SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

JOHN FINN and SALVATORE J. CONTRISTANO, individually and on behalf of all others similarly situated, Plaintiffs, v. EMPRESS AMBULANCE SERVICE, LLC, Defendant.	Index No. 61058/2023 CLASS ACTION

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

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I. INTRODUCTION[1]

Plaintiffs John Finn and Salvatore J. Contristano ("Plaintiffs" or "Class Representatives") respectfully seek final approval of a nationwide class action settlement with Defendant Empress Ambulance Service, LLC ("Empress" or "Defendant"). The Settlement resolves all claims against Empress on behalf of approximately 307,687 Settlement Class Members relating to the Empress Network Incident.

The Settlement is an excellent result; it establishes a non-reversionary $1,050,000.00 Settlement Fund to pay for claims made for two different options of cash payment: (i) a Documented Loss Payment to recover unreimbursed out-of-pocket losses stemming from the breach (up to $10,000), or (ii) a *pro rata* Cash Fund Payment that requires no documentary support. SA ¶ 3.2(a)-(b). In addition, Class Members may also submit a claim for 12 months of Credit Monitoring and Insurance Services ("CMIS") provided by TransUnion, to be paid for from the Settlement Fund, which provides three bureau credit monitoring services and $1 million in identity theft insurance. *Id*. ¶ 3.4. The Settlement's prospective relief requires Empress to maintain improved data security measures for a period of no less than three years, from which all Settlement Class Members will benefit irrespective of whether they submit a claim. *Id*. ¶ 2.1.

The Settlement is the product of extensive, arm's length negotiations between experienced attorneys familiar with the legal and factual issues of this case, and it was reached with the assistance of a well-respected and experienced mediator. The Settlement negotiations were guided by discovery from Defendant to confirm the Settlement's terms as fair, reasonable, and adequate.

[1] All capitalized terms not otherwise defined herein have the same definitions set forth in the Class Action Settlement Agreement and Release ("SA," "Settlement," or "Settlement Agreement") filed on June 16, 2023 (Dkt. 21).

The Court preliminarily approved the proposed Settlement on November 27, 2023 and conditionally certified the Settlement Class. *See* Order Granting Preliminary Approval of Class Action Settlement, Dkt. No. 32 ("Prelim. App. Order"). Since then, the Notice Plan and claims process were implemented by the Court-approved Settlement Administrator, Epiq Class Action and Claims Solutions, Inc. ("Epiq").

The reaction from Class Members to the Settlement is overwhelmingly positive. As of March 19, 2024, 2,708 Claim Forms have been submitted, with over six weeks remaining until the May 8, 2024 Claims Deadline.[2] Declaration of Cameron R. Azari, Esq. Regarding Implementation of Notice Plan ("Azari Decl."), attached as Exhibit 2, ¶ 24. Based on current estimates from Epiq and the current claims count as of March 19, 2024, Class Members who elected the *pro rata* cash payments option would receive payments in the approximate amount of $134, were the claims deadline to close now. Ferich Decl. ¶ 12. The period for filing objections and exclusions passed on March 8, 2024. Only one Class Member requested exclusion from the Settlement, and only one objection was filed. Azari Decl. ¶¶ 20-21. The lone objection lacks merit and is addressed below.

The Settlement delivers tangible and immediate benefits to Class Members addressing the potential harms of the Network Incident, without protracted litigation and the inherent risks of data breach class action litigation. It delivers a fair, reasonable, and adequate resolution for the Class, and warrants final approval.

[2] As discussed below, and in an abundance of caution, the Parties agreed to extend the deadline to file a claim by 30 days, to May 8, 2024, due to a technical malfunction with the email inbox for the Settlement. *See* concurrently filed Declaration of Andrew Ferich in Support of Final Approval of Class Action Settlement ("Ferich Decl."), attached as Exhibit 1, ¶ 11; Azari Decl. ¶¶ 24, 24 n.4. The Settlement Website was updated to communicate the new claim filing deadline. *Id.*

II. BACKGROUND

A. The Empress Network Incident and Subsequent Litigation

The factual background concerning the Network Incident and subsequent litigation are detailed in (i) Plaintiffs' Motion for Preliminary Approval (Dkt. 20), at pp. 3-6 ("Mot. for Prelim. App."); (ii) Motion for Attorneys' Fees, Costs, and Expenses, and for Class Representative Service Awards (Dkt. 33), at pp. 2-7 ("Fee Motion"); and (iii) supporting Fee Motion counsel declarations ("Wolfson Fee Decl.," Dkt. 35, and "Parkhill Fee Decl.," Dkt. 36).

On or about July 14, 2022, Empress discovered that an unauthorized individual or individuals had gained access to Empress's network systems. In September 2022, Empress began notifying patients of the Network Incident. On September 22, 2022, Plaintiff Finn commenced the lawsuit captioned as *Finn v. Empress Ambulance Services, Inc. d/b/a Empress EMS*, No. 7:22-cv-08101, in the Southern District of New York. After *Finn* was filed, numerous related actions were filed in New York state court (subsequently removed to federal court) and New York federal court (collectively, "Later-Filed Actions"). Empress subsequently sought to stay all Later-Filed Actions. During a status conference on November 10, 2022, before Judge Kenneth M. Karas of the Southern District, the Court agreed that a stay was appropriate and authorized Ahdoot & Wolfson, PC to proceed with efforts to negotiate settlement. *Finn,* ECF Nos. 17–19. All Later-Filed Actions were subsequently stayed by Judge Karas (*see Finn*, November 14, 2022 text Order) and remain stayed, pending final settlement approval in this Court.

B. Settlement Negotiations and Mediation

In early November 2022, the Parties began arm's length negotiations to potentially settle this matter. Dkt. 35, Wolfson Fee Decl. ¶ 13. The Parties agreed to attend a mediation on November 17, 2022 with respected mediator Rodney Max of Upchurch Watson White & Max Mediation

Group. *Id*. ¶ 14. In advance of the mediation, the Parties shared and discussed their respective positions on the merits of the claims and class certification, which they provided to the mediator in detailed mediation statements. *Id*. ¶ 15. The mediation was hard fought with each party zealously advocating for their client's respective positions. *Id*. ¶ 16. Following the mediation, the Parties reached an agreement to settle this matter in principle. *Id*. ¶ 18.

As part of the Settlement negotiations, Class Counsel requested information from Defendant to ascertain a fair, reasonable, and adequate settlement in this case. Dkt. 34, Fee Motion at 4; Dkt. 36, Wolfson Fee Decl. ¶ 17. This discovery guided Class Counsel in its negotiations with Defendant and established that the Settlement exceeds the standards of CPLR § 901, *et seq*., and § 908. *Id.*

In the numerous weeks that followed mediation, the Parties negotiated the remaining terms of the Settlement, including the amount of the common fund, the notice plan, selecting a settlement administrator, and other details. Dkt. 36, Wolfson Fee Decl. ¶¶ 18-22. After the Settlement Agreement and its supporting exhibits were finalized, the Parties executed the Settlement Agreement. *Id*. ¶ 27.

III. SUMMARY OF THE SETTLEMENT

A. The Settlement Class

The provisionally certified Settlement Class is defined as follows:

> All natural persons who are residents of the United States whose Personal Information was potentially compromised in the Network Incident and were sent via U.S. Mail notice by Empress that their Personal Information may have been compromised in the Network Incident. Excluded from the Settlement Class are: (1) the Judges presiding over the Action and members of their families; (2) Empress, its subsidiaries, parent companies, successors, predecessors, and any entity in which Empress or its parents, have a controlling interest, and its current or former officers and directors; (3) natural persons who properly execute and submit a Request for Exclusion prior to the expiration of the Opt-Out Period; and (4) the successors or assigns of any such excluded natural person.

Dkt. 20, Prelim. App. Order ¶ 18.

B. The Settlement's Substantial Benefits to Class Members

The Settlement establishes a non-reversionary Settlement Fund in the amount of $1,050,000 to pay for Administrative Expenses, class Notice, taxes, Approved Claims, attorneys' fees, costs and expenses, and Class Representative Service Awards.

The Settlement makes available three categories of benefits for Settlement Class Members:

1. Cash Settlement Payments

Class Members who incurred documented out-of-pocket expenses that are more likely than not a result of the Network Incident may submit a Claim Form for payment of up to $10,000 for reimbursement of such Documented Losses. Dkt. 21, SA ¶¶ 1.17, 3.2(a). Claimed Documented Losses must be supported by Reasonable Documentation and not otherwise recoverable through insurance. *Id*.

In the alternative to the Documented Loss Payments, Class Members may submit a Claim Form electing to receive a *pro rata* cash Settlement Payment, i.e., a Cash Fund Payment. *Id.* ¶¶ 1.7, 3.2(b). Based on current claims submitted to date, if the claims process were to end presently, each Class Member who elected the *pro rata* cash payment option would receive payment in the approximate amount of $134. Ferich Decl. ¶ 12.

2. Credit Monitoring and Insurance Services

In addition to electing one of the cash payment Settlement Benefits described in Section III.B.1, *supra*, all Class Members may submit a claim for 12 months of TransUnion's credit monitoring and insurance services ("CMIS"). SA ¶ 3.4. This Settlement Benefit is available to Class Members irrespective of whether they took advantage of any previous offering of credit monitoring from Empress. *Id.*

3. Data Security Commitments and Prospective Relief

Empress also has agreed to adopt, continue, and/or implement certain data security enhancements for a period of no less than three years from the Effective Date. SA ¶ 2.1. All Class Members receive this benefit regardless of whether they submit a Claim Form.

4. Release

In exchange for the relief provided under the Settlement Agreement, Class Members who do not opt out of the Settlement will fully release Empress for all claims and causes of action pleaded or that could have been pleaded that are related in any way to the Network Incident (the "Released Claims"). SA ¶¶ 1.38, 4.1–4.2.

C. Notice and Settlement Administration

1. Dissemination of Notice and Settlement Administration

After the Court preliminarily approved the Settlement, the Parties continued to work with the Settlement Administrator to supervise dissemination of Notice. Ferich Decl. ¶ 9. These efforts included review and drafting of the language and format of the Settlement Website, the script for the automated response to the toll-free number, the language and format of the Notice forms, monitoring for exclusion requests and objections, and ensuring prompt response to every Class Member inquiry regarding the Settlement, among others. *Id*. Prior to launching the designated email address, Epiq tested and confirmed the functionality of the email address and the Settlement Website. Azari Decl. ¶ 22.

In accordance with the Court's Preliminary Approval Order, Epiq provided notice to the Class, and successfully disseminated notice. *Id*. ¶¶ 10-15. Specifically, the Settlement Administrator provided written notice in the form of a Postcard Notice via the United States Postal Service ("USPS") first class mail to all Class Members with a valid mailing address. *Id*. ¶ 11. Prior

to mailing the Notice, the Settlement Administrator checked all mailing addresses against the National Change of Address database to ensure address information was up-to-date and accurately formatted for mailing. *Id.* ¶ 12. When Postcard Notices returned as undeliverable, the Postcard Notices were re-mailed to any new address available through USPS information and to better addresses that were found using a third-party lookup service. *Id*. ¶ 13. Further, at the Court's instruction, Class Counsel, through Epiq, provided special service of the notice and Settlement documents to counsel for the plaintiffs in the Later-Filed Actions in federal court. *Id.* ¶ 14; Ferich Decl. ¶ 10.

As of March 12, 2024, a Summary Notice was delivered to 266,446 of the 304,362 unique, identified Class Members. Azari Decl. ¶ 16. This means the individual notice efforts reached approximately 87.3% of the identified Class Members. *Id*. ¶ 7, 16, 28. This is an outstanding result. *See* Federal Judicial Center, *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide*, at 3 (2010), www.fjc.gov/sites/default/files/2012/NotCheck.pdf ("A high percentage [of the class] (e.g., between 70-95%) can often reasonably be reached by a notice campaign."); *see also In re Restasis Antitrust Litig.,* 527 F. Supp. 3d 269, 273 (E.D.N.Y. 2021) (citation omitted) (observing that "a notice plan that reaches between 70 and 95 percent of the class is reasonable," and endorsing a notice plan with 80% expected reach).

On January 3, 2024, Epiq established a dedicated website for the Settlement with a clear and concise domain name (www.EmpAmbulanceSettlement.com) Azari Decl. ¶ 17. Relevant case and settlement documents were posted on the Settlement Website. *Id.* The Settlement Website also provides the ability for Class Members to file an online Claim Form. *Id*. In addition, the Settlement Website includes relevant dates, answers to frequently asked questions (FAQs), instructions for

opting out of (i.e., requesting exclusion from) or objecting to the Settlement, contact information for the Settlement Administrator, and how to obtain other case-related information. *Id.*

Epiq also established a toll-free telephone number for the Settlement. *Id.* ¶ 18. The Settlement telephone number was prominently displayed in all notice documents. *Id*. A mailing address was established and continues to be available, providing Class Members with yet another avenue to request additional information or ask questions. *Id.* ¶ 19.

The Notice Plan was designed to reach the greatest practicable number of Class Members. *Id*. ¶ 7. The notice, as executed, reached this goal, and notice was highly successful here.

2. Claims, Requests for Exclusion, and Objections

Class Members must submit a Claim Form by May 8, 2024. Azari Decl. ¶ 24; Ferich Decl. ¶ 11. Epiq reports that, as of March 19, 2024, it has received 2,708 Claim Forms (2,595 online, 113 paper). Azari Decl. ¶ 24. The Settlement Administrator has and will continue to review and evaluate each Claim Form, including any required documentation submitted, for validity, timeliness, and completeness through the end of the claims period.

Class Members were provided an opportunity to opt out of, or object to, the Settlement on or before March 8, 2024. Prelim. App. Order ¶¶ 19-20; SA ¶¶ 6.8, 6.9. Epiq reports that as of March 12, 2024, only one Class Member timely requested exclusion from the Settlement, and only one objection to the Settlement was filed. Azari Decl. ¶¶ 19-20. Details about the lone opt out are included in an exhibit to the Final Approval Order, and the lone objection is addressed below.

D. <u>Attorneys' Fees, Costs, Expenses, and Service Awards</u>

On February 23, 2024, Plaintiffs and Class Counsel filed an application for Attorneys' Fees, Costs, Expenses, and for Class Representative Service Awards. Dkt. No. 34. As explained therein, the requested fee award, $350,000, amounts to approximately 33.33% of the $1,050,000

Settlement Fund, and is consistent with that routinely awarded in similar cases in New York. The requested $1,500 Service Awards reflect the work the Class Representatives performed in assisting Class Counsel with this litigation and their dedication to this lawsuit and the Settlement Class.

IV. ARGUMENT

A. The Settlement Is Fair, Reasonable, and Adequate, and Should Be Approved

The Settlement is an excellent result for the Settlement Class. It provides significant financial relief to participating Settlement Class Members as compensation for the Settlement Class's Released Claims, and relieves the settling Parties of the burden, uncertainty, and risk of continued litigation. The Settlement is fair, reasonable, and adequate, and the Court should grant final approval.

New York courts strongly favor settlements as a matter of public policy. *IDT Corp. v. Tyco Grp., S.A.R.L.*, 13 N.Y.3d 209, 213 (2009) ("[s]tipulations of settlement are judicially favored and may not be lightly set aside."); *see also Denburg v. Parker Chapin Flattau & Klimpl*, 82 N.Y.2d 375, 383 (1993) ("[a] negotiated compromise of a dispute avoids potentially costly, time-consuming litigation and preserves scarce judicial resources"); *Wal-Mart Stores, Inc. v. Visa US.A. Inc*., 396 F.3d 96, 116 (2d Cir. 2005) (courts should be "mindful of the 'strong judicial policy in favor of settlements'"). When considering whether to finally approve a class action settlement, New York courts focus their inquiry on "'the fairness of the settlement, its adequacy, its reasonableness, and the best interests of the class members.'" *Hosue v. Calypso St. Barth, Inc*., No. 160400/2015, 2017 WL 4011213, at *2 (Sup. Ct., N.Y. Cnty. Sept. 12, 2017). Specifically, it is "black-letter law" that New York courts consider the following factors: (i) the likelihood that plaintiff will succeed on the merits; (ii) the extent of support from the parties; (iii) the judgment of counsel; (iv) the presence of good faith bargaining; and (v) the complexity and nature of the issues

of law and fact, often referred to as the "*Colt* factors." *Saska v. Metro. Museum of Art*, 57 Misc. 3d 218, 222, 54 N.Y.S.3d 566, 569 (N.Y. Sup. Ct. 2017) (citing *In re Colt Indus. S'holder Lit.,* 155 A.D.2d 154, 160, 553 N.Y.S.2d 138 (1st Dept.1990)).

Two additional factors (i.e., the "*Gordon* factors") must be considered when evaluating proposed class action settlements. *Saska*, 54 N.Y.S.3d at 570 (citing *Gordon v. Verizon Communications, Inc.,* 46 N.Y.S.3d 557, 567 (2017)). The first is "whether the proposed settlement is in the best interests of the putative settlement class as a whole," and the second is "whether the proposed settlement is in the best interest of the corporation." *Gordon,* 46 N.Y.S.3d at 568.

As discussed below, the five "*Colt* factors" and two "*Gordon* factors" strongly favor final settlement approval.

1. Likelihood of Success on the Merits and Related Litigation Risk (*Colt* factor 1)

When assessing a proposed settlement of a class action, courts first take into consideration Plaintiffs' ultimate "likelihood of success on the merits." *Gordon*, 46 N.Y.S.3d at 566–67; *Colt*, 155 A.D.2d at 160. The Settlement is particularly strong in light of the risks and delay-related downsides of continued litigation, especially in data breach litigation. *Saska*, 54 N.Y.S.3d at 569 ("It is axiomatic that all trials involve substantial risk and uncertainty."). Plaintiffs are confident in the merits of their claims and believe they would prevail in this matter. However, serious questions of law and fact exist. Data breach litigation remains a novel and ever-changing area of the law, and few, if any, such cases have advanced all the way to trial. Numerous courts have noted that legal and factual uncertainty in these cases supports approval of data breach class settlements. *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 2020 WL 256132, at *7 (N.D. Ga. Mar. 17, 2020) (identifying disputed legal issues and challenges in data breach class actions); *In re Sonic Corp. Customer Data Sec. Breach Litig.*, No. 1:17-MD-2807, 2019 WL 3773737, at *6 (N.D. Ohio

Aug. 12, 2019) ("[t]he realm of data breach litigation is complex and largely undeveloped. It would present the parties and the Court with novel questions of law"). Even if the Court certified a litigation class, there is a risk of de-certification or appeal on the certification issue, and no guarantee that class status would be maintained. The case could also be dismissed during summary judgment proceedings. At trial, the jury could award a defense verdict and the class could receive nothing at all. The Settlement accounts for these realities now, rather than later, and gets excellent benefits into Class Members' hands while eliminating the risk of non-recovery.

2. Judgment of Counsel, Extent of Support from the Parties, and Presence of Good Faith Bargaining (*Colt* factors 2-4)

Colt factors two through four—the extent of support of the parties, the judgment of counsel, and whether the parties bargained in good faith—strongly support approval.

First, as discussed above, the Settlement is supported by the parties and it has received strong support from the Settlement Class, with only one opt out and a single objection, a fact which is indicative of a class's approval of a proposed settlement. *See, e.g., In re Currency Conversion Fee Antitrust Litig.*, 2009 WL 3415155, at *123 (S.D.N.Y. Oct. 22, 2009) (where less than 1% of members opted out or filed objections, the reaction was "extraordinarily positive … and weighs in favor of settlement"); *In re Initial Public Offering Sec. Litig.*, 671 F. Supp. 2d at 485 (S.D.N.Y. 2009) ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.") (citations omitted). Here, the one opt out and one objection, combined, account for 0.00065% of the Settlement Class Members.

Second, Class Counsel has concluded that the proposed settlement is fair, reasonable, and adequate, particularly given the risks, costs, and uncertainties of continued litigation. New York courts give counsel's views regarding settlement considerable weight, *Pressner v. MortgageIT Holdings, Inc*., No. 602472/2006, 2007 WL 1794935, at *2 (Sup. Ct., N.Y. Cnty. May 29, 2007).

Plaintiffs submit that the experience and expertise of Class Counsel here makes this factor weigh even more heavily in favor of approval. Ferich Decl. ¶ 14; Dkt. 35, Wolfson Fee Decl. ¶¶ 47-65 & Ex. A; Dkt. 36, Parkhill Fee Decl. ¶¶ 14–18 & Ex. A.

Third, the Settlement was reached after hard-fought litigation, and a contentious mediation involving experienced and well-informed counsel, with the assistance of a respected mediator, Rodney Max of Upchurch Watson White & Max Mediation Group. *Gordon,* 46 N.Y.S.3d at 567 (courts should presume that negotiations have been conducted at arm's length and in good faith absent evidence to the contrary). The Settlement's fairness was confirmed by the informal discovery conducted as part of the Settlement negotiation process. Ferich Decl. ¶ 5.

As demonstrated above, the combined experience of the firms and attorneys involved demonstrate that the Settlement Class Members were well-represented at the bargaining table. *Yang v. Focus Media Holding Ltd.*, No. 11-CIV-9051, 2014 WL 4401280, at *5 (S.D.N.Y. Sept. 4, 2014). There are no indications of collusive negotiations, and the Parties have not agreed to a "clear sailing" provision whereby Empress would agree to not oppose attorneys' fees, costs, expenses, and Service Awards. Furthermore, the Settlement Fund is non-reversionary, and upon the Effective Date, no portion of the fund will ever be returned to Empress and/or its insurers. SA ¶ 3.14. The second, third, and fourth *Colt* factors support final approval.

3. The Complexity of the Factual and Legal Issues Supports Approval (*Colt* factor 5)

Finally, under the fifth *Colt* factor, courts look to the complexity and nature of the case (which is closely related to Plaintiffs' likelihood of success). *Saska v. Metro. Museum of Art*, 54 N.Y.S.3d 566,570 (Sup. Ct., N.Y. Cnty. 2017) (evaluating 1st and 5th *Colt* factors, and granting approval); *City Trading Fundv. Nye*, 72 N.Y.S.3d 371,393 (Sup. Ct., N.Y. Cnty. 2018) (same).

Class actions, like the instant action dealing with complex data security issues, have a "reputation as being most complex." *Rosenfeld v. Lenich*, No. 18-CV-6720, 2021 WL 508339, at *5 (E.D.N.Y. Feb. 11, 2021) (internal quotation marks and citation omitted); *see also In re Sonic*, *supra*; *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 315 (N.D. Cal. 2018) ("many of the legal issues presented in . . . data-breach case[s] are novel"). Absent Settlement, Plaintiffs would have had to "to survive summary judgment, prevail at trial, and secure an affirmance of their victory on appeal in order to recover damages. Moreover, they would also need to certify and maintain the class, over the [] Defendant's possible opposition." *Rosenfeld*, 2021 WL 508339, at *5. Courts have consistently held that, unless the proposed settlement is clearly inadequate, the acceptance and approval thereof is preferable to the continuation of lengthy and expensive litigation with uncertain results. *Velez v. Novartis Pharms. Corp.*, No. 04-CIV-09194, 2010 WL 4877852, at *14 (S.D.N.Y. Nov. 30, 2010) ("[L]itigation inherently involves risks, and the purpose of settlement is to avoid uncertainty.").

This case is no exception. As discussed above, trial is a risky and labor-intensive undertaking. Plaintiffs anticipate that Defendant would continue to contest the matter at every opportunity and on all fronts. Plaintiffs would have to establish that Defendant was negligent in maintaining adequate data security measures, which would involve a battle of the experts regarding highly complex technical issues surrounding the security of computer databases and cyberattacks. *See*, *e.g.*, *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 426-27 (S.D.N.Y. 2001) ("Plaintiffs' Counsel recognize the possibility that a jury could be swayed by experts for Defendants, who could minimize or eliminate the amount of Plaintiffs' losses."). Indeed, while courts have granted class certification of data breach class actions in the past, others have declined to do so. *See*, *e.g.*, *Dolmage v. Combined Ins. Co. of Am.*, No. 14-C-3809, 2017 WL

1754772, at *9 (N.D. Ill. May 3, 2017) (denying certification of data breach class action because, *inter alia*, case "will require individualized damages inquiries for each class member."). The complexity of the issues presented by this data privacy litigation supports final approval.

4. The Proposed Settlement Is in the Best Interests of the Settlement Class as a Whole (*Gordon* factor 1)

The first additional approval factor under *Gordon* entails a consideration of "whether the proposed settlement is in the best interests of the putative settlement class as a whole." 46 N.Y.S.3d at 568. This factor clearly weighs in favor of approval. The Settlement provides Class Members immediate relief in the form of cash payments and credit monitoring, and robust injunctive relief (SA ¶¶ 2.1-3.4), while avoiding the risk, delay, and uncertainty of continued litigation. *Saska* 54 N.Y.S.3d at 570 (*Gordon* factor satisfied where settlement class was being provided with the relief sought in the litigation). As for those Class Members who desire not to participate in the Settlement, they had the right to opt out. SA ¶ 6.8. Only one person elected to do so. On the other hand, thousands of Class Members have already decided to participate in the Settlement. Azari Decl. ¶ 24. The number of participating Settlement Class Members will continue to increase through the May 8, 2024 extended claims deadline.

The Settlement provides a comprehensive benefits package for Settlement Class Members, while giving Class Members the right to participate or exclude themselves. The Settlement is in the best interests of the Settlement Class Members and *Gordon* factor 1 supports approval.

5. The Proposed Settlement Is in the Best Interests of the Corporation (*Gordon* factor 2)

The second additional approval factor under *Gordon* is a consideration of "whether the proposed settlement is in the best interest of the corporation." 46 N.Y.S.3d at 568. This *Gordon* factor was born out of, and in that case was analyzed in the context of, a shareholders' class action

settlement; however, other courts in New York have analyzed the factor in the context of a consumer class action. In *Saska*, the New York Supreme Court concluded that where a class action settlement allowed the defendant-museum to "obtain[] prompt certainty over" its challenged practices concerning museum admission pricing, the second *Gordon* factor favored approval. 54 N.Y.S.3d at 570–71.

The same reasoning applies here. The Settlement also allows Empress to obtain certainty over its liability and eliminate the prospect of future legal exposure concerning the Network Incident. Further, the Settlement provides for robust business practices enhancements that will improve Empress's data security going forward and benefit all Settlement Class Members (and future Empress customers), irrespective of whether they file a claim. This is in the best interest of Empress, in addition to the Settlement Class. The second *Gordon* factor favors final approval.

B. <u>The Objection Has No Merit and Should Be Overruled</u>

While Class Counsel appreciate the objector's thoughts and comments, respectfully, the Objection of David Buchwald ("Objection" or "Obj.") (Dkt. 38) is without merit and should be overruled.

Mr. Buchwald advances three primary positions as the basis for his Objection. *First*, Buchwald claims he, individually, never received confirmation of his specific personal information that was or may have been disclosed. Dkt. 38, Obj. at 2. This is incorrect. As an initial matter, Mr. Buchwald acknowledges he received the notification letter from Empress in September 2022 following the Network Incident. *Id.* at 2 n.1. In that letter, Empress indicated the nature of his potentially disclosed personal information, just as it did for every other Class Member who was sent a similar letter. Mr. Buchwald subsequently corresponded with Epiq by writing a letter requesting confirmation of his impacted data. *Id.* at 2 & Ex., attached Jan. 24, 2024 Letter. Epiq is

not the Defendant, so it does not possess or have access to the highly sensitive information, or the nature of that information. Nonetheless, in attempt to resolve Mr. Buchwald's inquiry, Epiq responded to Mr. Buchwald in a February 28, 2024 letter and confirmed that potentially compromised information might include Social Security numbers, names, addresses, dates of birth, driver's license numbers, client identification numbers, medical diagnostic and treatment information, and health insurance information. *Id.* at Ex., Feb. 28, 2024 letter.

Then, on March 22, 2024, counsel for Defendant Empress sent Mr. Buchwald a communication confirming the nature of the potentially disclosed information, which was also identified in Empress's initial letter and Epiq's February 28 response letter. *See* Exhibit 3 attached hereto, a true and correct copy of the March 22 letter sent by Empress's counsel to Mr. Buchwald. Mr. Buchwald's request is appreciated, and the specific information he seeks will be provided by Empress.

Second, Mr. Buchwald "object[s] to the settlement in part, specifically to the extent it does not provide members of the Settlement Class access to whatever information Empress has about them that was apparently breached." Dkt. 38, Obj. at 2. In his view, "each member of the Settlement Class should be entitled to learn what information Empress has about them" and "Empress should be required, as a term of any settlement, to provide a secure means for members of the Settlement Class to access the information related to them that they believed was accessed and/or copied in the data breach." *Id.* at 2. This is Mr. Buchwald's only *true* objection to the Settlement—that it does not offer Class Members, individual by individual, the opportunity to physically confirm the nature of their potentially compromised data. *Id*. Simply stated, Mr. Buchwald wants different relief than what the Settlement provides. Notwithstanding that the post-breach notice letters sent by Empress identified the universe of data potentially compromised, the

Settlement is a negotiated package of relief, and Mr. Buchwald's wish that the Settlement included different or additional terms of relief says nothing of the Settlement's fairness. *In re CenturyLink Sales Pracs. & Sec. Litig.*, No. CV-17-2832, 2020 WL 7133805, at *9 (D. Minn. Dec. 4, 2020) (denying objector's objection to the relief provided under the settlement, noting that objector had the ability to "opt out and individually pursue more or different relief"); *Saccoccio v. JP Morgan Chase Bank, N.A.*, 297 F.R.D. 683, 700 (S.D. Fla. 2014) ("[T]o the extent that these objectors believe that they are entitled to additional relief . . . , they were entitled to opt out of the settlement. They chose not to do so."); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 343 (S.D.N.Y. 2005). Class members have all the information needed to take measures to protect themselves, e.g., by utilizing the offered credit monitoring package offered as a benefit under the Settlement, or obtaining other protections. Mr. Buchwald's objection lacks merit.

Mr. Buchwald's objection is also, essentially, a demand for more information. But courts in the Second Circuit recognize that class action settlement objectors do not have an automatic right to discovery. *Casey v. Citibank*, No. 1:13-cv-353, 2014 WL 4120599, at *1 (N.D.N.Y. Aug. 21, 2014) (citation and internal quotation marks omitted) ("Objectors to a proposed settlement agreement do not have an automatic right to discovery or an evidentiary hearing in order to substantiate their objections."). Limited objector discovery *may* be permitted, "but only if there is some evidence that the settlement may be collusive or does not adequately reflect the interests of the class members." *Id*. (denying objector request for settlement discovery). Here, there is no basis for discovery because Mr. Buchwald offers no evidence of collusion (there was none) or that the Settlement is inadequate.

Third, Mr. Buchwald raises a concern with Epiq's Settlement email inbox issuing bounce-back notices in response to his emails. Dkt. 38, Obj. at 3. While Class Counsel appreciates Mr.

Buchwald raising this issue, it is not a basis to deny final approval. The Settlement Website and Settlement email address were tested prior to being launched, after the Court granted preliminary approval, and, at that point, both worked. Azari Decl. ¶ 22; Ferich Decl. ¶ 9. Due to a technical issue, there was a period where the Settlement email inbox did not work as intended. Azari Decl. ¶ 22. This issue has been corrected and the email box is working and fully operational. *Id*.

The email inbox issue, while unfortunate, does not impact the assessment of whether the Settlement is fair, reasonable, and adequate. Further, the issue does not relate to the success of the notice. As indicated by the notice expert in his declaration, notice to the Class Members was carried out in accordance with the Preliminary Approval Order, experienced an excellent result, and satisfies due process and the requirements of CPLR § 904. Azari Decl. ¶¶ 7, 27, 28. The email inbox issue did not preclude Class Members from submitting claims, opt outs, objections, or questions to Class Counsel. Nevertheless, and out of abundance of caution and with the interests of the Class in mind, the parties to the Settlement have agreed to extend the claims deadline by 30 days to allow for anyone who would like to submit a Claim Form or email the administrator to do so. Ferich Decl. ¶ 11.

Class Members who wanted to object to or opt out of the Settlement had all the information they needed to do so in the notice forms, which are available on the public Settlement Website. Furthermore, if a Class Member wanted to communicate with Epiq or counsel for either party, notwithstanding the technical issue with the email address, a Class Member could have written to or emailed Class Counsel or Empress's counsel, written to Epiq, or called counsel for either party. Indeed, Mr. Buchwald wrote a letter to Epiq and sent his Objection to Class Counsel via U.S. mail. Dkt. 38, Obj. at 3 (acknowledging letter communications with Epiq). Epiq has not received any

other objections, nor has it been made aware of any potential Class Member who sought to object being unable to do so as a result of the technical issues with the email address. Azari Decl. ¶ 22.

For all the foregoing reasons, Mr. Buchwald's Objection should be overruled.

C. The Court Should Grant Final Certification of the Settlement Class

The Court preliminarily certified the Settlement Class in its Preliminary Approval Order, finding that the requirements of CPLR §§ 901 and 902 elements were all met. Dkt. 20, Prelim. App. Order ¶¶ 18-20 ("The Court finds, only for purposes of preliminarily approving the settlement, that the requirements of CPLR § 901, *et seq.* are satisfied and that a class action is an appropriate means of resolving this litigation."). Nothing has occurred that would change the Court's previous determination that "[a]ll the prerequisites for class certification under CPLR §§ 901(a)(1)-(5) and 902 are present and satisfied." *Id.* ¶ 19. Nevertheless, Plaintiffs briefly revisit and analyze the §§ 901 and 902 elements below.

1. The Requirements of CPLR § 901 Are Satisfied

First, pursuant to CPLR § 901(a)(1), numerosity is satisfied as the Settlement Class consists of approximately 307,687 persons.[3] Pursuant to CPLR § 901(a)(2), there are numerous issues of fact and law common to the Settlement Class, including whether: (a) Defendant had a duty to safeguard the Class Members' Personal Information; (b) Defendant was negligent in maintaining adequate data security protocols to safeguard Class Members' Personal Information; and (c) the Class Members were all injured by having their Personal Information stored on Defendant's systems stolen by or disclosed to unauthorized third parties, among other issues. Those common

[3] Epiq de-duplicated the Settlement Class List and determined that there are 304,362 unique, identified Class member records. Azari Decl. ¶ 10.

questions predominate individual questions. The Settlement Class is sufficiently cohesive, and each Class Member's claims rise or fall with, and can be proven by resort to, common evidence.

Under CPLR § 901(a)(3), Plaintiffs' claims are typical of the Class. Each Settlement Class Member's claims and legal arguments arise out of the same event—the Network Incident. Precisely the same event occurred here to the entire class, and the Class Members were subjected to the same alleged wrongdoing, which was uniform to the Class.

The CPLR § 901(a)(4) adequacy requirement is also satisfied here. Plaintiffs' claims are co-extensive with those of the Settlement Class. Plaintiffs share a common interest with the Settlement Class in establishing liability and securing the maximum possible recovery. Plaintiffs have taken and continue to take their obligations to the Settlement Class seriously, and are committed to the best interests of the Settlement Class. Ferich Decl. ¶ 8. Further, Class Counsel are highly experienced class action litigators with specific expertise in data privacy and data breach class actions, and they will (and have) adequately represented the Settlement Class. *See generally* Dkt. 35, Wolfson Fee Decl., Ex. A; Dkt. 36, Parkhill Fee Decl., Ex. A. The Court already confirmed Class Counsel's adequacy by previously appointing them in the settlement process. Dkt. 20, Prelim. App. Order ¶ 24.

Finally, the CPLR § 901(a)(5) superiority requirement is satisfied. The relatively insignificant amount of damages suffered by Class Members makes individual actions cost prohibitive. A class action, and class resolution here, is the only method to ensure the fair and efficient adjudication of this case. Accordingly, and as discussed in more detail in the granted motion for preliminary approval, the requirements of CPLR § 901 are satisfied.

2. The Requirements of CPLR § 902 Are Satisfied

In addition to the CPRL § 901 prerequisites, this Court must also consider CPLR § 902, which includes the following factors:

> (1) the interest of class members in individually controlling the prosecution;
> (2) the impracticability or inefficiency of prosecuting or defending separate actions;
> (3) the extent and nature of any litigation concerning the controversy 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.

In re HSBC, 29 N.Y.S.3d 847, at *8–9.

As to the first two § 902 factors, as set forth above, the cost of individual litigation is prohibitive. As to the third § 902 factor, as explained above, after *Finn* was filed in the Southern District of New York, numerous Later-Filed Actions were filed in New York state court (subsequently removed to federal court) and New York federal court. Ferich Decl. ¶ 4. All Later-Filed Actions were subsequently stayed by Judge Kenneth M. Karas with direction from the Court for Ahdoot & Wolfson to proceed with settlement efforts on behalf of Class Members. *Id.* Because this action was first filed, is most advanced, and the federal court provided an imprimatur to Class Counsel to attempt to resolve this matter on behalf of the Class Members, these factors weigh in favor of final approval of the Settlement. *See*, *e.g.*, *In re HSBC*, 29 N.Y.S.3d 847, at *8–9.

As to the fourth § 902 factor, Empress is a New York corporation located in Yonkers. Further, the Court has already issued rulings of substance in this litigation, making this a highly desirable forum in which to concentrate the litigation. *Pino Alto Partners v. Erie Cnty. Water Auth.*, 21 Misc. 3d 1114(A), 7, 873 N.Y.S.2d 236 (Sup. Ct. 2008) *aff'd*, 67 A.D.3d 1375, 887 N.Y.S.2d 910 (2009). The fifth and final § 902 factor—the difficulties to be encountered in the management of a class action—does not factor here, as the class vehicle (and class settlement) are

preferred and more manageable when compared to the cost prohibitive nature of individual actions and the reality that there are nearly 308,000 individual Class Members.

3. Notice of the Settlement Satisfies Due Process

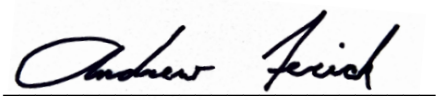
The method for processing Settlement Class Members' claims weighs in favor of final approval. The CPLR § 904 requires that reasonable notice of the commencement of a class action shall be given to the class in such a manner as the Court directs. As discussed in greater detail above, the Notice Plan was carried out in the manner approved by this Court in the Court's Preliminary Approval Order. *See generally* Azari Decl. Notice was successfully disseminated to the Class with an estimated reach of 87.3%, and the response was overwhelmingly positive.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an Order (1) finally certifying the Settlement Class for settlement purposes; (2) striking or overruling the Buchwald objection; (3) granting final approval of the Settlement; (4) finding that Notice has been conducted in accordance with the Court-approved notice plan and due process; (5) granting Plaintiffs' Motion for Attorneys' Fees, Costs, and Expenses, and for Class Representative Service Awards (Dkt. No. 33); and (6) dismissing with prejudice Plaintiffs' and Settlement Class Members' claims against Defendant relating to the Network Incident.

Dated: March 22, 2024

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 22nd day of March, 2024, a true and correct copy of the above and foregoing was filed with the Clerk of Court via the Court's electronic filing system for electronic service on all counsel of record.

The undersigned also certifies that on the 22nd day of March, 2024, a true and correct copy of the above and foregoing will be sent via electronic mail to the following:

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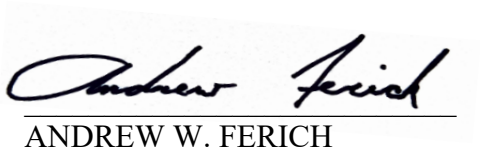


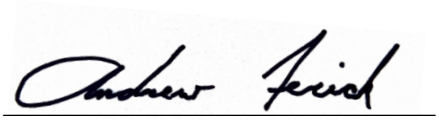
ANDREW W. FERICH

CERTIFICATE OF COMPLIANCE

Pursuant to CRR-NY 202.8b, the undersigned counsel certifies that the Memorandum of Law in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement was prepared, in Word, using Times New Roman 12-point typeface and contains 6,819 words, excluding the parts of the document that are exempted under 202.8b(b).

I declare under the penalty of perjury that the foregoing is true and correct.

DATED this 22nd day of March, 2024.



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