SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

SUSAN SZUCS, ANTHONY PARRIZZI, TERRENCE ERNEST GIDNEY, CHRISTINA CHURCH, JIMMIE HARDAWAY, JR., SHARON SIEGLE, PAUL PASCUCCI, JAMES MARCISZEWSKI, and SHANNON ALLGRIM, individually and on behalf of all others similarly situated, Plaintiffs, v. EXCELSIOR ORTHOPAEDICS, LLP, and BUFFALO SURGERY CENTER, LLP, Defendants.	Index No. 812753/2024 CLASS ACTION

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

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I. INTRODUCTION

Plaintiffs[1] respectfully seek final approval of a nationwide class action settlement with Defendants that resolves all claims against Defendants relating to the Incident, and does so on behalf of approximately 318,201[2] Class Members.

The Settlement is an excellent result for the Settlement Class as it establishes a $2.4 million non-reversionary Settlement Fund to pay Approved Claims for Settlement Payments and Credit Monitoring, and includes Defendants' confirmation of remedial measures it has already undertaken or planned to undertake to help better protect Settlement Class Members' sensitive information going forward. Specifically, under the Settlement, Class Members can submit a Claim Form for one of the following two forms of cash Settlement Payments: a Documented Loss Payment to recover unreimbursed out-of-pocket losses stemming from the Incident (up to $5,000), or a *pro rata* Cash Fund Payment that requires no documentary support. Settlement Agreement ("SA") ¶ 4.1(a)–(b). In addition to a Settlement Payment, all Class Members automatically received a product activation code on their Summary Notice for two years of a three-credit bureau Credit Monitoring product. The Credit Monitoring product will include, *inter alia*, $1 million of identity theft insurance, and can be activated following final settlement approval. SA ¶¶ 1.18, 4.3. The Settlement Fund also will be used to pay for Administrative Expenses, Notices, taxes, escrow fees and expenses, and any Court-approved Fee Award and Costs and Service Awards.

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[1] All capitalized terms used and not otherwise defined herein have the definitions set forth in the Settlement Agreement, attached hereto as **Exhibit 1**.

[2] Prior to preliminary approval, the Settlement Class population was estimated to be approximately 389,000 people. As is typical in settlements, the Settlement Administrator de-duplicated the Settlement Class list and determined that there are 318,201 unique, identified Class Member records, and Postcard Notice was successfully delivered to 316,291 of these Class Members. Affirmation of Cameron R. Azari, Esq., Regarding Implementation and Adequacy of Notice Plan ("Azari Aff."), attached hereto as **Exhibit 2**, ¶¶ 10, 15.

The Settlement also provides significant prospective relief in the form of data security changes implemented by Defendants at a cost of $600,000, from which all Settlement Class Members will benefit, irrespective of whether they submit a Claim Form. *Id.* ¶ 2.1.

The Settlement is the product of extensive, arm's-length negotiations between experienced attorneys familiar with the legal and factual issues of this case, and it was reached with the assistance of a well-respected and experienced mediator, Steven Jaffe of Upchurch Watson White & Max, a highly regarded mediator who was selected by the Settling Parties given his vast experience mediating data breach litigation. The Settlement negotiations were guided by informal discovery from Defendants to confirm the Settlement's terms as fair, reasonable, and adequate.

The Court preliminarily approved the proposed Settlement on February 10, 2026, and conditionally certified the Settlement Class. *See* Order Granting Plaintiffs' Unopposed Motion for Preliminary Approval, Dkt. No. 111 (i.e., the Preliminary Approval Order). Since then, the Notice Plan and claims process were implemented by the Court-approved Settlement Administrator, Epiq.

The reaction from Class Members to the Settlement is overwhelmingly positive. As of May 28, 2026, 31,769 Claim Forms have been submitted. *See* Azari Aff. ¶ 20. Based on current estimates from Epiq, and the current claims count as of May 28, 2026, Class Members who elected the *pro rata* cash payment option would receive payments in the approximate amount of $24.37. *Id*. ¶ 20. The Objection Deadline and Opt-Out Period passed on May 17, 2026, and only 12 Class Members out of over 318,000 requested exclusion from the Settlement, while only one objection was filed. *Id*. ¶ 21.

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

II. FACTUAL BACKGROUND

A. Defendants' Incident and Subsequent Litigation

The factual background concerning the Incident and subsequent litigation are detailed in the previously filed (i) Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Preliminary Approval (Dkt. No. 103) ("Mot. for Prelim. App."), at pp. 3-4; (ii) Plaintiffs' Memorandum of Law in Support of Their Motion for Attorneys' Fees, Costs, and Service Awards (Dkt. No. 114) ("Fee Motion"), at pp. 1-3; and (iii) supporting Fee Motion Joint Affirmation of Class Counsel (Dkt. No. 115) ("Fee Motion Joint Aff.").

On or about June 24, 2024, Defendants discovered an Incident during which one or more unauthorized individuals gained access to Defendants' computer network systems. Defendants' internal investigation following its discovery of the Incident confirmed that certain Defendants' systems were accessible on or around the same time, resulting in unauthorized access to certain files that may have contained Plaintiffs' and Class Members' Personal Information.

In or around August 2024, and again in December 2024, Defendants notified impacted persons and state Attorneys General that the affected patient data varied by individual and may have included at least the following Personal Information: full names, dates of birth, medical record numbers, diagnosis, diagnosis codes, treatment locations, procedure types, provider names, treatment cost, medical dates of service, health insurance information, subscriber member numbers, and patient account numbers.

Following public announcement of the Incident, numerous proposed consumer class actions against Defendants were commenced in New York state court, Erie County, by various plaintiffs relating to the Incident. All the actions were consolidated into this Action, Index No. 812753/2024, and Class Counsel were appointed as interim co-lead class counsel.

On June 3, 2025, Plaintiffs filed their Consolidated Class Action Complaint. Dkt. No. 88. The Action alleges, *inter alia*, that Defendants knew, or should have known that Plaintiffs' and Class Members' Personal Information was a target for malicious actors but, despite that knowledge, Defendants failed to implement and maintain reasonable and appropriate data privacy and security measures to protect that information from anticipated cyberattacks.

After consolidation and appointment of lead counsel, the filing of the Consolidated Class Action Complaint, and continued litigation, Defendants agreed to mediate the case.

B. Settlement Negotiations and Mediation

The Settling Parties agreed to attend a mediation on September 3, 2025, with respected mediator Steven Jaffe of Upchurch Watson White & Max. Fee Motion Joint Aff., ¶ 6. In advance of the mediation, the Settling Parties exchanged informal discovery and discussed their respective positions on the merits of the claims and class certification, which they provided to the mediator in detailed mediation statements. *Id*. ¶ 7. The mediation was hard fought, with each party zealously advocating for their client's respective positions. *Id*. ¶ 8. The mediation did not result in an agreement to settle this matter. *Id*. For months following the mediation, the Settling Parties continued to negotiate resolution to determine if a settlement was possible. *Id*.

In November 2025, the Settling Parties reached an agreement to settle the Action in principle. *Id*. For many weeks following the agreement, the Settling Parties continued to negotiate the remaining terms of the Settlement, including the amount of the Settlement Fund, the Notice Plan, selection of a Settlement Administrator, and other details, and they memorialized the terms of the Settlement Agreement, its exhibits, and the preliminary approval papers. *Id*. ¶ 9. After the

Settlement Agreement and its supporting exhibits were finalized, the Settling Parties executed the Settlement Agreement. *Id*.

III. TERMS OF THE SETTLEMENT

A. The Settlement Class

Under the Settlement Agreement, the Settlement Class is defined as follows:

> [A]ll living natural persons who are residents of the United States whose Personal Information was potentially accessible in the Incident, including all persons who received notice of the Incident.

SA ¶ 1.49. Excluded from the Settlement Class are: (1) the Judges presiding over the Action and members of their families; (2) Defendants and their officers and directors; (3) AMKAI, LLC d/b/a Surgical Information Systems and its officers and directors; (4) natural persons who properly execute and submit a Request for Exclusion prior to the expiration of the Opt-Out Period; and (5) the successors or assigns of any such excluded natural person. *Id.* The Settlement Class is comprised of approximately 318,201 persons.

B. The Settlement Benefits

The Settlement calls for the creation of a $2.4 million non-reversionary common Settlement Fund. SA ¶¶ 1.50, 3.1. Compensation will be paid from the Settlement Fund to Class Members who submit a timely and valid Claim Form that is approved by the Settlement Administrator. *Id.* ¶¶ 3.7, 4.1. Claims will be subject to review by the Settlement Administrator. *Id.* ¶ 4.5. For defective (but otherwise timely) claims, the Settlement Administrator will provide Claimants an opportunity to cure. *Id.* The Settlement Fund will be used to provide the following Settlement Benefits:

1. Cash Settlement Payments

Class Members who have suffered documented out-of-pocket expenses that are more likely than not a result of the Incident may submit a Claim Form for payment of up to $5,000 for reimbursement of Documented Losses. SA ¶¶ 1.21, 4.1(a). Claimed Documented Losses must be supported by Reasonable Documentation and not otherwise recoverable through insurance. *Id*.

In the alternative to the Documented Loss Payments, Class Members may submit a Claim Form electing to receive a *pro rata* cash Settlement Payment, i.e., a Cash Fund Payment. *Id.* ¶¶ 1.7, 4.1(b). The amount of the Cash Fund Payment will be calculated in accordance with ¶ 4.7 of the Settlement Agreement. *Id*.

2. Credit Monitoring

In addition to selecting one of the above cash Settlement Payments, all Class Members received, on their postcard notice (i.e., Summary Notice), a product activation code for two years of three-bureau credit monitoring that includes, *inter alia*, $1 million of identity theft insurance. SA ¶ 4.3. No claim is required to be made to receive the Credit Monitoring benefit. Instead, following final Settlement approval, Class Members will be able to activate their Credit Monitoring product using the code provided on their Summary Notice. *Id.* The Credit Monitoring benefit has a value of $839.76 per Class Member who activates the code, meaning that for each 1% of the roughly 316, 291 Class Members who actually received the Postcard Notice and activate the Credit Monitoring benefit, there is an additional Settlement value of $2,656,085.30 ([0.01*316,291] * $839.76). Previously submitted Joint Declaration of Class Counsel in Support of Unopposed Motion for Preliminary Approval ("Prelim. Counsel Decl."), Dkt. No. 105, ¶ 17; previously submitted Declaration of Robert Siciliano in Support of Plaintiffs' Unopposed Motion for Preliminary Approval, Dkt. No. 106, ¶¶ 6-7. This value is not insignificant.

3. Data Security Commitments and Prospective Relief

The Settlement also provides for non-monetary prospective relief in the form of additional, robust security enhancements to Defendants' data security measures. SA ¶ 2.1. Defendants have confirmed that they have made certain changes to their information security practices, at their own cost of $600,000, including having attested to these changes in a confidential declaration provided to Class Counsel in support of the Settlement. *Id*. All Class Members will receive the benefit of these enhancements irrespective of whether they submit a Claim Form, as will non-Class Members whose information remains in Defendants' possession.

4. Release

In exchange for the relief provided under the Settlement Agreement, Class Members who did not opt out of the Settlement will fully release Defendants from all claims and causes of action pleaded or that could have been pleaded that are related in any way to the Incident (i.e., the Released Claims). SA ¶¶ 1.41, 5.1–5.3.

C. Notice and Settlement Administration

1. Dissemination of Notice and Settlement Administration

After the Court preliminarily approved the Settlement, the Settling Parties continued to work with the Settlement Administrator to supervise the Notice Plan. These efforts included review and drafting of the language and format of the Settlement Website, the script for the automated response to the toll-free number, the language and format of the Notice forms, monitoring for Requests for Exclusion and objections, and ensuring prompt response to every Class Member inquiry regarding the Settlement, among others.

In accordance with the Court's Preliminary Approval Order, Epiq provided Notice to the Class, and successfully disseminated Notice. Azari Aff. ¶¶ 10-15. Specifically, the Settlement Administrator provided written Notice in the form of a Summary Notice (i.e., postcard) via the United States Postal Service ("USPS") first class mail, postage pre-paid, to all Class Members with a valid mailing address. *Id*. When Summary Notices returned as undeliverable, the Summary

Notices were re-mailed to any new address available (e.g., forwarding address) through USPS information. *Id*.

As of May 28, 2026, a Summary Notice (i.e., postcard) was delivered to 316,284 of the de-duplicated 318,201 unique, identified Class Members. *Id*. ¶ 15. This means the individual Notice efforts reached approximately 99% of the identified Class Members. *Id*. This is an outstanding result. *See* Federal Judicial Center, *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide*, at 1 (2010), www.fjc.gov/sites/default/files/2012/NotCheck.pdf ("A high percentage [of the class] (e.g., between 70-95%) can often reasonably be reached by a notice campaign."); *see also In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.,* 527 F. Supp. 3d 269, 273 (E.D.N.Y. 2021) (citation omitted) (observing that "a notice plan that reaches between 70 and 95 percent of the class is reasonable," and endorsing a notice plan with 80% expected reach).

Following preliminary approval, Epiq also established a dedicated website for the Settlement with a clear and concise domain name (www.ExcelsiorDataSettlement.com). Azari Aff. ¶ 16. Relevant case and Settlement documents were posted on the Settlement Website. *Id.* The Settlement Website also provides the ability for Class Members to file an online Claim Form. *Id*. In addition, the Settlement Website includes relevant dates, answers to frequently asked questions (FAQs), instructions for opting out of (i.e., requesting exclusion from) or objecting to the Settlement, contact information for the Settlement Administrator, and how to obtain other case-related information. *Id.*

Epiq also established a toll-free telephone number for the Settlement. *Id.* ¶ 17. The Settlement telephone number was prominently displayed in all Notice documents. *Id*. A mailing address was established and continues to be available, providing Class Members with yet another avenue to request additional information or ask questions. *Id.* ¶ 18.

The Notice Plan was designed to reach the greatest practicable number of Class Members. *Id*. ¶¶ 7, 24. The Notice, as conducted, reached this goal, and was highly successful here. *Id*. ¶ 15.

2. Claims, Requests for Exclusion, and the Lone Objection

Class Members must submit a Claim Form by June 11, 2026. *Id*. ¶ 20. Epiq reports that, as of May 28, 2026, it has received 31,769 Claim Forms (5,551 online and 26,218 paper) (*id.* ¶ 20), for a claims rate of approximately 10%. This is an astoundingly high and outstanding outcome, considering that settlements in data breach class actions typically experience a participation (i.e., claims) rate of 1–3%. The Settlement Administrator has and will continue to review and evaluate each Claim Form, including any required documentation submitted, for validity, timeliness, and completeness through the end of the Claims Period. *Id*. ¶ 20. The Settling Parties expect that the claims rate will continue to rise through the Claims Deadline.

Class Members were provided an opportunity to request exclusion from, or object to, the Settlement on or before May 17, 2026. *See generally* Prelim. App. Order; *see id.* at p. 11; SA ¶¶ 7.8, 7.9. Epiq reports that as of May 21, 2026, only 12 Class Members timely requested exclusion from the Settlement, and only one objection to the Settlement has been received. Azari Aff. ¶ 21. Details about the opt outs are included in an exhibit to the Azari Aff. and the proposed Final Approval Order submitted with this motion.

D. Attorneys' Fees, Litigation Costs, and Service Awards

On May 1, 2026, Plaintiffs and Class Counsel filed the Motion for Attorneys' Fees, Costs, and Service Awards. Dkt. Nos. 113-18. As explained therein, the requested fee award, $800,000, amounts to approximately 33.33% (one-third) of the $2.4 million Settlement Fund, and is consistent with fees routinely awarded in similar data breach and other class action cases in New York. The requested $2,500 Service Awards for each of the nine Class Representatives reflect the work they have performed in assisting Class Counsel with this litigation and their dedication to this Action and the Settlement Class.

IV. THE SETTLEMENT MERITS FINAL APPROVAL

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

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

New York courts strongly favor settlements as a matter of public policy. *IDT Corp. v. Tyco Grp., S.A.R.L.*, 13 N.Y.3d 209, 213 (2009) ("[s]tipulations of settlement are judicially favored and may not be lightly set aside."); *see also Denburg v. Parker Chapin Flattau & Klimpl*, 82 N.Y.2d 375, 383 (1993) ("[a] negotiated compromise of a dispute avoids potentially costly, time-consuming litigation and preserves scarce judicial resources"); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (courts should be "mindful of the 'strong judicial policy in favor of settlements'"). When considering whether to grant final approval of a class action settlement, New York courts focus their inquiry on "'the fairness of the settlement, its adequacy, its reasonableness, and the best interests of the class members.'" *Hosue v. Calypso St. Barth, Inc.*, 2017 WL 4011213, at *2 (Sup. Ct., N.Y. Cnty. Sept. 12, 2017). Specifically, it is "black-letter law" that New York courts consider the following factors: (i) the likelihood that plaintiff will succeed on the merits; (ii) the extent of support from the parties; (iii) the judgment of counsel; (iv) the presence of good faith bargaining; and (v) the complexity and nature of the issues of law and fact, often referred to as the "*Colt* factors." *Saska v. Metro. Museum of Art*, 57 Misc. 3d 218, 222, 54 N.Y.S.3d 566, 569 (Sup. Ct. 2017) (citing *In re Colt Indus. S'holder Litig.,* 155 A.D.2d 154, 160, 553 N.Y.S.2d 138 (1st Dept.1990)*).*

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

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

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

When assessing a proposed settlement of a class action, courts first take into consideration Plaintiffs' ultimate "likelihood of success on the merits." *Gordon*, 46 N.Y.S.3d at 566–67; *Colt*, 155 A.D.2d at 160. The Settlement is particularly strong in light of the risks and delay-related downsides of continued litigation, especially in data breach litigation. *Saska*, 54 N.Y.S.3d at 569 ("It is axiomatic that all trials involve substantial risk and uncertainty."). Plaintiffs are confident in the merits of their claims and believe they would prevail in this matter. However, serious questions of law and fact exist. Data breach litigation remains a novel and ever-changing area of the law, and the Settling Parties are unaware that any breach cases have ever advanced all the way to trial. Numerous courts have noted that legal and factual uncertainty in these cases supports approval of data breach class settlements. *In re Canon United States Data Breach Litig.*, 2024 WL 3650611, at *9 (E.D.N.Y. Aug. 5, 2024) (explaining that "no data breach class action has reached the trial stage" and "the trial risk is difficult to quantify and raises the uncertainty involved in the case" and that plaintiffs "likely would have encountered obstacles to establishing class-wide damages, particularly due to the inherent uncertainty of quantifying injury in a data breach case"); *Whelan v. Diligent Corp*, 2025 WL 2793689, at *2 (S.D.N.Y. Sept. 30, 2025) (granting final approval and finding that plaintiff "faced significant risks, expenses, delays, and uncertainties, including as to the outcome, including on appeal"); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 2020 WL 256132, at *7 (N.D. Ga. Mar. 17, 2020) (identifying disputed legal issues and challenges in data breach class actions); *In re Sonic Corp. Customer Data Sec. Breach Litig.*, 2019 WL 3773737, at *6 (N.D. Ohio Aug. 12, 2019) ("[t]he realm of data breach litigation is complex and largely undeveloped. It would present the parties and the Court with novel questions of law").

Even if the Court certified a litigation class, there is a risk of de-certification or appeal on the certification issue, and no guarantee that class status would be maintained. The case also could be dismissed during summary judgment proceedings. At trial, the jury could award a defense verdict, and the Class could receive nothing at all. The Settlement accounts for these realities now, rather than later, and gets substantial benefits into Class Members' hands—including Credit Monitoring into *all* Class Members' hands—while eliminating the risk of non-recovery.

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

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

First, as discussed above, the Settlement is supported by the Settling Parties and it has received strong support from the Settlement Class, with only 12 exclusion requests and one objection as of May 21, 2026, statistics which are indicative of a class's approval of a proposed settlement. *See, e.g., In re Currency Conversion Fee Antitrust Litig.*, 2009 WL 3415155, at *123

(S.D.N.Y. Oct. 22, 2009) (where less than 1% of members opted out or filed objections, the reaction was "extraordinarily positive . . . and weighs in favor of settlement"); *In re Initial Public Offering Sec. Litig.*, 671 F. Supp. 2d 467, 485 (S.D.N.Y. 2009) ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.") (citations omitted). Here, the combined 12 opt outs and single objection account for ~0.0041% of the Settlement Class (i.e., 13/316,291).

Second, Class Counsel have concluded that the proposed Settlement is fair, reasonable, and adequate, particularly given the risks, costs, and uncertainties of continued litigation. New York courts give counsel's views regarding settlement considerable weight, *Pressner v. MortgageIT Holdings, Inc.*, 2007 WL 1794935, at *2 (Sup. Ct., N.Y. Cnty. May 29, 2007). Plaintiffs submit that the experience and expertise of Class Counsel here make this factor weigh even more heavily in favor of approval. *See* Prelim. Counsel Decl. at Exs. A-C (Class Counsel firm resumes).

Third, the Settlement was reached after hard-fought litigation, and a contentious mediation involving experienced and well-informed counsel, and with the assistance of a respected mediator, Steven Jaffe of Upchurch Watson White & Max. *Gordon,* 46 N.Y.S.3d at 567 (courts should presume that negotiations have been conducted at arm's length and in good faith absent evidence to the contrary). The Settlement's fairness was confirmed by the informal discovery conducted as part of the Settlement negotiation process. Prelim. Counsel Decl. ¶ 8.

As demonstrated above, the combined experience of the firms and attorneys involved demonstrate that the Settlement Class was well-represented at the bargaining table. *Yang v. Focus Media Holding Ltd.*, 2014 WL 4401280, at *5 (S.D.N.Y. Sept. 4, 2014). There are no indications of collusive negotiations, and the Settling Parties have not agreed to a "clear sailing" provision whereby Defendants would agree to not oppose attorneys' fees, costs, and Service Awards.

Furthermore, the Settlement Fund is non-reversionary and, upon the Effective Date, no portion of the Settlement Fund will ever be returned to Defendants. SA ¶ 4.12. The second, third, and fourth *Colt* factors support final approval.

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

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

Class actions, like the instant action dealing with complex data security issues, have a "reputation as being most complex." *Rosenfeld v. Lenich*, 2021 WL 508339, at *5 (E.D.N.Y. Feb. 11, 2021) (internal quotation marks and citation omitted); *see also In re Sonic*, *supra*; *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 315 (N.D. Cal. 2018) ("many of the legal issues presented in . . . data-breach case[s] are novel"). Absent settlement, Plaintiffs would have had to "survive summary judgment, prevail at trial, and secure an affirmance of their victory on appeal in order to recover damages. Moreover, they would also need to certify and maintain the class, over the [] Defendant's possible opposition." *Rosenfeld*, 2021 WL 508339, at *5. Courts have consistently held that, unless a proposed settlement is clearly inadequate, the acceptance and approval thereof is preferable to the continuation of lengthy and expensive litigation with uncertain results. *Velez v. Novartis Pharms. Corp.*, 2010 WL 4877852, at *14 (S.D.N.Y. Nov. 30, 2010) ("[L]itigation inherently involves risks, and the purpose of settlement is to avoid uncertainty.").

This case is no exception. As discussed above, trial is a risky and labor-intensive undertaking. Plaintiffs anticipate that Defendants would continue to contest the Action at every opportunity and on all fronts. Plaintiffs would have to establish that Defendants were negligent in maintaining adequate data security measures, which would involve a battle of the experts regarding highly complex technical issues surrounding the security of computer databases and cyberattacks. *See*, *e.g.*, *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 426–27 (S.D.N.Y. 2001) ("Plaintiffs' Counsel recognize the possibility that a jury could be swayed by experts for Defendants, who could minimize or eliminate the amount of Plaintiffs' losses."). Indeed, while courts have granted class certification of data breach class actions in the past, others have declined to do so. *See*, *e.g.*, *Dolmage v. Combined Ins. Co. of Am.*, 2017 WL 1754772, at *9 (N.D. Ill. May 3, 2017) (denying certification of data breach class action because, *inter alia*, case "will require individualized damages inquiries for each class member."). The complexity of the issues presented by this data privacy litigation supports final approval.

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

The first additional approval factor under *Gordon* entails a consideration of "whether the proposed settlement is in the best interests of the putative settlement class as a whole." 46 N.Y.S.3d at 568. This factor clearly weighs in favor of approval. The Settlement provides Class Members immediate relief in the form of cash Settlement Payments, which can be claimed through submission of a Claim Form (SA ¶ 4.1); Credit Monitoring, which will be provided automatically to all Class Members (SA ¶ 4.3); and robust equitable relief in the form of meaningful data security improvements (SA ¶ 2.1), all while avoiding the risk, delay, and uncertainty of continued litigation. *Saska,* 54 N.Y.S.3d at 570 (*Gordon* factor satisfied where settlement class was being provided with the relief sought in the litigation). As for those Class Members who desire not to participate in the Settlement, they had the right to opt out. SA ¶ 7.8. Only 12 individuals have elected to do so as of May 21, 2026. Azari Aff. ¶ 21. On the other hand, over 31,000 Class Members have already decided to participate in the Settlement. *Id*. ¶ 20. The number of participating Class Members will continue to increase through the June 11, 2026 Claims Deadline.

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

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

The second additional approval factor under *Gordon* is a consideration of "whether the proposed settlement is in the best interest of the corporation." 46 N.Y.S.3d at 568. This *Gordon* factor was born out of—and in that case was analyzed in the context of—a shareholders' class action settlement; however, other courts in New York have analyzed the factor in the context of a consumer class action. In *Saska*, the New York Supreme Court concluded that where a class action settlement allowed the defendant-museum to "obtain[] prompt certainty over" its challenged practices concerning museum admission pricing, the second *Gordon* factor favored approval. 54 N.Y.S.3d at 570–71.

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

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

The Court preliminarily certified the Settlement Class in the Preliminary Approval Order, finding that the requirements of CPLR §§ 901 and 902 elements were all met. Dkt. No. 111, Prelim.

App. Order ¶ 1 ("For settlement purposes only and pursuant to NY CPLR Ch. 8, Art. 9, §§ 901(a)(1)-(5) and 902, the Court conditionally certifies the Settlement Class in this matter . . . ."). Nothing has occurred that would change the Court's previous determination that all the prerequisites for class certification under CPLR §§ 901(a)(1)-(5) and 902 are present and satisfied. Nevertheless, Plaintiffs briefly revisit and analyze the §§ 901 and 902 elements below.

1. The Requirements of CPLR § 901 Are Satisfied

First, pursuant to CPLR § 901(a)(1), numerosity is satisfied for settlement purposes only as the Settlement Class consists of approximately 318,201 persons.[3] Pursuant to CPLR § 901(a)(2), for settlement purposes only, there are numerous issues of fact and law common to the Settlement Class, including whether: (a) Defendants had a duty to safeguard the Class Members' Personal Information; and (b) Defendants were negligent in maintaining adequate data security protocols to safeguard Class Members' Personal Information. For settlement purposes only, those common questions predominate individual questions, the Settlement Class is sufficiently cohesive, and each Class Member's claims rise or fall with, and can be proven by resort to, common evidence.

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

The CPLR § 901(a)(4) adequacy requirement is also satisfied here for settlement purposes only. Plaintiffs' claims are co-extensive with those of the Settlement Class. Plaintiffs share a common interest with the Settlement Class in establishing liability and securing the maximum possible recovery. Plaintiffs have taken and continue to take their obligations to the Settlement

[3] *See* note 2, *supra*.

Class seriously, and they are committed to the best interests of the Settlement Class. Further, Class Counsel are highly experienced class action litigators with specific expertise in data privacy and data breach class actions, and they will (and have) adequately represented the Settlement Class. The Court already confirmed Class Counsel's adequacy by previously appointing them in the Settlement process. Dkt. No. 111, Prelim. App. Order ¶ 2.

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

2. The Requirements of CPLR § 902 Are Satisfied

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

> (1) the interest of class members in individually controlling the prosecution;
> (2) the impracticability or inefficiency of prosecuting or defending separate actions;
> (3) the extent and nature of any litigation concerning the controversy commenced by or against members of the class;
> (4) the desirability or undesirability of concentrating the litigation of the claim in the particular forum; and
> (5) the difficulties likely to be encountered in the management of a class action.

In re HSBC Bank U.S.A., N.A., Checking Acct. Overdraft Litig., 2015 WL 6698518, at *5 (Sup. Ct., N.Y. Cnty. Oct. 27, 2015).

As to the first two § 902 factors, as set forth above, the complexity and cost of individual litigation is prohibitive. As to the third § 902 factor, as explained in the preliminary approval motion, after considerable meet-and-confer efforts, counsel for all Plaintiffs consolidated various related actions into the first-filed Action, agreed upon the designation of interim lead counsel, and filed a Consolidated Complaint. Thereafter, Defendants agreed to mediate the case. Accordingly,

§ 902(3) weighs in favor of preliminary approval of the Settlement. *See*, *e.g.*, *In re HSBC*, 2015 WL 6698518, at *5.

As to the fourth § 902 factor, Defendants are New York companies and the Court has already issued rulings of substance in this litigation, making this a highly desirable forum in which to concentrate the Action. *Pino Alto Partners v. Erie Cnty. Water Auth.*, 21 Misc. 3d 1114(A), 873 N.Y.S.2d 236 (Sup. Ct. 2008) *aff'd*, 67 A.D.3d 1375, 887 N.Y.S.2d 910 (2009). The fifth and final § 902 factor—the difficulties to be encountered in the management of a class action—does not factor here, as the class vehicle (and class settlement) are preferred and more manageable when compared to the cost prohibitive nature of individual actions and the reality that there are approximately 318,000 individual Class Members.

3. Notice of the Settlement Satisfies Due Process

The method for processing Class Members' claims weighs in favor of final approval. The CPLR § 904 requires that reasonable notice of the commencement of a class action shall be given to the class in such a manner as the Court directs. As discussed in greater detail above, the Notice Plan was carried out in the manner approved by this Court in the Court's Preliminary Approval Order. *See generally* Azari Aff. Notice was successfully disseminated to the Class with an estimated reach of over 99%, and the response was overwhelmingly positive, with only 12 exclusion requests, a single objection, and, as of May 28, 2026, an approximately 10% claims rate. The successful Notice Plan satisfied due process. *See In re Restasis*, 527 F. Supp. 3d at 273 (noting that "a notice plan that reaches between 70 and 95 percent of the class is reasonable").

V. THE SOLE OBJECTION SHOULD BE OVERRULED

Finally, the sole objection to the Settlement, which was submitted by Hans Schiffert ("Objector") on May 20, 2026, should be overruled as it is nothing more than a legally and factually unsupported attempt to convince the Court that Class Counsel should not be fairly compensated for the work performed and exceptional results achieved on behalf of the Settlement Class, that the fee request is outside the benchmark, and this would not undermine Class Counsel compensation. All those arguments are wrong.

As an initial matter, Objector argues that the fee request falls outside of the benchmark of attorney fee awards approved in similar class action settlements. Not so. When analyzed under New York law, one-third is undeniably the benchmark for fee awards in class action litigation. *See Sukhnandan v. Royal Health Care of Long Island LLC*, 2014 WL 3778173, at *9 (S.D.N.Y. July 31, 2014) (noting that 33.3% is "consistent with the norms of class litigation in this circuit"); *Lea v. Tal Educ. Grp.*, 2021 WL 5578665, at *12 (S.D.N.Y. Nov. 30, 2021) ("The percentage of the fund requests—one-third—is a percent that has been approved as reasonable in this Circuit.") (collecting cases). Indeed, Class Counsel's request for one-third of the $2.4 million Settlement Fund falls squarely within the range of approved fee awards in similar data breach class action settlements approved in state and federal courts in New York and across the country. *See, e.g.*, *Guarnaschelli v. E. River Med. Imaging, P.C.,* 2025 NY Slip Op 31754(U) (Sup. Ct.) (approving attorneys' fee award of one-third of settlement fund in data breach settlement, noting the fees sought were reasonable); *see also In re Fortive Data Sec. Litig.*, 2026 WL 178738, at *3 (W.D. Wash. Jan. 22, 2026) (approving fee award of one-third of settlement value); *In re TikTok, Inc., Consumer Priv. Litig.*, 617 F. Supp. 3d 904, 941 (N.D. Ill. 2022) (granting one-third fee in data breach case noting "[a] one-third flat fee also is routine for class action settlements in similarly complex fields"); *Chabak v. Somnia Inc.*, 2025 WL 1275214 , at *2 (S.D.N.Y. Apr. 28, 2025) (granting 31.5% fee award in data breach settlement). Moreover, Objector fails to contemplate the full value of the Settlement achieved on behalf of the Settlement Class in relation to the fee request.

Specifically, the Settlement Agreement achieves both monetary and non-monetary benefits for the Settlement Class, including a $2.4 million Settlement Fund *and* $600,000 in business practice enhancements implemented by Defendants. *See In re Hudson's Bay Co. Data Sec. Incident Consumer Litig.*, 2022 WL 2063864, at *21 (S.D.N.Y. June 8, 2022) ("In addition to providing compensation to injured class members, the litigation and settlement of plaintiffs' claims incentivizes retailers to take stronger data-protection measures. . . . Public policy weights in favor of [the] attorneys' fees award."). However, rather than seeking one-third of the total $3,000,000 in Settlement value achieved on behalf of the Class, Class Counsel instead seeks one-third of the Settlement Fund (*i.e.*, 26.67% of the combined Settlement value).

Objector also raises the unfounded concern that valid claims submitted will exceed the amount of the Settlement Fund if the Court awards the Class Counsel their requested attorneys' fees and expenses. However, this position belies reality and could have been addressed without the need for motions practice had Objector simply contacted Class Counsel requesting data regarding the claims that were submitted. Here, over 31,000 valid claims have been submitted so far, all of which will be paid in full with no reduction. As such, there is no concern that payment of the requested fees will in any way impede these payments from being satisfied.

Finally, Class Counsel took on significant risk in prosecuting this Action and has zealously advocated for the Settlement Class, as reflected in the excellent Settlement that is presented here and which the Court has already preliminarily approved. As stated in Class Counsel's Motion for Attorneys' Fees, Costs, and Service Awards, Class Counsel took on this litigation on a purely contingent basis, meaning that without Settlement or a judgment, they would have collected nothing. This is exactly the type of significant risk borne by Class Counsel that Objector states in his objection is purportedly lacking. Such risk has been found to be sufficient to support one-third fee award requests. *Gilliam v Addicts Rehab. Ctr. Fund,* 2008 WL 782596 (S.D.N.Y. Mar. 24, 2008); *Richardson v. Sweetgreen, Inc.*, 2025 NY Slip Op 30472(U) (Sup. Ct.) ("The fee requested is also reasonable based on the fact that Class Counsel did substantial work on a fully contingent basis."); *Lopez v. Dinex Grp., LLC*, 2015 NY Slip Op 31866(U) (Sup. Ct.) (recognizing the "significant risks" undertaken by attorneys who work on contingency). The risk taken by Class Counsel supports awarding the requested fee here.

As stated above, Objector fails to cite to any case law, controlling or otherwise, in support of his position that Class Counsel's fee request is inappropriate. As such, the request should be approved and the sole objection overruled.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter the Final Approval Order (1) finally certifying the Settlement Class for settlement purposes; (2) granting final approval of the Settlement; (3) finding that Notice has been conducted in accordance with the Preliminary Approval Order, the Court-approved Notice Plan, and due process; (4) granting Plaintiffs' Fee Motion (Dkt. Nos. 113-18); and (5) dismissing with prejudice Plaintiffs' and Settlement Class Members' claims against the settling Defendants only relating to the Incident.

Dated: May 29, 2026

Respectfully submitted,

/s/ Andrew W. Ferich

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**Pro Hac Vice*

Class Counsel

<u>CERTIFICATE OF COMPLIANCE</u>

Pursuant to 22 N.Y.C.R.R. § 202.8b, the undersigned counsel certifies that the **Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Final Approval of Class Action Settlement** was prepared in Microsoft Word, using Times New Roman 12-point typeface, and contains 6,678 words, excluding the parts of the document that are exempted under § 202.8b(b).

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

Dated this 29th day of May, 2026.

<u>/s/ Andrew W. Ferich</u>
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