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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

NOREEN PERDUE, ELIZABETH DAVIS-BERG, DUSTIN MURRAY, CHERYL ELLINGSON, ANGELA TRANG, GORDON GREWING, and MELISSA WARD, individually and on behalf of all others similarly situated, Plaintiffs, v. HY-VEE, INC., Defendant.	CASE NO. 1:19-cv-01330-MMM **CLASS ACTION** **JURY TRIAL DEMANDED**

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

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Dated: January 12, 2021

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Plaintiffs Noreen Perdue, Elizabeth Davis-Berg, Dustin Murray, Cheryl Ellingson, Angela Trang, Gordon Grewing, and Melissa Ward (the "Plaintiffs") submit this Memorandum of Law in support of their Unopposed Motion for Preliminary Approval of the Class Action Settlement (the "Motion") with Defendant Hy-Vee, Inc. ("Defendant" or "Hy-Vee").

After hard-fought litigation and months of negotiations, the parties reached the settlement agreement (the "Settlement" or "SA") attached as Exhibit 1 to Plaintiffs' Motion. The Settlement is finely tailored to the unique facts of this litigation to make available timely and significant benefits to Settlement Class Members. As shown herein, the Settlement readily satisfies the applicable preliminary approval standard of being fair, reasonable, and adequate; the comprehensive Notice Plan is the best means of providing notice under the circumstances; and the Settlement Class is likely to be certified for Settlement purposes at final approval stage.

RELEVANT FACTUAL BACKGROUND

I. The Litigation

Plaintiffs are consumers whose private and confidential financial information, including credit card and debit card numbers, expiration dates, cardholder names, internal card verification codes, and other payment card information (collectively, "Card Information") was compromised in a massive security breach of Hy-Vee's computer servers and payment card environment commencing on or around December 2018 and continuing through July 2019 (the "Data Breach").

Plaintiffs Noreen Perdue and Dustin Murray filed their lawsuit in this Court on October 15, 2019. ECF No. 1. On November 15, 2019, a similar complaint was filed in the Western District of Wisconsin, *Davis v. Hy-Vee Inc.*, No. 3:19-cv-00941, and another was filed on November 18, 2019 in the Western District of Missouri styled *Gordon Grewing v. Hy-Vee, Inc.*, No. 4:19-cv-00928. Thereafter, counsel for the parties in these actions agreed to coordinate the cases before

the Court. Plaintiffs then filed a First Amended Class Action Complaint ("FAC") on November 25, 2019, which added additional plaintiffs. ECF No. 8. On December 11, 2019, the Court issued an Order appointing Benjamin F. Johns and Andrew W. Ferich of Chimicles Schwartz Kriner & Donaldson-Smith LLP and Ben Barnow and Erich P. Schork of Barnow and Associates, P.C. as Interim Co-Lead Counsel to act on behalf of Plaintiffs and the putative class. ECF No. 17.

The operative Second Amended Complaint ("SAC") was filed on December 30, 2019. ECF No. 21. The SAC alleges, *inter alia*, that Hy-Vee's failure to implement adequate data security measures to protect its customers' sensitive Card Information directly and proximately caused injuries to Plaintiffs and class members; that as a direct and proximate result of Hy-Vee's conduct and data security negligence, a massive amount of customer information was stolen from Hy-Vee and exposed to criminals; and that victims of the Data Breach have had their sensitive Card Information compromised, had their privacy rights violated, been exposed to the increased risk of fraud and identify theft, lost control over their personal and financial information, and otherwise have been injured. The SAC alleges damages caused by Hy-Vee's negligence, negligence per se, breach of contract, and violations of state consumer protection statutes. Additionally, Plaintiffs sought declaratory and injunctive relief.

On January 31, 2020, Hy-Vee responded to the SAC by filing a motion that sought to dismiss the case in its entirety, with prejudice, for failure to state a claim. ECF No. 30. After the motion was fully briefed, the Court issued an Order and Opinion Granting in Part and Denying in Part Defendant's Motion to Dismiss on April 20, 2020. ECF No. 41. Per the Court's opinion, many of Plaintiffs' claims survived, including claims brought pursuant to various state consumer protection statutes.

Prior to agreeing to the Settlement, Proposed Class Counsel conducted an independent investigation, obtained substantial discovery from Hy-Vee, and consulted with an expert to supplement their investigation and the discovery produced. As part of their investigation, Proposed Class Counsel and other attorneys from their firms reviewed dozens of articles relating to the Data Breach. Proposed Class Counsel propounded requests for production of documents on Hy-Vee, participated in four separate meet-and-confer conferences regarding Hy-Vee's responses and objections to same, and reviewed and analyzed thousands of documents produced by Hy-Vee through four separate productions. They served seven third-party subpoenas on the breach forensic investigator Kroll; card issuers American Express, Visa, Mastercard, and Discover; and acquiring banks Worldpay and Shazam. Proposed Class Counsel also worked with Plaintiffs on responding to Hy-Vee's written discovery and producing hundreds of pages of documents relating to same. Additionally, on September 23, 2020, they deposed a corporate representative of Hy-Vee pursuant to Fed. R. Civ. P. 30(b)(6).

II. Settlement Negotiations

All negotiations regarding settlement in this case have been conducted at arm's length, in good faith, and free of any collusion. *See* Declaration of Benjamin F. Johns in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of the Class Action Settlement ("Johns Decl.") ¶ 15, attached to the Motion as Exhibit 2.

After the ruling on Defendant's Motion to Dismiss, the parties commenced discussions regarding the possibility of reaching a negotiated settlement on behalf of Plaintiffs and the Settlement Class. Counsel for Plaintiffs sent a written settlement demand to Defendant and the parties agreed to enlist the aid of a private mediator to continue settlement negotiations.

On October 12, 2020, the parties engaged in a full-day mediation session with private mediator Bennett G. Picker via video conference. Mr. Picker has successfully mediated several data breach class action settlements that have been approved by various district courts.[1] With the assistance of Mr. Picker, the parties reached the proposed Settlement here.

III. The Settlement

As discussed in more detail below, the Settlement provides for cash payments to Settlement Class Members for a variety of expenses incurred due to the Data Breach. SA ¶¶ 2.1–2.3. The Settlement also provides that Hy-Vee shall take certain measures to increase its data security and consumer information protection procedures for a period of two years. SA ¶ 2.4; Johns Decl. ¶ 21. These measures include: appointment of a Group Vice President, IT Security; maintenance of a written information security program; employee training on data security policies and detecting/handling suspicious emails; maintenance of a policy for responding to information security events; compliance with PCI-DSS standards; and requiring third-party vendors to use multi-factor authentication to access Hy-Vee's payment card environment. SA ¶¶ 2.4.1–2.4.6. The Settlement provides that for two years following the settlement agreement, Class Counsel can request a declaration of a Hy-Vee executive attesting that the assessment was performed as required under the Settlement and confirming that Hy-Vee was found to be in compliance with PCI-DSS. *Id.* ¶ 2.4.7.

The Settlement also provides that Hy-Vee has committed no less than $20 million to maintaining data security enhancements. SA ¶ 2.4.

[1] *See, e.g., Gordon v. Chipotle Mexican Grill, Inc.*, Civil Action No. 17-cv-01415-CMA-SKC, 2019 U.S. Dist. LEXIS 215430 (D. Colo. Dec. 16, 2019); *Bray v. Gamestop Corp.*, No. 1:17-cv-01365-JEJ, 2018 U.S. Dist. LEXIS 226221 (D. Del. Dec. 19, 2018).

In exchange for this consideration, Plaintiffs agree to provide Hy-Vee with a release of claims relating to the Data Breach. SA ¶ 1.2. Final approval of the Settlement will also result in the dismissal with prejudice of Plaintiffs' and the Class' claims against Defendant. *Id*. § IV, p. 3.

A. The Settlement Class

Under the Settlement, the parties agreed to certification of the following class (the "Settlement Class") for settlement purposes only:

> All persons residing in the United States who used a payment card to make a purchase at an affected Hy-Vee point-of-sale device during the Security Incident, which as described in the definition of Security Incident occurred during the time frames and at the locations set forth in Exhibit C to the Settlement Agreement and Appendix A to the Publication Notice.

SA ¶ 1.2.6. The Settlement Class specifically excludes: (i) Hy-Vee and its officers and directors; (ii) all Settlement Class Members who timely and validly request exclusion from the Settlement Class; (iii) the Judge assigned to evaluate the fairness of this settlement; (iv) the attorneys representing the Settling Parties in the Litigation; (v) banks and other entities that issued payment cards which were utilized at Hy-Vee during the Security Incident; and (vi) any other Person found by a court of competent jurisdiction to be guilty under criminal law of initiating, causing, aiding, or abetting the criminal activity occurrence of the Security Incident or who pleads *nolo contendere* to any such charge. *Id*.

B. Compensation to Settlement Class Members

As more fully explained in the Settlement, all Settlement Class Members who submit a valid claim during the claim period (which will run until 120 days following commencement of the notice program) will be entitled to expense reimbursement of up to $225 (in total) for the following categories of potential expenses incurred as a result of the Data Breach:

- reimbursement of up to three (3) hours of documented lost time (at $20 per hour) spent dealing with replacement card issues or in reversing fraudulent charges (only

if at least one full hour was spent and if it can be documented with reasonable specificity);

- an additional $20 payment for each credit or debit card on which documented fraudulent charges were incurred that were later reimbursed;
- unreimbursed bank fees, card reissuance fees, overdraft fees, late fees, charges related to unavailability of funds, and over-limit fees;
- long distance telephone charges, postage, cell minutes (if charged by the minute), text messages (if charged by the message), and Internet usage charges (if charged by the minute or by the amount of data usage);
- unreimbursed charges from banks or credit card companies;
- interest on payday loans due to card cancelation or due to over-limit situation;
- costs of credit report(s); and
- costs of credit monitoring and identity theft protection.

SA ¶ 2.1.

Any Settlement Class Members who experienced extraordinary expenses will be eligible for reimbursement in the amount up to $5,000 per claim. *Id.* ¶ 2.2.

In addition to and separate from any payment to Settlement Class Members under the provisions described above, Defendants shall pay any and all notice and administration costs associated with the settlement. *Id.* ¶ 2.6. Significantly, all Settlement Class Members will receive the benefit of Hy-Vee's security enhancements set forth in the Settlement.

C. Notification to Settlement Class Members

The Declaration of Jeanne Finegan (the "Finegan Decl."), which is attached as Exhibit 3 to the Motion, sets forth the proposed notice program (the "Notice Plan") relating to the Settlement. The Notice Plan was designed to reach the greatest practicable number of members of the Settlement Class. *See* Finegan Decl. ¶¶ 3, 13-14.

The Notice Plan has direct email and direct mail components intended to reach potential Settlement Class Members. *Id*. Direct notice will be emailed to all Settlement Class Members for whom Hy-Vee has an email address on file. *Id*. ¶¶ 16-19. For those Settlement Class Members for whom Hy-Vee does not have an email address on file, direct mail notices will be utilized. *Id*. ¶¶ 20-23.

Copies of the proposed Notices are attached as Exhibits E through G to the Settlement. The Notices are designed to be easily understood and include information concerning: the nature of the action and Plaintiffs' claims; the definition of the Settlement Class; the class claims, issues, or defenses; that a Class Member may object to the Settlement Agreement; that any Settlement Class Member may appear in the action and be heard; that the Court will exclude from the Settlement Class any member who requests exclusion and the time and manner of requesting exclusion; the binding effect of a class judgment on members of the Settlement Class, as well as a toll-free number and web address to obtain more information and file a claim. *See* SA Exs. E–G.

D. Plaintiffs' Incentive Awards and Attorneys' Fees, Costs, and Expenses

The parties did not discuss the payment of attorneys' fees, costs, expenses or incentive awards to Class Representatives until after the substantive terms of the Settlement had been agreed upon. Johns Decl. ¶ 15; *see also* SA ¶ 7.1.

Only after reaching agreement on all substantive terms of the Settlement did the parties reach agreement that Defendant will pay (subject to Court approval) Plaintiffs' attorneys' fees in an amount of $727,000, costs and expenses in the amount of $12,000, and incentive awards to the Class Representatives in the amount of $2,000 each.[2] SA ¶¶ 7.2, 7.3. The amounts of any awards

[2] Incentive awards are proposed for the remaining named Plaintiffs only, which includes Noreen Perdue, Elizabeth Davis-Berg, Dustin Murray, Cheryl Ellingson, Angela Trang, Gordon Grewing, and Melissa Ward. Melanie Savoie, Patricia Davis, Harley Williams, and Mary Williams were voluntarily dismissed as Plaintiffs from this action. *See* ECF No. 53.

of attorneys' fees, costs, and expenses and the incentive awards are intended to be considered separately by the Court from the Court's consideration of the fairness, adequacy, and reasonableness of the Settlement. SA ¶ 7.6. The attorneys' fees, costs, expenses, and incentive awards approved by the Court will be paid separately from the compensation Settlement Class Members are entitled to under the Settlement and will not diminish or alter the benefits Settlement Class Members are entitled to in any way. *Id.* ¶ 7.6.

ARGUMENT

I. The Court Should Preliminarily Approve the Settlement

"Federal courts naturally favor the settlement of class action litigation." *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996). Indeed, "[i]t is axiomatic that the federal courts look with great favor upon the voluntary resolution of litigation through settlement. In the class action context in particular, there is an overriding public interest in favor of settlement." *Armstrong v. Bd. of Sch. Dirs. of City of Milwaukee*, 616 F.2d 305, 312–13 (7th Cir. 1980), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998) (internal quotations omitted). Evaluations of fairness, reasonableness, and adequacy require that the facts be viewed in a light most favorable to the settlement. *Isby*, 75 F.3d at 1199.

At the preliminary approval stage, the Court must ascertain whether the proposed settlement is likely to be approved as fair, reasonable, and adequate, and whether the Settlement Class is likely to be certified for settlement purposes at the final approval stage. Fed. R. Civ. P. 23(e)(1)(B). Rule 23(e)(2), as recently amended, provides that in determining whether a settlement is fair, reasonable, and adequate at the final approval stage, a Court must consider whether:

> (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, 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); and (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2). As consideration of these factors demonstrates, the Settlement is likely to be approved as fair, reasonable, and adequate. The Settlement Class is also likely to be certified for settlement purposes only at the final approval hearing.

A. Preliminary Approval of the Settlement is Appropriate

1. The Settlement Class Is Adequately Represented

Proposed Class Counsel have significant experience in data breach consumer class actions such as this, and are well-informed of the legal claims at issue and the risks of this case. Copies of Proposed Class Counsels' firm resumes are attached to the Johns Decl. as Exhibits A and B. Since the inception of this litigation, they have worked diligently to advance Representative Plaintiffs' and other Settlement Class Members' interests. They successfully consolidated the related cases pending against Hy-Vee in multiple jurisdictions without judicial intervention. They also drafted the Consolidated Class Action Complaint and the Second Amended Consolidated Class Action Complaint, successfully opposed Hy-Vee's motions to dismiss, and engaged in substantial discovery.

Representative Plaintiffs have likewise worked diligently on behalf of the Settlement Class. They stepped forward to prosecute this action on behalf of all Settlement Class Members, provided input in connection with the drafting of the complaint and responding to discovery, and reviewed and approved the Settlement.

This factor favors preliminary approval.

2. The Settlement is the Result of Arm's Length Negotiations

The negotiations in this matter occurred at arm's length with the assistance of an experienced mediator. Settlements negotiated by experienced counsel that result from arm's length negotiations are presumed to be fair, adequate, and reasonable. *Lucas v. Kmart Corp.*, 234 F.R.D. 688, 693 (D. Colo. 2006). This deference reflects the understanding that vigorous negotiations between seasoned counsel protect against collusion and advance the fairness consideration of Rule 23(e). As discussed above, the parties reached an agreement on all material terms after weeks of negotiation, including an all-day mediation before Bennett G. Picker. Johns Decl. ¶¶ 12-16. The arm's-length nature of the settlement negotiations and the involvement of an experienced mediator such as Mr. Picker supports the conclusion that the Settlement was achieved free of collusion, and merits preliminary approval. *See Alves v. Main*, No. 01-cv-789 (DMC), 2012 WL 6043272, at *22 (D.N.J. Dec. 4, 2012) (internal quotations omitted) ("The participation of an independent mediator in settlement negotiations virtually insures that the negotiations were conducted at arm's length and without collusion between the parties."); *see also Wornicki*, 2017 U.S. Dist. LEXIS 121535 at *10 (citing the use of an experienced mediator as evidence that the negotiations were conducted at arms' length and thus weighed in favor of a finding that the agreement was fair and reasonable). This factor likewise favors preliminary approval.

3. The Settlement Benefits Being Made Available to Settlement Class Members Are Excellent

The "most important factor relevant to the fairness of a class action settlement" is the "strength of plaintiff's case on the merits balanced with the amount offered in the settlement." *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006). "Because the essence of settlement is compromise, courts should not reject a settlement solely because it does

not provide a complete victory to plaintiffs." *In re AT & T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 347 (N.D. Ill. 2010) (citation omitted).

Balancing the risks of continued litigation, the benefits of the Settlement, and the immediacy and certainty of the significant recovery provided for by the Settlement, supports that the Settlement should be preliminarily approved.

Representative Plaintiffs and Proposed Class Counsel believe the claims asserted in the litigation have merit. They would not have fought so hard to advance the claims if it were otherwise. But they also recognize the substantial risks involved in continuing this litigation. Hy-Vee has aggressively maintained its positions that a litigated class could not be certified, that it would not be found liable at trial, and that Representative Plaintiffs would not be able to prove damages resulting from the Data Breach. While they disagree with Hy-Vee's views, Proposed Class Counsel are mindful of the inherent problems of proof and possible defenses to the claims asserted in the litigation. They also recognize the difficulties in establishing liability on a class-wide basis through summary judgment or even at trial and in achieving a result better than that offered by the Settlement here.

Prosecuting this litigation through trial and appeal would likely be lengthy, complex, and impose significant costs on all parties. *See, e.g., In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000) (recognizing that "[m]ost class actions are inherently complex and settlement avoids the costs, delays, and multitude of other problems associated with them"). Continued proceedings necessary to litigate this matter to final judgment would likely include substantial motion practice, extensive fact discovery, class certification proceedings, further dispositive motions and, of course, a trial and appeal. Given the complex nature of the security breach at issue, a battle of the experts at trial is almost a certainty and, as such, continued

proceedings would likely include substantial expert discovery and significant motion practice related to such. Also, considering the size of the Settlement Class and the amount of money at stake, any decision on the merits would likely be appealed, causing further delay.

The Settlement, in contrast, provides certainty of recovery through the creation of a claim process to reimburse Settlement Class members who submit valid claims. Settlement Class Members are eligible to receive reimbursement of up to $225 for out-of-pocket expenses incurred because of the Data Breach including, *inter alia*, bank fees, card reissuance fees, overdraft fees, late fees, over-limit fees, costs of credit monitoring and identity theft protection, reimbursement of up to three hours of documented time (at the rate of $20 per hour) spent dealing with replacement card issues or in reversing fraudulent charges. Settlement Class Members who had other extraordinary unreimbursed monetary losses because of information compromised as part of the Data Breach are eligible to make a claim for reimbursement of up to $5,000 for actual, documented, and unreimbursed monetary loss caused by the Data Breach.

To receive the benefits of the Settlement, Settlement Class Members need only log on to the settlement website and complete and submit a Claim Form attached as Exhibit D to the Settlement. As discussed above, the Settlement also requires Hy-Vee to implement and maintain specific security measures. This includes spending or commitment of millions of dollars to enhance and maintain enhancement of Hy-Vee's data security (SA ¶ 2.4), and implementing various measures (e.g., appointment of a Group Vice President, IT Security, creation of information security policy, employee training on data security) to reinforce Hy-Vee's information security (SA ¶¶ 2.4.1-2.4.7).

This factor favors approval of the settlement. *See Grant v. Capital Mgmt. Servs., L.P.*, No. 10-CV-WQH BGS, 2014 WL 888665, at *3 (S.D. Cal. Mar. 5, 2014) ("The court shall consider

the vagaries of the litigation and compare the significance of immediate recovery by way of compromise to the mere possibility of relief in the future, after protracted and expensive litigation. In this respect, it has been held proper to take the bird in hand instead of a prospective flock in the bush") (citations and quotations omitted); *see also Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) ("There are weighty justifications, such as the reduction of litigation and related expenses, for the general policy favoring the settlement of litigation."); *In re Sunrise Sec. Litig.*, 131 F.R.D. 450, 455 (E.D. Pa. 1990) (approving a class action settlement because, in part, the settlement "will alleviate . . . the extraordinary complexity, expense and likely duration of this litigation").

4. The Proposed Method of Distributing Relief Supports Preliminary Approval of the Settlement

Rule 23(e)(2)(C)(ii) requires consideration of "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." The advisory committee's notes to this recently enacted provision instruct: "Often it will be important for the court to scrutinize the method of claims processing to ensure that it facilitates filing legitimate claims. A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding." Fed. R. Civ. P. 23(e) advisory committee's note to 2018 amendment.

The Settlement and Claim Form are designed to facilitate the filing of valid claims by Settlement Class Members. To file a claim, Settlement Class Members need only complete a Claim Form and submit it along with documents supporting their claimed losses. Claims made settlements are the norm in payment card data breaches and they are routinely approved by courts. *See, e.g., Gordon*, 2019 U.S. Dist. LEXIS 215430 (approving claims made settlement in a payment card data breach); *Bray*, 2018 U.S. Dist. LEXIS 226221 (same).

All claims will be processed by Heffler Claims Group, an experienced and nationally recognized class action administration firm.

The methods of distributing relief to Settlement Class Members further support preliminary approval of the Settlement is appropriate.

5. The Terms of the Proposed Award of Attorneys' Fees, Costs, and Expenses Supports Preliminary Approval of the Settlement

Rule 23(e)(2)(C)(ii) requires consideration of "the terms of any proposed award of attorney's fees, including timing of payment." The advisory committee's Notes instruct: "Examination of the attorney-fee provisions may also be valuable in assessing the fairness of the proposed settlement. Ultimately, any award of attorney's fees must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class can be a significant factor in determining the appropriate fee award." Fed. R. Civ. P. 23(e) advisory committee's Note to 2018 amendment.

The terms of the proposed attorneys' fee award are consistent with class action best practices. The parties did not discuss attorneys' fees, costs, and expenses until after all substantive elements of the Settlement were agreed upon. SA ¶ 7.1. Additionally, the amount of any attorneys' fee award is intended to be considered by the Court separately from consideration of the fairness, reasonableness, and adequacy of the Settlement. SA ¶ 7.6.

Representative Plaintiffs intend to seek an attorney's fee award of $727,000—a number that the parties agreed upon with the assistance of the mediator through a mediator's proposal. In compliance with Rule 23(h), Plaintiffs will file a motion and supporting memorandum of law seeking this relief with the Court (and will upload to the Settlement website) 21 days prior to the deadline for Settlement Class Members to file objections to the Settlement.

6. The Settling Parties' Agreements

Rule 23(e)(3) provides that "parties seeking approval must file a statement identifying any agreement made in connection with the proposal." After mediation, the Settling Parties reached an informal agreement regarding the material terms. These terms are reflected in the Settlement, which was executed by the Settling Parties on January 12, 2021. Pursuant to §4.3 of the Settlement Agreement, the parties have also agreed upon an opt-out threshold which, if triggered, would give Hy-Vee the option to void the settlement. This letter agreement is being filed under seal separately.

7. The Settlement Treats Settlement Class Members Equally

The Settlement provides all Settlement Class Members with the option of filing claims for reimbursement. As the foregoing analysis demonstrates, the Settlement is likely to be approved as fair, reasonable, and adequate, and should be preliminarily approved.

B. The Settlement Class Is Likely to Be Certified for Settlement Purposes

At the preliminary approval stage, the Court must address whether it "will likely be able to . . . certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B)(ii). "The ultimate decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement." Fed. R. Civ. P. 23 advisory committee notes to 2018 amendments. Because the requirements of Rule 23(a) and 23(b)(3) are satisfied, the Settlement Class is likely to be certified for settlement purposes.

1. The Requirements of Fed. R. Civ. P. 23(a) Are Satisfied

Rule 23(a) sets forth the following prerequisites for certifying a class: "(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). These requirements are satisfied here.

a. The Settlement Class Is So Numerous that Joinder of Individual Members Is Impracticable

Fed. R. Civ. P. 23(a)(1) requires a showing that "the class is so numerous that individual joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). No "magic number" is necessary. *See Swanson v. Am. Consumer Indus.*, 415 F.2d 1326, 1333 n.9 (7th Cir. 1969). Courts in this circuit have certified classes with less than 50 members. *Patrykus v. Gomilla*, 121 F.R.D. 357, 361 (N.D. Ill. 1988). Here, the Settlement Class includes millions of geographically dispersed individuals. Numerosity is satisfied.

b. There Are Questions of Law and Fact Common to the Settlement Class

Rule 23(a)(2) requires the existence of a question of law or fact that is common to all Settlement Class Members and capable of class-wide resolution, the determination of which is central to the validity of all class members' claims. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). "Where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question." *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756 (7th Cir. 2014) (collecting authorities).

Several questions of law and fact common to all Settlement Class Members exist, including: (i) whether Hy-Vee violated common law duties, prohibitions on unfair and deceptive trade practices, other legal obligations, and industry standard practices in causing the Data Breach; (ii) whether Hy-Vee failed to properly secure and protect Settlement Class Members' Personal Information, and (iii) whether Settlement Class Members are entitled to damages, injunctive relief, or other equitable relief, and the measure of such damages and relief. These legal and factual

questions are common to each member of the Settlement Class. The commonality requirement is satisfied.

c. Representative Plaintiffs' Claims Are Typical of the Claims of the Settlement Class

Typicality is satisfied when "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Whether a plaintiff's claims are typical of those of the other class members is closely related to the commonality inquiry. *Keele v. Wexler*, 149 F.3d 589, 595 (7th Cir. 1998). A "plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *Id.* Typicality does not require claims to be "identical," and is generally "liberally construed." *Gasper v. Linvatec Corp.*, 167 F.R.D. 51, 57 (N.D. Ill. 1996).

Representative Plaintiffs and all other Settlement Class Members' claims arise from Hy-Vee's alleged failure to implement and maintain reasonable security measures and the resulting Data Breach, and their claims are based on the same legal theories. As a result, Rule 23(a)(3)'s typicality requirement is satisfied.

d. The Interests of Representative Plaintiffs and Proposed Class Counsel Are Aligned with the Interests of the Settlement Class

Representative parties must "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Adequacy requires that class representatives retain adequate counsel and have no conflicting interests with other class members. *In re Ready-Mixed Concrete Antitrust Litig.*, 261 F.R.D. 154, 168 (S.D. Ind. 2009); *Eggleston v. Chi. Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890, 896 (7th Cir. 1981) (requiring "competent and experienced counsel able to conduct the litigation"). When class representatives and members seek the common goal of the

largest possible recovery for the class, their interests do not conflict. *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 208 (5th Cir. 1981); *see also Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 453 (S.D.N.Y. 2004) ("There is no conflict between the class representatives and the other class members. All share the common goal of maximizing recovery.").

Representative Plaintiffs have demonstrated that they are well-suited to represent the Settlement Class. They each have been involved in this matter since prior to the filings of their initial pleadings, including participating in discovery. Their interests are aligned with those of the other Settlement Class Members. Additionally, Proposed Class Counsel are well-qualified to represent the Settlement Class, as they each possess significant experience leading the prosecution of complex class action matters. *See* Johns Decl., Exs. A, B. The adequacy requirement is satisfied.

2. The Requirements of Rule 23(b)(3) Are Satisfied

Rule 23(b)(3) requires that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members of the class, and that 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). These requirements were added "to cover cases 'in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (quoting Fed. R. Civ. P. 23(b)(3) advisory committee notes to 1966 Amendment).

Both of these requirements are satisfied here.

a. Questions Common to All Settlement Class Members Predominate Over Any Potential Individual Questions

Rule 23(b)(3)'s predominance element requires that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ.

P. 23(b)(3). The requirement "is satisfied when 'common questions represent a significant aspect of [a] case and . . . can be resolved for all members of [a] class in a single adjudication.'" *Messner v. Northshore University Healthsystem*, 669 F.3d 802, 815 (7th Cir. 2012) (quoting 7AA Wright & Miller, Federal Practice & Procedure § 1778 (3d ed. 2011)). Common questions predominate when adjudicating questions of liability common to the class will achieve economies of time and expense. *Chi. Teachers Union v. Bd. of Educ. of Chi.*, No. 14-2843, 2015 WL 4667904, at *14 (7th Cir. Aug. 7, 2015). Predominance is not determined by "counting noses"—determining whether more common issues or individual issues exist regardless of importance. *Butler v. Sears Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013). "An issue 'central to the validity to each one of the claims' in a class action, if it can be resolved 'in one stroke,' can justify class treatment." *Id.* (quoting *Dukes*, 131 S. Ct. at 2551). "Where 'defendants' liability predominates over any individual issues involving plaintiffs, and the Settlement Agreement will insure that funds are available' to compensate plaintiffs, predominance is satisfied." *In re Oil Spill by Oil Rig Deepwater Horizon*, 910 F. Supp. 2d 891, 921 (E.D. La. 2012), *aff'd sub nom. In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014) (quoting *In re Chinese–Manufactured Drywall Prods. Liab. Litig.*, MDL No. 2047, 2012 WL 92498, at *11 (E.D. La. Jan. 10, 2012)).

Representative Plaintiffs assert claims for negligence, negligence per se, breach of contract, and violations of state statutes prohibiting unfair and deceptive trade practices. The key questions in this litigation are whether a singular defendant - Hy-Vee - failed to take reasonable and adequate measures to prevent the Data Breach, detect the Data Breach once initiated, remedy and mitigate the effects of the Data Breach, and to timely notify affected persons of the Data Breach in its aftermath. These questions are common across Plaintiffs and all class members. The predominance requirement is satisfied.

b. A Class Action Is the Superior Method to Fairly and Efficiently Adjudicate the Matter

Rule 23(b)(3) requires a class action to be "superior to other available methods for the fair and efficient adjudication of the controversy," and sets forth the following factors:

> The matters pertinent to the findings include: (A) the class members' interest in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). "[A] class action has to be unwieldy indeed before it can be pronounced an inferior alternative—no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied—to no litigation at all. *Carnegie v. Household Int'l Inc.*, 376 F.3d 656, 661 (7th Cir. 2004). Where, as here, a court is deciding the certification question in the context of a proposed settlement class, questions regarding the manageability of the case for trial purposes do not have to be considered. *See Amchem*, 521 U.S. at 619.

A class action is the only reasonable method to fairly and efficiently adjudicate Settlement Class Members' claims against Hy-Vee. *See, e.g.*, *Phillips Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("[c]lass actions . . . permit the plaintiffs to pool claims which would be uneconomical to litigate individually . . . [in such a case,] most of the plaintiffs would have no realistic day in court if a class action were not available"). Settlement Class Members likely would be unable or unwilling to shoulder the great expense of litigating the claims on their own against Hy-Vee given the comparatively small size of each individual Settlement Class Member's claims. *See Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997) (stating that the "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 superiority requirement is satisfied.

C. The Notice Plan Should Be Approved

Notice serves to "afford members of the class due process which, in the context of the Rule 23(b)(3) class action, guarantees them the opportunity to be excluded from the class action and not be bound by any subsequent judgment." *Peters v. Nat'l R.R. Passenger Corp*., 966 F.2d 1483, 1486 (D.C. Cir. 1992) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173–74 (1974)). The Court must "direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). And, notice must fairly describe the litigation and the proposed settlement and its legal significance. *See, e.g., Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1227 (11th Cir. 1998)) ("[The notice] must also contain an adequate description of the proceedings written in objective, neutral terms, that, insofar as possible, may be understood by the average absentee class member[.]").

The proposed Notice Program satisfies all of these criteria. The Notice will inform Settlement Class Members of the substantive terms of the Settlement, their options for opting-out of or objecting to the Settlement, and how to obtain additional information about the Settlement. *See* SA Exs. E–G. Specifically, the Notice will advise Settlement Class Members of: (i) the pendency of the class action; (ii) the essential terms of the Settlement; and (iii) information regarding Plaintiffs' Counsel's motion for award of attorneys' fees, reimbursement of costs and expenses, and Class Representative incentive awards. The Notice will also provide specifics on the date, time, and location of the Final Fairness Hearing and set forth the procedures, as well as deadlines, for submitting a Claim Form, opting out of the Settlement Class, and objecting to the Settlement or Plaintiffs' motion for award of attorneys' fees, reimbursement of costs and expenses, and Class Representative incentive awards. Hy-Vee will also be fulfilling the notification requirements under the Class Action Fairness Act pursuant to 28 U.S.C. § 1715.

CONCLUSION

The Settlement readily meets the standard for preliminary approval. Representative Plaintiffs therefore respectfully request that this Court enter the proposed order submitted herewith granting preliminary approval of the Settlement, authorizing the dissemination of class notice in accordance with the Notice Plan, and scheduling a Final Fairness Hearing.

Plaintiffs respectfully request that the Final Fairness Hearing be scheduled 150 days after the commencement of the notice program (which the parties propose to begin 30 days after the entry of the preliminary approval order).

Dated: January 12, 2021

Respectfully submitted,

/s/ Benjamin F. Johns

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was filed and served via the Court's electronic case filing system on January 12, 2021, on all counsel of record.

/s/ Benjamin F. Johns
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