IN THE STATE COURT OF GWINNETT COUNTY
STATE OF GEORGIA

A.M AND A.M., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,	)	
Plaintiffs,	)	
	)	Case No: 21-C-06178-S3
v.	)	
REPRODUCTIVE BIOLOGY ASSOCIATES, LLC, and MYEGGBANK NORTH AMERICA LLC	)	
Defendants.	)	

PLAINTIFFS' UNCONTESTED MOTION FOR CERTIFICATION OF SETTLEMENT CLASS AND PRELIMINARY APPROVAL OF CLASS SETTLEMENT

COMES NOW Plaintiffs A.M. & A.M., Individually and On Behalf of All Others Similarly Situated, and hereby moves the Court for an order: (1) certifying a settlement class; (2) appointing Plaintiffs as the settlement class representative and their attorneys as counsel for the settlement class; (3) preliminarily approving the proposed settlement agreement; (3) directing that notice of the proposed settlement agreement be issued to the settlement class; and (4) scheduling a final fairness hearing. This motion is uncontested by Defendants.

STATEMENT OF FACTS

This lawsuit arises out of a cyber security incident that compromised Protected Health Information of Plaintiffs and other similarly situated class members. During the pendency of the case, the parties engaged in extensive arms-length settlement negotiations in good faith and reached a tentative settlement agreement in this case on behalf of the entire putative class. The parties have drafted a proposed Class Action Settlement Agreement (the "Settlement Agreement" or "Agreement"), a copy of which is attached hereto as Exhibit 1. This Court's approval of the Settlement Agreement is a condition precedent to the Agreement taking effect. The Settlement

Agreement sets forth the following material terms[1], which the parties agree constitute a fair, reasonable, and adequate settlement of this dispute:

1. For settlement purposes only, under O.C.G.A. § 9-11-23(b)(3), Plaintiff asks the Court to certify the following class:

> All individuals with Georgia addresses on file with Defendants whose personal identifying information or protected health information may have been accessed in the Data Incident announced by Defendants in June 2021.

This is referred to as the "Settlement Class," with the named Plaintiffs serving as the representative of the Settlement Class. The class is expected to be comprised of 27,244 individuals.

2. Defendant, through its insurers, shall provide a total settlement fund of up to, but not more than, One Million Dollars ($1,000,000) (hereinafter the "Class Settlement Fund"). The Class Settlement Fund will be a fund available for the payment of claims to eligible class members, as set forth below, as well as Court-approved attorneys' fees, administrative fees, and Court-approved participation awards to the representative Plaintiffs. The Class Settlement Fund shall be the maximum amount of Defendant's monetary obligation.

3. Subject to Court-approval: (1) the attorneys' fees shall be no more than Three Hundred thirty three thousand, three hundred and thirty three dollars ($333,333); (2) litigation costs and expenses not to exceed One Hundred Thousand dollars ($100,000); (3) the cost of administration shall be taken from the total settlement amount; and, (4) the participation award to each representative Plaintiff shall be no more Seven Thousand Five Hundred Dollars ($7,500).

4. The net settlement proceeds after the deduction of attorneys' fees, expenses, service awards, costs of settlement notice, reminder notices, and settlement administration costs shall be

[1] Additional terms are contained in the attached Settlement Agreement. The terms presented in this motion are a summary of the material terms that affect the class members and their recovery. All capitalized terms are used as defined in the Settlement Agreement.

distributed on a *pro rata* basis among all Class Members who have filed a valid claim within the deadlines set by the Court. If the total amount of claims by Class Members exceeds the amount available after attorneys' fees, expenses, service awards, costs of settlement notice, reminder notices, and settlement administration costs, the amounts distributed to all Class Members who have filed a valid claim within the deadlines set by the Court will be reduced on a *pro rata* basis.

5. Defendants shall not be entitled to the return of any residual monies in the Settlement Fund. Any nominal funds remaining after the foregoing *pro rata* distribution will be donated and provided to one or more nonprofit organizations of Defendants' choosing, provided that (1) such nonprofit organization(s) must be primarily focused on fertility research and/or to provide fertility to underprivileged patients; (2) the residual funds donated and provided to such nonprofit organization(s) must be used for fertility research and/or to provide fertility to underprivileged patients.

6. If the Court certifies the Settlement Class and preliminarily approves the Settlement Agreement, the parties will identify and notify the members of the Settlement Class in the following manner:

a. Upon Preliminary Approval of the Settlement, at the direction of Class Counsel, the Settlement Administrator will implement the Notice Program provided herein, using forms substantially in the nature of the forms of Notice approved by the Court in the Preliminary Approval Order. The Notice will include, among other information: a description of the material terms of the Settlement; a date by which Settlement Class Members may object to or opt out of the Settlement; the date upon which the Final Approval Hearing will occur; and the address of the Settlement Website at which Settlement Class Members may access this Settlement Agreement and other related documents and information.

b. The Notice Program has two components: (1) Notice via direct summary notice via United States Postal Service first class mail; and (2) Notice on the Settlement Website. The Settlement Administrator shall send Notice to all Settlement Class Members via summary notice via United States Postal Service first class mail and shall use the addresses for the Settlement Class Members on file with Defendants. The Settlement Administrator shall also have the option, if requested by Class Counsel, to mail reminder post card notices to Settlement Class Members who have not yet submitted a Claim Form, with such reminder notices to be mailed, if at all, thirty (30) days prior to the Claims Deadline.

c. The Notice shall include a procedure for Settlement Class Members to exclude themselves from the Settlement Class by notifying the Settlement Administrator in writing of the intent to exclude himself or herself from the Settlement Class. This procedure will provide for the submission of an opt-out or exclusion form to be provided to Settlement Class Members by the Settlement Administrator. Such written notification or exclusion form must be postmarked no later than the Opt-Out Deadline, as specified in the Notice. The Settlement Administrator shall provide the Parties with copies of all completed opt-out notifications, and a final list of all individuals who have timely and validly excluded themselves from the Settlement Class. Any Settlement Class Member who does not timely and validly exclude himself or herself shall be bound by the terms of the Settlement.

d. The Notice shall also include a procedure for Settlement Class Members to object to the Settlement and/or to Class Counsel's application for attorneys' fees, costs and expenses and Service Awards. Objections to the Settlement or

to the application for fees, costs, and expenses and Service Awards must be filed electronically with the Court or mailed to the Clerk of the Court and, additionally, served concurrently therewith upon counsel for all parties as set forth in the Proposed Settlement Agreement.

LEGAL STANDARDS

Georgia courts generally rely on Federal Law in interpreting Georgia's class action statute.[2] Approval of any class action settlement agreement is generally a two-step process. *Adams v. Sentinel Offender Servs., LLC*, No. 1:17-CV-2813-WSD, 2018 WL 2148372, at *7 (N.D. Ga. May 10, 2018). In the first step, the Court determines whether class certification is appropriate and, if so, appoints representatives and class counsel to represent that settlement class. *E.g.*, *Barkwell v. Sprint Commc'ns Co., L.P*, No. 4:09-CV-56 (CDL), 2013 WL 12212930, at *2 (M.D. Ga. Oct. 10, 2013). The Court also makes "a preliminary determination on the fairness, reasonableness, and adequacy of the proposed settlement terms," and ensures that the notice process satisfies the requirements of O.C.G.A. § 9-11-23(e). *Adams*, 2018 WL 2148372 at *7-8 (internal quotation marks omitted); *see also Barkwell*, 2013 WL 12212930 at *2. At the preliminary approval stage, the Court need only determine whether the proposed settlement is "within the range of possible approval." *Fresco v. Auto Data Direct, Inc.*, 2007 WL 2330895, at *4 (S.D. Fla. May 11, 2007)(internal citations omitted).

After notice of the proposed settlement has been sent and members of the provisionally approved class have been permitted to opt-out of, or object to, the Settlement Agreement, and the motion for fees and incentive award has been filed, the Court then holds a final approval hearing.

[2] *See State Farm Mut. Auto. Ins. Co. v. Mabry*, 274 Ga. 498, 499, 556 S.E.2d 114 (2001) ("[T]he appellate courts of Georgia have relied on the federal rules when construing our statute [O.C.G.A. § 9-11-23]."), citing *Ford Motor Credit Co. v. London*, 175 Ga. App. 33, 35, 332 S.E.2d 345 (1985) (noting adoption from federal rules of requirement of certification of class action).

Barkwell, 2013 WL 12212930 at *3-4. At the final approval hearing the Court evaluates the Settlement Agreement, the motion for fees and incentive award, and any objections, and determines whether to finally approve the proposed settlement. *E.g.*, *Barkwell v. Sprint Commc'ns Co., L.P.*, No. 4:09-CV-56 (CDL), 2014 WL 12704984, *passim* (M.D. Ga. Apr. 18, 2014). In this uncontested motion, Plaintiff requests that the Court undertake the first of these two steps to approve the Settlement Agreement.

ARGUMENT AND CITATION OF AUTHORITY

A. The Court Should Certify the Settlement Class as Satisfying the Requirements of § 9-11-23(A) AND (B)(3)

A case may proceed as a class action under Georgia law if plaintiff can "satisfy all four prerequisites of O.C.G.A. § 9-11-23(a) and meet the additional requirements set forth in any one of the three subsections of O.C.G.A. § 9-11-23(b)(1) or (2) or (3)." *Gay v. B.H. Transfer Co.*, 287 Ga. App. 610, 611, 652 S.E.2d 200, 201 (2007). The four O.C.G.A. § 9-11-23(a) prerequisites are numerosity, commonality, typicality, and adequacy:

> (1) The class is so ***numerous*** that joinder of all members is impracticable;
> (2) There are questions of law or fact ***common*** to the class;
> (3) The claims or defenses of the representative parties are ***typical*** of the claims or defenses of the class; and
> (4) The representative parties will fairly and ***adequately*** protect the interests of the class.

O.C.G.A. § 9-11-23(a) (emphasis added).

Once these prerequisites are established, the basis for class certification under § 9-11-23(b)(3) is:

> The court finds that the questions of law or fact common to the members of the class ***predominate*** over any questions affecting only individual members, and that a class action is ***superior*** to other available methods for the fair and efficient adjudication of the controversy….

O.C.G.A. § 9-11-23(b)(3) (emphasis added).

The trial court has broad discretion to certify a class under O.C.G.A. § 9-11-23, and the decision to approve class certification will only be overturned for abuse of discretion. *Glynn Cty.*, 334 Ga. App. at 559 ("On appellate review of a trial court's decision on a motion to certify a class, the discretion of the trial judge in certifying or refusing to certify a class action is to be respected in all cases where not abused."); *State Farm Mut. Auto. Ins. Co. v. Mabry*, 274 Ga. 498, 499–500, 556 S.E.2d 114, 117 (2001). There is "a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015). When [c]onfronted with a request for settlement-only certification, a [court] need not inquire whether the case, if tried, would present intractable management problems…for the proposal is that there will be no trial." *Amchem Prods. V. Windsor*, 521 U.S. 591, 620 (1997).

As explained below, the proposed settlement satisfies all of the requirements for class certification under O.C.G.A. § 9-11-23(a) and (b)(3).

1. The Proposed Classes are Sufficiently Numerous and Ascertainable

While there is no set number to meet numerosity, "generally less than twenty-one is inadequate, more than forty adequate, with numbers between varying according to other factors." *Cordoba v. DirecTV, LLC*, 320 F.R.D. 582, 600 (N.D. Ga. 2017); *Sta-Power Indus., Inc. v. Avant*, 134 Ga. App. 952, 955, 216 S.E.2d 897, 901 (1975) (cits. omitted). In this case, the proposed class includes 27, 244 members. As such, because there are thousands of class members, and because it would be impractical to bring all such claims before the Court individually, the proposed classes are sufficiently numerous to warrant class certification under O.C.G.A. § 9-11-23. *Id*. Defendant's records include the identities of the individuals whose PHI and/or PII was accessed. This information is sufficient to identify the class members. *Res. Life Ins. Co. v. Buckner*, 304 Ga. App. 719, 732, 698 S.E.2d 19, 31 (2010).

2. Plaintiffs' Claims Satisfy the Commonality Requirement

The commonality requirement "does not require that all the questions of law and fact raised by the dispute be common or that the common questions of law or fact predominate over individual issues." *In re Delta/AirTran Baggage Fee Antitrust Litig.*, 317 F.R.D. 675, 693 (N.D. Ga. 2016); *Brenntag Mid S., Inc.*, 308 Ga. App. at 903-04; *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1557 (11th Cir. 1986). All that is required is the "capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *In re Delta*, 317 F.R.D. at 693; *Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 984 (11th Cir. 2016). For example, cases that involve standard business practices and statutory violations typically satisfy the commonality requirement. *Campos v. ChoicePoint, Inc.*, 237 F.R.D. 478, 485 (N.D. Ga. 2006) ("This common question of statutory interpretation, deriving from Defendant's standardized business practice, makes Plaintiffs' claims appropriate for treatment as a class action."); *see also Carriuolo*, 823 F.3d at 985-86.

Here, the central question that determines liability for Plaintiffs' claims is whether Defendants unlawfully disclosed class members' PHI and/or PII. Because the answer to this central question will resolve or substantially aid in the resolution of liability for all of the class members' tort claims, Plaintiffs' lawsuit satisfies the commonality requirements of O.C.G.A. § 9-11-23(a).

3. Plaintiffs' Claims are Typical of the Proposed Class Claims

The typicality requirement "under O.C.G.A. § 9-11-23(a) is satisfied upon a showing that the defendant committed the same unlawful acts in the same method against an entire class." *Liberty Lending Servs. v. Canada*, 293 Ga. App. 731, 738, 668 S.E.2d 3, 10 (2008); *Walker v. City of Calhoun, Georgia*, 4:15-CV-170-HLM, 2016 WL 361580, at *7 (N.D. Ga. Jan. 28, 2016). To warrant class certification, claims of the proposed class members "need not be identical to satisfy the typicality requirement; rather, there need only exist a sufficient nexus between the legal claims

of the named class representatives and those of individual class members…." *Ault v. Walt Disney World Co.*, 692 F.3d 1212, 1216 (11th Cir. 2012); *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000). A sufficient nexus exists "if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory." *Ault*, 692 F.3d at 1216; *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984).

In the instant case, for the named Plaintiffs and the proposed class members, the allegations all relate to the same disclosure of information that took place during the relevant dates. As Plaintiffs' claims do not differ from the proposed class members' claims, Plaintiff's claims meet the typicality requirements of O.C.G.A. § 9-11-23(a). *See Ault*, 692 F.3d at 1216-17 (11th Cir. 2012) ("All claims in this class action arise from the same policy—Disney's ban on Segways®—and are all based upon liability pursuant to Title III. Thus, we conclude … the claims of the class representatives and class members are typical and warrant class certification."); *Walker*, 2016 WL 361580, at *7.

4. Plaintiffs and Their Counsel will Adequately Represent the Proposed Classes

For class certification, "[t]he important aspects of adequate representation are whether the plaintiffs' counsel is experienced and competent and whether plaintiffs' interests are antagonistic to those of the class." *Brenntag Mid S., Inc.*, 308 Ga. App. at 905; *Liberty Lending Servs.*, 293 Ga. App. at 739, 668 S.E.2d 3, 10 (2008). In the present lawsuit, Plaintiffs do not have any conflict of interest with the proposed class. Plaintiffs and the proposed class are united in seeking the maximum possible recovery for their claims. Additionally, Plaintiffs are represented by experienced and qualified counsel with significant experience in complex litigation, including class action lawsuits. Because the record is devoid of any conflict between Plaintiffs and the proposed class, and because there is nothing to suggest that Plaintiffs' counsel cannot provide

competent representation, Plaintiffs' lawsuit satisfies the adequacy requirement for class certification. *Brenntag Mid S., Inc.*, 308 Ga. App. at 905.

5. Common Questions of Law and Fact Predominate

To satisfy the predominance requirement of O.C.G.A. § 9-11-23(b)(3), "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof." *Campos* 237 F.R.D. at 488 (internal cits. omitted); *Carriuolo*, 823 F.3d at 985. For cases involving standard practices that allegedly violate statutory law, Courts have held that common questions of fact and law predominate over individual issues. *Carriuolo*, 823 F.3d at 986, 989 ("Because that theory is consistent for all class members, the predominance requirement under Rule 23(b)(3) is satisfied."); *Campos*, 237 F.R.D. at 489. Here, Plaintiffs' evidence of liability involves the same evidence of the single event breach. Because this evidence is consistent for all proposed class members, common questions of law and fact will predominate over any issues that are subject to individualized proof.

6. A Class Action is Superior to Other Available Methods of Adjudication

In assessing whether a class action superior to other methods, "the issue is not whether a class action will be difficult to manage. Instead, the trial court is to consider the relative advantages of a class action suit over other forms of litigation which might be available." *Brenntag Mid S., Inc.*, 308 Ga. App. at 907; *EarthLink, Inc. v. Eaves*, 293 Ga. App. 75, 77, 666 S.E.2d 420, 424 (2008). Georgia Courts have held multiple times that a class action is a superior when the class members' claims are, individually, of small monetary value. *Brenntag Mid S., Inc.*, 308 Ga. App. at 907. (cits. omitted) ("[I]t is unlikely that counsel could be found to pursue such relatively minor claims on an individualized basis so that economic reality dictates that petitioner's suit proceed as a class action or not at all."); *EarthLink, Inc.*, 293 Ga. App. at 77; *Carriuolo*, 823 F.3d at 989. In

the present case, because the class members' claims are too small to adjudicate separately, Plaintiff's lawsuit satisfies the superiority requirements of O.C.G.A. § 9-11-23(b)(3).

B. The Court Should Preliminarily Approve the Settlement

In analyzing a proposed class settlement, the Court should consider the following factors: "(1) the likelihood of success at trial; (2) the range of possible recovery; (3) the range of possible recovery at which a settlement is fair, adequate, and reasonable; (4) the anticipated complexity, expense, and duration of litigation; (5) the opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved." *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1240 (11th Cir. 2011). As explained below, each of these factors favors settlement.

1. The Uncertainty of Appellate Court Rulings Favors Settlement

Although Plaintiffs are confident in their claims, Defendants deny liability and have asserted legal and factual defenses. The uncertainty of Plaintiffs' claims and Defendants' defenses favor approval of the Settlement Agreement.

2. The Range of Possible Recoveries Favors Settlement

With this factor, courts analyze the likelihood of a damage award and of success at trial, as well as "the challenge Plaintiffs would face, if their claims did survive on the merits, in proving damages." *Greco v. Ginn Dev. Co., LLC*, 635 F. App'x 628, 632 (11th Cir. 2015). At trial, Plaintiff would seek to recover an award of general damages, which may vary based on various factors including cost to deal with the effects of the breach, resulting in a range of possible settlements of small values such as the cost of credit monitoring. The proposed Settlement Agreement would provide each plaintiff with certainty of settlement of approximately the same value. More importantly, if this Court were to rule in favor of Defendants' defenses, the class members would likely receive nothing at all. Accordingly, and because the proposed Settlement guarantees eligible class members a recovery that is within the range of possible results at trial, this factor favors

approval of the Settlement Agreement.

3. The Settlement is Fair, Adequate, and Reasonable

The relief in the Settlement Agreement is well within the fair, adequate, and reasonable range of recovery. Courts often approve class settlements "equaling a small fraction of the potential recovery…." *Columbus Drywall*, 258 F.R.D. at 559; *see also, e.g.*, *Overdraft Litig.*, 830 F. Supp. 2d at 1346 (approving settlement that "represents between 45 percent and 9 percent of the total potential damages"); *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 542 (S.D. Fla. 1988), *aff'd* 899 F.2d 21 (11th Cir. 1990) ("A settlement can be satisfying even if it amounts to a hundredth or even a thousandth of a single percent of the potential recovery."). The proposed Settlement offers a far greater recovery. As stated above, if litigated separately, the class members' net recovery would have likely been very similar to the Settlement amount once attorneys' fees are deducted.

4. The Complexity, Expense, and Duration of this Case Favors Settlement

Litigating this case through trial would be expensive and time consuming. Should the Settlement Agreement not be approved, the parties will need to complete discovery, and argue and brief class certification. Regardless of how the Court rules, the decisions on these motions will likely be appealed. If the class is certified, the parties would then need to engage in at least six months of merits-based discovery and conduct numerous depositions. This is all before the cost and time of trial itself is considered. Consequently, this factor also weighs in favor of preliminary approval of the Settlement Agreement.

5. No Opposition to Settlement is Known

At the final fairness hearing, "[i]n determining whether to certify a settlement class, a court must also examine the degree of opposition to the settlement." *Columbus Drywall*, 258 F.R.D. at 560. As no opposition to the Settlement is yet known, the Court should "address this

issue in further detail once notices are received by the class, and if any of the class members object." *Id.* At this point, this factor does not favor or disfavor preliminary approval of the Settlement Agreement.

6. The Parties Have Sufficient Information to Evaluate the Case

Courts should also assess the "stage of the proceedings at which a settlement is achieved" in order "to ensure that Plaintiffs had access to sufficient information to adequately evaluate the merits of the case and weigh the benefits of settlement against further litigation." *Adams*, 2018 WL 2148372 at *8. Here, the parties have spent years litigating already and have conducted substantial written discovery. Plaintiffs represent that they have sufficient information to conclude that the benefits of the Settlement Agreement outweigh the potential benefits of continued litigation. Defendant does not contest this motion or settlement.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court issue an Order: (1) certifying a settlement class; (2) appointing Plaintiffs as the settlement class representative and their attorneys as counsel for the settlement class; (3) preliminarily approving the proposed settlement agreement; (3) directing that notice of the proposed settlement agreement be issued to the settlement class; and (4) scheduling a final fairness hearing. This is motion is not contested by Defendant. A proposed Order is attached for the Court's review as Exhibit 2.

This 12th day of January 2024.

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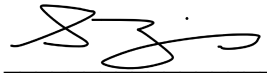
CERTIFICATE OF SERVICE

COMES NOW, Plaintiff, by and through the undersigned counsel, and hereby certifies that on this day a true and correct copy of *PLAINTIFF'S UNCONTESTED MOTION FOR CERTIFICATION OF SETTLEMENT CLASS AND PRELIMINARY APPROVAL OF CLASS SETTLEMENT* was served upon all parties to this action via Odyssey eFile GA, which transmits an electronic of the same to all counsel of record.

This 12th day of January, 2024.



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