NO. 202161470

ARTHUR DEKENIPP, On Behalf of Themselves and All Others Similarly Situated, Plaintiffs, v. GASTROENTEROLOGY CONSULTANTS, P.A., Defendant.	:	IN THE 295th DISTRICT COURT IN AND FOR HARRIS COUNTY, TEXAS

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

I. INTRODUCTION

On June 3, 2022, this Court preliminarily approved a proposed class action settlement between Plaintiff Arthur Dekenipp ("Plaintiff" or "Representative Plaintiff") and Defendant Gastroenterology Consultants, P.A. ("GCPA" or "Defendant"). *See* Preliminary Approval Order ("PA Order"). Class Counsel's efforts created a settlement valued at over $550,000—including attorneys' fees, costs, administration costs, and recovery for the Settlement Class.

Settlement Class Counsel have zealously prosecuted Plaintiff's claims, achieving the Settlement only after extensive research and informal exchange of information; protracted negotiations; participation in an all-day mediation with respected mediator Rodney A Max; and weeks of subsequent drafting and finalizing of the agreement. After this Court granted preliminary approval, the Settlement Administrator—with the help of the Parties—disseminated Notice by direct mail and email to the Settlement Class as ordered by the Court. The Notice provided Settlement Class Members with information regarding the Settlement Website, how to make a claim, and how to object to or request exclusion from the Settlement.

Out of approximately 166,271[1] Settlement Class Members, only thirteen have timely sought exclusion, and *zero* have objected. The individuals who sought exclusion will be bound by the terms of the Settlement. Settlement Class Members will have until October 3, 2022 to make a claim for Settlement benefits.

Plaintiff moved for attorneys' fees, costs, and service awards on July 21, 2021, and here move for final approval of this class action settlement. Because the Notice satisfies due process and was the best practicable—and because the Settlement is fair, adequate, and reasonable, this Court should grant final approval.

II. CASE SUMMARY

A. The Data Incident[2]

GCPA is a comprehensive gastrointestinal health care provider that services the communities of Houston, Nassau Bay, Webster, Pasadena, and Pearland. Decl. of Gary E. Mason in Supp. of Pl.'s Mot. for Prelim. Approval of Class Action Settlement, filed April 26, 2022, ("Mason MPA Decl."), ¶ 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

[1] While parties originally estimated 162,163 class members, the final class contact listed provided to Settlement Administrator by GCPA showed there are 166,271 class members.

[2] This section has been adopted, in large part, from the memorandum in Support of Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement, filed on or about April 26, 2022 ("MPA Memo.") and the Memorandum in Support of Plaintiffs' Motion for Attorneys' Fees, Costs, and Service Awards, filed on July 21, 2022

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 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.

B. The Petition

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.

Plaintiff moved for preliminary approval of the Settlement Agreement in April 2022. Through their respective counsel, the Parties appeared before this Court on June 3, 2022 on Plaintiff's Motion for Preliminary Approval. At the hearing, this Court granted preliminary approval and directed Notice be sent to the Settlement Class via both direct mail and where email addresses were available, by email. *See* Preliminary Approval Order ("PA Order").

Plaintiff here was able to complete an independent investigation sufficient to reach a full understanding of the value of the case, as well as the attendant risks of continued litigation. Mason MPA Decl. ¶ 9. It is proposed Class Counsel's opinion, based on their experience and investigation in this case, that the Settlement Agreement presents a favorable result for the Class. *Id*. at ¶ 32. Defendant GCPA denies all charges of wrongdoing or liability.

C. Procedural Posture

After Plaintiff filed his original petition, the Parties met and conferred to discuss the merits of the claims. They eventually agreed to mediation with Rodney A. Max. Mason MPA Decl. at ¶ 24.

On January 26, 2022, after submitting mediation statements that briefed the mediator on the issues, mediation proceeded via Zoom Video Conference with Rodney A. Max. *Id*. at ¶ 25. After a significant exchange of information, and a full day of arms' length negotiations with the assistance of Mr. Max, the Parties concluded the mediation without a settlement, but with a commitment to continue negotiations. *Id*. Over the next few months, the Parties continued to negotiate a Settlement Term Sheet, which was finalized in March 2022. *Id*. at ¶ 26. The Parties spent the next six-plus weeks diligently negotiating, drafting, and finalizing the settlement agreement, notice forms, and coming to an agreement on a claims process and administrator. *Id*. at ¶ 27. The Settlement Agreement was finalized and signed by the Parties in March 2021. Plaintiff moved for preliminary approval of the Agreement in April 2022. *Id*. at ¶ 29. The Court granted approval on June 3, 2022.

Defendant GCPA denies all charges of wrongdoing or liability. *Id*. at ¶ 30. Plaintiff here was able to complete an independent investigation sufficient to reach a full understanding of the value of the case, as well as the attendant risks of continued litigation. *Id*. at ¶ 31. It is proposed Class Counsel's opinion, based on their experience and investigation in this case, that the Settlement Agreement presents a favorable result for the Class. *Id*. at ¶ 32.

III. SUMMARY OF SETTLEMENT[3]

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 Decl. ¶ 37. The Settlement Class includes approximately 166,271 people and is defined as "all persons residing in the United States

[3] The Settlement Agreement ("Agr".), is available in full at Mason MPA Dec., Ex. 1.

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 Decl. ¶ 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

1. Court-Approved Notice

The Court approved Postlethwaite & Netterville, APAC ("P&N") to serve as the notice and claims administrator in this case. *See* PA Order. The Notices and Claim Forms negotiated by the Parties are clear and concise, and inform Settlement Class Members of their rights and options under the Settlement, including detailed instructions on how to make a claim, object to the Settlement, or opt-out of the Settlement. *See* Settlement Agreement, Exs. 1-A, 1-B, and 1-C; *see also* Declaration of Settlement Administrator ("Aldridge Decl."), filed herewith, Exs. A-B. The Notice Plan called for direct and individual Notice to be provided to Settlement Class Members mailed to the postal address of record with GCPA, as well as emailed to Settlement Class Members for whom GCPA has a valid email address. *Id.*; *see also*, PA Order. Notice in this case has been provided as agreed upon and as approved in this Court's Preliminary Approval Order.

i. Class List

P&N received the class data from GCPA in three separate files. Aldridge Decl. ¶ 5. File #1 contained names and mailing addresses for the 166,271 known Settlement Class Members (Settlement Class and Social Security Subclass). *Id.* File #2 contained e-mail addresses. *Id.* File #3 identified 468 potential Social Security Number Subclass members. *Id.* After consolidating the information in File #1 and File #2, P&N determined that 50,416 e-mail addresses existed in File #2 for Settlement Class Members and 166,217 Settlement Class Members had an address sufficient to attempt mailing the Short-Form Notice. *Id.*

ii. Individual Notice by Email and Mail

Beginning on July 5, 2022, P&N caused the Short-Form Notice to be sent via email ("Email Notice") to the 50,416 email addresses on the Class Notice List. *Id.* ¶ 6, Ex. A. Ultimately, the Email Notice was successfully delivered to 44,206 email addresses, or 87.7% deliverability. *Id.* P&N also coordinated and caused the Short-Form Notice to be mailed as postcard via First-Class Mail U.S. Mail ("Postcard Notice") to Settlement Class Members for which a mailing address was available from the class data. *Id.* ¶ 7.[4]

Prior to the mailing, all mailing addresses were checked against the National Change of Address (NCOA) database maintained by the United States Postal Service ("USPS"). *Id.* ¶ 8. In addition, the addresses were certified via the Coding Accuracy Support System (CASS) to ensure the quality of the zip code and verified through Delivery Point Validation (DPV) to verify the accuracy of the addresses. *Id.* Of the 166,217 Class Member records with a mailing address, 478 records did not successfully pass the address validation procedures noted above. *Id.* In the initial mailing, P&N sent Postcard Notice to 165,739 class members with valid mailing addresses. After executing a skip tracing, P&N was able to locate the addresses for 133 additional class members. *Id.* ¶ 9. P&N also executed supplemental mailings for 6,113 Class Members for which an initial Postcard Notice was returned undeliverable, but for which P&N was able to obtain an alternative mailing address through (1) forwarding addresses provided by the USPS, (2) skip trace searches using the LexisNexis third-party vendor database, or (3) requests received directly from Class Members. *Id.* ¶ 9.

Both the Email Notice and Postcard Notice included (a) the web address to the case website for access to online Claim Form and additional information, (b) rights and options as a Class

[4] For summary of notice statistics, *see* Aldridge Decl. ¶ 14, Table 1.

Member and the dates by which to act on those options, and (c) the date of the Final Approval Hearing. *Id.* Notice was completed on or before July 5, 2022, in accordance with the Preliminary Approval Order. *Id*

Through the Notice procedures outlined above, P&N attempted to send direct notice to all Settlement Class Members for which an email or mailing address was available. *Id.* ¶ 14. As of September 20, 2022, direct and individual notice reached a total of 157,085 Settlement Class Members—an impressive 94.4% of the Settlement Class. *Id., see* Table 1.

iii. Settlement Website, Toll-Free Telephone Number, E-mail Support

As per the terms of the Settlement Agreement and the Court's Preliminary Approval Order, P&N also activated and continues to maintain a case-specific website, **www.gcpadatasettlement.com** (the "Settlement Website"), where Settlement Class Members were and are able to file a claim directly on the website or download and print the Claim Form to be completed and mailed via the USPS. *Id.* ¶ 11. Visitors to the Settlement Website can download the Long Form Notice, the Claim form, as well as Court Documents, such as the Settlement Agreement, Motions filed by Class Counsel, and Orders of the Court. *Id.* Visitors are also able to submit claims electronically, submit address updates electronically, and find answers to frequently asked questions (FAQs), important dates and deadlines, and contact information for the Settlement Administrator. *Id.* This case-specific Settlement Website was designed to be user-friendly and makes it easy for Settlement Class Members to find information about the case. *Id.* As of September 20, 2022, the Settlement Website has received 7,527 unique visitors and 24,808 page views. *Id.*

P&N also caused a toll-free number, 1-844-950-2288, to be activated. *Id.* ¶ 12. The toll-free hotline is available twenty-four hours per day. *Id.* Settlement Class Members can call and

interact with an interactive voice response ("IVR") system that provides important settlement information and offers the ability to leave a voicemail message to address specific requests or issues. *Id.* The Toll-Free Number appeared in all Notices, as well as in multiple locations on the Settlement Website. *Id.* As of September 20, 2022, P&N has received 2,815 calls to the toll-free number. *Id.*

And finally, P&N established an Email address, info@gcpadatasettlement.com, as well as P.O. Office Box, to provide an additional option for Settlement Class Members to address specific questions and requests to the Settlement Administrator for support. *Id.* ¶¶ 10, 13.

2. Growing Claims, Limited Requests for Exclusion, and Zero Objections.

a. Claims

The timing of the claims process was structured to ensure that all Class Members have adequate time to review the terms of the Settlement Agreement, compile documents supporting their claim, and decide if they would like to opt-out or object. Mason MPA Dec. ¶ 52. Class Members have ninety (90) days from the completion of the Notice to submit their Claim Form to the Claim Administrator, either by mail or online. *Id.* ¶ 53. As of September 20, 2022, P&N has received 2,103 claim submissions. Aldridge Decl. ¶ 15. P&N will continue to intake and analyze claims through the claims filing deadline of October 3, 2022. *Id.*

b. Requests for Exclusion

Any Class Member who wishes to opt-out of the Settlement had until sixty (60) days after preliminary approval—August 4, 2022—to provide written Notice that they would like to be excluded from the Settlement Class. Mason MPA Decl. ¶ 58. The Request for Exclusion was required only to be a signed writing including a clear statement of intent to be excluded from the

Settlement. *Id*. at ¶ 56. As of the September 20, 2022, P&N received only 13 requests for exclusion from the Settlement. Aldridge Decl. ¶ 16.

c. Objections

Similarly, Class Members who wished to object to the terms of the Settlement Agreement were required to do so in writing by sixty (60) days from the date on which Notice was completed. Mason MPA Decl. ¶ 58. The deadline to object to the settlement was August 4, 2022. Aldridge Decl. ¶ 17. As of September 20, 2022 neither P&N nor Class Counsel have received any objection from Settlement Class Members. Aldridge Decl. ¶ 17; Decl. of Gary E. Mason in Supp. of Pl.'s Mot. for Final Approval, submitted herewith ("Mason FA Decl.") ¶ 2.

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

Plaintiff has moved separately for an award of Service Awards in the amount of $2,500 for Plaintiff, as well as attorneys' fees and costs in the amount of $150,000 (or approximately 25.6% of the benefit negotiated), to be paid separate and apart from the amount available to Settlement Class Members. *See* Plaintiff's Motion for Attorneys' Fees, Costs, and Service Award, filed July 21, 2022 ("Fees Motion"). The Service Award is meant to compensate Plaintiff for his efforts on behalf of the class. The requested fee is well within the range of those typically accepted by Texas and Fifth Circuit Courts, and the factors set forth by Rule 1.04(b) of the Texas Disciplinary Rules of Professional Conduct weigh in favor of approval.[5] No Settlement Class Members have objected to the request for fees, costs, and service awards. Aldridge Decl. ¶17; Mason Fees Decl. ¶ 2.

[5] For a detailed discussion regarding the request for fees, costs, and service awards, see Plaintiff's Fee Motion, filed July 21, 2022.

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.*

Texas law regarding class actions largely mirrors its federal counterpart, making federal cases regarding class action certification and settlement highly persuasive authority. *See Glassell v. Ellis,* 956 S.W.2d 676, 682 (Tex. Ct. App. 1997).[6]

V. ARGUMENT

A. Certification is Warranted under Texas Rule 42.

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." Plaintiff also seeks certification of 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." The Settlement Class (and

[6] While Rule 42 has not been amended to reflect the December 2018 additions regarding class action settlement made to Federal Rule 23(e), most of the factors codified in Rule 23(e) are considered by Texas Courts pursuant to relevant caselaw.

Subclass) are subject to specific and limited exclusions. *See* Mason MPA Decl. ¶ 33. The *Manual for Complex Litigation (Fourth)* advises that in cases presented for both 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 Security Breach Litigation*, 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. <u>The Settlement Class and Subclass Should be Certified Because they Satisfy the Requirements of Rule 42(a): numerosity, commonality, typicality, and adequacy.</u>[7]

a) The classes are 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

[7] This section is adopted in large part from Plaintiffs' MPA Mem.

proposed Settlement Class here numbers approximately 166,271 individuals, 468 of whom are members of the Social Security Number Subclass, judicial economy would be well-served by certification. Despite the likelihood that most proposed class members live in and around the State of Texas, and any attempt at joinder of such a large number of individual suits would be impractical. Accordingly, the Settlement Class and Subclass are sufficiently numerous to justify certification.

b) There are questions of law and fact common to the Settlement Class and Subclass.

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 1040, 1052 (S.D. Tex. March 12, 2012), *citing Wal-Mart Stores v. Dukes,* 564 U.S. 338, 347 (2011).

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

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 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.

c) The claims and defenses of representative parties are typical of the claims and defenses of the 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 computers and servers—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 Subclass Members and the typicality requirement is satisfied.

d) The Representative Plaintiff has fairly and adequately protected the interests of the class.

Representative Plaintiffs 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 and Subclass in that he seeks relief for 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, extensive experience in data breach class action litigation both nationwide and within the State of Texas, and are well suited to advocate on behalf of the class. *See* Mason MPA Dec. ¶¶ 2-8. 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.

2. The Settlement Class and Subclass Also Meet Certification Requirements Under Rule 42(b)(3).

The proposed Settlement Class and Subclass also meet the requirements of Rule 42(b)(3) because common issues predominate over individualized ones, and class treatment is superior. For a class action to be "superior to other available methods," under Rule 42(b)(3), the class action must "achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Canyon Lake Island Property Owners Association v. Sterling/Suggs Limited*

Partnership, 2015 WL 3543125, *5, *citing Amchem v. Windsor Prods.,* 521 U.S. at 614 (internal quotations omitted).

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 the 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, key predominating questions are whether GCPA had a duty to exercise reasonable care in safeguarding, securing, and protecting the personal information of Plaintiffs and the Settlement Class, and whether GCPA breached that duty. 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 over a hundred thousand 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. 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. Notice was Provided in Accordance with the Court's Order, and More Than Satisfies the Requirements of Due Process.

Under Rule 42, the quality and breadth of notice that must be provided differs depending on the subsection under which the Class is certified. For classes certified under Rule 42(b)(3), the court *must* direct the best possible notice practicable under the circumstances. Tex. R. Civ. P. 42(c)(2)(B). When a class action has reached settlement, Rule 42(e)(1)(B) provides that "[n]otice of the material terms of the settlement, dismissal, or compromise, together with an explanation of when and how the members may elect to be excluded from the class, shall be given to all members in such manner as the court directs." Tex. R. Civ. P. 42(e)(1)(B). Here, Plaintiff seeks certification for purposes of Settlement under Rule 42(b)(3): the notice provided to the Class complies with the Court's June 3, 2022 Amended Preliminary Approval Order and is the best possible practicable under the circumstances. Thus, it more than satisfies the requirements of due process.

As discussed in detail above, the Settlement Administrator caused Notice to be provided consistent with this Court's Preliminary Approval Order. In July, the Settlement Administrator caused notice of the Settlement to be mailed directly to each Settlement Class Member for whom GCPA provided a mailing address. Aldridge Decl. ¶ 14. Through USPS, LexisNexis, and/or other public source databases, the Settlement Administrator performed address searches for undeliverable notices, and re-mailed them where the searched yielded results. *Id.* ¶ 9. Direct mail notice is the gold-standard of notice programs, and is regularly approved by Courts. *See Barkley v. Texas Windstrom Ins. Ass'n.,* 2013 WL 5434171(finding direct mail notice in class action complied with due process). Here, notice by direct mail was further supplemented on this Court's order with e-mail notice. E-mail notice, in addition to mail notice, was provided to the 26% of the

class for whom GCPA had valid email addresses. *Id.* ¶ 14. The combined mail and email notice program had exceptional reach, with an estimated 94.4% of the class receiving direct and individualized notice by mail and/or email. *Id.* This far exceeds the 70% reach found to be a "high percentage" and the "norm" of class action notices. *See* Barbara J. Rothstein & Thomas E. Willging, Federal Judicial Center, "Managing Class Action Litigation: A Pocket Guide or Judges", at 27 (3d Ed. 2010).

The Notice mailed to Settlement Class Members provides details such as the definition of the Settlement Class, a description of the benefits, the amount sought by counsel and for service awards, relevant deadlines, and prominently displays the web address for a Settlement Website and a toll-free hotline by which Settlement Class Members could seek additional information, review the Long Form Notice and various Court Filings, and/or make a claim. *See* Aldridge Decl. ¶ 7, Ex. B. The Long Notice, available at the web address provided in the mail notice, provides even more details to Settlement Class Members. *Id.*

In addition to complying with the Court's direction, the Notice also meets the requirements of Rule 42(c)(2)(B)(i)-(vi). The Notice provided by the Settlement Administrator 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* Aldridge Decl., Exs. A, B. The Notice also meets the requirements of Rule 42(e)(1)(B): it explains the material terms of the Settlement, provides instructions on how class members may exclude themselves, and was provided as directed by the Court in its Preliminary Approval Order. *Id.* The Settlement Administrator even

made a Spanish-Language version of the Notice available on the Settlement Website. *See* GCPA Settlement Website.[8]

Accordingly, Notice here satisfied due process and requirements of Texas Rules of Civil Procedure.

C. Settlement is Fair, Reasonable, and Adequate.

Rule 42(e)(2) permits approval of a class action settlement after a determination that the Settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(1). 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 General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 955 (Tex. 1996). "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." *General Motors Corp. v. Bloyed*, 916 S.W.2d at 954 *citing Pettway v. American Cast Iron Pipe Co.,* 576 F.2d 1157, 1169 (5th Cir. 1978) (*cert denied*).

1. <u>The Settlement Agreement was the result of honest arm's length negotiations between the Parties.</u>

[8] https://www.gcpadatasettlement.com/

"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 (internal quotation omitted). Here, the Parties reached settlement only after a full-day virtual mediation with Rodney A. Max of Upchurch Watson White & Max Mediation Group, and subsequent settlement discussions. Mason MPA Decl. ¶ 28. After fully briefing the issues, the Parties attended a day-long mediation via Zoom Video Conference with Mr. Max, and after weeks of ongoing negotiations eventually agreed to central terms of a settlement. *Id*. Following the mediation, the Parties spent weeks drafting and finalizing the agreement presently before the Court. *Id.* at ¶¶ 26-29. 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, reasonable, and adequate.

a) Continued litigation is likely to be extensive, complicated and expensive.

The costs, risks, and delay of continued litigation weigh in favor of settlement approval. Data breach cases like the one at hand involve extremely complex issues of liability and damages, the determination of which would consume considerable resources. In fact, 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 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). Should litigation continue, Plaintiff would likely need to defeat Defendant's motion to dismiss, counter a

later motion for summary judgment, and both gain and maintain certification of the class. The level of additional costs would significantly increase as Plaintiff began preparations for the certification argument and if successful, a near inevitable interlocutory appeal attempt.

Of particular importance here, extended litigation leads to extensive additional costs—for both Parties. In light of the very likely complexity and expense of continued litigation, it is clear that this factor weighs in favor of settlement approval and guaranteeing a benefit to the class.

b) Plaintiff was sufficiently informed about the facts and legal issues involved in the case to negotiate a fair and adequate settlement.

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. *Id*. ¶¶ 13-14. Moreover, Settlement Class Counsel came to mediation armed with years of extensive experience in litigating data breach cases. *See* Declaration of Mason Fees Decl. ¶¶ 2-8. The completion of vast formal discovery is not a prerequisite to settlement approval. *Cotton v. Hinton,* 559 F.2d 1326,1332 (5th Cir. 1977). 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 Decl. ¶¶ 13-14 As such, they counsel was able to negotiate a fair and adequate settlement that provides monetary relief and ensures protections for Settlement Class Members from the very harm that could come about from the Data Incident—the misuse of their personal identifying information and private health information.

c) Significant obstacles could potentially block Plaintiff from prevailing on the merits.

As discussed above, due in part to the rapidly evolving nature of data security statutes and caselaw, Plaintiff would encounter significant difficulties in overcoming motions to dismiss,

motions for summary judgment, and obtaining and maintaining certification. The crucial factor in evaluating the fairness of a settlement is the strength of the Plaintiff's case is balanced against the amount offered. *General Motors Corp. v. Bloyed*, 916 S.W.2d at 956, *quoting In re General Motors Corp. Engine Interchange Litig.,* 594 F.2d 1106, 1132 n.44 (7th Cir. 1979) (cert. denied).

Although Plaintiff disputes the defenses it anticipates GCPA will likely assert—it is obvious that their success at trial is far from certain. Through the Settlement, Plaintiff and Settlement Class Members gain significant benefits, tailored to the risk allegedly caused by the Data Incident, without having to face further danger of not receiving any relief at all.

d) The Settlement provides for guaranteed relief within the range of recovery.

The Settlement guarantees Settlement Class Members real relief for harms. Settlement Class Members can claim up to (1) $500 for reimbursement of out-of-pocket expenses incurred as a result of the Data Incident; (2) $4,000 in extraordinary expenses, incurred as a result of the Data Incident (3) each Settlement Class Member is eligible to submit a claim to be enrolled in identity monitoring services for a total of 18-months of IdentityForce RapidResponse ID or IdentityForce RapidResponse Premium. Mason MPA Decl. ¶¶ 35-39. Additionally, 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.*

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, the 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 both liability and damages. As such, this factor weighs in favor of approval.

e) The complete lack of objections, low number requests for exclusion, and the opinion of experienced counsel support approval.

The final factor to be considered is the Plaintiff's, Counsel's, and Class' response to the Settlement. Here, the response received clearly supports final approval. It is the strong opinion of proposed Settlement Class Counsel that the Settlement presents a favorable result for the Class. Mason MPA Decl. at ¶ 32. Plaintiff has also signed off on the Agreement. *See generally,* Agr. And, importantly, as of September 20, 2022, the Settlement Administrator has received only 13 requests for exclusion and zero objections to the Settlement Agreement. Aldridge Decl. ¶¶ 16-17; *see also* Mason FA Decl. ¶ 2. While the support of Plaintiff and Class Counsel can be reasonably expected, the complete lack of objection to and low exclusions from the Class is a testament to the strength of the Settlement. Even in class actions where objections are lodged, Courts regularly still find settlements to be fair, reasonable, and adequate. *See for example, Johnson v. Scott*, 113 S.W. 3d 366, 374 (Tex. Ct. App. 2003) (upholding approval of a class action settlement wherein 500 individuals requested exclusion and 54 individuals objected); *Hall v. Pedernales Elec. Co-op., Inc.*, 278 S.W. 3d 536, 552 (Tex. Ct. App. 2009) (affirming approval of class action settlement despite 268 objections). As such, this factor, like those above, weighs in favor of final approval.

VI. CONCLUSION

Settlement Class Counsel, with the help of Plaintiff, have made significant benefits available to class members during a time where the law surrounding data breaches is evolving and uncertain. The Settlement Class Members have been provided notice of the Settlement, have been provided additional resources by which they can get more information about the Settlement Agreement, and the claims period will remain open until October 3, 2022. No Settlement Class Members have objected to either the Settlement Agreement or to Plaintiff's request for fees, costs,

and service awards. For these reasons, for the arguments set forth above, and because the Settlement Agreement is fair, adequate, and reasonable, Plaintiff respectfully requests this Court grant their motion for final approval.

Dated: September 21, 2022

Respectfully submitted,

/s/ Gary E. Mason

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