UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CORNELIUS COLEMAN AND LINDA HORAN, on behalf of themselves and all others similarly situated, Plaintiffs, v. RAILWORKS CORPORATION, KEVIN RIDDETT AND BOB CUMMINGS, Defendants.	Case No. 20-civ-02428 (GBD)

PLEASE TAKE NOTICE that, on a date and time convenient to the Court, Plaintiff in the above-captioned matter will move this Court, pursuant to Federal Rules of Civil Procedure 23(a), (b)(3), and (e) for an order: (1) certifying the proposed Settlement Class; (2) naming Plaintiffs as class representatives; (3) appointing Finkelstein, Blankenship, Frei-Pearson & Garber, LLP and Thomas & Solomon LLP as Class Counsel; (4) granting preliminary approval to the Settlement Agreement; (5) approving the proposed Notice Plan; (6) scheduling a final fairness hearing; and (7) granting such further relief the Court deems reasonable and just.

In support of this motion, Plaintiff respectfully submits the accompanying memorandum of law.

Dated: White Plains, New York
November 30, 2020

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

I. INTRODUCTION

Plaintiffs Cornelius Coleman and Linda Horan (the "Plaintiffs"), on behalf of themselves and all others similarly situated (the "Class Members" or "Class"), seek preliminary approval of a class action settlement that will resolve claims against Defendants RailWorks Corporation, Kevin Riddett, and Bob Cummings (collectively, the "Defendants" or "RailWorks") arising out of Plaintiffs' allegations with respect to a security incident that was discovered on or around January 27, 2020 (the "Data Breach"). Shortly after the filing of this complaint, Plaintiffs and Defendants (collectively, the "Parties") engaged in informal discovery. After informal discovery, the Parties, with the assistance of an experienced mediator, Bennett G. Picker, of Stradley Ronon Stevens & Young, LLP, were able to resolve this dispute and correspondingly, drafted a settlement agreement (the "Settlement" or "Settlement Agreement"). *See* Settlement Agreement ¶ 3, Ex. 1 to the Declaration of Jeremiah Frei-Pearson (the "Frei-Pearson Decl.").

The Settlement provides an extraordinary result for the Class Members, consisting of approximately 20,763 current and former employees (as well as beneficiaries of current/former employees and IRS Form 1099 vendors) whose Form W-2 data and/or payroll information was potentially compromised as a result of the Data Breach. Specifically, the Settlement states that Defendants will offer Class Members credit monitoring and identity theft protection coverage through Identity Guard (or an equivalent provider in the event Identity Guard ceases to operate in its current form), through April 1, 2023, for: (a) all Class Members who previously signed up for one year of credit monitoring and identity theft protection coverage when offered by RailWorks in connection with the Data Breach before the lawsuit was filed, without the need for filing a Claim Form; and (b) all Settlement Class Members who submit a Claim Form within thirty (30) days after the date of the Order and Final Judgment. Settlement Agreement ¶ 44. Plaintiffs estimate

that this coverage is valued at approximately $6.2 million to the Settlement Class. Frei-Pearson Decl. at ¶ 5. Furthermore, the Settlement also requires Defendants to financially reimburse Class Members who can substantiate that they have expended time remedying issues related to identity theft directly caused by the Data Breach. Settlement Agreement at ¶ 44(b). In addition, the Settlement obliges Defendants to implement cyber-security measures. *Id.* at ¶ 44(c). This Settlement compares favorably with other recent data breach settlements that courts have approved. Through this Settlement, Class Members will receive these benefits far sooner than if litigation were to continue through trial, and eliminate the risks that Defendants could prevail on a dispositive motion, on class certification or at trial. Frei-Pearson Decl. at ¶ 6.

Accordingly, and as explained in greater detail below, Plaintiffs respectfully request that the Court grant preliminary approval of the Settlement, certify the class for settlement purposes only, approve the form and manner of notice to the class, and appoint Plaintiffs' counsel, Finkelstein, Blankinship, Frei-Pearson & Garber, LLP ("FBFG") and Thomas & Solomon LLP ("TS"; collectively, "Plaintiffs' Counsel") as class counsel.

II. BACKGROUND

A. Plaintiffs' Allegations

The Class consists of approximately 20,763 of Defendants' current and former employees, beneficiaries of those employees, and IRS Form 1099 vendors. ECF No. 1 ("Compl.") ¶ 20; Frei-Pearson Decl. ¶ 1. On or about January 27, 2020, RailWorks discovered that an unauthorized third party encrypted Defendants' servers and systems resulting in the Data Breach and potential exposure of the personal information ("PI") of Plaintiffs and the Class Members. Compl. ¶ 20. The information that may have been compromised included PI, including potentially their name, address, driver's license number and/or government issued ID, Social Security number, date of

birth, and date of hire, termination and/or retirement. *Id.* at ¶ 26

Plaintiffs allege that: (1) Defendants were aware of the risk of cyberattacks and nevertheless failed to adequately protect and safeguard Plaintiffs' PI; (2) Plaintiffs have suffered concrete injuries as a direct and/or proximate result of Defendants' negligence -- including an increased risk that cybercriminals will use their PI for the rest of their lives, a decrease in value of their PI, and an increased likelihood of identity theft and fraud; and (3) Defendants failed to provide adequate compensation to Plaintiffs for Defendants' negligence. *Id.* at ¶¶ 28–36. Defendants deny Plaintiffs' allegations. *See* Settlement Agreement p. 1.

Defendants notified a subset of the Class Members about the data breach on either January 30, 2020 or February 7, 2020. Compl. ¶ 21. The remaining Class Members received notifications dated February 27, 2020. *Id.* The emails explained that as a result of the Data Breach, Plaintiffs' PI was potentially compromised, including potentially their name, address, driver's license number and/or government issued ID, Social Security number, date of birth, and date of hire, termination and/or retirement. *Id.* at ¶ 22. Defendants offered twelve months of credit monitoring through Identity Guard Total Service to the Class Members, including Plaintiffs. *Id.* at ¶ 36. This lawsuit followed shortly thereafter.

B. Settlement Negotiations And Resolution

The Parties selected a respected mediator, Mr. Bennett G. Picker, to attempt to assist them in resolving this dispute. Frei-Pearson Decl. ¶ 3. The Parties engaged in substantial informal discovery, with Plaintiffs using an expert to review and analyze that discovery, had numerous teleconferences with Mr. Picker, and supplied him several written mediation statements prior to mediation. *Id.* On August 26, 2020, the Parties participated in a full-day, arms'-length mediation negotiation with Mr. Picker via videoconference, where the Parties reached an agreement in

principle. *Id.* The Parties negotiated the Memorandum of Understanding for 20 days, a contentious process that involved multiple phone calls with Mr. Picker and between counsel. *Id.* After signing the Memorandum of Understanding on September 15, 2020, the Parties negotiated the Settlement Agreement, which also involved the exchange of multiple drafts, multiple conference calls and resolution of various issues in dispute. *Id.* at ¶ 4.

III. TERMS OF THE SETTLEMENT

A. Identity Theft Protection Services

The Settlement Agreement provides identity theft protection coverage through Identity Guard through April 1, 2023 for: (1) all Settlement Class Members who previously signed up for one year of credit monitoring and identity theft protection coverage when offered by RailWorks in connection with the Data Breach before suit was filed, without the need of filing a Claim Form; and (2) all Settlement Class Members who submit a Claim Form within thirty (30) days after the date of the Order and Final Judgment. Settlement Agreement ¶ 44(a). Plaintiffs' Counsel values the identity theft protection component of the Settlement consideration at approximately $300 per Class Member, or $6.2 million for the entire class. Frei-Pearson Decl. ¶ 5.

B. Reimbursement For Lost Time

The Settlement Agreement allows for reimbursement to Class Members who expended time remedying issues related to identity theft directly caused by the Data Breach. Settlement Agreement ¶ 44(b). To receive reimbursement for lost time, Class Members must submit a Claim Form, including a declaration signed (either by hand or electronically) under penalty of perjury pursuant to 28 U.S.C. § 1746 and supporting documentation of their lost time, for up to five (5) hours at a rate of ten dollars ($10.00) per hour if the Class Member has first enrolled in the services provided by RailWorks through Identity Guard (or another substitute provider). Such Claim Form

including a declaration signed under penalty of perjury pursuant to 28 U.S.C. § 1746 and supporting documentation must be submitted within 60 days of the last date on which time was expended by the individual or within 60 days of the date upon which the Settlement Reminder Notice is mailed, whichever is later, but in no event later than April 1, 2023.

C. Non-Monetary Relief

The Settlement requires Defendants to implement and maintain the following data security practices: (1) RailWorks will provide annual security training (through internal resources) to personnel it determines appropriate to receive such training, in its reasonable discretion, in each of 2021 and 2022; (2) RailWorks will expand its internal cyber awareness communications; and (3) RailWorks will conduct a penetration test within twelve months following the date of the Order and Final Judgment. Settlement Agreement ¶ 44(c).

D. Release

In exchange for the relief described above, Class Members who do not opt out of the Settlement will fully release RailWorks and its related and affiliated entities (the "Released Parties" defined in the Settlement Agreement) of liability for all claims arising out of or related to the Data Breach. Settlement Agreement ¶ 54.

E. Notice And Settlement Administration

The Parties agreed to the appointment of Epiq Class Action & Claims Solutions, Inc., as Settlement Administrator (the "Settlement Administrator"). Settlement Agreement ¶ 29. The Settlement Administrator will, subject to Court approval, provide notice to the class in the manner set forth below. The Settlement Administrator has represented to defense counsel that its estimated fees are $63,620.00 plus an additional $15,775.00 in postage and expenses -- a combined total of $79,395.00. Frei-Pearson Decl. ¶ 7. The costs of notice and settlement administration will be paid

by RailWorks, without reduction of any benefits to Class Members. Settlement Agreement ¶ 39(e).

F. Attorneys' Fees, Expenses, And Service Awards

The Parties agree that this Court shall determine the appropriate amount of any attorneys' fees and expenses to be paid to class counsel, and the amount of any incentive awards to be paid to the Plaintiffs, except that RailWorks has agreed to pay attorneys' fees, costs, expenses, and named plaintiff service awards in the total aggregate amount of up to $503,000 subject to this Court's approval. Settlement Agreement ¶ 51. RailWorks agrees not to challenge or oppose class counsel's requests for attorneys' fees, costs, expenses and the class representatives' incentive awards as long as they do not, in the aggregate, exceed a total amount of $503,000. *Id.* RailWorks also agrees that Plaintiffs and class counsel shall have sole discretion in determining how and to whom the $503,000 is allocated, but RailWorks has specifically not agreed to that allocation, which has been made solely by Plaintiffs and class counsel and which is subject to this Court's approval and/or modification. *Id.* At final approval, Plaintiffs intend to apply for $5,000 service awards for each Named Plaintiff and for $493,000 in attorneys' fees and costs. Frei-Pearson Decl. at ¶ 13.

IV. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED.

"Conditional settlement class certification and appointment of class counsel have several practical purposes, including avoiding the costs of litigating class status while facilitating a global settlement, ensuring notification of all class members of the terms of the proposed settlement agreement, and setting the date and time of the final approval hearing." *Almonte v. Marina Ice Cream Corp.*, No. 16-00660, 2016 WL 7217258, at *2 (S.D.N.Y. Dec. 8, 2016) (Daniels, J.). "Under Federal Rule 23(c)(1), 'the court can make a conditional determination of whether an action should be maintained as a class action, subject to final approval at a later date.'" *Ayzelman*

v. Statewide Credit Services Corp., 238 F.R.D. 358, 362 (E.D.N.Y. 2006) (citation and quotation marks omitted). Where a class is proposed in connection with a motion for preliminary approval, "a court must ensure that the requirements of Rule 23(a) and (b) have been met." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 270 (2d Cir. 2006). Courts employ a "'liberal rather than restrictive construction' of Rule 23, 'adopt[ing] a standard of flexibility' in deciding . . . certification." *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997). In addition, a plaintiff seeking class certification "must also satisfy at least one of the requirements contained in Rule 23(b)." *Moreno v. Deutsche Bank Americas Holding Corp*., No. 15-9936, 2017 WL 3868803, at *4 (S.D.N.Y. Sept. 5, 2017) (citing Fed. R. Civ. P. 23(b); *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 405 (2d Cir. 2015)).

However, when, as here, certification is sought of a settlement class, because the case will never go to trial, the court need not consider the manageability of the proceedings should the case or cases proceed to trial. *See In re Initial Pub. Offering Sec. Litig*., 260 F.R.D. 81, 88 (S.D.N.Y. 2009). Courts routinely certify settlement classes in data breach cases, and there is no reason why this case should be different. *See, e.g.*, *Sackin v. Transperfect Global, Inc.*, No. 17-1469, ECF No. 55 (S.D.N.Y. Mar. 13, 2018); *In Re Zappos Security Breach Litig.*, Case No. 12-00325, ECF No. 335 (D. Nev. Sept. 19, 2019); *In re Yahoo! Inc. Customer Data Breach Security Litig.*, Case No. 16-02752, ECF No. 390 (N.D. Cal. 2019); *Castillo v. Seagate Technology, LLC*, No. 16-01958, 2017 WL 4798611 (N.D. Cal. Oct. 19, 2017). Here, the proposed Settlement Class meets each of the elements of certification under Rule 23(a) and satisfies the requirements of Rule 23(b)(3).

A. The Settlement Class Satisfies Rule 23(a)'s Requirements.

1. The Settlement Class Satisfies The Numerosity Requirement.

The first prerequisite to class certification under Rule 23 is that the "class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). There is no specific minimum number of proposed class members required to satisfy the numerosity requirement, but generally a class of forty or more members is considered sufficient. *See, e.g., Shahriar v. Smith & Wollensky Rest. Grp.*, 659 F.3d 234, 252 (2d Cir. 2011) ("[N]umerosity is presumed where a putative class has forty or more members."); *see also Almonte*, 2016 WL 7217258, at *2 ("Plaintiffs satisfy Federal Rule of Civil Procedure 23(a)(1) because there are 34 Class Members and thus, joinder is impracticable.") (citing *Town of New Castle v. Yonkers Contracting Co.*, 131 F.R.D. 38, 41 (S.D.N.Y. 1990) (finding numerosity met with 36 class members)). Here, there are approximately 20,763 Class Members. Frei-Pearson Decl. ¶ 1. Accordingly, the proposed Settlement Class is so numerous that joinder of their claims is impracticable, and the numerosity requirement is easily satisfied.

2. The Settlement Class Satisfies The Commonality Requirement.

Second, Rule 23 requires that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2); *see gen. Almonte*, 2016 WL 7217258, at *3 ("Plaintiffs satisfy Federal Rule of Civil Procedure 23(a)(2) because Plaintiffs and Class Members all bring nearly identical claims arising from Defendants' alleged violations of the FLSA and NYLL for failure to pay appropriate overtime compensation, for applying unlawful deductions towards Class Members' wages, and for failure to provide accurate wage statements."). Commonality is demonstrated when the claims of all class members "depend upon a common contention," with "even a single common question" sufficing. *German v. Fed. Home Loan Mortg. Corp.*, 885 F. Supp. 537, 553 (S.D.N.Y.

1995) ("In fact, a single common question has been sufficient to satisfy the commonality requirement."). The common contention must be of such a nature that it is capable of class-wide resolution and that the "determination of its truth or falsity will resolve an issue." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 338 (2011). Moreover, the permissive standard of commonality provides that "[w]here 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." *Caufield v. Colgate-Palmolive Co.*, No. 16-4170, 2017 WL 3206339, at *4 (S.D.N.Y. July 27, 2017) (finding commonality where the defendants' answers to common questions of fact will "drive the resolution of the litigation").

Here, Class Members allege identical claims of negligence, breach of express contract, breach of implied contract, unjust enrichment, and violation of New York Labor Law § 203-d. Compl. at ¶¶ 54–88. Plaintiffs allege that RailWorks failed to adequately protect the Class Members' PI and that, as a result, RailWorks disclosed each Class Member's PI in the Data Breach. These common allegations lead to numerous common questions, such as:

- whether the Class Members' PI was compromised;
- whether Defendants were on notice of the risk that RailWorks was a target of a hacking incident;
- whether Defendants failed to protect the Class Members' PI with industry-standard protocols and technologies;
- whether the actions and/or inaction of Defendants caused the Class Members' PI to be compromised;
- whether Defendants promised Class Members that it would protect their PI that they provided as a condition of their employment;

- whether Defendants had a duty to protect Class Members' PI;
- whether Defendants breached their duty to protect the Class Members' PI.

See id. at ¶ 46.

Answering these questions, regardless of the outcome, will resolve the allegations for the whole class "in one stroke," thereby effectuating "classwide resolution." *Dukes*, 564 U.S. at 338. In fact, courts have found that privacy litigation concerning inadequate security measures to protect consumers' PI is particularly suited for class certification because the class members' claims are all based on the same action (or inaction) of the defendant. *See, e.g.*, *Smith v. Triad of Alabama, LLC*, No. 14-324, 2017 WL 1044692, at *15–16 (M.D. Ala. Mar. 17, 2017) (certifying a data breach class action). Thus, the proposed Settlement Class meets the commonality requirement.

3. The Settlement Class Satisfies The Typicality Requirement.

Rule 23 next requires that the class representatives' claims be typical of those of the putative class they seek to represent. Fed. R. Civ. P. 23(a)(3); *see Almonte*, 2016 WL 7217258, at *3 (holding that "[p]laintiffs satisfy the typicality requirement" because "[p]laintiffs' claims arise from the same factual and legal circumstances that form the basis of the Class Members' claims."). The typicality requirement ensures "that maintenance of a class action is economical and [that] the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Caufield*, 2017 WL 3206339, at *4 (quoting *Marisol A.*, 126 F.3d at 376). Typicality is measured under a permissive standard and does not require that the representative's claims be identical to those of all class members; rather, "[t]he typicality requirement may be satisfied even if there are factual dissimilarities or variations between the claims of the named plaintiffs and those of other class members, including

distinctions in the qualifications of the class members." *Blackmoss Investments, Inc. v. ACA Capital Holdings, Inc.*, 252 F.R.D. 188, 191 (S.D.N.Y. 2008) (citation omitted). Typicality is present when a defendant acts uniformly toward the class members, where that uniform conduct results in injury to the class members, and where the named plaintiffs suffer a similar injury to that of the class members as a result. *See Caufield*, 2017 WL 3206339, at *4 (holding that typicality is satisfied where "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." (quoting *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009))).

Plaintiffs, like every other Class Member, entrusted Defendants with their sensitive PI as a condition of employment and their PI was likewise compromised as a result of the same Data Breach. Thus, typicality is satisfied.

4. The Settlement Class is Adequately Represented.

Finally, Rule 23 requires that the proposed class representatives have and will continue to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). When assessing the adequacy requirement, the courts evaluate whether "(1) plaintiff's interests are antagonistic to the interest of other members of the class and (2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *Lapin v. Goldman Sachs & Co.*, 254 F.R.D. 168, 176 (S.D.N.Y. 2008) (quoting *Cordes & Co. Fin. Serv., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 99 (2d Cir. 2007)). Further, where a plaintiff's claims are found to be typical of those of the class, appointing that plaintiff as the class representative will ensure that interests of the class remain adequately protected. *See Dukes*, 564 U.S. at 349 n.5 (recognizing that typicality usually supports a finding of adequacy).

Here, Plaintiffs meet the requirements to serve as class representatives. First, as discussed

above, Plaintiffs share the same interests in securing relief for the claims in this case as every other member of the proposed Settlement Class, and there is no evidence of any conflict of interest. Frei-Pearson Decl. ¶ 12. Next, Plaintiffs have demonstrated their continued willingness to vigorously prosecute this case and have regularly consulted with their counsel, reviewed documents and the proposed settlement, provided documents in the course of this litigation, indicated their willingness to sit for depositions in this litigation, and indicated their desire to continue protecting the interests of the class through settlement or continued litigation. *Id.*

Plaintiffs' Counsel will similarly continue to adequately protect the interest of the proposed Settlement Class. FBFG regularly engages in major complex litigation and has extensive experience in consumer privacy class action lawsuits, including cases of first impression related to data breaches and consumer privacy. *See* FBFG Firm Resume, Ex. 2 to Frei-Pearson Decl. Judge Schofield appointed FBFG as class counsel in a similar data privacy case in this district. *See Sackin*, ECF No. 55 at ¶ 6. Similarly, courts throughout the country have appointed FBFG as class counsel. *See, e.g.*, *Castillo v. Seagate Tech., LLC*, No. 16-01958, 2017 WL 4798611, at *2 (N.D. Cal. Oct. 19, 2017) (appointing Jeremiah Frei-Pearson of FBFG as interim co-lead class counsel in a W-2 data breach); *Saint Joseph Health System Medical Information Cases*, JCCP No. 4716 (Cal. Sup. Ct. Feb. 3, 2016) (granting contested class certification motion in a data breach case and appointing Jeremiah Frei-Pearson of FBFG as co-lead class counsel); *In Re Zappos Security Breach Litig.*, Case No. 12-00325, ECF No. 335 (D. Nev. Sept. 19, 2019) (granting preliminary approval and appoint FBFG as co-lead class counsel). Moreover, class counsel have diligently investigated, prosecuted, and dedicated substantial resources to the claims in this action and will continue to do so throughout its pendency. Frei-Pearson Decl. ¶ 9.

Similarly, TS is also highly experienced in handling class actions and complex litigation,

and TS is knowledgeable about the applicable law here. *See* Fed. R. Civ. P. 23(g)(1)(A)(ii), (iii). For decades, TS has devoted the majority of its practice to representing and protecting the rights of individuals against large institutions through complex and class litigation within a variety of substantive contexts. Declaration of Jessica L. Lukasiewicz (the "Lukasiewicz Decl.") at ¶ 6. TS's experience includes representing classes consisting of tens of thousands of employees, including in class action contexts involving multistate and CAFA litigation. *Id.* at ¶ 7.

Many courts have acknowledged TS's class action leadership and ethical standards in appointing TS class counsel. *See, e.g., Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 182 (W.D.N.Y. 2005) (TS "has demonstrated that it is well-qualified to conduct the litigation"); *Camesi v. Univ. of Pittsburgh Med. Ctr.*, No. 09-85, 2009 WL 3032590, at *1 (W.D. Pa. Sept. 17, 2009) (TS was "qualified and could appropriately represent the plaintiffs"); *Masters v. F. W. Webb Co.*, No. 03-6280, 2006 WL 2604833, at *3 (W.D.N.Y. Sept. 11, 2006) (TS "is abundantly experienced in employment litigation, a substantial portion of which has been conducted before this Court"); *Hamelin v. Faxton St. Luke's Healthcare*, 274 F.R.D. 385, 396 (N.D.N.Y 2011) (TS has "established they are qualified and able to conduct this litigation").

TS has successfully represented employees in numerous class actions or other complex litigations. *Id.* at ¶ 9. TS is both experienced in class action litigation in general and also highly knowledgeable regarding data breach litigation in particular. *Id.* at ¶ 10. TS is currently pursuing numerous data breach cases and has devoted significant resources to extensively researching and analyzing the relevant claims and case law. *See* TS Firm Resume, Ex. A to the Lukasiewicz Decl.

Thus, Plaintiffs and Plaintiffs' Counsel will adequately represent the members of the Settlement Class and their interests. Plaintiffs accordingly request that the Court appoint Plaintiffs as class representatives and appoint FBFG and TS as class counsel.

B. The Settlement Class Meets Rule 23(b)(3)'s Requirements.

Rule 23(b)(3) provides that a class action can be maintained where: (1) the questions of law and fact common to class members predominate over any questions affecting only individuals; and (2) the class action mechanism is superior to the other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3); *In re Visa Check/MasterMoney Antitrust Litig*., 280 F.3d 124, 135-36 (2d Cir. 2001). Here, common questions of law and fact predominate for the purposes of the proposed settlement, and the proposed class-wide settlement is the best method of adjudication.

Where, as here, plaintiffs seek certification of a class under Rule 23(b)(3), they must demonstrate "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). In the instant action, "Plaintiffs' and Class Members' common factual allegations and legal theory . . . predominate over any variations among Class Members." Almonte, 2016 WL 7217258, at *3.

1. Common Questions Of Law And Fact Predominate.

The predominance requirement focuses on whether the proposed Settlement Class is sufficiently cohesive to warrant adjudication by representation. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 623 (1997). Predominance exists "[w]hen common questions represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication." *In re Chase Manhattan Corp. Sec. Litig*., No. 90-6092, 1992 WL 110743, at *3 (S.D.N.Y. May 13, 1992) (internal quotations, citations omitted). Here, as noted above, the common factual and legal questions presented are whether Defendants: (1) disclosed the Class Members' PI; (2) were on notice of the risk that RailWorks was a target of a hacking scheme; (3) failed to protect the

Class Members' PI with industry-standard protocols and technologies; actions and/or inactions caused the Class Members' PI to be compromised; (4) promised Class Members that RailWorks would protect their PI that they provided as a condition of their employment; (5) whether Defendants had a duty to protect Class Members' PI; and (6) whether Defendants breached their duty to protect the Class Members' PI. As many courts have held, these common issues predominate over individual ones. *See gen.*, *Sackin*, ECF No. 55; *Seagate*, 2017 WL 4798611, at *1 (preliminarily certifying a similar settlement class of employees whose employer disclosed their PI in response to a phishing scam).

2. This Class Action Is The Superior Method Of Adjudication.

Finally, certification of this settlement as a class action is superior to other methods available to fairly, adequately, and efficiently resolve the claims of the class. Recently in *Almonte*, this Court opined that "the class action device is superior to other methods available for a fair and efficient adjudication of the controversy because the class device will achieve economies of scale, conserve judicial resources, preserve public confidence in the integrity of the judicial system by avoiding the waste and delay of repetitive proceedings, and prevent inconsistent adjudications of similar claims." *Almonte*, 2016 WL 7217258, at *3 (citations and internal quotations omitted). Further,"[c]ourts in the Second Circuit regularly find that superiority is satisfied where, as here, potential class members are aggrieved by the same policies, the damages suffered are small relative to the expense and burden of individual litigation, and some potential class members are currently employed by the defendants." *Sanchez v. New York Kimchi Catering, Corp.*, 320 F.R.D. 366, 377 (S.D.N.Y. 2017); *accord Masoud v. 1285 Bakery Inc.*, No. 15-7414, 2017 WL 448955, at *7 (S.D.N.Y. Jan. 26, 2017) (same). Moreover, a potential class size of over fifty members suggests that a single class action is superior to a profusion of individual ones by achieving economies of

time, effort and expense and promoting uniformity of decisions as to persons similarly situated. *Masoud*, 2017 WL 448955, at *7. Finally, as in this action, when parties have already negotiated a compromise, courts need not focus on issues that could surface at trial because settlement obviates trial. *Amchem*, 521 U.S. at 620.

Here, Plaintiffs estimate that the proposed Settlement Class is comprised of approximately 20,763 persons and, if each were to pursue their claims against Defendants individually, they would each need to provide nearly the same, if not identical, legal and factual arguments and evidence. The result would be thousands of trials at enormous expense to the proposed Class Members, Defendants and the courts. Comparing the relatively small amount of damages each class member seeks to recover -- *i.e.*, the costs of additional identity theft protection and lost time allegedly caused by the Data Breach -- with the costs of actually prosecuting those claims, makes clear that individual Class Members would have little incentive to pursue them on their own. Additionally, a number of potential Class Members remain employed by Defendants. Accordingly, this Settlement is the superior method for adjudicating the controversy between the Parties, and, as all requirements of class certification under Rule 23 are met, the proposed Settlement Class should be certified.

C. Plaintiffs' Counsel Should Be Appointed As Class Counsel.

Under Rule 23, "a court that certifies a class must appoint class counsel. . . [who] must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1) and 23(g)(4). In making this determination, the Court must consider the following attributes of counsel: (1) work in identifying or investigating potential claims; (2) experience in handling class actions or other complex litigation and the types of claims asserted in the case; (3) knowledge of the applicable law; and (4) resources committed to representing the class. Fed. R. Civ. P.

23(g)(1)(A)(i-iv). As discussed above, FBFG has extensive experience in prosecuting similar class actions and other complex litigation, as does TS. Frei-Pearson Decl. ¶ 10; Lukasiewicz Decl. ¶ 10. Specific to this case, Plaintiffs' Counsel has diligently investigated this matter by dedicating substantial resources to the investigation of the claims at issue, which includes interviews of numerous Class Members. Frei-Pearson Decl. at ¶ 10. Plaintiffs' Counsel has also diligently developed the innovative and complex theories of this lawsuit, exchanged and reviewed informal discovery, and successfully negotiated the present Settlement to the benefit of the Settlement Class. *See id. at* 3, 4, and 9. Accordingly, Plaintiffs respectfully request that the Court appoint FBFG and TS as class counsel for the Settlement Class.

V. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY APPROVAL.

Rule 23(e) governs the settlement of class actions. The Rule provides that "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). Compromise and settlement of class actions are favored. *See Wal-Mart Stores v. Visa U.S.A.*, 396 F.3d 96, 116 (2d Cir. 2005) (emphasizing the "strong judicial policy in favor of settlements, particularly in the class action context"); Herbert B. Newburg & Alba Conte, NEWBURGH ON CLASS ACTION ("NEWBERG") § 11.41 (4th ed. 2002) ("The compromise of complex litigation is encouraged by the courts and favored by public policy."). This is especially so at the preliminary approval stage, where the Court need only "make a preliminary determination of the fairness, reasonableness and adequacy of the settlement" so that notice of the settlement may be given to the Class and a fairness hearing may be scheduled to make a final determination regarding the fairness of the Settlement. *See* NEWBERG § 11.25. "Because of the two-step process, a grant of preliminary approval is at most a determination that there is what might be termed probable cause to submit the proposal to class members and hold a full-scale

hearing as to its fairness." *Oladapo v. Smart One Energy, LLC*, No. 14-7117, 2017 WL 5956907, at *7 (S.D.N.Y. Nov. 9, 2017), *report and recommendation adopted*, No. 14-7117, 2017 WL 5956770 (S.D.N.Y. Nov. 30, 2017) (quoting *In re Traffic Exec. Ass'n-Eastern R.R.s*, 627 F.2d 631, 634 (2d Cir. 1980)).[1]

Where a settlement is achieved through arm's-length negotiations by experienced counsel and there is no evidence of fraud or collusion, "[courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement." *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, No. 05-10240, 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007). "The central question raised by the proposed settlement of a class action is whether the compromise is fair, reasonable and adequate. There are weighty justifications, such as the reduction of litigation and related expenses, for the general policy favoring the settlement of litigation." *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) (citation omitted).

As amended in 2018, Rule 23 provides that preliminary approval should be granted "if giving notice is justified by the parties' showing that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B). The factors set forth in the rule are whether:

> (A) the class representatives and 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:

[1] *See also* NEWBERG § 11.25 ("If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness . . . and [it] appears to fall within the range of possible approval," the court should permit notice of the settlement to be sent to class members); *Danieli v. IBM*, No. 08-3688, 2009 WL 6583144, at *4–5 (S.D.N.Y. Nov. 16, 2009) (granting preliminary approval where settlement "has no obvious defects" and proposed allocation plan is "rationally related to the relative strengths and weaknesses of the respective claims asserted.").

(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);[2] and

(D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

Prior to the 2018 amendment to Rule 23, the Second Circuit set forth the following similar list of factors for determining whether to grant preliminary approval of a proposed class settlement: whether the settlement (1) appears to be the product of serious, informed, non-collusive negotiations, (2) has no obvious deficiencies, (3) improperly grants preferential treatment to class representatives or segments of the class, and (4) falls within the range of possible approval. *See, e.g., In re Initial Pub. Offering Sec. Litig.*, 226 F.R.D. 186, 191 (S.D.N.Y. 2005). As set forth below, the Settlement easily satisfies these factors.

A. The Proposed Settlement Is The Product Of Serious, Informed Negotiations.

The Settlement is the product of serious, informed, non-collusive negotiations. Settlements are generally found to be non-collusive when reached with the assistance of a third-party neutral and in such situations enjoy a presumption that the settlement meets the requirements of due process. *See, e.g., In re Penthouse Exec. Club Comp. Litig.*, No. 10-1145, 2013 WL 1828598, at *2 (S.D.N.Y. Apr. 30, 2013); *Tiro v. Pub. House Investments, LLC*, No. 11-7679, 2013 WL 2254551, at *2 (S.D.N.Y. May 22, 2013). Settlement decisions are found to be informed where

[2] Rule 23(e)(3) provides that "[t]he parties seeking approval must file a statement identifying any agreement made in connection with the proposal." Here, the only such agreements are the MOU and the Settlement Agreement, which are submitted herewith. Frei-Pearson Decl. Exs. 1, 4.

the parties exchanged evidence and information prior to negotiations. *See, e.g.*, *In re Nat'l Football League Players' Concussion Injury Litig.*, 301 F.R.D. 191, 199 (E.D. Pa. 2014) (approving a class settlement "[a]lthough the parties have not reached the discovery stage of litigation"); *Trombley v. Nat'l City Bank*, 759 F. Supp. 2d 20, 26 (D.D.C. 2011) ("formal discovery is not required for preliminary approval"). Here, after exchanging informal discovery, the Parties participated in mediation before an eminently qualified mediator. As such, this first factor is satisfied.

B. The Proposed Settlement Has No Obvious Deficiencies.

There are no obvious deficiencies in the proposed Settlement. In contrast to some class action privacy settlements, the Settlement here provides actual relief to the Class Members in the form of several years of identity theft protection (without any need to submit a Claim Form for those Class Members who previously signed up for such protection), and the opportunity to seek reimbursement for those who expended time spent remedying issues related to identity theft directly caused by the Data Breach. *See* Settlement Agreement ¶ 44. The requirement of submission of a Claim Form for those who did not previously sign up for identity theft protection is reasonable because the parties cannot force that upon Class Members who do not desire it. Similarly, the requirement of submission of a Claim Form for time expended is necessary because the parties would have no way of knowing which Class Members incurred such time without a Claim Form. Submission of Claim Forms will be made relatively easy and convenient for Class Members by providing for online Claim Form submissions through a website to be established by the Settlement Administrator, in addition to an option for mailed-in Claim Forms for any Class Members (if any) who do not have online access. There is no question that the Settlement "treats class members equitably relative to each other," Fed. R. Civ. P. 23(e)(2)(D), given that all Class

Members have the right to the same relief.

Although Plaintiffs believe that the class would have been certified and that they would have ultimately prevailed, they also recognize that they would face risks at the pleading stage, as well as class certification, summary judgment, and trial. Indeed, "[m]ost class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them." *In re Austrian & German Bank Holocaust Litig*., 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000). Defendants would no doubt present a vigorous defense, and there is no assurance that the class would prevail. Balancing the strength of the class's claims against the legal and factual obstacles remaining, Plaintiffs and their counsel concluded that accepting the relief obtained in the settlement was in the best interest of the class. Frei-Pearson Decl. ¶ 11.

Had Settlement not been reached, Defendants, in response to Plaintiffs' claims, would assert numerous defenses, including, *inter alia*, that Plaintiffs did not incur damages and that Defendants were not negligent and had adequate procedures in place to protect Class Members' PI. Considering the monetary relief and data security protections under the Settlement (especially when weighed against the risk of continued litigation), the Settlement Agreement here is certainly not "obviously deficient." *See Danieli*, 2009 WL 6583144, at *4–5 (granting preliminary approval where settlement has no obvious defects and proposed allocation plan is rationally related to the relative strengths and weaknesses of the respective claims asserted.).

C. The Settlement Fairly Allocates Settlement Consideration Among Class Members.

Third, the Settlement Agreement fairly allocates the Settlement consideration among the Class Members. The Settlement provides no preferential treatment to any individual Class Member. Under the Settlement, every Class Member is treated exactly the same. Regardless of whether a Class Member sought credit monitoring and identity theft protection offered by

Defendants prior to Settlement, or if they will seek it by filing a Claim Form, all Class Members are offered the same identity theft protection plan. Settlement Agreement ¶ 44(a). Similarly, all Class Members have the opportunity to seek reimbursement for time expended.[3] *Id.* at ¶ 44(b). Thus, the Settlement fairly allocates consideration among Class Members. *See Hart v. RCI Hosp. Holdings, Inc.*, No. 09-3043, 2015 WL 5577713, at *12–13 (S.D.N.Y. Sept. 22, 2015).

D. This Settlement Falls Within The Range Of Possible Approval.

Finally, this Settlement falls well within the range of possible approval. In evaluating this factor, courts primarily consider a plaintiff's expected recovery balanced against the value of the settlement offer and the ability of the settling participants to withstand a greater judgment. *See, e.g., In re Bear Stearns Companies, Inc. Sec., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 269 (S.D.N.Y. 2012) (approving a settlement that represented under 12% of the class' potential damages). "[T]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Charron v. Pinnacle Grp. NY LLC*, 874 F. Supp. 2d 179, 201 (S.D.N.Y. 2012) (citing *Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 n.2 (2d Cir. 1974)).

Here, Class Members are receiving several years of credit and identity theft protection services, reimbursement for time expended (up to $50) remedying identity theft issues directly caused by the Data Breach, and non-monetary relief in the form of maintaining security measures

[3] Although Plaintiffs will seek modest service awards in recognition of the time and effort they spent performing their duties as Settlement Class representatives, the Settlement is not contingent on those awards; indeed, such awards are common and in no way preclude preliminary approval. *See, e.g., Almonte v. Marina Ice Cream Corp.*, No. 16-00660, ECF No. 51 at ¶ 6 (S.D.N.Y. March 23, 2017) (Daniels, J.) (granting service award of $10,000 to named plaintiff); *Chin v. RCN Corp.*, No. 08-7349, 2010 WL 1257586, at *1-3 (S.D.N.Y. Mar. 12, 2010). Class representatives' service awards and attorneys' fees are generally not considered at the preliminary approval stage, but rather are evaluated at or after the fairness hearing. *See In re Foreign Exch. Benchmark Rates Antitrust Litig.*, No. 13-07789, 2015 WL 9952596 at *5. (S.D.N.Y. Dec. 15, 2015)

to protect PI. *See* Settlement Agreement ¶ 44. Settlements have been approved for other data breach class actions where *no* credit monitoring was offered and loss reimbursement was significantly less than in the instant case. *See In re Linkedin User Privacy Litig.*, 309 F.R.D. 573, 587 (N.D. Cal. 2015) (approving settlement where "class members who submitted valid claims will each receive approximately $14.81").[4] The significant benefits available under the Settlement confirm that it is well within the range of possible approval.

Because the Settlement satisfies each of the factors set forth in Rule 23(e)(2) and those factors generally considered by courts in the Second Circuit to justify preliminary approval, this Court should – consistent with the Second Circuit's strong judicial policy favoring settlement – preliminarily approve the Settlement Agreement.

VI. THE PROPOSED NOTICE PLAN

To satisfy the requirements of both Rule 23 and Due Process, "[f]or any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). Rule 23(c)(2)(B) also provides that the substance of the "notice must clearly and concisely state in plain, easily understood language," the nature of the action, the definition of the class to be certified, the class claims and defenses at issue, as well as explain that class members may enter an appearance through counsel if so desired, request to be excluded from the settlement class, and understand that the effect of a class judgment shall be binding on all class members.

[4] *See also In re Adobe Systems Inc. Privacy Litig.*, No. 13-05226 (N.D. Cal. Aug. 13, 2015), ECF No. 105 (approving settlement that provided no credit monitoring and no reimbursement for economic losses); *In re Heartland Payment Sys.*, 851 F. Supp. 2d 1040, 1049, 1079-80 (S.D. Tex. 2012) (approving settlement providing for reimbursement of economic costs and no credit monitoring).

Fed. R. Civ. P. 23(c)(2)(B). Notice is "adequate if it may be understood by the average class member." NEWBERG § 11:53 at 167. Rule 23(e)(1) similarly advises that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1).

Here, the Parties have agreed on a notice plan that satisfies these requirements (the "Notice Plan"), and Plaintiffs respectfully request that this Court approve it. Within 14 days of entry of the Preliminary Approval Order, for those Class Members for whom Defendants provided an e-mail address, the Settlement Administrator shall send the Settlement Electronic Notice to the Class Members via electronic mail (with read receipt requested) to Class Members' last known electronic mail addresses. Settlement Agreement ¶ 39(b). Within fourteen (14) days after sending the Settlement Electronic Notice and within thirty-five (35) days of entry of the Preliminary Approval Order, the Settlement Administrator shall send the Settlement Postcard Notice via U.S. Mail to: (1) the Class Members for whom Defendants have no electronic mail address on record; and (2) the Class Members who were sent the Settlement Electronic Notice but for whom the Settlement Administrator did not receive a read receipt. *Id.* The form of the Settlement Postcard Notice is attached as Exhibit 5 to the Frei-Pearson Decl. If the mailing of a Settlement Postcard Notice is returned as undeliverable, the Settlement Administrator will make reasonable efforts to identify a new address for that Class Member, including, but not limited to, skip-tracing, and promptly re-send the Settlement Postcard Notice to the identified new address, if any. Settlement Agreement ¶ 39(b). Both the Electronic Notice and Postcard Notice clarify the Settlement Agreement's definitions and its benefits. Frei-Pearson Decl. ¶ 16. The Electronic Notice and Postcard Notice also include contact information for proposed Settlement Class Counsel, the settlement website address, the date of the final approval hearing, and instructions on how to object or opt-out of the

settlement. *Id.* A more-detailed Long Form Notice will also be available on the settlement website and linked to the Email Notice. *Id.* at ¶ 15. The Electronic Notice and Postcard Notice also direct potential Class Members to the settlement website, which will serve as a more detailed form of notice and provide Class Members with the ability to file a claim form online. Frei-Pearson Decl. at ¶ 17. The Settlement website will contain, in plain language, all requirements of Rule 23(c)(2)(B) about the nature of the lawsuit and Class Members' rights as well as provide access to relevant court documents (in addition to how to access the entire docket on PACER), answers to frequently asked questions, and a toll-free number to reach proposed class counsel. *Id*. at ¶ 17. The format and language of each form of notice has been drafted so that it is in plain language, is easy to read, and will be readily understood by the proposed class. *Id.* at ¶ 16.

Additionally, the Class Action Fairness Act requires that notice of a proposed settlement be sent to certain government officials. 28 U.S.C. § 1715. Within ten (10) days of the filing of this Motion, the Settlement Administrator, on behalf of RailWorks, will serve the proper notice upon the required officials. Settlement Agreement ¶ 38. Accordingly, the proposed Notice Plan comports with Rule 23 and the requirements of due process and should be approved by this Court. *Almonte*, 2016 WL 7217258, at *4 (approving class notice where notice "fully complie[d] with due process and Fed. R. Civ. P. 23.").

VII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court enter an order, a proposed form attached as Exhibit 3 to the Frei-Pearson Decl., (1) certifying the proposed Settlement Class; (2) naming Plaintiffs as class representatives; (3) appointing Finkelstein, Blankenship, Frei-Pearson & Garber, LLP and Thomas & Solomon LLP as Class Counsel; (4) granting preliminary approval to the Settlement Agreement; (5) approving the proposed Notice

Plan; (6) scheduling a final fairness hearing; and (7) granting such further relief the Court deems reasonable and just.

Dated: November 30, 2020

White Plains, New York

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