FILED
2ND JUDICIAL DISTRICT COURT
Bernalillo County
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KATINA WATSON
CLERK OF THE COURT
Sydney R Garcia

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

DAVID ANDREONI, individually, and on behalf of all others similarly situated, Plaintiff, v. RADIOLOGY ASSOCIATES OF ALBUQUERQUE, P.A., d/b/a RAA IMAGING; ADVANCED IMAGING, LLC, d/b/a/ HIGH RESOLUTION, Defendants.	Case No. D-202-cv-2022-05463 **MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT** (Assigned to The Hon. Joshua A. Allison)

The Court should grant final approval to the proposed Class Action Settlement Agreement (the "Settlement") [1] in this case under New Mexico Rule of Civil Procedure 1-023(E) because the proposed Settlement is a fair, reasonable, and adequate compromise. Under the Settlement, Defendants will pay $3,080,475 into a non-reversionary Settlement Fund to resolve claims that Defendants are liable for failing to adequately safeguard Plaintiff's and thousands of Class Members' personal information, which resulted in a data breach. If final approval is granted, the net Settlement Fund will be used to provide 3 years of 3-bureau credit monitoring, to reimburse ordinary and extraordinary losses suffered as a result of the breach, including lost time, or to pay Class Members an alternative cash

[1] The Settlement is attached as Exhibit 1 to the Unopposed Motion for Preliminary Approval of Class Action Settlement filed on February 9, 2024, as Exhibit 1 to the Unopposed Motion for Preliminary Approval of Class Action Settlement.

payment, which is estimated to be approximately $80 per claimant. The Court previously granted preliminary approval to the Settlement on March 15, 2024, notice was provided to Class Members, and, as of this motion, no Class Member objects. [2] The Court should therefore grant final approval.

FACTS AND PROCEDURAL BACKGROUND

I. The Parties litigate Plaintiff's claims relating to the exposure of personal health information in a data breach of Defendants' systems.

On September 16, 2022, Plaintiff filed a class action complaint against Defendant. The complaint alleged that from July 22, 2021, to August 3, 2021, Defendant Radiology Associates of Albuquerque, P.A.'s computer systems were accessed by unauthorized third parties and that from December 20, 2020 to July 15, 2021, its email systems were accessed by unauthorized third parties, resulting in exposure of Plaintiff's and thousands of other persons' personal health information.

On December 12, 2022, Defendant moved to dismiss the complaint; Plaintiff responded on December 22, 2022; and Defendants replied on January 20, 2022. The Court held a hearing on the motion on March 1, 2023. On March 10, 2023, the Court entered an order granting in part and denying in part Defendants' motion to dismiss. The Court granted the motion as to the claim for intrusion upon solitude/invasion of privacy, but denied the motion as to claims for negligence, breach of express and implied contract, and violation

[2] The deadline to file this Motion is April 23, 2024, but Class Members have until May 1, 2024, to submit objections or opt out. Prior to the May 7, 2024, final approval hearing, Class Counsel will file any objections received, responses to any such objections, and a listing of all persons who have requested to be excluded.

of the New Mexico Unfair Practices Act (NMSA 1978, Section 57-12-2).

On March 21, 2023, Defendants filed their answer, denying all liability and asserting affirmative defenses.

II. The parties mediate multiple times before reaching an agreement in principle to settle.

On July 19, 2023, the parties participated in a mediation facilitated by mediator Rodney A. Max. The case did not settle.

However, the parties continued settlement negotiations through another mediator, the Honorable (ret.) Wayne Andersen of JAMS. Ultimately, the parties reached an agreement in principle to settle the lawsuit, subject to formal documentation.

III. The Settlement provides significant benefits to the proposed Settlement Class.

Under the terms of the Settlement that is now before the Court for preliminary approval, the Class Members will receive the following benefits:

- Defendants will agree to the certification of the Settlement Class defined as:

  All individuals whose Personal Information was potentially compromised as a result of the Data Incident. [3] The Class specifically excludes (i) the Judge assigned to evaluate the fairness of this settlement (including any members of the Court's staff assigned to this case); (ii) Defendants' officers and directors, and (iii) 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 Data Incident or who pleads nolo contendere to any such charge.

- Defendants will pay $3,080,475 into a non-reversionary Settlement Fund. The net Settlement Fund will be used to provide:

[3] "Data Incident" means the incident from approximately July 22, 2021 to August 3, 2021, and from December 22, 2020, to July 15, 2021, during which an unauthorized third party gained access to Defendants' data systems, resulting in unauthorized access to the Plaintiff's and Class Members' personally identifying information and protected health information (collectively, "Personal Information").

(a) 3 years of 3-bureau credit monitoring with a $1,000,000 identity theft insurance policy;

(b) reimbursement for claims of lost time related to the data incident at $20 per hour up to 4 hours per Class Member;

(c) reimbursement of ordinary losses (such as bank fees, credit monitoring, and other out of pocket costs associated with the data incident) of up to $400 per Class Member;

(d) reimbursement for extraordinary losses (such as losses due to actual fraud) of up to $4,000 per Class Members; or

(e) Class Members may choose to forego the other benefits and instead claim an alternative cash payment, which is estimated to be approximately $80 per Class Member, but which may be more or less depending on the number of claims for other benefits. If any funds remain uncollected from the Settlement Fund, they will not revert to Defendant but will instead be paid to a non-profit charity.

- Subject to Court approval, Class Counsel may request one-third of the Settlement Fund as attorneys' fees, plus reasonable expenses; and the Class Representative may request a service award of $2,500.

The Settlement also includes proposed form for providing notice to the Class Members and propose agreed orders for preliminary and final approval.

In exchange for the Settlement benefits, if final approval is granted, the Class Members will release their claims against Defendants relating to the data incident, and this litigation will be resolved.

IV. The Court grants preliminary approval and the Class Members are sent notice.

On February 9, 2024, the Court certified the Settlement Class and granted preliminary approval to the Settlement. Court-approved notice was issued to the Class Members on April 1, 2024, and Class Members have until May 1, 2024, to object or opt out. The due date for this final approval motion was April 23, 2024, and, as of this date, no Class Members have objected. Class Counsel will file any timely objections received prior

to the May 7, 2024, final approval hearing.

LEGAL STANDARD

A class action settlement requires Court approval. N.M. R. Civ. P. 1-023(E). That approval is within the discretion of the district court. *Platte v. First Colony Life Ins. Co.*, 2008-NMSC-058, ¶ 7, 145 N.M/ 77, 78, 194 P.3d 108, 109 (citations omitted) (reversing court of appeals and reinstating district court's approval of class action settlement).

Review and approval of a proposed class action settlement involves two stages: preliminary approval and final approval. In the preliminary approval stage, class counsel submits the proposed terms of settlement to the court, which makes a preliminary fairness evaluation. *See Manual for Complex Litigation*, Fourth, § 21.632. "At the preliminary approval stage, the Court makes a preliminary evaluation of the fairness of the proposed settlement and determines whether it has any reason to not notify class members of the proposed settlement." *Lowery v. City of Albuquerque*, No. CIV 09-0457 JB/WDS, 2012 WL 394392, at *22 (D. N.M. Jan. 24, 2012).[4] "There is usually an initial presumption of fairness when a proposed class settlement, which was negotiated at arm's length by counsel for the class, is presented for Court approval." H. Newberg, A. Conte, *Newberg on Class Actions* (4th ed. 2002), § 11.41. At final approval, the Court then considers the Settlement in light of any objections raised by Class Members.

Before approving a settlement, the Court examines the fairness, reasonableness, and

[4] Because New Mexico's Rule 1-023 is similar to Federal Rule of Civil Procedure 23, courts may look to federal authorities for guidance. *Brooks v. Norwest Corp.*, 2004-NMCA-134, ¶ 8, 136 N.M. 599, 603, 103 P.3d 39, 43.

adequacy of the proposed settlement. In doing so, New Mexico courts examine the settlement process (including the adequacy of discovery, the fairness of the process afforded objectors, and the fairness and honesty of the negotiation), the risks of litigation (including the merits and complexities of the parties' claims and the potential duration and cost of trial), the reasonableness of the settlement in light of the risks of litigation and the possible recovery at trial, and the class members' reaction to the settlement. *See Rivera-Platte*, 2007-NMCA-158, ¶ 42, 143 N.M. at 175, 173 P.3d at 781-82.

The final approval hearing determines whether final approval of the proposed settlement agreement will be granted, considering any objections raised by class members. *See id.* § 21.634. At the fairness hearing, the court also determines the amount of the attorneys' fee and cost awards and the class representative incentive awards. *See id.* § 21.726. The final approval of a settlement class action is appropriate if the district court concludes that the class meets the requirements of New Mexico District Court Rule of Civil Procedure Rule 1–023 and that the settlement would be fair, adequate, and in the best interests of the class. *See Rivera-Platte v. First Colony Life Ins. Co.*, 2007-NMCA-158, ¶ 26, 143 N.M. 158, 169, 173 P.3d 765, 776 (citing *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d at 785 (relying on the language of Rule 23(e)), modified on other grounds by *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620, 117 S. Ct. 2231 (1997); N.M. Dist. Ct. R. Civ. P. 1-023.

DISCUSSION

I. The Court should grant final approval to the Settlement and certify the Settlement Class for settlement purposes.

The settling parties are asking this Court for final approval in the form of the order attached to the motion for final approval. As set forth below, the Settlement Class warrants certification for settlement purposes and the Settlement satisfies the factors for final approval.

A. The Court's prior certification of the Settlement Class remains appropriate under Rules 1-023(A) and (B)(3).

The Court previously certified the following Settlement Class defined as:

> All individuals whose Personal Information was potentially compromised as a result of the Data Incident.[5] The Class specifically excludes (i) the Judge assigned to evaluate the fairness of this settlement (including any members of the Court's staff assigned to this case); (ii) Defendants' officers and directors, and (iii) 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 Data Incident or who pleads nolo contendere to any such charge.

Certification remains appropriate because the Settlement Class continues to meet all of the certification requirements (numerosity, commonality, typicality, adequacy, predominance, and superiority) and none of the relevant facts have changed.

Numerosity—there are no fewer than 616,000 Class Members and therefore numerosity is easily satisfied.

Commonality—all the Class Members share common questions of law and fact because each Class Member's information was exposed in the Data Incident, leading to the

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[5] "Data Incident" means the incident from approximately July 22, 2021 to August 3, 2021, and from December 22, 2020, to July 15, 2021, during which an unauthorized third party gained access to Defendants' data systems, resulting in unauthorized access to the Plaintiff's and Class Members' personally identifying information and protected health information (collectively, "Personal Information").

same claims against Defendants regarding the Incident.

Typicality—the Plaintiff's claims are the same as those of the Class Members, as all of the claims relate to the exposure of Plaintiff's and Class Members private information as part of the Data Incident, and Defendants' duty to protect that information.

Adequacy—the Plaintiff's interests are completely aligned with the Class as by proving his own claims against Defendants related to the Data Incident, Plaintiff would necessarily prove the claims of the other Class Members relating to the Incident. Thus, adequacy is met.

Predominance—common questions predominate because all of the claims are related to the issue of Defendants' data security practices and how those practices lead to the Data Incident that exposed Class Members' data.

Superiority—one resolution of all of the common claims is far superior to thousands of individual suits that would use the courts' resources to prove the same facts.

Thus, as Defendant agrees for purposes of settlement, all of the class certification requirements are met.

B. The Court should final preliminary approval to the Settlement because it is a fair, reasonable, and adequate compromise.

Under Rule 1-023(E), the Court must consider the fairness of the settlement to give a settlement both preliminary and final approval. New Mexico courts examine the settlement process, the risks of litigation, the reasonableness of the settlement in light of the risks of litigation and the possible recovery at trial, and the class members' reaction to the settlement. *See Rivera-Platte*, 2007-NMCA-158, ¶ 42, 143 N.M. at 174–75, 173 P.3d

at 781–82. The Settlement here warrants final approval in light of these factors.

First, the Settlement is the product of good-faith, arm's length negotiations and is absent of any collusion. *See* Declaration of J. Gerard Stranch, IV, in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement, filed February 9, 2024 ("Stranch Decl.") ¶ 5. Settlements negotiated by experienced counsel that result from arm's length negotiations are presumed to be fair, adequate, and reasonable. *See Lucas v. Kmart Corp.*, 234 F.R.D. 688, 693 (D. Colo. 2006). In this case, Proposed Settlement Class Counsel conducted an extensive investigation into the merits of Plaintiff's claims prior to filing their Complaint and were well positioned throughout the mediation and settlement negotiations to have a full understanding of the value of Plaintiffs' and Settlement Class Members' claims. *See White v. Nat'l Football League*, 836 F. Supp. 1458, 1496 (D. Minn. Aug. 19, 1993) (finding no evidence of collusion and concluding settlement was the result of arm's length negotiations); *Pollard v. Remington Arms Co.*, 320 F.R.D. 198, 220 (W.D. Mo. 2017) (finding a settlement reached after extensive investigation and discovery by class counsel was reached in good faith). Here, the settling parties engaged in mediation with a third-party experienced neutral. Counsel for Plaintiff brought extensive experience in healthcare data breach class actions to the table, which, along with their internal investigation, allowed them to effectively negotiate Settlement terms that are fair, reasonable, and adequate for the Settlement Class. See Firm Resumes, Exs. A–C to Stranch Decl.

Second, the value achieved through the Settlement is guaranteed, whereas chances of prevailing on the merits are uncertain—especially where serious questions of law and

fact exist, which is common in data security incident litigation. This field of litigation is evolving; there is no guarantee of the ultimate result. *See Gordon v. Chipotle Mexican Grill, Inc.*, No. 17-cv-01415-CMA-SKC, 2019 WL 6972701, at *1 (D. Colo. Dec. 16, 2019) ("Data breach cases . . . are particularly risky, expensive, and complex."). While Plaintiff believes the case is a strong one, all cases, including this one, are subject to substantial risk. This case involves a proposed large class and a complicated and technical factual background. Defendants would assert a number of potentially case-dispositive defenses, only increasing Plaintiff's risk of further protracted, expensive litigation. By contrast, the Settlement provides that even Class Members who do not have any out of pocket loss from the Data Incident can still make a claim for an alternative cash payment that is estimated to be approximately $80 per claimant. Thus, the relief is substantial in the face of substantial risk and delay of continued litigation.

Third, the benefits here exceed those of other data breach settlements, meaning that Class Members are getting a good deal relative to other similar cases. *See, e.g., Mowery v. Saint Francis Healthcare Sys.*, No. 1:20-cv-00013-SPC (E.D. Mo. Dec. 22, 2020) (data breach settlement providing up to $280 in value to Settlement Class Members in the form of: reimbursement up to $180 of out-of-pocket expenses and time spent dealing with the data breach; credit monitoring services valued at $100; and equitable relief in the form of data security enhancements;); *Baksh v. IvyRehab Network, Inc.*, No. 7:20-cv-01845 (S.D.N.Y. Jan. 27, 2021) (providing up to $75 per class member out-of-pocket expenses incurred related to the data breach and $20 reimbursement for lost time, with payments capped at $75,000 in aggregate; credit monitoring for claimants; and equitable relief in the

form of data security enhancements); *Rutledge v. Saint Francis Healthcare Sys.*, No. 1:20-cv-00013-SPC (E.D. Mo.) (data breach settlement providing up to $280 in value to Settlement Class Members in the form of: reimbursement up to $180 of out-of-pocket expenses and time spent dealing with the data breach; credit monitoring services valued at $100; and equitable relief in the form of data security enhancements); *Chacon, et al. v. Nebraska Medicine*, No. 8:21-cv-00070 (D. Neb.) (data breach settlement providing up to $300 in ordinary expense reimbursements; up to $3,000 in extraordinary expense reimbursements; credit monitoring services; and equitable relief in the form of data security enhancements).

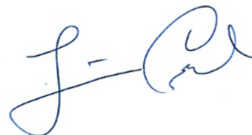
Fourth, the proposed Settlement does not improperly discriminate between any segments of the Settlement Class—Plaintiff and all Settlement Class Members are entitled to the same relief, respectively.

Fifth, while the reaction of the Class Members cannot be known definitively until the objection deadline passes on May 1, 2024, Class Members have already been sent notice and, at this time, there is no opposition to the Settlement. Class Counsel will file any objections with he Court prior to the final approval hearing.

Thus, all factors weigh in favor of the Court granting final approval.

DATED: April 22, 2024 Respectfully submitted,

O'STEEN & HARRISON, PLC



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 22, 2024, I filed the foregoing MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT electronically through the Odyssey File & Serve system, which caused the following parties to be served by electronic means, as per the Notice of Electronic Filing.

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