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IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO.: 2021-CA-007617-O

SAUL HYMES, ILANA HARWAYNE-GIDANSKY, EDGAR FIERRO, and JOAN LEWIS, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

EARL ENTERPRISES HOLDINGS, INC.

Defendant.

ORDER CERTIFYING SETTLEMENT CLASS, PRELIMINARILY APPROVING CLASS ACTION SETTLEMENT AND DIRECTING NOTICE TO THE SETTLEMENT CLASS

This matter came before the Court on Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement (the "Motion").

CLASS SETTLEMENT APPROVAL PROCESS

Rule 1.220(e) of the Florida Rules of Civil Procedure requires judicial approval of any settlement agreement in a class action. *See* Fla. R. Civ. P. 1.220(e). The purpose of obtaining preliminary approval is to determine if the proposed settlement falls within the range of possible approval. *See Chase Manhattan Mortg. Corp. v. Porcher,* 898 *So.* 2d 153, 156 (Fla. 4th DCA 2005). A court "must conduct a rigorous analysis to determine whether the elements of class action requirements have been met," which requires "heightened scrutiny" when the parties seek "certification of the class and approval of their settlements simultaneously." *Grosso v. Fidelity National Title Ins. Co.*, 983 So.2d 1165, 1170 (Fla. 3d DCA 2008).

To certify a class action for settlement purposes, a court must find that all of the requirements of Rule 1.220(a), Fla. R. Civ. P., and at least one subdivision of Rule 1.220(b), are satisfied. *See Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 106 (Fla. 2011); *Grosso*, 983 So. 2d at 1170.

The Court has considered the Unopposed Motion for Preliminary Approval of Proposed Class Action Settlement ("Motion"), the record, and the Settlement Agreement ("Agreement"), dated as of [DATE], 2021, (attached as Exhibit A to the Joint Motion). Based on these arguments and submissions, the Court hereby sets forth the following findings of fact and conclusions of law upon which this Order is based.

I. FINDINGS OF FACT

Plaintiffs Saul Hymes and Ilana Harwayne-Gidansky brought this class action case against Earl Enterprises Holdings, Inc. ("Defendant" or "Earl Enterprises") on April 3, 2019 in the United States District Court in the Middle District of Florida, No. 6:19-cv-644-Orl-41GJK, (Doc. 1). Subsequently, on May 23, 2019, Plaintiffs Edgar Fiero and Joan Lewis filed a complaint covering the same subject matter in *Fierro v. Earl Enterprises Holdings, Inc.*, No. 6:19-cv-974 (M.D. Fla.). Further, the Parties agreed to consolidate these matters into the present action (the "Litigation"), (Doc. 25), which the United States District Court for the Middle District of Florida granted on August 5, 2019. (Doc. 40). To this end, Plaintiffs filed an amended complaint on August 9, 2019. No. 6:19-cv-644-ORL-41GJK, (Doc. 41), which Plaintiffs further amended on September 4, 2020. In the Second Amended Class Action Complaint, Plaintiffs asserted claims for breach of implied contract, negligence, negligence *per se*, unjust enrichment, breach of confidence, violations of Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. §§ 501.201, *et seq* ("FDUTPA"), and violations of California Civil Code §§ 1798.80, *et seq*. (the "CRA"), California Civil Code § 1798.82

(the "California Breach Notification Law"), and California Unfair Competition Law, California Business & Professions Code §§ 17200, *et seq* ("UCL").

On July 15, 2021, after the United States District Court for the Middle District of Florida *sua sponte* expressed concerns about its jurisdiction under Article III of the United States Constitution, counsel for Plaintiffs and Earl Enterprises agreed to dismiss the consolidated amended complaint in the United States District Court for the Middle District of Florida and continue their negotiations in tstate court. Plaintiffs then filed their Class Action Complaint in the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida (the "Complaint").

According to the Complaint, Defendant failed to ensure that access to its data systems was reasonably safeguarded, failed to acknowledge and act upon industry warnings, failed to use proper security systems, and as a result, Class Members' personally identifiable information ("PII") was stolen via malicious software installed by unauthorized third parties on the point-of-sale ("POS") systems at Defendant's restaurants from approximately May 23, 2018 and March 18, 2019 (the "Data Breach Incident"). The Complaint also alleges that Defendant failed to provide timely and adequate notice to Plaintiffs and other Settlement Class Members that their PII had been stolen. Earl Enterprises denies the allegations in the Complaint.

After good faith, arm's-length negotiations overseen by mediator Rodnay A. Max, *Esq*., the Parties, through counsel, entered into a Settlement Agreement and Release ("Settlement Agreement" or "Settlement") providing significant benefits on a class-wide basis. The Parties have agreed to settle this Litigation, pursuant to the terms of the Settlement Agreement, and subject to the approval and determination of the Court as to the fairness, reasonableness, and adequacy of the Settlement which, if approved, will result in dismissal of this action with prejudice.

The Settlement provides both injunctive and monetary relief. Under the Settlement, Defendant agrees to establish a Settlement Fund of $650,000 for payment of valid claims for cash payments submitted by Settlement Class Members, costs of notice, the Settlement Administrator's fees and costs, attorneys' fees, costs, and expenses, and incentive awards for the Representative Plaintiffs. Settlement Class Members may submit claims for: 1) a cash payment for reimbursement of up to $5,000.00 per Settlement Class Member for documented out-of-pocket expenses incurred as a result of the Data Breach and time spent dealing with the Data Breach; or 2) compensation in the form of two $10.00 promotional cards that may be redeemed at either Planet Hollywood or Buca di Beppo restrauants for non-documented losses and time spent dealing with the repercussions of the Data Breach. Defendant has also agreed to take remedial, data security measures, including: 1) implementing an EMV/P2PE credit card solution for card-present transactions; 2) implementating an intrusion prevention system and an intrusion detection system; 3) developing an attendance required security awareness training program to educate employees about computer security, corporate policies and procedures, and the most prevalent security threats; 4) implementing file integrity monitoring (FIM) to test operating systems, databases, and application files for tampering; and 5) and promptly complying with Payment Card Industry Data Security Standards (PCI-DSS).

II. CONCLUSIONS OF LAW

Having reviewed the Settlement Agreement, including the exhibits attached thereto, and all prior proceedings herein, and for good cause shown, it is hereby ordered that Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement is granted as set forth herein (the "Preliminary Approval Order").

1. **Definitions.** The capitalized terms used in this Preliminary Approval Order shall have the same meaning as defined in the Settlement Agreement except as may otherwise be indicated.

2. **Jurisdiction.** The Court concludes that it has personal jurisdiction over all members of the Settlement Class and has subject matter jurisdiction, including jurisdiction to preliminarily approve the proposed settlement and conditionally certify a class for settlement purporses.

3. **Class Certification for Settlement Purposes Only.** For settlement purposes only, the Court provisionally certifies a class in this matter defined as follows:

> All residents of the United States whose Personal Information was exposed or potentially exposed as a result of the Data Breach Incident.
>
> Excluded from the Settlement Class are Defendant and any of its officers and directors; all Settlement Class Members who timely and validly request exclusion from the Settlement Class; the Judge and Magistrate Judge to whom the Litigation is assigned and any member of those Judges' staffs or immediate family members; and 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 or occurrence of the Data Breach Incident or who pleads *nolo contendere* to any such charge.

A. Numerosity, Fla. R. Civ. P. 1220(a)(1)

Numerosity is satisfied on this record because joinder of more than two million people into a single action would be impracticable. *See Estate of Bobinger v. Deltona Corp.*, 563 So. 2d 739, 742 (Fla. 2d DCA 1990) (noting that numerosity requires "specifying the approximate number in the class" and that the proposed class of over 400 persons was sufficiently numerous).

B. Commonality, Fla. R. Civ. P. 1220(a)(2) and (b)(3)

Commonality is satisfied where "the claim of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim of each member in the class." *Bouchard Transp. Co. v. Updegraff*, 807 So. 2d 768, 771 (Fla. 2d DCA 2002) ("The class of residential property owners whose property was physically invaded by the pollution meets the test of commonality and predominance."). The Court finds that the commonality requirement is satisfied, for purposes of approving the Settlement Agreement and conditionally certifying the Settlement Class in that all members of the class are customers of Earl Enterprises who used their payment cards at an affected restaurant and whose payment card information was disclosed without authorization in the data breach between May 23, 2018 and March 18, 2019.

Additionally, the Court finds that Plaintiffs' and the Settlement Class' claims arise from a common course of conduct and each shares a common interest in obtaining relief from Earl Enterprises as it relates to how Earl Enterprises collects, stores, and protects payment card information for customers. These commonalities satisfy the requirement for the purpose of preliminarily approving the Settlement Agreement and certifying the Settlement Class.

C. Typicality, Fla. R. Civ. P. 1220(a)(3)

The Court finds that the typicality requirement is satisfied for purposes of preliminarily approving the Settlement Agreement and certifying the Settlement Class based on the similarity of Plaintiffs' claims with those of the Settlement Class. A common course of action by the defendant against the purported class and class representatives suffices to show typicality. *See Safeway Premium*, 73 So. 3d at 114. Plaintiffs' claims are typical of those of other class members because Plaintiffs, like that of every other class member, allege that Earl Enterprises unlawfully disclosed their personal information.

D. Adequacy, Fla. R. Civ. P. 1220(a)(4)

The Court finds that Plaintiffs have no interests antagonistic to the Class they seek to represent and that Class Counsel is experienced in litigating class action cases. *See id.* at 115. Accordingly, the adequacy requirement is satisfied for purposes of approving the Settlement Agreement and conditionally certifying the Settlement Class.

E. Rule 1.220(b) Requirements

The Court also finds that the requirements of Rule 1.220(b)(1)(A), 1.220(b)(2) and 1.220(b)(3) have been satisfied for the purposes of approving the Settlement Agreement and certifying the Settlement Class. In particular, the Court, in its review of the factual record, finds that "the prosecution of separate claims or defenses by or against individual members of the class would create a risk of . . . inconsistent or varying adjudications concerning individual members of the class which would establish incompatible standards of conduct for the party opposing the class." Fla. R. Civ. P. 1.220(b)(1)(A). Florida law interprets this rule to mean that "it is not enough that separate litigation may result in inconsistent adjudications." Rather, the Rule explicitly requires that such adjudication impose "incompatible *standards of conduct* on the party opposing the class." *Seven Hills, Inc. v. Bentley*, 848 So. 2d 345, 354 (Fla. 1st DCA 2003) (emphasis added) (citation omitted). The Court finds here that the prosecution of separate claims or defenses by individual members of the class would create a risk of inconsistent or varying adjudications as different courts may impose on Earl Enterprises different standards of conduct regarding the Earl Enterprises' collection, storage, maintenance, and disclosure of customers' payment card inforamtion. This potential for inconsistencies could put Earl Enterprises in the untenable "position of being unable to comply with one judgment without violating the terms of another judgment," *id.* at 354, and could potentially "impair its ability to pursue a uniform continuing

course of conduct," *id.* at 353, in implementing changes to its information security practices and organization as agreed to in the Settlement Agreement. The Court also finds that certification under Rule 1.220(b)(2) and 1.220(b)(3) is appropriate where Plaintiffs allege that Earl Enterprises has failed to protect the payment card information of the entire class, making final injunctive relief and monetary damages concerning the class as a whole appropriate.

Accordingly, the Court finds that the Settlement Class may be certified under Rule 1.220(b)(1)(A), 1.220(b)(2) and 1.220(b)(3).

F. Approval of Notice

The Court finds that the form, content, and method of giving notice to the Settlement Class as described in the Settlement Agreement (including the exhibits thereto): (a) will constitute the best practicable notice to the Settlement Class; (b) are reasonably calculated to apprise Settlement Class Members of the pendency of the action, the terms of the proposed Settlement, and their rights under the proposed Settlement, including but not limited to their rights to object to or exclude themselves from the proposed Settlement and other rights under the terms of the Settlement Agreement; (c) are reasonable and constitute due, adequate, and sufficient notice to all Settlement Class Members and other persons entitled to receive notice; and (d) meet all applicable requirements of law and due process. The Court further finds that the Notice is written in plain language, uses simple terminology, and is designed to be readily understandable by Class Members.

The Court approves, in form and content: (a) the proposed Notice of Pendency of Class Action, substantially in the form attached to the parties' Settlement Agreement and motion as Exhibit B (the "Publication Notice"); (b) the long form notice, substantially in the form attached to the parties' Settlement Agreement and motion as Exhibit C (the "Long Notice"); and (c) the

claim form, substantially in the form attached to the parties' Settlement Agreement and motion as Exhibit D (the "Claim Form"). Non-material modifications to these Exhibits may be made without further order of the Court. The Settlement Administrator is directed to carry out the Notice Program in conformance with the Settlement Agreement.

The Court Rules that the mailing of the Postcard Notice: (a) will fully satisfy the requirements of Rule 1.220, Florida Rules of Civil Procedure, due process, and applicable law; (b) is the best notice practicable; and (c) shall constitute due and sufficient notice of the Settlement and Fairness Hearing to Class Members.

At or before the final Fairness Hearing, the parties shall file with the Court a proof of mailing of the Class Notice.

No later than **30 days from the date of this Order** (the "Notice Date"), the Settlement Administrator shall commence the Notice Program, which shall be completed in the manner set forth in Section VII and Exhibits B–D of the Settlement Agreement.

4. Representative Plaintiffs and Settlement Class Counsel.

Plaintiffs Saul Hymes, Ilana Harwayne-Gidansky, Edgar Fierro, and Joan Lewis are hereby provisionally designated and appointed as the Representative Plaintiffs. The Court provisionally finds that the Representative Plaintiffs are similarly situated to absent Settlement Class Members and therefore typical of the Settlement Class and will be adequate Representative Plaintiffs.

The Court finds that the following counsel are experienced and adequate counsel and are hereby provisionally designated as Settlement Class Counsel: John A. Yanchunis and Ryan J. McGee of Morgan & Morgan Complex Litigation Group, Matthew M. Guiney and Carl Malmstrom of Wolf Haldenstein Adler Freeman & Herz, LLP, Mark S. Reich and Courtney

Maccarone of Levi & Korsinsky, LLP, and Gayle M. Blatt of Casey Gerry Schenk Francavilla Blatt & Penfield, LLP, as Class Counsel.

5. **Administration.** The Court appoints Postlethwaite & Netterville as the Settlement Administrator, with responsibility for class notice and claims administration. All reasonable costs and expenses associated with providing notice to Settlement Class Members including, but not limited to, the Settlement Administrator's fees, shall be paid from the Settlement Fund.

6. **Final Approval Hearing.** A Final Approval Hearing shall be held on February 12, 2024 at 9:30 A.M. in Courtroom 10-A of the Orange County Courthouse, 425 N. Oranage Avenue, Orlando, Florida 32801, to determine, among other things, whether: (1) this matter should be finally certified as a class action for settlement purposes; (2) the Settlement should be finally approved as fair, reasonable, and adequate; (3) the action should be dismissed with prejudice pursuant to the terms of the Settlement Agreement; (4) Settlement Class Members should be bound by the releases set forth in the Settlement Agreement; (5) any motion of Settlement Class Counsel for an award of attorneys' fees, costs, and expenses (the "Fee Request") should be approved; and (6) the motion of Representative Plaintiffs for Service Awards (the "Service Award Request") should be approved.

The motion for final approval of the Settlement, Fee Request, and Service Award Request shall be filed with the Court at least **45 days prior to the Final Approval Hearing**. By no later than **21 days prior to the Final Approval Hearing**, the Parties shall file responses, if any, to any objections, and any replies in support of final approval of the Settlement and/or the Service Award Request and Fee Request.

7. **Exclusion from Class.** Any Settlement Class Member who wishes to be excluded from the Settlement Class must submit an exclusion request electronically on the Settlement

Website, or mail a written notification of the intent to exclude himself or herself from the Settlement Class to the Settlement Administrator at the address provided in the Notice, postmarked no later than **120 days after entry of the Preliminary Approval Order** (the "Opt-Out Deadline"). The written notification must include the individual's name and address; a statement that he or she wants to be excluded from the Action; and the individual's signature.

The Settlement Administrator shall provide the Parties with copies of all completed opt-out notifications, and a final list of all who have timely and validly excluded themselves from the Settlement Class, which Settlement Class Counsel may move to file under seal with the Court no later than **10 days prior to the Final Approval Hearing**.

Any Settlement Class Member who does not timely and validly exclude herself or himself from the Settlement shall be bound by the terms of the Settlement. If Final Judgment is entered, any Settlement Class Member who has not submitted a timely, valid written notice of exclusion from the Settlement Class shall be bound by all proceedings, orders, and judgments in this matter, including but not limited to the Release, including Settlement Class Members who have previously initiated or who subsequently initiate any litigation against any or all of the Released Parties relating to the claims and transactions released in the Settlement Agreement. All Settlement Class Members who submit valid and timely notices of exclusion from the Settlement Class shall not be entitled to receive any monetary benefits of the Settlement.

8. **Objections and Appearances.** A Settlement Class Member who complies with the requirements of this paragraph may object to the Settlement, the Service Award Request, or the Fee Request.

(a) Each Settlement Class Member desiring to object to the Settlement Agreement shall submit a timely written notice of his or her objection. To be timely, written notice of an objection

in the appropriate form must be postmarked to the Clerk of the Court at the address listed in the Notice, no later than **120 days after entry of the Preliminary Approval Order** (the "Objection Deadline").

For an objection to be considered by the Court, the objection must also set forth:

a. the objector's full name, address, email address (if any), and telephone number;
b. information identifying the objector as a Settlement Class Member, including proof that the objector is a member of the Settlement Class;
c. the objector's signature and, if applicable, the signature of the objector's duly authorized attorney or other duly authorized representative (along with documentation setting forth such representation);
d. a written statement of all grounds for the objection, accompanied by any legal support for the objection the objector believes applicable;
e. a statement confirming whether the objector intends to personally appear and/or testify at the Final Approval Hearing; and

Any Settlement Class Member who fails to comply with the requirements for objecting in this Paragraph shall waive and forfeit any and all rights he or she may have to object to the Settlement Agreement, and shall be bound by all the terms of the Settlement Agreement, this Order, and by all proceedings, orders, and judgments in this matter, including, but not limited to, the Release in the Settlement Agreement if Final Judgment is entered.

Any Settlement Class Member, including a Settlement Class Member who files and serves a written objection, as described above, may appear at the Final Approval Hearing, either in person or through counsel hired at the Settlement Class Member's expense, to object to or comment on the fairness, reasonableness, or adequacy of the Settlement, the Service Award Request, or the Fee Request. If the objecting Settlement Class Member intends to appear at the Final Approval Hearing through counsel, he or she must also identify the attorney(s) representing the objecting Settlement Class Member who will appear at the Final Approval Hearing and include the attorney(s) name,

address, phone number, e-mail address, and state bar(s) to which counsel is admitted, as well as the associated state bar numbers.

If Final Judgment is entered, any Settlement Class Member who fails to object in the manner prescribed herein shall be deemed to have waived his or her objections and shall be forever barred from making any such objections in this action or in any other proceeding or from challenging or opposing, or seeking to reverse, vacate, or modify any approval of the Settlement Agreement, the Service Award Request, or the Fee Request.

9. **Claims Process and Administration.** The Parties have agreed to a process for assessing and determining the validity and value of claims and a payment methodology to Settlement Class Members who submit a timely, valid claim form. The Court preliminarily approves the Claims Process described in Article III of the Settlement Agreement, and directs that the Settlement Administrator effectuate the distribution of settlement consideration according to the terms of the Settlement Agreement, should the Settlement be finally approved.

Settlement Class Members who qualify for and wish to submit a Claim Form shall do so in accordance with the requirements and procedures specified in the Notice and the Claim Form. If Final Judgment is entered, all Settlement Class Members who qualify for any benefit under the Settlement but fail to submit a claim in accordance with the requirements and procedures specified in the Notice and the Claim Form shall be forever barred from receiving any such benefit, but will in all other respects be subject to and bound by the provisions in the Settlement Agreement, the Release included in that Agreement, and the Final Judgment.

10. **Termination of Settlement.** This Order shall become null and void and shall be without prejudice to the rights of the Parties, all of whom shall be restored to their respective positions existing immediately before this Court entered this Order, if the Settlement is not finally

approved by the Court or is terminated in accordance with the Settlement Agreement. In such event, the Settlement and Settlement Agreement shall become null and void and be of no further force and effect, and neither the Settlement Agreement nor the Court's orders, including this Order, relating to the Settlement shall be used or referred to for any purpose whatsoever.

11. **Use of Order.** This Order shall be of no force or effect if Final Judgment is not entered or if there is no Effective Date and shall not be construed or used as an admission, concession, or declaration by or against Defendant of any fault, wrongdoing, breach, liability, or the certifiability of any class. Nor shall this Order be construed or used as an admission, concession, or declaration by or against the Representative Plaintiffs or any other Settlement Class Member that his or her claim lacks merit or that the relief requested is inappropriate, improper, unavailable, or as a waiver by any Party of any defense or claim he, she, or it may have in this litigation or in any other lawsuit.

12. **Further Revisions.** Class Counsel and counsel for Defendant are hereby authorized to use all reasonable procedures in connection with the approval and administration of the Settlement that are not materially inconsistent with this Preliminary Approval Order or the Settlement Agreement including making, without further approval of the Court, minor corrections or non-substantive changes to the form or content of the Notice that they jointly agree is reasonable or necessary.

13. **Stay of Proceedings.** Except as necessary to effectuate this Order, all proceedings and deadlines in this matter are stayed and suspended pending the Final Approval Hearing and issuance of the Final Judgment, or until further order of this Court.

14. **Continuance of Hearing.** The Court reserves the right to adjourn or continue the Final Approval Hearing and related deadlines without further written notice to the Class. If the

Court alters any of those dates or times, the revised dates and times shall be posted on the website maintained by the Settlement Administrator.

15. **Summary of Deadlines.** The preliminarily approved Settlement shall be administered according to its terms pending the Final Approval Hearing. Deadlines arising under the Settlement Agreement and this Order include but are not limited to:

1. **Notice Deadline:** October 7, 2023
   [30 days after entry of this Order]

2. **Opt-Out and Objection Deadlines:** January 5, 2023
   [120 days after entry of this Order]

3. **Claims Deadline:** January 5, 2023
   [120 days after entry of this Order]

4. **Motion for Final Approval:** December 29, 2023
   [no later than 45 days before the Final Approval Hearing]

5. **Motion for Service Awards, Attorneys' Fees and Costs:** November 10, 2023
   [no later than 45 days before the Final Approval Hearing]

6. **Final Approval Hearing:** February 12, 2024 at 9:30 A.M.
   [No earlier than 150 days after entry of this Order]

The dates set in this Order should be used as appropriate in the Notices to the Class.

IT IS SO ORDERED this 7 day of September, 2023.

Honorable A. James Craner
Circuit Court Judge