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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

NOREEN PERDUE, ELIZABETH DAVIS-BERG, DUSTIN MURRAY, CHERYL ELLINGSON, ANGELA TRANG, GORDON GREWING, and MELISSA WARD individually and on behalf of all others similarly situated, Plaintiffs, v. HY-VEE, INC., Defendant.	Case No. 1:19-cv-01330-MMM CLASS ACTION JURY TRIAL DEMANDED

PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND INCORPORATED MEMORANDUM OF LAW

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I. INTRODUCTION

After hard-fought litigation and extensive settlement negotiations, Plaintiffs Noreen Perdue, Elizabeth Davis-Berg, Dustin Murray, Cheryl Ellingson, Angela Trang, Gordon Grewing and Melissa Ward ("Plaintiffs"), reached a class action settlement agreement with Defendant Hy-Vee, Inc. ("Hy-Vee").

On January 25, 2021, the Court granted preliminary approval of the Settlement and ordered that notice be provided to the Settlement Class[1] in accordance with the Notice Program. *See* Order Conditionally Certifying a Settlement Class, Granting Preliminary Approval of the Class Action Settlement, Approving the Form and Manner of Notice, and Scheduling Final Approval Hearing, ECF No. 62 ("Preliminary Approval Order"). Class Counsel and the Claims Administrator have complied with all of the notice and other requirements in the Preliminary Approval Order, and are pleased to report that the response from the Class to the Settlement has been overwhelmingly positive: thousands of Claim Forms were timely submitted by Class Members, and only one objection to the Settlement was made.

As discussed in detail in Plaintiffs' preliminary approval motion, the Settlement provides meaningful benefits to Class Members' and is fair, reasonable, and adequate. Fed. R. Civ. P. 23(e). As such, Plaintiffs respectfully request that the Court grant final approval of the Settlement.

II. BACKGROUND

A. Nature of the Litigation

Between 2018 and 2019, Hy-Vee suffered a cyberattack on its point-of-sale system that accepts payment cards. Through the operation of a type of malware, the criminal hacker had the

[1] Unless otherwise indicated, all capitalized items have the same meaning ascribed to them in the Settlement Agreement ("Settlement Agreement" or "SA"), ECF No. 57-1.

ability to capture and steal payment card numbers when a card was swiped at an affected point-of-sale device between December 14, 2018 and August 2, 2019, although the specific dates during which data was at risk vary on a location-by-location basis. The cyberattack affected certain Hy-Vee fuel pumps, drive-thru coffee shops, and restaurants (which included Hy-Vee Market Grille Expresses and Wahlburgers locations that Hy-Vee owns and operates, as well as the cafeteria at Hy-Vee's West Des Moines corporate office).[2]

Plaintiffs Noreen Perdue and Dustin Murray subsequently commenced this lawsuit on October 15, 2019. The operative Second Amended Complaint ("SAC") was filed on December 30, 2019. ECF No. 21. Hy-Vee moved to dismiss the SAC, which the Court granted, in part, and denied in part, on April 20, 2020. ECF No. 41. Pursuant to the Court's opinion, many of Plaintiffs' claims survived, including claims brought pursuant to various state consumer protection statutes.

B. Settlement Negotiations

After the ruling on Hy-Vee's motion to dismiss, the parties began discovery while discussing the possibility of reaching a negotiated class-wide resolution of Plaintiffs' claims. Following the transmission of a demand letter and exchange of mediation briefs, the parties participated in a full-day mediation session with Bennett G. Picker via videoconference on October 12, 2020.

The Settlement was reached only after Plaintiffs had conducted a thorough investigation, including with the assistance and consultation of their expert. By the time the parties reached a settlement in principle, Class Counsel had reviewed and analyzed thousands of documents produced by Hy-Vee through four separate productions, served seven third-party subpoenas,

[2] The facts and procedural history of this litigation was set forth at length in Plaintiffs' motions for preliminary approval and for approval of their attorneys' fees, costs, expenses and representative service awards. *See* ECF Nos. 58 and 68.

taken a Fed. R. Civ. P. 30(b)(6) deposition of a Hy-Vee corporate designee, and also worked with Plaintiffs on responding to Hy-Vee's written discovery.

All negotiations regarding settlement in this case have been conducted at arm's length, in good faith, and free of any collusion.

C. Settlement Benefits

As more fully explained in the Settlement, all Settlement Class Members who submit a valid claim during the claim period will be entitled to expense reimbursement of up to $225 (in total) for the following categories of potential expenses incurred as a result of the Data Breach:

- reimbursement of up to three (3) hours of documented lost time (at the rate of $20 per hour) spent dealing with replacement card issues or in reversing fraudulent charges (only if at least one full hour was spent and if it can be documented with reasonable specificity);
- an additional $20 payment for each credit or debit card on which documented fraudulent charges were incurred that were later reimbursed;
- unreimbursed bank fees, card reissuance fees, overdraft fees, late fees, charges related to unavailability of funds, and over-limit fees;
- long distance telephone charges, postage, cell minutes (if charged by the minute), text messages (if charged by the message), and Internet usage charges (if charged by the minute or by the amount of data usage);
- unreimbursed charges from banks or credit card companies;
- interest on payday loans due to card cancelation or due to over-limit situation;
- costs of credit report(s); and
- costs of credit monitoring and identity theft protection.

SA ¶ 2.1.

Any Settlement Class Members who experienced extraordinary expenses will be eligible for reimbursement in the amount up to $5,000 per claim. *Id.* ¶ 2.2.

Significantly, all Settlement Class Members will receive the benefit of forward-looking relief with respect to Hy-Vee's security enhancements, which will benefit Class Members regardless of whether they submit a claim for reimbursement. SA, at ¶ 2.4.

D. Payment of Notice and Administration Costs, Service Awards, and Attorneys' Fees, Costs, and Expenses

The Settling Parties did not discuss the payment of attorneys' fees, costs, expenses and service awards to Plaintiffs until after the substantive terms of the Settlement had been agreed upon. Johns Decl. ¶ 15;[3] *see also* SA ¶ 7.1. Separate from any payment to Class Members under the provisions described above and in the Settlement Agreement, Hy-Vee has also agreed to pay any and all notice and administration costs associated with the Settlement. SA at ¶ 2.6. Hy-Vee has also agreed to pay, subject to Court approval, attorneys' fees, costs, and expenses, and service awards to the Class Representatives. *Id.* at ¶ 7.3.

On April 23, 2021, Plaintiffs filed their Motion for Award of Attorneys' Fees, Reimbursement of Costs and Expenses, and Payment of Representative Plaintiff Service Awards ("Fee Motion"). ECF No. 68. Plaintiffs and Class Counsel respectfully request the Court approve the payment of attorneys' fees of $727,000; reimbursement of $12,000 for costs and expenses; and service awards of $2,000 to each of the Class Representatives. The Court-approved notice provider, Kroll, uploaded Plaintiffs' Fee Motion to the Settlement website the next day. No objections to the Fee Motion were received.

[3] References to the "Johns Decl." are references to the Declaration of Benjamin F. Johns submitted in conjunction with Plaintiffs' motion for preliminary approval, at ECF No. 57-2.

E. Preliminary Settlement Approval and Implementation of the Court-Approved Notice Plan

On January 25, 2021, the Court granted Plaintiffs' preliminary approval motion and scheduled a final approval hearing for July 19, 2021. ECF No. 62. In granting preliminary approval of the Settlement, the Court conditionally certified the following Class pursuant to Fed. R. Civ. P. 23(a) and (b)(3):

> All persons residing in the United States who used a payment card to make a purchase at an affected Hy-Vee point-of-sale device during the Security Incident, which as described in the definition of Security Incident occurred during the time frames and at the locations set forth in Exhibit C to the Settlement Agreement and Appendix A to the Publication Notice. The Settlement Class specifically excludes: (i) Hy-Vee and its officers and directors; (ii) all Settlement Class Members who timely and validly request exclusion from the Settlement Class; (iii) the Judge assigned to evaluate the fairness of this settlement; (iv) the attorneys representing the Settling Parties in the Litigation; (v) banks and other entities that issued payment cards which were utilized at Hy-Vee during the Security Incident; and (vi) 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 Security Incident or who pleads *nolo contendere* to any such charge.

SA, at ¶ 1.26.

Pursuant to the Preliminary Approval Order, the parties implemented the Court-approved Notice Plan in coordination with Kroll (f/k/a Heffler Claims Group LLC). *See* Declaration of Jeanne C. Finegan ("Finegan Decl.") filed concurrently herewith, at ¶ 2. Pursuant to the Notice Program, direct notice was sent via email or postcard. Postcard or email notices were successfully sent to more than 80 percent of all Settlement Class Members. *Id.* at ¶ 4. Kroll established a Settlement Website, www.grocerysecurityincidentsettlement.com, operational as of February 20, 2021, where Class Members could obtain important information about the Settlement and submit/upload Claim Forms electronically. *Id.* at ¶ 29. Kroll also established a toll-free number that provided Class Members with additional information regarding the Settlement. *Id.* at ¶ 30.

Finally, notice was sent to the relevant governmental agencies as required by the Class Action Fairness Act. *Id.* at ¶¶ 6-8.

Class Counsel have worked diligently alongside Kroll to maximize exposure of Class Members to the Settlement and claims process. Among other things, Class Counsel have reviewed periodic reports from, and conferred with, Kroll about the progress of the claims process and responded to inquiries from members of the Class. *Id.* at ¶¶ 18-22. As of the June 24, 2021 deadline, there have been thousands of claims submitted by class members. There has been only one objection and only 34 exclusions. *Id.*, at ¶ 22-23.

III. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE, AND WARRANTS FINAL APPROVAL

A. Legal Standard

"Federal courts naturally favor the settlement of class action litigation." *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996). Indeed, "[i]t is axiomatic that the federal courts look with great favor upon the voluntary resolution of litigation through settlement. In the class action context in particular, there is an overriding public interest in favor of settlement." *Armstrong v. Bd. of Sch. Dirs. of City of Milwaukee*, 616 F.2d 305, 312–13 (7th Cir. 1980), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998) (internal quotations omitted).

A class action settlement may only be approved after a hearing and a finding that the settlement is fair, reasonable, and adequate. FED. R. CIV. P. 23(e)(1)(C). To determine whether a settlement satisfies the requirements of Rule 23(e), courts consider the following factors:

> (A) the class representatives and Co-Lead Class Counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment;

> and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other.

FED. R. CIV. P. 23(e)(2). These considerations overlap with the factors previously articulated by the Seventh Circuit prior to the amendment of Rule 23 in 2018, which include: (1) the strength of the plaintiff's case compared to the terms of the settlement; (2) the complexity, length, and expense of continued litigation; (3) the amount of opposition to the settlement; (4) the presence of collusion in gaining a settlement; (5) the stage of the proceedings and the amount of discovery completed. *Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12-0660-DRH, 2018 U.S. Dist. LEXIS 210368, at *12-13 (S.D. Ill. Dec. 13, 2018) (citing *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006); *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1082 (7th Cir. 1997)). The record in this case makes clear that approval of the Settlement is warranted under these factors.

B. The Settlement Satisfies the Rule 23 and Seventh Circuit Factors for Approval

1. The Settlement Class Is Well Represented

Class Counsel have extraordinary experience litigating data breach class actions and are well-versed with the legal claims at issue and the risks of this case. Since the inception of this litigation, they have worked diligently to advance Plaintiffs' and the other Settlement Class Members' interests. They also drafted the First and the Second Amended Class Action Complaints, opposed Hy-Vee's motion to dismiss, served and responded to discovery, and took the deposition of a Hy-Vee corporate designee.

Prior to reaching the Settlement, Class Counsel and counsel for Hy-Vee engaged in several rounds of settlement negotiations over the course of months, including a full day virtual mediation session with Mr. Picker. Throughout those negotiations, Class Counsel pursued informal discovery from Hy-Vee that was appropriately targeted at information relevant to the Settlement. *See In re*

Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 459 (9th Cir. 2000) ("In the context of class action settlements, formal discovery is not a necessary ticket to the bargaining table where the parties have sufficient information to make an informed decision about settlement.") (citations and quotations omitted); *see also* Manual for Complex Litigation (Fourth) § 13.12 (2004) (recognizing that the benefits of settlement are diminished if it is postponed until discovery is completed and approving of targeting early discovery at information needed for settlement negotiations); *id.* § 11.423 (courts are to "encourage counsel to exchange information, particularly relevant documents, without resort to formal discovery").

Pursuant to the confirmatory discovery process provided for by the Settlement, Class Counsel requested, received from Hy-Vee, and reviewed several important documents relating to the Data Breach and Hy-Vee's security measures before and after the Date Breach. Class Counsel also deposed the Chief Technology Officer for Hy-Vee regarding the facts and circumstances surrounding the Data Breach and Hy-Vee's response thereto. The process confirmed Class Counsels' view that the Settlement is fair, reasonable, and adequate.

This factor favors approval of the Settlement.

2. The Settlement Was Reached as a Result of Hard-Fought, Arm's Length Negotiations

The negotiations in this matter occurred at arm's length with the assistance of an experienced mediator. As discussed above, the parties reached an agreement on all material terms after weeks of negotiation, including an all-day mediation before Bennett G. Picker. The arm's-length nature of the settlement negotiations and the involvement of an experienced mediator such as Mr. Picker supports the conclusion that the Settlement was achieved free of collusion, and merits final approval. *See Alves v. Main,* No. 01-789 (DMC), 2012 U.S. Dist. LEXIS 171773, at *73-74 (D.N.J. Dec. 4, 2012) ("The participation of an independent mediator in settlement negotiations

'virtually insures that the negotiations were conducted at arm's length and without collusion between the parties.'").

Throughout the negotiations, Class Counsel and counsel for Hy-Vee fought hard for the interests of their respective clients. This factor supports approval of the Settlement. *See Hale*, 2018 U.S. Dist. LEXIS 210368, at *14 (citing *Great Neck Capital Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, L.L.P.*, 212 F.R.D. 400, 410 (E.D. Wis. 2002) ("A strong presumption of fairness attaches to a settlement agreement when it is the result of this type of [arm's length] negotiation.")).

3. The Settlement Benefits Are Excellent, Taking Into Consideration the Costs, Risks, and Delay of Trial and Potential Appeals

The "most important factor relevant to the fairness of a class action settlement" is the "strength of plaintiff's case on the merits balanced with the amount offered in the settlement." *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006). "Because the essence of settlement is compromise, courts should not reject a settlement solely because it does not provide a complete victory to plaintiffs." *In re AT & T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 347 (N.D. Ill. 2010) (citation omitted).

The Settlement will provide Class Members with significant and timely benefits. The monetary benefits are in line with those of other settlements in data breach class actions that have been approved by other courts. *See, e.g. Orr v. InterContinental Hotels Group, PLC*, 17-cv-1622, ECF No. 81 (N.D. Ga. Sept. 2, 2020) (approving settlement that made available to class members payments of up to $250 reimbursement for ordinary expenses and up to $3,500 for class members who experienced unreimbursed fraudulent charges); *Gordon*, 2019 U.S. Dist. LEXIS 215430, at *4 (approving settlement that made available to class members payments of up to $250 reimbursement for four categories of potential expenses, and up to $10,000 for class members who

experienced extraordinary expenses); *Bray v. Gamestop Corp*., No. 1:17-cv-01365-JEJ, 2018 U.S. Dist. LEXIS 226221, at *4 (D. Del. Dec. 19, 2018) (approving settlement that would reimburse up to $235 per claim including, *inter alia*, expenses for lost time, payment for each card on which fraudulent charges incurred, costs of obtaining credit report, costs of credit monitoring and identity theft protection, as well as up to $10,000 per claim for extraordinary expenses).

Furthermore, forward-looking relief obtained with respect to Hy-Vee's data security practices also provides substantial non-monetary benefits to Class Members. *See* SA, at ¶ 2.4; *Lucas v. Vee Pak, Inc.*, No. 12-CV-09672, 2017 U.S. Dist. LEXIS 209872, at *34 (N.D. Ill. Dec. 20, 2017) (recognizing injunctive relief, which benefitted the class by correcting and improving the practices that gave rise to the claims asserted in the case, as increasing the value of the settlement). The forward-looking relief provided by the Settlement is particularly valuable because it commits Hy-Vee to certain enhanced security measures and protection of personal information—a benefit that is available to all Class Members, regardless of whether or not they submit a claim for other benefits.

Plaintiffs and Class Counsel believe the claims asserted in the litigation have merit. They also recognize, however, the difficulties in establishing liability on a class-wide basis through summary judgment or even at trial and in achieving a result better than that offered by the Settlement here. "Data breach cases such as the instant case are particularly risky, expensive, and complex, *see In re Sonic Corp. Customer Data Sec. Breach Litig.*, No. 1:17-md-2807, 2019 U.S. Dist. LEXIS 135573, 2019 WL 3773737, at *7 (N.D. Ohio Aug. 12, 2019), and they present significant challenges to plaintiffs at the class certification stage." *Gordon v. Chipotle Mexican Grill, Inc.*, No. 17-cv-01415-CMA-SKC, 2019 U.S. Dist. LEXIS 215430, at *3 (D. Colo. Dec. 16, 2019). *See also Fulton-Green v. Accolade, Inc.*, No. 18-274, 2019 WL 4677954, at *4 (E.D. Pa.

Sept. 24, 2019) (recognizing in granting final approval to a settlement that "[t]his is a complex case in a risky field of litigation because data breach class actions are uncertain and class certification is rare"). Although Plaintiffs are confident that they could overcome Hy-Vee's defenses at class certification and summary judgment, they concede that success is not guaranteed. "Regardless of the outcome of these proceedings, there can be no question that they would have added significant costs and delay." *Hale*, 2018 U.S. Dist. LEXIS 210368, at *17.

By contrast to the substantial risks associated with continued litigation, the Settlement compensates Class Members for their losses and protects them against future risks promptly. The immediate and substantial benefits provided by the Settlement weigh in favor of final approval.

4. The Method of Distributing Relief Supports Final Approval of the Settlement

Rule 23(e)(2)(C)(ii) requires consideration of "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims."

The Notice Program and Claim Form were designed to encourage the filing of valid claims by Settlement Class Members. To file a claim, Settlement Class Members only have to complete a Claim Form and submit it with documentation supporting any claimed losses. Settlement Class Members may submit claims online or through the mail. *See* Finegan Decl., at ¶ 21. The claims administrator, Kroll, is an experienced and nationally recognized class action administration firm. "This procedure is claimant-friendly, efficient, cost-effective, proportional and reasonable under the particular circumstances of this case." *Hale*, 2018 U.S. Dist. LEXIS 210368, at *19-20.

The methods of distributing relief to Settlement Class Members further support that the Settlement is fair, reasonable, and adequate.

5. The Terms of the Proposed Award of Attorneys' Fees Supports Final Approval of the Settlement

Rule 23(e)(2)(C)(ii) requires consideration of "the terms of any proposed award of attorney's fees, including timing of payment."

The terms of the proposed attorney's fee award under the Settlement is consistent with class action best practices. The Settling Parties did not discuss attorneys' fees until after all substantive elements of the Settlement were agreed upon. SA ¶ 7.1. The amount of any attorney's fee award is intended to be considered by the Court separately from the Court's consideration of the fairness, reasonableness, and adequacy of the Settlement. SA ¶ 7.6. Additionally, the attorneys' fees award shall be paid from the Settlement Fund within fourteen (14) days of the Effective Date of the Settlement—there is no quick-pay provision in the Settlement. SA ¶ 7.5.

In accordance with FED. R. CIV. P. 23(h), Plaintiffs' Fee Motion was filed on April 23, 2021, and posted on the Settlement website the next day. The deadline to object to the Settlement was May 24, 2021. No objection to Plaintiffs' Fee Motion was submitted. The terms of the proposed attorney's fee award support final approval of the Settlement.

6. The Settling Parties' Agreements

Rule 23(e)(3) provides that "parties seeking approval must file a statement identifying any agreement made in connection with the proposal." After months of negotiations, the Settling Parties executed the Settlement Agreement on January 12, 2021. There is no other agreement, aside from the Settlement itself, that must be considered pursuant to this factor.

7. The Settlement Treats Settlement Class Members Equitably

All Settlement Class Members are entitled to the same relief under the proposed Settlement. As the foregoing analysis demonstrates, the Settlement is fair, reasonable, and adequate, and should be granted final approval.

C. The Sole Objection to the Settlement Should be Overruled

Out of the millions of Settlement Class Members, Class Counsel received only one objection. The objection lacks merit and should be overruled.

The objection from Kimber Ingle criticizes the fact that the Settlement does not provide all affected class members with credit monitoring/identity theft protection for a specific period of time. ECF No. 66. However, her objection misapprehends the Settlement. In fact, the Settlement does provide for credit monitoring via expense reimbursement up to $225 for Settlement class members who purchased credit monitoring between December 13, 2018 and the Claims Deadline. SA ¶ 2.1. Ms. Ingle's comparison between this settlement and other data breach settlements that she and her husband were a part of does nothing to detract from the Settlement, which provides excellent and timely relief to the class and reflects the best available terms after weeks of negotiations.

Ms. Ingle's *pro se* objection suggests that the additional relief of free credit monitoring or identity theft protection would be better for the Class. "The relevant inquiry, however, 'is not whether a better benefit could theoretically be provided, but whether the settlement is 'fair, adequate and free from collusion.'" *In re Sears, Roebuck & Co. Front-Loading Washer Prods. Liab. Litig.*, No. 06 C 7023, 2016 U.S. Dist. LEXIS 25290, at *40 (N.D. Ill. Feb. 29, 2016) (citing *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 595 (N.D. Ill. 2011) (an objection "complaining that the settlement should be 'better,' … is not a valid objection")). "It is true that something could always be added to every class action settlement to make it more favorable to class members, but that is not the standard by which class action settlements should be measured." *Id.* (citing *Mangone v. First USA Bank*, 206 F.R.D. 222, 227 (S.D. Ill. 2001)).

Ms. Ingle's *pro se* objection misapprehends the benefits provided by the Settlement and is meritless. This Court should overrule the sole objection, and approve the Settlement as fair, reasonable, and adequate. *See In re Sears,* 2016 U.S. Dist. LEXIS 25290, at *38 ("The small number of class members who objected or opted out further supports the fairness and reasonableness of the settlement.").

IV. FINAL CERTIFICATION OF THE SETTLEMENT CLASS IS APPROPRIATE

"The ultimate decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement." FED. R. CIV. P. 23 advisory committee notes to 2018 amendments. "The fact that the parties have reached a settlement is relevant to the class-certification analysis." *Burnett v. Conseco Life Ins. Co.*, No. 1:18-cv-00200-JPH-DML, 2021 U.S. Dist. LEXIS 6510, at *11 (S.D. Ind. Jan. 13, 2021). "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial." *Id.* (citations omitted). A plaintiff seeking certification of a settlement class must satisfy each requirement of Rule 23(a)—numerosity, commonality, typicality and adequacy of representation—and any one subsection of Rule 23(b). *id.* at *10-11. This Court provisionally certified the Settlement Class in its Preliminary Approval Order, finding that the requirements of Rule 23(a) and (b)(3) were met. ECF No. 62. Since that time, there have been no developments that would alter this conclusion. As explained below, the requirements of Rule 23(a) and 23(b)(3) are satisfied, and the Settlement Class should be finally certified for settlement purposes only.

A. The Requirements of FED. R. CIV. P. 23(a) Are Satisfied

Rule 23(a) sets forth the following prerequisites for certifying a class: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact

common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a). These requirements are satisfied here.

1. The Settlement Class Is So Numerous that Joinder of Individual Members Is Impracticable

Rule 23(a)(1) requires a showing that "the class is so numerous that individual joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). "While there is no magic number that applies to every case, a forty-member class is often regarded as sufficient to meet the numerosity requirement." *Mulvania v. Sheriff of Rock Island Cty.*, 850 F.3d 849, 860 (7th Cir. 2017). Here, the Settlement Class includes millions of class members geographically dispersed throughout the country. Numerosity is satisfied.

2. There Are Questions of Law and Fact Common to the Settlement Class

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). "To satisfy the commonality requirement, there must 'be one or more common questions of law or fact that are capable of class-wide resolution and are central to the claims' validity." *Burnett*, 2021 U.S. Dist. LEXIS 6510, at *12-13 (citing *Beaton v. SpeedyPC Software*, 907 F.3d 1018, 1026 (7th Cir. 2018)). "Where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question." *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756 (7th Cir. 2014) (collecting authorities).

Several questions of law and fact common to all Settlement Class Members exist, including: (i) whether Hy-Vee violated common law duties, prohibitions on unfair and deceptive trade practices, other legal obligations, and industry standard practices in causing the Data Breach; (ii) whether Hy-Vee failed to properly secure and protect Settlement Class Members' Personal Information, and (iii) whether Settlement Class Members are entitled to damages, injunctive relief,

or other equitable relief, and the measure of such damages and relief. Because Plaintiffs' claims involve common questions of law and fact, the commonality requirement is satisfied.

3. Representative Plaintiffs' Claims Are Typical of the Claims of the Settlement Class

Typicality is satisfied when "the claims or defenses of the representative parties are typical of the claims or defenses of the class." FED. R. CIV. P. 23(a)(3). Whether a plaintiff's claims are typical of those of the other class members is closely related to the commonality inquiry. *Keele v. Wexler*, 149 F.3d 589, 595 (7th Cir. 1998). "A claim is typical if it 'arises from the same event or practice or course of conduct that gives rise to the claims of other class members and . . . [the] claims are based on the same legal theory.'" *Burnett*, 2021 U.S. Dist. LEXIS 6510, at *14 (citing *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006)). "Although the typicality requirement may be satisfied even if there are factual distinctions between the claims of the named plaintiffs and those of other class members, the requirement primarily directs the district court to focus on whether the named representatives' claims have the same essential characteristics as the claims of the class at large." *Id.* (citations omitted).

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

4. The Interests of Representative Plaintiffs and Co-Lead Settlement Co-Lead Class Counsel Are Aligned with the Interests of the Settlement Class

Representative parties must "fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). "This adequate representation inquiry consists of two parts: (1) the adequacy of the named plaintiffs as representatives of the proposed class's myriad members, with their

differing and separate interests, and (2) the adequacy of the proposed class counsel." *Burnett*, 2021 U.S. Dist. LEXIS 6510, at *15. When class representatives and members seek the common goal of the largest possible recovery for the class, their interests do not conflict. *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 208 (5th Cir. 1981); *see also Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 453 (S.D.N.Y. 2004) ("There is no conflict between the class representatives and the other class members. All share the common goal of maximizing recovery.").

Plaintiffs have demonstrated that they are well-suited to represent the Settlement Class. They each came forward prior to the filing of the initial complaints and have been actively involved in this matter since that time, including responding to their discovery obligations. Their interests are aligned with those of the other Settlement Class Members. Additionally, Class Counsel are well-qualified to represent the Settlement Class, as they each possess significant experience leading the prosecution of complex class action matters, including cases involving data breaches. The adequacy requirement is satisfied.

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

Rule 23(b)(3) requires that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members of the class, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(b)(3). "This rule requires two findings: predominance of common questions over individual ones and superiority of the class action mechanism." *Burnett*, 2021 U.S. Dist. LEXIS 6510, at *16-17. Both of these requirements are satisfied here.

1. Questions Common to All Settlement Class Members Predominate Over Any Potential Individual Questions

Rule 23(b)(3)'s predominance element requires that "questions of law or fact common to class members predominate over any questions affecting only individual members." FED. R. CIV. P. 23(b)(3). The requirement "is satisfied when 'common questions represent a significant aspect of [a] case and . . . can be resolved for all members of [a] class in a single adjudication.'" *Messner v. Northshore University Healthsystem*, 669 F.3d 802, 815 (7th Cir. 2012) (quoting 7AA Wright & Miller, Federal Practice & Procedure § 1778 (3d ed. 2011)). Predominance is satisfied here because questions common to all Class Members substantially outweigh any possible issues that are individual to the Class Members. All of Class Members' claims arise out of the same alleged course of conduct by Hy-Vee and all Class Members were affected by the Data Breach. Numerous common issues relating to Hy-Vee's liability predominate over any individualized issues. The predominance requirement is satisfied.

2. A Class Action Is the Superior Method to Fairly and Efficiently Adjudicate the Matter

Rule 23(b)(3) also requires that a class resolution be "superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3). "[A] class action has to be unwieldy indeed before it can be pronounced an inferior alternative—no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied—to no litigation at all. *Carnegie v. Household Int'l Inc.*, 376 F.3d 656, 661 (7th Cir. 2004). Where, as here, a court is deciding the certification question in the context of a proposed settlement class, questions regarding the manageability of the case for trial purposes do not have to be considered. *See Anchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619 (1997).

Here, common questions comprise a substantial aspect of the case and can be resolved for all Class Members in a single adjudication, thereby obviating the need for multiple trials in multiple venues. Settlement would not only eliminate the uncertainty, risks, and costs of individualized litigation, but also relieve judicial burdens caused by individual adjudication. *See Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997) (stating that the "policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action"). The superiority requirement is satisfied.

The applicable requirements of Rule 23(a) and 23(b)(3) are satisfied and certification of the proposed Settlement Class is appropriate.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court grant final approval of the Settlement and enter the proposed Final Approval Order and Judgment.

Dated: June 28, 2021

Respectfully submitted,

/s/ Benjamin F. Johns

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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2021 the foregoing document was filed with the Court's CM/ECF system, which will provide notice of electronic filing to all counsel of record.

/s/ Benjamin F. Johns
Benjamin F. Johns