**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

FIRST CHOICE FEDERAL CREDIT UNION, AOD FEDERAL CREDIT UNION, TECH CREDIT UNION, VERIDIAN CREDIT UNION, SOUTH FLORIDA EDUCATIONAL FEDERAL CREDIT UNION, PREFERRED CREDIT UNION, ALCOA COMMUNITY FEDERAL CREDIT UNION, ASSOCIATED CREDIT UNION, CENTRUE BANK, ENVISTA CREDIT UNION, FIRST NBC BANK, NAVIGATOR CREDIT UNION, THE SEYMOUR BANK, FINANCIAL HORIZONS CREDIT UNION, NUSENDA CREDIT UNION, GREATER CINCINNATI CREDIT UNION, KEMBA FINANCIAL CREDIT UNION, WRIGHT-PATT CREDIT UNION, and MEMBERS CHOICE CREDIT UNION, on Behalf of Themselves and All Others Similarly Situated,

and

CREDIT UNION NATIONAL ASSOCIATION, GEORGIA CREDIT UNION AFFILIATES, INDIANA CREDIT UNION LEAGUE, MICHIGAN CREDIT UNION LEAGUE, and OHIO CREDIT UNION LEAGUE,

Plaintiffs,

v.

THE WENDY'S COMPANY, WENDY'S RESTAURANTS, LLC, and WENDY'S INTERNATIONAL, LLC,

Defendants.

Civil No. 2:16-cv-00506-NBF-MPK

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

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## INTRODUCTION

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, the Financial Institution Plaintiffs [1] and Association Plaintiffs (collectively, "Plaintiffs") respectfully submit this memorandum of law in support of their motion for final approval of the proposed Settlement ("Motion"). The proposed Settlement between Plaintiffs and Defendants, The Wendy's Company, Wendy's Restaurants, LLC, and Wendy's International, LLC (collectively, "Wendy's" or "Defendants"), was reached after two and a half years of litigation and discovery and three rounds of mediation. Under the Settlement, Wendy's will pay $50 million into a non-reversionary fund in exchange for a release of all claims against Wendy's and Wendy's Franchisees arising from third-party criminal cyberattacks of certain of Wendy's independently owned and operated franchisee restaurants involving malware variants targeting customers' payment card information that Wendy's reported in 2016 (the "Data Breach"). Wendy's also will adopt or maintain certain reasonable safeguards to manage its data security risks. If approved, the Settlement will resolve all pending claims in these consolidated actions and provide monetary relief to a nationwide class of payment-card issuing financial institutions. The Settlement is an excellent result in a complex, high-risk, hard fought case that provides a substantial financial recovery for payment card issuers that suffered losses as a result of the Data Breach.

On February 26, 2019, the Court preliminarily approved the Settlement. ECF No. 183. Since then, the Parties successfully implemented the Court-approved Notice Program and have received an overwhelmingly positive response to the Settlement from Settlement Class Members, with no objections and only one timely opt out. Plaintiffs now move the Court to: (1) certify the

[1] All capitalized terms not defined herein have the meaning defined in the Settlement Agreement and Release ("Settlement" or "Settlement Agreement") attached to the Motion as Exhibit 1.

Settlement Class under Rules 23(b)(3) and 23(e) for settlement purposes; (2) approve the Settlement as fair, reasonable, and adequate; and (3) enter the Parties' proposed Final Approval Order and Judgment, filed herewith. In support of this Motion, Plaintiffs submit the Joint Declaration of Gary F. Lynch and Erin Green Comite ("Jt. Decl."); and the Declaration of Christopher D. Amundson ("Amundson Decl."). Separately, Plaintiffs also are filing a Motion for an Award of Attorneys' Fee and Reimbursement of Expenses, which includes a request for a Service Award for the Settlement Class Representatives.

## I. BACKGROUND

### A. The Wendy's Data Breach and Early Litigation Stages

Plaintiffs alleged that, beginning in October 2015, computer hackers installed malware on the point-of-sale ("POS") systems at certain Wendy's independently owned and operated franchised restaurant for the purposes of capturing and exfiltrating customer payment card data. ¶¶ 2, 62.[2] Based on discovery developed in the Litigation, Plaintiffs estimate that approximately 18 million payment cards were exposed in the Data Breach. Jt. Decl. ¶ 11.

On April 25, 2016, Plaintiff First Choice Federal Credit Union filed an action against Wendy's in the United States District Court for the Western District of Pennsylvania. (ECF No. 1). Thereafter, a number of additional actions were filed by financial institutions against Wendy's in this District. *See Veridian Credit Union v. The Wendy's Co.*, No. 2:16-cv-00831 (W.D. Pa. June 15, 2016) (ECF No. 1); *Tech Credit Union v. The Wendy's Co.*, No. 2:16-cv-00854 (W.D. Pa. June 16, 2016) (ECF No. 1); *S. Fla. Educ. Fed. Credit Union v. The Wendy's Co.*, No. 2:16-cv-00873 (W.D. Pa. June 17, 2016) (ECF No. 1); *AOD Fed. Credit Union v. The Wendy's Co.*, No. 2:16-cv-

[2] All "¶" and "¶¶" references are to the Consolidated Amended Complaint ("Complaint") (ECF No. 32), unless otherwise indicated.

00900 (W.D. Pa. June 20, 2016). By orders dated July 12, 2016, these actions were consolidated (ECF No. 20) and the Court appointed Erin Green Comite of Scott+Scott Attorneys at Law LLP ("Scott+Scott") and Gary F. Lynch of Carlson Lynch, LLP ("Carlson Lynch") as interim co-lead class counsel ("Co-Lead Counsel"). (ECF No. 21).

On July 22, 2016, Plaintiffs filed the operative Complaint, asserting claims for negligence, negligence *per se*, violation of the Ohio Deceptive Trade Practices Act ("ODTPA"), Ohio Code §§ 4165.01, *et seq*., and declaratory and injunctive relief. (ECF No. 32). On August 22, 2016, Wendy's moved to dismiss the Complaint (the "Motion to Dismiss"). (ECF No. 53). On February 13, 2017, Magistrate Judge Kelly issued a Report and Recommendation, recommending that the Court deny the Motion to Dismiss. (ECF No. 80). On March 31, 2017, the Court adopted the Report and Recommendation and denied Wendy's Motion to Dismiss. (ECF No. 88). The parties participated in a first mediation session supervised by third-party neutral Hon. Edward A. Infante —retired at the time—on May 15, 2017, in San Francisco. Jt. Decl. ¶¶ 5. The mediation did not resolve the case, but the Parties and mediator were able to identify issues that posed roadblocks to settlement, and exchanged suggestions regarding a case management schedule that would permit the Parties to conduct discovery and motions practice related to those issues earlier in the case in order to facilitate progress in the litigation and more productive future discussions. *Id.* These discussions led directly to the schedule the Parties proposed to the Court, adopted in the initial scheduling order, which included an initial phase of discovery related to the choice of law and franchisor-franchisee relationship issues, followed by briefing directed specifically to the choice of law question. (ECF No. 100).

**B. Discovery, Further Motion Practice, and Settlement Discussions**

After the Motion to Dismiss was denied and the first mediation session did not resolve the case, the Parties engaged in significant discovery and motion practice related to the issues mentioned above. Jt. Decl. ¶¶ 5–7; SA ¶ E. In particular, Plaintiffs served Wendy's with document requests, and Wendy's produced millions of pages of documents, which Plaintiffs reviewed. Jt. Decl. ¶ 6. Plaintiffs also deposed Wendy's corporate representative, pursuant to Federal Rule of Civil Procedure 30(b)(6). *Id.* Additionally, Plaintiffs obtained and reviewed thousands of pages of documents from numerous third parties in response to subpoenas Plaintiffs served, including subpoenas served on the major card brands. *Id.*

Wendy's served the Financial Institution Plaintiffs with document requests, to which the Financial Institution Plaintiffs responded with the production of thousands pages of responsive documents. Jt. Decl. ¶ 6; SA ¶ F. Wendy's also deposed 16 corporate witnesses of 15 of the Financial Institution Plaintiffs with knowledge of facts relating to the Financial Institution Plaintiffs' response to the Data Breach, designated pursuant to Federal Rule of Civil Procedure 30(b)(6). Jt. Decl. ¶ 6.

On January 19, 2018, Plaintiffs filed a motion seeking to apply Ohio law to Plaintiffs' claims on a nationwide basis (ECF No. 131), which Wendy's opposed. (ECF No. 139). On May 9, 2018, Magistrate Judge Kelly issued a Report and Recommendation, recommending that the Court grant the Motion for Application of Ohio Law as to the negligence and negligence per se claims, and deny it as to the ODTPA claim to the extent any Plaintiffs not located in Ohio sought to assert that claim. (ECF No. 147 at 14). District Judge Nora Barry Fischer adopted the Report and Recommendation on June 6, 2018 (ECF No. 152), and shortly thereafter the Parties were ordered to conduct another alternative dispute resolution process. (ECF No. 153).

This Settlement resulted from good faith, arm's-length settlement negotiations, including one full-day mediation session before the then-retired Honorable Edward Infante, on May 15, 2017, in San Francisco,[3] and two full-day mediation sessions before the Honorable Diane M. Welsh (Ret.), on August 29, 2018 and November 16, 2018, in Philadelphia. Jt. Decl. ¶¶ 5, 7–8; SA ¶ I. Two representatives of the Financial Institution Plaintiffs, Susan Bradley of Plaintiff Members Choice Credit Union, and Greg Slessor of Plaintiff Veridian Credit Union, attended the August 29, 2018 mediation. Jt. Decl. ¶ 8. In support of their mediation positions, the Parties drafted detailed mediation briefs that explored the strengths and weaknesses of each side's case, including issues of liability, class certification, and proof of damages, and attached numerous exhibits. *Id.* The Parties also participated in numerous direct discussions about possible resolution of the Litigation. *Id.*; SA ¶ I. The Parties did not discuss attorneys' fees, costs, and expenses or Service Awards prior to agreeing to the essential terms of the Settlement. Jt. Decl. ¶ 9; SA ¶ I.[4]

On February 13, 2019, Plaintiffs filed an unopposed Motion for Preliminary Approval of Class Action Settlement. (ECF. No. 175). The Court granted the motion on February 26, 2019. (ECF No. 183) ("Prelim. App. Order"). The Court provisionally certified 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 Alerted on Payment Cards. Excluded from the Settlement Class is the judge presiding over this matter and any members of her judicial staff, Wendy's, and persons who timely and validly request exclusion from the Settlement Class.

[3] Judge Infante resumed his position on the federal bench as a U.S. Magistrate Judge for the Central District of California before the Parties' second mediation could be scheduled.

[4] As mentioned in the Joint Declaration, there are two additional agreements between Class Counsel and Wendy's, one regarding the threshold number of requests for exclusion that would trigger Wendy's rights to terminate the Agreement, and the other regarding certain limitations on the content of public statements made about the Agreement. *See* Jt. Decl. ¶ 22.

(Prelim. App. Order at 1–2); *see also* SA ¶ 38. The Court appointed as Class Counsel Erin Green Comite of Scott+Scott, and Gary F. Lynch of Carlson Lynch. (Prelim. App. Order at 2). The Court, upon a preliminary review, found that the proposed Settlement was fair, reasonable, and adequate, otherwise met the criteria for approval, and warranted issuance of Notice to the Settlement Class. (*Id.*) The Court approved the Parties' proposed Notice Program (*id.* at 4); set a schedule for the notice and claims period and the final approval briefing (*id.* at 3–6), and set a fairness hearing for November 6, 2019. (*Id.* at 2).

Thereafter, the Settlement Administrator sent out Notice and the claims process began. Admundson Decl. ¶¶ 2–6. The details and results of that process are discussed in Section III, *infra*.

## II. THE PROVISIONS OF THE SETTLEMENT AGREEMENT

### A. The Settlement Class

For settlement purposes only, the Parties agreed that the Court should certify the aforementioned Settlement Class under Fed. R. Civ. P. 23(b)(3). SA ¶ 38. The term "Alerted on Payment Card" in the class definition means any payment card (including debit or credit cards) that was identified as having been at risk as a result of the Data Breach in an alert or similar document by Visa, MasterCard, Discover, American Express, or JCB. SA ¶ 1. Based on discovery, there are approximately 18 million Alerted on Cards, issued by approximately 5,168 Settlement Class Members. Jt. Decl. ¶ 11; *see also* Amundson Decl. ¶ 5.

### B. The Direct Benefits to the Settlement Class

#### 1. The $50 Million Settlement Fund

Under the Settlement Agreement, Wendy's will create a non-reversionary Settlement Fund of $50 million. SA ¶ 40. The 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 Awards in amounts approved by the Court. SA ¶¶ 40, 40(b).

Under the Distribution Plan that governs payments from the Settlement Fund, a copy of which is attached as Exhibit 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.[5] SA ¶ 40(b); SA Ex. 1 ¶ 2, 2.1. 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 Awards approved by the Court. SA ¶ 40(b); SA Ex. 1 ¶ 4.2. Based on the claims filed as of October 1, 2019 (which are still subject to verification), the projected payments to Settlement Class Members will be within the range of $4.41 to $5.10 per card. Jt. Decl. ¶ 12.

The Parties intend and expect that the entire Settlement Fund will be distributed pursuant to the Distribution Plan through the Claims Administration process. Nonetheless, to the extent any funds remain after the Claims Administration process is completed, no portion of the Settlement Fund will be returned to Wendy's. SA ¶ 40(b). Instead, those funds will be distributed *pro rata* to Settlement Class Members, if administratively feasible, and otherwise will be distributed to *cy pres* entities selected by Class Counsel and approved by the Court. SA Ex. 1, ¶ 4.3.

**2. Additional Security Measures**

If the Settlement is approved, Wendy's will, within 30 days of the issuance of the Final Approval Order and Judgment, and subject to Board approval, adopt and/or maintain an

[5] The term "Claimed-On Card" means an Alerted on Payment Card that was issued by a Settlement Class Member and for which the Settlement Class Member seeks compensation under the Settlement. SA at Ex. 1 ¶1.2.

information security program that is reasonably designed to protect the security, integrity, and confidentiality of payment cardholder data with respect to Company-owned U.S. restaurants and systems. These measures are described in detail in SA ¶ 41(a)-(c). Wendy's will materially maintain these additional security measures for at least two years following the Effective Date, subject to certain limited exceptions. SA ¶ 42.

**C. Releases**

Plaintiffs, Settlement Class Members who do not opt out, and related persons and entities (*e.g.*, parents, subsidiaries, and counsel) will, if the Settlement is approved and effectuated, release Wendy's and related persons and entities from claims relating to issues in this Litigation. SA ¶¶ 62-63, 65. In turn, Wendy's and their affiliated persons and entities will also release any potential claims or counterclaims against Plaintiffs, Settlement Class Members, and their affiliated entities relating to the institution, prosecution, or settlement of the Litigation. SA ¶ 64.

**D. Service Awards**

The Settlement Agreement provides that Class Counsel will apply for, and Wendy's will not oppose, Service Awards of $7,500 to each of the fifteen (15) Financial Institution Plaintiffs that were deposed and $2,500 to each of the remaining three (3) Financial Institution Plaintiffs that were not deposed to compensate them for their efforts in the Litigation and commitment on behalf of the Settlement Class. SA ¶ 66. Any Service Awards approved by the Court will be paid from the Settlement Fund. *Id.*

**E. Attorneys' Fees and Expenses**

Under the Settlement Agreement, Class Counsel will request 30% of the gross Settlement Fund, including any interest earned thereon, from the Court for their attorneys' fees and will additionally request reimbursement of their reasonable costs and expenses from the Settlement Fund. SA ¶ 67. Wendy's agrees not to oppose Class Counsel's request for attorneys' fees and

reimbursement of reasonable costs and expenses to be paid from the Settlement Fund. *Id.* Plaintiffs' motion for a fee and expense award is being filed concurrently with this Motion.

## III. UPDATE ON IMPLEMENTATION AND RESULTS OF THE NOTICE PROGRAM AND CLAIMS PROCESS

The Parties implemented the Court-approved Notice Program in coordination with the approved Settlement Administrator, Analytics Consulting, LLC ("Analytics"). (Prelim. App. Order at 4–6). Using records obtained by Class Counsel through third party discovery, Analytics created a database list of Settlement Class Members and verified the addresses using multiple methods. Admundson Decl. ¶¶ 4–5. This resulted in mail-able address records for 5,168 Settlement Class Members. *Id.* ¶ 5. Analytics caused the Court-approved Notice and Claim Forms to be sent via USPS first-class mail on March 28, 2018. *Id.* ¶ 6 & Ex. B.

As of October 1, 2019, USPS has returned 12 Notices with an updated address for the Settlement Class Member (the period in which USPS automatically forwards the Notice had expired). *Id.* ¶ 7. Analytics re-mailed the Notices to these Settlement Class Members at their updated addresses. *Id.* An additional 269 Notices were returned by USPS as undeliverable. *Id.* Of these undeliverable Notices, Analytics located 14 new addresses through a third-party commercial data source, Experian, and re-mailed the Notices to those Settlement Class Members at the updated addresses. *Id.* Analytics estimates that Notice was successfully delivered to over 95% of the Settlement Class. *Id.* 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 April 26, 2019. *Id.* ¶ 8 & Ex. C.

With input from counsel for the Parties, Analytics established a Settlement Website, operational as of March 27, 2019, where Settlement Class Members could obtain important information about the Settlement and submit/upload Claim Forms electronically. *Id.* ¶ 10. The

Settlement Website received visits from 2,240 unique users as of October 1, 2019, and Analytics resolved 246 email exchanges with Settlement Class Members. *Id.* ¶¶ 10–11. Analytics also established a toll-free phone number to provide Settlement Class Members with additional information regarding the Settlement through both automated messages and live call center representatives. *Id.* ¶ 9. The toll-free number became operational on March 28, 2019, and as of October 1, 2019, the number has received 268 phone calls and 80 requests to speak with a customer service representative. *Id.* On July 17, 2019, Analytics mailed a reminder postcard to 4,293 Settlement Class Members that had not submitted Claim Forms as of that date. *Id.* ¶ 12 & Ex. D.

In compliance with the Class Action Fairness Act ("CAFA"), 28 U.S.C. §1715(b), Analytics served Notice of the proposed Settlement on the appropriate state and federal authorities on February 14, 2019. *Id.* ¶ 3 & Ex. A.

**A. Claims, Requests for Exclusion, and Objections to Date**

Under the schedule established by the Preliminary Approval Order, the deadline for Settlement Class Members to opt out from or object to the Settlement was May 28, 2019, and the deadline for Settlement Class Members to submit claims was September 30, 2019. (Prelim. App. Order at 11).

Only one timely request for exclusion was received by Analytics. Amundson Decl. ¶ 14 & Ex. E. The deadline for Settlement Class Members to object to the Settlement was May 28, 2019. (Prelim. App. Order at 11). As of the date of this filing, Class Counsel is unaware of any objections. Jt. Decl. ¶ 13. If any responses in opposition to Plaintiffs' Motion for an Award of Attorneys' Fees and Reimbursement of Expenses are filed, Plaintiffs will respond, if necessary, by October 25, 2019.

As of October 1, 2019, a total of 1,389 Claim Forms have been submitted by Settlement Class Members. Amundson Decl. ¶ 13. This represents a claims rate of 26.8%, which, in the experience of the Settlement Administrator and Class Counsel, is an excellent and high claims rate

for this type of settlement. *Id.* ¶ 13; Jt. Decl. ¶ 12. Based on these claim numbers, Class Members will receive between $4.41 and $5.10 per Claimed-On Card, approximately. Jt. Decl. ¶ 12.

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

### A. Legal Standard for Final Approval of a Proposed Class Action Settlement

Court approval is required for settlement of a class action. Fed. R. Civ. P. 23(e). The settlement of class action litigation is favored and encouraged in the Third Circuit. *See Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004); *In re General Motors Corporation Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) ("*In re GM Trucks*"); *Jackson v. Wells Fargo Bank, N.A.*, 136 F. Supp. 3d 687, 700 (W.D. Pa. 2015).

"Rule 23(e) imposes on the trial judge the duty of protecting absentees, which is executed by the court's assuring the settlement represents adequate compensation for the release of the class claims." *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 316 (3d Cir. 1998) (citation omitted). Courts in the Third Circuit apply the nine-factor test enunciated in *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975), which was reaffirmed in *In re Warfarin*, 391 F.3d at 534–35, to determine whether the settlement is fair, reasonable and adequate under Rule 23(e). These factors are:

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

9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

*Girsh*, 521 F.2d at 156–57. [6] The proponents of a settlement bear the burden of proving consideration of these factors on balance warrants approval of the proposed settlement. *In re Cendant Corp. Litig.*, 264 F.3d 201, 232 (3d Cir. 2001).

The Third Circuit has stressed that the most relevant consideration is whether the proposed settlement is within a "range of reasonableness" in light of all costs and risks of continued litigation; that is, the test is whether the proposed settlement is fair and reasonable under the circumstances. *In re Prudential*, 148 F.3d at 322. In making its determination of these risks, the Court should give deference to the opinions of counsel, who have researched the issues and are familiar with the facts of the litigation. *Zanghi v. Freightcar Am., Inc.*, No. 3:13-cv-146, 2016 WL 223721, at *15 (W.D. Pa. Jan. 19, 2016) ("Significant weight should be attributed to the belief of experienced counsel that settlement is in the best interest of the class.") (internal quotations omitted).

Approval under amended Rule 23(e)(2) also requires that courts take into consideration the following factors: (1) whether "the class representatives and class counsel have adequately represented the class"; (2) whether the settlement "was negotiated at arm's length"; (3) whether "the relief provided for the class is adequate"; and (4) whether the settlement "treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(A)-(D). Factors (1) and (3) are fully subsumed in the *Girsh* factors and are discussed below. Factor (2) is satisfied because, as mentioned above, this Settlement was negotiated at arm's length with the involvement of two

[6] The *In re Prudential* court identified several additional factors for courts to weigh if relevant. *See In re Prudential*, 148 F.3d at 323. The factors which are relevant to the case at bar are either subsumed within the *Girsh* factors (*e.g.* extent of discovery on the merits) or will be addressed in Plaintiffs' motion for an award of attorneys' fees.

successive third-party neutrals. Factor (4) is satisfied because the Settlement provides identical relief, on the same terms, to all Class Members.

### B. The Settlement Satisfies the *Girsh* Factors

As explained below, the application of the *Girsh* factors unequivocally demonstrates that the proposed Settlement is fair, reasonable, and adequate.

#### 1. Complexity and Duration of the Litigation

This factor is concerned with assessing the "'probable costs, in both time and money, of continued litigation.'" *In re Cendant*, 264 F.3d at 234 (quoting *In re GM Trucks*, 55 F.3d at 812). "By measuring the costs of continuing on the adversarial path, a court can gauge the benefit of settling the claim amicably." *Jackson*, 136 F. Supp. 3d at 701. "This factor weighs heavily in favor of final approval" where "[c]ontinuing litigation in this matter would result in a complicated trial with inevitable post-trial motions and appeals that would prolong the litigation [and] reduce the value of any recovery to the class." *Zanghi*, 2016 WL 223721, at *16.

This case was in litigation for close to two and a half years. The Parties briefed a motion to dismiss and issues related to choice of law, and conducted substantial discovery, including depositions and the exchange and review of millions of pages of documents produced by both parties and third party entities. Wendy's filed a Motion for Judgment on the Pleadings on August 27, 2018. (ECF. No. 163). This Motion was denied as moot after the Court granted preliminary approval of the settlement. (ECF. No. 184). Had the parties not reached a settlement, no matter what the outcome of the motion or any additional summary judgment motions would have been, it is virtually certain that whichever party did not prevail would appeal, including in such appeal issues related to the Court's rulings on class certification, summary judgment, and evidentiary matters. The Settlement therefore saves the parties and the Court from briefing on both the motion

that was pending, as well as appeals and possibly a trial. Accordingly, the first *Girsh* factor weighs heavily in favor of approval.

**2. The Reaction of the Class to the Settlement**

The second factor, the reaction of the class to the settlement, "attempts to gauge whether members of the class support the settlement." *Zanghi*, 2016 WL 223721, at *16 (quoting *In re Warfarin*, 391 F.3d at 536. No Settlement Class Member has objected to any aspect of the Settlement and only one Settlement Class Member has timely opted out. Jt. Decl. ¶ 13; Amundson Decl. ¶ 14. In addition, to date 1,389 Settlement Class Members have submitted claims, representing issuers of 7.5 million of the payment cards compromised in the breach. Jt. Decl. ¶ 12; Amundson Decl. ¶ 13. This suggests a highly favorable reaction from the Settlement Class and, accordingly, this *Girsh* factor strongly weighs in favor of final approval of the Settlement. *See In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 501–02 (W.D. Pa. 2003) (finding that two opt-outs and one objector from a class of 8,600, plus a large number of filed claims, indicated "overwhelming class-wide support" for the settlement and weighed in favor of approval); *McCoy v. Health Net, Inc.*, 569 F. Supp. 2d 448, 460–61 (D.N.J. 2008) (finding that 1,708 opt-outs and nine objectors from a class of 2.5 million indicated an "overwhelmingly favorable response.").

**3. The Stage of Proceedings and Amount of Discovery Completed**

The third factor takes into account the stage of the proceedings and the amount of discovery completed. This factor assesses "the degree of case development that class counsel have accomplished prior to settlement…[to] determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re GM Trucks*, 55 F.3d at 813. The purpose of this factor is to "assess whether counsel adequately appreciated the merits of the case while negotiating." *Jackson*, 136 F. Supp. 3d at 702 (citing *In re Warfarin*, 392 F.3d at 537).

Class Counsel has significant experience in data breach litigation. Jt. Decl. ¶¶ 2, 15–16. Here, Class Counsel relied on their experience and familiarity with these types of cases to negotiate with Wendy's—and persuade the Court to adopt—a unique and novel approach to case management. The Parties sequenced first discovery regarding choice of law and the franchisee/franchisor relationship, two discrete issues that the Parties believed warranted early resolution and would drive progress in the case.

The Parties conducted significant discovery on these issues, including reviewing millions of pages of documents, defending 16 depositions of the Financial Institution Plaintiffs, and examining one Wendy's corporate witness. *Id*. at ¶ 6. The Parties were then able to present the choice-of-law issue to the Court at a relatively early stage in the Litigation, but with the benefit of significant evidence to support their arguments. The early discovery, motions practice, and legal rulings from the Court then permitted the Parties to prepare very detailed mediation briefs for the second mediation, outlining the strengths of weaknesses of each side's case, with references to actual evidence. *Id.* at ¶¶ 5–8. As a result, the Parties' negotiated settlement came only after substantial development of the underlying factual and legal issues. This factor therefore weighs in favor of approval.

**4. The Risks of Establishing Liability**

The fourth factor assesses "what the potential rewards (or downside) of litigation might have been had class counsel decided to litigate the claims rather than settle them." *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 322 (3d Cir. 2011). In assessing the fairness, reasonableness and adequacy of the settlement, the Court should balance the risks of establishing liability against the benefits afforded by the settlement, and the immediacy and certainty of an adequate recovery against the risks of continuing litigation. *Girsh*, 521 F.2d at 157.

Although Plaintiffs are confident in their claims, success is far from certain. Plaintiffs here, as in any complex class action, face enormous risks, including that proving liability may be difficult. Data breach is still a developing area of litigation. Jt. Decl. ¶ 16. During this litigation to date, Wendy's has asserted several defenses against liability, and although Plaintiffs do not believe those defenses would carry the day, they nevertheless pose the threat of defeating Plaintiffs' claims or reducing their ultimate value. For instance, Wendy's has argued, among other defenses, that Plaintiffs' negligence claims are barred by the economic loss rule; that Wendy's owed Plaintiffs' no common law duty to protect payment card data from criminal intrusion; that the criminal intrusion was an intervening cause of Plaintiffs' damages; and that Wendy's is not the proper defendant because certain franchisees or outside vendors were more directly at fault for the Data Breach than Wendy's. (*See* ECF No. 139.) These defenses pose significant risks, weighing strongly in favor of approval.

**5. The Risks of Proving Damages**

Similarly, the fifth factor "attempts to measure the expected value of litigating the action rather than settling it at the current time." *Sullivan v. DB Investments, Inc.*, 667 F.3d at 322. Many of the same concerns implicated in the fourth factor are present here. It is not clear that the negligence or negligence per se claims would have withstood the Motion for Judgment on the Pleadings. Further, Plaintiffs may have had difficulty proving causation. This *Girsh* factor therefore weighs in favor of approving the settlement.

**6. The Risk of Maintaining a Class Action**

This factor "measures the likelihood of obtaining and keeping a class certification if the action were to proceed to trial in light of the fact that the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the class action." *Sullivan*,

667 F.3d at 322 (internal quotations omitted). "The value of a class action depends largely on the certification of the class because, not only does the aggregation of the claims enlarge the value of the suit, but often the combination of the individual cases also pools litigation resources and may facilitate proof on the merits." *In re GM Trucks*, 55 F.3d at 817.

Plaintiffs would have faced significant risks in litigating this case through trial and maintaining a class action. Class actions initiated by financial institutions against merchants after data breaches are a relatively new form of litigation. While some cases ended in settlements, such as *Target*,[7] *Home Depot*,[8] and this one, some have been dismissed in whole or in substantial part, *e.g.*, *Cmty. Bank of Trenton v. Schuck Markets, Inc.*, 887 F.3d 803, 817–18 (7th Cir. 2018), and class certification has been denied in others. *E.g.*, *In re TJX Cos. Retail Sec. Breach Litig.*, 246 F.R.D. 389 (D. Mass. 2007) (denying class certification because necessity of individualized inquiries regarding causation, comparative negligence, and damages precluded a finding of predominance). Plaintiffs believe the *Target* litigation is the only case to date in which a class of financial institutions has obtained class certification against a data breach merchant defendant while in active litigation.[9] To date, no similar case has ever gone to trial or ended in favorable summary judgment for a plaintiff financial institution.

Plaintiffs anticipate that, had the case proceeded to the class certification stage in a litigation posture, Wendy's would have vigorously opposed such a motion, relying on *In re TJX* and highlighting factual dissimilarities between this case and *Target*, such as the origin of the data breach at Wendy's franchisee locations. Again, although Plaintiffs believe they would have

[7] *In re Target Customer Data Sec. Breach Litig.*, No. 0:14-md-02522, at ECF No. 758 (D. Minn.) (final approval order).
[8] *In re Home Depot Customer Data Sec. Breach Litig.*, No. 1:14-md-02583, at ECF No. 343 (N.D. Ga.) (final approval order).
[9] *In re Target Customer Data Sec. Breach Litig.*, 309 F.R.D. 482 (D. Minn. 2015).

achieved class certification in litigation, that outcome could not be guaranteed. This factor weighs in favor of approving the settlement.

**7. Defendants' Ability to Withstand a Greater Judgment**

The Third Circuit interprets this factor to be "concerned with whether the defendants could withstand a judgment for an amount significantly greater than the [s]ettlement." *In re Cendant*, 264 F.3d at 240. "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*, 2016 WL 223721, at *19. There is no evidence in the record regarding Defendants' ability to pay. Therefore, this *Girsh* factor is neutral.

**8. Range Of Reasonableness of the Settlement in Light of the Best Possible Recovery and All Attendant Risks of Litigation**

"The last two *Girsh* factors evaluate whether the settlement represents a good value for a weak case or a poor value for a strong case. These factors test two sides of the same coin: reasonableness in light of the best possible recovery and reasonableness in light of the risks the parties would face if the case went to trial." *Zanghi*, 2016 WL 223721, at *19. "The reasonableness of a proposed settlement is assessed by comparing 'the present value of the damages plaintiffs would likely recover if successful [at trial], appropriately discounted for the risk of not prevailing ... with the amount of the proposed settlement.'" *Sullivan v. DB Investments, Inc.*, 667 F.3d at 323–24 (quoting *In re Prudential*, 148 F.3d at 322). The fact that a settlement represents a fractional amount of the best possible recovery does not mean the settlement is unreasonable or inadequate. *See In re Cendant Corp. Sec. Litig.*, 109 F. Supp. 2d 235, 263 (D.N.J. 2000); *Nat'l Rural Telecomm's Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004) ("[I]t is well-settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery that might be available to the class members at trial."). In conducting this

economic valuation, a court should "guard against demanding too large a settlement based on its view of the merits of the litigation." *In re G.M. Trucks*, 55 F.3d at 806.

As mentioned above, Plaintiffs faced significant risks, not just to class certification, but also to establishing liability on all of their claims. The non-reversionary $50 million Settlement Fund thus provides an opportunity for recoupment of a significant percentage of the Plaintiffs' and the Class Members' losses resulting from the Data Breach. Jt. Decl. ¶ 14. Based on the number of claims submitted, Class Members will receive approximately $4.41 to $5.10 per Claimed-On Card. *Id.* at ¶ 12. Even if all Settlement Class Members had submitted claims, the distribution per Claimed-On Card would have been approximately $2.00. *Id.* at ¶ 11. This compares very favorably to the two other notable settlements of data breach class actions between financial institution plaintiffs and merchant defendants, namely Target and Home Depot. Those settlements—both of which received final approval—provided financial institutions with $1.50 and $2.00 fixed per-card recovery, respectively, without documentation of loss (with an option to obtain a percentage of documented losses). *See Target*, ECF No. 747-1, Ex. A at 4–5; *Home Depot*, ECF No. 336-1 at 25.[10] The per-card relief offered by this settlement is reasonable in light of these results in similar cases.

Class Members will also benefit from the injunctive relief Wendy's agreed to, since many of Plaintiffs' payment-card using customers and members are certain to continue using their cards for purchases at Wendy's restaurants in the future. The settlement here is a solid recovery for the class when viewed in light of the significant risks.

Accordingly, these *Girsh* factors weigh in favor of approval.

[10] In *Home Depot* and *Target*, the financial institutions received payments through the assessment programs managed by Visa and MasterCard, whereas here, there were no such payments. Jt. Decl. ¶ 14.

## V. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS.

This Court provisionally certified the Settlement Class in the Preliminary Approval Order, finding that the requirements of Rules 23(a) and (b)(3) were met. (ECF No. 183 at 1–2). Since that time, there have been no developments that would alter this conclusion. The Settlement Class should now be finally certified.

### A. The Rule 23(a) Factors Are Satisfied.

The Settlement Class satisfies the four requirements of Rule 23(a). First, the Settlement Class, which contains at least 5,168 financial institutions, is so numerous that joinder of all members is impracticable. Jt. Decl. ¶ 11; Amundson Decl. ¶ 5; *see Stewart v. Abraham*, 275 F.3d 220, 266 (3d Cir. 2001) (a class with more than 40 will satisfy the numerosity requirement).

The second requirement of Rule 23(a), commonality, focuses on whether there exists questions of law or fact common to the class. Questions are common to the class if class members' claims "depend upon a common contention" that is "of such a nature that it is capable of class wide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Even a single common question will satisfy the requirement of Rule 23(a)(2). *Id.* at 359. "[T]he focus is on whether the defendant's conduct was common as to all of the class members, not on whether each plaintiff has a 'colorable' claim." *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 299 (3d Cir. 2011).

Here, the Settlement Class Members share common legal and factual questions vis-à-vis Wendy's liability, for instance, whether Wendy's owed Settlement Class Members a duty to use reasonable data security practices, whether the duty was breached, and whether Wendy's actions caused Settlement Class Members' alleged damages. As to damages, the Settlement Class

Members each suffered the same general forms of injury: they all issued payment cards that were alerted-on as potentially compromised in the Data Breach and incurred costs related to reissuing the affected cards or reimbursing customers for fraudulent transactions on the card accounts. Accordingly, the Settlement Class satisfies commonality.

Third, Rule 23(a)(3) requires that the class representative's claims or defenses be "typical" of the claims or defenses of the class. "The threshold for establishing typicality is low, and Rule 23(a)(3) will be satisfied as long as the factual or legal position of the named Plaintiff is not markedly different from that of the other members of the class." *Seidman v. American Mobile Sys., Inc.*, 157 F.R.D. 354, 360 (E.D. Pa. 1994) (internal quotations and citations omitted). Here, the claims of the Plaintiffs and Settlement Class Members arise from the same conduct: Wendy's alleged failure to install and maintain reasonable security measures at Wendy's-branded restaurants and to implement appropriate policies to protect Plaintiffs' and Settlement Class Members' payment card data. Wendy's alleged conduct caused the same type of alleged injury to members of the Class. The only notable variation among Settlement Class Members is the degree of damages each one suffered.

The final requirement, adequacy, requires that a representative party must fairly and adequately protect the interests of the class. Adequate representation depends on two factors: (a) the class counsel must be qualified, experienced and generally able to conduct the proposed litigation; and (b) the proposed class representative must not have interests antagonistic to those of the class. *Seidman*, 157 F.R.D. at 365. As to the first factor, Plaintiffs are represented by counsel that is highly experienced and skilled in matters relevant to this litigation. Gary Lynch of Carlson Lynch and Erin Green Comite of Scott+Scott possess substantial experience in class actions and other complex litigation, including data breach litigation such as this. *See* Jt Decl. ¶¶

2, 15–16. As to the second factor, Plaintiffs and each member of the Settlement Class are aligned in their interests vis-à-vis this litigation and Wendy's. All Class Members will receive settlement distributions according to an objective methodology that values claims using the same criteria. There are no fundamental conflicts of interest among Plaintiffs or Settlement Class Members, and the named Plaintiffs do not have interests antagonistic to the Class. Jt. Decl. ¶ 17. Several of the named Plaintiffs contributed substantial time and resources during the limited discovery period by working with counsel to produce documents and sit for depositions. *Id.* These efforts demonstrate that Plaintiffs are more than adequate representatives.

**B. The Rule 23(b)(3) Factors Are Satisfied.**

Rule 23(b)(3) requires a showing of predominance and superiority. *Sala v. National Railroad Passenger Corp.*, 120 F.R.D. 494, 498 (E.D. Pa. 1988).

**1. Predominance**

This rule requires only a "predominance of common questions, not a unanimity of them." *Rodriguez v. McKinney*, 156 F.R.D. 118, 119 (E.D. Pa. 1994). As long as the claims of the class members are not in conflict with each other, class members need not be identically situated and may have individualized issues. *See O'Keefe v. Mercedes Benz USA, LLC*, 214 F.R.D. 266, 290 (E.D. Pa. 2003). "The question is whether the class cohesive enough to warrant adjudication by representation." *Fisher v. Virginia Elec. and Power Co.*, 217 F.R.D. 201, 203 (E.D. Va. 2003). "[T]he predominance requirement focuses on whether essential elements of the class's claims can be proven at trial with common, as opposed to individualized, evidence." *Hayes v. Wal–Mart Stores, Inc.*, 725 F.3d 349, 359 (3d Cir. 2013).

Individualized damage variations among class members do not by themselves preclude a finding of predominance. First, a class may be certified for liability purposes only, leaving

individual damages calculations to subsequent proceedings. *See Taha v. County of Bucks*, 862 F.3d 292, 309 (3d Cir. 2017); 2 W. Rubenstein, Newberg on Class Actions § 4:54, pp. 206–208 (5th ed. 2012). Second, a plaintiff class may prove classwide damages through use of representative evidence and statistical modeling, provided that the methodology offered is mathematically sound and comports appropriately with the plaintiffs' liability theory. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036, 1047–49 (2016); *Comcast Corp. v. Behrend*, 569 U.S. 27, 35–37 (2013).

The predominate legal and factual issues in this litigation concern the nature of the Data Breach and Wendy's degree of responsibility under Ohio negligence law. In ruling on the choice of law questions presented to the Court in early 2018, the Court already determined that application of Ohio law was appropriate with respect to the negligence and negligence per se claims, despite the varying home states of the Plaintiffs and the spread of the malware across Wendy's restaurants nationwide. (*See* ECF 147 at 11–13). The most significant remaining issues to be litigated or tried with respect to liability were whether the economic loss rule affects Plaintiffs' claims; whether Wendy's had a legal duty to Plaintiffs to protect card data; whether Wendy's breached a duty of reasonable care, whether Wendy's acts or omissions were the proximate cause of Plaintiffs' injuries, and the allocation of responsibility as between Wendy's and its franchisees and vendors. All of these issues could have been resolved on a classwide basis, with little to no emphasis on unique circumstances of any individual Plaintiff.

These issues predominate, and the Settlement and Distribution Plan ensure that individualized damage calculations do not pose a problem. Settlement Class Members will receive distributions from the Settlement Fund based on a fixed rate per Claimed-On Card, a

methodology that is objective, easy to calculate, and offers fair and equal treatment to all Settlement Class Members.

**2. Superiority**

The superiority requirement "asks the court to balance, in terms of fairness and efficiency, the merits of the class action against those of alternative available methods of adjudication." *Prudential*, 148 F.3d at 316; *In re Warfarin*, 391 F.3d 516. Rule 23(b)(3) lists the following factors to guide the superiority inquiry: the class members' interests in individually controlling the prosecution or defense of separate actions; the extent and nature of any litigation concerning the controversy already begun by or against class members; the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and the likely difficulties in managing a class action. Fed R. Civ. P. 23(b)(3). With respect to both requirements, the Court need not inquire whether the "case, if tried, would present intractable management problems, for the proposal is that there be no trial." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (citation omitted). Plaintiffs address each of the other factors in turn.

It is in the interest of individual Settlement Class Members to proceed with this litigation as a class action. Although Settlement Class Members collectively suffered significant damages as a result of the Wendy's Data Breach, those losses are distributed among several thousand card-issuing institutions. Settlement Class Members who issued only a few compromised cards will have no incentive to litigate against Wendy's individually, as their damages may only be a few hundred dollars. Even for the largest issuers, the distributions offered by this Settlement likely provide better net recoveries than the Class Members could obtain by suing Wendy's individually, after costs of litigation are considered.

Plaintiffs are not aware of other pending litigation by Settlement Class Members concerning the same facts and claims. The handful of cases filed against Wendy's in the wake of the Data Breach were all consolidated before this Court with the consent of all named Plaintiffs. The discovery conducted to date has been efficient and focused on the key common issues discussed above, allowing both Settlement Class Members and Wendy's to benefit from economies of scale and elimination of duplicative work. Resolving these actions by way of a class settlement in this forum is therefore a superior procedure than individual actions.

Accordingly, the Rule 23 factors having been met, Plaintiffs request that the Court confirm its preliminary decision and certify the Settlement Class.

## VI. CONCLUSION

For the reasons set forth above, Plaintiffs request 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.

Dated: October 7, 2019

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 7, 2019, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List.

*/s/ Gary F. Lynch*
Gary F. Lynch