IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT COURT OF WISCONSIN

SANGER POWERS, ROBERT LEGG, JENNIFER McCREARY, BETTY OWEN, and LYDIA POSTOLOWSKI, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

FILTERS FAST, LLC, a North Carolina corporation,

Defendant.

CASE NO. 3:20-cv-00982-jdp

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR RENEWED, UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

Plaintiffs Sanger Powers, Robert Legg, Jennifer McCreary, Betty Owen, and Lydia Postolowski ("Plaintiffs") hereby renew their Unopposed Motion for Final Approval of this Class Action Settlement with Defendant, Filters Fast, LLC ("Defendant" or "Filters Fast").

On November 17, 2021 this Court preliminarily approved a proposed Class Action Settlement that created distinct monetary benefits for the approximate 323,000 Settlement Class Members: (1) up to $750 in cash reimbursements for ordinary out-of-pocket expenses; (2) $15 per hour for up to four hours of lost time spend dealing with fraud likely to have been caused by the Incident[1]; or (3) a flat payment of up to $25. In addition to the monetary relief provided, the Settlement provides for up to 24-months of credit monitoring services for each Settlement Class Member, and equitable relief in the form of information security enhancements designed to ensure Settlement Class Members' Personal Identifying Information is better protected in the future.

Class Counsel zealously prosecuted Plaintiffs' claims against Filters Fast in two separate lawsuits that were simultaneously pending in two separate federal courts—this Honorable Court, and the United States District Court for the Western District of North Carolina. It was the cumulative effort and pressure applied by this "two-front war" that brought Filters Fast to the table to negotiate a possible resolution. It was the full briefing of twin Motions to Dismiss filed by Filters Fast in the North Carolina action—motions that were ultimately denied by the federal court in North Carolina—that brought about the possibility of settlement. *See McCreary v. Filters Fast LLC*, No. 3:20-CV-595-FDW-DCK, 2021 WL 3044228 (W.D.N.C. July 19, 2021).

[1] All capitalized terms not otherwise defined herein shall have the same meanings as set forth in the Settlement Agreement and Release ("Settlement Agreement" or "Agreement"), ECF No. 35-1.

These Motions to Dismiss were filed by able defense counsel from a well-regarded national law firm, in a case-law environment that is increasingly hostile towards data breach litigation. *See e.g.*, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2197, 210 L. Ed. 2d 568 (2021). Notably, *TransUnion* was decided on June 25, 2021, just days before the North Carolina court's ruling in the companion case against Filters Fast.

Class Counsel only reached a settlement after an extensive investigation and prolonged arm's-length negotiations presided over by an immensely talented mediator, The Honorable Wayne Andersen (Ret.). Even after coming to an agreement on the central terms, Class Counsel negotiated for weeks over the fine points of the Settlement, including securing two rounds of Email Notice for the Class. Class Counsel worked for weeks to finalize the Settlement Agreement and associated exhibits (like the Class notices and claim form) pertaining to notice, preliminary approval, and final approval. Class Counsel moved for preliminary approval twice—responding to and satisfying the Court's concerns over jurisdiction. This was not a case where Class Counsel merely "phoned it in," attempting to secure a big payday for the lawyers at the expense of the Class.

After this Court granted preliminary approval, the Settlement Administrator—with the help of the Parties—disseminated Notice to the Settlement Class. Despite previously reporting to the Court that Class Notice "reached" 89% of the Class, Class Notice actually had a reach of 97.56%. However, in the process of preparing this reviewed Motion, and in the process of responding to the Court's questions posed in its February 15, 2022 Order (ECF No. 54), Kroll discovered that 6,728 Class Members were not mailed Notice after the attempted Email Notice to them "bounced." This is explained in more detail in the Supplemental Declaration of Matthew Neylon of Kroll Settlement Administration in Support of Final Approval ("Suppl. Kroll Decl.") (attached hereto as

Exhibit 1). Plaintiffs and Class Counsel include a proposed solution herein (page 17) to deal with these 6,728 Class Members. However, this issue should not delay entry of an order granting final approval, or delay conveying the settlement benefits to those Class Members who have already made claims.

Individual Notice was provided directly to Settlement Class Members via email or first-class mail. The notice provided each Settlement Class Member with information regarding how to reach the Settlement Website, make a claim, and how to opt-out or object to the Settlement.

Out of approximately 323,000 Settlement Class Members, only ten (10) have sought to exclude themselves from the Settlement, and *zero* have objected.

Plaintiffs respectfully submit that these facts demonstrate that the Court's preliminary determination that the Settlement should be approved was correct—especially in light of the universal support received from the Settlement Class. Accordingly, Plaintiffs now renew their request for final approval of the Settlement and final certification of a nationwide Settlement Class. Plaintiffs submit that this Settlement is an excellent result for the Class and satisfies all criteria for final settlement approval under Rule 23 and Seventh Circuit criteria. Plaintiffs therefore respectfully renew their request that the Court grant their Motion.

II. CASE SUMMARY

A. The Data Breach

This case involves a putative class action against Defendant, Filters Fast, LLC, relating to a data security breach that potentially exposed payment card information of certain of Filters Fast's customers who used payment cards to make purchases on the Filters Fast website located at www.filtersfast.com from July 15, 2019 to July 10, 2020 (the "Incident."). Filters Fast announced the Incident in a Notice of Data Breach sent to customers in August 2020.

B. Procedural Posture

On October 26, 2020, Plaintiffs Legg and Powers filed their Complaint alleging, among other things, that Defendant failed to take adequate measures to protect their and other putative Class Members' payment card information and failed to disclose that Defendant's systems were susceptible to a cyber-attack. *See* ECF No. 1. On October 27, 2020, Plaintiffs Jennifer McCreary, Betty Owen, and Lydia Postolowski filed suit against Filters Fast in the Western District of North Carolina related to the Incident (*see* Compl., *McCreary v. Filters Fast, LLC*, No. 3:20-cv-595 (W.D.N.C. filed Oct. 27, 2020), ECF No. 1 (the "*McCreary* Action")). Both counsel in this action and counsel in the *McCreary* Action have worked closely together while negotiating with Filters Fast. Thus, in the interest of judicial economy and efficiency, Counsel in the instant action and the *McCreary* Action have since filed an Amended Complaint in order to add the plaintiffs from the *McCreary* Action as parties to this action (*see* ECF No. 25, filed on June 29, 2021) and dismissed their action in the Western District of North Carolina. Counsel for this action and the *McCreary* Action shall be referred to collectively herein as "Class Counsel" and all Plaintiffs and Filters Fast are collectively referred to as the "Parties."

On December 29, 2020, Defendant filed two Motions to Dismiss and a Motion to Transfer Venue to the Western District of North Carolina Pursuant to 28 U.S.C. § 1404. *See* ECF Nos. 8, 11 & 13, respectively. During this time, the Parties continued to make meaningful progress towards reaching a settlement. Accordingly, Plaintiffs Legg and Powers and Filters Fast submitted a Joint Motion to Stay Deadlines on January 14, 2021. *See* ECF Nos. 17 & 19 (granting the Joint Motion to Stay until February 19, 2021). Following a telephonic status conference held on February 2, 2021, this Court granted their Joint Request to Stay further briefing on the pending motions. *See* ECF No. 19.

Prior to mediation, the Parties negotiated a stipulated protective order. Filters Fast served

informal discovery requests upon Plaintiffs. These requests were related to Plaintiffs' experiences and damages as a result of the Incident. All Plaintiffs responded in good faith. Filters Fast also produced documentation to Plaintiffs that was utilized in preparation of mediation.

On March 31, 2021, the Parties participated in an all-day mediation before JAMS mediator Hon. Wayne R. Andersen (Ret.). Following multiple exchanges of information and negotiations of terms, the Parties were able to reach a settlement in principle. Thereafter, the Parties negotiated the remaining terms, circulating drafts back and forth of the Settlement Agreement and Release and its exhibits. The Agreement was finalized and executed on June 15, 2021.

On July 2, 2021, Plaintiffs moved this Honorable Court for preliminary approval of this proposed Class Action Settlement and certification of the Settlement Class for purposes of the settlement. *See* ECF No. 26. On September 24, 2021, the Court denied the motion without prejudice, holding that Plaintiffs failed to satisfy the diversity requirement of 28 U.S.C. § 1332(d)(2)(A), but granting Plaintiffs leave to file a renewed motion that established the Court's basis for jurisdiction. On September 30, 2021, Plaintiffs renewed their Motion for Preliminary Approval, making the requisite showing of diversity through attached sworn declarations of Plaintiffs and the sole member of the Defendant limited liability company. This Court granted preliminary approval on November 17, 2021. ECF No. 43.

C. Summary of Settlement

1. Settlement Benefits

The Settlement negotiated on behalf of the Class provides for a choice of three separate forms of monetary relief, as well as 24-months of credit monitoring services and equitable relief in the form of business practice changes implemented to better protect Class Member data in the future. *See* Settlement Agreement ("Agr."), attached as Ex. 1 to Pls.' Mot. for Prelim. Approval at

ECF No. 35-1. The Settlement Agreement calls for certification of a Settlement Class defined as follows:

> **Settlement Class:**
> All residents of the United States whose payment card was used on the Filters Fast website (www.filtersfast.com) to make a purchase between July 15, 2019 and July 10, 2020.

Agr. ¶ 34. The Settlement Class specifically excludes: (i) judges presiding over this Action and the *McCreary* Action and any members of their judicial staff(s); (ii) the officers and directors of Filters Fast; and (iii) persons who timely and validly request exclusionfrom the Settlement Class. *Id.* The Parties estimate the size of the Settlement Class to be approximately 323,000 Filters Fast customers.

a. Up to $750 in Expense Reimbursements

Under the terms of the Settlement Agreement, Settlement Class Members can submit a claim for expense reimbursements of up to $750 per Settlement Class Member. Agr. ¶ 42.a. While capped at an individual level, this sum is *uncapped in the aggregate*, meaning every Class Member can recover the whole $750 without *pro rata* reduction should they have eligible expenses and make a valid claim. *Id.*

Pursuant to the Agreement, Settlement Class Members who attest that they used one or more of their payment cards at the Filters Fast website to make a purchase during the Settlement Class Period, and who provide reasonable documentation of unreimbursed out-of-pocket expenses or losses in connection with a fraudulent transaction incurred on the subject payment card, will be entitled to cash payments equal to their out-of-pocket expenses or losses up to $750.00, subject to the terms of ¶ 42(a). These losses may include, but are not limited to: unreimbursed fraudulent charges, bank fees, replacement card fees, late fees from transactions with third parties that were delayed due to fraud or card replacements, credit freeze fees, parking expenses or other

transportation expenses for trips to a financial institution to address fraudulent charges or receive a replacement payment card, credit monitoring purchased for up to three years, or other expenses reasonably attributable to the Incident. The submitted evidence must show: the loss is an actual, documented, and unreimbursed monetary loss; the loss was more likely than not caused by the Incident; the loss occurred after the Settlement Class Member used the Payment Card on the Filters Fast website to make a purchase; and the Settlement Class Member made reasonable efforts to avoid or seek reimbursement for the loss, including but not limited to exhaustion of all available credit monitoring insurance and identity theft insurance. *Id.*

b. Up to $60 for Lost Time

In the alternative, Settlement Class Members who attest that they used one or more of their Payment Cards at the Filters Fast website to make a purchase during the Settlement Class Period, who submit reasonable documentation of a subsequent fraudulent charge on the Payment Card that was more likely than not caused by the Incident, and who attest to the time they spent addressing the fraudulent transaction or monitoring their account as a result of the Incident, will be entitled to a cash payment equal to $15.00 per hour of time spent addressing the fraudulent transaction or monitoring their account as a result of the Incident up to a maximum of four hours ($60.00 maximum). Agr. ¶ 41.b.

Similar to the expense reimbursements, there is no aggregate cap on the amount available to be claimed for lost time. As such, every Settlement Class Member can claim the full $60 available for lost time.

c. Up to $25 Cash Payment

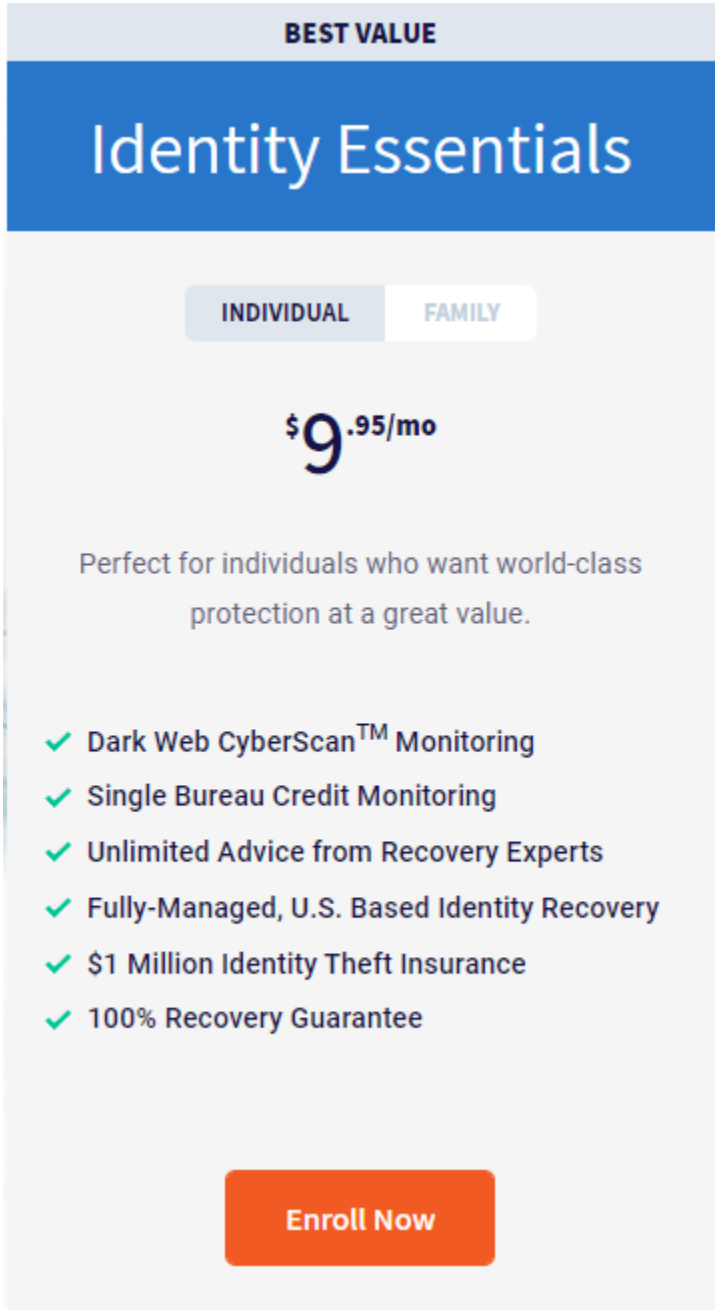
Lastly, Settlement Class Members can claim a flat payment of up to $25 by simply attesting that they used one or more of their Payment Cards at the Filters Fast website to make a

purchase during the Settlement Class Period. Agr. ¶ 41.c. This is essentially a "no documentation" payment to any Class Member who simply attests that they used their payment card on Defendant's website during the Class Period. Unlike the expense reimbursements and compensation for lost time, payments made pursuant to this section are capped at $175,000.00 in aggregate. If the total amount of Approved Claims under this paragraph exceeds the $175,000.00, then each approved claim under this paragraph shall be calculated on a pro rata basis (by taking $175,000.00 divided by the number of Approved Claims under ¶ 41(c)), such that the total aggregate payment made under this paragraph does not exceed $175,000.00. *Id*.

d. Credit Monitoring and Identity Theft Restoration

In addition to the choice of monetary compensation available, Settlement Class Members who submit a valid and timely Claim Form and who did not previously enroll in the twelve (12) months of ID Experts service offered by Filters Fast are eligible to receive 24 months of 1-bureau credit monitoring provided by ID Experts paid for by Filters Fast. Agr. ¶ 47. Settlement Class Members who previously received and enrolled in the 12 months of ID Experts service offered by Filters Fast are eligible to receive an additional 12 months of 1-bureau credit monitoring provided by ID Experts paid for by Filters Fast. *Id*.

In response to the Court's question about the value of this service, the Identity Protection service provided by ID Experts can be found here: https://www.idx.us/idx-identity/plans. This webpage shows it would cost a Class Member $9.95 per month to receive this particular ID monitoring and protection service secured by this Settlement:



The value of this service is therefore not speculative—it is easily quantified as being worth exactly $9.95 per month for a 24-month period, which equals $119.40 per year, or $238.80 for the 24-month period secured by this Settlement. These amounts are fully in line with the conservative estimates offered by Class Counsel (via a sworn declaration) in the original Motion for Attorneys' Fees ($90.00 per year or $7.50 per month, which is the lowest retail value of comparable identity

theft protection to $107.88 per Settlement Class Member). The potential value of this benefit to the Class is therefore up to $77,132,400 (if no Class Member had availed him or herself of the 12 months of coverage previously offered by Filters Fast, and claimed the full 24 months). The potential value might also be expressed as half that amount, or $38,566,200, if all Class Members had signed up for the coverage offered previously and only claimed 12 months. Or, making a reasonable assumption that Class Members might occasionally be able to find a discount on the price of this service, the $29 million dollar figure previously offered by Class Counsel (which assumes an annual cost of only $90 per person) is supported by the actual retail cost of the actual service offered, as plainly expressed on the IDX website. There is nothing speculative about this number.

Class Counsel also now has available to it actual claims data about how many Class Members have signed up for the identity protection benefit offered, and the value of that benefit. As of February 17, 2022, 2,914 persons signed up for credit monitoring. *See* Ex. 1, Suppl. Kroll Decl. ¶ 16. 164 claimants signed up for 12 months of coverage, and 2,750 claimants signed up for 24 months. This amounts to $676,281.60 of value actually claimed by Class Members that they would not (and will not) otherwise receive but for the proposed Settlement.[2]

Class Counsel also believes that providing this identity protection benefit to all Class Members is a critical and necessary element of this Settlement. This benefit—a benefit that any Class Member can take without having any other claim at all (whether it be a claim for out-of-pocket expenses, lost time, or even the $25 "no documentation" claim) provides good and valuable consideration to each and every Class Member for the release that he or she is providing. Without this extremely valuable benefit, an argument might be made that some Class Member was giving

[2] (164 x 12 x $9.95 = $19,581.60) + (2,750 x 24 x $9.95 = $655,700.00) = $676,281.60.

a release without receiving any consideration for the release. That is why Class Counsel made the determination to bargain for and obtain 24 months of identity protection for the entire Class, as opposed to simply putting those dollars into cash payments that only a limited subset of the Class might potentially claim.

e. Equitable and Prospective Relief

Pursuant to the Agreement, Filters Fast has implemented multiple important business practice changes in response to the Incident:

- *Enhanced Website Security.* Filters Fast moved the website to a new hosting provider (Rackspace) with greater focus on security. Rackspace alsoutilizes a change control process to approve and verify all website code changes.

- *24/7 Security and Breach Monitoring*. Filters Fast hired Alert Logic for 24/7 security and breach monitoring and detection services. All website code that processes cardholder data is now controlled and managed by AlertLogic's file integrity monitoring system.

- *Ongoing Third-Party Review of PCI DSS Compliance.* Filters Fast has agreed to obtain third party review and assessments of its information security practices by a Payment Card Industry Security Standards Council Qualified Security Assessor ("QSA") biennially for the next five years.

- *Training and Appointment of an Information Security Program Employee.* Filters Fast has agreed to appoint a qualified employee responsible for implementing, maintaining, and monitoring the Information Security Program. The appointed individual shall report regularly to the Chief Executive Officer concerning Filters Fast's security posture, the security risks faced by Filters Fast, and the Information Security Program

  Addressing and Remediating Findings within the PFI's Report. Filters Fast has addressed and remediated each of the PCI DSS deficiencies noted in the final report from Foregenix.

Agr. ¶ 46.

According to Filters Fast, the estimated value of its business practice changes is no less than $528,269.43. *Id.*[3] Further, Filters Fast will continue to implement business practice changes designed to enhance the security of its website in each of the years 2021 and 2022. *Id.*

2. Plaintiffs' Service Awards

The Settlement Agreement calls for a reasonable service award to be sought for Plaintiffs in the amount of $2,500 per Plaintiff. Agr. ¶ 81. The service award is meant to recognize Plaintiffs for their efforts on behalf of the Class, which include maintaining contact with counsel, participating in client interviews, providing relevant documents, assisting in the investigation of the case, remaining available for consultation throughout settlement negotiations, reviewing relevant pleadings and the Settlement Agreement, and for answering counsel's many questions. Decl. of David Lietz in Support of Pls.' Renewed Mot. for Attorneys' Fees, Costs, and Service Awards ¶ 30 ("Lietz Decl."), filed with Pls.' Renewed Mot. for Attorneys' Fees, Costs, and Service Awards, filed contemporaneously herewith.

3. Class Counsel's Attorneys' Fees and Costs

After agreeing to the terms of the Settlement on behalf of the Class, Class Counsel negotiated their fees and costs separate from the benefit to Class Members, in the amount of $320,000 for fees and costs combined, subject to Court approval. Lietz Decl. ¶ 31; *see also* Agr. ¶ 83. As discussed fully in Plaintiffs' separate, renewed Fees Motion and Memorandum in Support, the requested fees, costs, and service awards are reasonable, are fully supported by a lodestar analysis, and compare favorably with those regularly approved by Seventh Circuit Courts in other

[3] Contrast against *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 283 (7th Cir. 2002), reversing the district court's ruling where "the value of [the injunctive relief] no one has attempted to monetize and which is barely discussed in the briefs or by the judge." *See also*, *Grok Lines, Inc. v. Paschall Truck Lines, Inc.*, No. 14 C 08033, 2015 WL 5544504, at *8 (N.D. Ill. Sept. 18, 2015) (denying approval of settlement while noting the proposed injunctive relief had "little or no value.").

similar settlements, including a recent data breach settlement approved by this Court. *See, e.g.*, *Fox v. Iowa Health Sys*., No. 3:18-CV-00327-JDP, 2021 WL 826741, at *6 (W.D. Wis. Mar. 4, 2021) (awarding $1,575,000 in attorneys' fees and costs for a class action data breach settlement with similar settlement metrics to this settlement and a lower claims rate).

4. The Notice and Claim Process

a. Notice

In its Order Granting Preliminary Approval, the Court appointed Kroll Settlement Administration as the Notice Specialist and Claims Administrator in this case. Prelim. App. Order, ECF No. 43. Notably, Defendant Filters Fast is to pay for the entire cost of providing notice and claims administration separate and apart from the Settlement Payments available to Settlement Class Members. Agr. ¶¶ 33, 48. There is no cap on the amount of money that Filters Fast has to pay for the cost of providing notice under the Settlement Agreement.

Kroll provided notice of the proposed Settlement reflected in the Settlement Agreement pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715(b) ("the CAFA Notice"). Decl. of Matthew Neylon of Kroll Settlement Administration LLC in Support of Final Approval ¶ 4 ("Kroll Decl."), ECF No. 53. At Defense Counsel's direction, Kroll sent the CAFA Notice and an accompanying thumb drive containing the documents required under 28 U.S.C. § 1715(b)(1)–(8) to the Attorney General of the United States and 50 state Attorneys General identified in the Manifest for the CAFA Notice via First-Class Certified Mail, on July 9, 2021. *Id*. ¶ 4.

The following is an explanation of Kroll's determination of the percentage of Class Members that received notice, in response to the Court's February 15, 2022 Order (ECF No. 54 at 2C3, item 3). On November 23, 2021, Kroll received from Defendant's Counsel an Excel file of the Class Member data ("the Class List") for the estimated 323,309 Class Members. Ex. 1, Suppl.

Kroll Decl. ¶ 4. The Class List contained email addresses for 100% of Class Members. *Id.*

As outlined in the Initial Declaration prepared by the Settlement Administrator in Support of the Motion for Final Approval (ECF No. 53), on December 8, 2021, Kroll implemented the Notice Program by releasing 323,309 emails to Class Members whose email addresses appeared to be valid. Kroll Decl. ¶ 9; Ex. 1, Suppl. Kroll Decl. ¶ 4. Of those 323,309 attempted emails, Kroll received a message indicating that a total of 33,309 emails attempted were deemed undeliverable (26,581 were rejected and 6,728 emails bounced). Ex. 1, Suppl. Kroll Decl. ¶ 4. The remaining 290,000 emails were presumed delivered.

As requested by the Court's Order (ECF No. 54 at 3, item 4), the form of the Initial Email Notices (including two exemplars of the emails sent to two of the Plaintiffs here) is shown in Exhibit A to the Suppl. Kroll Decl.

As part of the email campaign process, the major Internet Service Providers (ISPs) were made aware that Kroll was about to begin a large email campaign. *Id*. ¶ 5. Kroll's email service provider also reviewed the proposed email subject line and body content for potential spam filter triggering words and phrases. *Id*. This is Kroll's standard practice when providing class notice via email and greatly reduces the risk that the ISPs will incorrectly identify Kroll-originated emails as junk mail and intercept them or otherwise divert them from recipients' inboxes. *Id.*

As also outlined in the Initial Declaration, on December 14, 2021, Kroll mailed Notices to 25,916 Class Members whose initial Email Notice was rejected or was bounced. *Id*. ¶ 6; *see also* ECF No. 53 ¶ 10. The Mailed Notice was accomplished in the following way: as to the 33,309 email addresses determined to be undeliverable (the 26,581 emails rejected and 6,728 emails bounced), Kroll was able to identify a mailing address through the National Change of Address Database ("NCOA") maintained by the U.S. Postal Service ("USPS") for 25,916 Class Members

of the 26,581 email addresses whose emails were rejected. *Id*. A copy of the Mailed Notice is attached as Exhibit B to the Suppl. Kroll. Decl. There was no additional cover letter sent with the Mailed Notice.

Through February 17, 2022, of the 25,916 Notices mailed, a total of 729 Mailed Notices have been returned by the USPS as undeliverable. Ex. 1, Suppl. Kroll. Decl. ¶ 6. Of these 729, a total of 153 were re-mailed to an updated address. *Id*. A total of 25,430 Mailed Notices were sent (25,916 mailed – 729 returned + 153 remailed). *Id*.

Kroll recently discovered that for the 6,728 emails that bounced during the First Email Notice sent on December 8, 2021, due to an administrative error, Kroll inadvertently did not run those Class Members' data through the NCOA and therefore inadvertently did not send USPS Mailed Notice to those Class Members (who were sent Email Notice, but whose Email Notice bounced).

In summary, 290,000 Class Members received Notice via email (because the emails were neither rejected or bounced), and 25,430 Class Members received Notice via USPS mail, for a total of 315,340 Notices. *Id*. ¶ 8. Overall, **97.56% of the Class** were successfully sent Notice via the first wave of Email Notice and the subsequent Mailed Notices. This is a substantial increase over the 89% notice rate previously reported by the Settlement Administrator, which was a conservative estimate (as indicated in the Initial Declaration by the Settlement Administrator (ECF No. 53 ¶ 14). *Id*.

Although most data breach class action settlements have only one USPS mail notice or one email notice, the Settlement Agreement negotiated by Class Counsel in this case included a requirement to send a second reminder Email Notice. *Id*. ¶ 9. To supplement the Notice Program and claim filing in this action, on January 6, 2022, Kroll released 321,291 reminder emails to Class

Members who at the time had not yet submitted a claim. *Id*. This Second Email Notice—which was identical in form to the First Email Notice—reminded the Class Member of the claim filing deadline along with other important information including their rights and deadlines to exercise them. *Id.* A copy of the reminder Email Notice is attached to the Suppl. Kroll Decl. as Exhibit C. Out of the 321,291 reminder emails released by Kroll, 60,655 attempted to be sent were rejected or bounced and 260,636 emails were presumed delivered. *Id*. ¶ 10. The 97.56% notice success rate does not include any estimation of the reach of the Second Email Notice. *Id*. ¶ 11.

As stated above, in the process of preparing this renewed Motion and in answering the Court's questions about Notice, it was discovered that for the 6,728 emails that bounced during the First Email Notice, due to an administrative error, Kroll inadvertently did not run those Class Members' data through the NCOA and therefore inadvertently did not send USPS Mail Notice to those Class Members. *Id*. ¶ 7. This group of Class Members represents approximately 2% of the Class, and the Notice Program would likely have had over 99% reach if US mail had been sent to these Class Members.

While the overall Notice provided (at a 97.56% reach rate) meets and exceeds the rate needed to satisfy due process considerations, the fact that 6,728 Class Members did not receive a USPS Mail Notice to which they are entitled under the terms of Settlement Agreement (Agr. § 64(b)) isn't fair. However, delaying final approval of an overall settlement that is fair, reasonable, and adequate and (more importantly) delaying delivery of the settlement benefits to the thousands of Class Members who made valid claims isn't fair either. As such, the Court could grant final approval, finding that the Notice given and the 97.56% reach rate was adequate and meets due process considerations.

In the alternative, to address this unfortunate error, Plaintiffs propose that the Final

Approval Order could contain the following provisions if the Court desires:

1. Within 14 days of the Final Approval Order (which shall be the "Supplemental Notice Date"), the Settlement Administrator Kroll shall cause Notice to issue via the United States Postal Service ("USPS") to those persons for whom good mailing addresses can be ascertained (after running their addresses through the USPS National Change of Address ("NCOA") database) from the group of 6,728 Class Members who had the Initial Email Notice sent to them on December 8, 2021 "bounce" ("Email Bounce Group") (Ex. 1 ¶ 8);
2. A Supplemental Claims Period for this Email Bounce Group only shall be reopened for 30 days after the Supplemental Notice Date, establishing a Supplemental Claims Deadline on that date;
4. A Supplemental opt-out and objection deadline shall also be reopened for 30 days after the Supplemental Notice Date for the Email Bounce Group only;
5. The submission and processing of all claims, requests for exclusion, and objections discussed above must comply with the Settlement Agreement and the Preliminary Approval Order in all respects except for the new deadlines set forth above;
6. Plaintiffs will file a report to the Court on the results of the Supplemental Notice and Supplemental Claim Period within 45 days of the Supplemental Notice Date (*i.e.*, within 15 days after the Supplemental Claims Deadline);
7. The Court may enter its order of final judgment at some point after receipt of this report.

This proposed solution would address the competing concerns set out above, should the Court decide that Final Approval cannot be granted based upon the Notice provided to date.

b. Claims and Value of Claims

Kroll has received and logged a total of 3,740 timely Claim Forms: (a) 3,639 Claim Forms filed online through the Settlement Website; and (b) 101 paper Claim Forms received through the USPS. Ex. 1, Suppl. Kroll Decl. ¶ 14. The 3,740 timely claims represent 1.16% of the Class. *Id*. This claims rate compares favorably to similar data breach/security incident settlements administered by Kroll. *Id*. ¶ 15; *see also* Lietz Decl. in Support of Renewed Mot. for Attorneys' Fees ¶¶ 18–19 ("Lietz Decl."), filed as Exhibit B to that Motion.

In response to the Court's comment in its February 15, 2022 Order that "Plaintiffs offer no explanation for what appears to be a low response rate in a context where there was little downside to submitting a claim," Class Counsel notes that the 1.16% claims rate is completely consistent with other, recent, comparable settlements, including the following:

Fox v. Iowa Health Sys., U.S. District Court for the Western District of Wisconsin (Final Approval Granted 3/4/2021)	0.84%
Orr v. InterContinental Hotels Grp., PLC, U.S. District Court for the Northern District of Georgia (Final Approval Granted 9/2/2020)	0.65%
Perdue v. Hy-Vee, Inc., U.S. District Court for the Central District of Illinois Peoria Division (Final Approval Granted 7/21/2021)	1.32%

Lietz Decl. ¶ 19. Thus, while this may appear to be a low response rate, it is not. Admittedly, it is perplexing that Class Members didn't step forward in greater numbers to claim what is a substantial cash benefit ($25) with essentially no documentation. However, where Class Counsel negotiated and had Kroll successfully carry out a Two-Email Direct Notice Program (with a 97.56% reach rate—*see* Ex. 1, Suppl. Kroll Decl. ¶ 8)—a Direct Notice Program that equals or exceeds what is done in most class action settlements—the only explanation that Class Counsel can offer is "you can lead a horse to water, but you cannot make him drink." This, however, does not diminish the adequacy or fairness of this Settlement.

As of February 17, 2022, Settlement Class Members have claimed $111,432.37 in

monetary compensation (although not all may be valid). Ex. 1, Suppl. Kroll Decl. ¶ 17. Per the Settlement Agreement, Tier 1 claims can be paid up to $750, Tier 2 claims can be paid up to $60 and Tier 3 claims can be paid up to $25. Applying these maximum awards to the filed claims, and based on claimed amounts, the potential maximum benefit to be paid assuming all timely claims are valid is:

a. Tier 1: 85 claims - $16,442.37

b. Tier 2: 121 claims - $6,640.00

c. Tier 3: 3,534 claims - $85,350.00

d. Total possible awards: 3,740 claims - $108,432.37.

Ex. 1, Suppl. Kroll Decl. ¶ 18. The $3,000 difference between the potential maximum payout of $108,432.37 and the $111,432.37 claimed is a result of the tier limits and certain Class Members seeking relief beyond the applicable tier limits. *Id.* Counsel for Defendant Filters Fast has indicated and agreed not to object to, and to pay, all $108,432.37 of these claims. *Id*. at ¶ 19.

Also as of February 17, 2022, 2,914 Settlement Class Members have made a claim for Credit Monitoring services. *Id*. at ¶ 16. Out of these 2,914 claims made, 164 claimants signed up for 12 months of coverage, and 2,750 claimants signed up for 24 months. This amounts to $676,281.60 of value actually claimed by Class Members.

c. Objections and Requests for Exclusion

The deadline for Settlement Class Members to object to or exclude themselves from the Settlement Agreement was February 11, 2022. *Id.* ¶¶ 12–13. As of February 22, 2022, Kroll has received only ten (10) requests for exclusion and *zero* objections. *Id*. Since the objection and opt-out deadline has passed, 10 opt-outs is approximately 0.003 percent of the Class.

III. FINAL APPROVAL IS WARRANTED

A. The Settlement Approval Process

As the Seventh Circuit recognizes, federal courts strongly favor and encourage settlements, particularly 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:

> It is axiomatic that the federal courts look with great favor upon the voluntary resolution of litigation through settlement. In the class action context in particular, there is an overriding public interest in favor of settlement. Settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources.

Armstrong v. Bd. of Sch. Dirs. of Milwaukee, 616 F.2d 305, 312–13 (7th Cir. 1980) (citations and quotations omitted), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998); *see also Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) ("Federal courts naturally favor the settlement of class action litigation."); 4 *Newberg on Class Actions* § 11.41 (4th ed. 2002) (citing cases).

The traditional means for handling claims like those at issue here—individual litigation—would unduly tax the court system, require a massive expenditure of public and private resources and, given the relatively small value of the claims of the individual Settlement Class Members, be impracticable. Indeed, as one Court within the Seventh Circuit previously observed:

> [T]he law recognizes class actions as a legitimate part of the U.S. litigation system. The Supreme Court has made this clear on several occasions. *See, e.g.*, *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 155, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982) (explaining that, in appropriate cases, "the class action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every class member to be litigated in an economical fashion under Rule 23"); *Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980) ("Where it is not

> economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."). In addition, Federal Rule of Civil Procedure 23 provides for the use of such a procedure.

Kolinek v. Walgreen Co., 311 F.R.D. 483, 497 (N.D. Ill. 2015) (quoting *In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 982 (N.D. Ill. 2011) (St. Eve, J.)). For these reasons, the proposed Settlement is the best vehicle for Settlement Class Members to receive relief to which they are entitled in a prompt and efficient manner.

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

Under Rule 23(e) of the Federal Rules of Civil Procedure, a class-action settlement may be approved if the settlement is "fair, reasonable, and adequate." *In re AT & T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 345 (N.D. Ill. 2010). Federal Rule 23(e)(2) requires certain factors to be considered by a court before granting final approval of a class action settlement: (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 . . . ; and (D) the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(A)–(D). In determining whether the relief provided is adequate, Courts must consider: (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).

Before the 2018 revisions to Rule 23(e), the Seventh Circuit had developed its own list of factors for consideration in determining whether to grant final approval of a class action settlement:

> (1) the strength of plaintiffs' case compared to the terms of the proposed settlement;

(2) the likely complexity, length, and expense of continued litigation;

(3) the amount of opposition to settlement among affected parties;

(4) the opinion of competent counsel; and

(5) the stage of the proceedings and the amount of discovery completed.

Isby, 75 F.3d at 1199; *accord Holmes v. Roadview, Inc.*, No. 15-CV-4-JDP, 2016 WL 1466582, at *4 (W.D. Wis. Apr. 14, 2016). In reviewing these factors, courts view the facts "in a light most favorable to the settlement" and "should not substitute their own judgment as to the optimal settlement terms for the judgment of the litigants and their counsel." *Isby*, 75 F.3d at 1199; *In re Sears, Roebuck & Co. Front-loading Washer Prods. Liab. Litig.*, No. 06 C 7023, 2016 WL 772785, at *7 (N.D. Ill. Feb. 29, 2016) (citing *Armstrong*, 616 F.2d at 315).

Application of both the Rule 23 and the Seventh Circuit specific factors confirms that the settlement is fair, reasonable, and adequate, and should be finally approved. Although there is some overlap, Plaintiffs will review the settlement in light of both sets of criteria below.

1. The Settlement Warrants Approval Under Rule 23

a. The Class Representatives and Class Counsel have Adequately Represented the Class

Adequacy involves two inquiries: "(1) the adequacy of the named plaintiffs as representatives of the proposed class's myriad members, with their differing and separate interests, and (2) the adequacy of the proposed class counsel." *Gehrich v. Chase Bank, N.A.*, 316 F.R.D. 215, 224 (N.D. Ill. 2016) (citing *Gomez v. St. Vincent Health, Inc.*, 649 F.3d 583, 592 (7th Cir. 2011)). In the context of settlement, this includes consideration of the nature and amount of discovery undertaken in the litigation. *See* Fed. R. Civ. P. 23(e)(2)(A), 2018 Advisory Committee Notes. Formal discovery is not required: the relevant inquiry with respect to this factor is whether

the parties have "completed a sufficient amount of discovery to be able to place a value on their respective positions" in this case. *Gehrich v. Chase Bank, N.A.*, 316 F.R.D. at 224, 230.

Plaintiffs here are adequate representatives because they have no interests that are "antagonistic or conflicting" with those of the other Class representatives or absent Class Members. *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992). Plaintiffs allege they were harmed in the same way as all Class Members when Defendant's practices compromised their personal data. In light of this common injury, the named Plaintiffs have every incentive to vigorously pursue the Class claims. Each Plaintiff agreed to undertake the responsibilities of serving as a Class representative, and to act in the Class Members' best interests. As such, the Plaintiffs are adequate representatives for the Class.

Class Counsel too has demonstrated their adequacy in their vigorous litigation of this matter. Class Counsel have decades of combined experience in class action litigation and a demonstrated track record as vigorous litigators. Lietz Decl. ¶¶ 2–9; Federman Decl. ¶¶ 2–4. Moreover, prior to mediation the Parties exchanged informal discovery pertaining to Plaintiffs' claims. This substantial informal discovery process both before and during mediation allowed the Parties to thoroughly investigate their claims and defenses and evaluate the strengths and weaknesses of their respective cases, and to negotiate with a solid understanding of the legal issues and value of the case. Decl. of William B. Federman in Supp. of Pls.' Mot. for Prelim. Approval ¶ 9 ("Federman MPA Decl."), ECF No. 35-2. The Settlement was informed by Class Counsel's extensive experience and analysis of the factual and legal issues involved in the case. *Id.*; Lietz Decl. ¶¶ 2–9. Since winning preliminary approval, Class Counsel has performed substantial work to bring this case to conclusion, assisting in the implementation of and overseeing the notice process, fielding inquiries from Class Members, and preparing the required motions. *See* Lietz

Decl. ¶¶ 15, 55; Federman Decl. ¶ 18.

Accordingly, Plaintiffs and Class Counsel have served as adequate representatives to the Class.

b. The Proposal was Negotiated at Arm's Length

Courts recognize that arm's-length negotiations conducted by competent counsel are *prima facie* evidence of fair settlements. "A settlement reached after a supervised mediation receives a presumption of reasonableness and the absence of collusion." 2 *McLaughlin on Class Actions* § 6:7 (8th ed. 2011). Settlement negotiations in this matter were hard-fought. The Settlement was negotiated at arm's length by vigorous advocates, and there has been no fraud or collusion. On March 31, 2021, after briefing the relevant issues, the Parties participated in an all-day mediation before JAMS mediator and retired federal judge Hon. Wayne R. Andersen (Ret.). Lietz Decl. ¶¶ 13, 55. Following multiple exchanges of information and negotiations of terms, the Parties were able to reach a settlement in principle. *Id.* Thereafter, the Parties negotiated the remaining terms, circulating drafts back and forth of the Settlement Agreement and Release and its exhibits. *Id.* The Agreement was not finalized and executed until June 15, 2021.

The Parties' views of the case differed sharply, and the negotiations were highly adversarial *Id.* Accordingly, this factor weighs in favor of final approval.

c. The Relief Provided for the Class is Adequate

Fed. R. Civ. P. 23(e)(2)(c) requires examination of the relief provided by the settlement. The Settlement negotiated here provides for significant relief. If approved, it will make up to $750 available per Settlement Class Member who makes a claim, and provide up to two years of valuable Credit Monitoring Services per Class Member who claims it. *See generally*, Agr.

The total potential monetary value of the negotiated Settlement was immense, and the

actual calculated payout tis substantial. Current claims data demonstrates 3,740 claims will be approved for $108,432.37. Ex. 1, Suppl. Kroll Decl. ¶ 18. Counsel for Defendant Filters Fast has indicated and agreed not to object to, and to pay, all $108,432.37 of these claims. *Id*. at ¶ 15.

Also as of February 17, 2022, 2,914 Settlement Class Members have made a claim for Credit Monitoring Services. *Id*. ¶ 13. Out of these 2,914 claims made, 162 claimants signed up for 12 months of coverage, and 2,744 claimants signed up for 24 months. This amounts to an additional $676,281.60 of value actually claimed by Class Members. Adding just the claimed cash benefits and the value of the credit monitoring claimed together, the value of the actual calculated payout is $784,713.97 (without assigning any value whatsoever to the business practice changes made by Filters Fast).

Recent data breach settlements in this Court and other Seventh Circuit district courts are also comparable. In *Fox*, 2021 WL 826741, at *6, this Court approved a data breach class action settlement that mirrors (in almost every aspect) or is inferior to the relief obtained for the Class here. In *Fox*, as in this case, there was the ability to claim for "ordinary" out-of-pocket expenses. *Id*. at *4. In *Fox*, as in this case, class members could claim for 3 hours of lost time, but at the lesser rate of $15 per hour (as opposed to $20 here). *Id*. And in *Fox*, the class members could claim one year of free credit monitoring, as opposed to the two years of monitoring offered here. *Id*. The *Fox* settlement also did not have the option to claim a $25 cash payment with essentially no documentation, which is a benefit of the Settlement here.[4]

[4] While the Court may note that while the *Fox* benefits offered were somehow greater because they were all "uncapped," none of the caps came into play in this case, and uncapped benefits therefore would not have provided this Class with any more compensation. Also, while Class Counsel here is not privy to any breakdown of the claims actually made in *Fox*, upon information and belief the claims rate for the "100 percent of costs and up to 10 hours of lost time incurred responding to actual identity theft, up to $6,000" was probably something approaching 0%. Class Counsel requests that the Court take judicial notice of its own records relating to the *Fox* case, in particular Pages 10 and 12 of ECF No. 101 in Case No. 3:18-cv-00327-jdp (showing 1,420,337 postcards sent, and only 12,028 claims made—a .084% claims rate) and any other document that

In *Perdue v. Hy-Vee, Inc.*, No. 19-1330, 2021 WL 3081051 (C.D. Ill. July 21, 2021), a payment card data breach case, the court finally approved a settlement that allowed for claims up to $225 for "ordinary expenses," as opposed to the $750 in reimbursements offered here. Included in that $225 ordinary expense cap was the lost time component—three hours of documented lost time at $20 per hour, as opposed to the four hours of attested to lost time at $15 per hour available to Class Members here. While the settlement in *Perdue* allowed for claims of documented "extraordinary" losses of up to $5000, the *Perdue* settlement did not offer Class Members any credit monitoring whatsoever. Moreover, plaintiffs' counsel in *Perdue*:

> estimated that nearly 6,000 class members filed claims for a total of approximately $600,000, but that it was not yet clear how many of the claims would be approved. The Court expressed concern the class might just receive a fraction of the amount they requested, and that Counsel would receive substantially higher fees than the total class payout.

Perdue, 2021 WL 3081051, at *2. The *Perdue* settlement is inferior to this settlement in multiple, material aspects, and yet it was finally approved (with attorneys' fees of $739,000 also approved).

The relief provided here compares favorably with other payment card settlements approved in state and federal courts in the Seventh Circuit and across the country. For example, in *Remijas v. The Neiman Marcus Grp., LLC*, No. 1:14-cv-01735 (N.D. Ill. June 4, 2021), the parties reached an agreement for $1,600,000.00 with a class size of approximately 370,385 payment cards, yet were only entitled to payment up to $100.00. *See also*, *In re Wawa, Inc. Data Sec. Litig.*, No. 19-cv-6019-GEKP (E.D. Pa. Mar. 4, 2021) (providing Tier 1" claimants a $5.00 Wawa gift card and "Tier 3" claimants, the highest tier, only reimbursement of up to $500.00); *see also*, *FirstChoice Fed. Credit Union v. The Wendy's Co.*, No. 2:16-cv-00506-NBF-MPK (W.D. Pa. Mar. 17, 2020) (where the defendant agreed to pay $50 million into a settlement fund, *but* settlement class

provides a detailed breakdown of the actual claims made.

members were only entitled to an amount determined by how many settlement class members made claims (*e.g.*, if valid claims were made for all eligible cards, settlement class members were estimated to receive approximately $2.00 each)). Here, Settlement Class Members can claim up to $750 in expense reimbursements per person, without an aggregate cap; up to $60 in compensation for lost time, without an aggregate cap; or a standardized $25 payment, subject to pro rata reduction should the total claimed in this category be greater than $175,000. *See* Agr. ¶ 41. In addition to the monetary relief, Settlement Class Members here can also make a claim for up to 2-years of credit monitoring services, and all Settlement Class Members will receive the benefit of the increased data security enhancements implemented as equitable relief. *Id.* ¶¶ 46–47.

i. The costs, risks, and delay of trial and appeal are great.

"In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *Newberg on Class Actions* § 11:50. This is in part because "the law should favor the settlement of controversies, and should not discourage settlement by subjecting a person who has compromised a claim to the hazard of having the settlement proved in a subsequent trial . . . ." *Grady v. de Ville Motor Hotel, Inc.*, 415 F.2d 449, 451 (10th Cir. 1969). It is also in part because "[s]ettlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998); *see also Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 228 (N.D. Ill. 2016) ("The essential point here is that the court should not "reject[ ]" a settlement "solely because it does not provide a complete victory to plaintiffs," for "the essence of settlement is compromise").

Importantly, this very Court recently recognized the exact litigation risks faced by Plaintiffs here:

> Data breach litigation is evolving; there is no guarantee of the ultimate result. *See Gordon v. Chipotle Mexican Grill, Inc.*, No. 17-cv-01415-CMA-SKC, 2019 WL 6972701, at *1 (D. Colo. Dec. 16, 2019) ("Data breach cases . . . are particularly risky, expensive, and complex."). Plaintiffs also faced the risk that UnityPoint would successfully oppose class certification, obtain summary judgment on one or more of their claims, or win at trial or on appeal. Also, the cost for UnityPoint and Plaintiffs to maintain the lawsuit would be high, given the amount of documentary evidence as well as the expert costs both parties would incur in the context of class certification, summary judgment, and trial. As such, the current Settlement strikes an appropriate balance between Plaintiffs' "likelihood of success on the merits" and "the amount and form of the relief offered in the settlement." *See Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981).

Fox, 2021 WL 826741, at *5.

Continued litigation would involve additional extensive motion practice, including Filters Fast renewing its Motions to Dismiss (motions that were already denied in the *McCreary* Action), motions for summary judgment, and ultimately a trial on the merits. Plaintiffs would also have to both gain and maintain class certification. Due at least in part to their cutting-edge nature and the rapidly evolving law, data breach cases like this one generally face substantial hurdles—even just to make it past the pleading stage. *See Hammond v. The Bank of N.Y. Mellon Corp*., No. 08 Civ. 6060(RMB)(RLE), 2010 WL 2643307, at *1 (S.D.N.Y. June 25, 2010) (collecting data breach cases dismissed at the Rule 12(b)(6) or Rule 56 stage). Class certification is another hurdle that would have to be met—and one that been denied in other data breach cases. *See, e.g.*, *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig*., 293 F.R.D. 21 (D. Me. 2013). *See also*, *Steinmetz v. Brinker Int'l, Inc.*, No. 21-13146 (11th Cir. Sept. 16, 2021) (the first payment card data breach case to obtain class certification; it is now on appeal at the Eleventh Circuit). Instead of facing the uncertainty of a potential award in their favor years from now, the Settlement allows Plaintiffs and Settlement Class Members to receive immediate and certain relief. *See, e.g.*, *Schulte*

v. Fifth Third Bank, 805 F. Supp. 2d 560, 586 (N.D. Ill. 2011) ("Settlement allows the class to avoid the inherent risk, complexity, time, and cost associated with continued litigation.") (citation omitted).

While Plaintiffs are confident in the strength of their claims, they are also pragmatic in their awareness of the various defenses available to Defendant, as well as the risks inherent to continued litigation. Defendant has consistently denied the allegations raised by Plaintiffs, made clear at the outset that it would vigorously defend the case, and has in fact vigorously defended the case (through filing Motions to Dismiss in both this case and the *McCreary* Action, and even renewing and splitting the Motion to Dismiss in the *McCreary* Action after an Amended Complaint was filed). Through the Settlement, Plaintiffs and Class Members gain significant benefits without having to face further risk of not receiving any relief at all.

ii. Upon approval, relief to the Class will be distributed in an effective manner.

The Settlement here calls for the Settlement Administrator to distribute all Settlement payments in the form of a mailed check or electronic payment as soon as practicable after the allocation and distribution of the funds are determined by the Settlement Administrator after the Effective Date. Agr. ¶ 49. Checks will be valid for 180-days from issuance, and upon request, the Settlement Administrator can re-issue a check for up to 90-days following the initial 180-day period. *Id*. ¶ 50. The distribution is straightforward, equitable, and will be carried out by the Settlement Administrator.

iii. The terms of any proposed award of attorney's fees, including the timing of payment, support final approval.

The Settlement Agreement provides for payment of a reasonable attorneys' fees and reimbursement of costs in the amount of $320,000 and as approved by the Court. Lietz Decl. ¶ 31.

Class Counsel's request is reasonable, appropriate, supported by a lodestar analysis, and compares favorably with fees approved by Seventh Circuit Courts. Any approved attorneys' fees shall be paid by the Settlement Administrator within 14-days of the Effective Date. Agr. ¶ 84.

iv. No additional agreement are required to be identified under Rule 23(e)(3).

There are no additional agreements that require identification and/or examination under Rule 23(e)(3).

d. The Proposed Settlement Agreement Treats Class Members Equitably to Each Other

Under the terms of the Settlement, the Class Members will be treated equitably to each other. Each Class Member had until February 11, 2022 to make a claim for monetary compensation and/or Credit Monitoring Services. Similarly, Settlement Class Members had until that same date to object to or exclude themselves from the Settlement. Kroll Decl. ¶¶ 15–17. As such, each Class Member has had an equal opportunity to benefit from the Settlement, and each Settlement Class Member who has chosen to take advantage of the Settlement will take an equal share. As such, this factor weighs in favor of Settlement Approval.

2. The Settlement Warrants Approval After Consideration of Traditional Seventh Circuit Factors

First, "[t]he most important factor relevant to the fairness of a class action settlement is the first one listed: the strength of the plaintiffs' case on the merits balanced against the amount offered in the settlement." *Synfuel Techs, Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006) (internal quotes and citations omitted). Nevertheless, "[b]ecause the essence of settlement is compromise, courts should not reject a settlement solely because it does not provide a complete victory to plaintiffs." *In re AT&T Mobility*, 270 F.R.D. at 347 (citations omitted). While Plaintiffs strongly believe in their claims, Plaintiffs understand that Defendant asserts a number of

potentially case-dispositive defenses and Plaintiffs will encounter hurdles such as surviving the already-filed Motions to Dismiss, facing a likely motion for summary judgment, and both gaining and maintaining class certification. While Plaintiffs dispute Filters Fast's defenses and are confident in the merits of their claims, they must unfortunately concede that their likelihood of success at trial is far from certain. Indeed, as this Court has noted before (in *Fox*, *supra*), data breach cases like the one at hand face considerable risks, in part due to the evolving nature of the law in this area. Therefore, the risk is very real that Class Members would recover nothing in this litigation if it were to proceed. "In light of the potential difficulties at class certification and on the merits . . . , the time and extent of protracted litigation, and the potential of recovering nothing, the relief provided to class members in the Settlement Agreement represents a reasonable compromise." *Wright v. Nationstar Mortg. LLC*, No. 14 C 10457, 2016 WL 4505169, at *10 (N.D. Ill. Aug. 29, 2016).

Second, continued litigation would be lengthy, complex, and expensive. Although the Parties engaged in early discovery efforts to prepare for mediation, continued litigation would involve extensive motion practice, including responding and replying to any renewed motions to dismiss, motions for summary judgment, motion for class certification, likely a motion to decertify any class, and ultimately a trial on the merits. Further, it is likely to be early- to mid-2024 before the case would actually proceed to trial. And, any judgment in favor of Settlement Class Members could be further delayed by the appeal and certiorari petition process, which would likely include a Due Process challenge. Instead of facing the uncertainty of a potential award in their favor years from now, the Settlement allows Plaintiffs and Settlement Class Members to receive immediate and certain relief. *See, e.g.*, *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d at 586 ("Settlement allows the class to avoid the inherent risk, complexity, time, and cost associated with continued

litigation.") (citation omitted). Thus, this factor favors settlement approval.

Third, as discussed at length *supra,* the reaction of Class Members to the Settlement Agreement has been overwhelmingly positive. Of the estimated 323,000 Class Members, only ten Class Members have sought exclusion from the Settlement Agreement, and *none have objected*. The lack of objections and small number of exclusions strongly support approval of the Settlement. *See e.g.*, *In re Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Injury Litig.*, 332 F.R.D. 202, 219 (N.D. Ill. 2019) (approving settlement where 22 of 4 million class members had objected).

Fourth, highly qualified and competent counsel support the Settlement in this matter. Class Counsel have decades of combined experience in class action litigation, and it is their opinion that the Settlement is fair, reasonable, and adequate. Class Counsel's opinion on the Settlement is entitled to great weight, particularly because: (1) Class Counsel are competent and experienced in class action litigation (particularly in similar privacy class action cases); (2) Class Counsel engaged in significant investigation and discovery and exhaustively evaluated the claims in the context of settlement negotiations; and (3) the Settlement was reached at arm's length through negotiations by experienced counsel, after full-day mediation session, which was preceded by briefing beforehand, before retired federal judge Hon. Wayne Andersen (Ret.) of JAMS, with many additional weeks of contentious negotiations between the Parties following the mediation. Lietz Decl. ¶¶ 2–15. *See McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806, 812 (E.D. Wis. 2009) (factors including that "counsel endorses the settlement and it was achieved after arms-length negotiations facilitated by a mediator . . . suggest that the settlement is fair and merits final approval"); *see also In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1020 (N.D. Ill. 2000) (placing "significant weight on the unanimously strong endorsement of these settlements" by "well-respected attorneys"). This factor therefore weighs in favor of approval.

Fifth, the Settlement was informed by Class Counsel's analysis of the factual and legal issues involved in the case. Lietz Decl. ¶ 10. Counsel's judgment was based upon interviews with clients, significant informal exchange of discovery with Defendant, and the submission of mediation briefs where the Parties briefed the strengths and weaknesses of their claims and class certification. Accordingly, at the time of negotiations, Class Counsel possessed information sufficient to evaluate the claims and defenses, assess the monetary value of the case, and confirm that the Settlement was fair, reasonable, and adequate. *Id*. The final terms of Settlement were agreed to only after Class Counsel thoroughly vetted the claims and potential damages through plaintiff investigations, informal discovery, and numerous, contentious arm's-length negotiations. *Id.* This factor thus supports final approval of the Settlement. *See Isby*, 75 F.3d at 1200 (noting "the discovery and investigation conducted by class counsel prior to entering into settlement negotiations was 'extensive and thorough'").

As was true with the Rule 23 factors, an assessment of the factors traditionally examined by Seventh Circuit Courts supports a finding that the Settlement is in fact fair, reasonable, and adequate, and warrants final approval.

C. The Settlement Class Should be Finally Certified

In the Preliminary Approval Order, the Court conditionally approved certification of the Settlement Class. *See* ECF No. 43. For all the reasons set forth in Plaintiffs' renewed preliminary approval briefing (ECF No. 34), the Preliminary Approval Order (ECF No. 43), and described above, the Court should grant certification for settlement purposes and final approval of the Settlement.

IV. CONCLUSION

The Settlement is fair, adequate, and reasonable in all respects. Therefore, Plaintiffs respectfully request that the Court grant final approval to the Settlement.

Dated: February 22, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2022, I electronically filed the foregoing document with the Clerk of the Court, using the CM/ECF system, which will send a notice of electronic filing to all Counsel of record.

/s/ *David K. Lietz*
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