CAUSE NO. 202161470

ARTHUR DEKENIPP, individually and on behalf of all others similarly situated,	:	IN THE DISTRICT COURT OF
Plaintiff,	:	HARRIS COUNTY, TEXAS
v.	:	
GASTROENTEROLOGY CONSULTANTS, P.A.,	:	
Defendant.	:	295TH JUDICIAL DISTRICT

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

Plaintiff Arthur Dekenipp ("Plaintiff") submits this Memorandum in Support of Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement.

I. INTRODUCTION

In January 2021, Gastroenterology Consultants, P.A. ("Defendant" or "GCPA") was the victim of a ransomware cyberattack in which criminals gained access to one of its systems (the "Data Incident"). As a result of the Data Incident, approximately 162,163 patients' private and personal health information was potentially impacted. This class action arises out of GCPA's alleged failure to safeguard the personal identifying information ("PII") and personal health information ("PHI") (collectively "Private Information") that it collected and maintained from and for Plaintiff and class members. GCPA denies all liability and wrongdoing.

After extensive arms' length negotiations with the assistance of an independent third-party mediator, the parties have reached a settlement that is fair, adequate, and reasonable. The

agreement calls for four separate categories of relief for Settlement Class Members.[1] Plaintiff strongly believes the settlement is favorable to the Settlement Class.[2]

Pursuant to Rule of Civil Procedure 42(e), Plaintiff moves the Court for an order certifying the class for settlement purposes, preliminarily approving the proposed settlement agreement, and approving the content and manner of the proposed notice process. Accordingly, and relying on the following memorandum of points and authorities, the Declaration of Plaintiff's Counsel Gary E. Mason and attached exhibits filed herewith, Plaintiff respectfully requests the Court preliminarily approve the parties' Settlement Agreement and issue the proposed order attached to the Declaration of Gary E. Mason as Exhibit 1-D.

II. CASE SUMMARY

A. The Data Incident

GCPA is a comprehensive gastrointestinal health care provider that services the communities of Houston, Nassau Bay, Webster, Pasadena, and Pearland. Mason MPA Dec., ¶ 15.a. In the ordinary course of receiving healthcare services from GCPA, patients provide GCPA with sensitive, personal and private information such as their: name, address, phone number and email address; date of birth; social security number; information relating to individual medical history; medical record information; insurance information and coverage; and treatment details. *Id.* ¶ 15.b. GCPA also creates and stores medical records and other protected health information for its patients, including records of treatments and diagnoses. *Id.* ¶ 15.c.

All of GCPA's employees, staff, entities, sites, and locations may share patient information with each other for various purposes, as disclosed in the HIPAA compliant privacy notice that

[1] The Settlement Agreement in its entirety is attached as Exhibit A to the Declaration of Gary E. Mason ("Mason MPA Dec.") filed herewith.
[2] *Id.* at ¶¶ 11-12, 33-34.

GCPA is required to maintain. *Id.* ¶ 15.d. GCPA agreed to and undertook to maintain the protected health information entrusted to it by Plaintiff and Class Members safely, confidentially, and in compliance with all applicable laws. *Id.* ¶ 15.e. The patient information held by Defendant in its computer system and network included the Private Information of Plaintiff and Class Members. *Id.* ¶ 15.f.

On January 10, 2021, Defendant learned that an unauthorized actor had gained access to its system to deploy ransomware, encrypt its system and copy files (the "Data Incident"). *Id.* ¶ 15.g. GCPA reached a "negotiated resolution" with the cyber-criminals. *Id.* ¶ 15.h. GCPA engaged a forensic investigation firm that determined that the ransomware was introduced by an unknown individual or individuals outside of its organization who gained access to part of its network where GCPA stored files that contained confidential patient information of its clients. *Id.* ¶ 15.i. Defendant's investigation further determined that, as a result of this incident, certain personal or protected health information was potentially compromised, including names, addresses, personal health information, Social Security numbers and other protected healthcare information (the "Private Information"). *Id.* ¶ 15.j.

On or about August 6, 2021, GCPA notified all potentially affected persons of the Data Incident. *Id.* ¶ 16. As a result of the Data Incident, approximately 162,163 patients' private and personal health information was impacted and potentially compromised. *Id.* ¶ 14.

B. The Petition and Procedural Posture

On September 22, 2021, Plaintiff filed his original class action petition in the District Court for Harris County, Texas. *Id.* ¶ 17. GCPA filed a motion to dismiss Plaintiff's complaint on November 15, 2021, pursuant to Texas Rule of Civil Procedure 91(a). *Id.* ¶ 18. On December 1, 2021, Plaintiff filed his operative and amended class action petition, alleging seven causes of

action: negligence; breach of implied contract; negligence *per se*; breach of fiduciary duty; intrusion upon seclusion / invasion of privacy; unjust enrichment; and violation of the Texas Deceptive Trade Practices Consumer Protection Act. *Id.* ¶ 19. Plaintiff sought certification of a class of persons including "[a]ll persons whose Private Information was compromised as a result of the Ransomware Attack announced by Gastroenterology on or about August 6, 2021." *Id.* ¶ 20.

By his operative and amended petition, Plaintiff seeks equitable relief enjoining GCPA from engaging in the wrongful conduct complained of and compelling GCPA to utilize appropriate methods and policies with respect to consumer data collection, storage, and safety. *Id.* ¶ 21. Plaintiff further seeks an order requiring GCPA to provide credit monitoring services to himself and the rest of the Class. *Id.* ¶ 22. Finally, Plaintiff seeks an award of actual, compensatory, and statutory damages as well as attorneys' fees and costs, and any such further relief as may be deemed just and proper. *Id.* ¶ 23.

Plaintiff and GCPA agreed that an early mediation of the above-captioned litigation (the "Litigation") was warranted. *Id.* ¶ 26. After the Settling Parties began to discuss the potential for early resolution, GCPA withdrew its motion to dismiss. *Id.* ¶ 24. On or about December 20, 2021, the Settling Parties confirmed, via correspondence to the Court, that they agreed to a litigation stay pursuant to Rule 11 and had scheduled a mediation. *Id.* ¶ 25.

On January 26, 2022, a virtual mediation was conducted before Rodney A. Max of Upchurch Watson White & Max Mediation Group in Miami, Florida. *Id.* ¶ 27. Arms' length settlement discussions continued following the virtual mediation session, and a Confidential Settlement Term Sheet was fully executed on March 7, 2022. The Settling Parties notified the Court of the Settlement on March 9, 2022. *Id.* ¶ 28. Over the next six-plus weeks, the parties continued to diligently negotiate, draft, and finalize the settlement agreement, notice forms, and

came to an agreement on a claims process and administrator. *Id.* ¶ 29. The Settlement Agreement was finalized by the Parties in April 2022. *Id.* ¶ 31, Ex. 1.

III. SUMMARY OF SETTLEMENT

The Settlement negotiated on behalf of the class provides for four separate types of relief: up to $500 per claimant in ordinary expense reimbursements and compensation for lost time; up to $4,000 in extraordinary expense reimbursements; identity monitoring services; and equitable relief in the form of data security enhancements. Mason MPA Dec. ¶ 37. The Settlement Class includes approximately 162,163 people and is defined as "all persons residing in the United States whose PII/PHI was potentially compromised as a result of the ransomware attack announced by GCPA on or about August 6, 2021 and were sent notice of the ransomware attack." *Id.* ¶ 35. Included within the Settlement Class is the Social Security Number Subclass, which includes: "all persons residing in the United States whose PII/PHI, including their Social Security Numbers, was potentially compromised as a result of the ransomware attack announced by GCPA on or about August 6, 2021 and were sent notice of the ransomware attack." *Id.* The Settlement Class and Social Security Subclass specifically excludes: (i) GCPA and its officers and directors; (ii) all Settlement Class Members who timely and validly request exclusion from the Settlement Class; (iii) the Judge assigned to evaluate the fairness of this settlement; and (iv) any other Person found by a court of competent jurisdiction to be guilty under criminal law of initiating, causing, aiding or abetting the criminal activity occurrence of the Data Incident or who pleads *nolo contendre* to any such charge. *Id.*

A. Settlement Benefits

1. Ordinary Expense Reimbursements and Lost Time

The first category of benefits provides Settlement Class Members who submit a valid claim may receive up to $500 per person for reimbursement of out-of-pocket expenses incurred as a result of the Data Incident including: unreimbursed losses relating to fraud or identity theft; professional fees including attorneys' fees, accountants' fees, and other fees for credit repair or similar services; costs associated with freezing or unfreezing credit with any credit reporting agency; credit monitoring costs that were incurred in 2021 but before claimant received any offer of credit monitoring by GCPA; and miscellaneous associated expenses such as notary, fax, postage, copying, mileage, and long-distance phone calls. Unreimbursed losses must: (i) be actual, documented, and unreimbursed monetary loss; (ii) more likely than not been caused by the Data Incident; (iii) have occurred in 2021 or 2022; (iv) not already be covered by the Extraordinary Expense Reimbursement category; and (v) the claimant is required to have made reasonable efforts to avoid, or seek reimbursement for the loss, including but not limited to exhaustion of all available credit monitoring insurance and identity theft insurance. Mason MPA Dec. ¶ 38.

Additionally, included within the $500, each Settlement Class Member with documented expenses can also claim up to three (3) hours of documented lost time spent in response to the Data Incident, e.g., time spent dealing with replacement card issues, reversing fraudulent charges, (calculated at the rate of Twenty Dollars and Zero Cents ($20.00) per hour), but only if at least one full hour was spent. *Id*.

2. Extraordinary Expense Reimbursements

The second category of benefits allows Settlement Class Members to submit a claim for reimbursement of up to $4,000 in extraordinary expenses, incurred as a result of the Data Incident. *Id.* ¶ 39.

3. Identity Monitoring Services

In addition to the monetary compensation available, each Settlement Class Member is eligible to submit a claim to be enrolled in identity monitoring services. *Id.* ¶ 40. All Settlement Class Members can submit a claim for a total of 18-months of IdentityForce RapidResponse ID. *Id*. RapidResponse ID provides such services as: advanced fraud monitoring; dark web ID monitoring; a convenient app and two factor authentication; fully managed restoration services; identify theft insurance up to $1,000,000; stolen funds reimbursement, tax fraud coverage and medical identity theft coverage. *Id.* All Social Security Number Subclass Members are eligible to enroll in a total of 18-months of IdentityForce RapidResponse Premium. *Id.* In addition to the services provided by RapidResponse ID described above, RapidResponse Premium also provides such services as: bank and credit card activity alerts; change of address monitoring; court record monitoring; medical ID fraud protection; online protection tools; and three-bureau credit monitoring; three bureau quarterly credit score and score tracker. *Id.* Enrollment in credit monitoring services shall be available to Settlement Class Members regardless of whether the Settlement Class Member has submitted a claim for expense reimbursement. *Id.*

In return for a release tailored to the claims that have been plead or could have been plead in this case, the Settlement Agreement provides that GCPA will pay up to $400,000 (less costs of Settlement Administration) to compensate Settlement Class Members and provide identity monitoring services. *Id.* at ¶¶ 37-42.

4. Equitable Relief

GCPA has adopted and implemented significant data security measures following the Data Incident, including multifactor authentication, VPN remote access protocols, EDR software implementation, operating system and backup upgrades, and restricted access procedures. *Id.* ¶ 41. GCPA has committed to completing a security risk assessment in 2022 and 2023, and to enact

reasonable and appropriate security enhancements identified in the security risk assessments. *Id.* To date, GCPA estimates that the total costs of improvements is approximately $3,500 and that the improvements will cost an additional $11,500 in 2022. *Id.*

5. Release

The release in this case is tailored to the claims that have been plead or could have been plead in this case. *Id.* ¶ 43. Settlement Class Members who do not exclude themselves from the Settlement Agreement will release claims against GCPA and Related Persons. *Id.* ¶ 44.

B. The Notice and Claims Process

The Parties agreed to use Postlethwaite & Netterville ("P&N") as the Notice Specialist and Claims Administrator in this case. *Id*. ¶ 55.

1. Notice

Within thirty (30) days after Preliminary Approval Order is entered, the Claims Administrator will provide Notice via direct email, mail, website, and toll-free telephone line. *Id.* ¶ 46. The Settlement provides for the Short Form Notice (*see* Mason MPA Dec. Ex. 1B) to be provided to Settlement Class Members via email to the email address GCPA has on record for Settlement Class members. *Id.* ¶ 47. Where Settlement Class Members did not provide GCPA with an email address, or where the Short Form Notice is unable to be delivered via email address, direct notice will be provided by U.S. Mail to the postal address provided when the Settlement Class Members conducted transactions with GCPA. *Id.* ¶ 48.

Prior to completing the mailing, the address shall be run through the National Change of Address database ("NCOA"). *Id.* ¶ 49. Where a mailing is returned with a forwarding address at least 14-days prior to the Claims Deadline, the Settlement Administrator shall resend the Notice to the updated address. *Id.* Where a mailing is returned undeliverable with no forwarding address

at least 14-days prior to the Claims Deadline, the Settlement Administrator shall make reasonable efforts (such as skip tracing) to locate the correct address for the Settlement Class Member and resend. *Id*.

The Short Form Notice is designed to be understandable, clear, and concise, and to advise Settlement Class Members of their rights under the terms of the Settlement Agreement and direct them to the Settlement Website where they can obtain additional information. *See id,* Ex. 1B.

The Claims Administrator shall also establish a dedicated settlement website and shall maintain and update the website throughout the claim period, with the forms of Short Notice, Long Notice, and Claim Form approved by the Court, as well as this Settlement Agreement. *Id.* ¶ 51. Further, a toll-free help line shall be made available to provide Settlement Class Members with additional information about the settlement. *Id.* ¶ 52. Upon request of Settlement Class Members, the Administrator also will provide copies of the forms of Short Notice, Long Notice, and Claim Form approved by the Court, as well as the full-form Settlement Agreement. *Id.* ¶ 53.

2. Claims

The timing of the claims process is structured to ensure that all Class Members have adequate time to review the terms of the Settlement Agreement, make a claim, or decide whether they would like to opt-out or object. *Id.* ¶ 54. Class Members will have until ninety (90) days after notice is completed to submit their Claim Form to the Claims Administrator online or via mail. *Id.* ¶ 55. The Claim Form, attached to the Declaration of Gary E. Mason at Exhibit 1-A, is written in plain language to facilitate Settlement Class Members' ease in completing it.

3. Exclusion Requests

Settlement Class Members will have up to and including sixty (60) days following entry of the Preliminary Approval Order to exclude themselves from the Settlement. *Id.* ¶ 57. To be

excluded from the Settlement, Settlement Class Members must make their request in writing or via the Settlement Website. *Id.* ¶ 58. Any Member of the Settlement Class who elects to be excluded shall not (i) be bound by any order or the Judgment; (ii) be entitled to relief under the Settlement Agreement; (iii) gain any rights by virtue of the Settlement Agreement; or (iv) be entitled to object to any aspect of the Settlement Agreement. *Id.* ¶ 59.

4. Objections

Similar to their deadline by which to exclude themselves from the class, Settlement Class Members will also have up to and including sixty (60) days following entry of the Preliminary Approval Order to object to the Settlement. *Id*. ¶ 60. The timing with regard to objections is structured to give Settlement Class Members sufficient time to review the Settlement documents—including Plaintiff's Motion for Attorneys' Fees, Costs, and Service Awards, which will be filed forty-five (45) days following entry of the Preliminary Approval Order—two weeks prior to the deadline for Settlement Class Members to object or exclude themselves from the Settlement. *Id*. ¶ 61.

Any Settlement Class Member who wishes to object shall file notice of his/her intention to do so with the Clerk of Court and at the same time serve copies upon both Class Counsel and Counsel for GCPA. *Id*. ¶ 62. The objection to the Settlement Agreement must include: (i) the objector's full name, address, telephone number, and e-mail address (if any); (ii) information identifying the objector as a Settlement Class Member, including proof that the objector is a member of the Settlement Class (e.g., copy of notice, copy of original notice of the Data Incident); (iii) a written statement of all grounds for the objection, accompanied by any legal support for the objection the objector believes applicable; (iv) the identity of all counsel representing the objector; (v) a statement whether the objector and/or his or her counsel will appear at the Final Fairness

Hearing; (vi) the objector's signature and the signature of the objector's duly authorized attorney or other duly authorized representative (along with documentation setting forth such representation); and (vii) a list, by case name, court, and docket number, of all other cases in which the objector and/or the objector's counsel has filed an objection to any proposed class action settlement within the last three (3) years. *Id.* ¶ 63.

C. Plaintiff's Service Awards, Attorneys' Fees and Costs

The Settling Parties did not discuss the payment of attorneys' fees, costs, expenses and/or service award to Representative Plaintiff, until after the substantive terms of the settlement had been agreed upon, other than that GCPA would pay reasonable attorneys' fees, costs, expenses, and an service award to Representative Plaintiff as may be agreed to by the Settling Parties and/or as ordered by the Court, or, in the event of no agreement, then as ordered by the Court. *Id.* ¶ 64. The Settlement Agreement calls for a reasonable service award to Plaintiff in the amount of $2,500. *Id.* ¶ 65. GCPA has agreed to pay the service award outside of and separate from the $400,000 Settlement Cap. *Id.* ¶¶ 65-67. The Service Award is meant to compensate Plaintiff for his efforts on behalf of the Settlement Class, including maintaining contact with counsel, reviewing pleadings, assisting in the investigation of the case, remaining available for consultation throughout the mediation and answering counsel's many questions. *Id*. ¶ 66.

After agreeing to the terms of the settlement on behalf of the Class, counsel for Plaintiff negotiated their fees and costs separate from the benefit to Class Members, in the amount not to exceed $150,000 for fees and costs combined. *Id.* ¶ 67. Subject to approval of the Court, this sum is to be paid separate and apart from the settlement available to Class Members. *Id.* ¶ 68.

Class Counsel will submit a separate motion seeking attorneys' fees, costs, and Plaintiff's Service Awards prior to prior to Settlement Class Members' deadline to exclude themselves from or object to the Settlement Agreement. *Id.* ¶ 69.

IV. LEGAL AUTHORITY

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

In determining whether a class action settlement should be approved, Texas courts endorse the three step process described in the *Manual for Complex Litigation*: (1) preliminary approval of the proposed settlement; (2) dissemination of notice of the settlement to settlement class members; and (3) a fairness hearing or final approval hearing where class members may be heard regarding the settlement, evidence regarding the fairness, adequacy and reasonableness of the settlement can be presented, and the court can safeguard class member interests and determine whether to provide final approval. *See, e.g., Stassi v. Boone,* No. 2003 WL 214369959 (Tex. Dist. Ct. June 6, 2003) (noting that when the Court preliminarily approved the class settlement it had issued an order granting class certification, preliminarily approving the settlement, and approving the content of the notice and ordering dissemination prior to final approval); *see also Northrup v. Southwestern Bell Telephone Co.,* 72 S.W.3d 16, 18 (Tex. Ct. App. 2002) (same).

The preliminary approval stage provides a forum for the initial evaluation of a settlement, and where no class has been previously certified, a determination as to whether a proposed settlement class should be certified. 2 Newberg & Conte, Newberg on Class Actions ("*Newberg*") §§ 11.22, 11.27 (3d ed. 1992); *In re Beef Indus. Antitrust Litig.,* 607 F.2d 167, 175 (5th Cir. 1979). The decision to approve or reject a proposed settlement lies firmly within the discretion of the trial court. *Northrup*, 72 S.W.3d at 21, *citing General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 955 (Tex. 1996). Granting preliminary approval will allow Settlement Class Members the opportunity to learn about the settlement, make a claim, opt-out, or object and be heard by the Court.

Plaintiff here seeks preliminary approval of the proposed settlement—an initial evaluation of the fairness of the proposed Settlement. *See Manual for Complex Litigation* § 30.44 (4th ed.). Because the proposed Settlement Agreement and plan of distribution fall within the range of possible approval, this Court should grant Plaintiff's motion and allow notice to be provided to the class. *See Newberg* § 11.25 (3d ed. 1992).

VI. LEGAL DISCUSSION

Judicial policy favors the resolution of disputes through settlement. *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982). There is a strong presumption in favor of finding Settlement Agreements fair. Settlement Agreements are not required to "achieve some hypothetical standard constructed by imagining every benefit that might someday be obtained in contested litigation"—rather, compromise is the essence of settlement, and a court may rely on the judgment of experienced counsel for the parties. *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 286 (W.D. Tex. Feb. 21, 2007), *quoting Garza v. Sporting Goods Properties, Inc*., No. CIV.A. SA-93-CA-108, 1996 WL 56247 (W.D. Tex. Feb. 6, 1996).

A. The Court Should Certify the Proposed Class for Settlement Purposes.

Plaintiff here seeks certification of a Settlement Class consisting of "all persons residing in the United States whose PII/PHI was potentially compromised as a result of the ransomware attack announced by GCPA on or about August 6, 2021 and were sent notice of the ransomware attack" and a Social Security Number Subclass including "all persons residing in the United States whose PII/PHI, including their Social Security Numbers, was potentially compromised as a result of the ransomware attack announced by GCPA on or about August 6, 2021 and were sent notice of the ransomware attack" with specific and limited exclusions. *See* Mason MPA Dec. ¶ 35. The *Manual for Complex Litigation* advises that in cases presented for both preliminary approval and class certification, the "judge should make a preliminary determination that the proposed class satisfies the criteria". MCL 4th, § 21.632.

Because a court evaluating certification of a class action that settled is considering certification only in the context of settlement, the court's analysis is somewhat different than in a case that has not yet settled. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997). In some ways, the court's review of certification of a settlement-only class is lessened: as no trial is anticipated in a settlement-only class case, the case management issues inherent in the ascertainable class determination need not be confronted. *See id.* Other certification issues however, such as "those designed to protect absentees by blocking unwarranted or overbroad class definitions" require heightened scrutiny in the settlement-only class context "for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold." *Id*.; *see also McAllen Medical Center, Inc. v. Cortez,* 66 S.W.3d 227 (Tex. 2001). Specifically, Texas courts require a rigorous analysis of the scope of the class definition and the typicality and adequacy prongs of the class action assessment

at the preliminary approval stage—as "the trial court's ability to later adjust the class at the fairness hearing and still protect all class members' interest may be severely limited. *McAllen Medical Center, Inc. v. Cortez,* 66 S.W.3d at 232.

Despite the necessarily rigorous analysis of certain prongs at the preliminary certification stage, class actions are regularly certified for settlement. In fact, similar data breach cases have been certified – on a *national* basis—including most recently the record-breaking settlement in *In re Equifax. See In re Equifax, Inc. Customer Data Sec. Breach Litig.*, Case No. 1:17-md-2800-TWT (N.D. Ga. 2019). *See, also, e.g., In re Target*, 309 F.R.D. 482 (D. Minn. 2015); *In re Heartland Payment Systems, Inc. Customer Data Sec. Breach Litig*., 851 F.Supp.2d 1040 (S.D. Tex. 2012). This case is no different.

Texas law regarding class actions mirrors its federal counterpart, making federal cases regarding the certification of class actions highly persuasive authority. *See Glassell v. Ellis,* 956 S.W.2d 676, 682 (Tex. Ct. App. 1997). Under Rule 42, a class action may be maintained where the movants demonstrate (1) the class is so numerous that joinder is impracticable; (2) the class has common questions of law or fact; (3) the representatives' claims are typical of the class claims; and (4) the representatives will fairly and adequately protect class interests. *St. Louis Southwestern Ry. Co. v. Voluntary Purchasing Groups, Inc.,* 929 S.W.2d 25, 31 (May 13, 1996), *citing* Tex. R. Civ. P. 42 (a). A proposed class must also meet one of the prongs of Rule 42(b) to be maintained. Here, questions of law or fact common to the class predominate over individualized issues, and a class action is superior to other means of adjudication. *See* Rule 42(b)(3).

1. The Settlement Class is so numerous that joinder is impracticable.

Numerosity requires "the class [be] so numerous that joinder of all members is impractical." Tex. R. Civ. P. 42(a)(1). This determination is not always based on numbers alone,

but rather considers numbers as well as the nature of the action, judicial economy, geographical locations of the class members, and the likelihood that class members would be unable to prosecute individual lawsuits. *Weatherly v. Deloitte & Touche*, 905 S.W.2d 642, 653 (Ct. App Tex. 1995). Here, the numbers alone are sufficient to demonstrate the numerosity prong has been met. As the proposed Settlement Class here numbers approximately 162,163 individuals, and the Social Security Number Subclass includes 452 of those individuals, judicial economy would be well-served by certification. Despite the likelihood that most proposed class members live around GCPA, any attempt at joinder of such a large number of individual suits would be impractical. Accordingly, the Settlement Class is sufficiently numerous to justify certification.

2. Questions of law and fact are common to the Settlement Class.

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

Here, the commonality requirement is met because Plaintiff contends that he can demonstrate numerous common issues exist. For example, Plaintiff asserts that whether GCPA failed to adequately safeguard the records of Plaintiff and other Settlement Class Members is a question common across the entire class. Plaintiff further asserts that GCPA's data security

safeguards were common across the Class, and those applied to the data of one Settlement Class Member did not differ from those safeguards applied to another.

Plaintiff contends that other specific common issues include (but are not limited to):

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

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

3. Plaintiff's claims and defenses are typical of the Settlement Class.

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

Here, Plaintiff's and Settlement Class Members' claims all stem from the same event—the cybersecurity attack on GCPA's system—and the cybersecurity protocols that GCPA had (or did

not have) in place to protect Plaintiff's and Settlement Class Members' data. Thus, Plaintiff's claims are typical of the Settlement Class Members' and the typicality requirement is satisfied.

4. Plaintiff and his counsel will provide fair and adequate representation for the Settlement Class.

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

Here, Plaintiff's interests are aligned with those of the Settlement Class in that they seek relief for alleged injuries arising out of the same Data Incident. Plaintiff's and Settlement Class Members' data was all allegedly compromised by Defendant in the same manner. Under the terms of the Settlement Agreement, Plaintiff and Settlement Class Members will all be eligible for the same monetary relief based on the type of injury they have experienced.

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

5. Certification is also appropriate because common issues predominate over individualized ones, and class treatment is superior.

To show that common issue predominate, plaintiffs must demonstrate that common questions of law or fact relating to the class predominate over any individualized issues. Tex. R. Civ. Proc. 42(b)(3). In evaluating predominance of common issues, Texas courts do not focus on

whether the common issues outnumber the individual ones, but rather whether the common issues "will be the object of most of the efforts of litigation." *Weatherly v. Deloitte & Touche*, 905 S.W.2d 642, 648 (Tex. Ct. App. 1996); *National Gypsum Co. v. Kirbyville Independent School Dist.*, 770 S.W.2d 621, 625 (Tex. Ct. App. 1989). Factors to be considered include:

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

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

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

In this case, Plaintiff asserts that key predominating questions are whether GCPA had a duty to exercise reasonable care in safeguarding, securing, and protecting the personal information of Plaintiff and the Settlement Class, and whether GCPA breached that duty. Plaintiff contends that the common questions that arise from GCPA's conduct predominate over any individualized issues. Other courts have recognized that the types of common issues arising from data breaches predominate over any individualized issues. *See, e.g., In re Heartland*, 851 F. Supp. 2d at 1059

(finding predominance satisfied in data breach case despite variations in state laws at issue, concluding such variations went only to trial management, which was inapplicable for settlement class); *In re Anthem, Inc. Data Breach Litig*., 327 F.R.D. 299, 312–315 (N.D. Cal. Aug. 15, 2018) (finding predominance was satisfied because "Plaintiffs' case for liability depend[ed], first and foremost, on whether [the defendant] used reasonable data security to protect Plaintiffs' personal information," such that "the claims rise or fall on whether [the defendant] properly secured the stolen personal information," and that these issues predominated over potential individual issues); *see also Hapka v. CareCentrix, Inc.*, 2018 WL 1871449, at *2 (D. Kan. Feb. 15, 2018) (finding predominance was satisfied in a data breach case, stating "[t]he many common questions of fact and law that arise from the E-mail Security Incident and [Defendant's] alleged conduct predominate over any individualized issues"); *In re The Home Depot, Inc., Customer Data Sec. Breach Litig*., 2016 WL 6902351, at *2 (N.D. Ga. Aug. 23, 2016) (finding common predominating questions included whether Home Depot failed to reasonably protect class members' personal and financial information, whether it had a legal duty to do so, and whether it failed to timely notify class members of the data breach).

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

B. The Settlement Terms are Fair, Adequate, and Reasonable.

Rule 42(e)(2) permits approval of a class action settlement after a determination that the Settlement is "fair, reasonable, and adequate." In determining whether a proposed class settlement is fair, adequate, and reasonable, a trial court is required to consider six factors: (1) whether the settlement was negotiated at arms' length or was a product of fraud or collusion; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of proceedings, including the status of discovery; (4) the factual and legal obstacles that could prevent the plaintiffs from prevailing on the merits; (5) the possible range of recovery and the certainty of damages; (6) the respective opinions of the participants, including class counsel, class representatives, and the absent class members. *Johnson v. Scott*, 113 S.W.3d 366 (Tex. Ct. App. 2003), *citing Bloyed*, 916 S.W.2d at 955. "Put another way, the trial court must examine both substantive and procedural elements of the settlement: (1) whether the terms of the settlement are fair, adequate, and reasonable; and (2) whether the settlement was the product of honest negotiations or collusion." *Bloyed*, 916 S.W.2d at 954, *citing Pettway v. American Cast Iron Pipe Co.,* 576 F.2d 1157, 1169 (5th Cir. 1978). The analysis at this first stage is a preliminary one, where the Court need determine only whether the Settlement falls within the range of possible approval, and notice should be permitted to issue to the Class. *See Newberg* § 11.25 (3d ed. 1992).

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

"A settlement reached after a supervised mediation receives a presumption of reasonableness and the absence of collusion." 2 McLaughlin on Class Actions § 6:7 (8th ed. 2011); *see also Wal-Mart Stores,* 396 F.3d at 116. Here, the Parties reached settlement only after a full-day mediation with respected mediator Rodney A. Max. Mason MPA Dec. ¶ 27. Arms' length settlement discussions continued following the virtual mediation session, and a Confidential

Settlement Term Sheet was fully executed on March 7, 2022. *Id.* ¶ 28. The Settling Parties notified the Court of the Settlement on March 9, 2022. *Id.* Over the next six-plus weeks, the parties continued to diligently negotiate, draft, and finalize the settlement agreement, notice forms, and came to an agreement on a claims process and administrator. *Id.* ¶ 29. Accordingly, and in absence of any facts suggesting negotiations were at all improper, the presumption of reasonableness should apply here, and Plaintiff should be found to have met this requirement.

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

i. The Settlement Agreement provides real and certain relief to the Settlement Class.

The Settlement guarantees Settlement Class Members real relief for harms incurred that are reasonably tied to the Data Incident. As described in full above, each Settlement Class Member who submits a valid claim is eligible to receive payments for various misuses of their private identifying information reasonably related to the Data Incident, reimbursements for time spent addressing those misuses, and reimbursement for related out-of-pocket expenses. *See supra,* Section III.A.; *see also* Mason MPA Dec. ¶¶ 35-42. Settlement Class Members can claim up to (1) $500 in ordinary expense reimbursements including up to $60 for lost time; (2) up to $4,000 in extraordinary expense reimbursements; and (3) identity monitoring services. *Id.*

The value achieved through the Settlement Agreement is guaranteed, where chances of prevailing on the merits—and securing any amount of damages—are uncertain. While Plaintiff strongly believes in the merits of his case, he also understands that GCPA will assert a number of potentially case-dispositive defenses. Proceeding with litigation would open up Plaintiff to the risks inherent in trying to achieve and maintain class certification and prove liability. In fact, should litigation continue, Plaintiff would likely have to survive another motion to dismiss filed in order to proceed past the pleading stage and into litigation. Moreover, extended litigation leads to

extensive additional costs—for both the Parties and the Court—to the potential detriment of the Class.

Moreover, due at least in part to their cutting-edge nature and the rapidly evolving law, data breach cases like this one generally face substantial hurdles—even just to make it past the pleading stage. *See Hammond v. The Bank of N.Y. Mellon Corp*., 2010 WL 2643307, at *1 (S.D.N.Y. June 25, 2010) (collecting data breach cases dismissed at the Rule 12(b)(6) or Rule 56 stage). Class certification is another hurdle that would have to be met—and one that has been denied in other data breach cases. *See, e.g., In re Hannaford Bros. Co. Customer Data Sec. Breach Litig*., 293 F.R.D. 21 (D. Me. 2013).

Plaintiff disputes the defenses it anticipates GCPA will likely assert—but it is obvious that his success at trial is far from certain. Through the Settlement, Plaintiff and Settlement Class Members gain significant benefits without having to face further risk of not receiving any relief at all.

ii. Continued litigation is likely to be complex, lengthy, and expensive.

The costs, risks, and delay of continued litigation weigh in favor of settlement approval. Although Plaintiff is confident in the merits of his claims, the risks discussed above cannot be disregarded. Aside from the potential that either side will lose at trial, Plaintiff anticipates incurring substantial additional costs in pursuing this litigation further. Should litigation continue, Plaintiff would likely need to defeat a motion to dismiss, counter a later motion for summary judgement, and both gain and maintain certification of the class. The level of additional costs would significantly increase as Plaintiff began his preparations for the certification argument and if successful, a near inevitable interlocutory appeal attempt.

Thus it is clear that this factor weighs in favor of settlement approval and guaranteeing an immediate benefit to the class.

iii. The settlement was reached after significant investigation and exchange of information, and has strong support from Counsel.

The Parties were able to reach settlement only after substantial investigations and a significant exchange of information facilitated by mediator Rodney A. Max. Mason MPA Dec., ¶¶ 16, 19, 27-28. Despite the early stage of litigation, Plaintiff here was able to complete an independent investigation of the facts to reach a full understanding of the value of the case, as well as the attendant risks of continued litigation. Mason MPA Dec. ¶¶ 11-12. It is the strong opinion of proposed Settlement Class Counsel that the Settlement presents a favorable result for the Class. *Id.* ¶ 12. As information regarding class support for the settlement is not currently available, it will be provided to the Court prior to the final approval hearing to facilitate the Court's final decision.

C. The Proposed Settlement and Claims Administrator will Provide Adequate Notice.

Texas Rule of Civil Procedure 42(e) requires that notice of a proposed class action settlement shall be provided to all members of the class "in such manner as the court directs." Notice should be provided in a manner reasonably calculated under all the circumstances to apprise interested parties of the pending action and to afford them an opportunity to present their objections. *Mullane v. Central Hanover Bank and Trust Co*., 339 U.S. 306, 314 (1950). Individual notice must be provided to those class members who are identifiable through reasonable effort. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175 (1974).

Here, the proposed Notice Plan provides for individual Notice to be provided to Settlement Class Members via mail to the postal address provided when the Settlement Class Members conducted transactions with GCPA. Mason MPA Dec., ¶¶ 46-49. The Settlement Administrator

will also maintain a dedicated Settlement Website and toll-free telephone number by which Settlement Class members can seek answers to questions and reference pertinent case documents such as the Settlement Agreement and the Short Notice, Long Notice, and Claim Form approved by the Court. *Id.* ¶¶ 51-53. Upon request of Settlement Class Members, the Administrator also will provide copies of the forms of Short Notice, Long Notice, and Claim Form approved by the Court, as well as the full-form Settlement Agreement. *Id.* at ¶ 57.

Notice is required to provide specific information, all of which is included in the notice available to class members here. Tex. R. Civ. P. 42(c)(2)(A)(i)-(vi). The Notice proposed by the Parties here explains clearly and in plain language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues or defenses; (iv) that a class member may enter an appearance through counsel if the member so desires; (v) that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and (vi) the binding effect of a class judgment on class members under Rule 42(c)(3). *See* Long Form Notice, at Mason MPA Dec., Ex. 1-C.

The Notice is designed to be the best practicable under the circumstances, apprises Settlement Class Members of the pendency of the action, and gives them an opportunity to object or exclude themselves from the settlement. Accordingly, the Notice process should be approved by this Court.

V. CONCLUSION

Plaintiff has negotiated a fair, adequate, and reasonable settlement that guarantees Settlement Class Members significant relief in the form of settlement payments for real damages incurred as a potential result of the Data Incident at issue. The Settlement Agreement is well within the range of reasonable results, and an initial assessment of factors required to be considered on

final approval favors approval. For these and the above reasons, Plaintiff respectfully requests this Court certify the class for settlement purposes and grant his Motion for Preliminary Approval of Class Action Settlement.

Dated: April 26, 2022

Respectfully submitted,

/s/ Gary E. Mason

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CERTIFICATE OF SERVICE

I, Jarrett L. Ellzey, an attorney of record in this case, hereby certify that on April 26, 2022, I served Plaintiff's MEMORANDUM IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, by causing a true and accurate copy of such papers to be filed and served on all counsel of record via electronic mail.

/s/ Jarrett L. Ellzey
Jarrett L. Ellzey