UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Village Bank, on behalf of itself and all others similarly situated,

Plaintiff,

v.

Caribou Coffee Company, Inc., Bruegger's Enterprises, Inc., Einstein & Noah Corp., and Einstein Noah Restaurant Group, Inc.

Defendants.

Case No. 0:19-cv-01640-JNE-HB

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiff Village Bank respectfully submits this memorandum of law in support of its unopposed motion for final approval of the Settlement. The Settlement between Plaintiff and Defendants Caribou Coffee Company, Inc., Bruegger's Enterprises, Inc., Einstein & Noah Corp., and Einstein Noah Restaurant Group, Inc. (collectively, "Caribou" or "Defendants") was reached after litigating the case for nearly 12 months, including discovery and a day-long mediation before the Honorable Arthur J. Boylan (Ret.). Under the Settlement, Defendants will pay $5,816,250 into a non-revisionary fund in exchange for a release of all claims against Defendants arising from cyberattacks by third-party criminal hackers who installed malware on Caribou computer systems and accessed customers' payment card information in 2018 (the "Data Breach").[1] Defendants will also continue to design and implement safeguards to manage and protect the security and confidentiality of payment cardholder data and the payment cardholder data environment. The Settlement provides significant relief to Settlement Class Members who suffered losses as a result of the Data Breach.

The Court preliminarily approved the Settlement as fair, reasonable, and adequate on June 24, 2020; and it directed notice to be provided to the Settlement Class. [Dkt. No. 51.] Since that time, the Parties successfully implemented the Notice Program approved

[1] All terms not defined in this memorandum have the same meaning defined in the Settlement Agreement ("Settlement" or "Settlement Agreement") attached to the Declaration of Bryan L. Bleichner in Support of Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement and Notice Plan as Exhibit A. [Dkt. No. 48-1 Ex. A.]

by the Court and have received a very positive response to the Settlement Class Members with no objections to the fairness, reasonableness, or adequacy of the settlement; only one Class Member has opted out of the Settlement.

Based on the ample compensation the Settlement provides, the experience of Settlement Class Counsel, the risks and costs of continued litigation, the robustness of the notice provide to the Settlement Class, and the overwhelmingly positive response of Class Members to the Settlement, Plaintiff respectfully requests that the Court grant final approval of the Settlement as fair, reasonable, and adequate, and enter final judgment accordingly.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. History of the Litigation

On June 21, 2019, Plaintiff filed an action in this Court against Defendants alleging that in 2018, third-party criminal hackers installed malware on Caribou computer systems and accessed customers' payment card information. (Compl. [Dkt. No. 1] ¶¶ 1-4.) Plaintiff, like the Settlement Class of financial institutions, issued payment cards allegedly compromised in the Data Breach, was notified that its cards had been compromised, and suffered financial loss in connection with covering customers' fraud losses and reissuing the compromised cards. (*Id.* ¶¶ 5, 12, 47, and 51.)

Plaintiff alleged that the Data Breach and Plaintiff's injury were the foreseeable result of Caribou's inadequate data security measures and refusal to implement industry-standard security measures because of the cost. (*Id.* ¶¶ 23-25, 57, 60, 76.) Plaintiff brought this action to recover its losses caused by Caribou's negligence and violations of

the Minnesota Plastic Card Security Act ("MNPCSA"), Minn. Stat. § 325E.64, and for declaratory and injunctive relief, and to do the same on behalf of a nationwide class.

The Parties negotiated and electronically filed a Stipulation for Protective Order [Dkt. No. 19] and a Stipulation for Federal Rule of Evidence 502(d) Order [Dkt. No. 21]. On August 28, 2019, Caribou filed an Answer to Class Action Complaint [Dkt. No. 28]. The Parties then met and conferred and prepared a joint Rule 26(f) Report. [Dkt. No. 35.]

B. Following Informal and Third-Party Discovery, a Mediated Settlement Negotiations Resulted in a Settlement.

The parties agreed to engage in early informal discovery to efficiently mediate and resolve the matter. In particular, Plaintiff requested numerous documents and Caribou produced over 800 pages of documents in response, which Plaintiff reviewed. Plaintiff also obtained and reviewed documents from third parties in response to subpoenas Plaintiff served on the major payment card brands. Caribou requested documents from Plaintiff, and Plaintiff produced responsive documents that Caribou reviewed.

The Settlement is the result of good faith, arm's-length settlement negotiations, including a full-day mediation before the Hoorable Arthur J. Boylan (Ret.) on January 15, 2020 in Minneapolis, Minnesota. (Settlement at 2.) Prior to the mediation, the Parties provided the mediator detailed confidential mediation statements setting forth their respective positions as to liability and damages. Counsel for the Parties also participated in several direct discussions about the resolution of the litigation. The mediation was highly contested, with counsel for each side advancing their respective arguments zealously on behalf of their clients while continuing to demonstrate their willingness to

litigate rather than accept a settlement not in the best interests of their clients. The negotiations were hard-fought throughout, and the settlement process, while conducted in a highly professional and respectful manner, was adversarial.

The Parties did not discuss attorneys' fees, costs, and expenses prior to agreeing to the essential terms of the Settlement. The Parties subsequently formalized the terms of their proposed settlement in the full settlement agreement. (*See* Settlement [Dkt. No. 48-1 Ex. A].)

On May 15, 2020, Plaintiff filed an Unopposed Motion for Preliminary Approval of Class Action Settlement and Notice Plan. [Dkt. No. 47.] The Court granted the motion on June 24, 2020 finding the proposed settlement was fair, reasonable, and adequate and provisionally certifying the Settlement Class proposed by the Parties:

> All banks, credit unions, financial institutions, and other entities in the United States (including its Territories and the District of Columbia) that issued Visa- and/or MasterCard-branded payment cards (including debit or credit cards) that were affected by the Data Breach and/or part of initial and/or final alerts from Visa or MasterCard related to the Data Breach.

[Dkt. No. 51 ¶ 3.] The Court appointed as Settlement Class Counsel Bryan L. Bleichner and Karl L. Cambronne of Chestnut Cambronne PA and it directed Notice to be provided to the Settlement Class. (*Id.* ¶¶ 10, 14.) The Court set a schedule for the notice and claims period, for final approval briefing, and set a Final Approval Hearing for December 1, 2020. (*Id.* ¶¶ 13, 14.) Thereafter, the Settlement Administrator sent out Notice and the claims process began. (Declaration of Kari Schmidt (Schmidt Decl.) ¶¶ 7, 8.) The details and results of that process are discussed in Section III below.

II. SETTLEMENT AGREEMENT

A. Benefits to the Settlement Class.

1. Settlement Fund.

Under the Settlement Agreement, Defendants will pay $5,816,250 into a non-revisionary fund. [Dkt. No. 48-1 ¶ 38.] This Settlement Fund will be used to pay: 1) disbursements to Settlement Class Members that file Approved claims in accordance with the Distribution Plan (described below); 2) the Costs of Settlement Administration and any taxes due on the Settlement Fund account; 3) attorneys' fees, costs, and expenses to Class Counsel in amounts approved by the Court; and 4) Service Award in amounts approved by the Court. [Dkt. No. 48-1 ¶ 38(b).]

Under the Distribution Plan that governs cash payment awards to Settlement Class Members from the Settlement Fund, a copy of which is attached as Exhibit A-1 to the Settlement Agreement, Settlement Class Members that have filed an Approved Claim will receive a Cash Payment Award per Claimed-On Card without having to submit documentation or prove their losses.[2] (*Id.*; Dkt. No. 48-2 Ex, A-1.) The amount of the cash payment will depend on the total number of eligible payment cards submitted by Settlement Class Members, the Costs of Settlement Administration, taxes paid on the Settlement Fund, and the amount of attorneys' fees, costs, and expenses, and Service

[2] "Claimed-On Card" means an Alerted on Payment Card as defined in the Settlement Agreement, or a payment card that was otherwise affected by the Data Breach, that was issued by a Settlement Class Member and for which the Settlement Class Member seeks compensation under the Settlement. [Dkt No. 48-2 Ex. A-1 ¶¶ 1.2, 2.1, 4.2.]

Award approved by the Court. Based on the claims filed by October 29, 2020, the current payments to Settlement Class Members will be approximately $14.00 per card, although this number is expected to decrease as additional valid claims are submitted. (Declaration of Bryan L. Bleichner (Bleichner Decl.) ¶ 5.)

The Parties anticipate that the entire Settlement Fund will be distributed pursuant to the Distribution Plan through the Claims process. To the extent any funds remain after the Claims process, no portion of the Settlement Fund will be returned to Defendants. [Dkt. No. 48-1 ¶ 38(b).] Instead, those funds will be distributed *pro rata* to Settlement Class Members and otherwise will be distributed to *cy pres* entities selected by Settlement Class Counsel and approved by the Court. [Dtk. No. 48-2 Ex. A-1 ¶¶ 4.2, 4.3.]

2. Injunctive Relief.

If the Settlement is approved, Defendants will, subject to approval by its Board, adopt or continue Measures designed to protect the security and confidentiality of payment cardholder data, including using reasonable efforts to upgrade its systems to point-to-point encryption. The Measures are described in detail in the Settlement Agreement ¶ 39. [Dkt. No. 48-1 Ex. A ¶ 39.] Defendants will materially maintain these additional security Measures for at least two years following the Effective Date, subject to certain limited exceptions. (*Id*, ¶ 40.)

3. Releases.

Plaintiff, Settlement Class Members who do not opt out, and related persons and entities (e.g. parents, subsidiaries, and successors) will, if the Settlement is approved and

becomes effective, release Caribou and related persons and entities from claims relating to issues in this Litigation. (*Id.* ¶¶ 62, 64, 65.) Caribou and their related persons and entities (e.g., parents, subsidiaries, affiliates, predecessor, successors, and attorneys) will also release any potential claims or counterclaims against Plaintiff, Settlement Class Members, and their affiliated entities relating to issues in this Litigation. (*Id.* ¶¶ 63-65.)

4. Service Awards.

The Settlement Agreement provides that Settlement Class Counsel will seek, and Defendants will not oppose, a Service Award of $15,000 to Class Representative to compensate them for their efforts in the Litigation and commitment on behalf of the Settlement Class. (*Id.* ¶ 66.) Any Service Award approved by the Court will be paid from the Settlement Fund. (*Id.)*

5. Attorneys' Fees and Expenses.

Under the Settlement Agreement, Settlement Class Counsel have requested a percentage of the gross Settlement Fund, including any interest earned on it, from the Court for their attorneys' fees and have additionally requested reimbursement of their reasonable costs and expenses from the Settlement Fund. (*Id.* ¶ 67; *see also* Dkt. No. 53.) Defendants agreed not to oppose Class Counsel's request for attorneys' fees and reimbursement of reasonable costs and expenses to be paid from the Settlement fund.

III. NOTICE PLAN AND CLAIMS ADMINISTRATION

A. Notice to the Class.

The Parties implemented the Notice Plan approved by the Court in coordination with the approved Settlement Administrator, Analytics Consulting, LLC ("Analytics").

[Dkt. No. 51 ¶ 11.] Using records obtained by Settlement Class Counsel through third party discovery, Analytics created a database list of Settlement Class members and verified the addresses using multiple methods. (Schmidt Decl. ¶¶ 5, 6.) This resulted in mailable address records for 3,802 Settlement Class Members. (*Id.* ¶ 6.) Analytics caused the Court-approved Notice and Claim Form to be sent via USPS first-class mail on August 21, 2020. (*Id.* ¶ 7; Ex. B.)

As of October 28, 2020, USPS returned 186 Notices. Analytics estimates that Notice was successfully delivered to over 95% of the Settlement Class. (*Id.* ¶ 8.) Analytics also caused the summary form of the Notice to be published in the digital edition of the *ABA Banking Journal* for a period of 30 consecutive days, ending on September 30, 2020. (*Id.* ¶ 9; Ex. C.)

With input from counsel for the Parties, Analytics established a Settlement Website, operational as of August 21, 2020, where Settlement Class Members could obtain important information about the Settlement and submit Claim Forms electronically. (*Id.* ¶ 11.) The Settlement Website received has visits from 2,319 unique users as of October 29, 2020, and Analytics resolved nine email exchanges with Settlement Class Members. (*Id.* ¶¶ 11, 12.) Analytics also established a toll-free telephone number to provide Settlement Class Members with additional information regarding the Settlement through both automated messages and live call center representatives. (*Id.* ¶ 10.) The toll-free number became operational on August 21, 2020, and as of October 28, 2019, the telephone number has received 12 telephone calls and two requests to speak with a customer service representative. (*Id.*) On October 28, 2020,

Analytics mailed a reminder postcard to Settlement Class Members that had not submitted Claim Forms as of that date. (*Id.* ¶ 13.)

In compliance with the Class Action Fairness Act ("CAFA"), 28 U.S.C. Section 1715(b), Analytics served Notice of the proposed Settlement on the appropriate state and federal authorities on May 26, 2020 and a supplemental Notice on August 27, 2020. (*Id.* ¶ 4; Schmidt Decl. Ex. A.)

B. Claims, Requests for Exclusion, and Objections to Date.

Under the Preliminary Approval Order, the deadline for Settlement Class Members to opt out from or object to the Settlement was October 22, 2020, and the deadline for Settlement Class Members to submit claims is December 22, 2020. [Dkt. 51 ¶ 17.]

Analytics only received one timely filed request for exclusion. (Schmidt Decl. ¶ 14.) The deadline to object to the Settlement has passed and as of the date of this filing, there have been no objections filed. (*Id.*)

As of October 29, 2020, a total of 346 Claim Forms have been submitted by Settlement Class Members claiming a total of 299,393 Alerted on Payment Cards (*Id.* ¶ 16.) This represents a current claims rate of 11.1%, which in the experience of the Settlement Administrator and Class Counsel, is an excellent claims rate (*Id.*) Based on these claim numbers, Class Members would receive approximately $14.00 per Claimed-On Card. (Bleichner Decl. ¶ 5.)

IV. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AND SHOULD BE APPROVED.

This Court has broad discretion to grant final approval to the Settlement. *Rawa v. Monsanto Co.*, 934 F.3d 862, 870 (8th Cir. 2019). The law strongly favors resolving litigation through settlement, particularly in the class action context. *White v. Nat'l Football League*, 822 F. Supp. 1389, 1416 (D. Minn. 1993); *In re Zurn Pex Plumbing Prods. Liab. Litig.*, No. 08-MDL-1958 ADM/AJB, 2013 WL 716088, at *6 (D. Minn. Feb. 27, 2013). The Eighth Circuit has recognized that "strong public policy favors [settlement] agreements, and courts should approach them with a presumption in their favor." *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999) (citation and internal quotations omitted); *see also Soderstrom v. MSP Crossroads Apartments LLC*, Civ No. 16-233 ADM/KMM, 2018 WL 692912, at *3 (D. Minn. Feb. 2, 2018) (observing that courts in the Eighth Circuit have held that there is a presumption of fairness when a settlement is negotiated at arm's length by well-informed counsel). "The court's role in reviewing a negotiated class settlement is 'to ensure that the agreement is not the product of fraud or collusion and that, taken as a whole, it is fair, adequate, and reasonable to all concerned.'" *Marshall v. Nat'l Football League,* 787 F.3d 502, 509 (8th Cir. 2014) (citation omitted).

In determining whether a class-action settlement should be approved as being a fair, reasonable, and adequate resolution of the case, the Eighth Circuit has instructed district courts to consider the following factors (the "*Van Horn* factors"):

(a) the merits of the plaintiffs' case weighed against the terms of the settlement;

(b) the defendant's financial condition;

(c) the complexity and expense of further litigation; and

(d) the amount of opposition to the settlement.

See id. at 508 (listing factors from *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988)). Consistent with Eighth Circuit precedent, Rule 23 of the Federal Rules of Civil Procedure was recently amended and now requires that:

> the court may approve [a proposed class-action settlement] 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), *cited in Keech v. Sanimax USA, LLC*, Civ. No. 18-683 (JRT/HB), 2020 WL 2903903, at **1–2 (D. Minn. June 3, 2020). The single most

important factor in determining whether a settlement is fair, reasonable, and adequate is a balancing of the strength of the plaintiff's case against the terms of the settlement. *Rawa*, 934 F.3d at 870; *Marshall*, 787 F.3d at 508 (citing *Van Horn*, 840 F.2d at 607). All the Rule 23(e) factors, plus additional factor sometimes considered by this Court and the Eighth Circuit, support granting final approval of the Settlement.

A. The Class Representative and Class Counsel have Adequately Represented the Class.

Rule 23(e)(2)(A), which requires that the plaintiff and the class have been adequately represented by counsel is easily satisfied. Plaintiff actively participated in the litigation and worked closely with counsel to ensure the Class was adequately represented. For example, Plaintiff responded to Defendant's discovery requests to establish damages for itself and the Class. Plaintiff actively participated in the litigation at other critical stages as well, including the mediation process that resulted in the Settlement, which is discussed more fully below. The efforts of counsel also resulted in a fair, reasonable, and adequate Settlement on a relatively swift timeline. These efforts and efficiencies are more fully documented in the memorandum supporting the request for an award of attorneys' fees. [Dkt. No. 55 at 6-9.]

B. The Settlement was the Product of Good-Faith, Arm's-Length Negotiation.

The Parties held a full-day mediation on January 15, 2020 in Minneapolis, Minnesota before the Honorable Arthur J. Boylan (Ret.) who facilitated the arm's-length negotiations. Prior to the mediation, the Parties provided the mediator detailed confidential mediation statements setting forth their respective positions as to liability

and damages. The Parties also participated in several direct discussions about the resolution of the Litigation. The mediation and subsequent direct discussions ended in a signed Settlement Agreement fully executed on May 14, 2020. The arm's-length negotiations before an impartial mediator with vast experience in helping to resolve large, complex cases; with the parties well informed by an informal discovery record; their independent investigation of the facts; their considerable experience with complex cases of this type; and their understanding of existing and developing law all support that the Court would be acting well within its discretion to attach a presumption of fairness to the Settlement.

C. The Relief Provided to the Class is Adequate.

In determining whether the relief provided to the Class is adequate, the court considers the costs, risks, and delay of trial and appeal; the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; the terms of any proposed award of attorney's fees, including timing of payment; any agreement required to be identified under Rule 23(e)(3). Fed. R. Civ. P. 23(e)(2)(C). All these factors support granting final approval of the Settlement.

First, final approval motions provide counsel for the class the opportunity to report on the risks they perceive about continued litigation in lieu of a proposed settlement. In fact, the most important consideration in deciding whether a statement is fair, reasonable, and adequate is "the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." *Petrovic,* 200 F.3d at 1150 (internal quotations omitted); *Dryer v. Nat'l Football League,* Civ. No. 09-2182 (PAM/AJB), 2013 WL 5888231, at *2

(D. Minn. 2013). The Court must balance the risks and benefits of litigation against immediate recovery for class members. *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 124 (8th Cir. 1975); *see also Petrovic*, 200 F.3d at 1150. The key question is whether, given what was known about the case *at the time of settlement*, the settlement was reasonable in light of the class's likelihood of recovery, the risks and costs of litigation, and the value of claims forgone. *Beck v. Austin*, No. 19-CV-1453 (PJS/ECW), 2020 WL 4476443, at *5 (D. Minn. Aug. 4, 2020). "These are *predictions* that were made at a particular point in time. The parties can litigate over the reasonableness of those predictions without taking full discovery into the merits of this lawsuit." *Id.* (emphasis in original).

At the time of settlement, counsel for Plaintiff strongly believed in the merits of their liability case against Defendants and in their ability to provide convincing damages models to establish the aggregate amounts of fraud losses and card reissuance expenses incurred by Class Members. At the same time, certain risks attending those strengths counseled in favor of settlement in May 2020: (1) numerous merits issues remained uncertain, such as establishing negligence causation or injury and causation under the Minnesota Plastic Card Security Act; (2) the challenges associated with proving damages on a class-wide basis; (3) obtaining 100% of the data for and establishing a damage model and expert testimony that would ultimately be persuasive to a jury; (4) further developments in the law or the factual record of the case that could undermine Village Bank's claims; (5) the risk that a jury might award lower damages than what is provided by the Settlement Agreement or no damages at all; (6) the risk both sides faced that a jury

could react unfavorably to the evidence presented; and (7) the uncertainties, risks, expense, and significant delays associated with any appeal that would inevitably be pursued following trial and entry of final judgment. (Dkt. No. 56, Bleichner Decl. ¶ 7.) While Class Counsel believed their case and damages methodology would ultimately succeed, there is no question it would come at a significant, additional expense. Moreover, the unsuccessful party likely would have appealed the judgement, posing further risks and potential for delays.

Second, the Settlement also provides for an effective and fair means of allocating the Settlement among Class Members who submit valid claims. Under the Distribution Plan, Settlement Class Members that have filed an Approved Claim will receive a Cash Payment Award per Claimed-On Card without having to submit documentation or prove their losses. [Dkt. Nos. 48-1 ¶ 38(b), 48-2 ¶, 48-2 Ex. A-1.] The claims process is progressing smoothly.

Third, as presented in the motion for an award of attorneys' fees, the requested attorneys' fees are well within the range of reasonableness for class action cases, particularly matters involving data breaches. The requested award of attorneys' fees and costs in the aggregate amount of $1,463,515.88 has not met a single objection from any Settlement Class Member, and the requested percentage of the common fund—25 percent—and the resulting lodestar multiplier—3.2—comport with prior attorneys' fee awards in cases from this District and the Eighth Circuit. [Dkt. 55 at 18-25.] This factor likewise supports granting final approval.

Fourth, there are no agreements under Rule 23(e)(2)(C)(4). For all these reasons, the relief provided to the Settlement Class is adequate, and this factor supports granting final approval of the Settlement.

D. The Settlement Treats Class Members Equitably Relative to Each Other.

Finally, Rule 23(e)(2)(D) "calls attention to a concern that may apply to some class action settlements—inequitable treatment of some class members vis-a-vis others. Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." Fed. R. Civ P. 23(e)(2)(D), 2018 advisory cmt. note. There are no such concerns here. Other than the Service Award of $15,000 to Plaintiff to recognize that, as the sole plaintiff and Settlement Class Representative, it provided valuable services to all Class Members. In all other aspects, apportionment among Settlement Class Members, per the plan of distribution, will result in equitable treatment of all. This factor, too, supports granting final approval.

In sum, the factors set out in Fed. R. Civ. P. 23(e) support entry of final judgment approving the Settlement.

E. Additional Factors Also Considered by the Court Further Support Final Approval.

1. The complexity and expense of further litigation support final approval.

Class Counsel has already committed extensive time, money, and resources to the Class's cause. Factual investigation, informal discovery, pre-discovery negotiations, and mediation all brought significant costs, as reflected in Class Counsel's fee petition. Continued litigation would involve formal discovery, seeking certification of the class, the drafting and exchange of liability and damages expert reports (including expert depositions), summary judgment motions, *Daubert* motions, motions in limine, and trial. Given the class-wide and complex nature of the trial, these expenses would be quite burdensome. *See Schmidt v. Fuller Brush Co.,* 527 F.2d 532, 535 (8th Cir. 1975) (finding that class actions 'place an enormous burden of costs and expenses [] upon parties."). This case was in litigation for nearly one year. Had the Parties not reached a settlement, it is certain that the Parties would have continued costly litigation with no certainty of a positive resolution for the Class. Instead, the Settlement provides for the cessation of litigation costs; and immediate and certain payment to Class Members.

2. The positive response and lack of any objection to the settlement support final approval.

Settlement Class Members have had an overwhelmingly positive response to the Settlement after receiving notice pursuant to the Notice Plan that conformed to due process and this Court's order granting preliminary approval of the settlement. As the Supreme Court explained in *Mullane v. Central Hanover Bank & Trust Co.*, "an

elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. 306, 314 (1950). "[W]hat qualifies as a 'reasonable effort' is a case-specific question subject to the wide discretion of the trial judge." William B. Rubenstien, *Newberg on Class Actions* § 8:8 (5th ed. 2015). However, identifiable class members are entitled to individual notice, i.e., direct-mailed notice. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974). When there is a possibility that a class member's address is misidentified or unavailable, publication notice "serves the worthy purpose of supplementing direct mailings" and is within the Court's discretion. *In re Potash Antitrust Litig.,* 161 F.R.D. 411, 413 (D. Minn. 1995). In this case, Analytics flawlessly executed the Court-approved Notice Plan, which combined both direct-mail and publication notice. Both the Notice Plan and its execution went far beyond the requirements of the Due Process clause. (*See* Schmidt Decl. ¶¶ 5-13; Bleichner Decl. ¶ 5.)

No Settlement Class Member has objected to any aspect of the Settlement and only one Settlement Class Member has timely opted out. (Schmidt Decl. ¶¶ 14, 15.) To date, 346 Settlement Class Members have submitted claims representing issuers of 299,393 of the payment cards compromised in the breach. (Schmidt Decl. ¶ 16.) This represents a claims rate of 11.1%, a high claims rate. (*Id.*) The fact that no Class Member has objected and the high claims rate supports the conclusion that the Settlement is beyond fair, reasonable, and adequate. *See Evans v. Linden Research, Inc.,* No. C-11-

01078 DMR, 2014 WL 1724891, at *4 (N.D. Cal. Apr. 29, 2014) (approving class settlement as fair, reasonable, and adequate where there was a low 4.3% claim rate, and where there was only one objector). As an expert in providing class notice and claims administration services, Kari Schmidt states "The current claims filing rate of over 11% of eligible accounts exceeds normal claim response rates for class action settlements." (Schmidt Decl. ¶ 17.)

3. Defendant's financial condition supports final approval.

Finally, the defendant's financial condition is often considered neutral when where, as here, the defendant's ability to pay is not an issue. *Dryer,* 2013 WL 5888231, at *4, *aff'd, Marshall,* 787 F.3d at 512. "However, just because defendants *could* pay more does not necessarily mean they should *have to* pay more than the parties negotiated to settle these claims." *Zanghi v. Freightcar Am., Inc.*, No. 3:13-cv-146, 2016 WL 223721, at *19 (W.D. Pa. Jan. 19, 2016). There is no evidence in the record regarding Defendants' ability to pay. Therefore, this factor is neutral.

Based on all the factors enumerated in Rule 23(e)(2) plus additional factors sometimes considered by the Eighth Circuit and courts in this District, Plaintiff has established that the Settlement is fair, adequate, and reasonable, and the Court should grant final approval of the Settlement.

V. THE SETTLEMENT CLASS SATISFIES THE REQUIREMENTS OF RULE 23(a) AND 23(b)(3) AND SHOULD BE FINALLY CERTIFIED FOR PURPOSES OF SETTLEMENT

Lastly, Settlement Class Counsel respectfully submit that the Court should confirm that the Settlement Class it certified for settlement purposes in its preliminary

approval order of July 24, 2020 (Dkt. No. 51 ¶3), is appropriately certified for final approval, because it meets all applicable requirements of Rule 23 as discussed in detail in the Memorandum of Law in Support of Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement and Notice Plan. [Dkt. No. 47.]

VI. CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court certify the proposed Settlement Class for settlement purposes, approve the proposed Settlement as fair, adequate, and reasonable, and enter the proposed Final Order and Judgment submitted herewith.

Respectfully submitted,

Dated: October 30, 2020

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