep't 2004). "Typicality does not require identity of issues and the typicality requirement is met even if the claims asserted by class members differ from those asserted by other class members." *Pludeman*, 74 A.D. 3d at 423 (citing *Pruitt v. Rockefeller Ctr. Props.*, 167 A.D.2d 14, 22 (1st Dep't 1991); *Super Glue Corp. v. Avis Rent A Car Sys., Inc.*, 132 A.D. 2d 604, 607 (2d Dep't 1987). The typicality requirement is regularly met in data breach class actions. *See, e.g., In re Equifax Inc. Cust. Data Sec. Breach Litig.*, 2020 WL 256132, at *12 (N.D. Ga. Mar. 17, 2020).

Here, the typicality requirement is satisfied for the same reasons that Plaintiff's claims meet the commonality requirement. Specifically, Plaintiff's claims are typical of those of other Settlement Class Members because they arise from the same Data Breach. They are also based on the same legal theory, *i.e.,* that MTDC had a legal duty to protect Plaintiff's and Settlement Class Members' PII and PHI. Because Plaintiff's claims and the claims of the Settlement Class Members

are the same, and Plaintiff's claims arise from the same event that gives rise to the claims of the Settlement Class Members, the typicality requirement is satisfied.

d. The representative parties will fairly and adequately protect the interests of the class.

To maintain a class action, the representative parties must "fairly and adequately protect the interests of the class" under Rule 901(a)(4). C.P.L.R. § 901(a)(4). "A class representative acts as a principal to the other class members and owes them a fiduciary duty to vigorously protect their interests." *City of Rochester v. Chiarella*, 65 N.Y. 2d 92, 100 (1985) (internal citations omitted). "That responsibility encompasses the duty to act affirmatively to secure the class members' rights as well as to oppose the adverse interests asserted by others." *Id.* "'The three essential factors to consider in determining adequacy of representation are potential conflicts of interest between the representative and the class members, personal characteristics of the proposed class representative (e.g., familiarity with the lawsuit and his or her financial resources), and the quality of class counsel.'" *Cooper v. Sleepy's, LLC*, 120 A.D. 3d 742, 743 (2d Dep't 2014) (citing *Globe Surgical Supply v. GEICO Ins. Co.*, 59 A.D. 3d 129, 144 (2d Dep't 2008).

Here, Plaintiff does not possess any interest antagonistic to the class. *See In re Hannaford Bros. Co. Customer Data Breach Litig.*, 293 F.R.D. at 29 (holding there should be no potential conflict of interest between named plaintiff and the putative class members). He provided his personal information to MTDC and alleged that information was compromised because of the Data Breach, as the personal information of the Settlement Class Members was also allegedly compromised. Indeed, Plaintiff's claims coincide identically with the claims of the Settlement Class Members, and Plaintiff and the Settlement Class Members desire the same outcome of this litigation. Plaintiff has zealously and vigorously prosecuted this case for the benefit of all Settlement Class Members. *See Drabrowski v. Abax Inc.*, 84 A.D. 3d 633, 634 (1st Dep't 2011)

(finding that the representative plaintiffs engaged in a "contentious and litigious prosecution" of the matter). Plaintiff has further participated in the litigation, reviewed pleadings, and participated in the factual investigation of the case, and there is no evidence as regarding whether Plaintiff has the financial resources to continue with conditional certification of this class action for settlement purposes only. *See id.* at 635 ("There is no evidence that plaintiffs lack the financial means to prosecute this case, or that plaintiffs may have conflicts with other putative class members.").

Settlement Class Counsel will also adequately represent the interests of the Settlement Class Members. Settlement Class Counsel has thoroughly investigated the matter, prepared and reviewed pleadings and other relevant filings, as well as possesses the necessary qualifications and experience to prosecute the action, and can vigorously conduct the litigation. Settlement Class Counsel has extensive experience in class actions generally and in cybersecurity incident cases, in particular. *See* Lietz Decl., ¶¶ 2-17 and Milberg Firm Resume, attached thereto as **Exhibit 2**.

Because Plaintiff and his counsel possess substantial experience and track records in similar litigation and have vigorously prosecuted the case at hand to get the best result for Plaintiff and Settlement Class Members, the adequacy requirement is satisfied.

e. Class treatment is superior to individual litigation.

Class treatment "is superior to other available methods for the fair and efficient adjudication of the controversy." C.P.L.R. § 901(a)(5). Here, the resolution 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 thousands of individual data breach cases arising out of the *same* Data Breach.

Further, there is no indication that Settlement Class Members have an interest in pursuing 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"); *Pesantez v. Boyle Enviorn. Servs., Inc.*, 251 A.D. 2d 11 (1st Dep't 1998) (finding superiority requirement satisfied where, in part, there would be a small amount of potential recovery by each individual class member and the fact that many of the class members did not individually seek relief); *Nawrocki v. Proto Constr. & Dev. Corp.*, 82 A.D. 3d 534, 536 (1st Dep't 2011) (finding superiority requirement satisfied where damages allegedly suffered by each individual class member are likely to be insignificant and the costs of prosecuting individual actions would result in class members having no realistic day in court).

Lastly, 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. Accordingly, the superiority requirement has been met.

2. <u>The Proposed Settlement Class Satisfies Factors Set Forth In Rule 902</u>

In addition to the requirements for maintaining a class action set forth in C.P.L.R. Rule 902 ("Rule 902") provides that, in determining whether an action may proceed as a class action, the Court shall also consider the following factors:

1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;

2. The impracticability of or inefficiency of prosecuting or defending separate actions;

3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum; [and]

5. The difficulties likely to be encountered in the management of a class action.

C.P.L.R. § 902(1)-(5); *see Ackerman v. Price Waterhouse*, 252 A.D.2d 179, 191 (1st Dep't 1998). Here, the is no evidence that there are any interests of members of the class in individually controlling the prosecution or defense of separate actions. Nor should the Court be concerned with the impracticability of or inefficiency of prosecuting or defending separate actions at this time since, at present, there are none. In addition, Plaintiff is not aware of any litigation concerning the controversy already commenced by or against members of the class. Concentrating the litigation in the particular forum is desirable because the Court because the litigation has remained pending before this Court since its inception, and the Court has proper jurisdiction and venue. *See Comp.*, ¶¶ 15-16. Finally, since this case has now been settled pending Court approval, the Court need not be concerned about manageability issues.

Plaintiff has satisfied all the requirements of Rules 901 and 902 for conditional certification of the Settlement Classes. Accordingly, this Court should conditionally certify the Settlement Classes for settlement purposes only.

B. Plaintiff's Counsel Should Be Appointed Settlement Class Counsel

Plaintiff's counsel should be provisionally appointed at Settlement Class Counsel. In deciding whether counsel is 'adequate' to represent the class, a court must consider "the work counsel has done in identifying or investigating potential claims in the action, … counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action, … counsel's knowledge of the applicable law, and … the resources counsel will commit to representing the class.'" *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 165 (S.D.N.Y. 2008)

(quoting F.R.C.P. 23(g)). "The Court may also consider 'any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class.'" *Id.* Here, as fully explained in Settlement Class Counsels' declaration, Settlement Class Counsel has extensive experience prosecuting similar class actions and other complex litigation, and, in particular, data breach incident litigation, and has extensive knowledge in this area. *See* Lietz Decl., ¶¶ 2-17 and Milberg Firm Resume attached thereto as **Exhibit 2**. Further, proposed Settlement Class Counsel has diligently identified, investigated, and prosecuted the claims in this matter, has dedicated substantial resources to the investigation and litigation of those claims, and has successfully negotiated the Settlement of this matter to the benefit of Plaintiff and Settlement Class Members. *See* Lietz Decl., ¶¶ 18-27. Accordingly, the Court should appoint Milberg Coleman Bryson Phillips Grossman, PLLC as Settlement Class Counsel.

C. The Proposed Settlement Should Be Preliminary Approved Because it is Fair, Reasonable, Adequate, and in the Best Interests of the Settlement Class

After determining that certification of the Class is appropriate, the court must determine whether the Settlement Agreement itself is worthy of preliminary approval and of providing notice to the class. Preliminary approval of a settlement of a class action may be given if the court determines that that the settlement is "fair, reasonable, adequate and in the best interests of the class." *Klein v. Robert's Am. Gourmet Food, Inc.*, 28 A.D. 3d 63, 73 (2d Dep't 2006); *Rosenfeld v. Bear Stearns & Co., Inc.*, 237 A.D. 2d 199, 199-200 (1st Dep't 1996); *Joel A. v. Giuliani*, 218 F.3d 132, 138 (2d Cir. 2000). New York state courts weigh the five *Pfizer* factors when determining whether a class action settlement is fair, reasonable, adequate, and in the best interests of the class: (1) the likelihood of success; (2) the extent of support from the parties; (3) the judgment of counsel; (4) the nature of the issues of law and fact; and (5) the presence of bargaining in good faith. *See Klurfeld v. Equity Enters., Inc.*, 79 A.D. 2d 124, 133 (2d Dep't 1981); *In re Colt*

Inds. Shareholder Litig., 155 A.D.2d 154 at 160; *Hibbs v. Marvel Enters., Inc.*, 19 A.D.3d 232, 233 (1st Dep't 2005); *Saska*, 54 N.Y.S. 3d at 222; *State of W. Va. v. Chas. Pfizer & Co., Inc.*, 314 F. Supp. 710, 740 (S.D.N.Y. 1970), *cert. denied*, *Colter Drugs, Inc. v. Chas. Pfizer & Co.*, *Inc.*, 404 U.S. 871, 92 S. Ct. 81 (1971) [hereinafter, "*Pfizer & Co., Inc.*"].[5] Application of the *Pfizer* factors does not follow a "formulistic approach"; "rather, it is the circumstance of the case itself which should mold the approach of the court in deciding the weight to be accorded to each of the components." *Klurfeld*, 79 A.D. at 133.

Here, when preliminarily considering the *Pfizer* factors examined in depth at final approval, there is no question that the proposed Settlement is well "within the range of possible approval" as fair, reasonable, and adequate, and in the best interests of the Settlement Class, and should be preliminarily approved.

1. <u>The Likelihood of Success</u>

"The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement. This factor is sometimes referred to as the likelihood of success." *Pfizer & Co., Inc.*, 314 F. Supp. at 740. The judge should "reach 'an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated' and … 'form an educated estimate of the complexity, expense, and likely duration of such litigation, … and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise.'" *Id.* at 740-41 (quoting *Protective Comm. for Ind. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968)). The court should then emphasize: "'Basic to this process in every instance, of course is the need to compare the terms of the compromise

[5] New York state courts rely on the *Pfizer & Co., Inc.* decision when deciding the five factors to weigh when determining the fairness, adequacy, and reasonableness of a proposed settlement. *See, e.g., Klurfeld*, 79 A.D. 2d at 133; *In re Colt Inds. Shareholder Litig.*, 155 A.D.2d at 160. While the decisions do not address these five factors as the "*Pfizer* factors," this brief will do so for ease of reading.

with the likely rewards of litigation.'" *Id.* at 740-41 (quoting *Protective Comm. for Ind. Stockholders of TMT Trailer Ferry Inc.*, 390 U.S. at 424-25). This factor has been described as the "'risk and cost of further litigation'" factor. *Id*. at 741 (quoting *Neuwirth v. Allen*, 338 F.2d 2, 3 (2d Cir. 1964)).

Here, Settlement Class Counsel has negotiated substantial benefits for the Settlement Class Members. Settlement Class Members are eligible to receive cash payments and credit monitoring services *and* will gain the benefit of MTDC's data security enhancements. Specifically, each individual Settlement Class Member is eligible to receive up to $450.00 for ordinary losses, with appropriate documentation (other than for Lost Time, which may be claimed with a mere attestation), which includes out-of-pocket expenses, fees for credit reports, credit monitoring, or other identity theft product purchased between the date of the Data Breach and the Claim Deadline, and Lost Time. Ordinary losses are capped at $450.00. Each Settlement Class Member is also eligible to receive up to $2,500.00 in extraordinary losses, with appropriate documentation, and this benefit is capped at this amount. Moreover, Settlement Class Members will be offered a one (1)-year membership for credit monitoring services. The credit monitoring offering alone is a significant benefit for Settlement Class Members. In addition, MTDC will be responsible for providing equitable relief in the form of cybersecurity-related measures that it has implemented, or will implement, to protect Plaintiff's and Settlement Class Members' PII and PHI in the future. *See generally Columbus Drywall & Insulation, Inc. v. Masco Corp.*, 258 F.R.D. 545, 559 (N.D. Ga. 2007) (settlement fair, reasonable, and adequate, and preliminary approval warranted where the there was an immediate and substantial benefit to the class).

While Plaintiff believes strongly in the merits of his case, he also understands that MTDC will assert a number of potentially case-dispositive defenses. Due at least in part to the cutting-

edge nature and the rapidly evolving state of the law in this area, cybersecurity 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). To the extent the law has gradually accepted this relatively new type of litigation, the path to a class-wide monetary judgment remains unforged, particularly in the area of damages, as set forth below. As one federal district court recently observed in finally approving a settlement with similar class relief: "Data breach litigation is evolving; there is no guarantee of the ultimate result." *Fox v. Iowa Health Sys*., No. 3:18-CV-00327-JDP, 2021 WL 826741, at *5 (W.D. Wis. Mar. 4, 2021) (citing *Gordon v. Chipotle Mexican Grill, Inc*., No. 17-cv-01415-CMA-SKC, 2019 WL 6972701, at *1 (D. Colo. Dec. 16, 2019)). For now, cybersecurity incident cases are among the riskiest and uncertain of all class action litigation, making settlement the more prudent course when a reasonable one can be reached.

The damages methodologies in this cybersecurity incident litigation, while theoretically sound in Plaintiff's view, remain unproven in a disputed class certification setting and untested in front of a jury. At least for now, given the uncertainty of establishing damages in a cybersecurity incident class action, settlement is the more practical course of action, if a reasonable one can be reached. *See, e.g., Southern Independent Bank v. Fred's, Inc.*, NO. 2:15-CV-799-WKW, 2019 WL 1179396, at *8 (M.D. Ala. Mar. 13, 2019) (holding under *Daubert* motion that causation was not met for class certification purposes in data security breach case); *In re TJX Cos. Sec. Breach Litig.*, 246 F.R.D. 389, 398 (D. Mass. Nov. 29, 2007) ("[T]he need for individualized damages decisions does not ordinarily defeat predominance where there are … disputed common issues as to liability.'") (quoting *Tardiff v. Knox Co.*, 365 F.3d 1, 6 (1st Cir. 2004)). Given the inherent risks

of establishing damages in this case, the Settlement reached between the Parties is the more prudent course of action and should be preliminarily approved by the Court. Because damages may be difficult to prove at the class action certification stage of litigation, settlement of this action will result in the best outcome for Plaintiff and the Settlement Class Members.

Moreover, while Plaintiff feels confident that he can prove the Rule 901 and 902 requirements for certifying a class action in this case, he also appreciates that there are always inherent risks associated with maintaining a class action, especially in a cybersecurity incident case, which is among the chanciest and indefinite of all class action litigation. As noted above, while there are data breach cases that have been certified (*see, e.g.*, *In re Marriott, Equifax, Brinker supra*), the cases in which classes have been certified, even on a preliminary basis, are not numerous.

The risk of obtaining and maintaining class status throughout trial also weighs in favor of preliminary approval. Continued litigation would require more discovery, depositions, expert reports, motion practice over class certification and summary judgment, as well as possible appeals, which would require additional rounds of briefing and the possibility of no recovery at all. "Regardless of the risk, litigation is always expensive, and both sides would bear those costs if the litigation continued." *Paz v. AG Adriano Goldschmeid, Inc.*, No. 14CV1372DMS(DHB), 2016 WL 4427439, at *5 (S.D. Cal. Feb. 29, 2016). Settlement eliminates the risk, expense, and delay inherent in this process, and the risk that Settlement Class Members may receive no recovery whatsoever. *See generally Fleisher v. Phoenix Life Ins. Co.*, Nos. 1-cv-8405 (CM), 14-cv-8714 (CM), 2015 WL 10847814, at *10 (S.D.N.Y. Sept. 9, 2010).

The combination of monetary and non-monetary benefits to the Settlement Class is a sizeable recovery, especially given the attendant risks of proving damages and liability and

maintaining a class throughout trial and potential appeals and inherent costs of doing so. Indeed, the proposed Settlement is more than a favorable result for the Settlement Class Members, given all of the inherent risks of cybersecurity incident litigation, especially when considering there is a possibility of no relief at all.

Accordingly, the first *Pfizer* factor is readily satisfied.

2. The Extent of Support from the Parties

Plaintiff and proposed Class Counsel strongly endorse this Settlement. *See* Lietz Decl., ¶¶ 67-69. In addition, Plaintiff has no reason to believe there will be opposition to the Settlement. However, this factor is better considered after Notice has been provided to the Settlement Class Members, and they are given the opportunity to object. *See Columbus Drywall & Insulation, Inc.*, 258 F.R.D. at 561. Accordingly, this factor is satisfied at this time.

3. The Judgment of Counsel

This Settlement will provide meaningful monetary and nonmonetary relief to Settlement Class Members. The Settlement also has the support of Plaintiff's counsel and MTDC's counsel who have significant experience in class action and other complex litigation—including cybersecurity incident litigation. *See Hibbs*, 19 A.D.3d 232, 233 (finding "experienced counsel on both sides endorsed the settlement"); *Saska*, 54 N.Y.S. 3d at 570 (finding the settlement was negotiated "between two … firms with excellent reputations"). *See* Lietz Decl., ¶ 69. Accordingly, this *Pfizer* factor is met.

4. The Nature and Issues of Law and Fact

The nature and issues of fact in this case primarily stem from one singular event—the Data MTDC collected the PII and PHI of Plaintiff and Settlement Class Members in the ordinary course of business, MTDC owed Plaintiff and Settlement Class Members legal and equitable duties to

protect their PII and PHI from unauthorized disclosure, Plaintiff and Settlement Class Members relied on MTDC to do so, MTDC breached those duties, and MTDC's conduct resulted in injuries to Plaintiff and the Settlement Class Members. *See Comp.*, ¶¶ 121-172.[6]

While Plaintiff is confident in the strength of his claims, and in particular proving the issues of law and fact in his case, Plaintiff is also pragmatic in his awareness of the various defenses available to MTDC, as well as the attendant risks of continued litigation. MTDC has consistently denied the allegations raised by Plaintiff and MTDC will likely assert—but it is obvious that Plaintiff's success at the class certification stage, proving damages, and through trial, and then any possible appeals, is far from certain.

Through the Settlement, Plaintiff and Settlement Class Members gain real, significant benefits now without having to face further risk of not receiving any relief whatsoever. If the Settlement between the Parties is approved, it is of importance that the substantial recovery is available now for the class members, instead of at "'distant time in the future.'" *Pfizer Co., Inc.*, 324 F. Supp. at 473 (finding that there were a number of doubtful questions of law and fact) (quoting *Ladd v. Brickley*, 158 F.2d 212, 220 (1st Cir. 1946), *cert. denied*, 330 U.S. 819, 67 S. Ct. 675, 91 L. Ed 1271 (1947). The proposed Settlement is eminently reasonable, especially considering that it avoids the potential contingencies of continued litigation. Given the uncertainties in success on the merits—and the chances of no relief at all—settlement is the most sensible course of action.

Accordingly, this *Pfizer* factor is satisfied.

[6] Several issues of law and fact in this case involve the same incident—the Data Breach—and MTDC's legal and equitable duty to protect and safeguard Plaintiff's and Settlement Class Members' PII and PHI.

5. The Presence of Bargaining in Good Faith Between the Parties

"Negotiations are presumed to have been conducted at arm's length and in good faith where there is no evidence to the contrary." *Gordon v. Verizon Comms., Inc.*, 148 A.D. 3d 146, 157 (1st Dep't 2017) (citing *In re Advanced Battery Techs., Inc. Secs. Litig.*, 298 F.R.D. 171, 179 (S.D.N.Y. 2014) ("[A] strong initial presumption or fairness attaches to the proposed settlement if, as here, the settlement is reached by experienced counsel after arm's-length negotiations."). Here, there being no evidence to the contrary, good faith bargaining between the Parties is presumed, and this factor weighs heavily in favor of approval of the settlement. *See id.*

Indeed, the Parties reached this Settlement after protracted, arm's-length negotiations. MTDC supplied information to Plaintiff, which included information about the cause and scope of the Data Breach and the class size. The Parties have engaged in months of negotiations and ultimately executed a Term Sheet and drafted Settlement Agreement and accompanying Notices and other exhibits. Accordingly, the Settlement was reached through good-faith negotiations between the Parties and is absent of any collusion, and is fair, reasonable, and adequate. *See Joel A.*, 218 F.3d at 144 ("[A] settlement agreement achieved through good-faith, non-collusive negotiation does not have to be perfect, just reasonable, adequate, and fair.").

Accordingly, this *Pfizer* factor is also satisfied.

All the *Pfizer* factors for approval of the Settlement are satisfied, and, accordingly, the Settlement should be determined as fair, reasonable, adequate, and in the best interests of the Settlement Class, and well within the "range of possible approval,' and should be preliminarily approved by this Court, and Notice should be sent to Settlement Class Members.

D. The Proposed Notice Program Should Be Approved

Rule 908 provides that "[n]otice of the proposed dismissal, discontinuance, or compromise [of a class action] shall be given to all members of the class in such manner as the court directs." *See* C.P.L.R. § 908. In addition, C.P.L.R. § 904(b) ("Rule 904") states that, in monetary class actions, "reasonable notice of the commencement of a class action shall be given to class in the manner as the court directs." *Id.* § 904(b). In determining the method of notice to give to the class, the court shall also consider:

> I. The cost of giving notice by each method considered;
>
> II. The resources of the parties; and
>
> III. The stake of each represented member of the class, and the likelihood that significant numbers of represented members would desire to exclude themselves from the class or to appear individually, which may be determined, in the court's discretion, by sending notice to random sample of the class;

Id. § 904(c).

The Notice Program provided for by the Settlement Agreement is designed to be "reasonable notice of the commencement of a class action." *See* Lietz Decl. ¶ 41. Here, notice will be sent to Settlement Class Members via US mail to the address in MTDC's records. SA at ¶ 40(a). In addition to sending the notice via US mail, MTDC has also agreed to have the Settlement Administrator establish and maintain a Settlement Website through which Settlement Class Members can receive additional information about the Settlement. *Id.*, ¶ 40(d).

The Notice is written in plain language, uses simple terminology, and is designed to be readily understandable by Settlement Class Members. Moreover, the Notice is clear and straightforward: it apprises Settlement Class Members of the pendency of the Lawsuit; describes the essential terms of the Settlement; defines the Settlement Classes; clearly describes the options

available to the Settlement Classes and the deadlines for taking action; explains procedures for making claims, objections, or requesting exclusion; provides information that will enable Settlement Class Members to calculate their individual recovery; discloses the Plaintiff's requested attorneys' fees, costs, expenses, Service Awards; describes the date, time, and place of the Final Approval Hearing; and prominently displays the address and phone number of proposed Settlement Class Counsel.. *See Avena v. Ford Motor Co.*, 85 A.D. 2d 149, 159 (1st Dep't 1982) ("[I]t is the basic duty of a fiduciary to disclose all relevant facts to his beneficiaries."); *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1105 (5th Cir. 1977) (The notice must also "contain information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt-out or remain a member of the class and be bound by the final judgment."); *Achtman v. Kirby, McInerney & Squire LLP*, 464 F.3d 328, 338 (2d Cir. 2006) (same); *Barkwell v. Sprint Comms. Co. L.P.*, No. 4:09-CV-56 (CDL), 2014 WL 12704984, at *6 (M.D. Ga. Apr. 18, 2014) (finding a notice program involving direct mail notice to satisfy due process); C.P.L.R. §§ 904, 908; S.A. Exs. A-B. Finally, direct mailing, combined with publishing on the Settlement Website, is designed to be the best reasonable notice of the commence of the action to reach the Settlement Class Members under the circumstances. Thus, the Notice satisfies the requirements of Rules 904 and 908.

Finally, the Parties have agreed that MTDC will pay for the costs of the Notice. *See* C.P.L.R. § 904(d)(I) ("The court may, if justice requires, require that the defendant bear the expense of notification ..."); Lietz Decl. ¶ 40. The notice is estimated to cost $76,653. *See* Lietz Decl., ¶ 54; C.P.L.R. § 904(d)(I). MTDC and/or its insurer also has the resources to pay for the proposed Settlement. *See* Lietz Decl., ¶ 40; C.P.L.R. § 904(d)(II).

Accordingly, this Court should approve the Notice Program.

VI. CONCLUSION

Pursuant to C.P.L.R. §§ 901-902, 904, and 908, Plaintiff respectfully requests this Court (a) preliminarily approve the Settlement Agreement and exhibits attached thereto, (b) conditionally certify the Settlement Class and Subclass, (c) preliminarily approve the Settlement as sufficiently fair, reasonable, and adequate to warrant providing Notice to Settlement Class Members; (d) appoint P&N as Settlement Administrator; (e) approve the Notice Program; (f) direct the Settlement Administrator and MTDC to provide Notice to Settlement Class Members; (g) approve the Claim Form, Long Form Notice, and Short Form Notice, in forms substantially similar to those attached as **Exhibits A-C** to the Settlement Agreement; (h) direct the Settlement Administrator to conduct Settlement Administration; (i) approve the Opt-Out and Objection procedures in the Settlement Agreement; (j) provisionally appoint Plaintiff Kevin Vandermark as Class Representative; (k) provisionally appoint Milberg Coleman Bryson Phillips Grossman, PLLC as Settlement Class Counsel; and (l) set a hearing and schedule for final approval of the Settlement and consideration of Settlement Class Counsel's motion for award of fees, costs, and Service Awards.

Plaintiff has negotiated a fair, adequate, and reasonable Settlement that guarantees Settlement Class Members significant relief in the form of cost and time reimbursements, credit monitoring, and equitable relief consisting of increased data-enhancements. For these and the above reasons, the Settlement Agreement clearly falls within the range of possible approval, and Plaintiff respectfully requests this Court grant his Unopposed Motion for Preliminary Approval of Class Action Settlement.

Dated: May 24, 2023

Respectfully submitted,

/s/ *Vicki J. Maniatis*

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CERTIFICATION OF COMPLIANCE WITH RULE 202.8-b

I hereby certify that the foregoing contains 10,268 words and the word count is consistent with the enlargement requested in the contemporaneously filed Letter Motion.

Vicki J. Maniatis

CERTIFICATE OF SERVICE

I, Vicki J. Maniatis, hereby certify that on this____ day of May, 2023, I caused a true and correct copy of the foregoing Plaintiff's Memorandum of Law in Support of his Unopposed Motion for Preliminary Approval to be electronically filed using the Court's NYSCEF system, which will serve all counsel of record.

/s/ Vicki J. Maniatis
Vicki J. Maniatis