UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MATTHEW FERO, et al.,

Plaintiffs,

v.

EXCELLUS HEALTH PLAN INC., et al.,

Defendants.

6:15-CV-06569 EAW

MOTION FOR FINAL APPROVAL OF SETTLEMENT

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INTRODUCTION

Plaintiffs, as appointed and proposed class representatives, presented their proposed Settlement with defendants Excellus Health Plan Inc. ("Excellus"), Lifetime Healthcare, Inc., Lifetime Benefit Solutions, Inc., Genesee Region Home Care Association, Inc. d/b/a Lifetime Care, MedAmerica, Inc., and Univera Healthcare (collectively, the "Excellus Defendants") and defendant Blue Cross Blue Shield Associations ("BCBSA") in the Motion for Preliminary Approval of Settlement filed on December 10, 2021. (ECF No. 542.) The Court held a conference on January 14, 2022 to discuss this motion, and Plaintiffs' Motion for Preliminary Approval of Settlement was granted on January 14, 2022. (ECF No. 548.) This Settlement, if approved, will resolve the injunctive relief claim pled in the Complaint, the only claim certified by the Court pursuant to Federal Rule of Civil Procedure 23, on a classwide basis, and the parties have now executed an addendum to the Settlement Agreement that includes the additional clarification in the Court's preliminary approval Order. The Settlement releases all claims pled by the Class Representatives for both injunctive relief and individual damages.[1] The Settlement should receive final approval because it provides substantial injunctive relief to the Class in this hard-fought litigation. The Settlement includes injunctive relief that is worth millions of dollars in tangible benefits, and targets what Plaintiffs contend are Excellus' current and historical security deficiencies.

Since the Court granted Preliminary Approval on January 14, 2022, the Defendants provided notice to relevant state and federal regulatory authorities pursuant to 28 U.S.C. § 1715 ("CAFA Notice"). Notice of the Settlement was also posted to the Plaintiffs' website within days

[1] Capitalized terms herein have the meaning as defined in the Settlement Agreement attached as Exhibit A to Declaration of Hadley E. Lundback, Esq., in support of this motion.

of this Court's granting preliminary approval and remains there today.[2] Plaintiffs also issued a press release and received coverage in Rochester media and beyond.[3] On February 14, 2022, Plaintiffs filed their unopposed Motion for Attorneys' Fees, Litigation Expenses, and Service Awards. (ECF No. 552.) That motion is still pending. Moreover, objections to the Settlement were required to be filed by March 15, 2022, and no objections were received. That no Class Members have lodged an objection weighs strongly in favor of final approval. For the reasons set forth below, Plaintiffs respectfully request this Court grant final approval to the Settlement.

BACKGROUND

A detailed summary of the relevant background and procedural history is set forth in Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Approval of Class Settlement (ECF No. 542), which Plaintiffs incorporate herein by reference.

This case arises out of a high-profile data breach of Excellus' network that began as late as December 2013 and was detected by Excellus in August 2015. (ECF No. 122-1.) During the breach, hackers infiltrated Excellus's computer networks and had access to PII and PHI of approximately 9.3 million individuals, including Plaintiffs and the Class Members ("Security Incident"). (*Id.*) Plaintiffs and Class Members include individuals who enrolled in Excellus health plans and individuals whose health information was processed by Excellus under agreements with Excellus' affiliates and BCBSA.

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[2] *See* https://excellusdatabreachclassaction.com/wp-content/uploads/2022/02/1050316.pdf.

[3] *See, e.g.*, https://spectrumlocalnews.com/nys/central-ny/public-safety/2022/01/24/attorneys-announce-settlement-in-excellus-blue-cross-blue-shield-data-breach-lawsuit; https://www.whec.com/rochester-new-york-news/consumer-alert-excellus-agrees-to-increase-cybersecurity-in-class-action-settlement/6368350/; https://www.wxxinews.org/local-news/2022-01-24/settlement-reached-in-excellus-data-breach-lawsuit; https://www.hipaajournal.com/settlement-reached-in-excellus-class-action-data-breach-lawsuit/; https://healthitsecurity.com/news/excellus-bcbsa-reach-settlement-following-2015-data-breach.

After the Excellus Defendants announced the Security Incident and subsequent data breach, 14 lawsuits were filed in this Court, which were consolidated with this case. (ECF No. 1.) From the outset and for the ensuing nearly six years, the parties engaged in extensive fact and expert discovery and motion practice. (Lundback Dec. ¶¶ 2-13.) On November 23, 2020, this Court issued its Decision and Order denying in part and granting in part Plaintiffs' motion for class certification. (ECF No. 521.) Specifically, the Court denied certification of all damages classes, but certified an injunctive class under Rule 23(b)(2). (*Id.*)

The parties engaged in mediation sessions with experienced data breach mediator Bennett J. Picker on January 8, 2020 (ECF No. 407) and August 23, 2021 (ECF No. 539). At the conclusion of the second mediation session, the Parties reached an agreement on all outstanding terms in the Settlement. (Lundback Dec. ¶ 14-19, Ex. A.) The Settlement Agreement was executed on December 9, 2021. (*Id.* at Ex. A.) An Addendum to the Settlement Agreement pursuant to Hon. Elizabeth A. Wolford's Order Granting Preliminary Approval of the Class Action Settlement was executed on March 29, 2022. (*Id.* at ¶ 21, Ex. B.) Under the Settlement, Excellus has committed to a floor for information security for the next three fiscal years and will be required to implement certain security measures that will comprehensively address security risks and provide protection against the risk of a future cyberattack. (*Id.* at Ex. C.)

SUMMARY OF THE SETTLEMENT

The Class

On November 23, 2020, the Court issued a Decision and Order on Plaintiffs' Motion for Class Certification and related filings, denying certification of all damages classes, but certifying an injunctive relief class under Rule 23(b)(2), defined as follows: "All individuals in the United States whose PII and/or PHI was stored in Excellus's systems between December 23, 2013 and

May 11, 2015 who (1) are included in Excellus's list of Impacted Individuals and (2) whose PII and/or PHI currently resides in Excellus's systems" (hereafter, the "Class"). (ECF No. 521.)

Benefit to the Class

The Settlement includes injunctive relief that is worth millions of dollars in tangible benefits, and targets what Plaintiffs contend are Excellus' current and historical security deficiencies as well as data retention. (Lundback Dec. at ¶ 20, Ex. A.) Excellus has committed to a substantial increase in its information security budget over its pre-lawsuit spend for the next three fiscal years and has committed to spending the entire amount budgeted on information security. (*Id.* at ¶ 22, Ex. C.)

The Settlement also requires Excellus to remedy alleged security control deficiencies and mandate key improvements. (*Id.* at ¶ 23, Ex. C.) After years of litigation, taking numerous depositions, and reviewing more than 1,510,000 of pages of documents, Plaintiffs' counsel are extremely familiar with Excellus' information security strengths and weaknesses. (*Id.* at ¶ 24.) Under the leadership of its Chief Information Officer and Chief Information Security Officer, Excellus has made significant improvements to its security controls. (*Id.* at ¶ 25.) Several of the improvements mandated in the Settlement address controls that Plaintiffs believe remain insufficient. These include concerns with phasing out insecure encryption algorithms and implementing challenging technical fixes to alleged security flaws in key data sources. (*Id.* at ¶ 26, Ex. C.) Similarly, Plaintiffs contend that Excellus still retains more historical data on class members than it is required to. Excellus will delete this old data on an ongoing basis, allowing Excellus to substantially reduce the residual risk to class members' data now and for many years to come. (*Id.* at ¶ 27, Ex. C.) Moreover, Excellus has already undertaken an extensive data archiving project, and has agreed to provide Plaintiffs with discovery regarding that project.

The Settlement also requires Excellus to invest in the future. For example, Excellus has agreed to implement cutting-edge zero trust controls, a data security approach that provides substantial and long-lasting security benefits. (*Id.* at ¶ 28, Ex. C.) Finally, the Settlement requires Excellus provide Plaintiffs' counsel with an annual declaration on or before December 31 attesting to Excellus' compliance with each of the terms related to enhancing its information security. (*Id.* at ¶ 29, Ex. C.)

Releases

In consideration for the Settlement, Class Members will refrain from bringing any claim for injunctive or declaratory relief made in this matter, and, as per the Court's preliminary approval Order, any claim arising from the Security Incident in any matter that relates in any way to injunctive or declaratory relief. (*Id.* at ¶¶ 20-21, Exs. A and B.) However, Class Members will retain their right to bring claims against the Settling Defendants for damages. (*Id.* at Exs. A and B.)

Objections

This Court's Order granting Plaintiffs' Motion for Preliminary Approval set forth a procedure under which any Class Member could raise objections to the Settlement, and the deadline for any such objections to be filed was March 15, 2022. (ECF No. 548.) No objections to any aspect of the Settlement were received. (Lundback Dec. ¶ 44.)

Attorneys' Fees, Litigation Costs and Class Representative Plaintiffs' Service Awards

Plaintiffs filed a separate motion for attorneys' fees, litigation costs and Class Representative Plaintiffs' Service Awards. (ECF No. 552.) That motion, like this motion, is unopposed.

ARGUMENT

Rule 23(e) of the Federal Rules of Civil Procedure requires court approval of any class action settlement.[4] The court must "carefully scrutinize the settlement to ensure its fairness, adequacy and reasonableness, and that it was not a product of collusion." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (citation omitted). This evaluation requires the Court to consider "both the settlement's terms and the negotiating process leading to the settlement." *Wal-Mart Stores, Inc. v. Visa U.S.A.*, 396 F.3d 96, 116 (2d Cir. 2005).

FED. R. CIV. P. 23(e)(2) provides a list of factors for the Court to consider to determine if a proposed settlement is "fair, reasonable and adequate." *See* Rule 23(e)(2). Those factors are 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

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[4] This Court has already certified a 23(b)(2) class so the only issue before the Court is whether the proposed Settlement merits approval under FED. R. CIV. P. 23(e)(2). (ECF No. 521.)

(D) the proposal treats class members equitably relative to each other.

Id.

As the Advisory Committee's note to the 2018 Rule 23 Amendment explains, subsections (A) and (B) focus on the "procedural" fairness of a settlement and subsections (C) and (D) focus on the "substantive" fairness of the settlement. (FED. R. CIV. P. 23(e)(2) advisory committee's note to 2018 amendments). These factors are similar to the "procedural" and "substantive" factors the Second Circuit developed prior to the amendment. *See Charron v. Wiener*, 731 F.3d 241, 247 (2d Cir. 2013) (explaining that courts evaluate procedural and substantive fairness of a class settlement). The 2018 amendment, however, recognizes that "[t]he sheer number of factors" considered in various Circuits "can distract both the court and the parties from the central concerns that bear on review under Rule 23(e)(2)." (FED. R. CIV. P. 23(e)(2) advisory committee's note to 2018 amendments). The 2018 Amendment "therefore directs the parties to present the settlement to the court in terms of a shorter list of core concerns, by focusing on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal." *Id.*

A. The Class Representative Plaintiffs and Class Counsel have adequately represented the Class.

The Class Representative Plaintiffs and Class Counsel have adequately represented the Class (FED. R. CIV. P. 23(e)(2)(A)). Class Counsel have extensive experience in class action litigation in general as well as data breach class actions. (ECF Nos. 338, 393, 394, 395). Class Counsels' combined expertise allowed them to build a strong case in a highly complex area involving information security and cybersecurity. (Lundback Dec. at ¶ 33.) Class Counsel developed evidence related to the liability of Defendants, including inadequate cybersecurity that led to the cyberattack and ongoing risk to class members' data due to security flaws. (*Id.* at ¶ 34.)

Class counsel also developed evidence related to the dark web and exposure of PII and PHI on the dark web. (*Id.* at ¶ 35.) Without their persistence, expertise, and willingness to invest time and financial resources in this matter, the Class would have been left without legal recompense. (*Id.* at ¶ 36.) Class Counsel engaged in extensive written and oral advocacy on the claims, resulting in, *inter alia*, this Court's denial of Defendants' motion to dismiss, this Court's granting of Plaintiffs' Motion for Reconsideration and this Court's certification of an injunctive relief class. (*Id.* at ¶ 37.)

Class Counsel aggressively pursued discovery of relevant evidence, obtaining more than 1,510,000 pages of documents and electronic files through requests for production served on Defendants and subpoenas served on third parties, and then organized and reviewed this massive amount of data using a document review platform. (*Id.* at ¶ 38.) Class Counsel conducted depositions of current and former employees of Defendants, as well as a 30(b)(6) of Excellus and non-parties. (*Id.* at ¶ 5.) The results of Class Counsels' efforts, along with their significant experience in this type of litigation, culminated in the Settlement that provides for technical fixes to some ongoing serious security flaws, deletion of older sensitive data of Class Members and former subscribers and customers on an ongoing basis, and provision of an annual declaration attesting to Excellus' compliance with each of the terms related to enhancing its information security. (*Id.* at Ex. C.)

Similarly, the Class Representative Plaintiffs timely responded to written discovery requests and produced hundreds of pages of documents. (*Id.* at ¶ 39.) The Class representative Plaintiffs also timely responded to alleged discovery deficiencies sent by Defendants, which required Plaintiffs to undertake additional time and effort to ensure discovery compliance, including completing additional document searches and participating in multiple phone calls or in-person meetings with Class Counsel. (*Id.* at ¶ 40.) Sixteen of the seventeen class representatives

also sat for a full day or close to a full day deposition. (*Id.* at ¶ 41.) Two of the class representatives remained available to Class Counsel throughout negotiations and all Class Representative Plaintiffs reviewed and approved the terms of the Settlement. (*Id.* at ¶ 42.)

The Class Representative Plaintiffs and Class Counsel "have obtained a sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement." *In re AOL Time Warner, Inc.*, No. 02 CIV. 5575 (SWK), 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006); *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986) (approving settlement where "[d]iscovery is fairly advanced and the parties certainly have a clear view of the strengths and weaknesses of their cases"); *Millien v. Madison Square Garden Co.*, No. 17-CV-4000 (AJN), 2020 WL 4572678, at *5 (S.D.N.Y. Aug. 7, 2020) (same). Accordingly, Class Counsel and the Class Representative Plaintiffs have adequately represented the Class. Fed. R. Civ. P. 23(e)(2)(A).

B. The Settlement was negotiated at arm's length with the assistance of an experienced data breach mediator.

The Settlement is the product of hard-fought, arm's-length negotiations with the assistance of a very experienced and well-respected mediator, Bennett G. Picker. *See* FED. R. CIV. P. 23(e)(2)(B). "To determine procedural fairness, courts examine the negotiating process leading to the settlement." *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 618 (S.D.N.Y. 2012). "A 'presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" *Wal-Mart Stores, Inc.*, 396 F.3d at 116 (quoting Manual for Complex Litig. (Third) § 30.42 (1995)). Moreover, in such circumstances, "great weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. Mar. 20, 1997); *see also Clark v. Ecolab Inc.*,

Nos. 07 Civ. 8623, 04 Civ. 4488, 06 Civ. 5672, 2010 WL 1948198, at *4 (S.D.N.Y. May 11, 2010) ("In evaluating the settlement, the Court should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation"). Class Counsel, who have extensive experience litigating and settling class actions, including data breach class actions across the country, are of the opinion that the Settlement is a good result for the Settlement Classes. (Lundback Dec. at ¶ 30.) Moreover, the Settlement was reached only after two mediation sessions and numerous phone conferences with Bennett G. Picker. (*Id.* at ¶¶ 14-19.) Accordingly, this Settlement was negotiated at arm's length and was procedurally fair. *See* Fed. R. Civ. P. 23(e)(2)(B).

Additionally, courts in the Second Circuit have long considered the following factors set forth in *City of Detroit v. Grinnell Corp.*:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). Not every factor must weigh in favor of settlement; "rather, the court should consider the totality of these factors in light of the particular circumstances." *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 61 (S.D.N.Y. 2003).

As demonstrated herein, the Settlement readily satisfies all of the Rule 23(e)(2) and *Grinnell* factors,[5] meets the favored public policy of resolving class action claims, and warrants the Court's final approval.

C. The relief provided for the Settlement Classes is significant, taking into account the relevant Rule 23(e) and *Grinnell* factors.

1. The relief provided by the Settlement is significant.

Perhaps the best indicator of the fairness of the Settlement is the significance of the relief it provides. Under the Settlement, Excellus is required to remedy security control deficiencies and mandate key improvements that will significantly increase the protection of Class Members' PII and PHI as well as the PII and PHI of all individuals whose information is in or will be added in the coming years to Excellus' network. (Lundback Dec., Ex. C.) The Settlement also requires Excellus to provide Class Counsel with an annual declaration on or before December 31 of each year attesting to Excellus' compliance with each of the terms related to enhancing its information security. (*Id.*)

Courts in the Second Circuit routinely approve settlements involving injunctive relief, and the Second Circuit has upheld such approvals where challenged. *See, e.g.*, *Charron*, 731 F.3d at 254 (upholding approval of a class action settlement where "[t]he ensuing litigation has achieved significant benefits for the class, particularly in its injunctive aspects, against significant odds" including novel legal theories underlying Plaintiffs' claims); *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650 (S.D.N.Y. 2015); *N.N. by A.N. v. Rochester City School District*, 505 F. Supp. 3d

[5] The factors set forth in Rule 23(e)(2) were intended "to add to, rather than displace, the *Grinnell* factors." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 29 (E.D.N.Y. 2019). *See also* Advisory Committee Notes to 2018 Amendments to Rule 23 (noting that the Rule 23(e)(2) factors are not intended to "displace" any factor previously adopted by the Court of Appeals). Accordingly, Plaintiffs will discuss both the factors set forth in Rule 23(e)(2) and the non-duplicative *Grinnell* factors.

211 (W.D.N.Y. 2020) (granting preliminary approval finding final declaratory and junctive relief appropriate respecting the Classes as a whole); *Martin v. Weiner*, 2008 WL 648918 (W.D.N.Y. 2008) (recommending final approval of settlement in class action seeking purely injunctive relief); *Davis v. Eastman Kodak Co.*, 2010 WL 11558014 (W.D.N.Y. Sept. 3, 2010) (approving settlement where "significant aspect of the relief plaintiffs seek . . . is injunctive"); *J.S. v. Attica Cent. Schools*, 2012 WL 3062804 (W.D.N.Y. July 26, 2012) (approving settlement of a case involving injunctive relief and dispensing with the notice and fairness hearing requirements). Here, the Settlement provides class wide relief for the Class that this Court held could be certified, easily accords with Second Circuit authorities, and will provide significant relief to the Class without further delay of this years-long litigation.

2. The costs, risks, and delay of trial and appeal make the relief provided by the Settlement even more valuable.

The Settlement is even more significant when considered against the substantial costs, risks, and delays of continued litigation. *See* FED. R. CIV. P. 23(e)(2)(C)(i). The relief provided by the Settlement is concrete, guaranteed, and immediate, while the results from continued litigation against the Settling Defendants would be delayed at best and could potentially end up with no recovery at worst. Without this Settlement, it could be several years before the protections afforded the Class under this Settlement could be implemented after trial.

Defendants are sophisticated and well-funded opponents with the resources to prosecute the claims through trial and potentially multiple appeals. There is little doubt that continued litigation against the Defendants could span years and be costly to the parties and a tax on judicial resources.

Defeating summary judgment, achieving a litigated verdict at trial, and then sustaining any such verdict on appeal is a prolonged, complex, and risky proposition that would require substantial

additional time and expense. *See In re IPO*, 671 F. Supp. 2d 467, 481 (S.D.N.Y. 2009) (finding that the complexity, expense, and duration of continued litigation supports approval where, among other things, "motions would be filed raising every possible kind of pre-trial, trial and post-trial issue conceivable"). The substantial risk of continued litigation weighs in favor of approving the Settlement. *In re Global Crossing Securities and ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004).

Apart from substantial risk and expense, courts overwhelmingly recognize that the delay of resolution of the litigation by itself is a significant consideration in approving a settlement. As the Court explained in *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003), "even if a [plaintiff] or class member was willing to assume all the risks of pursuing the actions through further litigation . . . the passage of time would introduce yet more risks . . . and would in light of the time value of money, make future recoveries less valuable than this current recovery." Inevitable litigation delays "not just at the trial stage, but through post-trial motions and the appellate process, would cause Settlement Class Members to wait years for any recovery, further reducing its value." *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002) (citing *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 467 (2d Cir. 1974)); *see also In re Marsh & McLennan*, *Cos. Sec. Litig.*, No. 04 Civ. 8144(CM), 2009 WL 5178546, at *5 (S.D.N.Y. Dec. 23, 2009) (noting the additional expense and uncertainty of "inevitable appeals" and the benefit of Settlement, which "provides certain and substantial recompense to the Class members now"); *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1322 (S.D. Fla. 2005) (likelihood that appellate proceedings could delay class recovery "strongly favor[s]" approval of a settlement); *Cardiology Assocs., P.C. v. Nat'l Intergroup, Inc.*, No. 85 CIV. 3048 (JMW), 1987

WL 7030, at *3 (S.D.N.Y. Feb. 13, 1987) ("[E]ven assuming a favorable jury verdict, if the matter is fully litigated and appealed, any recovery would be years away").

The relief provided under the Settlement readily falls within the range of reasonable results given the complexity of the case and the significant barriers that stand between today and a final, implemented judgment. *Nobles v. MBNA Corp.*, No. C 06-3723 CRB, 2009 WL 1854965, at *2 (N.D. Cal. June 29, 2009) ("The risks and certainty of recovery in continued litigation are factors for the Court to balance in determining whether the Settlement is fair."); FED. R. CIV. P. 23(e)(2)(C)(i).

3. The stage of the proceedings and substantial discovery completed favor final approval.

The advanced stage of the proceedings also supports approval of the Settlement. Under the third *Grinnell* factor, settlement is especially favored when the litigation is at an "advanced stage" with an "extensive amount of discovery completed." *In re Marsh & McLennan Cos. Sec. Litig.*, No. 04 Civ. 8144, 2009 WL 5178546, at *6 (S.D.N.Y. Dec. 23, 2009). This factor goes to "whether the parties had adequate information about their claims, the strengths of the defenses asserted by defendants, and the value of plaintiffs' causes of action for purposes of settlement." *In re Facebook IPO Sec. & Derivative Litig.*, MDL No. 12-2389, 2015 WL 6971424, at *4 (S.D.N.Y. Nov. 9, 2015); *see also In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986) (approving settlement where "[d]iscovery is fairly advanced and the parties certainly have a clear view of the strengths and weaknesses of their cases").

As a result of more than six years of litigation, including the completion of class discovery and significant merits discovery against the Settling Defendants, as well as fully briefed *Daubert* motions and a class certification motion that was decided, the Parties are well aware of the relative strengths and weaknesses of various claims and defenses. Counsel therefore had the requisite

information to make an informed decision about the benefits of continued litigation versus settlement of the Action and "developed an informed basis from which to negotiate a reasonable compromise." *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. at 459. The Court should find this factor weighs in support of final approval of the Settlement.

4. The requested attorneys' fees and litigation costs are reasonable and will be paid only after Court approval and in an amount justified by the Settlement.

Rule 23(e)(2)(C)(iii) requires evaluation of the terms of any proposed attorneys' fees, including timing of payment. Plaintiffs petitioned the Court for an award of attorneys' fees of $3,571,511.88 and litigation costs of $ 682,988.12. (ECF No. 552.) In accordance with the Settlement, Defendants do not object to the fee request. (Lundback Dec. Ex. A.) As set forth in Plaintiffs' Motion for Attorneys' Fees, Litigation Expenses and Service Awards (ECF No. 552), the requests here are reasonable and supported by the law, evidence, and results achieved in this case.

5. Disclosure of side agreements.

Rule 23(e)(2)(C)(iv) requires the Court to consider any side agreements that must be disclosed under Rule 23(e)(3). This is because side agreements can result in inequitable treatment of class members. FED. R. CIV. P. 23(C) advisory committee's note to 2018 amendments. Here, the Settlement before the Court is the only existing agreement.

D. The Settlement treats Class Members equitably relative to each other.

The Court must also consider whether the Settlement treats Settlement Class Members equitably relative to one another. *See* FED. R. CIV. P. 23(e)(2)(D). Here, the Settlement treats Settlement Class Members equally because the injunctive relief will benefit all Class Members in an identical manner. *Meredith Corp.*, 87 F. Supp. 3d at 660 (approving settlement of a 23(b)(2)

class where a licensing scheme was directed at all members of the proposed class and contemplated settlement provides relief to protect all member of the proposed settlement class).

E. The fact that there are no objections to the Settlement supports final approval.

"It is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *Maley*, 186 F. Supp. 2d at 362. Here, "[t]he fact that the vast majority of class members neither objected nor opted out is a strong indication that the proposed settlement is fair, reasonable, and adequate." *Wright v. Stern*, 553 F. Supp. 2d 337, 345 (S.D.N.Y. 2008).

The deadline for filing of an objection was March 15, 2022, and no objections were filed. (Lundback Dec. ¶¶ 43-44.) It can easily be deduced from the lack of even a single objection that the reaction of Class Members is positive. *See In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 246 F.R.D. 156, 167 (S.D.N.Y. 2007) (11 objections out of 1.8 million mailed notices reflected "overwhelmingly positive reaction of the class . . . weigh[ing] heavily in favor of approval of the Settlement"). As such, the clear positive reaction of the Class to the Settlement weighs heavily in favor of final approval.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court granted their Motion for Final Approval of Settlement.

Dated: March 29, 2022

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