UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JASMYN BICKHAM, AMANDA BAILEY, AND LISA GORDON, individually and on behalf of all others similarly situated, Plaintiffs, v. REPROSOURCE FERTILITY DIAGNOSTICS, INC. Defendant.	No: 1:21-cv-11879-GAO

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

STATEMENT OF ISSUES PRESENTED

1. Does the proposed Settlement Class meet Rule 23's requirements for class certification for settlement purposes under Fed. R. Civ. P 23(b)(2) and (b)(3)?

Plaintiffs' Answer: Yes.

2. Should Plaintiffs be appointed as Class Representatives for the Settlement Class?

Plaintiffs' Answer: Yes.

3. Based on an initial evaluation, is the proposed Settlement fair, adequate, and reasonable, sufficient to warrant the dissemination of notice to the proposed Settlement Class?

Plaintiffs' Answer: Yes.

4. Should the Court appoint Migliaccio & Rathod LLP, Pastor Law Office PC, Kind Law, and Freedom Law Firm, LLC as class counsel, with Migliaccio & Rathod LLP serving as lead class counsel?

Plaintiffs' Answer: Yes.

5. Should Kroll Settlement Administration LLC be appointed as Settlement Administrator?

Plaintiffs' Answer: Yes.

6. Does the Notice Plan satisfy the requirements of Rule 23 and Due Process?

Plaintiffs' Answer: Yes.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

In re Credit Suisse-AOL Sec. Litig.
253 F.RD. 17 (D. Mass 2008)

In re Lupron Mktg. and Sales Practices Litig.
228 F.R.D. 75 (D. Mass 2005)

In re Relafen Antitrust Litig.
231 F.R.D. 52 (D. Mass 2005)

In re The Home Depot, Customer Data Sec. Breach Litig.
No. 1:14-MD-2583 (N.D. Ga. Mar. 7, 2016)

Nat'l Ass'n of the Deaf v. Mass. Inst. of Tech.
No. 3:15-CV-30024-KAR, 2020 U.S. Dist. LEXIS 53643 (D. Mass. Mar. 27, 2020)

Smilow v. Southwestern Bell Mobile Sys.
323 F.3d 32 (1st Cir. 2003)

Torres v. Wendy's Int'l LLC
No. 6:16-cv-00210 (M.D. Fla. Feb. 26, 2019)

U.S. v. Comunidades Unidas Contra La Contaminacion
204 F.3d 275 (1st Cir. 2000)

Wal-Mart Stores, Inc. v. Dukes
131 S. Ct. 2541 (2011)

Weiss v. Arby's Restaurant Grp. Inc.
No. 17-cv-01035 (N.D. Ga. June 6, 2019)

Wright v S. N.H Univ.
561 F. Supp. 3d 211(D. N.H. 2021)

Rules

Fed. R. Civ. P. 23

Other Authorities

Manual for Complex Litigation, Third, § 30.41 (1995)

Newberg on Class Actions § 11.41 (4th ed. 2002)

I. INTRODUCTION

This case arises from a data breach experienced by Defendant ReproSource Diagnostics Inc, ("ReproSource") on or about August 8, 2021, involving the potential unauthorized access of Personally Identifiable Information ("PII") of certain individuals (the "Data Breach"). *See* Declaration of Nicholas Migliaccio in support of Plaintiffs' Motion ("Migliaccio Decl."), ¶ 8. On or about August 10, 2021, ReproSource discovered that the Data Breach resulted in the potential unauthorized access of the PII of 228,214 persons. *See, e.g.*, First Amended Class Action Complaint ("FAC"), ¶ 28-29. Plaintiffs' counsel in this case have worked collaboratively in prosecuting this matter.

Upon the filing of ReproSource's motion to dismiss the FAC and Plaintiffs' Response (ECF Nos. 6 & 10), the Parties agreed to mediate the case to see whether they could reach an early resolution of the matter. To that end, the parties exchanged documents and informal discovery relevant to their claims and defenses. On July 13, 2023, the Parties[1] participated in a mediation with a neutral, Judge Wayne Andersen (ret.) of JAMS.

After nearly two years of litigation and a month of hard-fought negotiations, the Parties reached a resolution that—if approved by the Court—will resolve the litigation and provide substantive relief to the Settlement Class.[2] The Parties negotiated the Settlement Agreement, providing for a $1,250,000 non-reversionary settlement fund (the "Settlement Fund") which constitutes the total payment to the Settlement Class, as well as for Administrative Expenses, Notice, Costs, and any Fee and Service Awards. Migliaccio Decl. ¶ 25; *see also* S.A. § 3.1.

Settlement Class members benefit directly from the Settlement Agreement in many ways,

[1] The capitalized terms not defined herein have the same definition as set forth in the settlement agreement, dated January 10, 2024 (the "Settlement Agreement").
[2] Defined in the Settlement Agreement as "all natural persons whose Personal Information was compromised in the Security Incident and to whom ReproSource sent written notice of the Security Incident in or around October 2021."

as they may submit a claim for one of the following: (a) up to $3,000 in Documented Loss Payment (*see* S.A. § 3.3(a)); (b) Credit Monitoring and Insurance Services ("CMIS") (*id.* § 3.3(e)); or (c) an Alternative Cash Payment of $50 (*id.* § 3.3(f)).[3] Importantly, the Settlement Fund is non-reversionary—no funds will revert back to ReproSource. The Settlement Agreement also requires ReproSource to implement several measures designed to improve its data security practices.

The results achieved by the Settlement Agreement are outstanding given the litigation risks faced by Plaintiffs and compare favorably with that achieved in other data breach cases, especially given the size of the Settlement Class.[4] Accordingly, Plaintiffs respectfully move this Court to enter an Order which does the following: (1) grants preliminary approval of the Settlement Agreement.; (2) provisionally certifies the Settlement Class under Rules 23(b)(2) and 23(b)(3) in relation to the settlement process; (3) provisionally appoints Plaintiffs as representatives of the Settlement Class; (4) finds that the proposed Settlement Agreement is sufficiently fair, reasonable, and adequate to allow dissemination of notice of the settlement to the proposed Settlement Class by a settlement administrator; (5) provisionally appoints Migliaccio & Rathod LLP, Pastor Law Office PC, Kind Law, and Freedom Law Firm, LLC as class counsel ("Class Counsel"), with Migliaccio & Rathod LLP as lead class counsel ("Lead Class Counsel"); (6) appoints Kroll Settlement Administration LLC as the settlement administrator ("Administrator"); (7) approves the Notice Plan described in the Settlement Agreement and its Exhibits, and the specific Notice of Class Action and Proposed Settlement ("Proposed Notice") and directs distribution of the Proposed Notice; (8) establishes dates for a hearing on final approval of the proposed Settlement Agreement, Plaintiffs' counsel's request for service awards, attorneys' fees, and expenses; and (9)

[3] California residents will be entitled to an additional $50.00 payment.

[4] The Settlement Agreement produces a class member result of roughly $5.48 per person for the class of 228,214 Settlement Class members. *Cf., e.g.*, *Breneman v. Keystone Health*, No. 1:22-cv-01643 (Pa. Com. Pl. Apr. 11, 2023) (preliminarily approving award of $3.83 per person for a class of 235,237people).

establishs a deadline for filing objections by members of the Settlement Class, and for them to exclude themselves from the proposed Settlement Class.

II. STATEMENT OF FACTS

ReproSource is a Massachusetts corporation with its principal place of business in Woburn, Massachusetts. FAC, ¶ 23. Plaintiffs allege that ReproSource's computer network was subject to a cybersecurity attack from August 8-10, 2021. *Id.*, ¶ 28. The Data Breach involved roughly 228,214 patients. *Id.*, ¶¶ 3, 29, 34. The Data Breach allegedly resulted in the release of Settlement Class members' sensitive PII including, but not limited to: Social Security numbers ("SSNs"), first and last names, email addresses, dates of birth, health insurance billing information, and treating physician information. *Id.*, ¶ 1, 34-35.

Plaintiffs allege that their PII was compromised due to ReproSource's negligent acts and omissions and failure to protect the sensitive personal data of the Settlement Class. FAC, *e.g.*, ¶¶ 49, 90-91, 120, 164. They also contend that, despite becoming aware of the attack on or about August 10, 2021, ReproSource unreasonably delayed notifying them after becoming aware of the breach. *Id.* ¶¶ 31-32. ReproSource denies these allegations.

Plaintiffs allege that they and the Class suffered injury as a result of ReproSource's conduct, including, e.g.: (i) identity theft; (ii) theft of their PII; (iii) imminent injury from fraud; (iv) risks of having compromised confidential medical information; (iv) damages flowing from delayed notification of the Data Breach; (v) loss of privacy; (vi) out-of-pocket expenses and time-value reasonably expended to mitigate the effects of the Data Breach; (vii) improper access by third parties to their credit score, accounts, and/or funds; and (viii) increased costs related to reduced credit score, including costs of borrowing and insurance. *See* FAC, ¶ 211 (full list).

III. PROCEDURAL HISTORY

Plaintiff Jasmyn Bickham initiated this action against ReproSource by filing a class action complaint in the United States District Court for the District of Massachusetts on November 19, 2021.[5] ECF No. 1. On February 21, 2022, Bickham and Plaintiff Amanda Bailey filed the FAC. ECF No. 11. On March 21, 2022, ReproSource filed a motion to dismiss the FAC in its entirety. ECF No. 14. Plaintiffs filed their opposition on April 4, 2022. ECF No. 23.

The Parties subsequently agreed to mediation with Judge Andersen. Prior to the mediation, Plaintiffs served ReproSource with written questions seeking information relevant to the Data Breach and potential resolution. Migliaccio Decl., ¶ 19. ReproSource also served its own set of requests for documents and information on each of the Plaintiffs. On July 13, 2023, the Parties participated in a full day mediation with Judge Andersen. *Id.* ¶ 16. The parties were unable to reach a resolution on the day of the mediation. Following a period of continued discussion, Judge Andersen made a mediator's proposal that was ultimately accepted by both sides on August 8, 2023. *Id.* ¶ 18. Since then, the Parties have negotiated the details of the Settlement Agreement and its exhibits and executed the Settlement Agreement on January 10, 2023. *Id.*, ¶ 19.

IV. THE SETTLEMENT TERMS

Proposed Settlement Class. The Settlement Agreement will provide substantial relief for the Settlement Class, defined as: "all natural persons whose Personal Information was compromised in the Security Incident and to whom ReproSource sent written notice of the Security Incident in or around October 2021." S.A. § 1.44 (exclusions *id.*). The Settlement Class contains roughly 228,214 individuals. S.A. (Recitals); FAC, ¶ 1.

[5] On January 25, 2022, Plaintiff Lisa Gordon filed a class action complaint in the Eighth Judicial District Court in Clark County, Nevada. On February 24, 2022, ReproSource removed the case to the United States District Court for the District of Nevada. On May 18, 2022, the *Gordon* Action was transferred by mutual agreement of the Parties to the District of Massachusetts (case no. 2:22-2-cv-10766-GAO). The *Gordon* Action was dismissed and consolidated into the *Bickham* Action on May 3, 2023. ECF 48.

The Settlement Fund. ReproSource has agreed to create the non-reversionary Settlement Fund in the amount of $1,250,000, which will be used to make payments to Settlement Class and to pay the costs of Administration, Costs, and any Fees and Service Awards. S.A. § 3.1. As noted, Settlement Class members may submit a claim for one of the following: (1) *Documented Loss Payment*: claimants submit a claim for up to $3,000 and must attest to the loss and submit supporting documentation (S.A. § 3.3(a)); (2) *Credit Monitoring and Insurance Services* ("CMIS"): Settlement Class members may elect 3 years of CMIS, and this benefit will provide one-bureau credit monitoring services and one million dollars in identity theft insurance (S.A. § 3.3(e)); or (3) *Cash Fund Payment*: Settlement Class members may submit a claim to receive a *pro rata* Settlement Payment in cash (S.A. § 3.3(f)). Any residual funds after payment of Settlement Class benefits, administration and other costs, and any attorneys' and service fees, shall be used to make an equal payment to all Settlement Class members who elected a Cash Fund Payment. *See* S.A. § 3.10.

Remedial Measures and Security Enhancements. ReproSource has also adopted measures to enhance its data security. S.A. § 2.1. These changes will benefit Settlement Class members whose PII remains in ReproSource's possession as these changes provide enhanced protection of the Settlement Class's PII from unauthorized access.

Class Notice and Settlement Administration. The Parties selected Kroll Settlement Administration LLC as the settlement administrator through a competitive bidding process. The Administrator is experienced in administering data breach class claims. S.A. § 1.42; Kroll Settlement Administration Overview ("Kroll Resume") (attached as Exhibit 3 to Migliaccio Decl).

Within 10 days after the issuance of the Preliminary Approval Order, ReproSource will provide to the Administrator a list of any and all names, addresses, telephone numbers, and email

addresses of Settlement Class members that it has in its possession, custody, or control. S.A. § 6.4. Notice will begin within thirty-five (35) days after entry of a Preliminary Approval Order. S.A. § 1.28.

The "Short Form Notice" or "Summary Notice" (*see Id.*, ¶ 6.3) will then be mailed to Settlement Class members. The Administrator also will establish and maintain a Settlement Website ("Website") that will host a traditional "Long Form" notice. S.A. § 6.7. The Notices will refer Settlement Class members to the Website where they will be able to learn about the Settlement Agreement and their rights in relation to it. *Id.* The Website shall contain information regarding Claim Form submission (i.e., through the Website) and downloadable documents, including the Long Form Notice, Claim Form, the Settlement Agreement, the Preliminary Approval Order upon entry by the Court, and the operative complaint, and will notify the Settlement Class of the date, time, and place of the Final Approval Hearing. S.A. §§ 6.7, 7.1. The Website shall also provide the number and address to contact the Administrator directly and allow for submission of Requests for Exclusion through the Website. *Id.* at § 6.7

The Notices will be clear and concise and directly apprise Settlement Class members of claim, objection, and opt-out information. Fed. R. Civ. P. 23(c)(2)(B). The Administrator shall provide 90 days following the Notice Date for submission of Claim Forms. S.A. § 3.5. To the extent any submitted claims are incomplete or deficient, Settlement Class members shall have 30 days to cure. S.A. § 3.6. And within 90 days after: (i) the Effective Date (the date on which all required conditions of the Settlement Agreement are satisfied prior to disbursement, *see* S.A. § 10.1); or (ii) all Claim Forms have been processed subject to the terms and conditions of this Agreement, whichever date is later, the Administrator shall cause funds to be distributed to each Settlement Class member who is entitled to funds based on the selection made on their given Claim

Form. S.A. § 3.6.

Attorneys' Fees and Expenses. Plaintiffs will also separately seek an award of attorneys' fees not to exceed one-third (1/3) of the Settlement Fund (i.e., $416,666.67), and reimbursement of reasonable costs and litigation expenses, which shall be paid from the Settlement Fund. S.A. § 9.1. Class Counsel's fee request is reasonable for settlements of this nature and size. *See, e.g.*, *Wright v S. N.H Univ.*, 561 F. Supp. 3d 211, 214 (affirming preliminary approval of a settlement that included a payment of $416,666.66 in attorneys' fees out of the $1,250,000 Settlement Fund). Plaintiffs' motion for attorneys' fees will be filed in advance of the objection deadline and uploaded to the Website promptly after filing.

Service Awards to Named Plaintiffs. Plaintiffs in this case support the Settlement Agreement, have been personally involved, and have been vital to this case. Migliaccio Decl., ¶ 54. Plaintiffs assisted the Settlement Class Counsel with their investigation, sat through multiple interviews, and provided supporting documentation and personal information. *Id.* Plaintiffs will separately petition for awards of $2,500 each, recognizing their time, effort, and expense incurred pursuing claims that benefited all Settlement Class members. *Id.*, ¶ 53; S.A. § 8.1.

The amount requested here is reasonable and common in settled class actions. *See, e.g.*, *Bray. v. GameStop Corp.*, No. 17-CV-01365, ECF No. 54 (D. Del. Dec. 19, 2018) ($3,750 per class representative); *Gordon v. Chipotle Mexican Grill, Inc.*, No. 17-CV-01415, ECF Nos. 128-29 (D. Colo. Dec. 16, 2019) ($2,500 per class representative); *Weiss v. Arby's Restaurant Grp. Inc.*, No. 17-cv-01035, ECF No. 190 (N.D. Ga. June 6, 2019) ($4,500 per class representative); *Torres v. Wendy's Int'l LLC*, No. 6:16-cv-00210, ECF No. 157 (M.D. Fla. Feb. 26, 2019) ($5,000 per class representative).

Release and Dismissal with Prejudice. Plaintiffs and the Settlement Class, upon entry of

the Final Approval Order, will be deemed to have released all claims against ReproSource related to the Data Breach. S.A. § 4; *Id.* § 1.37, Released Claims definition. The parties at that time will request that the Court dismiss the action with prejudice.

V. ARGUMENT

As a matter of public policy, settlement is a highly favored means of resolving disputes—particularly in complex cases where substantial judicial resources can be conserved by avoiding litigation. *U.S. v. Comunidades Unidas Contra La Contaminacion*, 204 F.3d 275, 280 (1st Cir. 2000); *see also*, *Hotel Holiday Inn de Isla Verde v. N.L.R.B.*, 723 D.2d 169, 173 (1st Cir. 1983) (settlement agreements "will be upheld wherever possible because they are a means of amicably resolving doubts and preventing lawsuits"); *In re Lupron Mktg. and Sales Practices Litig*., 228 F.R.D. 75, 88 (D. Mass 2005) ("the law favors class action settlements").

Preliminary approval of a class action settlement is a low bar; the Court need only make an initial fairness evaluation that the Settlement is "within the range of final approval." *Manual for Complex Litigation,* Third, § 30.41 (1995). Federal Rule of Civil Procedure 23(e)(2) sets out three requirements for preliminary approval: "(A) the proposed class should be certified for the purpose of the settlement; (B) the settlement [should be] fair, reasonable and adequate; and (C) the proposed notice and notice plan [must] satisfy due process requirements." *Nat'l Ass'n of the Deaf v. Mass. Inst. of Tech*., No. 3:15-CV-30024-KAR, 2020 U.S. Dist. LEXIS 53643, 2020 WL 1495903, at *1 (D. Mass. Mar. 27, 2020) (citing Fed. R. Civ. P. 23(e)). Additionally, FRCP 23(g) requires "a court that certifies a class [to] appoint class counsel" who "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B).

A. The Court Should Certify the Proposed Settlement Class

Before granting preliminary approval of a proposed settlement, a Court must determine that the proposed settlement class is appropriate for certification. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Class certification is proper if the proposed class satisfies the numerosity, commonality, typicality, and adequacy of representation requirements. Fed. R. Civ. P. 23(a). Because certification is sought under Rule 23(b)(3), Plaintiffs must demonstrate that common questions of law or fact predominate over individual issues and that a class action is the superior device to adjudicate the claims. *Amchem*, 521 U.S. at 615–16. District courts have broad discretion concerning issues of class certification. *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979); *Dionne v. Bouley*, 757 F.2d 1344, 1355 (1st Cir. 1985). As explained below, the Settlement Class satisfies Rule 23(a) and 23(b)(3) and should be certified.

1. Rule 23(a) Requirements Are Met for Settlement Purposes

Numerosity. The first prerequisite is that the "class is so numerous that joinder of all members is impracticable." Rule 23(a)(1). The threshold for numerosity is not high. *See Connor B. ex rel. Vigurs v. Patrick*, 272 F.R.D. 288, 292 (D. Mass. 2011) ("Generally, classes of forty or more are considered sufficiently numerous"). The Settlement Class includes roughly 228,214 individuals identified by ReproSource, thus satisfying the numerosity requirement for purposes of settlement.

Commonality. Rule 23(a)(2) is satisfied when questions of law or fact are common to the class, the resolution of which will bring a class-wide resolution. Fed. R. Civ. P. 23(a)(2). It may be shown when the claims all "depend upon a common contention," with a single common question sufficing. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). The common contention must be capable of class-wide resolution and the "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* Here,

Plaintiffs' claims turn on the adequacy of ReproSource data security in protecting Settlement Class members' PII. Evidence to resolve that claim does not vary among class members, and so can be fairly resolved, for purposes of settlement, for all Settlement Class Members at once.

Typicality. A class representative's claims must be typical of those of other class members. Fed. R. Civ. P. 23(a)(3). Typicality assesses whether the Court may properly attribute a collective nature to the challenged conduct, but it is a flexible standard: "The claims of the class representative and the class overall must share essential characteristics, but they need not be precisely identical." *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 338 (D. Mass 2015), *aff'd*, 809 F.3d 78 (1st Cir. 2015).

Plaintiffs satisfy the typicality requirement where their "injuries arise from the same events or course of conduct as do the injuries of the class" and when the "plaintiff[s'] claims and those of the class are based on the same legal theory." *In re Credit Suisse-AOL Sec. Litig.*, 253 F.RD. 17, 23 (D. Mass 2008). Here, Plaintiffs allege that they had their PII compromised as a result of the same data breach event and thus were impacted by the same course of conduct—allegedly inadequate data security on the part of the Defendant—that they allege harmed the rest of the Settlement Class. Thus, Plaintiffs base their claims on the same legal theory as the rest of the Settlement Class, satisfying the typicality requirement.

Adequacy. Class representatives must fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). To satisfy the adequate representation requirement, "[t]he moving party must show first that the interests of the representative party will not conflict with the interests of any of the class members, and second, that counsel chosen by the representative party is qualified, experienced and able to vigorously conduct the proposed litigation." *Andrews v. Bechtel*

Power Corp., 780 F.2d 124, 130 (1st Cir. 1985). The proposed Representatives have no conflict and are represented by attorneys experienced in class actions, including data breach cases.

Plaintiffs' counsel regularly engage in consumer privacy cases, have the resources necessary to prosecute this case, and have frequently been appointed lead class counsel in data breach cases and other class actions. *See* Migliaccio Decl. ¶¶ 3-5. Plaintiffs' counsel have devoted substantial resources to this action: investigating Plaintiffs' claims; obtaining and analyzing Plaintiffs' detailed personal records; analyzing the scope of the Data Breach, ReproSource's privacy policies, remedial steps, and financial condition; participating in mediation; and, ultimately, negotiating a settlement agreement. that provides meaningful relief for the Settlement Class, despite substantial litigation risks. Migliaccio Decl. ¶¶ 10, 21-22. Plaintiffs' counsel have vigorously prosecuted this case and will work diligently on behalf of the Settlement Class throughout the administration process.

2. Rule 23(b) Requirements Are Met for Purposes of Settlement

After satisfying Rule 23(a), a plaintiff must also satisfy one of the three requirements of Rule 23(b) for a court to certify a class. Fed. R. Civ. P. 23(b); *Smilow v. Southwestern Bell Mobile Sys.*, 323 F.3d 32, 38 (1st Cir. 2003); *see also*, *Amchem*, 521 U.S. at 614.

Plaintiffs seek certification under Rule 23(b)(3), which requires that (i) common questions of law and fact predominate over individualized ones, and that (ii) a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3). This requirement considers "the difficulties likely to be encountered in the management of a class action" and issues with individual litigation. Fed. R. Civ. P. 23(b)(3); *see also Amchem*, 521 U.S. at 617 ("[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action[.]"). The Proposed Settlement satisfies the above.

Common Questions of Law and Fact Predominate. Predominance focuses on whether the theory of alleged liability is common enough to warrant class-wide adjudication. The predominance inquiry "trains on the legal or factual questions that qualify each class member's case as a genuine controversy…test[ing] whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. "The requirement is "merely that common issues predominate, not that all issues be common to the class… [where] common questions predominate regarding liability, then courts generally find the predominance requirement to be satisfied." *Smilow*, 323 F.3d at 39-40.

Data breach cases present multiple questions of law and fact that are central to liability. Whether ReproSource failed to properly secure patient data is a question that can be resolved using the same evidence for all Settlement Class class members because their personal information was all stored in the same data warehouse subject to the same breach. Thus, the resolution of all Settlement Class claims hinges on the same questions of law and fact, which predominate over any individualized questions.

A Class Action Is the Superior Method of Adjudication. Certification of this suit as a class action is superior to other methods to fairly, adequately, and efficiently resolve the claims here. The superiority requirement may be met when "there is a real question whether the putative class members could sensibly litigate on their own for these amounts of damages, especially with the prospect of expert testimony required." *Gintis v. Bouchard Transp. Co., Inc.*, 596 F.3d 64, 68 (1st Cir. 2010). Such is especially true in situations which "vindicat[e] the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." *Amchem*, 521 U.S. at 617. Adjudicating individual actions here would be impracticable: the amount in dispute per person is too small given both the complexity of the subject matter and the

litigation costs, including costs for document review, technical issues, and experts. Individual damages are insufficient to allow such actions—at least not with the aid of adequate counsel. Such prosecution would delay resolution, and may lead to inconsistent rulings.[6] Thus, the Court should certify the Class pursuant to Rule 23(b)(3). ReproSource does not oppose class certification for settlement purposes.

B. The Proposed Settlement Is Fair, Reasonable, and Adequate

Settlement of class actions is favored. *Newberg on Class Actions* § 11.41 (4th ed. 2002)("The compromise of complex litigation is encouraged by the courts and favored by public policy.") Rule 23(e)(2) provides factors for the Court to consider to determine if a settlement is "fair, reasonable, and adequate," examining: whether (A) class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the class relief is adequate, reviewing: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing class relief, including the processing of class-member claims; (iii) the terms of any proposed attorney's fee, including timing; and (iv) any agreement required to be identified under Rule 23(e)(2); and (D) the proposal treats class members equitable to each other. Fed. R. Civ. P. 23(e)(2).

There is "no single test in the First Circuit for determining the fairness, reasonableness, and adequacy of a proposed class action settlement." *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 72 (D. Mass 2005). Prior to the 2018 amendment to the settlement provisions in Rule 23, district courts in the First Circuit used a variety of methods to determine if a class action settlement was fair, adequate, and reasonable—including those factors set out in *In re Compact Disc Minimum*

[6] The Court need not consider trial manageability. *Amchem*, 521 U.S. at 620 ("with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems").

Advertised Antitrust Litig., 216 F.R.D. 197, 203 (D. Me. 2003), judgment entered, No. MDL 1361, 2003 WL 21685581 (D. Me. 2003) as well as the nine-factor test originated by the Second Circuit in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974). Plaintiffs address only the updated Rule 23(e)(2) Factors, not the *Compact Disc* or *Grinnell* factors, in the interest of brevity.

1. The Rule 23(e)(2) Factors Weigh in Favor of Preliminary Approval

First, Plaintiffs and Plaintiffs' counsel have adequately represented the Class, securing a per-class member recovery of roughly $5.48 for the approximately 228,214 class members. This is on par with comparable data breach class settlements. *See, e.g.*, *Keystone supra* n.2 (roughly $3.83 each for 235,237 person class); *In re The Home Depot, Customer Data Sec. Breach Litig*., No. 1:14-MD-2583, ECF No. 181-2 (N.D. Ga. Mar. 7, 2016) (roughly $0.51 each for 40 million class members).

Second, the settlement agreement was negotiated at arm's-length through the use of a neutral as mediator, Judge Andersen, after exchanging information sufficient to assess the strengths and weaknesses of each Party's position. *See supra*.

Third, the relief is adequate. Settlement Class members may elect for one of three avenues of recovery: Documented Loss Payment, CMIS, or Cash Fund Payment, described *supra*. S.A. ¶¶ 3.2(a)–(c). And the structure of proposed attorneys' fees, service awards, and costs are consistent with other data breach settlements. *See supra*.

Fourth, the settlement agreement treats Settlement Class Members equitably. Each Settlement Class member may elect one of the three avenues of recovery (S.A. ¶¶ 3.2(a)–(c). This settlement structure has received preliminary and final approval in other data breach cases. *See, Keystone*, *supra*.

Finally, the settlement agreement and its terms are available for review by all Settlement

Class Members.

C. The Proposed Notice Plan Is the Best Practicable

"For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances" who "can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). "The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise." Fed. R. Civ. P. 23(e)(1). Notice is "adequate if it may be understood by the average class member." NEWBERG, § 11:53 at 167.

D. The Court Should Appoint Settlement Class Counsel

The final step when deciding whether to preliminarily approve a settlement is to appoint class counsel. Courts generally consider the following: (1) proposed class counsel's work in investigating potential claims; (2) proposed counsel's experience in handling class actions or other complex litigation, and the types of claims asserted; (3) proposed counsel's knowledge of the applicable law; and (4) proposed counsel's resources committed to representing the class. Rule 23(g)(1)(A)(i-iv).

Proposed Settlement Class Counsel have extensive experience prosecuting data breach actions and other complex cases, and dedicated substantial resources to this case, including successfully negotiating this Settlement. Migliaccio Decl., ¶¶ 1-7. The Court should thus appoint Settlement Class Counsel as class counsel.

VI. CONCLUSION

Based on the above, Plaintiffs respectfully request the Court certify the class, appoint Plaintiffs as Class Representatives, appoint the Settlement Class Counsel as class counsel, grant preliminary Settlement approval, approve the form and manner of the Notice as described, and schedule a Final Fairness hearing.

Dated: January 10, 2024

Respectfully submitted,

/s/ David Pastor

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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2024, I electronically filed the foregoing documents using the Court's electronic filing system, which will notify all counsel of record authorized to receive such filings.

/s/ David Pastor
David Pastor