UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

CHRISTINE JACKSON, ASHLEY MCCONNELL, AND GERALD THOMAS, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

WENDY'S INTERNATIONAL LLC,

Defendant.

Case No. 6:16-cv-210-Orl-18DAB

PLAINTIFFS' UNOPPOSED AMENDED* MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND CERTIFICATION OF SETTLEMENT CLASS

* Plaintiffs filed their initial Unopposed Motion for Final Approval on February 12, 2019. (Doc. 150). For reasons that remain unclear, that document was corrupted during the filing process; having incorrect pagination and other inexplicable formatting problems. It also appears to have potentially been the wrong version of the document. Accordingly, Plaintiffs file this amended, and corrected, version of the motion.

On July 24, 2018, Plaintiffs Christine Jackson, Ashley McConnell, and Gerald Thomas ("Plaintiffs" or "Class Representatives"), moved for preliminary approval of the Settlement and for certification of the Settlement Class ("Preliminary Approval Motion").[1] (Doc. 138). On August 23, 2018, this Court granted the Preliminary Approval Motion. (Doc. 146).

Plaintiffs now move for final approval of the class action settlement and for certification of the Settlement Class. As set forth in the declaration of Deborah McComb, the notice administrator implemented an extensive notice program through print media and online ads which were designed to reach the class. As set forth in her declaration, the notice program reached 70 percent of the class at least 1.9 times each. As further set forth in Ms. McComb's declaration, the response from the class has been positive: to date more than 6,051 claims have been received—with no opt-outs or objections. *See* Declaration of Class Action Administrator ("McComb Decl."), attached hereto as **Exhibit 1.**

INTRODUCTION

This class action case was filed against Wendy's International, LLC ("Wendy's") in February 2016 following a data security incident arising out of third-party criminal attacks on the point of sale systems of certain of Wendy's independently owned and operated franchisee restaurants involving malware that targeted customer payment card related information. Cybercriminals installed malware on those franchisees' POS systems via those franchisees' third-party vendors. *See* Second Amended Complaint ("SAC"), (Doc. 102 ¶ 4). The malware facilitated the exfiltration of payment card related data, such as cardholder name, card number, expiration date, cardholder verification value, and service code.

[1] Unless otherwise noted, all capitalized terms are defined in the Settlement Agreement and Release ("Settlement"), which was previously filed at Doc. 138-1.

The proposed Settlement, reached after extensive discovery in this case, and following a mediation conducted by David Lichter in Atlanta, Georgia on March 22, 2018, provides a resolution of the claims of the consumers against Wendy's, ***without the class releasing any claims against the impacted Wendy's franchises or the third-party vendors through which access was obtained***. As set forth in more detail in the Settlement, the Settlement provides for the resolution of all claims and causes of action asserted, or that could have been asserted, against Wendy's and the Released Persons. In exchange for the releases in the Settlement, Wendy's agreed, as set forth in the Settlement, to reimburse Settlement Class Members for, among other things: unreimbursed bank and payment card fees; time spent dealing with replacement card issues or in reversing fraudulent charges; fraudulent charges on a payment card; costs of credit reports; and costs of credit monitoring. The Settlement offers a significant recovery for class members. This is an excellent result.

For the reasons stated below, Plaintiffs respectfully request that the Court enter an order granting final approval of the settlement and finally certifying the Settlement Class.

SUMMARY OF THE LITIGATION

This class action case was filed against Wendy's in February 2016 following a malware incident designed to steal credit and debit card data on Wendy's POS systems. Wendy's has indicated that cybercriminals gained access via a third-party vendor with access to the data systems of certain Wendy's franchises. (SAC, Doc. 102 ¶ 4.) The original Plaintiff, Jonathan Torres, asserted three claims in his initial complaint: breach of implied contract, negligence, and violations of Florida's Unfair and Deceptive Trade Practices Act (Compl., Doc. 1 ¶¶ 57-96.)

Mr. Torres was later joined by Christine Jackson, Donald Jackson, Ashley McConnell, Roxanne Gant, and Gerald Thomas and an amended complaint was filed on July 29, 2016

asserting claims for breach of implied contract, negligence, violations of State Consumer Protection Laws, and violations of state data breach statutes. (First Amended Complaint, Doc. 71.) Following Wendy's motion to dismiss, the Court dismissed the violations of state consumer protection laws and violations of state data breach statutes claims and allowed the other three claims to go forward. (Order, Doc. 101.)

Pursuant to the Order of dismissal, Plaintiffs filed a Second Amended Complaint on April 3, 2017, asserting claims for breach of implied contract, negligence, violations of the Florida Deceptive and Unfair Trade Practices Act, violations of the New York Business Law, violations of the Tennessee Consumer Protection Act, violation of New Jersey Consumer Fraud Act, and violation of Texas Deceptive Trade Practice Act. (SAC, Doc. 102).

The parties have engaged in voluminous document and ESI discovery and have exchanged substantial written discovery. Wendy's has taken the depositions of Ashley McConnell, Roxanne Gant, Christine Jackson, and Gerald Thomas. Plaintiffs have taken the deposition of Wendy's Rule 30(b)(6) representative and other Wendy's employees.

The parties have also engaged in substantial third-party discovery. Plaintiff issued subpoenas to CrowdStrike, Dumac, MasterCard, Visa, Vantiv, NCR, Mandiant, SecureWorks, and Wand.

Plaintiff's counsel also retained a cybersecurity expert to assist Plaintiff's counsel to identify the cause of the breach and to determine the preventive measures necessary to protect information of consumers in the future. This expert telephonically attended several of the depositions and reviewed documents produced by Wendy's. In addition, Plaintiff's counsel retained a damages expert to assist counsel in determining the type and nature of the damages which could be sustained by a class member.

INFORMATION ABOUT THE SETTLEMENT

In order to explore the resolution of this case, the parties retained David Lichter, a highly experienced mediator. Declaration of John A. Yanchunis in Support of Final Approval ("Yanchunis Decl."), ¶ 11, attached hereto as **Exhibit 2**. On March 22, 2018, the parties had a full-day mediation session with Mr. Lichter at Alston & Bird in Atlanta, Georgia. Yanchunis Decl., ¶ 11. The negotiations were hard-fought throughout and the settlement process was conducted at arm's length. Yanchunis Decl., ¶ 11. Through the negotiations that continued in the weeks after the mediation, the parties were able to reach an agreement on the substantive terms of the Settlement. Yanchunis Decl., ¶ 11. The subject of the amount attorneys' fees, costs and expenses, subject to Court approval, was negotiated only after the substantive terms of the Settlement were agreed upon by the parties. Yanchunis Decl., ¶ 11.

It cannot be contested that at all times the parties' negotiations were adversarial, non-collusive, and conducted at arm's length.

I. Summary of the Settlement Terms

A. The Settlement Class

The proposed Settlement Class is defined as:

> All residents of the United States whose Personal Information was compromised as a result of the Security Incident. The Settlement Class specifically excludes: (i) Wendy's and its officers and directors; (ii) all Settlement Class Members who timely and validly request exclusion from the Settlement Class; (iii) the Judge assigned to evaluate the fairness of this settlement; and (iv) any other Person found by a court of competent jurisdiction to be guilty under criminal law of initiating, causing, aiding or abetting the criminal activity occurrence of the Security Incident or who pleads nolo contendere to any such charge.

B. The Settlement Benefits

1. Monetary Remedies

The Settlement provides for the following benefits and relief to Settlement Class Members who submit valid Claim Forms under specified terms. Settlement Class Members are eligible to submit Settlement Claims for both Expense Reimbursement and Undocumented Time Spent, not to exceed a total of $5,000.00 per Settlement Class Member as follows:

1. Expense Reimbursement. All Settlement Class Members who submit a valid Settlement Claim using the Claim Form, which is attached as Exhibit A to the Settlement Agreement, are eligible to receive reimbursement for documented out-of-pocket expenses that were incurred as a result of the Security Incident for one or more of the following, not to exceed a total of $5,000 per Settlement Class Member: (i) costs and expenses spent addressing identity theft or fraud; (ii) losses caused by restricted access to funds (*e.g.*, 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 were not reimbursed; (vi) other documented losses that were not reimbursed; and (vii) up to five hours of documented time spent remedying issues relating to the Security Incident (calculated at the rate of $15.00 per hour). *See* SA ¶ 2.1

2. Undocumented Time Spent. Any Settlement Class Member who spent time and effort dealing with repercussions of the Security Incident, but does not have documentation of such time and effort, will be eligible to submit a Settlement Claim for time spent in an amount of $15 per hour up to two hours (for a total of $30). *See* SA ¶ 2.2

The aggregate amount of Approved Claims reimbursement under SA ¶¶ 2.1-2.2; attorneys' fees, costs, and expenses under ¶ 8.2; and service awards to the Representative

Plaintiffs under ¶8.3;**Error! Reference source not found.** for which Wendy's shall be responsible to pay is capped at $3,400,000.00. If the total amount of valid claims submitted under ¶¶ 2.1-2.2 above exceeds the $3,400,000.00 cap minus the court-awarded attorneys' fees, costs and expenses, and service awards, each individual claim amount shall be reduced in a pro rata amount. *See* SA ¶ 24

II. Notice Plan

KCC Class Action Services, LLC ("KCC") was appointed by the Court to implement an extensive notice plan to reach the class of consumers defined above. As set forth in the declaration of Ms. McComb, KCC caused the Publication Notice to appear as an approximate one-third-page advertisement unit once in the print and online digital replicas of *Country Living*, *ESPN The Magazine*, and *People*. The Notice appeared on page 115 in the December 2018 issue of *Country Living* which went on-sale and became available to readers on November 13, 2018. The Notice appeared on page 46 in the October 29, 2018 issue of *ESPN The Magazine* which went on-sale and became available to readers on October 19, 2018. The Notice appeared in the October 22, 2018 issue of *People* which went on-sale and became available to readers on October 12, 2018.

In addition, KCC implemented a paid nationwide online advertising campaign consisting of internet banners on the Google Display Network and Yahoo! audience network, as well as the social media site Facebook. KCC purchased 170 million impressions, which were targeted to reach adults 25 years of age or older on both desktop and mobile devices, including tablets and smartphones. The online advertisements included an embedded link to the case website. A total of 184,072,509 impressions were delivered from September 22, 2018 through November 21, 2018 – ***more than 14 million more impressions*** than proposed in connection with Notice Plan

submitted to the Court. *See* ECF 138-1, at ¶ 14 (estimating that approximately 169.5 million impressions would be generated pursuant to the Notice Plan).

SETTLEMENT WEBSITE

On or about September 21, 2018, KCC established a settlement website www.wendysdatabreachsettlement.com dedicated to the Settlement to provide settlement information to the Class Members and to answer frequently asked questions. The website URL was set forth in the Long Form Notice, Publication Notice, and Claim Form. Visitors of the website can download copies of the Long Form Notice, Claim Form, and other case-related documents. Visitors can also submit claims online and upload supporting documentation. Since September 24, 2018, Wendy's has also provided hyperlinked access to the Settlement Website from its Payment Card Incident website.

TELEPHONE HOTLINE

KCC established and continues to maintain a toll-free telephone number (844-295-9845) for potential Class Members to call and obtain information about the Settlement and request a Notice Packet containing the Long Form Notice and Claim Form. The telephone hotline became operational on September 19, 2018, and is accessible 24 hours a day, 7 days a week. As of February 4, 2019, KCC has received more than 300 calls to the telephone hotline.

According to KCC's media team and consistent with the Notice Plan submitted and approved by the Court, the Notice Plan reached approximately 70% of likely Class members on average 1.9 times each.

RELEASE OF CLAIMS

As set forth in more detail in the Settlement, under the Settlement, each member of the Settlement Class will be deemed to have released any and all claims, demands, rights, liabilities

and causes of action of every nature and description whatsoever, known or unknown, suspected or unsuspected, asserted or that might have been asserted, by the Plaintiffs or any Settlement Class Member, arising out of or related to the facts giving rise to the subject matter of the Complaint against The Wendy's Company, Wendy's Restaurants, LLC, Wendy's International, LLC, and their current and former parents, subsidiaries, affiliated companies, and divisions, whether indirect or direct, as well as these entities' respective predecessors, successors, directors, officers, employees, principals, agents, attorneys, insurers, and reinsurers. The Release does not include any past or current franchisees of Wendy's or any third party, unaffiliated vendors, such as WAND Corporation, NCR, and DUMAC Business Systems, Inc. SA ¶ 7.1.

ARGUMENT AND CITATION TO AUTHORITIES

A. Certification of the Settlement Class is Appropriate

As this Court has already held, the Settlement Class meets the requirements for certification for settlement purposes under Rule 23. *See* (Doc. 146). Specifically, the Settlement Class meets the numerosity, commonality, typicality, and adequacy of representation requirements of Rule 23(a), and the predominance requirement of Rule 23(b). Fed. R. Civ. P 23(a)(1)–(4), (b)(3). *See* MANUAL FOR COMPLEX LITIG., § 21.632 (4th ed. 2004); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Class certification is proper if the proposed class, proposed class representative(s), and proposed class counsel satisfy the numerosity, commonality, typicality, and adequacy of representation requirements of Rule 23(a). Fed. R. Civ. P 23(a)(1)–(4); see also *Fabricant v. Sears Roebuck*, 202 F.R.D. 310, 313 (S.D. Fla. 2001). Additionally, where (as in this case) certification is sought under Rule 23(b)(3), the plaintiff must demonstrate that common questions of law or fact predominate over individual issues and that a class action is superior to other methods of adjudicating the claims. Fed. R. Civ. P. 23(b)(3);

Amchem, 521 U.S. at 615–16. District courts are given broad discretion to determine whether certification of a class action lawsuit is appropriate. *Walco Investments, Inc. v. Thenen*, 168 F.R.D. 315, 323 (S.D. Fla. 1996).

A court in a sister district has stated that "[a] class may be certified 'solely for purposes of settlement where a settlement is reached before a litigated determination of the class certification issue.'" *Burrows v. Purchasing Power, LLC,* No. 1:12-CV-22800, 2013 WL 10167232, at *1 (S.D. Fla. Oct. 7, 2013) (quoting *Lipuma v. American Express Co*., 406 F. Supp. 2d 1298, 1314 (S.D. Fla. 2005)). "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem Products, Inc.,* 521 U.S. at 620. This case meets all of the Rule 23(a) and 23(b)(3) prerequisites, and for the reasons set forth below, certification is appropriate.

1. The Proposed Settlement Class Meets the Requirements of Rule 23(a).

a. Numerosity.

Numerosity requires "the class [be] so numerous that joinder of all members is impractical." Fed. R. Civ. P. 23(a)(1). "While 'mere allegations of numerosity are insufficient,' Fed. R. Civ. P. 23(a)(1) imposes a 'generally low hurdle,' and 'a plaintiff need not show the precise number of members in the class.'" *Manno v. Healthcare Revenue Recovery Grp., LLC,* 289 F.R.D. 674, 684 (S.D. Fla. 2013) (citation omitted). While the exact size of the putative class need not be specified, "'generally less than twenty-one is inadequate, more than forty adequate; with numbers between varying according to other factors.'" *Cox v. Am. Cast. Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986) (quoting 3B Moore's Federal Practice para. 23.05[1] n.7 (1978)).

Here, hundreds of independently owned and operated Wendy's franchisee restaurants were impacted over multiple months. Seventy-five percent (75%) of dine-in restaurant customers pay with a credit or debit card.[2] More than 6,250 individuals have already submitted claims. Thus, the numerosity requirement is clearly satisfied.

b. Commonality.

The second prerequisite to class certification is commonality, which "requires the plaintiff to demonstrate that the class members 'have suffered the same injury,'" and the plaintiff's common contention "must be of such a nature that it is capable of classwide resolution–which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2545 (2011) (citation omitted). The commonality requirement presents a low hurdle, as commonality does not require that all questions of law and fact raised be common. *Muzuco v. Re$ubmitIt, LLC*, 297 F.R.D. 504, 514 (S.D. Fla. 2013). "[F]or purposes of Rule 23(a)(2) '[e]ven a single [common] question' will do." *Dukes*, 131 S. Ct. at 2556. Rule 23(a)(2) requires "only that there be at least one issue whose resolution will affect all or a significant number of the putative class members." *Sharf v. Financial Asset Resolution, LLC*, 295 F.R.D. 664, 669 (S.D. Fla. 2014) (internal citations omitted); *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1355 (11th Cir. 2009); *James D. Hinson Elec. Contr. Co. v. BellSouth Telecomms., Inc.*, 275 F.R.D. 638, 642 (M.D. Fla. 2011) (citing *Williams*, 568 F.3d at 1355).

Here, the commonality requirement of Rule 23(a)(2) is satisfied. There are questions of law and fact common to the Class, and resolution of these common issues will resolve them for

[2] *2017 TSYS U.S. Consumer Payment Study*, p. 41, *available a*t https://www.tsys.com/Assets/TSYS/downloads/rs_2017-us-consumer-payment-study.pdf (last accessed February 9, 2019).

the entire Class. See *Manno*, 289 F.R.D. at 685. Specifically, Plaintiffs' claims involve the following questions of fact and law common to the Class:

- Whether Wendy's had a duty to protect Customer Data; whether Wendy's was negligent in failing to implement reasonable security procedures and practices; whether Wendy's knew or should have known that its computer systems were vulnerable to attack; whether Wendy's was negligent by failing to promptly notify class members their personal information had been compromised; whether Wendy's was reckless in continuing to accept payment cards from customers while its investigation was pending; whether Wendy's conduct, including its failure to act, resulted in or was the proximate cause of the breach of its systems, resulting in the loss of the Customer Data of Plaintiffs and Class members; whether class members may obtain injunctive relief against Wendy's to require that it safeguard, or destroy rather than retain the Customer Data of Plaintiffs and Class members; what security procedures and data-breach notification procedure Wendy's should be required to implement as part of any injunctive relief ordered by the Court; whether Wendy's has an implied contractual obligation to use reasonable security measures; whether Wendy's has complied with any implied contractual obligation to use reasonable security measures; what security measures, if any, must be implemented by Wendy's to comply with its implied contractual obligations; and, the nature of the relief, including equitable relief, to which Plaintiffs and the Class members are entitled.

c. Typicality.

The next prerequisite to certification, typicality, "measures whether a significant nexus exists between the claims of the named representative and those of the class at large." *Hines v. Widnall*, 334 F.3d 1253, 1256 (11th Cir. 2003); Fed. R. Civ. P. 23(a)(3). A class representative's claims are typical of the claims of the class if they "arise from the same event or pattern or practice and are based on the same legal theory." *Kornberg v. Carnival Cruise Lines, Inc.,* 741 F.2d 1332, 1337 (11th Cir. 1984); *see also Cooper v. Southern Co*., 390 F.3d 695, 714 (11th Cir. 2004) ("Neither the typicality nor the commonality requirement mandates that all putative class members share identical claims, and . . . factual differences among the claims of the putative members do not defeat certification."). Simply put, when the same course of conduct is directed at both the named plaintiff and the members of the proposed class, the typicality requirement is met. *Kennedy v. Tallant*, 710 F.2d 711, 717 (11th Cir. 1983).

Here, the typicality requirement is satisfied for the same reasons that Plaintiffs' claims meet the commonality requirement. Specifically, Plaintiffs' claims are typical of those of other Class members because Plaintiffs allege Wendy's failed to safeguard Plaintiffs' information, like that of every other Class member.

d. Adequacy.

Rule 23(a)(4) requires that the class representative "not possess interests which are antagonistic to the interests of the class." 1 Newberg on Class Actions § 3:21. Additionally, the class representative's counsel "must be qualified, experienced, and generally able to conduct the litigation." *Id*.; *Amchem*, 521 U.S. at 625–26. The adequacy requirement is satisfied. The Class Representatives are members of the Settlement Class and do not possess any interests antagonistic to the Settlement Class. In addition, Settlement Class Counsel are experienced in class action litigation, and have submitted declarations establishing their skills and experience in

handling class litigation around the country and in this District. *See* Declaration of John A. Yanchunis and Declarations of Class Counsel, attached as exhibits to Plaintiffs' Motion for Award of Attorneys' Fees filed simultaneously herewith. Thus, the requirements of Rule 23(a) are satisfied.

2. The Predominance and Superiority Requirements of Rule 23(b)(3) Are Met.

In addition to meeting the prerequisites of Rule 23(a), the proposed Settlement Class must also meet one of the three requirements of Rule 23(b). *In re Checking*, 286 F.R.D. at 650. Here, Plaintiffs seek certification under Rule 23(b)(3), which requires that (i) questions of law and fact common to members of the class predominate over any questions affecting only individuals, and that (ii) the class action mechanism is superior to other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3). "'It is not necessary that all questions of fact or law be common, but only that some questions are common and that they predominate over individual questions.'" *BellSouth Telecomms., Inc.*, 275 F.R.D. at 644 (quoting *Klay v. Humana, Inc.*, 382 F.3d 1241, 1254 (11th Cir. 2004)). The "inquiry into whether common questions predominate over individual questions is generally focused on whether there are common liability issues which may be resolved efficiently on a class-wide basis." *Agan*, 222 F.R.D. at 700. The Settlement Class readily meets these requirements.

a. Predominance.

Rule 23(b)(3)'s predominance requirement focuses primarily on whether a defendant's liability is common enough to be resolved on a class basis, see *Dukes*, 131 S. Ct. at 2551–57, and whether the proposed class is "sufficiently cohesive to warrant adjudication by representation," *Amchem*, 521 U.S. at 623. Common issues of fact and law predominate in a case "if they have a direct impact on every class member's effort to establish liability and on every class member's

entitlement to injunctive and monetary relief." *BellSouth Telecomms., Inc*., 275 F.R.D. at 644 (citing *Klay*, 382 F.3d at 1255); *see also Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1179 (11th Cir. 2010) (noting that "[t]he relevant inquiry [is] whether questions of liability to the class . . . predominate over . . . individual issues relating to damages. . . ."). Predominance does not require that all questions of law or fact be common, but rather, that a significant aspect of the case "can be resolved for all Settlement Class Members of the class in a single adjudication." *In re Checking Account Overdraft Litig*., 275 F.R.D. 654, 660 (S.D. Fla. 2011). "When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.'" *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (quoting 7AA C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §1778, pp. 123-124 (3d ed. 2005)). Common issues readily predominate here because the central liability question — whether Wendy's adequately protected Plaintiffs' payment card data — can be established through evidence that is common to the class. *See Klay*, 382 F.3d at 1264 ("When there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position, the predominance test will be met.").

b. Superiority.

Finally, a class action is superior to other methods available to fairly, adequately, and efficiently resolve the claims of the proposed Settlement Class. As courts have historically noted, "[t]he class action fills an essential role when the plaintiffs would not have the incentive or resources to prosecute relatively small claims in individual suits, leaving the defendant free

from legal accountability." *In re Checking*, 286 F.R.D. at 659. At its most basic, "[t]he inquiry into whether the class action is the superior method for a particular case focuses on 'increased efficiency.'" *Agan*, 222 F.R.D. at 700 (quoting *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1359 (11th Cir. 2002)).

Factors the Court may consider are: (A) the interests of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class. As noted earlier, any perceived difficulties managing the Settlement Class need not be considered in this settlement context. *Amchem*, 521 U.S. at 620; *Sullivan v. DB Invs., Inc.,* 667 F.3d 273, 302–03 (3d Cir. 2011) (holding that potential variances in different states' laws would not defeat certification of a settlement-only class because trial management concerns were not implicated by a settlement-only class, as opposed to a litigated class). A class action settlement is superior to other means of resolution because a settlement affording Settlement Class Members an opportunity to receive compensation benefits all parties.

Here, resolution of thousands of claims in one action is far superior to individual lawsuits, because it promotes consistency and efficiency of adjudication. *See* Fed. R. Civ. P. 23(b)(3). Indeed, absent class treatment, each Settlement Class Member will be required to present the same or essentially the same legal and factual arguments, in separate and duplicative proceedings, the result of which would be a multiplicity of trials conducted at enormous expense to both the judiciary and the litigants. Moreover, there is no indication that members of the Settlement Class have an interest in individual litigation or an incentive to pursue their claims

individually, given the amount of damages likely to be recovered, relative to the resources required to prosecute such an action. See *In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. 672, 700 (S.D. Fla. 2004) (class actions are "particularly appropriate where . . . it is necessary to permit the plaintiffs to pool claims which would be uneconomical to litigate individually").

Additionally, the proposed Settlement will give the parties the benefit of finality. Because the claims are being certified for purposes of settlement, there are no issues with manageability, and resolution of thousands of claims in one action is far superior to individual lawsuits and promotes consistency and efficiency of adjudication. *Amchem*, 521 U.S. at 620 ("Confronted with a request for settlement-only certification, a district court need not inquire whether the case, if tried, would present intractable management problems … for the proposal is that there be no trial.").

The Court should certify the Settlement Class, as the superiority requirement is satisfied, along with all other Rule 23 requirements.

B. Plaintiff's Counsel Should Be Appointed as Class Counsel.

Under Rule 23, "a court that certifies a class must appoint class counsel . . . [who] must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). In making this determination, the court must consider the proposed class counsel's (1) work in identifying or investigating potential claims, (2) experience in handling class actions or other complex litigation and the types of claims asserted in the case, (3) knowledge of the applicable law, and (4) resources committed to representing the class. Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv).

As discussed above, and as fully explained in Class Counsels' Declarations, attached as exhibits to Plaintiffs' Motion for Preliminary Approval (Doc. 138-3), proposed Class Counsel

have extensive experience prosecuting similar class actions and other complex litigation. Further, proposed Class Counsel have diligently investigated and prosecuted the claims in this matter, have dedicated substantial resources to the investigation and litigation of those claims, and have successfully negotiated the Settlement of this matter to the benefit of Plaintiffs and the Settlement Class. *Id*. Accordingly, the Court should appoint John Allen Yanchunis Sr. as Lead Class Counsel and Jean Martin, Patrick Barthle, Ariana Tadler, Melissa Clark, John Emerson and Jeremy Glapion as Class Counsel.

C. The Settlement Is Fair, Reasonable, and Adequate.

"Settlements of complex cases contribute greatly to the efficient utilization of scarce judicial resources, and achieve the speedy resolution of justice." *Wilson v. EverBank*, No. 14-CIV-22264, 2016 WL 457011, at *6 (S.D. Fla. Feb. 3, 2016). "For these reasons, 'there exists an overriding public interest in favor of settlement, particularly in class actions that have the well-deserved reputation as being most complex." *Id.* (quoting *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 114 (S.D. Fla. 2005)). "Settlement agreements are highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and uncertainties and preventing lawsuits." *Pierre-Val v. Buccaneers Ltd. Partn.*, No. 8:14-CV-01182, 2015 WL 3776918, at *1 (M.D. Fla. June 17, 2015) (quoting *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1105 (5th Cir. 1977).

In deciding whether to approve the Settlement, the Court will analyze whether it is "fair, adequate, reasonable, and not the product of collusion." *Leverso v. Lieberman*, 18 F.3d 1527, 1530 (11th Cir. 1994); *see also Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984). The Court's "judgment is informed by the strong judicial policy favoring settlement as well as by

the realization that compromise is the essence of settlement." *Wilson*, 2016 WL 457011, at *6 (quoting *Nelson v. Mead Johnson & Johnson Co.*, 484 Fed. App'x 429, 434 (11th Cir. 2012)).

Revisions to Rule 23—effective on December 1, 2018—require the Court to conduct a detailed analysis to determine whether a settlement is fair, reasonable and adequate. Rule 23(e)(2) states:

> ***Approval of the Proposal.*** If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
>
> > **(A)** the class representatives and class counsel have adequately represented the class;
> >
> > **(B)** the proposal was negotiated at arm's length;
> >
> > **(C)** the relief provided for the class is adequate, taking into account:
> >
> > > **(i)** the costs, risks, and delay of trial and appeal;
> > >
> > > **(ii)** the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> > >
> > > **(iii)** the terms of any proposed award of attorney's fees, including timing of payment; and
> > >
> > > **(iv)** any agreement required to be identified under Rule 23(e)(3); and
> >
> > **(D)** the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2.)

This revised rule reflects factors already used in the Eleventh Circuit in analyzing the fairness, reasonableness and adequacy of a class settlement under Rule 23(e):

(1) the existence of fraud or collusion behind the settlement;

(2) the complexity, expense, and likely duration of the litigation;

(3) the stage of the proceedings and the amount of discovery completed;

(4) the probability of the Class Representative's success on the merits;

(5) the range of possible recovery; and

(6) the opinions of the class counsel, class representative, and the substance and amount of opposition to the settlement.

Montoya v. PNC Bank, N.A., No. 14-20474, 2016 WL 1529902 at *8 (S.D. Fla. April 13, 2016), (citing *Leverso*, 18 F.3d at 1530 n.6; *Bennett*, 737 F.2d at 986). The analysis of these factors, set forth below, shows this Settlement to be eminently fair, adequate, and reasonable.

1. The Settlement Is Not the Product of Fraud or Collusion.

The first factor for final approval requires the Court to consider whether the Settlement was obtained by fraud or collusion among the parties and their counsel. Courts begin with a presumption of good faith in the negotiating process. "Where the parties have negotiated at arm's length, the Court should find that the settlement is not the product of collusion." *Wilson*, 2016 WL 457011, at *6 (quoting *Saccoccio v. JPMorgan Chase Bank, N.A.*, 297 F.R.D. 683, 692 (S.D. Fla. 2014)). In such cases, "[t]here is a presumption of good faith in the negotiation process." *Id.*

Here, the Settlement was the result of intensive, arms-length negotiations between experienced attorneys who are familiar with class action litigation and with the legal and factual issues involved in this case. The Settlement was reached only after mediation before an experienced neutral. Yanchunis Decl., ¶ 11. *See, e.g.*, *Blessing v. Sirius XM Radio, Inc.*, 507 F. App'x. 1, 3 (2nd Cir. 2012) (finding that "the district court did not abuse its discretion when it presumed the proposed settlement was fair" where "competent counsel appears on both sides" and "settlement was reached only after contentious negotiations"); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 244 (S.D. Ohio 1991) (approving settlement reached "after almost six months of concerted negotiations").

Additionally, the Settlement was reached only after nearly two years of litigation, including extensive briefing on motions to dismiss and discovery. The parties conducted

discovery on all relevant issues, with Wendy's producing millions of pages of documents, and both Plaintiffs and Wendy's taking numerous fact depositions. Yanchunis Decl., ¶10. In short, the parties could hardly have litigated this case more vigorously, or done more to understand the issues in the case or to test their theories and defenses. *See* 4 NEWBERG ON CLASS ACTIONS, §13:14 ("Where the proposed settlement was preceded by a lengthy period of adversarial litigation involving substantial discovery, a court is likely to conclude that the settlement negotiations occurred at arms-length.").

There is no doubt this Settlement was at all times arms-length, and it therefore carries a presumption of fairness. Where there "is no evidence of any kind that the parties or their counsel have colluded or otherwise acted in bad faith in arriving at the terms of the proposed settlement . . . counsel's informed recommendation of the agreement is persuasive that approval is appropriate." *Strube v. Am. Equity Inv. Life Ins. Co.*, 226 F.R.D. 633, 703 (M.D. Fla. 2005). And here, Class Counsel are in favor of this proposed settlement and recommend its approval. Yanchunis Decl. ¶ 18.

2. The Complexity, Expense, and Duration of Further Litigation Supports Approval of the Settlement.

The claims and defenses in this case are complex and vigorously contested. Continued litigation will involve substantial expenditures of time and money, which further counsels in favor of final approval. Even if Plaintiffs succeed in obtaining class certification on a contested basis, Plaintiffs and the Class would still inevitably face a challenge to the certification decision of the Court, as well as summary judgment, a trial on the merits, and a post-judgment appeal. The uncertainties and delays from this process would be significant. Complex litigation – like the instant case – "can occupy a court's docket for years on end, depleting the resources of the parties and the taxpayers while rendering meaningful relief increasingly elusive." *Wilson*, 2016

WL 457011, at *7 (quoting *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992)). As a result, recovery by any means other than settlement will undoubtedly require additional complex, protracted and expensive litigation.

In addition, in evaluating this factor, "[t]he court should consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation. In this respect, '[i]t has been held proper to take the bird in the hand instead of a prospective flock in the bush.'" *Lipuma*, 406 F. Supp. 2d at 1323 (quoting *In re Shell Oil Refinery*, 155 F.R.D. 552, 560 (E.D. La. 1993)). Because the "demand for time on the existing judicial system must be evaluated in determining the reasonableness of the settlement," *Ressler v. Jacobson*, 822 F. Supp. 1551, 1554 (M.D. Fla. 1992), there can be no doubt about the adequacy of the present Settlement, which provides meaningful benefits to the Class. Considering the uncertainties inherent in continued litigation, including trial and an appeal, along with the delays and complexities inherent in this type of litigation, settlement is in the best interest of Plaintiffs and the Class. *Lipuma*, 406 F. Supp. 2d at 1324.

3. The Factual Record Was Sufficiently Developed to Enable Class Counsel to Make a Reasoned Judgment.

The stage of proceedings at which settlement is reached is "evaluated to ensure that Plaintiffs had access to sufficient information to adequately evaluate the merits of the case and weigh the benefits of settlement against further litigation." *Wilson*, 2016 WL 457011, at *7 (quoting *Lipuma*, 406 F. Supp. 2d at 1324).

As stated, the Settlement resulted from arms-length negotiations informed by over two years of aggressive and comprehensive litigation. During the course of this litigation, millions of pages of documents have been produced and reviewed and fact depositions have been

conducted. Between this extensive discovery and briefing the parties could hardly have contested this matter more vigorously, nor done more to understand the relative strengths and weaknesses of their respective positions.

Simply put, this matter has been vigorously litigated for two years and, thus, there was no shortage of information from which the parties could evaluate the propriety of a settlement. There was no rush to settlement here. This Settlement was reached after both sides endured the rigors of hard-fought motion practice, discovery, and litigation.

4. The Likelihood of Success at Trial Supports Approval of the Settlement.

"By far the most important factor in evaluating the fairness and adequacy of a settlement is the likelihood and extent of any recovery from the defendants absent the settlement." *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. at 314; *see also Ressler*, 822 F. Supp. at 1555 ("A Court is to consider the likelihood of the plaintiff's success on the merits of his claims against the amount and form of relief offered in the settlement before judging the fairness of the compromise.").

The Settlement here is compelling given the substantial litigation risks the Settlement Class faced. First, while the Settlement provides meaningful benefits to all Class Members nationwide, certifying a nationwide litigation class would have been challenging. The Settlement, however, provides nationwide relief for all affected Class Members.

The Settlement Class also faced risks beyond just class certification. The malware which resulted in the extraction of class members PII occurred at franchise retail locations and not at Defendant's locations. And the cyberattacks were the result of third-party criminal conduct that arguably severed the chain of causation for plaintiffs' negligence claims. For these and other reasons, liability was seriously contested.

By contrast, the proposed settlement provides certain, timely, and substantial relief. *Bennett v. Behring Corp*., 96 F.R.D. 343, 349 (S.D. Fla. 1982) (plaintiffs faced a "myriad of factual and legal problems" that led to "great uncertainty as to the fact and the amount of damage," making it "unwise [for plaintiffs] to risk the substantial benefits which the settlement confer[red] … to the vagaries of a trial"), *aff'd*, 737 F.2d 982 (11th Cir. 1984). Assessed against the delays and uncertainties associated with trial and appeals, the Settlement provides immediate, substantial economic benefits that are fair and reasonable.

5. The Benefits Provided by the Settlement are Fair, Adequate and Reasonable Compared to the Range of Possible Recovery.

In determining whether a settlement is fair in light of the potential range of recovery, "the focus is on the possible recovery at trial." *Wilson*, 2016 WL 457011, at *7 (quoting *Saccoccio*, 297 F.R.D. at 693). "[T]he fact that a proposed settlement amounts to only a fraction of the potential recovery does not mean the settlement is unfair or inadequate." *Behrens*, 118 F.R.D. at 542. Indeed, "[a] settlement can be satisfying even if it amounts to a hundredth or even a thousandth of a single percent of the potential recovery." *Id.* This is because a settlement must be evaluated "in light of the attendant risks with litigation." *Thompson v. Metropolitan Life Ins. Co.*, 216 F.R.D. 55, 64 (S.D.N.Y. 2003); *see also Bennett*, 737 F.2d at 986 ("[C]ompromise is the essence of settlement."). Thus, courts regularly find settlements to be fair where "[p]laintiffs have not received the optimal relief." *Warren v. City of Tampa*, 693 F. Supp. 1051, 1059 (M.D. Fla. 1988); *see also, e.g*., *Great Neck Capital Appreciation Investment P'ship, L.P. v. PriceWaterHouseCoopers, L.L.P.*, 212 F.R.D. 400, 409–10 (E.D. Wis. 2002) ("The mere possibility that the class might receive more if the case were fully litigated is not a good reason for disapproving the settlement.").

As discussed, the benefits available here compare favorably to what class members could recover if successful at trial. Specifically, Class Members will be able to seek relief based upon the affects and repercussions to each of them arising from the breach at franchisees' retail locations. Thus, while there is a cap on individual damages, Class Members are able to recover what they might have received at trial had they been successful.

Class Counsel assert that the Settlement benefits provided to Plaintiffs and Class Members through this Settlement present a substantial recovery, especially considering the strengths of the claims and the litigation risks described above.

6. The Opinions of Class Counsel, Class Representatives, and Absent Settlement Class Members Favor Approval of the Settlement.

In addition to the factors discussed above, the Court should give "great weight to the recommendations of counsel for the parties, given their considerable experience in this type of litigation." *Warren*, 693 F. Supp. at 1060; *see also Domestic Air*, 148 F.R.D. at 312–13 ("In determining whether to approve a proposed settlement, the Court is entitled to rely upon the judgment of the parties' experienced counsel. '[T]he trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel.'") (citations omitted).

> This Court, like others, considers the reaction of the class, as well as the reaction of the various state attorney generals and regulators, to the proposed settlement to be an important indicator as to its reasonableness and fairness. Obviously, a low number of objections suggests that the settlement is reasonable, while a high number of objections would provide a basis for finding that the settlement was unreasonable.

Howard Braynen, et al. v. Nationstar Mortgage, LLC, et al., 2015 WL 6872519 (S.D. Fla. 2015) (internal citations and quotation marks omitted).

Here, Class Counsel wholeheartedly endorses the Settlement. *See* Yanchunis Decl., ¶ 18. Additionally, the reaction of the Settlement Class to the Settlement here has been extremely

positive. There have been more than 6,250 claims and no objections and no opt-outs have been received. Yanchunis Decl. ¶ 17. Likewise, at present, neither the United States Attorney General nor any other state attorney general objected to the Settlement despite being directly notified. These are powerful indicia that the Settlement is fair, reasonable, and adequate and deserves final approval. *See Hall v. Bank of America, N.A.*, No. 1:12-cv-22700, 2014 WL 7184039, at *5 (S.D. Fla. Dec. 17, 2014) (noting where objections from settlement class members "equates to less than .0016% of the class" and "not a single state attorney general or regulator submitted an objection," "such facts are overwhelming support for the settlement and evidence of its reasonableness and fairness"); *Hamilton v. SunTrust Mortg. Inc.,* No. 13-60749, 2014 WL 5419507, at *4 (S.D. Fla. Oct. 24, 2014) (where "not a single state attorney general or regulator submitted an objection," and there were few objections to the class settlement, "such facts are overwhelming support for the settlement").

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court enter a Final Order and Judgment Certifying the Class, approving the Class Settlement, and dismissing the action with prejudice.

Dated: February 12, 2019

Respectfully submitted,

s/ John A. Yanchunis

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Local Rule 3.01(g) Certification

In accord with Local Rule 3.01(g), Plaintiffs conferred with Defendants regarding the relief requested in this motion and Defendants do not object to the relief sought herein but only in connection with the proposed settlement of this case. In the event that the Settlement is not approved, the Settlement Agreement is terminated for any reason, or the Effective Date, as defined in the Settlement Agreement, does not occur for any reason, Defendants reserve all defenses in the case and specifically reserve the right to object to this case proceeding on a class-wide basis for any purpose.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed with the Court and furnished via ECF to all counsel of record on this 14th day of February, 2019.

/s/ John A. Yanchunis