

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

IN RE U.S. VISION DATA BREACH
LITIGATION

Civ. Action No. 1:22-cv-06558
(CPO/SAK)

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL
APPROVAL OF CLASS ACTION SETTLEMENT**

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I. INTRODUCTION

Plaintiffs Ian Torres, Bonita Odell, and Lacie Morgan (collectively, “Plaintiffs”) filed this class action against Defendants Nationwide Optometry, P.C., together with its affiliates Sightcare, Inc. and Nationwide Vision Center, LLC (collectively, “Nationwide-Sightcare”), and U.S. Vision, Inc. and USV Optical, Inc. (with U.S. Vision, Inc., “USV”) (collectively, “Defendants”), claiming that Defendants failed to protect and safeguard Plaintiffs’ and Settlement Class Members’ personally identifiable information (“PII”)¹ and personal health information (“PHI”).

Following months of contentious litigation and arm’s-length negotiations, including engaging in mediation, the Parties reached a proposed Settlement² with Nationwide-Sightcare that was preliminarily approved by the Court on May 8, 2024 (ECF No. 74). Under the terms of the Settlement, Nationwide-Sightcare will establish a non-reversionary cash common fund of \$3,450,000, which will be utilized to fund: (1) approved claims of all eligible and participating Settlement Class Members; (2) notice and administration costs; (3) Court-approved attorneys’ fees, and expenses; and (4) Court-approved service awards. Since the Court granted preliminary approval, the Parties completed the Notice process, with Settlement Class Members responding positively to the Settlement. Accordingly, Plaintiffs respectfully request that the Court enter an Order granting final approval of the Settlement and finally certifying the Settlement Class.

II. SUMMARY OF THE LITIGATION

Plaintiffs Ian Torres, Bonita Odell, and Lacie Morgan individually and separately filed Class Action Complaints against Defendants, before moving to consolidate the actions on January

¹ Unless otherwise indicated, capitalized terms shall have the same meaning as they do in the Motion for Preliminary Approval (ECF 67-1) and Settlement Agreement (ECF 67-2).

² The Settlement does not include USV and no claims against USV are being settled or released. The Settlement is not intended to affect Plaintiffs’ ongoing litigation against USV.

11, 2023. ECF No. 11. After the Court granted the motion to consolidate, Plaintiffs filed a Consolidated Amended Class Action Complaint (“CAC”) on July 31, 2023. ECF No. 46. Plaintiffs’ CAC stated claims for negligence, negligence per se, breach of fiduciary duty, breach of implied contract, unjust enrichment, violations of the Arizona Consumer Fraud Act, violations of the Oklahoma Consumer Protection Act, and violations of the New Jersey Consumer Fraud Act. *See generally id.* The litigation against USV has continued, with the Court ruling on one Motion to Dismiss, a Second Amended Consolidated Class Action Complaint filed, and another Motion to Dismiss fully briefed. *See* ECF Nos. 70, 79, 80, 82, 83.

Class Counsel for Plaintiffs and Settlement Class Members have vast experience with complex litigation and data breach litigation. *See* ECF No. 67-1, Exhibits 2 (Declaration of Ben Barnow) (“Barnow Decl.”); 3 (Declaration of Terence R. Coates) (“Coates Decl.”); and 4 (Declaration of Jean S. Martin) (“Martin Decl.”). As experienced litigators, Class Counsel have litigated dozens of similar data breach class actions. Class Counsel utilized their collective experience to aid Plaintiffs in reaching this present Settlement. ECF No. 67-1, at 3. After engaging in preliminary discussions regarding potential resolution, the Parties participated in a formal mediation with the Honorable Diane M. Welsh (Ret.). *See* Barnow Decl. ¶ 3; Coates Decl. ¶ 3; Martin Decl. ¶ 3. Prior to mediation, Class Counsel comprehensively investigated the factual and legal considerations underlying Plaintiffs’ claims and requested and received discovery from Defendants regarding the Data Breach. ECF No. 67-1 at 4; Barnow Decl. ¶¶ 4–5; Coates Decl. ¶¶ 4–5; Martin Decl. ¶¶ 4–5.

Although the mediation did not result in settlement that day, the Parties continued negotiations, ultimately reaching the terms of the Settlement that the Court preliminarily approved

on May 8, 2024, and that is now before the Court for final approval. On August 9, 2024, Plaintiffs filed their Motion for Approval of Attorneys' Fees, Expenses, and Service Awards. ECF No. 81.

III. THE TERMS OF THE PROPOSED SETTLEMENT

A. Summary of the Settlement Terms

1. Settlement Class

The proposed Settlement establishes the following Settlement Class:

All residents of the United States who are current or former patients, customers, employees, members, or covered dependents of Nationwide Optometry, P.C., Nationwide Vision Center, LLC, Sightcare, Inc., or any of their affiliated or related business entities whose Personal Information was accessed, stolen, or compromised as a result of the Data Breach.

SA ¶ 2.40. The Settlement Class excludes (i) Nationwide-Sightcare, any Entity in which Nationwide-Sightcare has a controlling interest, and Nationwide-Sightcare's officers, directors, legal representatives, successors, subsidiaries, and assigns; (ii) any judge, justice, or judicial officer presiding over the Action and the members of their immediate families and judicial staff; (iii) any individual who timely and validly opts out of the Settlement; and (iv) USV, any Entity in which USV has a controlling interest, and USV's officers, directors, legal representatives, successors, subsidiaries, and assigns. *Id.*

2. Monetary and Non-Monetary Relief

Pursuant to the Settlement Agreement, Nationwide-Sightcare has agreed to create a non-reversionary Settlement Fund in the amount of \$3,450,000 for the benefit of the Settlement Class.

SA ¶ 3.1. The Settlement Fund will be used to pay all Settlement Claims, Settlement Administration Costs, any Service Awards to Class Representatives awarded by the Court, and any attorneys' fees and expenses awarded by the Court to Class Counsel.

Settlement Class Members who submit a timely and valid Claim Form may receive compensation for one of two categories of loss resulting from the incident: a cash payment, or reimbursement of certain losses and Credit Monitoring services. The first category that Settlement Class Members may select is a *Pro-Rata* Cash Payment that is estimated to be \$50, which may vary depending on the number and types of claims actually submitted and determined to be valid.

In the alternative, Settlement Class Members may submit claims for any of the following benefits: (1) Documented Ordinary Expenses up to \$300 per Settlement Class Member, including (i) costs and expenses spent addressing identity theft or fraud; (ii) preventative costs including purchasing credit monitoring, placing security freezes on credit reports, or requesting copies of credit reports for review; and (iii) other documented expenses that were not reimbursed; (2) Documented Extraordinary Expenses up to \$5,000 per Settlement Class Member including actual identity theft losses or expenses or other unreimbursed fraudulent charges resulting from the Data Breach; (3) Lost Time at a rate of \$25 per hour up to 4 hours (for a total of \$100) for time spent dealing with the repercussions of the Data Breach; and (4) Credit Monitoring Services in the form of three-bureau credit and identity theft monitoring services for 24 months.

3. Attorneys' Fees, Reimbursement of Expenses, and Service Awards

The Short Form notice mailed to Settlement Class Members stated that Plaintiffs would seek attorneys' fees no greater than 1/3 of the Settlement Fund, plus reasonable costs and expenses, and Class Representative Service Awards in the amount of \$3,500 per Class Representative. On August 9, 2024, Plaintiffs filed their Motion for Approval of Attorneys' Fees, Expenses, and Service Awards, seeking \$1,150,000 in attorneys' fees, \$13,819.38 in expenses, and Service Awards for the Class Representatives in the amount of \$3,500 each (for a total of \$10,500). For the reasons stated in those papers, which Plaintiffs incorporate herein, these requests are fair and

reasonable when compared to other similar settlements, meaning that this factor supports final approval of the Settlement.

B. Implementation of the Settlement Notice Plan

The Parties utilized Epiq as the Settlement Administrator to assist with disseminating Notice and implementing the Claims process. The Settlement Administrator provided Settlement Class Members with Notice via Short Form Notice distributed by U.S. mail, and Long Form Notice available on the Website established and maintained by the Settlement Administrator for the duration of the Notice process.

On June 22, 2024, the Settlement Administrator mailed 682,461 Short Form Notices via U.S. mail to potential Settlement Class Members with a valid mailing address. Declaration of Cameron R. Azari (“Azari Decl.”) ¶ 14. Short Form Notices returned as undeliverable were re-mailed to any new address available through USPS information and third-party lookup services. *Id.* ¶ 16. Thereafter, a total of 71,863 addresses were updated and Notices were then re-mailed. *Id.* Out of the 682,461 total Class Notices mailed to Settlement Class Members, notice to 612,369 Settlement Class Members was determined to be delivered, totaling an approximately 90% deliverable rate, well within the range accepted in other class actions within the Third Circuit. *Id.* ¶ 18; *see, e.g., Stechert v. Travelers Home & Marine Ins. Co.*, No. 17-0784-KSM, 2022 U.S. Dist. LEXIS 113277, at *21 (E.D. Pa. June 27, 2022) (89.84% deliverable rate “satisfied the requirements of Rule 23(c)(2)(B) and comports with due process”); *Wood v. Saroj & Manju Invs. Phila. LLC*, No. 19-2820-KSM, 2020 U.S. Dist. LEXIS 253960, at *14–15 (E.D. Pa. May 13, 2020) (92.8% deliverable rate was “reasonably calculated to provide notice”). The Federal Judicial Center’s Judges’ Class Action Notice and Claims Process Checklist and Plain Language Guide, which is often relied upon for federal cases, states that, “the lynchpin in an objective determination

of the adequacy of a proposed notice effort is whether all the notice efforts together will reach a high percentage of the class. It is reasonable to reach between 70–95%.³ The notice here, which when taking into account direct notice and targeted digital advertising reached more than 90% of Settlement Class Members, comfortably satisfies due process. Azari Decl. ¶ 33.

In addition to the direct notice sent to Settlement Class Members, the Settlement Administrator implemented a digital notice program, delivering 76,190,881 targeted impressions on social media and the Google Display Network. *Id.* ¶ 23. The digital notice program also included sponsored search listings that were displayed 14,900 times when search engine visitors searched certain key words. *Id.* ¶ 25.

As part of its duties, the Settlement Administrator established a Settlement Website, (www.NationwideSightcare.com) to permit Settlement Class Members to submit Claim Forms online; display important documents like the Long Form Notice, Settlement Agreement, and filings relevant to the Litigation; display upcoming deadlines; and answer frequently asked questions. Azari Decl. ¶ 26. Likewise, the Settlement Administrator established a toll-free telephone number for Settlement Class Members to call with Settlement-related questions. *Id.* ¶ 27.

The Notice program provided Settlement Class Members with key information regarding the Settlement and their rights, including the material Settlement terms; the process of accessing and submitting a Claim Form; the dates and deadlines for opting out of and objecting to the Settlement, as well as the requirements for doing so; the terms of the Motion for Attorneys' Fees, Expenses, and Service Awards; the Final Approval Hearing date; and information regarding the Settlement Website where Settlement Class Members could access the Settlement Agreement and

³ Fed. Jud. Ctr., *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide* 3 (2010), <https://www.fjc.gov/content/judges-class-action-notice-and-claims-process-checklist-and-plain-language-guide-0>.

related documents. The Notice Plan, implemented according to the terms that the Court preliminarily approved on May 8, 2024, complies with the legal requirements of Rule 23.

As of September 25, 2024, the Settlement Administrator has received 15,908 potentially valid Claim Forms from Settlement Class Members. Azari Decl. ¶ 31. This represents 2.3% of the 682,461 Settlement Class Members. This response is in line with the percentage of participating Settlement Class Members when compared to other recent data breach settlements that have been approved. *See, e.g., In re Forefront Data Breach Litig.*, No. 21-cv-887, 2023 U.S. Dist. LEXIS 175848, at *14–15 (E.D. Wis. Mar. 22, 2023) (stating that a claim rate of 1.47% “is generally in line with the rate experienced in other data breach class actions”); *Carter v. Vivendi Ticketing United States LLC*, No. SACV 22-01981-CJC (DFMx), 2023 U.S. Dist. LEXIS 210744, at *28 (C.D. Cal. Oct. 30, 2023) (holding that a 1.6% claim rate “is in line with claim rates in other data breach class action settlements that courts have approved” and collecting cases); *In re Wawa, Inc., Data Sec. Litig.*, No. 19-6019, 2022 U.S. Dist. LEXIS 72569, at *20–21 (E.D. Pa. Apr. 20, 2022) (2.6% claims rate “actually compares favorably with other data breach settlements” and collecting cases); *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 321 (N.D. Cal. 2018) (1.8% claims rate indicates positive reaction).

C. Release of Claims

Each Settlement Class Member who did not submit a valid Opt-Out request will be deemed to have fully, finally, and forever completely released, relinquished, and discharged the Released Claims from all Released Persons. SA ¶ 13.1. The Settlement does not include USV and no claims against USV are being settled or released. The Settlement does not affect Plaintiffs’ ongoing litigation against USV.

IV. ARGUMENT

There is a strong judicial policy in favor of resolution of litigation before trial, particularly in “class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.” *In re CertainTeed Corp. Roofing Shingle Prods. Liab. Litig.*, 269 F.R.D. 468, 484 (E.D. Pa. 2010) (quoting *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010)); *see also O’Brien v. Brain Research Labs, LLC*, Civil Action No. 12-204, 2012 U.S. Dist. LEXIS 113809, at *29–31 (D.N.J. Aug. 8, 2012) (same).

“In this Circuit, a settlement is entitled to an initial presumption of fairness where it resulted from arm’s-length negotiations between experienced counsel, there was sufficient discovery, and there were no objectors and only a small percentage of opt outs.” *Galt v. Eagleville Hosp.*, 310 F. Supp. 3d 483, 493 (E.D. Pa. 2018). These circumstances exist here, and accordingly, the Court should apply a presumption of fairness when reviewing the Settlement. *See, e.g.*, Herbert B. Newberg and Alba Conte, *Newberg on Class Actions* §11.41 at 11–88 (3d ed. 1992); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 796 (3d Cir. 1995) (“*In re Gen. Motors*”) (“[T]he court determines whether negotiations were conducted at arms’ length by experienced counsel after adequate discovery, in which case there is a presumption that the results of the process adequately vindicate the interests of the absentees.”).

A. The Settlement is Fair, Reasonable, and Adequate

Federal Rule of Civil Procedure 23(e) provides that a class action cannot be settled without court approval. To be approved, a class action settlement must be “fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2); *Halley v. Honeywell Int’l, Inc.*, 861 F.3d 481, 488 (3d Cir. 2017). In making this determination, Rule 23(e)(2) provides that the court should consider whether: “(A) the class representatives and counsel have adequately represented the class; (B) the proposal was negotiated

at arm's length; (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2).

Plaintiffs' claims are typical of those of other Class Members because Plaintiffs' PII/PHI, like that of all Class Members, were compromised in the Data Breach. Plaintiffs have fairly and adequately represented and protected the interests of Class Members. Furthermore, Plaintiffs' counsel is competent and experienced in litigating class actions, including data privacy litigation of this kind. *See generally*, ECF No. 67-1, Barnow Decl.; Coates Decl.; and Martin Decl.

Rule 23(e)(2)(B) instructs the Court to consider whether the Settlement was negotiated at arm's length. The Parties only entered into the Settlement Agreement after engaging in months of contested, arm's-length negotiations, including mediation before the Honorable Diane M. Welsh (Ret.). The Parties did not discuss attorneys' fees, expenses, or Class Representatives' Service Awards until after the material terms of the Settlement Agreement were agreed upon. This weighs in favor of granting final approval.

Moreover, and pursuant to Rule 23(e)(2)(C), the Settlement addresses the attendant costs and risks of continued litigation by providing Settlement Class Members with substantial benefits that will be accessible much earlier than if the Litigation were to continue, particularly considering that Plaintiffs' success on the merits is not guaranteed. While risk, expense, and complexity are inherent to all class actions, they are particularly important considerations for data breach litigation, which is an especially risky and rapidly evolving area of law. *See, e.g., In re Sonic Corp.*

Customer Data Sec. Breach Litig., No. 1:17-md-2807, 2019 U.S. Dist. LEXIS 135573, at *14 (N.D. Ohio Aug. 12, 2019) (“Data breach litigation is complex and risky. This unsettled area of law often presents novel questions for courts.”). Class certification is another hurdle that Plaintiffs would need to overcome; success at that stage is not guaranteed. *See, e.g., In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 293 F.R.D. 21, 35 (D. Me. 2013) (denying class certification). Given the speed with which data protection case law is evolving, it is likely that a win by either party will result in appeals, and accordingly, further increased costs and time expended before Plaintiffs and Class Members receive relief, if at all. While Plaintiffs strongly dispute Nationwide-Sightcare’s defenses and believe in the strengths of their case, they are cognizant that success at trial is uncertain. Given this, the Settlement Agreement amounts to a reasonable compromise and substantial benefit to Plaintiffs and Settlement Class Members.

Furthermore, Rule 23(e)(2)(D) requires that the Court determine whether the Settlement treats Class Members equitably. No one group or individual out of the Settlement Class Members is favored or given preferential treatment under the Settlement. All Settlement Class Members are entitled to the same forms of recovery, pursuant to the same guidelines. Thus, this factor also supports granting final approval.

B. The *Girsh* Factors Support Final Approval

Third Circuit courts have traditionally considered class action settlements under the factors delineated in *Girsh v. Jepsen*, 521 F.2d 153, 156 (3d Cir. 1975): (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the

settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. “These factors are a guide and the absence of one or more does not automatically render the settlement unfair.” *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 176 F.R.D. 158, 184 (E.D. Pa. 1997).

1. The Complexity, Expense, and Likely Duration of the Litigation

The first *Girsh* factor considers “the probable costs, in both time and money, of continued litigation.” *In re Cendant Corp. Litig.*, 264 F.3d 201, 233–34 (3d Cir. 1992) (citation omitted). “Where the complexity, expense, and duration of litigation are significant, the Court will view this factor as favoring settlement.” *Bredbenner v. Liberty Travel, Inc.*, No. 09-905, 2011 U.S. Dist. LEXIS 38663, at *33 (D.N.J. Apr. 8, 2011).

This factor certainly weighs in favor of granting final approval, as continued litigation of these complex factual and legal issues would likely be expensive and time consuming. *See In re Gen. Motors*, 55 F.3d at 812 (“this settlement made its remedies immediately available and avoided the substantial delay and expense that would have accompanied the pursuit of this litigation”). Here, the Settlement allows the Parties to avoid litigating these claims for potentially years to come. This area of law is rapidly developing and complex; engaging in continued litigation would take an indefinite amount of time without promising Plaintiffs and Class Members a favorable result. The Settlement Agreement provides substantial benefits to Settlement Class Members while saving them from delay, risk, and the uncertainty related to continued litigation.

2. Reaction of the Settlement Class

The Parties successfully provided notice to over 90% of identified Settlement Class Members, with positive response. As stated above, 15,908 potentially valid Claim Forms from Settlement Class Members were submitted. The deadline for Settlement Class Members to submit

requests for exclusion was August 23, 2024, and as of September 25, 2024 only 41 out of the 682,461 total Settlement Class Members have timely and properly requested exclusion and no Settlement Class Members have submitted an objection. Azari Decl. ¶ 29. This positive response clearly favors granting final approval. *See In re Impinj, Inc. Derivative Litig.*, No. 18-1686-RGA, 2021 U.S. Dist. LEXIS 224687, at *7 (D. Del. Nov. 22, 2021) (“As a general rule, a small number of objectors weighs in favor of approval.”); *In re Ins. Brokerage Antitrust Litig.*, Nos. 1663, 04-5184 (GEB), 05-1079 (GEB), 2007 U.S. Dist. LEXIS 65037, at *47 (D.N.J. Aug. 31, 2007) (“As the Third Circuit articulated in *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir.2005), ‘such a low level of objection is a ‘rare phenomenon.’”), *aff’d*, 579 F.3d 241 (3d Cir. 2009).

3. The Stage of the Proceedings and the Amount of Discovery Completed

The third *Girsh* factor also supports granting final approval. Specifically, “[t]he Court should consider the stage of the proceedings and the amount of discovery completed in order to evaluate the degree of case development that Class Counsel have accomplished prior to settlement.” *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 103 (D.N.J. 2012). “The fact that a case has not proceeded through discovery does not necessarily weigh against settlement approval.” *P. Van Hove BVBA v. Universal Travel Grp., Inc.*, Civil Action No. 11-2164, 2017 U.S. Dist. LEXIS 97909, at *21 (D.N.J. June 26, 2017). Notably, “[e]ven settlements reached at a very early stage and prior to formal discovery are appropriate where there is no evidence of collusion and the settlement represents substantial concessions by both parties.” *In re Impinj*, 2021 U.S. Dist. LEXIS 224687, at *8 (internal quotations and citations omitted).

Here, the Parties have conducted extensive legal research into the merits of the case; engaged in informal settlement discovery; exchanged mediation briefs; and engaged in mediation before the Honorable Diane M. Welsh (Ret.). Although the Settlement was reached before the

Parties had an opportunity to partake in formal discovery, the Parties independently investigated the case and their respective strengths and weaknesses, as indicated by the consolidated complaint, briefing the motion to dismiss, and exchanging informal discovery prior to settlement discussions. The Parties were well-informed of the merits of the case, and this factor does not weigh against final approval. *See In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 436 (3d Cir. 2016) (holding trial court did not abuse its discretion in finding class counsel’s informal discovery sufficient).

4. The Risks of Establishing Liability and Damages at Trial

The fourth, fifth, and sixth *Girsh* factors contemplate the risks of establishing liability, damages, and maintaining certification at trial, and therefore “balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of immediate settlement.” *In re Prudential Ins. Co. of Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283, 319 (3d Cir. 1998). As discussed herein, Plaintiffs face considerable risks because this area of law is rapidly evolving and particularly complex. There is no guarantee this Litigation would be resolved in Plaintiffs’ favor if taken to trial. The Settlement removes any element of uncertainty while providing Settlement Class Members with substantial monetary and non-monetary benefits. This factor, therefore, weighs in favor of granting final approval.

5. The Ability of Nationwide-Sightcare to Withstand a Greater Judgment

“[T]he Third Circuit [has] interpreted this factor as concerning whether the defendants could withstand a judgment for an amount significantly greater than the Settlement.” *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. at 104 (internal quotations omitted). Although Nationwide-Sightcare might be able to withstand a greater judgment, this factor does not support denying final approval. *See id.* at 104–05 (“While Plaintiffs might concede that Defendants could withstand a

larger judgment, they do submit that many settlements are approved even where a settling party has the ability to pay a greater amount[.]” collecting cases and finding factor in favor of final approval). Accordingly, Nationwide-Sightcare’s ability to withstand a greater judgment should not weigh against Plaintiffs here.

6. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and the Attendant Risks of Litigation

The final two *Girsh* factors assess the relative reasonableness of the Settlement considering the best possible recovery and attendant risks of litigation. As the Third Circuit has recognized, “in conducting the analysis, the court must guard against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution.” *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 324 (3d Cir. 2011). Thus, a settlement should be considered “against the realistic, rather than theoretical potential for recovery after trial.” *Id.* at 323. Certainly, courts within the Third Circuit have found even recoveries amounting to a small percentage of a defendant’s maximum exposure fair, reasonable, and adequate. *See, e.g., In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001) (noting that since 1995, settlements for class actions have typically “recovered between 5.5% and 6.2% of the class members’ estimated losses”).

The Settlement here creates a \$3,450,000 non-reversionary common Settlement Fund, providing excellent benefits to Settlement Class Members. Considering that Plaintiffs’ success at trial is uncertain, along with the substantial costs associated with continued litigation, the Settlement provides a great value to Class Members and is well within the range of reasonableness.

C. The Settlement Satisfies the Prudential Factors

Lastly, the Third Circuit has pinpointed additional, nonexclusive elements to be contemplated in determining whether to approve class action settlements. *See In re Prudential*,

148 F.3d at 223–24. The *Prudential* factors generally overlap with the *Girsh* factors, and “are illustrative of additional inquiries that in many instances will be useful for a thoroughgoing analysis of a settlement’s terms.”⁴ *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 350 (3d Cir. 2010). These factors also supports granting final approval.

The first element is satisfied because the Parties engaged in factual and legal investigation and briefed key issues relating to the litigation, along with exchanging informal discovery. While litigating their claims and engaging in settlement discussions, Class Counsel became particularly knowledgeable of the case, and its relative strengths and weaknesses. Accordingly, the Parties were able to enter the Settlement in an informed manner. Moreover, “[f]actors two and three look at the outcomes of claims by other classes and other claimants.” *Vista Healthplan, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1833, 2020 U.S. Dist. LEXIS 69614, at *67 (E.D. Pa. Apr. 20, 2020). Here, while the claims against USV continue to be litigated, all outstanding claims relating to Class Members against Nationwide-Sightcare have been addressed by the Settlement, which has no bearing on outstanding claims against USV. This weighs in favor of granting final approval.

Moreover, the results achieved by Class Counsel on behalf of Plaintiffs and Class Members here are favorable when compared to other data breach settlements. *See, e.g., Cochran v. Kroger Co.*, No. 5:21-cv-01887 (N.D. Cal.) (\$5,000,000 settlement for class of 3,825,200); *Reynolds v.*

⁴ The *Prudential* factors are: (1) 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; (2) the existence and probable outcome of claims by other classes and subclasses; (3) 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; (4) whether class or subclass members are accorded the right to opt-out of the settlement; (5) whether any provisions for attorneys’ fees are reasonable; and (6) whether the procedure for processing individual claims under the settlement is fair and reasonable. *In re Prudential*, 148 F.3d at 323–24.

Marymount Manhattan College, No. 1:22-cv-06846 (S.D.N.Y.) (\$1,300,000 settlement for 191,752 class members).

Finally, the remaining *Prudential* elements are fulfilled because, as recognized when the Notice program was preliminarily approved, Settlement Class Members were offered substantial notice and opportunity to object to and opt out of the Settlement. Likewise, Settlement Class Members were informed of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards with adequate time to object. As of September 25, 2024 no objections have been brought with the objection deadline having passed on August 23, 2024. In their totality, the *Prudential* factors further support granting final approval.

D. The Court Should Finally Certify the Settlement Class

The propriety of certifying a class solely for purposes of settlement is well established in the Third Circuit. *E.g.*, *In re Gen. Motors*, 55 F.3d at 778. Settlement classes must satisfy all the requirements of Rule 23(a) and (b), though the manageability concerns of Rule 23(b)(3) are not at issue for a settlement class. *Id.*; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 593 (1997) (“Whether trial would present intractable management problems . . . is not a consideration when settlement-only certification is requested.”). As demonstrated below, the proposed Settlement Class satisfies these requirements.

1. The Settlement Class Satisfies Rule 23(a)

Rule 23(a) of the Federal Rules of Civil Procedure sets forth the prerequisites for class certification: (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. Fed. R. Civ. P. 23(a); *Sullivan*, 667 F.3d at 296.

a. Numerosity

Rule 23(a)(1) requires that a class be “so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). While there is no minimum class size required to satisfy numerosity, the Third Circuit has indicated that a class size of more than 40 is usually sufficient. *See In re Modafinil Antitrust Litig.*, 837 F.3d 238, 249–50 (3d Cir. 2016). Here, Notice was sent to 682,461 Settlement Class Members, a class size much larger than the 40-member benchmark and larger than many other classes held to satisfy numerosity. *E.g.*, *Gair v. Great Star Tools USA, Inc.*, No. 4:21-CV-00976, 2023 U.S. Dist. LEXIS 163753, at *7 (M.D. Pa. Sept. 13, 2023) (class of approximately 436 satisfied numerosity); *Alfaro v. First Advantage LNS Screening Sols., Inc.*, Civil Action No. 15-5813 (MAS) (TJB), 2017 U.S. Dist. LEXIS 131688, at *5 (D.N.J. Aug. 16, 2017) (class of approximately 8,714 satisfied numerosity).

b. Commonality

Rule 23(a)(2) requires that there be “questions of law or fact common to the class.” Fed. R. Civ. P. 23(a). This commonality requirement is satisfied “if the Named Plaintiffs share at least one question of law fact or law with the grievances of the prospective class.” *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 528 (3d Cir. 2004); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011) (“We quite agree that for purposes of Rule 23(a)(2) even a single common question will do.”).

Plaintiffs’ allegations that Nationwide-Sightcare failed to take adequate steps to protect their PII/PHI raise common questions of fact regarding Nationwide-Sightcare’s actions or inactions. Plaintiffs’ claim also raise common questions of law, such as whether Nationwide-

Sightcare violated Arizona, Oklahoma, or New Jersey consumer protection laws; whether Nationwide-Sightcare had a duty to protect Plaintiffs' and Class Members' PII/PHI; whether Nationwide-Sightcare violated any such duties; and whether Class Members are entitled to damages or other relief. Thus, the commonality requirement is met here. *See In re Google, Inc. Cookie Placement Consumer Priv. Litig.*, No. 12-MD-2358, 2023 U.S. Dist. LEXIS 117696, at *15 (D. Del. July 10, 2023) (finding similar questions satisfied commonality).

c. Typicality and Adequacy

“The adequacy and typicality analyses under Rules 23(a)(3) and 23(a)(4), respectively, often merge and may, therefore, be discussed together.” *Alfaro*, 2017 U.S. Dist. LEXIS 131688, at *7; *see also Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 186 (3d Cir. 2001) (“the commonality and typicality criteria tend to merge into an analysis of adequacy of representation under Fed. R. Civ. P. 23(a)”).

Rule 23(a)(3) requires that the class representatives' claims be typical of the claims of the class. Fed. R. Civ. P. 23(a)(3). “[E]ven relatively pronounced factual differences will generally not preclude a finding of typicality where this is a strong similarity of legal theories’ or where the claim arises from the same practice or course of conduct.” *In re Prudential*, 148 F.3d at 312 (citation omitted). Here, typicality is satisfied because Plaintiffs’ claims are “the same as the claims of the rest of the class and all class members share similar injuries (alleged violations of privacy rights) all flowing from the same alleged conduct” by Nationwide-Sightcare. *In re Google*, 2023 U.S. Dist. LEXIS 117696, at *15.

Regarding adequacy, Rule 23(a)(4) requires that: “the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). This two-step inquiry “tests the qualifications of class counsel and the class representatives. It also aims to root out conflicts

of interest within the class to ensure that all class members are fairly represented in the negotiations.” *In re NFL Players*, 821 F.3d at 428.

“When examining settlement classes, [the Third Circuit has] emphasized the special need to assure that class counsel: (1) possessed adequate experience; (2) vigorously prosecuted the action; and (3) acted at arm’s length from the defendant.” *Id.* at 429. As demonstrated during their appointment as Interim Class Counsel and the Motion for Preliminary Approval, Class Counsel have extensive experience in data breach class actions throughout the United States. Class Counsel vigorously prosecuted this action throughout the litigation, and negotiated the terms of the Settlement at arm’s length. Class Counsel are therefore more than adequate for purposes of certification herein. *See id.* at 429; *In re Prudential*, 148 F.3d at 312.

As for the second step of the inquiry, “[t]he ‘linchpin of the adequacy requirement is the alignment of interests and incentives between the representative plaintiffs and the rest of the class.’” *In re NFL Players*, 821 F.3d at 431 (quoting *Dewey v. Volkswagen AG*, 681 F.3d 170, 183 (3d Cir. 2012)). Here, the claims of all Plaintiffs and Settlement Class Members arise from Nationwide-Sightcare’s alleged failure to protect PII/PHI properly. This alleged failure affected all Plaintiffs and Settlement Class Members in the same way. Accordingly, the interests of Settlement Class Members and Plaintiffs are entirely aligned because they arise from the same course of conduct by Nationwide-Sightcare and rely upon identical legal theories. *See, e.g., In re Google*, 2023 U.S. Dist. LEXIS 117696, at *15. Plaintiffs’ interests are therefore aligned with those of the Settlement Class, and Plaintiffs are adequate representative. *See Alfaro*, 2017 U.S. Dist. LEXIS 131688, at *9.

2. The Settlement Class Satisfies Rule 23(b)(3)

Rule 23(b)(3) authorizes class certification if “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). The Settlement Class satisfies these requirements.

a. Predominance

This requirement “tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” *In re NFL Players*, 821 F.3d at 434 (quoting *Amchem Prods.*, 521 U.S. at 623). This test incorporates the Rule 23(a) commonality requirement, but is more demanding. *Id.* The rule, however, “does not require a plaintiff seeking class certification to prove that every element of her claim is susceptible to classwide proof.” *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 469 (2013). Rather, predominance is determined by whether: “the efficiencies gained by class resolution of common issues are outweighed by individual issues.” *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 231 (D.N.J. 2005). “[T]he focus of the predominance inquiry is on whether the defendant’s conduct was common as to all of the class members, and whether all of the class members were harmed by the defendant’s conduct.” *Sullivan*, 667 F.3d at 298. The Third Circuit has indicated that courts are “more inclined to find the predominance test met in the settlement context.” *In re NFL Players*, 821 F.3d at 434.

Here, the predominance requirement under Rule 23(b) is satisfied for many of the same reasons that the commonality requirement of Rule 23(a) is satisfied. Nationwide-Sightcare’s alleged actions or inactions with respect to protecting PII/PHI affected all members of the Settlement Class, and all Settlement Class Members were harmed as a result of the same alleged conduct by Nationwide-Sightcare. *See In re Prudential*, 148 F.3d at 314–15. To prove their claims,

Plaintiffs “would have to focus on [Nationwide-Sightcare’s] conduct rather than on any individual factual differences in the class members’ conduct.” *Alfaro*, 2017 U.S. Dist. LEXIS 131688, at *7. As such, the predominance requirement is met. *Id.*; *see also Sullivan*, 667 F.3d at 298 (“the focus of the predominance inquiry is on whether the defendant’s conduct was common as to all of the class members, and whether all of the class members were harmed by the defendant’s conduct”).

b. Superiority

Superiority requires “that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). In assessing superiority, the Court considers “the class members’ interests in individually controlling litigation, the extent and nature of any litigation, the desirability or undesirability of concentrating the litigation, and the likely difficulties in managing a class action.”⁵ *In re NFL Players*, 821 F.3d at 435 (citing Fed. R. Civ. P. 23(b)(3)(A)–(D)).

Here, Settlement Class Members have little interest in individually pursuing litigation as the cost of litigating their claims would likely surpass the losses they stand to recoup. *See Varacallo*, 226 F.R.D. at 233; *Alfaro*, 2017 U.S. Dist. LEXIS 131688, at *9 (“absent certification, [class members] would have to conduct individual trials, which would likely prove too costly for individuals”). “Additionally, given the estimated size of the class, individual cases would be excessively burdensome for the Court.” *Alfaro*, 2017 U.S. Dist. LEXIS 131688, at *9. Concentrating the litigation is desirable in the settlement context. *Varacallo*, 226 F.R.D. at 234. Therefore, the superiority requirement is met and supports certifying the Settlement Class. *See, e.g., In re Prudential*, 148 F.3d at 316.

⁵ “In the context of settlement, the desirability or undesirability of concentrating the litigation of the claims in a particular forum are not significant and are essentially irrelevant.” *Varacallo*, 226 F.R.D. at 233 (citing *Amchem Prods.*, 521 U.S. at 620).

V. **CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that this Court: (1) finally certify the Settlement Class for settlement; (2) finally approve the Settlement Agreement; and (3) grant Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards.

Dated: October 1, 2024

Respectfully submitted,

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