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

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.	**Case No. 2021-CA-007617-O** **CLASS REPRESENTATION**

PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Plaintiffs Saul Hymes, Ilana Harwayne-Gidansky, Edgar Fierro, and Joan Lewis ("Plaintiffs") now respectfully move on an unopposed basis for preliminary approval of a proposed class action settlement with Defendant Earl Enterprises, Inc. ("Defendant" or "Earl Enterprises"), the terms of which are set forth in the "Settlement Agreement and Release" ("Settlement Agreement" or "SA") attached hereto as **Exhibit 1**.[1]

I. INTRODUCTION

This Action was initiated following Earl Enterprises' announcement that it was the subject of third-party cyberattacks involving malware installed on Earl Enterprises' point-of-sale ("POS") systems for approximately ten (10) months, resulting in the exfiltration of its customers' personally identifiable information ("PII"), with the attacker claiming that the attack included approximately 2.15 million stolen card numbers (the "Data Breach Incident"). Plaintiffs allege, *inter alia*, that

[1] Unless otherwise defined herein, all capitalized terms have the same force, meaning, and effect as ascribed in the Definitions embodied in Article II of the Settlement Agreement (SA ¶¶ 2.01-2.35).

Earl Enterprises was negligent, breached its contracts with its customers, was unjustly enriched, breached customers' confidence, and violated state consumer protection laws when it failed to protect Plaintiffs' PII from being compromised in the Data Breach Incident at issue. As a result of swift litigation and mediation, the Parties reached a hard-fought and arms-length resolution.

The Settlement is fair, reasonable, and adequate, and is in the best interests of the nationwide Settlement Class Members ("Class Members"). The Settlement squarely addresses the issues raised in the Action and affords Class Members significant monetary and nonmonetary relief: tiered monetary relief to compensate Settlement Class Members for inconveniences and losses, and injunctive relief designed to better protect Earl Enterprises restaurants against similar data breaches that may again compromise consumers' PII. The Settlement compares favorably with settlements in similar litigation and was reached only after intensive, arms-length negotiations before a neutral and experienced mediator and subsequent, multiple negotiation sessions following that mediation. If approved, the Settlement will resolve all claims arising out of the Data Breach Incident and will provide Settlement Class Members with the precise relief this Litigation was filed to obtain. In light of the current pandemic that has upended the lives and finances of millions, immediate relief is now more valuable than ever.

Accordingly, pursuant to Florida Rule of Civil Procedure 1.220 and the Settlement Agreement, Plaintiffs respectfully request that the Court enter an order: (1) provisionally certifying the proposed Settlement Class; (2) preliminarily approving the Settlement; (3) approving the proposed Notice Program and the form and content of the Claim Form and Notices attached to the Settlement Agreement as Exhibits B, C, and D;[2] (4) appointing Postlethwaite & Netterville to serve

[2] Unless otherwise stated, the Exhibits are to the Settlement Agreement.

as Settlement Administrator; (5) approving the proposed opt-out and objection procedures; (6) appointing Plaintiffs as Representative Plaintiffs; (7) appointing 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, Rosemary M. Rivas of Levi & Korsinsky, LLP, and Gayle M. Blatt of Casey Gerry Schenk Francavilla Blatt & Penfield, LLP, as Settlement Class Counsel; and (8) scheduling a Final Approval Hearing at a time and date convenient for the Court.[3]

II. SUMMARY OF THE LITIGATION

On March 29, 2019, Defendant announced that it had "become aware of a data security incident potentially affecting payment card information of a limited number of guests that dined at certain of Earl Enterprises' restaurants." Defendant included a list of approximately 100 affected restaurants (largely its chain Buca di Beppo, but also other restaurants including Planet Hollywood and Earl of Sandwich) and stated that the breach involved transactions at restaurants between May 23, 2018, through March 18, 2019.[4] The Data Breach Incident involved an estimated 2.15 million cards that were located and for sale on the dark web through a site called "Joker's Stash" beginning as early as February 20, 2019, according to blogger Brian Krebs.

Plaintiffs allege that Defendant failed to ensure that access to the affected data systems was reasonably safeguarded, failed to acknowledge and act upon industry warnings, failed to use proper security systems and protocols to detect and deter the type of attack that occurred, and failed to provide timely and adequate notice to Plaintiffs and other proposed Class Members that their PII had been stolen, putting Plaintiffs and the proposed Class Members at a substantially increased

[3] A proposed Preliminary Approval Order entering the relief requested herein is attached to the Settlement Agreement as Exhibit A.

[4] *Id.*

risk of identity theft. Defendant disputes those allegations.

Following briefing a motion to dismiss and Plaintiffs' responses thereto, the Parties agreed to and did retain Rodney Max, *Esq*., a highly experienced mediator, to assist the Parties in settlement negotiations. Declaration of John A. Yanchunis, filed concurrently herewith ("Yanch. Dec."), ¶ 15, attached hereto as **Exhibit 2**. Prior to the mediation, the Parties briefed their respective positions on the facts, claims, defenses, and assessments of the risk of litigation. *Id*. ¶ 16. The Parties also submitted a draft settlement term sheet prepared by Plaintiffs, which was then used as the foundation for the ensuing negotiations. *Id*.

On February 19, 2020, the Parties, through their respective counsel, engaged in a full-day mediation session before Mr. Max. The negotiations were hard-fought throughout and the settlement process was conducted at arm's length. *Id*. With the assistance of Mr. Max, the Parties were able to reach an initial resolution to the Litigation on a class-wide basis that provides both injunctive and monetary relief to Settlement Class Members. Yanch. Dec., ¶ 16. On February 20, 2020, the Parties had reached a term sheet outlining the substance of settlement. During the ensuing months, the Parties continued the exchange of information and negotiations as to the final details of the Settlement Agreement. Based on Plaintiffs' counsel's independent investigation of the relevant facts and applicable law, experience with other data breach cases, the information provided by Defendant, and the strengths and weaknesses of the Parties' respective positions (including the defenses articulated in Defendant's Motion to Dismiss and Reply to Plaintiffs' Opposition thereto), Plaintiffs' counsel determined that the Settlement is fair, reasonable, adequate, and in the best interest of the Settlement Class. Yanch. Decl., ¶ 23.

The Parties jointly selected Postlethwaite & Netterville to serve as the Settlement Administrator. SA ¶ 2.20. The Parties worked together to refine the details of the proposed Notice

Program and each document comprising the Class Notice, which are embodied in the Settlement Agreement and the Exhibits attached thereto. Yanch. Dec., ¶ 34.

III. THE PROPOSED SETTLEMENT TERMS

The material terms of the proposed Settlement are summarized as follows:

A. The Settlement Class

Pursuant to the Settlement Agreement, Plaintiffs request that the Court provisionally certify the following Settlement Class:

> All residents of the United States whose Personal Information was exposed or potentially exposed as a result of the Data Breach Incident.

SA ¶ 2.21.[5]

B. Compensation to Settlement Class Members

1. Cash Payment for Reimbursement of Out-of-Pocket Expenses

All Class Members who submit a valid and timely Claim Form and supporting documentation are eligible to receive up to $5,000.00 per Settlement Class Member for reimbursement for documented out-of-pocket expenses incurred as a result of the Data Breach.[6] To receive payment for out-of-pocket expenses, the Settlement Class Member must complete the

[5] 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 action 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. SA, ¶ 2.21.

[6] Class Members may claim reimbursement for one or more of the following: (i) costs and expenses spent addressing identity theft or fraud; (ii) losses caused by restricted access to funds (*i.e.*, costs of taking out a loan, ATM withdrawal fees); (iii) preventative costs including purchasing credit monitoring, placing security freezes on credit reports, or requesting copies of credit reports for review; (iv) late fees, declined payment fees, overdraft fees, returned check fees, customer service fees, and/or card cancellation or replacement fees; (v) unauthorized charges on credit or debit card that the Settlement Class Member sought to have the card issuer reverse but that were not reimbursed; (vi) other documented losses incurred as a result of the Data Breach Incident and that were not reimbursed; and (vii) up to four hours of documented time spent for personal investigation and remediation relating to the Data Breach Incident (calculated at the rate of $20.00 per hour). SA ¶ 3.03.

appropriate section of the Claim Form and provide documentation supporting a claim for out-of-pocket expenses, which could include but is not limited to, a receipt from an affected restaurant reflecting payment by a payment card during the Data Breach Incident's Relevant Period; a payment card statement reflecting a charge at an affected restaurant during the Data Breach Incident's Relevant Period; or, notification from a bank or financial institution that a payment card was compromised as a result of the Data Breach Incident. SA ¶ 3.03.

To be considered valid, all Claim Forms and related documentation must be postmarked (or submitted electronically in accordance with the requirements for electronic submission of a Claim Form) on or before the Claims Deadline, which the Parties propose shall be the 90th day after the commencement of the Notice Program. SA ¶ 3.04(b).

C. Earl Enterprises Restaurant Vouchers

For those Settlement Class Members who do not have or cannot demonstrate out-of-pocket expenses, those Settlement Class Members who submit a valid and timely Claim Form and attest that they used a payment card at an affected Earl Enterprises restaurant during the Data Breach Incident's Relevant Period are eligible to receive two $10.00 promotional cards for dining at either Planet Hollywood or Buca di Beppo. SA ¶ 3.02.

D. Remedial Measures Attributable to the Settlement

An additional benefit of the Settlement is the remedial measures that Earl Enterprises agrees to adopt, continue, or maintain as a result of this Litigation (SA ¶¶ 4.01–03), which will benefit all Settlement Class Members regardless of whether or not they submit a Claim, as well as consumers in general who may dine at Earl Enterprises restaurants in the future. These remedial measures include, but are not limited to: 1) implement an EMV/P2PE credit card solution for card-present transactions; 2) implement an intrusion prevention system and an intrusion detection

system; 3) develop an attendance required security awareness training program to educate employees about computer security, corporate policies and procedures, and the most prevalent security threats; 4) implement file integrity monitoring (FIM) to test operating systems, databases, and application files for tampering; and 5) promptly comply with Payment Card Industry Data Security Standards (PCI-DSS). SA ¶¶ 4.01(a)–(e).

E. Notice Program and Settlement Administration

Notice and administration will be paid from the Settlement Fund. SA ¶ 3.06. Plaintiffs' counsel will work with Earl Enterprises and the Settlement Administrator in good faith to minimize these costs consistent with the requirements of Due Process.

As set forth in greater detail in the Settlement Agreement, notice to the Settlement Class will be provided *via* the following methods: (i) Publication Notice; and (ii) a dedicated Settlement Website established and maintained by the Settlement Administrator which amongst other details will provide relevant dates and deadlines pertaining to the Settlement and make important case documents available for review and download; (iii) Google & Yahoo Network of Sites; (iv) social media targeted ads on Facebook, Instagram, and YouTube; and (v) Spotify audio and banner advertisements. *See* Declaration of Brandon Schwartz, attached hereto as **Exhibit 3**. The Settlement Website will also provide Class Members with the ability to submit an online request to opt out of the Settlement. SA ¶ 8.01. Finally, the Settlement Administrator will establish a toll-free help line to address Class Members' inquiries. SA ¶ 7.02(b).

F. Attorneys' Fees and Expenses and Service Awards

Plaintiffs will request a total for both attorneys' fees, costs, and expenses of $195,000.00. Earl Enterprises agrees Plaintiffs may seek this amount from the common fund to pay the fees and expenses of legal counsel for Plaintiffs in an aggregate amount not to exceed $195,000.00, subject

to Court approval. SA ¶ 11.02. Plaintiffs will also request a service award for each of the four named Plaintiffs. Earl Enterprises agrees to the payment from the common fund of a service award not to exceed $2,500.00 for each of the four named Plaintiffs, subject to approval by the Court. SA ¶ 11.03. Attorneys' fees, costs, expenses, and the service awards were negotiated only after all substantive terms of the Settlement were agreed upon by the Parties. SA ¶ 11.01; Yanch. Dec., ¶ 20.

IV. MEMORANDUM OF LAW

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).

A. Certification of the Proposed Settlement Class is Appropriate

In approving a settlement in a class action, the court must first determine that all the requirements for class certification set forth in FLA. R. CIV. P. 1.220(a), and at least one of the requirements of subdivision of Rule 1.220(b), are satisfied. *Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 106 (Fla. 2011).

B. The Rule 1.220(a) Requirements are Satisfied

The four prerequisites of subsection (a) of Rule 1.220 are usually referred to as the principles of numerosity, commonality, typicality, and adequacy. *Id.*

1. Numerosity

First, numerosity as set forth in Rule 1.220(a)(1) is satisfied on this record because joinder of what could be more than two million persons into a single action would be impracticable. *See Id.* at 114 (noting that numerosity requires more than mere speculation and that a proposed class of over 350 persons has been determined sufficiently numerous) (referencing *Maner Props., Inc. v. Siksay*, 489 So. 2d 842, 844 (Fla. 4th DCA 1986)).

2. Commonality

Second, 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.").

Here, the commonality requirement is readily satisfied. Settlement Class Members are joined by common questions of law and fact that arise from the same event—the Data Breach Incident. The critical issues posed by this litigation are: (1) whether the PII of Settlement Class Members was obtained by a third party without authorization due to compromised POS systems at Earl Enterprises' affected restaurants; (2) whether Defendant had a duty to protect the PII of Settlement Class Members from disclosure; and (3) whether Settlement Class Members were injured by Defendant's failure to protect their PII. The central question behind every claim in this Litigation is whether Defendant adequately secured its consumers' PII. The answer to that question depends on common evidence that does not vary from class member to class member, and can be

fairly resolved on a class-wide basis—whether through litigation or settlement—for all Settlement Class Members at once. These common issues converge at the center of Defendant's conduct in this Litigation, satisfying the commonality requirement. *See, e.g.*, *Hughley v. University of Central Florida Bd. of Trustees*, No. 2016-CA-001654-O, 2017 WL 9287318, at *2 (Fla. 9th Cir. Ct. Dec. 1, 2017) (commonality satisfied where "all members of the class are current or former students and/or employees of UCF whose personal information was accessed without authorization at UCF in early 2016"); *In re Countrywide Fin. Corp. Cust. Data Sec. Breach Litig.*, No. 3:08-MD-01998, 2009 WL 5184352, at *3 (W.D. Ky. Dec. 22, 2009) (commonality satisfied where all "class members had their private information stored in Countrywide's databases at the time of the data breach.").

3. Typicality

Third, the finding of typicality inquires as to whether the class representative possesses the same legal interest and has borne the same legal injury as the class members. *Safeway Premium*, 73 So. 3d at 114 (internal citations omitted). Typicality is satisfied when the claims of Plaintiffs and the Class are "based on the same legal theory .. that arose from the same course of conduct that caused a similar injury." *See Id*. at 115. "The test for typicality is not demanding and focuses generally on the similarities between the class representative and the putative class members," and typicality will not be defeated by "[m]ere factual differences" between claims asserted by the class representative, and those of class members. *Id*. at 114 (internal citations omitted).

Here, Plaintiffs' claims arise from the same event (the Data Breach Incident), that gives rise to the claims of the other Settlement Class Members and are based on the same legal theory, *i.e*., that Defendant had a legal duty to protect Plaintiffs' and Settlement Class Members' PII. Although Plaintiffs' and the Settlement Class Members' damages recovery might differ depending

on out-of-pocket expenses incurred as a result of the Data Breach, such differences are "mere[ly] factual difference[s] . . . which does not preclude a finding of typicality." *Id*. at 115 (holding that the plaintiffs' and putative class members' difference in damage recovery did not preclude a finding of typicality). Because there is a "strong similarity," between the legal theories and injuries upon which Plaintiffs' claims are based, and the legal theories and injuries upon the claims of Settlement Class Members, typicality is satisfied. *Id*. at 114-15 (internal citations omitted).

4. Adequacy

Fourth, and finally, the court must determine that the Plaintiffs "can fairly and adequately protect and represent the interests of each member of the class." Fla. R. Civ. P. 1.220(a)(4). This inquiry serves to uncover conflicts of interest between the presumptive class representative and the class he or she seeks to represent. *See Terry L. Braun, P.A. v. Campbell*, 827 So. 2d 261, 268 (Fla. 5th DCA 2002). The analysis into adequacy is two pronged: (1) qualifications, experience, and ability of class counsel to conduct the litigation; and (2) whether the class representative's interests are antagonistic to the interests of the class members. *Safeway Premium*, 73 So. 3d at 115 (citing *City of Tampa v. Addison*, 979 So. 2d 246, 255 (Fla. 2d DCA 2007)).

Here, both components are satisfied because Plaintiffs are represented by qualified and competent counsel, and because Plaintiffs' interests in this Litigation are aligned with, and not antagonistic to, those of the Settlement Class. First, proposed Settlement Class Counsel are experienced in nationwide class action litigation; with respect to data breach class actions, the undersigned are well recognized practice leaders. Yanch. Dec., ¶¶ 6, 12. Moreover, because Plaintiffs and their counsel have devoted considerable time and resources to this Litigation and have shown a deft understanding of the issues in this Litigation, the adequacy requirement is

satisfied. *Id.* ¶ 11. Second, Plaintiffs provided their PII to Defendant and allege that their PII was compromised as a result of the Data Breach Incident, just as the PII of the Settlement Class Members was also allegedly compromised. Indeed, Plaintiffs' claims are identical to the claims of Settlement Class Members, and Plaintiffs and the Settlement Class Members desire the same outcome in this Litigation. Plaintiffs have vigorously prosecuted this case thus far for the benefit of all Settlement Class Members. *Id.* Plaintiffs have participated in the Litigation, reviewed pleadings, participated in informal discovery, and provided input in crafting and approving the Settlement. *Id.* ¶ 37. Accordingly, the adequacy requirement is satisfied for purposes of approving the Settlement Agreement and conditionally certifying the Settlement Class.

C. The Rule 1.220(b) Requirements are Satisfied

The parties propose that the Court preliminarily certify the Settlement Class pursuant to Rule 1.220(b)(1)(A), 1.220(b)(2), and 1.220(b)(3). Under Rule 1.220(b)(1)(A), "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). Because Florida law has held that under Rule 1.220(b)(1)(A), "it is not enough that separate litigation may result in inconsistent adjudications," the adjudications must therefore 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). A class may also be certified "if the party opposing the class has acted or refused to act on grounds generally applicable to all class members, thereby making final injunctive or declaratory relief concerning the class as a whole appropriate." *Id.* at 352.

Here, certification under Rule 1.220(b)(1)(A) is appropriate where the prosecution of separate claims or defenses by individual members of the Settlement Class would create a risk of inconsistent or varying adjudications as different courts may impose on Earl Enterprises different standards of conduct regarding its collection, storage, maintenance, and disclosure of customers' payment card information. 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 "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 set forth in the Settlement Agreement. Certification under Rule 1.220(b)(2) and 1.220(b)(3) is likewise appropriate where Plaintiffs allege that Earl has generally failed to protect the personal payment card information of the entire class, thereby making final injunctive relief and monetary damages concerning the class as a whole appropriate. Accordingly, the parties propose that the Settlement Class be certified under Rule 1.220(b)(1)(A), 1.220(b)(2) and 1.220(b)(3).

II. Preliminary Approval of the Settlement is Warranted

Once the Settlement Class is determined to meet the requirements for class certification pursuant to Rule 1.220, the Court's analysis turns to the terms of the proposed settlement. *Grosso*, 983 So.2d at 1170.

The approval of a class action settlement is warranted where the settlement is "fair, adequate, and reasonable." *Ramos v. Philip Morris Cos.*, 743 So. 2d 24, 24 (Fla. 3d DCA 1999) (affirming class action second hand smoker settlement because it provided "substantial benefits" to the class members); *Barnhill v. Fla. Microsoft Anti-Trust Litig*., 905 So. 2d 195 (Fla. 3d DCA 2005) (affirming class action settlement against Microsoft); *see also* Fla. R. Civ. P. 1.220(e)

(requiring court approval of class action settlements). "A settlement is fair, reasonable and adequate when the interests of the class as a whole are better served if the litigation is resolved by settlement rather than pursued." *Allen v. A.E. New, Jr., Inc.*, No. 2015-CA-000722, 2019 WL 5859608, at *2 (Fla. 1st Cir. Ct. Feb. 22, 2019) (citation omitted). The factors to consider in determining whether to approve a settlement of a class action include: (1) the complexity and duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action; (7) the ability of the defendant to sustain a greater judgment; (8) the range of reasonableness of the settlement in light of the best recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation. *See Grosso*, 983 So. 2d at 1165.

Class Counsel thoroughly investigated and analyzed the facts and circumstances relevant to the claims brought by the Plaintiffs in this case. Although formal discovery did not occur, Earl Enterprises was forthcoming with information related to the Data Disclosure. The information shared through this informal process provided a sound basis that allowed the Parties to weigh the terms of the Settlement against the risks of continued litigation. Although the Plaintiffs and Class Counsel believe that the claims asserted are meritorious, continued litigation against Earl Enterprises posed significant risks that made any recovery uncertain. If the parties had been unable to resolve this case through settlement, Class Counsel believes that the litigation would likely have been protracted and costly.

The Settlement resulted from arm's-length negotiations between experienced counsel with an understanding of the strengths and weaknesses of their respective positions in this Litigation, under the supervision of a neutral and experienced mediator. Yanch. Dec., ¶¶ 16-17. These

circumstances weigh in favor of approval. *See Perez v. Asurion Corp*., 501 F. Supp. 2d 1360, 1384 (S.D. Fla. 2007) (concluding that class settlement was not collusive in part because it was overseen by "an experienced and well-respected mediator").[7] Additionally, the Parties spent significant time negotiating the terms of the final written Settlement Agreement which is now presented to the Court for approval. Yanch. Dec., ¶ 16. At all times, these negotiations were at arm's length and, while courteous and professional, the negotiations were intense and hard-fought on all sides. Yanch. Dec., ¶¶ 16-17.

The relief offered by the Settlement (both monetary and injunctive) is adequate considering the risks of continued litigation. Although Plaintiffs are confident in the merits of their claims, the risks involved in prosecuting a class action through trial cannot be disregarded. Yanch. Decl., ¶ 27. Plaintiffs' claims would still need to survive likely motions practice (*e.g.*, a motion to dismiss and motion for summary judgment), succeed at class certification and appeal. Almost all class actions involve a high level of risk, expense, and complexity, which is one reason that judicial policy strongly favors resolving class actions through settlement. *See In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) ("Public policy strongly favors the pretrial settlement of class action lawsuits"); *Lee v. Ocwen Loan Servicing*, *LLC*, No. 0:14-cv-60649-JG, 2015 U.S. Dist. LEXIS 121998, *14 (S.D. Fla. Sept. 14, 2015) ("Particularly in class action suits, there is an overriding public interest in favor of settlement.").

This is not only a complex case, but it is in an especially risky, expensive, and complex field of litigation: data breaches. *See, e.g., In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig*., 2010 WL 3341200, at *6 (W.D. Ky. Aug. 23, 2010) (approving data breach

[7] Florida courts often look to federal cases for guidance as persuasive authority on issues regarding class actions. *See, e.g.*, *Griffith v. Quality Distribution, Inc.*, No. 2D17-3160, 2018 WL 3403537, at *799 n.6 (Fla. 2d DCA, July 13, 2018); *Barnhill*, 905 So.2d 195 at 198.

settlement, in part, because "proceeding through the litigation process in this case is unlikely to produce the plaintiffs' desired results"); *See also In re Sonic Corp. Customer Data Sec. Breach Litig.*, No. 1:17-md-2807, 2019 WL 3773737, at *7 (N.D. Ohio Aug. 12, 2019) ("Data breach litigation is complex and risky. This unsettled area of law often presents novel questions for courts. And of course, juries are always unpredictable."). Although data breach law is continuously developing, data breach cases are still relatively new, and courts around the country are still grappling with what legal principles apply to the claims. *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 315 (N.D. Cal. 2018) (noting that "many of the legal issues presented in [] data-breach case[s] are novel"). Because the "legal issues involved in [data breach litigation] are cutting-edge and unsettled . . . many resources would necessarily be spent litigating substantive law as well as other issues." *In re Target Corp. Customer Data Security Breach Litig*., No. 14-2522 (PAM/JJK), 2015 WL 7253765, at *2 (D. Minn. Nov. 17, 2015). Through the Settlement, Plaintiffs and Settlement Class Members gain significant benefits without having to face further risk.

While Plaintiffs believe they would prevail on their claims, there is little directly analogous precedent to rely upon. Beyond the merits, class certification is challenging in any case. Class certification has been denied in other consumer data breach cases and to date only two Federal Rules of Civil Procedure 23(b)(3) classes have been certified in consumer data breach cases. *See In re Brinker Data Incident Litig.*, 2021 U.S. Dist. LEXIS 71965 (M.D. Fla. Apr. 14, 2021); *Smith v. Triad of Alabama, LLC*, No. 1:14-cv-324-WKW, 2017 WL 1044692, at *16 (M.D. Ala. Mar. 17, 2017). Further, while Plaintiffs feel they would be able to obtain certification outside of a settlement context and maintain certification through trial, this is not certain. Yanch. Decl. ¶ 22. Any potential certification would also be subject to later appeal, potential reversal, and a protracted

timelines. The cost of trial and any appeals would be significant and would delay the resolution of this Litigation without the guarantee of any relief. *Id.* ¶ 26.

Furthermore, the outcome of this Settlement should be considered not only as favorable as other payment card data breach class action settlements, but as more favorable given that multiple other payment card data breach cases have resulted in no recovery for the plaintiff or class members. *See, e.g., Dugas v. Starwood Hotels & Resorts Worldwide, Inc*., 3:16-cv-00014-GPC-BLM (S.D. Cal.) (Doc. 56) (July 11, 2017) (order dismissing payment card data breach case); *Whalen v. Michaels Stores, Inc*., 689 F. App'x 89 (2d Cir. 2017) (order affirming dismissal of payment card data breach case).[8]

The Settlement is a common fund settlement that will provide Settlement Class Members with significant and timely benefits which compare favorably to what Settlement Class Members could recover were they to secure a favorable judgment at trial. In the experience of proposed Class Counsel, the monetary relief provided by this Settlement is an outstanding result, and is fair and reasonable in light of reported average out-of-pocket expenses due to a data breach.[9] *See Jackson et al. v. Wendy's International, LLC*, No. 6:16-cv-21-PGB-DCI (M.D. Fla.) (Doc. 157) (Feb. 26, 2019) (approving settlement that provides class members reimbursement of documented losses of up to $5,000); *Albert v. School Bd. of Manatee Cty., Fla.*, No. 12-CA-004113 (Doc. 53) (Fla. 12th Cir. Ct. Nov. 19, 2018) (approving settlement that provides for reimbursement of

[8] The same is true for data breach cases involving solely PII, and no PCD. *See, e.g., Storm v. Paytime, Inc*., 90 F. Supp. 3d 359, 368 (M.D. Pa. 2015) (dismissed for lack of standing as plaintiffs failed to demonstrate that they had suffered actual harm, such as, identity theft); *Longenecker-Wells v. Benecard Servs. Inc*, 658 F. App'x 659, 663 (3d Cir. 2016) (negligence claim barred by economic loss doctrine and breach of implied contract dismissed for failure to plead sufficient allegations).

[9] For individuals who experienced actual identity theft, a 2014 Congressional Report stated that these victims incurred an average of $365.00 in expenses in dealing with the fraud. *See* Kristin Finklea, Congressional Research Service, *Identity Theft: Trends and Issues* (January 16, 2014), p. 2, available at https://fas.org/sgp/crs/misc/R40599.pdf (last visited February 1, 2022).

identity theft protection, out-of-pocket expenses for tax fraud for up to $250 and other incidents of identity theft or expenses for up to $500, and also helps Settlement Class Members protect against future harm through extended identify theft protection); *see also Hapka v. CareCentrix, Inc.*, No. 2:16-CV-02372-KGG, 2018 WL 1879845, at *3 (D. Kan. Feb. 15, 2018) ("The Settlement addresses past harms through reimbursement of Out-of-Pocket Losses or the alternative minimum $200 payment for tax fraud and also helps Settlement Class Members protect against future harm through the Credit Monitoring Services.").

Here, the two $10.00 promotional cards with an attestation of use of a payment card at an affected restaurant during the Data Breach Incident's Relevant Period is a novel benefit requiring minimal effort for those Settlement Class Members who spent material time dealing with the Data Breach Incident but did not have any out-of-pocket expenses. SA ¶ 3.02. Additionally, the reimbursement for documented out-of-pocket losses due to fraud of up to $5,000.00 with compensation for time spent investigating and remediating fraud of up to $80.00 ($20.00/hour) compares favorably to past data breach settlements. SA ¶ 3.03.

Furthermore, the injunctive relief provided for in this Settlement is significant and ensures the rights of the Settlement Class because it swiftly commits Earl Enterprises to certain security measures and protection of personal information. These remedial measures are attributable to the Settlement and are squarely consistent with the claims on which Plaintiffs have focused in the Litigation. SA ¶ 4.01. These commitments will ensure the adequacy of Defendant's data security practices, and will provide ongoing protection for any consumers' information, as well as providing protection for consumers in the future. Without this Settlement, there is little Settlement Class Members could do individually to achieve similar promises from Earl Enterprises regarding data security going forward. The Settlement is calculated to ensure that Earl Enterprises not only

employs the necessary, immediate resources to address existing data security vulnerabilities, but also employs the consistent best practices and accountabilities needed for long-term, proactive data security. This injunctive relief will remain in effect for three (3) years. SA ¶ 4.02. The Settlement benefits present a substantial recovery, especially considering the litigation risks described above.

Finally, the Settlement treats all Settlement Class Members equitably relative to one another because all who have been damaged are eligible to receive reimbursement based on expenses incurred, not on any unequitable basis, and the remainder of Settlement Class Members who do not have demonstrable out-of-pocket expenses are all eligible for the two $10 promotional vouchers. SA ¶¶ 3.01–3.04. Class Counsel do not expect to encounter a high degree of opposition to the settlement considering the variety of benefits provided by the Settlement Class. The proposed Settlement would provide Settlement Class members with an excellent recovery at the level of what Plaintiffs might recover if they were to prevail at trial, but with immediate recovery and without continued litigation risk and cost. Given the hurdles Plaintiffs would have to overcome if they were to litigate this case to verdict and the benefits provided by the Settlement, the parties submit that the proposed Settlement is in the best interest of the Class and represents a fair, reasonable and adequate recovery.

III. Notice Requirement

The proposed Settlement is sufficient to satisfy the notice requirements of Rule 1.220(d)(1) and the due process rights of the Settlement Class. Under Rule 1.220(d), to certify a class, notice of the pendency of a claim or defense must generally be provided to each identified and located class member. The class member then has the option to opt out of the class. Here, the parties' notice and claims administration plan meet this requirement.

The Notice Program is reasonably calculated under the circumstances to apprise the Settlement Class of the pendency of the case, the proposed Settlement and its terms, any request for attorneys' fees, costs, and expenses, service awards, and the Settlement Class Members' rights to opt-out of or object to the Settlement, as well as the other information required Rule 1.220.

Notice will be provided to Settlement Class Members through: (i) Publication Notice; and (ii) a dedicated Settlement Website established and maintained by the Settlement Administrator which amongst other details will provide relevant dates and deadlines pertaining to the Settlement and make important case documents available for review and download; (iii) Google & Yahoo Network of Sites; (iv) social media targeted ads on Facebook, Instagram, and YouTube; and (v) Spotify audio and banner advertisements. SA ¶ 7.02; Schwartz Decl. (Ex. 3 hereto) ¶¶ 10-25.

Therefore, the Notice Program (including the proposed Notice forms) comply with all applicable law, including the requirements of Rule 1.220, Florida Rules of Civil Procedure and Due Process.[10] Accordingly, Plaintiffs respectfully request that the Court approve the Notice Program and direct Notice to the Settlement Class.

IV. The Court Should Schedule a Final Approval Hearing and Pertinent Deadlines

In connection with the preliminary approval of the Settlement, Plaintiffs request that the Court set: (1) a date for the Final Approval Hearing no earlier than 150 days from the Preliminary Approval Order; (2) dates for filing papers relating to final approval and attorneys' fees; (3) dates for sending notice to the Settlement Class; and (4) deadlines for any requests for exclusion or objections. Plaintiffs propose the following schedule:

[10] The form of the Preliminarily Approval Order (Exhibit A), which was drafted and approved by Plaintiffs' counsel and Defendant's counsel, and the proposed Claim Form (Exhibit D), likewise satisfy all of the criteria of Rule 1.220.

Event	Time for Compliance
Creation of Settlement Website	30 days after entry of the Preliminary Approval Order
Notice Date	30 days after entry of the Preliminary Approval Order
Exclusion/Objection Deadline	120 days after entry of the Preliminary Approval Order
Claims Deadline	120 days after entry of the Preliminary Approval Order
Deadline for Class Counsel's Application for Attorneys' Fees and Service Awards for Settlement Class Representative	No later than 35 days before the Exclusion/Objection Deadline
Deadline for Motion in Support of Final Approval of Settlement	45 days before the Final Approval Hearing
Final Approval Hearing	No earlier than 150 days after entry of the Preliminary Approval Order

V. Relief Requested

The parties seek an order:

(a) preliminarily approving the Settlement;

(b) conditionally certifying, pursuant to Rule 1.220, Florida Rules of Civil Procedure, and solely for the purpose of effectuating the settlement, the Settlement Class;

(c) approving, in form and content (i) the proposed Notice of Class Action Settlement, substantially in the form attached to this motion as Exhibit C (the "Long Form Notice"); and (ii) the Publication Notice of Class Action Settlement, substantially in the form attached to this motion as Exhibit B (the "Publication Notice");

(d) ruling that the Publication Notice and dedicated Settlement Website: (i) will fully satisfy the requirements of Rule 1.220, Florida Rules of Civil Procedure, due process, and applicable laws; (ii) is the best notice practicable; and (iii) shall constitute due and sufficient notice of the Settlement and Fairness Hearing to members of the Settlement Class;

(e) directing that all proceedings in this action, other than such proceedings as may be necessary to carry out the terms and conditions of the Settlement Agreement, are hereby stayed and suspended until further order of the Court;

(f) designating Plaintiffs as representatives of the Settlement Class and John A. Yanchunis and Ryan 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.

(g) appointing Postlethwaite & Netterville as Claim Administrator and directing that, within thirty (30) days after the date on which this order is entered, the Claim Administrator shall commence the Notice Program, which shall be completed in the manner set forth in Article VII and Exhibits B–D of the Settlement Agreement.

(h) permitting any Class Member to opt out of the Settlement Class by submitting to the Claim Administrator a written notice to the designated Post Office box established by the Settlement Administrator or submitted electronically on the Settlement Website, within 120 days after the date on which this order is entered; and

(i) providing that any Class Member who objects to the approval of the Settlement Agreement may appear at the Fairness Hearing, and show cause why all terms of the proposed settlement should not be approved as fair, reasonable, and adequate, and why judgment should not be entered thereon, as long as that Class Member has filed and served on counsel of record in this action an objection, no later than thirty (30) days before the Fairness Hearing, which must include: (i) the objector's full name, address, telephone number, and e-mail address (if any); (ii) information identifying the objector as a Settlement Class Member, including proof that the objector is a member of the Settlement Class; (iii) a written statement of all grounds for the objection, accompanied by any legal support for the objection the objector believes applicable; (iv) the identity of all counsel representing the objector; (v) a statement confirming whether the objector intends to personally appear and/or testify at the final fairness and approval hearing; and, (vi) the objector's signature and the signature of the objector's duly authorized attorney or other duly authorized representative (along with documentation setting forth such representation).

VI. Conclusion

For the foregoing reasons, Plaintiffs respectfully request that the Court enter the accompanying proposed order, directing notice of the proposed Settlement to the Settlement Class and setting a hearing for the purpose of deciding whether to grant final approval of the Settlement.

Dated: October 26, 2022

Respectfully submitted,

/s/ John A. Yanchunis
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* *pro hac vice* forthcoming

Attorneys for Plaintiffs and the Putative Class

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 26, 2022, I electronically filed a true and correct copy of the foregoing unopposed motion with the Clerk of the Court using the court's electronic filing system, which will send notification to all attorneys of record in this matter.

/s/ John A. Yanchunis
John A. Yanchunis