Exhibit 2

THE UNITED STATES DISTRICY COURT
FOR THE DISTRICT OF NEW JERSEY

CARLOS GAMEZ and ROBERTO QUINONEZ, as parent and general guardian of C.L.Q-B, a minor, on behalf of themselves and all others similarly situated, Plaintiffs, vs. PCS REVENUE CONTROL SYSTEMS, INC., a New Jersey corporation, Defendant.	Case No.: 2:21-cv-08991-JXN-AME

PLAINTIFFS' UNOPPOSED MOTION TO DIRECT CLASS NOTICE AND GRANT PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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Plaintiffs Carlos Gamez and Roberto Quinonez, as parent and general guardian of C.L.Q-B, a minor (collectively, "Plaintiffs" or "Settlement Class Representatives") respectfully move for preliminary approval of the Settlement and for certification of the Settlement Class.[1]

I. INTRODUCTION

Defendant PCS Revenue Control Systems, Inc. ("PCS") is a provider of food, nutrition and other technology products and services serving K-12 educations institutions throughout the United States.

On or about March 12, 2021, PCS disclosed that on or before December 19, 2019, an unidentified and unauthorized actor accessed a server that belonged to an entity called Advanced Business Technologies ("ABT"), which PCS acquired in 2016 (the "Data Breach"). This server included files and records related to certain school lunch and meal programs. The files and records on the server contained personally identifiable information ("PII"), including names, student identification numbers, Social Security numbers, and/or dates of birth.

On April 12, 2021, Plaintiffs commenced the instant litigation and filed a complaint in the District of New Jersey relating to the Data Breach. The complaint sought class action status and sought remedies for Plaintiffs and the other individuals impacted by the Data Breach.

On October 21, 2021, the parties engaged in mediation with mediator Bennett Picker, an experienced mediator. In advance of the mediation, the parties submitted mediation briefs advancing their respective positions on the merits of the claims and class certification. After extensive arm's length settlement negotiations, the parties were able to reach an agreement, which, if approved by the Court, would resolve the claims of Plaintiffs and the other individuals impacted

[1] Unless otherwise noted, all capitalized terms are defined in the Settlement Agreement and Release, which is attached hereto as **Exhibit A**.

by the Data Breach.

Pursuant to the terms that were negotiated between them, the parties now wish to fully and finally resolve their dispute on a class-wide basis. Those terms are memorialized in the Settlement Agreement attached hereto as **Exhibit A** ("Settlement Agreement" or "S.A."). This Settlement Agreement provides for the resolution of all claims asserted, or that could have been asserted, against Defendant relating to the Data Breach, by and on behalf of Plaintiffs and Settlement Class Members.

The relief negotiated by counsel extremely experienced in litigating privacy litigation and security incidents of the type at issue in the present litigation, and provided by the Settlement Agreement, is designed to address the injuries and repercussions typically experienced by individuals whose personally identifiable information has been compromised in a security incident of the type at issue here. Specifically, the Settlement provides an aggregate cap of $500,000.00 for the reimbursement of up to $2,500 in out-of-pocket losses per Settlement Class Member, including attested time at a rate of $20 for up to 3 hours. The Settlement separately provides for the payment of $550,264 in Notice and Administrative Expenses,[2] to be handled by a neutral experienced in disseminating notice to the class and administrating claims of the type which will be filed by Settlement Class Members; a Service Award Payment[3] of $1,000 to each of the Class

[2] Notice and Administrative Expenses "means all of the expenses incurred in the administration of this Settlement, including, without limitation, all expenses or costs associated with providing Notice to the Settlement Class, locating Settlement Class Members, processing claims, determining the eligibility of any person to be a Settlement Class Member, and administering, calculating and distributing the Settlement Fund to Settlement Class Members. Administrative Expenses also includes all reasonable third-party fees and expenses incurred by the Settlement Administrator in administering the terms of this Agreement." S.A. ¶ I.22.

[3] Service Award Payment "means compensation awarded by the Court and paid to the Class Representatives in recognition of their role in this litigation." S.A. ¶ I.32.

Representatives, subject to Court approval; and $82,736 for the Fee Award and Costs,[4] also subject to Court approval.

II. BACKGROUND

A. Information About the Settlement

To explore and potentially negotiate a class-wide settlement before a neutral, the parties agreed on and retained Bennett Picker, a highly experienced mediator. Declaration of John A. Yanchunis, attached as **Exhibit B** ("Yanchunis Decl."), ¶ 16. The parties briefed their respective positions on the facts, claims, defenses, and assessments of the risk of litigation.

On October 21, 2021, the parties had a full-day mediation session with Mr. Picker. *Id.* ¶ 16. The negotiations were hard-fought throughout, and the process was conducted at arm's length and was non-collusive. *Id.* After extensive arm's length settlement negotiations conducted through Mr. Picker, the parties reached an agreement on the essential terms of settlement. *Id.* The subject of the Fee Award and Costs was negotiated only after all substantive terms of the Settlement were agreed upon by the parties. *Id.* ¶ 19.

Based on Plaintiffs' counsel's independent investigation of the relevant facts and applicable law, experience with many other data breach cases, and the information provided by Defendant, Plaintiffs' counsel submits that the Settlement is fair, reasonable, adequate, and in the best interest of the Settlement Class.

B. The Terms of the Settlement Agreement

1. The Settlement Class

[4] Fee Award and Costs "means the amount of attorneys' fees and reimbursement of Litigation Costs and Expenses awarded by the Court to Class Counsel." S.A. ¶ I.13. Litigation Costs and Expenses "means costs and expenses incurred by counsel for Plaintiffs in connection with commencing, prosecuting, and settling the Action." S.A. ¶ I.16.

The proposed Settlement Class sought to be certified for purposes of Settlement is defined as follows:

> [A]ll individuals who were sent notification by PCS that their personal information was or may have been compromised in the data breach initially disclosed by PCS beginning in or around March 2021. Excluded from the Settlement Class are: (1) the judges presiding over this Action, and members of their direct families; (2) the Defendant, its subsidiaries, parent companies, successors, predecessors, and any entity in which the Defendant or its parents have a controlling interest and their current or former officers, directors, and employees; (3) Settlement Class Members who submit a valid a Request for Exclusion prior to the Opt-Out Deadline; and (4) Jose Montanez, as parent and natural guardian of and on behalf of his minor son Manuel Montanez, who entered into a release with PCS effective August 30, 2021.

S.A. ¶ I.35.

2. The Settlement Benefits

Under the Settlement, Settlement Class Members are eligible to receive the following benefits:

- Reimbursement of ordinary expenses not to exceed $2,500 per Settlement Class Member, including attested-to lost time spent to address the repercussions of the Data Breach at a rate of $25 per hour for up to 3 hours.

S.A. ¶¶ III.48, III.50.

3. Proposed Notice Program

Pursuant to the Settlement Agreement, the parties propose American Claim Legal Services LLC ("ACLS") to be appointed as Settlement Administrator. ACLS is a nationally recognized class action notice and administration firm that has designed a class notice program for this case, which the parties and ACLS believe is an effective program.

Subject to Court approval, this Notice Program involves direct notice disseminated via e-mail to Settlement Class Members who are currently employed or contracted by PCS and their minor beneficiaries and via U.S. mail to Settlement Class Members who are not currently or were

never employed or contracted by PCS. S.A. ¶ VII.62. The forms of Notice are attached as Exhibits B and C to the Settlement Agreement. A declaration from ACLS with additional details about the Notice Program is attached hereto as **Exhibit C** ("Davis Decl.").

Finally, ACLS will also establish a settlement website. S.A. ¶ IX.66. In addition to the Notice, the website will include information about the Settlement, related case documents, and the Settlement Agreement. Settlement Class Members will also be able to submit claims electronically.

Notice of the Settlement will be given to the Settlement Class no later than thirty (30) days from the date of the Court's Preliminary Approval Order. S.A. ¶ I.21.[5]

The Notice informs Settlement Class Members of the nature of the Action, the litigation background, the terms of the agreement, the relief provided, Class Counsel's request for fees, costs, and expenses, and the scope of the release and the binding nature of the Settlement on Class Members. The Notice also describes the procedure for objecting to the Settlement; advises Settlement Class Members that they have the right to opt out and describes the consequences of opting out; and will state the date and time of the final approval hearing (subject to this Court's scheduling), advising that the date may change and how to check the settlement website.

Plaintiffs are informed that all Notice and Administrative Expenses under ¶ I.22 are expected to be approximately $550,264.00. Yanchunis Decl. ¶ 30.

4. Exclusion and Objection Procedures

The proposed Notice advises Settlement Class Members of their rights to object or opt out of the Settlement and directs Settlement Class Members to the settlement website for more information. The Notice provides instructions for Settlement Class Members to exclude

[5] A proposed Preliminary Approval Order is attached hereto as **Exhibit D**.

themselves from the Settlement Class. The Notice also provides instructions for Settlement Class Members to object to the Settlement and/or to Plaintiffs' Counsel's application for attorneys' fees, costs, and expenses. S.A. VIII.64.

5. Attorneys' Fees, Costs, and Expenses

Class Counsel has agreed to request, and Defendant has agreed to pay, subject to Court approval, the amount of $82,736 to Class Counsel for the Fee Award and Costs. S.A. ¶ XIV. Notably, the parties did not negotiate this agreement or any other issue with respect to the Fee Award and Costs until after they had reached an agreement on Class relief. Yanchunis Decl. ¶ 19.

6. Release of Claims

Under the Settlement, each Settlement Class Member will release:

> any and all claims or causes of action of every kind and description, including any causes of action in law, claims in equity, complaints, suits or petitions, and any allegations of wrongdoing, demands for legal, equitable or administrative relief (including, but not limited to, any claims for injunction, rescission, reformation, restitution, disgorgement, constructive trust, declaratory relief, compensatory damages, consequential damages, penalties, exemplary damages, punitive damages, attorneys' fees, costs, interest or expenses) that the Releasing Parties had or have (including, but not limited to, assigned claims and any and all "Unknown Claims" as defined below) that have been or could have been asserted in the Action or in any other action or proceeding before any court, arbitrator(s), tribunal or administrative body (including but not limited to any state, local or federal regulatory body), regardless of whether the claims or causes of action are based on federal, state, or local law, statute, ordinance, regulation, contract, common law, or any other source, and regardless of whether they are known or unknown, foreseen or unforeseen, suspected or unsuspected, or fixed or contingent, arising out of, or related or connected in any way with the claims or causes of action of every kind and description that were brought, alleged, argued, raised or asserted in any pleading or court filing in the Action, including but not limited to those concerning: (1) the disclosure of Settlement Class Members' personal information in the Data Breach; (2) PCS' maintenance of Settlement Class Members' personal information as it relates to the Data Breach; (3) PCS' information security policies and practices as it relates to the Data Breach; and/or (4) PCS' provision of notice to Settlement Class Members following the Data Breach..

S.A. ¶¶ I.28, XII.

III. ARGUMENT

A. Certification of the Settlement Class is Appropriate

Prior to granting preliminary approval of a proposed settlement, the Court should first determine the proposed Settlement Class is appropriate for certification. *See* MANUAL FOR COMPLEX LITIG., § 21.632 (4th ed. 2004); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997). The prerequisites for class certification under Rule 23(a) are numerosity, commonality, typicality, and adequacy—each of which is satisfied here. Fed. R. Civ. P. 23(a). The Third Circuit has approved class certification in light of settlement where the class satisfies the requirements of Federal Rules of Civil Procedure 23(a) and 23(b). *See Sullivan v. DB Invs., Inc*., 667 F.3d 273, 296 (3d Cir. 2011) (*en banc*); *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 349 (3d Cir. 2010). However, in the settlement context, the Court need not consider whether the case would present intractable management problems because there will be no trial. *Sullivan*, 667 F.3d at 322, n.56.

In the Third Circuit, courts have recognized an additional class certification perquisite, which is that the class must be readily "ascertainable" based on objective criteria. Once the party seeking class certification has satisfied the prerequisites of Rule 23(a) and ascertainability, the party must demonstrate at least one of the three requirements of Rule 23(b). *Byrd v. Aaron's Inc,* 784 F.3d 154, 165 (3d Cir. 2015). This case meets all of the Rule 23(a) and (b)(3) prerequisites, and for the reasons set forth below, certification is appropriate.

1. The Proposed Settlement Class Meets the Requirements of Rule 23(a).

a. Numerosity.

Numerosity requires "the class [be] so numerous that joinder of all members is impractical." Fed. R. Civ. P. 23(a)(1). Although there is no bright-line threshold, a class of forty has been presumed to be numerous. *See, e.g.*, *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir.

2001) "While 'mere allegations of numerosity are insufficient,' Fed. R. Civ. P. 23(a)(1) imposes a 'generally low hurdle,' and 'a plaintiff need not show the precise number of members in the class.'" *Manno v. Healthcare Revenue Recovery Grp., LLC*, 289 F.R.D. 674, 684 (S.D. Fla. 2013) (citation omitted).

Here, Defendant identified approximately 867,209 people in the Settlement Class. S.A. ¶ I.35. Thus, numerosity is easily satisfied.

b. Commonality.

The second prerequisite to certification is commonality, which "requires the plaintiff to demonstrate that the class members 'have suffered the same injury,'" and the plaintiff's common contention "must be of such a nature that it is capable of classwide resolution–which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2545 (2011) (citation omitted). "[T]he United States Court of Appeals for the Third Circuit 'has recognized that courts have set a low threshold for satisfying this requirement.'" *In re Merck & Co. Inc., Vytorin/Zetia Sec. Litig.*, No. 08–2177 (DMC), 2012 WL 4482041, at *3 (D.N.J. Sept. 25, 2012) (quoting *Georgine v. Amchem Prods. Inc.*, 83 F.3d 610, 627 (3d Cir. 1996)). "[F]or purposes of Rule 23(a)(2) '[e]ven a single [common] question' will do." *Dukes*, 131 S. Ct. at 2556. Rule 23(a)(2) requires "only that there be at least one issue whose resolution will affect all or a significant number of the putative class members."[6] "Commonality" under Rule 23(a)(2) does not require that all class members have identical claims, and "factual differences among the claims of the putative class members do not defeat certification." *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994).

[6] *Sharf v. Fin. Asset Resolution, LLC*, 295 F.R.D. 664, 669 (S.D. Fla. 2014) (cleaned up) (quoting *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1355 (11th Cir. 2009)); *James D. Hinson Elec. Contr. Co. v. BellSouth Telecomms., Inc.*, 275 F.R.D. 638, 642 (M.D. Fla. 2011) (citing *Williams*, 568 F.3d at 1355).

Instead, "[c]ommonality exists when proposed class members challenge the same conduct of the defendants." *Sanneman v. Chrysler Corp.*, 191 F.R.D. 441, 446-47 (E.D. Pa. 2000). Here, commonality is readily satisfied.

The Settlement Class Members are joined by the common questions of law and fact that arise from the same event: the Data Breach. *See Manno*, 289 F.R.D. at 685. Specifically, Plaintiffs alleged, among others, the following common questions:

a. Whether and to what extent Defendant had a duty to protect the PII of Plaintiffs and Class Members;

b. Whether Defendant had duties not to disclose the PII of Plaintiffs and Class Members to unauthorized third parties;

c. Whether Defendant had duties not to use the PII of Plaintiffs and Class Members for non-business purposes;

d. Whether Defendant failed to adequately safeguard the PII of Plaintiffs and Class Members;

e. Whether and when Defendant actually learned of the Data Breach;

f. Whether Defendant adequately, promptly, and accurately informed Plaintiffs and Class Members that their PII had been compromised;

g. Whether Defendant violated the law by failing to promptly notify Plaintiffs and Class Members that their PII had been compromised;

h. Whether Defendant failed to implement and maintain reasonable security procedures and practices appropriate to the nature and scope of the information compromised in the Data Breach;

i. Whether Defendant adequately addressed and fixed the vulnerabilities which permitted the Data Breach to occur;

j. Whether Defendant engaged in unfair, unlawful, or deceptive practices by failing to safeguard the PII of Plaintiffs and Class Members;

k. Whether Plaintiffs and Class Members are entitled to actual damages, statutory damages, and/or nominal damages as a result of Defendant's wrongful conduct;

l. Whether Plaintiffs and Class Members are entitled to restitution as a result of Defendant's wrongful conduct; and

m. Whether Plaintiffs and Class Members are entitled to injunctive relief to redress the imminent and currently ongoing harm faced as a result of the Data Breach.

(Compl. ¶ 82). Such issues, focusing on Defendant's conduct, satisfy commonality.[7]

c. Typicality.

Rule 23(a)(3) requires that a representative plaintiff's claims be "typical" of those of other class members. The commonality and typicality requirements of Rule 23(a) "tend to merge." *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n. 13 (1982). The "typicality requirement is designed to align the interests of the class and the class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals." *In re Prudential Ins. Co. of Am. Sales Practices Litig.,* 148 F.3d 283, 311 (3d Cir. 1998) (citations omitted). Thus, "[t]o evaluate typicality, we ask whether the named plaintiff's claims are typical, in common-sense terms, of the class, thus suggesting that the incentives of the Plaintiff are aligned with those of the class." *Beck v. Maximus, Inc.*, 457 F.3d 291, 295-96 (3d Cir. 2006) (citations omitted). Rule 23(a)(3) is satisfied where a named plaintiff can "show that the issues of law or fact he or she shares in common with the class occupy the same degree of centrality to his or her claims as to those of unnamed class members." *Weiss v. York Hosp.*, 745 F.2d 786, 809 n.36 (3d Cir. 1984) (citation omitted). Thus, "factual variations will not defeat certification where the various claims arise from the same legal theory," unless there is a danger regarding the named plaintiff that "the unique circumstances or legal theory will receive inordinate emphasis" so the common claims "will not be pressed with equal vigor or will go unrepresented." *Id.*

Here, typicality is satisfied for the same reasons as commonality. Specifically, Plaintiffs'

[7] *See, e.g.*, *In re Countrywide Fin. Corp. Cust. Data Sec. Breach Litig.*, No. 3:08-MD-01998, 2009 WL 5184352, at *3 (W.D. Ky. Dec. 22, 2009) ("All class members had their private information stored in Countrywide's databases at the time of the Data Security Incident"); *In re Heartland Payment Sys., Inc. Cust. Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1059 (S.D. Tex. 2012) ("Answering the factual and legal questions about Heartland's conduct will assist in reaching classwide resolution.").

claims are typical of those of other Settlement Class Members because they arise from the Data Breach. They are also based on the same legal theory, *i.e.*, that Defendant had legal duties to protect Plaintiffs' and Class Members' PII. Because the claims of Plaintiffs and the Class are aligned as to the theory of liability central to the claims of both, , typicality is met.

d. Adequacy.

Rule 23(a)(4) requires that the class representative "not possess interests which are antagonistic to the interests of the class." 1 NEWBERG ON CLASS ACTIONS § 3:21. Additionally, the class representative's counsel "must be qualified, experienced, and generally able to conduct the litigation." *Id.*; *Amchem*, 521 U.S. at 625–26.[8] At this stage, there is nothing suggesting this requirement is not satisfied. Plaintiffs are members of the Settlement Class and do not possess any interests antagonistic to the Settlement Class. They authorized PCS to collect and retain their PII and alleges it was compromised by the Data Breach, as the PII of the Settlement Class was also allegedly compromised. Indeed, Plaintiffs' claims coincide identically with the claims of the Settlement Class, and Plaintiffs and the Settlement Class desire the same outcome of this litigation. Because of this, Plaintiffs have prosecuted this case for the benefit of all Settlement Class Members.

In addition, Class Counsel are experienced in class action litigation and have submitted their skills and experience in handling class litigation around the country and in this District. Yanchunis Decl., ¶¶ 3–12, and its Composite Exh. 1. Because Plaintiffs and their counsel have devoted substantive time and resources to this litigation, the adequacy requirement is satisfied.

e. Ascertainability

[8] *See also New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 313 (3d Cir. 2007)

In addition to the Rule 23 requirements, courts in the Third Circuit also analyze the judicially created doctrine of ascertainability when evaluating whether to certify a class. A class is ascertainable if "(1) the class is defined with reference to objective criteria; and (2) there is a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Byrd*, 784 F.3d at 163. Here, the class is defined with reference to objective criteria and the determination of whether someone is within the Settlement Class is administratively feasible because it can be – and has been obtained – based on the Defendant's records. The identity— as well as current or last known addresses and email addresses—of each Settlement Class Member is obtainable from Defendant's records, and, in fact, will be provided to the Settlement Administrator within three (21) days after entry of the Preliminary Approval Order. S.A. ¶ 36.

2. The Predominance and Superiority Requirements of Are Met.

Under Rule 23, once the threshold requirements of subsection (a) have been satisfied, the party seeking class certification must then demonstrate that the requirements of subsections (b)(1), (2), or (3) are satisfied. Plaintiff is seeking certification of the Settlement Class under Rule 23(b)(3), which requires a party show that "(i) common questions of law or fact predominate (predominance), and (ii) the class action is the superior method for adjudication (superiority)." *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 591 (3d Cir. 2012).

a. Predominance.

The predominance requirement focuses on whether a defendant's liability is common enough to be resolved on a class basis, *see Dukes*, 131 S. Ct. at 2551–57, and whether the proposed class is "sufficiently cohesive to warrant adjudication by representation," *Amchem*, 521 U.S. at 623. The mere "presence of individual questions . . . does not mean that the common questions of

law and fact do not predominate." *Eisenberg v. Gagnon*, 766 F.2d 770, 786 (3d Cir.1985). Instead, the reviewing court should look to whether "the efficiencies gained by class resolution of the common issues [will be] outweighed by individual issues presented for adjudication." *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 511 (D.N.J. 1997). The "focus of the predominance inquiry is on whether the defendant's conduct was common as to all of the class members, and whether all of the class members were harmed by the defendant's conduct." *Sullivan*, *supra*, 667 F.3d at 298. "When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.'"[9]

Common issues readily predominate here because the central liability question in this case—whether Defendant failed to safeguard Plaintiffs' PII, like that of every other Class member—can be established through generalized evidence.[10] Several case-dispositive questions could be resolved identically for all members of the Settlement Class, such as whether Defendant had duties to exercise reasonable care in safeguarding, securing, and protecting their PII and whether Defendant breached those duties. The many common questions that arise from Defendant's conduct predominate over individualized issues. Other courts have recognized that common issues arising from a data breach predominate.[11] Because the claims are being certified

[9] *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (quoting 7AA C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1778, 123–124 (3d ed. 2005)).

[10] *See Klay v. Humana, Inc.*, 382 F.3d 1241, 1264 (11th Cir. 2004) ("When there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position, the predominance test will be met.").

[11] *See, e.g., Countrywide*, 2009 WL 5184352, at *6–7 (finding predominance where proof would focus on data breach defendant's conduct both before and during the theft of class members' information); *Heartland*, 851 F. Supp. 2d at 1059 (finding predominance where "several common questions of law

for settlement purposes, there are no manageability issues.[12]

b. Superiority.

Finally, a class action is superior to other methods available to fairly, adequately, and efficiently resolve the claims of the proposed Settlement Class. As courts have historically noted, "[t]he class action fills an essential role when the plaintiffs would not have the incentive or resources to prosecute relatively small claims in individual suits, leaving the defendant free from legal accountability." *In re Checking Account Overdraft Litig.*, 275 F.R.D. 654, 659 (S.D. Fla. 2011). At its most basic, superiority asks the Court "to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 533-34 (3d Cir. 2004) (citations omitted). Factors the Court may consider are: (1) the interests of members of the class in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class.

Here, resolution of numerous claims in one action is far superior to individual lawsuits, because it promotes consistency and efficiency of adjudication. *See* Fed. R. Civ. P. 23(b)(3). Indeed, absent class treatment, each Settlement Class Member will be required to present the same or essentially the same legal and factual arguments, in separate and duplicative proceedings, the result of which would be a multiplicity of trials conducted at enormous expense to both the

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and fact ar[ose] from a central issue: Heartland's conduct before, during, and following the Data Security Incident, and the resulting injury to each class member from that conduct").

[12] *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.").

judiciary and the litigants. Moreover, there is no indication that Settlement Class Members have an interest or incentive to pursue their claims individually, given the amount of damages likely to be recovered, relative to the resources and expense required to prosecute such an action.[13] Additionally, the Settlement will give the parties the benefit of finality.

B. Plaintiffs' Counsel Should Be Appointed as Class Counsel.

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

As discussed above, and as fully explained in Mr. Yanchunis' Declaration, Class Counsel have extensive experience prosecuting similar class actions, as well as other complex litigation, and have the experience to assess the risk of continued litigation and appeals. Class Counsel have diligently investigated and prosecuted the claims here, have dedicated substantive resources to the litigation of those claims, and have successfully negotiated the Settlement to the benefit of Plaintiffs and the Settlement Class. Accordingly, the Court should appoint James Barry, John A. Yanchunis, and Ryan D. Maxey as Class Counsel.

C. The Settlement Is Fair, Reasonable, and Adequate.

[13] *See See In re Ford Motor Co. Ignition Switch Prod. Liab. Litig.*, 174 F.R.D. 332, 351 (D.N.J. 1997) (finding class treatment preferred when "the recovery being sought by each of the Plaintiffs is not sufficiently large to render individualized litigation a realistic possibility") (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985)); *see also Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.")

After determining that certification is appropriate, courts next consider whether the proposed settlement warrants preliminary approval. Under Rule 23(e), the Court should approve a class action settlement if it is fair, reasonable, and adequate.[14]

Further, it must be noted that there is a strong judicial and public policy favoring the voluntary conciliation and settlement of complex class action litigation.[15] Thus, while district courts have discretion in deciding whether to approve a proposed settlement, deference should be given to the consensual decision of the parties. *Warren*, 693 F. Supp. at 1054 ("affording great weight to the recommendations of counsel for both parties, given their considerable experience in this type of litigation").

1. The Settlement Satisfies Amended Rule 23(e)

Rule 23(e)(1) now provides that notice should be given to the class, and hence, preliminary approval should be granted, where the Court "will likely be able to" (i) finally approve the settlement under Amended Rule 23(e)(2), and (ii) certify the class for settlement purposes. Fed. R. Civ. P. 23(e)(1)(B)(i)–(ii); *see also id.* 2018 Amendment Advisory Committee Notes. As explained above, the Class here meets the criteria for certification of a settlement class, including all aspects of numerosity, commonality, typicality, adequacy, and predominance. Rule

[14] *See Taylor v. Citizens Telecom Servs. Co., LLC*, ----F. Supp. 3d ---- 2022 WL 456448, at *2 (M.D. Fla. Feb. 8, 2022) (Honeywell, J.) (finding the "Settlement Agreement, including all Exhibits thereto, [were] entered into in good faith and [thus were] fully and finally approved as fair, reasonable, and adequate as to, and in the best interests of, each of the Parties and the Settlement Class Members").

[15] *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) ("Public policy strongly favors the pretrial settlement of class action lawsuits"); *Warren v. City of Tampa*, 693 F. Supp. 1051, 154 (M.D. Fla. 1998), *aff'd,* 893 F. 2d 347 (11th Cir. 1998); *Access Now, Inc. v. Claires Stores, Inc.*, No. 00-cv-14017, 2002 WL 1162422, at *4 (S.D. Fla. May 7, 2002). This is because class action settlements ensure class members a benefit, as opposed to the "mere possibility of recovery at some indefinite time in the future." *In re Domestic Air Transport.*, 148 F.R.D. 297, 306 (N.D. Ga. 1993); *see also*, *e.g.*, *Ass'n for Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 466 (S.D. Fla. 2002) (finding that the policy favoring settlement is especially relevant in class actions and other complex matters, where the inherent costs, delays and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain).

23(e)(1)(B)(ii) is therefore met.

As to Rule 23(e)(1)(B)(i), final approval is proper under the amended rule upon a finding that the settlement is "fair, reasonable, and adequate" after considering:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> > (i) the costs, risks, and delay of trial and appeal;
> >
> > (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> >
> > (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> >
> > (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e). Here, the Court will "likely be able to" finally approve this Settlement and thus preliminary approval should be granted.

a. Adequacy of Representation and Arm's Length Negotiation

As explained above, Plaintiffs and Class Counsel have adequately represented the Class. *See supra* § III.A.1.d. Moreover, the Settlement was negotiated at arm's length using experienced mediator Bennett Picker. Yanchunis Decl. ¶ 16.[16] Subsections (A) and (B) of Rule 23(e)(2) are therefore met.

b. Adequacy of Relief

[16] *See also Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1384 (S.D. Fla. 2007) (concluding class settlement not collusive in part because it was overseen by "an experienced and well-respected mediator"); *Lipuma*, 406 F. Supp. 2d at 318-19 (approving settlement where the "benefits conferred upon the Class are substantial, and are the result of informed, arms-length negotiations by experienced Class Counsel").

The relief offered by the Settlement is adequate considering the risks of continued litigation. Although Plaintiffs are confident in the merits of their claims, the risks involved in prosecuting a class action through trial cannot be disregarded. Plaintiffs' claims would still need to succeed against a motion to dismiss, and on a motion for class certification, and likely survive an appeal thereof. Almost all class actions involve a high level of risk, expense, and complexity, which is one reason that judicial policy so strongly favors resolving class actions through settlement: "[T]here is an overriding public interest in settling class action litigation, and it should therefore be encouraged." *In re Warfarin*, 391 F.3d at 535; *see also In re Ins. Brokerage Antitrust Litig.*, 297 F.R.D. 136, 144 (D.N.J. 2013) ("'The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.'") (quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995)); *see also Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010).

Pursuant to the Settlement, Defendant will provide an aggregate cap of $500,000.00 for the reimbursement of up to $2,500 in out-of-pocket expenses for each Settlement Class Member, included attested time at a rate of $20 for up to 3 hours. Given the relief available, Class Counsel believe the results achieved are well within the range of possible approval.

Here, the central legal issues affecting the Settlement Class are as attacks on the substantive claims Plaintiffs have alleged. *See* (Doc. 15, 16). Nevertheless, and despite the strength of the Settlement, Plaintiffs are pragmatic in his awareness of the various defenses available to Defendant, as well as the risks inherent to continued litigation. Defendant has consistently denied the allegations and made clear that they would vigorously defend this case through trial as needed.

Settlement relief will be distributed via a straight-forward claims process utilizing an easy-to-understand claim form. S.A. Ex. A. Payments for approved claims shall be issued in the form of an electronic payment via Zelle, Venmo, or PayPal or a Mastercard mailed as soon as practicable after the allocation and distribution of funds are determined by the Settlement Administrator following the Effective Date. S.A. ¶ IV.54.

Class counsel will move the Court for a service award payment not to exceed $1,000 for each of the Class Representatives. S.A. ¶ XIII.80. Such Service Award Payment shall be paid by the Settlement Administrator, in the amount approved by the Court, no later than thirty (30) days after the Effective Date.

The Fee Award and Costs were negotiated separate, apart, and after reaching agreement on the Class relief. Yanchunis Decl. ¶ 19. Class Counsel will request the amount of $82,736 for the Fee Award and Costs. S.A. ¶ XIV. Such Fee Award and Costs (plus any interest accrued thereon) shall be paid by the Settlement Administrator from the Settlement Fund, in the amount approved by the Court, no later than three (3) days after the Effective Date. S.A. ¶ XIV.82.

Accordingly, the relief provided by the Settlement is fair, reasonable, and adequate especially when considering the inherent costs, risks, and delay were this matter to proceed. Subsection (C) of Rule 23(e)(2) is therefore met.

c. The Settlement Treats Class Members Equitably

The last requirement of the new Rule 23(e) is that the Settlement "treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). Here, the Settlement treats Settlement Class Members equitably because all Settlement Class Members are eligible for reimbursement following submission of a claim form. Yanchunis Decl. ¶ 27.

2. The Settlement Satisfies Historic Preliminary Approval Factors

The historical procedure for review of a proposed class action settlement is a well-established two-step process. ALBA & CONTE, 4 NEWBERG ON CLASS ACTIONS, §11.25, at 38–39 (4th ed. 2002). The first step is a preliminary, pre-notification hearing to determine whether the proposed settlement is "within the range of possible approval."[17] Historically, preliminary approval of a settlement does not require a definitive determination of the fairness of a proposed settlement. *In re Gen. Motors Corp.*, 55 F.3d at 785 (holding that "the preliminary determination establishes an initial presumption of fairness"); *Smith v. Prof'l Billing & Mgmt. Servs., Inc.*, No. 06-cv-04453, 2007 WL 4191749, at *1 (D.N.J. Nov. 21, 2007) (same). Rather, a definitive determination of the fairness, reasonableness, and adequacy of a settlement is made at a Final Settlement Hearing. *See In re Linerboard Antitrust Litig.*, 292 F. Supp. 631, 638 (E.D. Pa. 2003).[18] "Preliminary approval is not binding, and it is granted unless a proposed settlement is obviously deficient." *Jones v. Commerce Bancorp, Inc.*, 2007 WL 2085357, at *2. To grant preliminary approval, a court must find that: "(1) the parties' negotiations occurred at arm's length; (2) there was sufficient discovery; [and] (3) the proponents of the settlement are experienced in similar

[17] *Id.* (quoting MANUAL FOR COMPLEX LITIG., §30.41 (3rd ed. 1995)); *Fresco v. Auto Data Direct, Inc.*, No. 03-cv-61063, 2007 WL 2330895, at *4 (S.D. Fla. May 14, 2007).

[18] The factors considered for final approval of a class settlement as "fair, reasonable and adequate" include: (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action through trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best possible recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation. *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). "The Court need not, however, consider the *Girsh* factors in the context of" a motion for preliminary approval of a settlement." *Gregory v. McCabe, Weisberg & Conway, P.C.*, No. 13-cv-6962, 2014 WL 2615534, at 2 n.6 (D.N.J. June 12, 2014).

litigations."[19] *Smith*, 2007 WL 4191749, at *1. Upon such findings, a settlement agreement is entitled to a presumption of fairness and should be granted preliminary approval. *Id.*

Preliminary approval is a matter within the discretion of the district court. *See In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 299 (3d Cir. 1998); *In re Lucent Techs., Inc.*, 307 F. Supp. 2d 633, 641 (D.N.J. 2004) (a court enjoys considerable discretion to determine whether a proposed settlement satisfies Rule 23 standards). In making this determination, the Court should give deference to the recommendations of experienced counsel who have engaged in arms-length settlement negotiations. *See In re Am. Family Enters.*, 256 B.R. 377, 421 (D.N.J. 2000) ("significant weight should be given 'to the belief of experienced counsel that settlement is in the best interest of the class, so long as the Court is satisfied that the settlement is the product of 'good faith, arms-length negotiations.'") (citations omitted).

Here, there is no question that the proposed Settlement is "within the range of possible approval." As explained above, the process used to reach the Settlement was exceedingly fair and overseen by an experienced neutral. The Settlement is the result of intensive, arm's length negotiations between experienced attorneys who are familiar with class action litigation and with the legal and factual issues in this case. Further, the relief provided is significant, especially considering the risks and delay further litigation would entail. Thus, the Settlement should be preliminarily approved.

D. The Proposed Class Notice Satisfies Rule 23.

"Rule 23(e)(1)(B) requires the court to direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise

[19] A fourth factor, the number of objections to the settlement, is not properly evaluated until the final approval stage. *Smith*, 2007 WL 4191749, at *1 n. 3

regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or (b)(3)." MANUAL FOR COMPL. LITIG. § 21.312 (internal quotation marks omitted). The best practicable notice is that which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950). To satisfy this standard, "[n]ot only must the substantive claims be adequately described but the notice must also contain information reasonably necessary to make a decision to remain a class member and be bound by the final judgment or opt out of the action." *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1227 (11th Cir. 1998) (internal quotation marks omitted).

The Notice program here satisfies all of these criteria and is designed to provide the best notice practicable. Foremost, the Notice is reasonably calculated to apprise the Settlement Class of the pendency of the case, class certification (for settlement purposes), the terms of the Settlement, Class Counsel's request for the Fee Award and Costs, Settlement Class Members' rights to opt-out of or object to the Settlement, as well as the other information required by Fed. R. Civ. P. 23(c)(2)(B). Additionally, the Notice program is comprised of: (1) direct Notice sent by U.S. mail (and email where possible) to Settlement Class Members; and (2) Notice posted to the settlement website. S.A. ¶¶ IV.1.18, IV.3.1(f), IV.3.2. This approach will satisfy due process as set forth in the Declaration of Benny Davis, attached as **Exhibit C**.

The form of the Preliminarily Approval Order, Exhibit D, has been drafted and approved by counsel for Plaintiffs and counsel for Defendant. The proposed claim form, S.A. Ex. A, likewise satisfies all of the above criteria. Finally, Defendant and/or the Settlement Administrator, on behalf of Defendant, will provide the notification required by the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1715, to the relevant state and federal governmental officials. S.A. ¶ X.71.

Therefore, the Notice and Notice Program satisfy all applicable requirements of the law, including Rule 23 and Due Process. The Court should therefore approve the Notice, Notice Program, and the form and content of the claim form and Notice.

E. The Court Should Schedule a Final Approval Hearing.

The last step in the preliminary approval process is to schedule a Final Approval Hearing, at which the Court will hear evidence and argument necessary to make its final evaluation of the Settlement; whether to enter a Final Approval Order under Rule 23(e); and whether to approve Class Counsel's request for the Fee Award and Costs. Plaintiffs request that the Court schedule the Final Approval Hearing at a date convenient for the Court, at least 90 days after Defendant notifies the appropriate government officials pursuant to CAFA. Class Counsel will file the motion for Final Approval no later than 21 days prior to the hearing.

IV. CONCLUSION

For the reasons stated, Plaintiffs respectfully requests that the Court enter an order: (1) preliminarily approving the proposed settlement; (2) preliminarily certifying the Settlement Class; (3) appointing Carlos Gamez and Roberto Quinonez, as parent and general guardian of C.L.Q-B, a minor, as Settlement Class Representatives; (4) appointing James Barry, John A. Yanchunis, Ryan D. Maxey as Class Counsel; (5) approving the proposed Notice Program and authorizing its dissemination; (6) appointing American Legal Claim Services LLC as the Settlement Administrator; (7) approving the procedures for exclusions and objection; and (8) setting a schedule for the final approval process. A proposed Preliminary Approval Order is attached as Exhibit D.

Dated: May 27, 2022

Respectfully submitted,

/s/ James A. Barry
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