UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

VINCIEN CURRIE
1550 Madison Road, Apartment 9
Hermitage, Pennsylvania 45206

Individually and on behalf of all others similarly situated,

Plaintiff,

v.

JOY CONE CO.
3435 Lamor Road
Hermitage, Pennsylvania 16148

Defendant.

Case No. 2:23-cv-00764-CCW

Judge Christy C. Wiegand

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

I. INTRODUCTION

Plaintiff Vincien Currie ("Plaintiff"), on behalf of himself and the Settlement Class, by and through the undersigned Settlement Class Counsel, respectfully submit this Memorandum of Law in support of his motion requesting final approval of this proposed class action settlement ("Settlement") with Defendant Joy Cone Co. ("Joy Cone"). This case arises out of a data breach (the "Data Breach") on February 27, 2023, which allegedly exposed the personally identifiable information ("PII") of 3,098 of Joy Cone's current and former employees (the "Class" or "Class Members"). Dkt. 44, at 1. Furthermore, this Settlement was the product of lengthy arm's-length negotiations and a full-day mediation session with Mr. Bruce A. Friedman Esq. from JAMS. *Id*. As explained *infra*, the Settlement meets the "presumption of fairness" standard—and also satisfies the Rule 23(e) factors, the mandatory *Girsh* factors, the permissive *Prudential* factors, and the mandatory *Baby Products* "direct benefit" factor. Thus, the Settlement is "fair, reasonable, and adequate" and should be finally approved.

The Settlement provides Class Members with timely and tailored relief—including up to $500.00 per person for ordinary losses (including up to four hours at $20.00 per hour for lost time for a total of $80.00); up to $4,500.00 per person for extraordinary losses, like identity theft; two years of credit monitoring and identity theft protection with $1 million in insurance; and, in the alternative to loss reimbursement and credit monitoring, an alternative cash payment of $50.00 per person. Dkt. 34-2 ("Settlement Agreement" or "S.A."), ¶¶ 3.2–3.4. Notably, Joy Cone will pay all claims up to a very high $300,000.00 aggregate cap. *Id*. ¶ 3.4 Meanwhile, all notice costs, claims administration costs, attorney fees and costs, and the service award will be paid by Joy Cone ***separate and apart*** from the sums provided to Class Members. *Id*. ¶¶ 3.7–4.1. And the Settlement

provides substantial injunctive relief by requiring that Joy Cone take significant steps to upgrade its data security systems at its own expense. *Id*. ¶ 3.5

On June 25, 2024, the Court granted preliminary approval of the Settlement after supplemental briefing from Plaintiff. Dkt. 41, 43. Pursuant to the Notice plan, the Court-appointed Claims Administrator, Atticus Administration, LLC ("Atticus"), mailed 3,060 notices on July 25, 2024. Dkt. 45, ¶ 10. Critically, the Settlement Class's reaction to the Settlement was overwhelmingly positive. *See* Declaration of Bryn Bridley Re Notice And Settlement Administration ("Bridley Decl.") ¶¶ 11–14. Out of all Settlement Class Members that were sent notice, only two (2) timely requested exclusion, and zero (0) timely submitted objections. *Id*. ¶ 11. This response strongly weighs in favor of final approval.

In sum, the Settlement satisfies the standards for final approval and is a fair, reasonable, and adequate result for Class Members. Thus, Plaintiff respectfully requests that the Court: (i) grant final approval of the Settlement; (ii) finally certify the Settlement Class; (iii) find that the Notice provided satisfies due process and Rule 23; (iv) grant Plaintiff's Motion for an Award of Attorneys' Fees, Reimbursement of Litigation Costs, and Payment of a Service Award to the Class Representative; and (v) enter a final judgment dismissing this case.

II. STATEMENT OF FACTS

Defendant Joy Cone is a Pennsylvania Corporation that produces ice cream cones. Dkt. 1, ¶¶ 15, 19. As part of its business, Joy Cone obtains and maintains the sensitive PII of its current and former employees. *Id*. ¶ 3. On or around February 27, 2023, Joy Cone experienced the Data Breach which may have compromised the PII numbers of its current and former employees. *Id*. ¶¶ 1–5. On or around April 10, 2023, Joy Cone began notifying its affected employees about the Data Breach. *Id*. ¶ 6.

Following Defendant's notification to those affected by the Data Breach, Plaintiff filed this class action lawsuit against Defendant in this Court on May 9, 2023. Dkt. 1. Plaintiff alleged that, because of the Data Breach, Defendant was liable for: negligence, negligence *per se*, breach of confidence, breach of implied contract, unjust enrichment, publicity given to private life, and declaratory judgment. *Id*. ¶¶ 90–162. Thereafter, the Parties agreed to mediate the dispute with Bruce A. Friedman, Esq. of JAMS. Dkt. 34-1, ¶ 14. During the full-day mediation session, the parties negotiated at "arm's length" and ultimately reached an agreement on the material terms of the settlement. *Id*. ¶ 17.

On June 25, 2024, the Court granted Plaintiff's unopposed Motion for Preliminary Approval of Class Action Settlement. Dkt. 42, 43. Therein, the Court noted that the Settlement Agreement "contain[ed] a clear-sailing clause, whereby Joy Cone has agreed not to contest Mr. Currie's fee petition up to $100,000." Dkt. 42, at 7. However, under the Settlement Agreement, Joy Cone agreed to provide attorney fees "separate and apart from any other sums agreed to[.]" S.A. ¶ 8.2. And the Settlement Agreement was carefully drafted to ensure that "the Court's approval or denial of any request for a Service Award and/or attorneys' fees and costs are ***not conditions*** to this Settlement Agreement[.]" *Id*. ¶ 8.5 (emphasis added).

Moreover, as detailed in Plaintiff's motion (*see* Dkt. 44 & 45), such provisions are "not an automatic bar to settlement approval[.]" *In re Wawa, Inc. Data Sec. Litig*., 85 F.4th 712, 725 (3d Cir. 2023); *see also* Dkt. 44, at 20. And the oversight of an experienced mediator—here, Bruce A. Friedman, Esq. of JAMS—is significant and "weigh[s] in favor of a finding of noncollusiveness[.]" *Id*. at 726. In sum, Joy Cone's agreement to not contest the fee award does not materially impact the reasonableness of the Settlement—especially in light of the timely and tailored relief provided by the Settlement.

III. SETTLEMENT TERMS

A. The Settlement Class & Benefits

The Settlement provides for the certification of a Settlement Class defined as: "All Persons residing in the United States whose PII was compromised in the Joy Cone Data Security Incident that occurred on or around February 27, 2023." S.A. ¶ 1.32. Under the Settlement Agreement, PII included names and Social Security numbers. *Id*. at 1. The Settlement provides Class Members with timely and tailored relief. ***First***, Settlement Class Members can claim up to $500.00 per person for documented out-of-pocket expenses (e.g., professional fees, fees for credit repair services, credit monitoring costs). S.A. ¶ 3.2(a). ***Second***, Settlement Class Members can claim up to $80.00 per person for lost time—up to four (4) hours at $20.00 per hour, subject to the $500.00 cap for out-of-pocket expenses. *Id*. ***Third***, Settlement Class Members can claim up to $4,500.00 per person for extraordinary losses (e.g., fraud or identity theft). *Id*. ¶ 3.2(b). ***Fourth***, Settlement Class Members can obtain two years of credit monitoring and identity theft protection with $1 million in insurance through Experian. *Id*. ¶ 3.2(c). ***Fifth***, as an alternative, Settlement Class Members can receive a $50.00 cash payment in lieu of claims for ordinary losses, lost time, extraordinary losses, and credit monitoring. *Id*. ¶ 3.3.

Meanwhile, all notice costs, claims administration costs, attorney fees and costs, and the service award will be paid by Joy Cone *separate and apart* from the sums provided to Class Members. *Id*. ¶¶ 3.7–4.1. And the Settlement provides substantial injunctive relief by requiring that Joy Cone take significant steps to upgrade its data security systems at its own expense. *Id*. ¶ 3.5

B. Notice and Claims Administration

On July 5, 2024, Atticus received from Joy Cone the names, addresses, email addresses, employee identification numbers, and employment information for 3,070 potential Class Members. Bridley Decl. ¶ 5. Atticus reviewed the data and excluded ten (10) erroneous records (e.g., duplicative). *Id*. Prior to sending notice, Atticus processed the Settlement Class List through the National Change of Address database maintained by the United States Postal Service ("USPS") and obtained address updates from the past four (4) years. *Id*. ¶ 6. On July 25, 2024, Atticus issued notice to 3,060 Class Members by U.S. first class mail. *Id*. ¶ 7. For those notices that were returned as undeliverable, Atticus used a professional address tracing service to find updated addresses. *Id*. ¶ 8. Ultimately, notice was successfully mailed to 2,954 Class Members which equates to a success rate of 96.53%. *Id*.

Additionally, on July 25, 2024, Atticus established the website "www.joyconedatasettlement.com" which provided Class Members with easy access to the Long Form Notice, answers to frequently asked questions, other settlement documents filed with the Court, a summary of the key dates and deadlines, and contact information for Atticus. *Id*. ¶ 9. Furthermore, the website included a secure portal which provided Settlement Class Members with the opportunity to complete and submit claims online. *Id*. Notably, the website has received 8,151 visits to date. *Id*. Atticus also established a toll-free telephone number (1-888-999-3721) whereby Settlement Class Members could ask questions about the Settlement. *Id*. ¶ 10. To date, the toll-free telephone number has received twenty (20) calls. *Id*.

The deadline to submit a claim form was October 23, 2024. *Id*. ¶ 12. In total, Atticus received 129 claim submissions, all of which were filed online via the website. *Id*. Thereafter, Atticus reviewed the submissions and determined that 127 claims were valid. *Id*. For the two

invalid claims (i.e., deficient or incomplete), Atticus notified the claimants of the issues and provided them with 30 days to respond and correct or complete their claims. *Id*. ¶ 13. For the 127 valid claims, 52 selected the alternative cash payment, and the remainder selected credit monitoring or compensation for lost time. *Id*. ¶ 14. The deadline to request exclusion or object was October 23, 2024.[1] *Id*. ¶ 11. In total, Atticus received two (2) exclusion requests from Class Members John Johnson and Brandon Johnson. *Id*. Notably, Atticus received zero (0) objections to the Settlement. *Id*.

C. Attorney Fees, Costs, and Service Award

On September 9, 2024, Plaintiff moved for an award of attorney fees, costs, and a service award. Dkt. 44. Therein, Plaintiff requested $100,000 in attorney fees, $9,676.49 in costs (less than the $15,000.00 contemplated by the Settlement Agreement), and a Service Award of $2,500. *Id*. at 2, 16. As detailed therein, such requests are reasonable and align with those in similar data breach cases. *Id*. at 8–22.

IV. LEGAL STANDARD

Federal Rule of Civil Procedure 23 requires that a class action "may be settled . . . only with the court's approval." Fed. R. Civ. P. 23(e). Before granting final approval, a court must determine that the settlement is "fair, reasonable, and adequate." *Id.* This requires a court to "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interest of those whose claims will be extinguished."

[1] Initially, the deadline for Settlement Class Members to exclude themselves or object to the Settlement was set at September 23, 2024 (i.e., 60 days after the Notice Date). *See* Dkt. 43, ¶¶ 6–7. Unfortunately, due to an administrative oversight, the deadline for Settlement Class Members to exclude themselves or object to the Settlement was set at October 23, 2024 (i.e., 90 days after the Notice Date). *See* Bridley Decl. ¶ 11. However, as a result, Settlement Class Members were afforded a more fulsome opportunity to exclude themselves or object.

In re Cendant, 264 F.3d 201, 231 (3d Cir. 2001) (quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995)). Critically, "there is an overriding public interest in settling class action litigation," *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004). And "[t]he law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *Rebecca Nguyen v. Educ. Comput. Sys., Inc*., No. 2:22-cv-1743, 2024 U.S. Dist. LEXIS 140013, at *21–22 (W.D. Pa. Aug. 7, 2024) (quoting *Gen. Motors*, 55 F.3d at 784).

V. ARGUMENT

A. Settlement Class Certification Should Not Be Disturbed.

On June 25, 2024, the Court provisionally certified the Class for settlement under Rule 23(a) and 23(b)(3). Dkt. 42, at 8–11. Notably, the Class still satisfies the requirements of 23(a) and 23(b)(3)—and there has been no intervening change of law or fact that would disturb the Court's previous determination. Thus, Plaintiff respectfully requests that the Court allow the settlement process to proceed and grant final approval.

B. Notice Satisfied Due Process.

The notice plan was successfully executed and satisfied Fed. R. Civ. P. 23(e). Here, Atticus provided direct notice and notice via the Settlement Website. S.A. ¶¶ 5.2–5.4 And as detailed *supra*, Atticus succeeded in sending notice to 96.53% of Class Members—which is sufficient to satisfy Rule 23. *See* Bridley Decl. ¶ 8; *In re Philips Recalled CPAP*, 347 F.R.D. 113, 126 (W.D. Pa. 2024) (holding that notice which "reached approximately 90% of the class . . . me[t] all the requirements of Rule 23"). Furthermore, the notice plan provided Class Members with all the information required by Rule 23. S.A. ¶¶ 5.2–5.4; *see also Philips Recalled CPAP*, 347 F.R.D. at 126 (approving the notice plan which informed class members about, *inter alia*, the underlying

litigation, the claims asserted, the opportunity to object and opt-out, the binding nature of the settlement, and timing of the final settlement hearing). Thus, notice was provided to Class Members "in the best way practicable under the circumstances." *Id*.

C. The Presumption of Fairness Applies.

Final approval is proper because the settlement is "fair, reasonable, and adequate." *In re Prudential Ins. Co. Am. Sales Prac. Litig*., 148 F.3d 283, 316 (3d Cir. 1998). In the Third Circuit, district courts "apply a presumption of fairness" when four factors are satisfied. *Philips Recalled CPAP*, 347 F.R.D. at 126 (quoting *Warfarin*, 391 F.3d at 535). Here, all four factors are satisfied and the "presumption of fairness" applies.

i. Arm's length negotiations.

The first factor is whether "the settlement negotiations occurred at arm's length[.]" *Philips Recalled CPAP*, 347 F.R.D. at 126. For example, this factor was satisfied in *Calhoun* when settlement negotiations were "at arm's length" and occurred though an experienced mediator. *Calhoun v. Invention Submission Corp*., No. 18-1022, 2023 U.S. Dist. LEXIS 41177, at *31 (W.D. Pa. Mar. 8, 2023); *see also Rebecca Nguyen v. Educ. Comput. Sys., Inc*., No. 2:22-cv-1743, 2024 U.S. Dist. LEXIS 140013, at *24 (W.D. Pa. Aug. 7, 2024) (same). Here, settlement negotiations occurred at arm's length and through an experienced mediator (Mr. Bruce A. Friedman Esq. from JAMS). Dkt. 34-1, ¶¶ 14–17. Thus, this factor is satisfied.

ii. Sufficient discovery.

The second factor is whether "there was sufficient discovery[.]" *Philips Recalled CPAP*, 347 F.R.D. at 126. Notably, "formal discovery" is not required when "informal discovery [is] enough for class counsel to assess the value of the class' claims and negotiate a settlement that provides fair compensation." *In re NFL Players Concussion Injury Litig*., 821 F.3d 410, 436 (3d

Cir. 2016). For example, this factor was satisfied in *Calhoun* when the plaintiffs had "conducted sufficient investigation to allow them to evaluate the strengths and weaknesses of their claims[.]" 2023 U.S. Dist. LEXIS 41177, at *33; *see also Nguyen*, 2024 U.S. Dist. LEXIS 140013, at *23–24 (same). Here, the Parties engaged in sufficient informal discovery prior to mediation whereby "Plaintiff requested, and Defendant produced, key information about the size and composition of the Settlement Class, how the Data Breach occurred, Defendant's response to the Data Breach, and security changes Defendant undertook as a result of the Data Breach." Dkt. 34-1, ¶ 10. Thus, this factor is satisfied.

iii. Experience in similar litigation.

The third factor is whether "the proponents of the settlement are experienced in similar litigation[.]" *Philips Recalled CPAP*, 347 F.R.D. at 126. For example, in *Calhoun*, this factor was satisfied when plaintiffs' counsel was "highly experienced in similar class action litigation[.]" 2023 U.S. Dist. LEXIS 41177, at *33; *see also Nguyen*, 2024 U.S. Dist. LEXIS 140013, at *24 (same). Here, Counsel has significant experience in complex class actions—and has a particular expertise in data breach class actions. Dkt. 34-1, ¶¶ 29–32. Thus, this factor is satisfied.

iv. Minimal objections.

The fourth factor is whether "a small fraction of the class objected[.]" *Philips Recalled CPAP*, 347 F.R.D. at 126. For example, in *Calhoun*, this factor was satisfied when "only 26 objections to the proposed settlement have been asserted" out of the 53,000 class members. 2023 U.S. Dist. LEXIS 41177, at *33; *see also Nguyen*, 2024 U.S. Dist. LEXIS 140013, at *25 (similar). Here, there have been zero (0) objections to the Settlement. Bridley Decl. ¶ 11. Thus, this factor is also satisfied, and the "presumption of fairness" applies.

D. The Rule 23(e) Factors Support Final Approval.

Under Rule 23(e), district courts must consider four factors before granting final approval. *Philips Recalled CPAP*, 347 F.R.D. at 127 (quoting Fed. R. Civ. P. 23(e)(2)(B)). Here, all such factors support final approval.

i. Adequacy of representation.

First, Rule 23(e) requires that "the class representatives and class counsel have adequately represented the class[.]" *Philips Recalled CPAP*, 347 F.R.D. at 127 (quoting Fed. R. Civ. P. 23(e)(2)(B)). Here, Class Counsel and the Class Representative have adequately represented the Class as evidenced by the tailored and timely relief secured on behalf of the Class. S.A. ¶¶ 3.1–3.5; *see also* Dkt. 42 ("[C]ounsel for Mr. Currie, Raina C. Borrelli, Esq. has significant experience in complex class actions, including in data breach class actions."). Thus, this factor is satisfied.

ii. Arm's length negotiations.

Second, Rule 23(e) requires that "the proposal was negotiated at arm's length[.]" *Philips Recalled CPAP*, 347 F.R.D. at 127 (quoting Fed. R. Civ. P. 23(e)(2)(B)). Here, settlement negotiations occurred at arm's length, after several rounds of offers and counteroffers, and through an experienced mediator (Mr. Bruce A. Friedman Esq. from JAMS). Dkt. 34–1, ¶¶ 14–17. Thus, this factor is satisfied.

iii. Adequacy of relief.

Third, Rule 23(e) requires that "the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any

agreement required to be identified under Rule 23(e)(3)[.]" *Philips Recalled CPAP*, 347 F.R.D. at 127 (quoting Fed. R. Civ. P. 23(e)(2)(B)).

Here, the relief provided is adequate because Counsel "tailored the terms of the Settlement to address the specific potential harms (including out-of-pocket expenses, lost time, and the future risk of identity theft) caused by the Data Breach" and because such relief is "well within the range of those accepted by courts in similar data breach class action settlements[.]" Dkt. 34–1, ¶¶ 21–23. And such relief "is particularly favorable given the risks of protracted litigation [because] Plaintiff faces serious risks of prevailing on the merits, proving causation, achieving class certification, maintaining class certification, and surviving appeal." *Id*. ¶ 24. Thus, this factor is satisfied.

iv. Equitable treatment.

Fourth, Rule 23(e) requires that "the proposal treats class members equitably relative to each other[.]" *Philips Recalled CPAP*, 347 F.R.D. at 127 (quoting Fed. R. Civ. P. 23(e)(2)(B)). Here, the Settlement provides all Class Members with equal opportunity to secure monetary compensation for their injuries. S.A. ¶¶ 3.1–3.4. Moreover, all Class Members equally benefit from the data security improvements made by Joy Cone. *Id*. ¶ 3.5. Thus, this factor is satisfied.

E. The Mandatory *Girsh* Factors Support Final Approval.

In the Third Circuit, district courts must consider the nine factors provided by *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). *Philips Recalled CPAP*, 347 F.R.D. at 127. Notably, these factors are mandatory. *In re Pet Food Prods. Liab. Litig*., 629 F.3d 333, 350 (3d Cir. 2010) ("The district court must make findings as to each of the nine *Girsh* factors in order to approve a settlement[.]"). On balance, the *Girsh* factors support final approval.

i. Complexity, expense, and duration.

The first *Girsh* factor is "the complexity, expense and likely duration of the litigation[.]" *Philips Recalled CPAP*, 347 F.R.D. at 127. This factor "captures the probable costs, in both time and money, of continued litigation." *In re Warfarin*, 391 F.3d at 535–36 (quoting *In re Cendant*, 264 F.3d at 233). Thus, when the settlement "reduces expenses and avoids delay, this factor weighs heavily in favor of approving the Settlement." *Philips Recalled CPAP*, 347 F.R.D. at 129 (quoting *In re Suboxone Antitrust Litig*., No. 2445, 2024 U.S. Dist. LEXIS 33018, at *16 (E.D. Pa. Feb. 27, 2024)). For example, in *Nguyen*, this factor supported final approval when "the proposed settlement permits the parties to avoid the significant expenditure of time and resources while providing a recovery to the settlement class[.]" 2024 U.S. Dist. LEXIS 140013, at *25–26. Likewise, the Settlement here "avoid[s] the risks of protracted litigation, [and] it also provides benefits to the Class Members today—as opposed to the mere possibility of future relief." Dkt. 34-1, ¶ 25. Thus, this factor supports final approval.

ii. Reaction of the Class.

The second *Girsh* factor is "the reaction of the class to the settlement[.]" *Philips Recalled CPAP*, 347 F.R.D. at 127. For example, in *Philips Recalled CPAP*, this factor favored approval when "more than 5 million class notices sent" and "the settlement administrator received only seventy-eight objections and 390 opt-outs." *Id*. at 129; *see also Nguyen*, 2024 U.S. Dist. LEXIS 140013, at *27 (similar). Here, only two Class Members excluded themselves from the Settlement—and zero (0) Class Members objected to the Settlement. Bridley Decl. ¶ 11. Thus, this factor supports final approval.

iii. Stage of the proceedings.

The third *Girsh* factor is "the stage of the proceedings and the amount of discovery completed[.]" *Philips Recalled CPAP*, 347 F.R.D. at 127. This factor focuses on whether the "proposed settlement is the product of informed negotiations." *Id*. at 129. For example, in *Calhoun*, this factor supported final approval when the parties had exchanged information and engaged in mediation. 2023 U.S. Dist. LEXIS 41177, at *36–37; *see also Nguyen*, 2024 U.S. Dist. LEXIS 140013, at *27–28 (same). Likewise, the Settlement here is the product of informed negotiations whereby the Parties exchanged informal discovery and then engaged in mediation with Bruce A. Friedman, Esq. of JAMS. Dkt. 34-1, ¶¶ 10–14. Thus, this factor supports final approval.

iv. Risks of establishing liability and damages.

The fourth *Girsh* factor is "the risks of establishing liability" and the fifth factor is "the risks of establishing damages[.]" *Philips Recalled CPAP*, 347 F.R.D. at 127. Courts "commonly group the fourth and fifth *Girsh* factors because they 'survey the possible risks of litigation in order to balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of an immediate settlement.'" *Id*. at *129 (quoting *In re Warfarin*, 391 F.3d at 537). For example, in *Calhoun*, this factor supported final approval when "obtaining a judgment and recovering on any judgment obtained are all matters that remain[ed] uncertain." 2023 U.S. Dist. LEXIS 41177, at *38; *see also Nguyen*, 2024 U.S. Dist. LEXIS 140013, at *28–29 (same). Likewise, Plaintiff here "is also aware that a successful outcome is uncertain—and would be achieved (if at all) only after prolonged, arduous litigation with the attendant risk of drawn-out appeals and the potential for no recovery at all." Dkt. 34-1, ¶ 21. Thus, this factor supports final approval.

v. Risks of maintaining the class action through trial.

The sixth *Girsh* factor is "the risks of maintaining the class action through the trial[.]" *Philips Recalled CPAP*, 347 F.R.D. at 127. This factor deals with the "possibility of decertification, and consequently the court can always claim this factor weighs in favor of settlement[.]" *Id*. at *129 (quoting *Sorace v. Wells Fargo Bank, N.A.*, No. 20-4318, 2024 U.S. Dist. LEXIS 26340, at *19 (E.D. Pa. Feb. 15, 2024)). For example, in *Calhoun*, this factor weighed "strongly in favor of granting final approval" because "there is an immediate benefit to Settlement Class Members as opposed to an uncertain result that may only be achieved through protracted and expensive litigation." 2023 U.S. Dist. LEXIS 41177, at *41; *see also Nguyen*, 2024 U.S. Dist. LEXIS 140013, at *30–31 (same). Likewise, this Settlement here "provides timely and significant relief" and "is particularly favorable given the risks of protracted litigation." Dkt. 34-1, ¶¶ 22–24. Thus, this factor supports final approval.

vi. Defendant's ability to withstand a greater judgement.

The seventh *Girsh* factor is "the ability of the defendants to withstand a greater judgment[.]" *Philips Recalled CPAP*, 347 F.R.D. at 127. This factor "is most relevant when the defendant's professed inability to pay is used to justify the amount of the settlement." *Calhoun*, 2023 U.S. Dist. LEXIS 41177, at *41 (quoting *In re NFL*, 821 F.3d at 440). However, this factor "carries little weight because the fact that a defendant could pay more does not mean that it should pay more than what was negotiated." *Philips Recalled CPAP*, 347 F.R.D. at 129–30. For example, in *Nguyen*, this factor was "neutral [because] no evidence was submitted about [defendant's] ability or inability to withstand a greater judgment." 2024 U.S. Dist. LEXIS 140013, at *32. Likewise, Joy Cone has not produced any evidence establishing an ability or inability to withstand a greater judgment. Thus, this factor is neutral.

vii. The reasonableness of the Settlement.

The eighth *Girsh* factor is "the range of reasonableness of the settlement fund in light of the best possible recovery" and the ninth *Girsh* factor is "the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation." *Philips Recalled CPAP*, 347 F.R.D. at 127. Given the overlap between these two factors, courts frequently blend the analysis and simply ask "whether the settlement is reasonable in light of the best possible recovery and the risk of further litigation." *Id*. at *130 (quoting *In re Warfarin*, 391 F.3d at 538). Notably, the Third Circuit has established that courts "must take seriously the litigation risks inherent in pressing forward with the case." *In re NFL Players*, 821 F.3d at 440. For example, in *Calhoun*, these factors weighed toward final approval because "the proposed settlement falls well within the range of reasonableness[.]" 2023 U.S. Dist. LEXIS 41177, at *43; *Nguyen*, 2024 U.S. Dist. LEXIS 140013, at *35 (same). Likewise, the Settlement here is "well within the range of those accepted by courts in similar data breach class action settlements" especially given the "risks of protracted litigation[.]" Dkt. 34-1, ¶¶ 22–26. Thus, on balance, the mandatory *Girsh* factors support final approval.

F. The Permissive *Prudential* Factors Support Final Approval.

In the Third Circuit, given the "sea-change in the nature of class actions in the two decades since *Girsh*," district courts may consider the six *Prudential* factors. *Philips Recalled CPAP*, 347 F.R.D. at 127 (citing *Krell v. Prudential Ins. Co. of Am.*, 148 F.3d 283, 323 (3d Cir. 1998)). Notably, the six *Prudential* factors are permissive. *Pet Food*, 629 F.3d at 350 ("The factors we identified in *Prudential* are illustrative of additional inquiries that in many instances will be useful[.]"). Thus, "[a] reviewing court need only address those *Prudential* considerations that are

relevant to the litigation in question." *Calhoun*, 2023 U.S. Dist. LEXIS 41177, at *45. On balance, the six *Prudential* factors support final approval.

i. Maturity of the substantive issues.

The first *Prudential* factor is "the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages[.]" *Philips Recalled CPAP*, 347 F.R.D. at 127. This factor "substantially mirrors *Girsh* factor three[.]" *Id*. at *130. For example, in *Calhoun*, this factor supported final approval when the parties "understood the substantive issues[] and appreciated the risks associated with continued litigation before engaging in settlement negotiations." 2023 U.S. Dist. LEXIS 41177, at *45; *Nguyen*, 2024 U.S. Dist. LEXIS 140013, at *37 (same). Likewise, the Settlement here was achieved after the maturation of the substantive issues because "[t]he Parties both prepared detailed mediation statements outlining their positions on the legal and factual claims at issue and their positions on the framework for resolution . . . [which] enabled the parties to fully understand the claims, defenses, and risks of continued litigation." Dkt. 34-1, ¶ 11. Thus, this factor supports final approval.

ii. Other classes and subclasses.

The second *Prudential* factor is "the existence and probable outcome of claims by other classes and subclasses" and the third *Prudential* factor is "the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved—or likely to be achieved—for other claimants[.]" *Philips Recalled CPAP*, 347 F.R.D. at 127. These factors blend together and "focus on the existence and probable outcomes of claims by other

classes or other claimants[.]" *Calhoun,* 2023 U.S. Dist. LEXIS 41177, at *45. However, these factors are inapplicable when there are no other competing cases. *See, e.g., Philips Recalled CPAP*, 347 F.R.D. at 130 (finding that "[f]actors two and three . . . are not applicable here"); *Calhoun,* 2023 U.S. Dist. LEXIS 41177, at *45 (same); *Nguyen*, 2024 U.S. Dist. LEXIS 140013, at *37 (same). Likewise, Counsel is unaware of any other relevant cases, classes, or subclasses that are relevant to this litigation. Thus, this factor is neutral.

iii. Opt-out opportunities.

The fourth *Prudential* factor is "whether class or subclass members are accorded the right to opt out of the settlement[.]" *Philips Recalled CPAP*, 347 F.R.D. at 127. This factor weighs supports final approval when "class members were given an adequate opportunity to opt out[.]" *Id*. at *130. Thus, in *Calhoun*, this factor supported final approval because class members were advised "of their right to object or to be excluded[.]" 2023 U.S. Dist. LEXIS 41177, at *45–46; *Nguyen*, 2024 U.S. Dist. LEXIS 140013, at *37–38 (same). Here, the Settlement provided Class Members with the opportunity to opt-out (i.e., exclude themselves) from the Settlement. S.A. ¶¶ 6.1–7.6. Indeed, two (2) Class Members opted-out of the Settlement. Bridley Decl. ¶ 11. Thus, this factor supports final approval.

iv. Reasonableness of attorney fees.

The fifth *Prudential* factor is "whether any provisions for attorneys' fees are reasonable[.]" *Philips Recalled CPAP*, 347 F.R.D. at 127. This factor "is analyzed separately in connection with [a] motion for attorneys' fees[.]" *Calhoun,* 2023 U.S. Dist. LEXIS 41177, at *46. As explained in the separate motion and memorandum, Plaintiff's request for attorney fees is reasonable and aligns with those awarded in similar data breach class actions. Dkt. 44, 45. Thus, this factor supports final approval.

v. The procedure of claims processing.

The sixth *Prudential* factor is "whether the procedure for processing individual claims under the settlement is fair and reasonable[.]" *Philips Recalled CPAP*, 347 F.R.D. at 127. For example, in *Calhoun*, this factor supported final approval when "the entire claims handling process was handled by the Settlement Administrator, who submitted a detailed declaration about the process that was employed." 2023 U.S. Dist. LEXIS 41177, at *46; *Nguyen*, 2024 U.S. Dist. LEXIS 140013, at *38 (same). Here, the entire claims process was handled by Atticus Administration, LLC—which was selected for its "experience[] in administering class action claims[.]" S.A. ¶ 1.2. Furthermore, Atticus submitted a detailed declaration about the claims process. *See generally* Bridley Decl. ¶¶ 1–15. Thus, this factor supports final approval.

G. The Mandatory *Baby Products* Factor Supports Final Approval.

In the Third Circuit, district courts must consider the *Baby Products* "direct benefit" factor. *Philips Recalled CPAP*, 347 F.R.D. at 130. This factor focuses on "the degree of direct benefit provided to the class." *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 174 (3d Cir. 2013). For example, in *Calhoun*, this factor supported final approval when "class members would receive cash compensation based upon specific circumstances, as outlined in the Settlement Agreement." 2023 U.S. Dist. LEXIS 41177, at *47; *Nguyen*, 2024 U.S. Dist. LEXIS 140013, at *38–39 (same). Here, the Settlement provides credit monitoring services, injunctive relief, and direct cash compensation to Class Members based upon their injuries, and thus addresses the injuries caused by the data breach as outlined by Plaintiff in the Complaint on behalf of the Settlement Class. S.A. ¶¶ 3.2–3.5; Dkt. 1. Thus, this factor supports final approval.

VI. CONCLUSION

In sum, the relevant factors support Plaintiff's motion. Thus, Plaintiff respectfully requests that the Court: (i) grant final approval of the Settlement; (ii) finally certify the Settlement Class; (iii) find that the Notice provided satisfies due process and Rule 23; (iv) grant Plaintiff's Motion for an Award of Attorneys' Fees, Reimbursement of Litigation Costs, and Payment of a Service Award to the Class Representative; and (v) enter a final judgment dismissing this case.

Dated: November 4, 2024

By: */s/ Raina C. Borrelli*

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CERTIFICATE OF SERVICE

I, Raina C. Borrelli, hereby certify that on November 4, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel of record, below, via the ECF system.

DATED this 4th day of November, 2024.

STRAUSS BORRELLI PLLC

By: */s/ Raina C. Borrelli*

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