

CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

WILLIAM BOYKIN AND SALLY,
ROBBINS, on behalf of themselves and
all others similarly situated,

DOCKET NO.: 20-0615-BC

Plaintiffs,

v.

TENNESSEE ORTHOPAEDIC
ALLIANCE, P.A.,

Defendant.

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION FOR FINAL
APPROVAL OF CLASS ACTION SETTLEMENT AGREEMENT AND ENTRY OF
FINAL JUDGMENT**

TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY OF THE LITIGATION AND NEGOTIATIONS	1
II.	OVERVIEW OF THE SETTLEMENT, NOTICE AND ADMINISTRATION	3
	A. Terms of the Settlement	3
	1. The Settlement Class	3
	2. Settlement Benefits	4
	a. Monetary Consideration	4
	b. Out of Pocket Expenses	4
	c. Lost Time	4
	d. Credit Monitoring and Fraud Resolution	5
	e. Extended Fraud Resolution Services	5
	f. Credit Monitoring Services	5
	g. Injunctive Relief	5
	i. Awareness Campaign	6
	ii. Cybersecurity Training for TOA Personnel	6
	iii. New Cybersecurity Protocols	6
	3. Release of Claims	6
	B. The Best Practical Notice Has Been Given to the Settlement Class	6
	C. Claims, Objections and Opt-Outs	7
III.	MEMORANDUM OF LAW	9
	A. Tenn. R. Civ. P. 23.01(1) Numerosity	12
	B. Tenn. R. Civ. P. 23.01(2) Commonality	12
	C. Tenn. R. Civ. P. 23.01(3) Typicality	13
	D. Tenn. R. Civ. P. 23.01(4) Adequacy	14
	E. Additional Factors to Be Considered by the Court	15
	1. Likelihood of success at trial compared to settlement	17
	2. Complexity, expense and duration of litigation	17
	3. Judgment of class counsel and the class representatives	17
	4. The amount of discovery engaged in by the parties	18
	5. The reaction of absent class members	18
	6. The risk of fraud and collusion	18
	7. The public interest	19
	a. Notice provided meets the requirements of due process and Rule 23.03	19
	b. The one objection made to the Settlement should be overruled	20
IV.	CONCLUSION	21

TABLE OF AUTHORITIES

Cases

<i>Bacon v. Honda of America Mfg., Inc.</i> , 370 F. 3d 565 (6th Cir. 2004).....	12,13
<i>Denver Area Meat Cutters v. Clayton</i> , 209 S.W.3d 584 (Tenn. Ct. App. 2006).....	9, 10, 11, 15
<i>In re "Agent Orange" Product Liab. Litig.</i> , 597 F. Supp. 740, 762 (E.D.N.Y. 1984).....	11, 15
<i>In re American Medical Systems, Inc.</i> , 75 F. 3d 1069 (6th Cir. 1996).....	12, 14
<i>In re Cast Iron Soil Pipe & Fittings Antitrust Litig.</i> , 2017 U.S. Dist. LEXIS 97491 (E.D. Tenn. May 26, 2017).....	16, 19
<i>In re Estate of Jones</i> , 154 S.W.3d 582 (Tenn. Ct. App. 2004).....	10
<i>In re High Pressure Laminate Antitrust Litig.</i> , No. M2005-01747-COA-R3-CV, 2006 Tenn. App. LEXIS 786, 2006 WL 3681147 (Tenn. Ct. App. Dec. 13, 2006).....	15,16
<i>In re Pacer Int'l, Inc.</i> , No. M2015-00356-COA-R3-CV, 2017 Tenn. App. LEXIS 442 (Tenn. Ct. App. June 30, 2017).....	12, 15, 20
<i>In re Southeastern Milk Antitrust Litig.</i> , 2013 U.S. Dist. LEXIS 70163 (E.D. Tenn. May 17, 2013).....	18, 19
<i>Manjunath A. Gokare, P.C. v. Fed. Express Corp.</i> 2013 WL 12094870 (W.D. Tenn. Nov. 22, 2013).....	20
<i>Meighan v. U.S. Sprint Commc'ns Co.</i> , 924 S.W.2d 632 (Tenn. 1996).....	11
<i>Peck v. Air Evac EMS, Inc.</i> , 2020 WL 354307 (E.D. Ky. Jan. 21, 2020).....	20
<i>Petersen v. Genesis Learning Centers</i> , 2005 Tenn. App. LEXIS 783 (2005 WL 3416303 (Tenn. Ct. App. Dec. 13, 2005).....	10
<i>Posey v. Dryvit Sys., Inc.</i> , No. E2004-02013-COA-R9-CV, 2005 Tenn. App. LEXIS 1, 2005 WL 17426 (Tenn. Ct. App. Jan. 4, 2005).....	11, 15
<i>Reynolds v. Beneficial Nat'l Bank</i> , 288 F.3d 277 (7th Cir. 2002).....	11, 15
<i>Sterling v. Velsicol Chemical Corp.</i> , 855 F. 2d 1188 (6th Cir. 1988).....	13
<i>Tenn. Ass'n of Health Maint. Orgs., Inc. v. Grier</i> , 262 F.3d 559 (6th Cir. 2001).....	20
<i>Vythoukaskas v. Vanderbilt Univ. Hosp.</i> , 693 S.W.2d 350 (Tenn. Ct. App. 1985).....	11

Statutes

Fed. R. Civ. P. 23.....	<i>passim</i>
Tenn. R. Civ. P. 23.01.....	10-14
Tenn. R. Civ. P. 23.02.....	10, 11
Tenn. R. Civ. P. 23.03.....	19, 20
Tenn. R. Civ. P. 23.05.....	9,11

Other Authorities

1 Herbert Newberg & Alba Conte, <i>Newberg on Class Actions</i> (4 th ed. 2002).....	13, 14
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I. INTRODUCTION AND SUMMARY OF THE LITIGATION AND NEGOTIATIONS

Between August and October of 2019, a Phishing Attack (hereinafter “Phishing Attack”) targeted Tennessee Orthopaedic Alliance P.A.’s (hereinafter “TOA” or “Defendant”) email system.¹ See Affidavit and Declaration of Joel R. Rhine in Support of Preliminary Approval of Class Action Settlement and Certification of Settlement Class (hereinafter “Rhine Preliminary Approval Decl.”) at ¶ 5. On February 14, 2020, TOA announced that two of its employees had been subjected to the Phishing Attack, and that the attack had resulted in the potential compromise of emails that contained the personally identifiable information (“PII”) and protected health information (“PHI”) of numerous TOA patients. *Id.* The data that was compromised may have included: patient names, dates of birth, contact information (addresses, phone numbers and email addresses), health insurance information, treatment or diagnostic information (including codes), and/or treatment cost information. *Id.* It is also possible that some Class Member’s Social Security numbers were compromised as a result of the Phishing Attack. *Id.*

On April 6, 2020, Plaintiffs commenced this action on behalf of themselves and all others similarly situated in this court.² In their Complaint, Plaintiffs assert claims for negligence, negligence *per se*, invasion of privacy and public disclosure of private facts, breach of implied contract, unjust enrichment, and constructive fraud. Plaintiffs’ Complaint sought monetary damages as well as equitable, declaratory, and injunctive relief to compel TOA to adopt security

¹ Unless otherwise indicated, capitalized terms used herein have the same meaning as defined in the Settlement Agreement and Release, which was filed with Plaintiffs’ Motion for Preliminary Approval of Class Action Settlement.

² This action was first filed in the Circuit Court for Davidson County, Tennessee. At the joint request of the Parties, the litigation was transferred to the Chancery Court on June 29, 2020, followed by acceptance and assignment by the Supreme Court of the case to the Business Court Docket Pilot Project.

practices to safeguard patient PII and PHI that remain in TOA's custody. Finally, Plaintiffs sought an award of actual damages, attorneys' fees and costs, and any such other further relief as may be deemed just and proper.

TOA strenuously contested the litigation on factual and legal grounds. For example, TOA claimed that Plaintiffs had not suffered actual identity theft or fraud, and thus suffered no cognizable injury and only a risk of future injury, which they claim made Plaintiff's claims legally deficient and unviable. Rhine Preliminary Approval Decl. ¶10. TOA asserted that the invasion of privacy count failed under Tennessee law because the date was not disclosed to an adequately large group of persons and must be dismissed. *Id.* According to TOA, Plaintiffs' unjust enrichment claim was equally flawed because Plaintiffs could not prove it would be inequitable for TOA to retain the benefit without payment for value. *Id.* TOA asserted a variety of defenses to the negligent misrepresentation and constructive fraud claims for relief. Among other arguments, TOA contends it issued no false statements to the plaintiffs. *Id.* As for factual defenses, TOA challenges Mr. Boykin's claims that the spam email and telephone calls were related to the Phishing Attack because his email address and phone number was not among the compromised data. *Id.* Of course, TOA emphasized causation, damages and other allegedly individualized issues that could hamper class certification under Tennessee law. *Id.*

On July 29, 2020, the parties participated in a mediation with Rodney Max, Esq., a nationally recognized mediator with substantial experience in data breach class action litigation. With Mr. Max's assistance and after good faith, lengthy, arms-length negotiations, the parties reached a settlement as to all claims. *Id.* at ¶18. The parties then worked together and with the Settlement Administrator to prepare a comprehensive set of settlement documents, notices and claim forms, which are embodied in the Settlement Agreement and exhibits thereto. Negotiations

continued throughout this process, including the weekend prior to the filing of the Motion for Preliminary approval. *Id.* at ¶19.

The Settlement Agreement requires Defendant to provide: (a) fraud resolution services; (b) credit monitoring services; (c) reimbursement of expenses for out of pocket losses; (d) certain injunctive relief regarding data security; (e) service awards to the Class Representatives; and (f) attorney’s fees, costs, and expenses to Class Counsel. In order to maximize the benefits to the Class, in addition to paying the service awards, attorney’s fees and costs separate and apart from the reimbursement to Class Members, Defendant agreed to pay all costs associated with the settlement notice and claims administration, separate and apart from the reimbursement to Class Members. *Id.* at ¶20.

On September 29, 2020, the Court entered an Order Certifying a Settlement Class, Preliminarily Approving a Class Action Settlement, and Directing Notice to the Settlement Class (hereinafter “Preliminary Approval Order”).

The parties respectfully submit that for the reasons set forth herein the proposed settlement is fair, adequate and reasonable. Plaintiffs request that the Court grant final approval of the Settlement Agreement, certify the Class for the purposes of settlement, and enter a Final Judgment against TOA.

II. OVERVIEW OF THE SETTLEMENT, NOTICE AND ADMINISTRATION

A. Terms Of The Settlement.

1. The Settlement Class.

The Settlement Class is defined as follows:

All individuals residing in the United States who, on or about February 14, 2020, were notified via mail of a Phishing Attack by Tennessee Orthopaedic Alliance, P.A. that occurred between August and October 2019. Excluded from the Settlement Class are: (1) the Judge presiding over this Litigation, the

Judge's immediate family members and any members of the Judge's judicial staff; (2) the officers, directors, and employees of Tennessee Orthopaedic Alliance, P.A.; (3) Class Counsel and their immediate family members; and (4) Settlement Class Members who submit a valid Request for Exclusion prior to the Opt-Out Deadline.

2. The Settlement Benefits.

The Settlement provides the following benefits to the Class.

a. Monetary Consideration.

Subject to an aggregate cap of \$2,000, all Participating Settlement Class Members may submit a claim for reimbursement of documented out-of-pocket losses related to the Phishing Attack as well as a claim for lost time addressing the Phishing attack.

b. Out of Pocket Expenses.

The approved claim form allows class members to claim reimbursement for out-of-pocket expenses, which include but are not limited to: unreimbursed bank, credit card fees and expenses; unreimbursed charges related to unavailability of funds; long distance telephone charges; interest on payday loans taken as a result of the Phishing Attack; interest paid on missed or late payments due to credit freezes or on late payments; costs of credit reports or credit monitoring; and payments to professionals such as bookkeepers, accountants and lawyers.

c. Lost Time.

Upon submission of a valid claim form, Participating Settlement Class Members will receive reimbursement, at the hourly rate of \$15.00 per hour, for up to six (6) hours of time they spent dealing with the Phishing Attack as follows. For the first 3 hours, a Participating Settlement Class Member need only attest that the time was spent as a result of the Phishing Attack. If, however, the Class Member spent more than 3 hours dealing with the Phishing Attack, then compensation for up to an additional 3 hours will be provided if the Participating Settlement Class

Member provides documentation of these additional hours. If supporting documentation cannot be provided, then Participating Settlement Class Member may provide the Settlement Administrator with a written statement of the reason documentation cannot be provided and if the excuse is deemed reasonable, the Participating Settlement Class Member will be paid.

d. Credit Monitoring and Fraud Resolution Benefits.

Each Participating Class Member shall receive Credit Monitoring and all Class Members receive Fraud Resolution Benefits.

e. Extended Fraud Resolution Services.

Defendant is providing three (3) years of Fraud Resolution Services to all Settlement Class Members. This benefit is being provided automatically and submission of a valid claims form is not required. Thus, 60,295 Class Members receive this benefit.

f. Credit Monitoring Services.

Defendant is offering one year of Credit Monitoring Services to all Settlement Class Members who make a valid claim for such services. Each Participating Settlement Class Member will receive the service named “Identity Guard Total powered by IBM Watson.” For those Settlement Class Members who previously received Credit Monitoring Services by Kroll, the one year of Identity Guard Credit Monitoring Services shall begin at the conclusion of the Kroll Credit Monitoring Services.

g. Injunctive Relief.

Defendant has or will undertake the following activities, which benefit all Class Members whose PII and PHI remain in the possession of TOA³:

³ The business commitments to protect PII and PHI also benefit future TOA patients who are not members of the class.

i. **Awareness Campaign.**

Defendant conducted an awareness campaign to educate Settlement Class Members regarding the coverage and claims process for the Credit Monitoring Services. This campaign included a reference to the Settlement Class Website in the initial class mailing, as well as information in the Claims Forms and other materials on the Settlement Class Website.

ii. **Cybersecurity training for TOA Personnel.**

Defendant and its employees will receive annual training improvements on security awareness.

iii. **New Cybersecurity Protocols:**

Defendant has further agreed to implement a robust set of Business Practice Commitments for at least two years, that are specifically identified in the Settlement Agreement, but generally include access improvements, logging improvements, email security improvements, policy review improvements, encryption improvements, audit improvements, MFA advancements, and training improvements.

3. Release of Claims.

The release is tailored to the claims that have been asserted or could have been asserted in this case. Class Members who do not opt-out will release claims against Defendant and its affiliates related to the disclosure of the Class Members' PII and PHI in the Phishing Attack, Defendant's maintenance of Settlement Class Members' PII and PHI as it relates to the Phishing Attack, Defendant's security policies and practices as it relates to the Phishing Attack and Defendant's notice to Settlement Class Members following the Phishing Attack. *See* Agr. ¶16; Rhine Preliminary Approval Decl. ¶22.

B. The Best Practical Notice Has Been Given to the Settlement Class.

Following the September 29, 2020 Preliminary Approval Order, Heffler Claims Group (hereinafter “Heffler”), the Claims Administrator, began preparing the notice and administration program. *See* Motion for Final Approval Ex. C, Declaration of Brian Smitheman (“Smitheman Decl.”), at ¶¶4, 6, 7, 9, 13. On October 28, 2020, Heffler provided direct notice to the Class when it mailed 60,114 postcard notices. *Id.* at ¶ 6. Prior to mailing, Heffler checked the addresses against the National Change of Address database. *Id.*

Heffler also provided notice through a Settlement Website with the URL <http://www.TOASettlement.com> (“Settlement Website”). *Id.* at ¶ 9. The Settlement Website included the Long Form Notice and the Claim Form. (“Claim Packet”). *Id.* Visitors to the website are provided the option to download copies of the Claim Packet and other case-related documents. *Id.* Visitors are also able to submit claims online and upload supporting documentation. *Id.* As of November 27, 2020, there have been a total of 2,906 webpage visits totaling 6,156 pages viewed. *Id.* at ¶10. According to Heffler’s Status Reports, this represents 2,542 unique visits. Rhine Final Approval Decl. at ¶5.

Third, Heffler Group established and continues to maintain a toll-free telephone number at 833-537-1184 for potential Class Members to call and obtain information about the Settlement and request the Claim Packet. Smitheman Decl. at ¶11. The telephone hotline became operational on October 7, 2020, and has been accessible 24 hours a day, 7 days a week. *Id.* As of November 27, 2020, Heffler has received 935 calls to the telephone hotline, with no requests for the Claim Packet. *Id.* at ¶12.

C. Claims, Objections and Opt-Outs.

While claimants have until December 28, 2020, to complete their claim forms, file objections, or opt-out, as of November 27, 2020, 580 Class Members have submitted claims. *Id.*

at ¶17. One person has made an objection and one person has opted out of the Settlement. Rhine Final Approval Decl. at ¶6.

The lone objection was filed by Danny Ray Scarborough. See discussion in Rhine Final Approval Decl. at ¶¶7-12. Mr. Scarborough's objection fails to comply with the requirements of Paragraph X of the Preliminary Approval Order because he failed to mail the same to Plaintiffs' and Defense counsel and the objection fails to: (1) provide the objector's full name, address, email address and telephone number; (2) explain the basis upon which the objector claims to be a Settlement Class Member; (3) provide any legal support for the objection; (4) state whether or not the objector has any legal counsel; (5) list any persons who will be called to testify at the Final Approval Hearing in support of the objection; and (6) contain a statement confirming whether the objector intends to personally appear and/or testify at the Final Approval Hearing.⁴ Rhine Final Approval Decl. at ¶7.

Mr. Scarborough's objection states that the "Relief for this Settlement offered is to (*sic*) low." Mr. Scarborough's objection details ways PII and PHI may be used by identity thieves to a victim's detriment. Mr. Scarborough indicates that he has been a victim of identity theft. Mr. Scarborough states he is "informed that in a Small Claims Court, the Settlement could be granted up to \$100,000." Mr. Scarborough requests each Class Member receive \$10,000 and TOA provide the costs for an attorney to represent every Class Member "in either a STATE or UNITED STATES DISTRICT COURT." Rhine Final Approval Decl. ¶11.

Mr. Scarborough's objection should not hamper all other Class Members from receiving Fraud Resolution Services, Credit Monitoring, monetary compensation or the business

⁴ As pointed out by the Court, the objection was not served on Class Counsel, Defendant's counsel or the Settlement Administrator as required in the Order and Notice of Claim.

commitment benefits. First, with respect to his demand for \$10,000 per Claimant including himself, Mr. Scarborough doesn't provide any information regarding or supporting his allegation that he suffered from any identity theft or damage through the misuse of information which might have been taken in the breach. Further, Class Counsel are unaware of any Settlement with the amount of monetary relief requested by Mr. Scarborough for each class member. Rhine Final Approval Decl. at ¶11.

With respect to his demand that TOA pay attorneys to represent Class Members in future litigation, no such litigation is anticipated as the Fraud Resolution Services included in the Settlement are available to Class Members to deal with any identity theft problems suffered as a result of the Phishing Attack. Thus, the requested relief is moot and the objection should be denied. Rhine Final Approval Decl. at ¶¶9-10.

Finally, Mr. Scarborough's objection highlights some of the hurdles Plaintiffs face in this case. First, Mr. Scarborough apparently has been the victim of cybersecurity events in the past. This experience makes his claim more difficult to prove as he will have to confront Defendant's causation challenge. Rhine Final Approval Decl. at ¶12. The Defendant will also raise this allegedly individualized past identity theft experience issue during the class certification fight. *Id.*

MEMORANDUM OF LAW

Like its federal counterpart (Fed. R. Civ. P. 23), Tennessee Rule of Civil Procedure 23.05 requires judicial approval of any class action settlement. The approval of a proposed class action settlement is a matter within the sound discretion of the Court. *Denver Area Meat Cutters v. Clayton*, 209 S.W.3d 584 (Tenn. Ct. App. 2006). "Before approving a settlement, a district court must conclude that it is "fair, reasonable, and adequate." *Intl. Union, United Auto., Aerospace, and Agr. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007). Several

factors guide the inquiry: (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest. *Id.*

“Settlement agreements ... are favored by the courts and represent the achievement of an amicable result to pending litigation.” *Denver Area Meat Cutters*, at 589 (Tenn. Ct. App. 2006), quoting *Petersen v. Genesis Learning Centers*, 2005 Tenn. App. LEXIS 783 2005 WL 3416303 (Tenn. Ct. App. M.S., Dec. 13, 2005)(citing *In Re Estate of Jones*, 154 S.W.3d 582, 584 (Tenn. Ct. App. 2004).

According to Tennessee’s Rules of Civil Procedure, the trial court should consider: (1) whether a plaintiff satisfies the prerequisites to a class action pursuant to Tenn. R. Civ. P. 23.01; (2) whether individual adjudications would be dispositive on other class members or would impair or impede another’s ability to protect their rights pursuant to Tenn. R. Civ. P. 23.02(1)(b); (3) whether the defendant acted in a manner generally applicable to the class making injunctive relief appropriate pursuant to Tenn. R. Civ. P. 23.02(2); (4) whether common questions of law or fact predominate over individual issues pursuant to Tenn. R. Civ. P. 23.02(3); (5) whether class treatment is superior to individual cases pursuant to Tenn. R. Civ. P. 23.02(3); (6) the interests of individuals to control individual actions pursuant to Tenn. R. Civ. P. 23.02(3)(a); (7) the extent of existing litigation commenced by Class Members pursuant to Tenn. R. Civ. P. 23.02(3)(b); (8) forum considerations pursuant to Tenn. R. Civ. P. 23.02(3)(c); and, (9) class management issues pursuant to Tenn. R. Civ. P. 23.02(3)(d).

On September 29, 2020, this court entered the Preliminary Approval Order. In its Order, the court found that the conditions of numerosity, commonality, typicality, and adequacy were

satisfied for purposes of approving the Settlement and conditionally certifying the Class. The court also found the requirements of Rules 23.01 and 23.02 were satisfied for the same purposes. *See* Preliminary Approval Order § I, at 3.

Tennessee Rule of Civil Procedure 23.01 sets out four (4) specific prerequisites to class certification: (1) the class must be so numerous that joinder of all members is impracticable; (2) there must be questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interest of the class.

These are familiar concepts throughout state and federal jurisprudence. The Tennessee Court of Appeals addressed using federal precedent when assessing class action settlements as follows:

The parties urge us to apply the standard used in federal court for approving class action settlements. *See* Fed. R. Civ. P. 23(e). Under the Federal Rules of Civil Procedure, when a proposed settlement is binding on all class members, the "court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate." *Id.* The Sixth Circuit has directed federal district courts to consider several factors when making a fairness determination: "(1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest." *UAW*, 497 F.3d at 631.

When Tennessee and federal procedural **rules** are identical, we view case law construing the analogous federal **rule** as persuasive authority. *Meighan v. U.S. Sprint Commc'ns Co.*, 924 S.W.2d 632, 637 n.2 (Tenn. 1996). But the current federal counterpart to Tennessee Rule 23.05 is markedly different. Even so, our previous opinions have referenced federal case law in evaluating class action settlements. *See Denver Area Meat Cutters & Emp'rs Pension Plan*, 209 S.W.3d at 591 (quoting *In re "Agent Orange" Product Liab. Litig.*, 597 F. Supp. at 762); *Posey*, 2005 Tenn. App. LEXIS 1, 2005 WL 17426, at *2 (quoting *Reynolds*, 288 F.3d at 280). Thus, while we may consider federal law, Tennessee's common law must control the outcome of this case. *See Vythoukaskas v. Vanderbilt Univ. Hosp.*, 693 S.W.2d 350, 358 (Tenn. Ct. App. 1985), superseded on other grounds by Tenn. R. Civ. P. 26.02(4)(B) (explaining that any doubt concerning "whether federal construction of the Federal Rules of Civil Procedure or Tennessee's common law

controls a question of **procedure** should be resolved in favor of Tennessee's common law."'). Therefore, we review the fairness of the settlement in light of the Tennessee common law.

In re Pacer Int'l, Inc., No. M2015-00356-COA-R3-CV, 2017 Tenn. App. LEXIS 442, at *15-16 (Tenn. Ct. App. Jun. 30, 2017)(emphasis in original). Thus, it is appropriate for this memorandum to address each requisite set forth in Tenn. R. Civ. P. 23.01.

A. Tenn. R. Civ. P. 23.01(1) Numerosity

Numerosity requires “the class [be] so numerous that joinder of all members is impractical.” Tenn. R. Civ. P. 23.01(1). “There is no automatic cut-off point at which the number of plaintiffs makes joinder impractical, thereby making a class-action suit the only viable alternative.” *Bacon v. Honda of America Mfg., Inc.*, 370 F. 3d 565, 570 (6th Cir. 2004). Indeed, the “sheer number of potential litigants in a class, especially if it is more than several hundred, can be the only factor needed to satisfy Rule 23(a)(1). *Id.* (finding numerosity requirement satisfied for a class of 800 employees)(citing 1 Herbert Newberg & Alba Conte, *Newberg on Class Actions*, Section 3.5 at 243-45 (4th ed. 2002)).

Here, the Parties have identified approximately 60,295 Class Members whose data was impacted by the Phishing Attack. (Rhine Preliminary Approval Decl., at ¶6). The “sheer” number is much greater than several hundred and renders joinder impracticable. As such, the numerosity requirement is easily satisfied here.

B. Tenn. R. Civ. P. 23.01(2) Commonality

Commonality requires Plaintiffs to demonstrate “questions of law or fact common to the class.” Tenn. R. Civ. P. 23.01(2). “The commonality test requires only a single issue to all members of the class.” *In re American Medical Systems, Inc.*, 75 F. 3d 1069, 1080 (6th Cir. 1996). Moreover, “[t]he mere fact that questions specific to each member of the class remain after the common

questions have been resolved, does not make the class action impermissible. *Sterling v. Velsicol Chemical Corp.*, 855 F. 2d 1188, 1197 (6th Cir. 1988)

Here, the commonality requirement is met because numerous common issues exist. For example, one issue is whether TOA failed to adequately safeguard the Class Members' PII and PHI. TOA's data security safeguards were common across the Class, and those applied to the data of one Class Member did not differ from those safeguards applied to another.

Other specific common issues include (but are not limited to):

- Whether TOA unlawfully disclosed Class Members' PII and PHI;
- Whether TOA failed to implement and maintain reasonable security procedures and practices appropriate to the nature and scope of information compromised in the Phishing Attack;
- Whether TOA's data security systems prior to and during the Phishing Attack complied with applicable data security laws and regulations including, *e.g.* HIPAA; and,
- Whether TOA's conduct rose to the level of negligence.

These common questions, and others alleged by Plaintiffs in their Complaint, are central to the causes of action brought here and can be addressed on a class-wide basis. Thus, Plaintiffs have met the commonality requirement of Tennessee Rule of Civil Procedure 23.01.

C. Tenn. R. Civ. P. 23.01(3) Typicality

Tenn. R. Civ. P. 23.01(3) requires: "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Again, this is a universal class action requirement. "In order to meet the typicality requirement, the plaintiffs must show that their 'injury arises from or is directly related to a wrong to a class, and that wrong includes the wrong to the plaintiff.'" *Bacon v. Honda of America Mfg., Inc.*, 370 F. 3d 565, 572 (6th Cir. 2004)(citations omitted). "A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that

gives rise to the claims or other class members, and if his or her claims are based on the same legal theory.” *In re American Medical Systems, Inc.*, at 1082 (6th Cir. 1996)(citing 1 Herbert Newberg & Alba Conte, *Newberg on Class Actions*, Section 3-13 at 3-76 (4th ed. 1992)).

Here, Plaintiffs’ and Class Members’ claims all stem from the same event – the Phishing Attack on TOA’s computer systems. The Class Members share the same claims as Plaintiffs. Further, Plaintiffs’ alleged injuries resulting from the Phishing Attack are the same as the expected injuries suffered by the Class Members. Thus, the typicality requirement is satisfied.

D. Tenn. R. Civ. P. 23.01(4) Adequacy

Tenn. R. Civ. P. 23.01(4) requires: “the representative parties will fairly and adequately protect the interest of the class.” *See also Vassalle v. Midland Funding, LLC*, 708 F.3d 747, 757 (6th Cir. 2000). Specifically, to satisfy the adequacy of representation requirement, the plaintiff has the burden to establish: (1) the class representatives’ interest is common with the unnamed class members; and (2) “the representative will vigorously prosecute the interest of the class through qualified counsel.” *Id.* In connection with the representative’s adequacy inquiry, the Court must determine whether the plaintiff can establish “class counsel are qualified, experienced and generally able to conduct the litigation” *Id.*

Here, Plaintiffs’ interests are aligned with those of the Settlement Class in that they seek relief for injuries arising out of the same Phishing Attack. Plaintiffs and Class Members’ data was allegedly compromised by Defendant in the same manner. There is no evidence that their claims or interests are antagonistic to the claims or interests of the class, nor is there any hint that such might exist. Under the terms of the Settlement Agreement, Plaintiffs and Class Members will all be eligible for Credit Monitoring, Fraud Resolution Services, and reimbursement for out-of-pocket

losses and time. Moreover, Plaintiffs' and Class Members' PII and PHI will be more secure in the future because of the increased security protections TOA has agreed to put into place.

Further, Plaintiffs selected experienced and qualified counsel capable of prosecuting Plaintiffs' and Class Members' claims. Class Counsel is experienced in class action work, complex litigation, as well as consumer protection issues. Moreover, Class Counsel has been approved as class counsel in numerous cases across the country. *See* Rhine Preliminary Approval Decl. at ¶¶2-3 and Exhibit A, Rhine Attorney Fee Decl. at ¶2 and Motion for Award of Attorneys' Fees, Costs and Expenses Ex. B, Adkins Decl. at ¶¶13-14.

E. Additional Factors to Be Considered by the Court

In addition to the Rule 23.01 prerequisites, when determining whether to approve a class action settlement, the Court is encouraged to consider a number of additional factors. Once again, the Tennessee Court of Appeals provides guidance:

We have directed trial courts to consider various factors, such as "the 'risk and likely return to the class of continued litigation', the range of possible outcomes and probability of each, [and] whether class counsel's fees are proportional to the incremental benefits conferred on the class members." *Posey v. Dryvit Sys., Inc.*, No. E2004-02013-COA-R9-CV, 2005 Tenn. App. LEXIS 1, 2005 WL 17426, at *2 (Tenn. Ct. App. Jan. 4, 2005) (quoting *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 280 (7th Cir. 2002)). We have also focused on the level of investigation of the plaintiffs' claims, whether settlement negotiations were at arm's length, the number of objectors, the objectors' access to information, and the experience of the parties' counsel. *In re High Pressure Laminate Antitrust Litig.*, No. M2005-01747-COA-R3-CV, 2006 Tenn. App. LEXIS 786, 2006 WL 3681147, at *4-5 (Tenn. Ct. App. Dec. 13, 2006). In the only published Tennessee opinion, we focus on the fairness of the proposed settlement. *Denver Area Meat Cutters & Emp'rs Pension Plan*, 209 S.W.3d at 591. And we indicated that "[t]he most important consideration [in determining whether a settlement is fair] is the strength of plaintiffs' case on the merits weighed against the amount offered in settlement." *Id.* (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984)).

In re Pacer Int'l, Inc., 2017 Tenn. App. LEXIS 442, at *14-15.

With respect to these additional considerations, it is important for the Court to consider the complexity, costs, and difficulty of the case. Individual claims may be too small to pursue alone and subject to causation and other defenses. Using the Plaintiffs as an example, if they are successful, what would a jury award as damages? Basically, the jury would be asked to value the further risk of identity theft, lost time and the nuisance of spam phone calls and spam emails. Obviously, the threat of future identity theft is the most valuable damage component. However, at this time, no actual identity theft can be proven. The range of recovery is between \$0 and an unknown amount.

The Phishing Attack has been adequately investigated by Class Counsel and a cyber security expert. The settlement discussions were hotly contested and were supervised by a nationally recognized data breach class action mediator. The result is a fair and tailored settlement that provides everyone with fraud resolution protection. Those who submit claims can receive credit monitoring, monetary compensation for lost time and unreimbursed expenses in a reasonably appropriate amount, and business commitments that will help TOA patients in the future.

Tennessee law further sets forth additional factors including: (1) the likelihood of success on the merits weighed against the amount and form of the relief offered in the settlement; (2) the complexity, expense, and likely duration of further litigation; (3) the opinions of class counsel and class representatives; (4) the amount of discovery engaged in by the parties; (5) the reaction of absent settlement class members; (6) the risk of fraud and collusion; and (7) the public interest.” *Id.* at *16; *In re Cast Iron Soil Pipe & Fittings Antitrust Litig.*, 2017 U.S. Dist. LEXIS 97491, *16 (E.D. Tenn. May 26, 2017). *See also In re High Pressure Laminate Antitrust Litig.*, 2006 Tenn. App. LEXIS 786 (Tenn. Ct. App. Dec. 13, 2016).

Here, all six factors support the fairness, adequacy and reasonableness of the Settlement.

1. Likelihood of success at trial compared to the settlement.

All cases, particularly class action cases, have an inherent risk both in terms of establishing the merits and in terms of obtaining a recovery in a timely manner. Some of the unique issues presented in this data breach case include: the duty of care owed by the Defendant when collecting and storing this type of personal and protected information; standing in the context of improper disclosure; types of damages available at trial; and whether Plaintiffs can obtain and maintain class certification. Defendant has vigorously defended the action, and the Class Members face a very real risk of not prevailing on the merits at trial as opposed to the remedies provided to each Class Member pursuant to the Settlement Agreement.

In contrast, the Settlement Agreement ensures that the Class receives meaningful and immediate benefits, which include: (a) fraud resolution services; (b) extended credit monitoring services; (c) reimbursement of expenses for certain out-of-pocket and identity fraud losses; and (d) injunctive relief regarding Defendant's data security business practice changes. Moreover, the Parties have agreed that the costs of the notice and claims administration will be paid by the Defendant and will not reduce the amount available to pay the claims of Class Members. Rhine Preliminary Approval Decl. ¶24.

2. Complexity, expense and duration of litigation.

The case has been pending since April of 2020. In that time, the matter was thoroughly investigated by both sides. For all parties concerned, settlement is a desirable alternative to the continued prospect of lengthy, complicated, and expensive motion practice, discovery, and trial. The case would be expert witness driven and thus, quite expensive.

3. Judgment of class counsel and the class representatives.

As the Court held in *In re Southeastern Milk Antitrust Litig.*, 2013 U.S. Dist. LEXIS 70163, *13 (E.D. Tenn. May 17, 2013), “The judgment of experienced counsel and class representatives regarding the settlement should be given great weight.” The judgment of experienced counsel for both parties is that the settlement should be approved. The opinions of counsel support the Court’s finding that the settlement is fair, adequate and reasonable. See Rhine Preliminary Approval Decl. ¶12, Rhine Final Approval Decl. ¶3, Motion for Final Approval Ex. B, Ramey Decl. (“Ramey Final Approval Decl.”) ¶¶14-17, and Adkins Attorneys’ Fees Decl. at ¶23.

4. The amount of discovery engaged in by the parties.

The proceedings to date provide an adequate basis for an informed settlement. The case was filed on April 6, 2020, and over the past months the parties have had an opportunity to investigate the claims, ascertain the facts, and negotiate a settlement that obviates the need for the significant (and expensive) amount of work that would need to be done to adjudicate the dispute on the merits and bring the case to trial. Prior to filing the case, the parties participated in intensive investigation as well. Rhine Preliminary Approval Decl. ¶14, 15.

5. The reaction of absent class members.

The Court preliminarily approved the settlement on September 29, 2020, and to date no intervening events have occurred that would give reason for the Court to reconsider that decision. As of the filing of this Motion, only one member of the class has filed an opposition or objection to the settlement, and one member of the class has opted out. Rhine Final Approval Decl, ¶6 and Smitheman Decl. ¶15.

6. The risk of fraud and collusion.

A threshold consideration in evaluating a settlement for approval is whether it is the product of fraud or collusion between the parties. “Courts respect the integrity of counsel and

presume the absence of fraud or collusion in negotiating the settlement, unless evidence to the contrary is offered.” *In re Southeastern Milk Antitrust Litig.*, 2013 U.S. Dist. LEXIS 70163, *17 (E.D. Tenn. May 17, 2013). *See also In re Cast Iron Soil Pipe & Fittings Antitrust Litig.*, 2017 U.S. Dist. LEXIS 97491, *16 (E.D. Tenn. May 26, 2017).

Here, the Settlement Agreement satisfies this threshold condition. Class Counsel have many years of experience in litigating class actions and have negotiated other class action settlements that have been approved by courts throughout the country. *Supra*. Defendant’s counsel are highly capable, very experienced, and zealous advocates. The Settlement was ultimately reached only after arm’s-length negotiations with a well-respected national mediator. The Parties settled only after engaging in thorough investigation of the claims. Attorneys’ fees and the service award to the class representatives were not discussed until the material terms of relief to the class had been agreed upon, and the settlement was not the result of any collusion. Rhine Preliminary Approval Decl. ¶30.

7. The public interest.

The public interest factor weighs in favor of final approval based on the class notice and the singular objection to the Settlement.

a. Notice provided meets the requirements of due process and Rule 23.03

Rule 23.03 of the Tennessee Rules of Civil Procedure requires the best notice practicable under the circumstances, which was provided here. Notice was mailed to all individuals identified as Class Members for whom Defendant had a valid mailing address or could find one using a national change of address database. Heffler Group also launched a settlement website to inform class members about the settlement. Smitheman Decl. ¶ 9.

The content of the notice also was approved by the Court, and adequately and fairly informed Class Members of their right to opt-out of the settlement, and the result of foregoing that right. The notice was written in plain language, described the nature of the litigation, and advised Class Members that they could contact the Settlement Administrator with any questions or requests for additional information. The content of the notice, and the notice procedures implemented in this case, adequately satisfy Rule 23.03 and due process standards.

b. The one objection made to the Settlement should be overruled.

To date, only one person has objected to the Settlement. Rhine Final Approval Decl. ¶ 6. “The small number of objectors relative to the overall class size is strong evidence of the fairness of the settlement.” *In re Intl., Inc.*, M201500356COAR3CV, 2017 WL 2829856, at *8 (Tenn. App. June 30, 2017). Due process is satisfied when an objecting party is allowed to “present evidence and have its objections heard.” *Id.* (citing *Tenn. Ass'n of Health Maint. Orgs., Inc. v. Grier*, 262 F.3d 559, 567 (6th Cir. 2001). “[O]nce preliminary approval has been granted, a class action settlement is presumptively reasonable, and an objecting class member must overcome a heavy burden to prove that the settlement is unreasonable.” *Peck v. Air Evac EMS, Inc.*, 2020 WL 354307, *9 (E.D. Ky. Jan. 21, 2020). “Objections based purely upon individual claims of loss do not warrant disapproval of the proposed settlement.” *Id.* “General objections without factual or legal substantiation carry little weight”, and “[n]one of the objectors has demonstrated the injury-in-fact or redressability required for standing to object.” *Manjunath A. Gokare, P.C. v. Fed. Express Corp.*, 2013 WL 12094870, *23 (W.D. Tenn. Nov. 22, 2013).

Here, the lone objection purportedly filed by Danny Ray Scarborough (the “Objection”) is due to be overruled. *Supra*, at 7-9. First, the Preliminary Approval Order sets forth a number of procedural requirements in order to file a valid filing objection to the Settlement. *See*, Preliminary

Approval Order ¶X. Mr. Scarborough's objection failed to comply with these requirements. Rhine Final Approval Decl. ¶7.

Moving to the substance of Mr. Scarborough's objection, he generally asserts: (a) each Class Member should be entitled to monetary relief of at least \$10,000; and (b) TOA should pay for attorneys to represent him and all class Members in individual lawsuits that are not yet pending.

There is no factual or legal substantiation of the claim asserted in the Objection. Mr. Scarborough alleges that "this is not the first time that I've had [i]dentity theft for which I receive[d] a Four-Digit Pin from the Internal Revenue Source." However, he fails to allege any specific facts to demonstrate that the theft of his identity was in any way related to the Phishing Attack. Instead, it appears that he believes that his identity was stolen in an earlier incident. Nonetheless he demands a minimum payment of \$10,000 for himself and Class Members. Based on the minimal information supplied in the Objection, it would be highly unlikely for a court or any jury to award such an amount, if any, under the circumstances presented. Even should Mr. Scarborough be able to prove his individual claim of loss, this would not warrant disapproval of the proposed settlement, as pursuant to the Settlement, he has the right to opt-out of the Class.

In addition to the monetary component, the Objection seeks attorney's fees from TOA for future litigation maintained by Class Members. Mr. Scarborough fails to identify any pending litigation. And, in light of the Fraud Resolution Services settlement benefit, it seems unlikely that additional litigation will occur. The Court has previously approved the Settlement, and the Objection fails to meet the procedural requirements and is meritless as Mr. Scarborough, and has failed to demonstrate any shortcomings of Settlement is unreasonable or that he has standing to file the Objection.

IV. CONCLUSION

For the foregoing reasons, the Court should grant this motion and enter a Final Judgment approving the Settlement Agreement and certifying the Class and grant any such other and further relief as the court deems just and proper.

DATED this 2nd day of December, 2020.

Respectfully submitted,

/s/ Micah S. Adkins

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CERTIFICATE OF SERVICE

I certify that on December 2, 2020, I caused the foregoing paper to be filed electronically using the Davidson County Chancery Court E-Filing System, which will electronically serve notification of same on the following counsel of record:

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