UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE: AMERICAN FINANCIAL RESOURCES, INC. DATA BREACH LITIGATION	Civil Action No. 22-1757 (MCA) (JSA)

PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND FINAL CERTIFICATION OF THE SETTLEMENT CLASS

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Plaintiffs Dora Micah, Sharon Styles, Matthew Stuart, and Anthony A. Olivia, Ph.D., individually and on behalf of the proposed Settlement Class ("Settlement Class Members" or "Settlement Class"), by their counsel ("Co-Lead Counsel"), respectfully move pursuant to Rule 23 of the Federal Rules of Civil Procedure for final approval of class action settlement and final certification of the Settlement Class ("Motion"). In support of the Motion, Plaintiffs submit this memorandum of law, the Class Action Settlement Agreement and Release ("Settlement" or "Settlement Agreement")[1] (ECF No. 74-2), the Declaration of James E. Cecchi in Support of Motion for Final Approval of Class Action Settlement and Final Certification of the Settlement Class and Motion for Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Class Representatives ("Cecchi Decl."), submitted herewith and the Declaration of Cameron R. Azari, Esq. of Epiq Global Regarding Implementation and Adequacy of Notice Program ("Azari Decl."), attached as Exhibit A to the Cecchi Decl.

I. OVERVIEW

After an extensive investigation and two years of hard fought litigation, including briefing on two motions to dismiss and the exchange and review of voluminous written party and third-party discovery, Co-Lead Counsel gained a full

[1] Unless otherwise stated, all capitalized words are defined the same as in the Settlement Agreement.

understanding of all of the relevant issues, which they brought to bear in negotiating and ultimately agreeing to the Settlement.

Plaintiffs reached a nationwide class action settlement with Defendant American Financial Resources, Inc. ("Defendant" or "AFR"), for a $2,500,000.00 non-reversionary Common Fund; the direct payment by AFR for all Notice and Settlement Administration Costs; and up to an additional $1,000,000.00 for the direct payment of claims based on out-of-pocket losses. The Settlement will resolve all claims arising from the cybersecurity incident that took place in December 2021, which was announced by AFR in or around March 2022, and which potentially impacted approximately 216,645 of AFR's current and former customers and employees (the "Incident"). *See* Cecchi Decl., ¶2.

The Settlement also provides a credit monitoring benefit to Settlement Class Members who elect that benefit, which includes one year of credit monitoring with up to $1 million in identity theft insurance. Finally, the Settlement requires AFR to remove Personally Identifiable Information ("PII") of any Settlement Class Member from its system to the extent allowable under all applicable state and federal laws or regulations.

This Settlement, which resulted from arm's-length mediations and discussions initially overseen by the Honorable Faith S. Hochberg (ret.) and, subsequently, the

Honorable Diane Welsh (ret.), represents an exceptional recovery for the Settlement Class and should be granted final approval.

On June 5, 2024, the Court preliminarily approved the Settlement, conditionally certified the Settlement Class, and ordered that notice be given to the Settlement Class ("Preliminary Approval Order"). ECF No. 76. The Settlement Administrator, Epiq Global ("Epiq"), with the assistance of the Parties, successfully disseminated notice to the Settlement Class pursuant to the Court-approved Notice Plan. Out of the 215,361 Settlement Class Members who received notice, only three (3) requests for exclusion have been received, and zero (0) objections have been filed. Azari Decl., ¶¶17, 21.

In light of the foregoing, the Settlement easily satisfies the requirements of Rule 23(e)(2), meets each of the *Girsh* factors,[2] and balances the objective of attaining the highest possible recovery against the many risks and costs of continued litigation. This includes the risk that, as in any complex case, the Settlement Class could receive nothing, or a far lower sum, after trial and any appeals. Additionally, the Plan of Allocation set forth in the Notice should be approved because it treats all Settlement Class Members equitably.

Because nothing has transpired since the Preliminary Approval Order to warrant a reconsideration, Plaintiffs respectfully request final approval of the

[2] *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975).

proposed Settlement and Plan of Allocation, and the final certification of the Settlement Class.

II. PROCEDURAL HISTORY

The first case stemming from the Incident was filed on March 29, 2022. Soon after, other plaintiffs filed other, related class action lawsuits, which the Court consolidated.

On July 8, 2022, Plaintiffs filed their Consolidated Class Action Complaint, asserting claims for negligence, negligence *per se*, unjust enrichment, breach of confidence, invasion of privacy (intrusion upon seclusion), breach of implied contract, and violations of the New Jersey Consumer Fraud Act ("NJCFA"), the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), the Maryland Consumer Protection Act ("MCPA"), the Maryland Personal Information Protection Act ("MPIPA"), and the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"). ECF No. 20.

On August 22, 2022, AFR filed a motion to dismiss under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure (ECF No. 29), which the Court granted in part and denied in part on March 29, 2023. ECF No. 40.

On April 28, 2023, Plaintiffs filed the operative First Amended Consolidated Class Action Complaint (the "Complaint"). ECF No. 46. AFR filed a motion for partial dismissal of the Complaint under Rules 12(b)(1) and 12(b)(6) (ECF No. 50),

and on January 31, 2024, the Court issued an Order denying AFR's motion to dismiss under Rule 12(b)(1) and granting AFR's motion to dismiss under Rule 12(b)(6) as to Plaintiffs' MCPA, ICFA, and NJCFA claims. *See* ECF No. 64.

Discovery, including rolling document productions from all Parties over several months, occurred from June 2023 to February 2024, and both Defendant and Plaintiffs conducted searches for and collections of electronically stored information. Additionally, Plaintiffs served numerous document subpoenas on third parties who contracted with AFR in connection with their information security and had information concerning the Incident. All told, over 36,000 documents were produced and reviewed by Defendant, third-parties, and Plaintiffs.

The Parties engaged in mediation early on February 15, 2023, with the Honorable Faith S. Hochberg (ret.). While the Parties were unable to reach agreement during this first mediation, after another year of litigation and intense document discovery, they engaged in a second mediation on February 16, 2024, with the Honorable Diane Welsh (ret.) and were able to reach an agreement in principle to resolve this matter.

The Parties have agreed to settle the Litigation on the terms and conditions set forth in the Settlement Agreement in recognition that the outcome of the Litigation is uncertain and that achieving a final result through litigation would require substantial additional risk, uncertainty, discovery, time, and expense for both of the

Parties.

On June 5, 20204, the Court entered the Preliminary Approval Order granting preliminary approval of the Settlement, preliminarily certifying the Settlement Class, and approving the form and manner of providing notice of the Settlement of this Action to potential Settlement Class Members. ECF No. 76. Notice was provided in accordance with the Preliminary Approval Order. *See* Azari Decl., ¶¶10-17. To date, only three (3) people have requested exclusion from the Settlement Class. *See id.*, ¶21. Objections to the proposed Settlement are due by September 11, 2024. To date, zero (0) objections have been filed.

III. NOTICE HAS BEEN PROVIDED TO THE SETTLEMENT CLASS IN COMPLIANCE WITH RULE 23, DUE PROCESS, AND THE COURT'S PRELIMINARY APPROVAL ORDER

Rule 23(e), which governs notice requirements for class action settlements, provides that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1)(B). In addition, Rule 23(c)(2)(B) requires that a certified class receive "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B).

Here, the Notices were approved by the Court in the Preliminary Approval Order and fully complied with Rule 23. Among other disclosures, the Notice apprises Settlement Class Members of the nature of this Litigation, the definition of

the Settlement Class, the claims and issues in the Litigation, and the claims that will be released in the Settlement. The Notice also: (i) advises that a Settlement Class Member may enter an appearance through counsel; (ii) describes the binding effect of a judgment on Settlement Class Members; (iii) states the procedures and deadline for Settlement Class Members to exclude themselves from the Settlement Class or to object to the proposed Settlement, the Plan of Allocation, or the requested attorneys' fees and expenses; (iv) states the procedures and deadline for submitting a Proof of Claim; and (v) provides the date, time, and location of the Final Fairness Hearing. The contents of the Notices therefore satisfy all applicable requirements.

In the Preliminary Approval Order, the Court approved "the proposed Long Form Notice, the proposed Short Form Notice, and the proposed methods of dissemination thereof." Preliminary Approval Order, ¶7. The notice program has since been carried out. Following preliminary approval of the Settlement, AFR provided the Settlement Administrator with the list of the names, email addresses, and/or physical addresses of all Settlement Class Members identified through its records. Thereafter, the Settlement Administrator Epiq commenced sending notices, including emailed notices to Settlement Class Members' last known email addresses and mailed notices to Settlement Class Members whose email addresses were not known. *See* Azari Decl., ¶¶10-17.

On July 18, 2024, Epiq posted copies of the Notices, Claim Form, Settlement

Agreement, and Preliminary Approval Order on the website maintained for the Settlement, www.afrclassactionsettlement.com. *Id.*, ¶18. Epiq also established a toll-free number with interactive voice response, FAQs, and the option to speak with a live operator. *Id.*, ¶19.

This combination of notice by email, or mail where necessary, to all Settlement Class Members who could be identified with reasonable effort, and creation of a website, is typical of notice plans in data breach class actions, and constitutes "the best notice practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B).

In addition, on May 31, 2024, as required by 28 U.S.C. § 1715(b), Epiq served notice of the proposed Settlement on the appropriate officials pursuant to the Class Action Fairness Act. Cecchi Decl., ¶34.

IV. THE SETTLEMENT TERMS

The Settlement Class is defined as "all persons whose [PII] was maintained on AFR's system that was allegedly accessed during the Incident in December 2021, and who were sent a notice of the Incident in or around March 2022."

The Settlement Class specifically excludes: (i) AFR and its respective officers and directors; (ii) all Settlement Class Members who timely and validly request exclusion from the Settlement Class; (iii) the Judge and/or Magistrate assigned to evaluate the fairness of this Settlement; and (iv) any other Person found by a court

of competent jurisdiction to be guilty under criminal law of initiating, causing, aiding, or abetting the Incident or who pleads *nolo contender* to any such charge. Settlement Agreement, ¶1.30.

AFR has agreed to create a non-reversionary common fund ("Common Fund") in the amount of $2,500,000 to pay Common Fund Benefit Claims to all Settlement Class Members who were notified of the Incident and file a Valid Claim. *Id.*, ¶1.8. From the $2,500,000 Common Fund, all Settlement Class Members will be able to submit a Claim for an automatic *pro rata* payment. The Common Fund will also be responsible for the payment of all attorneys' fees, expenses, and charges awarded to Co-Lead Counsel and any service awards to Plaintiffs. AFR will directly pay for all Notice and Settlement Administration Costs.

AFR has also agreed to create an Out-of-Pocket Loss Benefit in which Settlement Class Members have the opportunity to submit Claims for documented, unreimbursed, Out-of-Pocket Losses that are fairly traceable to the Incident. The Out-of-Pocket Loss Benefit shall provide up to a maximum of $7,500 per person and is subject to an aggregate cap of $1,000,000. Out-of-Pocket Losses include, for example, and without limitation, unreimbursed losses related to the following: (i) costs, expenses, losses, or charges incurred as a result of identity theft or identity fraud or other misuse of a Settlement Class Member's PII after December 20, 2021; (ii) costs incurred on or after December 20, 2021, associated with accessing or

freezing/unfreezing credit reports with any credit reporting agency; (iii) miscellaneous expenses such as notary, postage, copying, mileage, and other charges; and (iv) charges for credit monitoring or other mitigative expenditures incurred on or after December 20, 2021, through March 1, 2024. Settlement Class Members with Out-of-Pocket Losses must submit documentation and attestation supporting their Claims. This may include receipts or other documentation, not "self-prepared" by the claimant, that document the costs incurred. "Self-prepared" documents such as handwritten receipts are, by themselves, insufficient to receive reimbursement, but may be considered to add clarity or support to other submitted documentation. Out-of-Pocket Losses must include an attestation that the monetary losses are fairly traceable to the Incident and were not incurred due to some other event or reason. Settlement Agreement, ¶2.2(b).

AFR will also make available a Credit Monitoring Benefit on a claims-made basis. This benefit allows Settlement Class Members to enroll in one year of one credit bureau monitoring with up to $1 million in identity theft insurance. Settlement Class Members may submit a Claim for all three benefits.

Finally, but no less importantly, AFR has agreed as part of the Settlement to delete the PII of any Settlement Class Member in its system to the extent allowable under all applicable state and federal laws or regulations, and to, within 90 days of the Settlement's Effective Date, certify via affidavit or sworn declaration from an

AFR employee with the ability to legally bind AFR that it has deleted and/or made non-accessible such PII of Settlement Class Members to the extent allowable under state and/or federal laws or regulations.

V. THE SETTLEMENT WARRANTS THE COURT'S FINAL APPROVAL

"[A] class action cannot be settled without the approval of the court and a determination that the proposed settlement is fair, reasonable and adequate." *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 316 (3d. Cir. 1998) (internal quotation omitted); *see also* Fed. R. Civ. P. 23(e)(2).

It is well-established that the settlement of class action litigation is favored. *See In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004) ("[T]here is an overriding public interest in settling class action litigation, and it should therefore be encouraged."); *Nyby v. Convergent Outsourcing, Inc.*, 2017 WL 3315264, at *3 (D.N.J. Aug. 3, 2017) ("The 'law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.'"). Settlement spares litigants the uncertainty, delay, and expense of a trial and appeals while simultaneously reducing the burden on judicial resources. The Third Circuit Court of Appeals has reiterated that there is a "strong presumption in favor of voluntary settlement agreements." *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594 (3d Cir. 2010). "This presumption is especially strong in 'class actions and other complex cases where substantial

judicial resources can be conserved by avoiding formal litigation.'" *Id*. at 595.

Rule 23(e)(2) identifies the following factors to be considered at final approval:

> (2) Approval of the Proposal. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
>
> > (A) the class representatives and class counsel have adequately represented the class;
> >
> > (B) the proposal was negotiated at arm's length;
> >
> > (C) the relief provided for the class is adequate, taking into account:
> >
> > > (i) the costs, risks, and delay of trial and appeal;
> > >
> > > (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> > >
> > > (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> > >
> > > (iv) any agreement required to be identified under Rule 23(e)(3); and
> >
> > (D) the proposal treats class members equitably relative to each other.

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

These factors are considered alongside, and largely overlap with, those set forth by the Third Circuit in *Girsh*:

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

Id., 521 F.2d at 157.[3]

As detailed below, each of these factors supports final approval of the Settlement.

A. Plaintiffs and Co-Lead Counsel Have More Than Adequately Represented the Settlement Class

The first factor under Rule 23(e)(2) concerns the adequacy of representation provided by the class representatives and class counsel. *See* Fed. R. Civ. P. 23(e)(2)(A). This overlaps with the third *Girsh* factor, which focuses on the stage of the proceedings and the amount of discovery completed. *See Girsh*, 521 F.2d at 157; *see also Warfarin*, 391 F.3d at 535 (noting similar considerations for applying presumption of fairness).

Plaintiffs and Co-Lead Counsel have vigorously pursued this Litigation. Among many other undertakings, Co-Lead Counsel filed the Consolidated

[3] The *Girsh* factors "'are a guide and the absence of one or more does not automatically render the settlement unfair.'" *In re Schering-Plough/Merck Merger Litig.*, 2010 WL 1257722, at *5 (D.N.J. Mar. 26, 2010).

Complaint and the First Amended Consolidated Complaint, briefed two of AFR's motions to dismiss, and also engaged in extensive discovery, in which AFR and third parties produced over 36,000 documents. Plaintiffs and Co-Lead Counsel have thus more than adequately represented the Settlement Class under Rule 23(e)(2)(A), and have secured "an adequate appreciation of the merits of the case" by means of substantial discovery and litigation. *See Warfarin*, 391 F.3d at 537; *see also Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 240 (D.N.J. 2005) ("Class Counsel's approval of the Settlement also weighs in favor of the Settlement's fairness."); *Alves v. Main*, 2012 WL 6043272, at *22 (D.N.J. Dec. 4, 2012) ("courts in this Circuit traditionally 'attribute significant weight to the belief of experienced counsel that settlement is in the best interest of the class'"), *aff'd*, 559 F. App'x 151 (3d Cir. 2014).

B. The Settlement Negotiations Were Conducted at Arm's-Length and Under the Oversight of Experienced Mediators

The second factor under Rule 23(e)(2) considers whether the Settlement was negotiated at arm's length. *See* Rule 23(e)(2)(B).

With the benefit of discovery, the Settling Parties engaged in extensive arm's-length negotiations, including two mediations conducted by highly regarded retired judges who are experienced mediators. The first mediation took place in February 2023, and negotiations continued throughout the litigation, culminating in a second

mediation session a year later in February 2024.

These negotiations were held with each side having full knowledge of the crucial issues in the case and the benefit of significant document discovery, and they involved numerous phone calls and emails between counsel in addition to the two mediation sessions. As both mediators can attest, these negotiations were difficult, adversarial, and vigorously executed by both sides, and Defendant is represented by highly sophisticated counsel.

The direct participation of an experienced mediator further ensures that the negotiations were non-collusive and conducted properly. *Bredbenner v. Liberty Travel, Inc.*, 2011 WL 1344745, at *10 (D.N.J. Apr. 8, 2011) ("Participation of an independent mediator in settlement negotiations 'virtually insures that the negotiations were conducted at arm's length and without collusion between the parties.'"); *see also Sanders v. CJS Sols. Grp., LLC*, 2018 WL 1116017, at *2 (S.D.N.Y. Feb. 28, 2018) ("[T]he settlement was negotiated at arm's length with the assistance of an independent mediator, which reinforces the non-collusive nature of the settlement.").

C. The Settlement Is Adequate Considering the Costs, Risks, and Delay of Trial and Appeal

The third factor under Rule 23(e)(2), which overlaps with several of the *Girsh* factors (*i.e.*, factors 1, 4-9), concerns the adequacy of the Settlement in light of the costs, risks, and delay that trial and appeal would impose. *See* Fed. R. Civ. P.

23(e)(2)(C)(i). Data breach cases are often lengthy and complex. *See Desue v. 20/20 Eye Care Network, Inc.*, 2023 WL 4420348, at *8 (S.D. Fla. July 8, 2023) (collecting cases and accepting the contention "that data breach cases, such as this one, can be especially risky, expensive, and complex"). This case was filed two years ago, and undoubtedly would face many risks and delays were litigation to continue at class certification, summary judgment, trial, and appeal. Proceeding through these stages of litigation would significantly prolong the time until any Settlement Class Member could receive a financial recovery. The court should "'give credence to the estimation of the probability of success proffered by class counsel, who are experienced with the underlying case, and the possible defenses which may be raised to their cause of action.'" *See Huffman v. Prudential Ins. Co. of Am.*, 2019 WL 1499475, at *4 (E.D. Pa. Apr. 5, 2019).[4]

1. Risks of Establishing Liability and Damages

Settlements are favored where "continuing litigation through trial would have required additional discovery, extensive pretrial motions addressing complex factual and legal questions, and ultimately a complicated, lengthy trial." *In re Ins. Brokerage*

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[4] *See also In re Prudential Ins. Co. Am. Sales Pracs. Litig. Agent Actions*, 148 F.3d at 323 (identifying "the extent of discovery on the merits" as a relevant factor in evaluating class action settlements); *In re Philips/Magnavox Television Litig.*, 2012 WL 1677244, at *11 (D.N.J. May 14, 2012) ("'Where this negotiation process follows meaningful discovery, the maturity and correctness of the settlement become all the more apparent.'").

Antitrust Litig., 282 F.R.D. 92, 103 (D.N.J. 2012) (quoting *In re Warfarin*, 391 F.3d at 536).

Plaintiffs believe that their case is strong but acknowledge that there were risks involved in further litigation. AFR's arguments on its motions to dismiss would likely be re-raised on summary judgment and/or at trial. In addition, there would likely be highly contested briefing on a motion for class certification, and even if successful, there would always be a risk of decertification or an appeal under Rule 23(f), the outcome of which would be uncertain and the litigation of which would entail additional delays and expenses.

In complex cases, "[t]he risks surrounding a trial on the merits are always considerable." *Weiss v. Mercedes-Benz of N. Am., Inc.*, 899 F. Supp. 1297, 1301 (D.N.J. 1995). And "no matter how confident one may be of the outcome of the litigation, such confidence is often misplaced." *In re Auto. Refinishing Paint Antitrust Litig.*, 617 F. Supp. 2d 336, 343 (E.D. Pa. 2007). While Plaintiffs remain confident in their positions both on the merits and the certification of a class, these issues pose undeniable risks. Moreover, any trial victory for Plaintiffs would almost certainly be appealed by AFR, which at a minimum would have resulted in substantial delays before any financial recovery. "Compared to the costs and risks of continued litigation, the settlement avoids these uncertainties and provides the . . . class with substantial and certain relief." *Shou Kao v. CardConnect Corp.*, 2021 WL 698173, at *7-*8 (E.D.

Pa. Feb. 23, 2021). Accordingly, this factor weighs in favor of approving the Settlement.

2. The Settlement Falls Well Within the Range of Reasonableness.

Girsh requires the Court to evaluate the proposed Settlement alongside "'a range of reasonable settlements in light of the best possible recovery (the eighth *Girsh* factor) and . . . in light of all the attendant risks of litigation (the ninth factor).'" *In re Merck & Co., Inc. Vytorin ERISA Litig.*, 2010 WL 547613, at *9 (D.N.J. Feb. 9, 2010) ("*Merck/Vytorin*"). In making a "range of reasonableness" assessment, courts do not need to make a precise estimate of damages. *See In re N.J. Tax Sales Certificates Antitrust Litig.*, 2016 WL 5844319, at *8 (D.N.J. Oct. 3, 2016) (granting final approval where "it is not possible to predict the precise value of damages that Plaintiffs would recover if successful").

Given the complexity of this case and the risks and delay in continued litigation, the $2.5 million non-reversionary common fund plus up to $1 million for out-of-pocket direct claims is an exceptional result, especially when also factoring in (i) that all costs for notice and administration are being paid for directly by AFR, (ii) the free credit monitoring service and identity theft insurance being made available to the Settlement Class, and (iii) the deletion of PII by AFR that the Settlement provides. Considering that the case has been litigated for two years, and the scope and amount of the recovery, the Settlement here falls well within the range

of reasonableness given the attendant risks and uncertainties of continued litigation and should be finally approved. *See Girsh*, 521 F.2d at 157.

Here, assuming every one of the 215,361 potential Settlement Class Members that received a notice files a claim against the $2.5 million Common Fund (less 33% of the Common Fund for attorneys' fees ($825,000), $29,052.98 in expenses, and $30,000 in service awards for the four Plaintiffs), each member would receive about $7.50. This compares favorably to other data breach settlements. *See, e.g.*, *In re Anthem, Inc. Data Breach Litig.*, No. 5:15-MD-02617-LHK (N.D. Cal.) (securing $1.39 per class member), *In re Home Depot, Inc. Customer Data Sec. Breach Litig.*, No. 1:14-md-02583-TWT (N.D. Ga. 2016) ($0.51 to $0.68 per class member), and *In re Target Corp. Customer Data Sec. Breach Litig.*, No. 0:14-md-02522-PAM (D. Minn. 2015) ($0.15 per class member).

D. The Settlement Satisfies the Remaining Rule 23(e)(2) Factors

The remaining factors of Rule 23(e)(2) require courts to consider: (i) the effectiveness of the proposed method for distributing relief; (ii) the terms of the proposed attorneys' fees, including the timing of payment; (iii) the existence of any other "agreements"; and (iv) whether the settlement treats class members equitably relative to each other. Fed. R. Civ. P. 23(e)(2)(C)(ii)-(iv); Fed. R. Civ. P. 23(e)(2)(D).

1. The Proposed Method for Distributing Relief Is Effective

The proposed methods of notice and claims administration process are effective and provide Settlement Class Members with the necessary information to receive their *pro rata* payment. AFR will pay $2,500,000 into a non-reversionary Common Fund. Once any attorneys' fees and expenses, and any service awards to Class Representatives, have been paid from the Common Fund, the remaining amount, will be distributed to Settlement Class Members who submit a Valid Claim. Settlement Agreement, ¶2.1.

Unlike the vast majority of data breach settlements, Settlement Class Members are not required to attest to having spent time in response to the Data Breach, nor are they required to present any documentation in order to receive payment. Instead, Settlement Class Members need only provide basic contact information and submit their signed claim. *See id.*, ¶2.4(c).

2. The Requested Attorneys' Fees Are Reasonable

As set forth in the separately and concurrently filed Co-Lead Counsel's motion for an award of attorneys' fees, expenses, and service rewards, Co-Lead Counsel's requested attorneys' fees is reasonable and appropriate.

3. The Parties Have No Other Agreements Besides an Agreement to Address Requests for Exclusion

As discussed in connection with the motion for preliminary approval, Plaintiffs and AFR have entered into a supplemental agreement which provides that

AFR will have the right to terminate the Settlement in the event that valid requests for exclusion from the Settlement Class exceed the criteria set forth in that agreement.

4. Settlement Class Members Will Be Treated Equitably, and the Reaction of the Settlement Class Supports Final Approval

Rule 23(e)(2)(D) requires the Court to consider whether Settlement Class Members will be treated equitably. All Settlement Class Members will be treated equitably under the terms of the Settlement Agreement, which provides that each Settlement Class Member that properly submits a Valid Claim will receive a *pro rata* payment from the Common Fund. Likewise, those Settlement Class Members with demonstrable out of pocket costs will be compensated based on their actual loss (subject to the $7,500 cap and possible pro ration if total claims exceed $1 million). Finally, all Settlement Class Members are eligible for credit monitoring and identity theft insurance and will have their PII removed by AFR where possible.

Further, out of the thousands of potential Settlement Class Members, there have been no objections and only three (3) requests for exclusion to date. Azari Decl., ¶21. *See, e.g.*, *In re the Prudential Ins. Co. of Am.*, 962 F. Supp. 450, 537 (D.N.J. 1997) (small number of negative responses to settlement favors approval). It is well-established that the lack of objections to a proposed class-action settlement raises a strong presumption that the terms of a proposed class action settlement are favorable to the class

members. *See Castro v. Sanofi Pasteur Inc.*, 2017 WL 4776626, at *4 n.3 (D.N.J. Oct. 23, 2017).

To the extent that any objections to the Settlement are made subsequent to this filing, they will be addressed in Plaintiffs' reply to be filed September 25, 2024.

* * *

Thus, each factor identified in Rule 23(e)(2) and *Girsh* is satisfied. Given the litigation risks involved and the complexity of the underlying issues, the monetary benefits and injunctive relief provided would not have been achieved without the commitment of Plaintiffs and the hard work their counsel. Plaintiffs respectfully submit that the Settlement is fair, reasonable, and adequate, and should be granted final approval.

VI. THE COURT SHOULD APPROVE THE PLAN OF ALLOCATION

The Notice contains the Plan of Allocation, which details how the Settlement proceeds are to be divided among Settlement Class Members who submit claims. "The '[a]pproval of a plan of allocation of a settlement fund in a class action is governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate.'" *Merck/Vytorin*, 2010 WL 547613, at *6 (alteration in original).

In determining whether a plan of allocation is fair, reasonable, and adequate, "courts give great weight to the opinion of qualified counsel." *In re Schering-Plough*

Corp. Enhance ERISA Litig., 2012 WL 1964451, at *6 (D.N.J. May 31, 2012) ("*Schering-Plough I*") (approving plan of allocation).

"As numerous courts have held, a plan of allocation need not be perfect" and "'need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel.'" *Christine Asia Co., Ltd. v. Yun Ma*, 2019 WL 5257534, at *15 (S.D.N.Y. Oct. 16, 2019).

Here, the proposed Plan of Allocation is fair and reasonable. Settlement Class Members can easily file claims and payments from the Common Fund will be distributed equally amongst Settlement Class Members who file claims. Those claiming out-of-pocket losses must supply documentation of the loss, but such requirements are routine. The requirement that losses be "fairly traceable" to the breach is not onerous (and indeed is a significantly more modest standard that would apply at trial) and its enforcement is subject to a claims administration protocol. Such payments of out-of-pocket losses are equitable as the amount is tied to the actual costs each Settlement Class Member incurred. Finally, all Settlement Class Members are entitled to the credit monitoring and identity theft insurance benefit and claims are not even required for Settlement Class Members to benefit from the deletion of PII by AFR from its systems. Thus, the Plan of Allocation should be approved. *In re Lucent Techs., Inc., Sec. Litig.*, 307 F. Supp. 2d 633, 649 (D.N.J. 2004); *In re Par Pharm. Sec. Litig.*, 2013 WL 3930091, at *8 (D.N.J. July 29, 2013) (approving plan

of allocation that "provides for the distribution of the Net Settlement Funds on a *pro rata* basis based on a formula tied to liability and damages").

VII. CERTIFICATION OF THE SETTLEMENT CLASS IS APPROPRIATE

Under the terms of the Settlement Agreement, the Parties have agreed, for the purposes of the Settlement only, to the certification of the Settlement Class, defined as follows:

> [A]ll persons whose Personally Identifiable Information ("PII") was maintained on AFR's system that was allegedly accessed during the Incident in December 2021, and who were sent a notice of the Incident in or around March 2022.
>
> The Settlement Class specifically excludes: (i) AFR and its respective officers and directors; (ii) all Settlement Class Members who timely and validly request exclusion from the Settlement Class; (iii) the Judge and/or Magistrate assigned to evaluate the fairness of this Settlement; and (iv) any other Person found by a court of competent jurisdiction to be guilty under criminal law of initiating, causing, aiding, or abetting the Incident or who pleads *nolo contender* to any such charge.

In the Preliminary Approval Order, the Court preliminarily certified the Settlement Class. *See* ECF No. 76 at ¶3. Nothing has changed since then, and thus, for all the reasons stated in Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement (ECF No. 74-1), incorporated herein by reference, Plaintiffs request the Court grant final certification to the Settlement Class pursuant to Fed. R. Civ. P. 23(a) and (b)(3), appoint Plaintiffs Dora Micah, Sharon Styles, Matthew Stuart, and Anthony A. Olivia, Ph.D. as Class Representatives, and appoint

Carella, Byrne, Cecchi, Brody & Agnello, P.C. and Robbins Geller Rudman & Dowd LLP as Co-Lead Counsel and Kantrowitz, Goldhamer & Graifman, P.C., The Lyon Firm, Markovits, Stock & DeMarco, LLC, and Milberg Coleman Bryson Phillips Grossman, PLLC as Class Counsel for the Settlement Class.[5]

VIII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court grant the relief sought herein.

DATED: August 27, 2024

Respectfully submitted,

CARELLA, BYRNE, CECCHI, BROD`
& AGNELLO, P.C.
JAMES E. CECCHI
KEVIN G. COOPER

s/ James E. Cecchi
JAMES E. CECCHI

[5] Courts have routinely certified other data breach settlement classes. *See, e.g.*, *Home Depot*, 2016 WL 6902351; *Anthem*, 327 F.R.D. 299; *Target*, 892 F.3d 968 (affirming certification of settlement class); *In re Am. Med. Collection Agency, Inc. Customer Data Sec. Breach Litig.*, No. 19-md-2904 (D.N.J. Nov. 3, 2023); *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040 (S.D. Tex. 2012); *In re Cap. One Consumer Data Sec. Breach Litig.*, 2022 WL 18107626, at *12 (E.D. Va. Sept. 13, 2022); *Covington v. Gifted Nurses, LLC*, No. 22-cv-4000 (N.D. Ga. Aug. 1, 2024); *In re Forefront Data Breach Litig.*, 2023 WL 6215366, at *8 (E.D. Wis. Mar. 22, 2023); *Thomsen v. Morley Companies, Inc.*, 2023 WL 3437802, at *2 (E.D. Mich. May 12, 2023); *Lamie v. LendingTree, LLC*, 2024 WL 811519, at *2 (W.D.N.C. Feb. 27, 2024).

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