IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT
WILLIAMSON COUNTY, ILLINOIS

SUZANNE RESTIVO-CONLEY, individually and on behalf of all others similarly situated, Plaintiff, vs. SOUTHERN ORTHOPEDIC ASSOCIATES, S.C. D/B/A ORTHOPAEDIC INSTITUTE OF WESTERN KENTUCKY AND SOUTHERN ORTHOPEDIC ASSOCIATES, L.L.C. D/B/A ORTHOPAEDIC INSTITUTE OF WESTERN KENTUCKY, Defendant.	)	Case No.: 2022LA77

UNOPPOSED MOTION AND MEMORANDUM IN SUPPORT OF PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Plaintiff Suzanne Restivo-Conley respectfully moves the Court to enter the tendered agreed Preliminary Approval Order. That Order grants preliminary approval to the proposed class action Settlement Agreement (the "Settlement") that the parties reached with the help of a neutral third-party mediator, certifies the Settlement Class, directs the parties through the Settlement Administrator to give notice to the Settlement Class, provides deadlines for members of the Settlement Class to object to or opt out of the Class, and sets a final approval hearing at which the Court can consider whether to grant final approval to the Settlement.

As detailed below, the Court should enter the Preliminary Approval Order because the Settlement is well within the range of a fair, reasonable, and adequate compromise and because the Settlement Class meets the requirements for class certification. The Settlement provides for Defendants to pay $660,000.00 into a non-reversionary Settlement Fund to be used to provide identity theft protection services and to pay claims for actual losses caused by the Data Incident at the heart of this litigation.

FACTS

I. Plaintiffs sue Defendants over the compromise of personal health information and personally identifiable information resulting from the Data Incident.

On June 23, 2022, Plaintiff Suzanne Restivo-Conley filed a Class Action Complaint in this Court against SOA on behalf of a class of Illinois patients. The Complaint alleged that on December 20, 2021, SOA began to provide notice that between June 24, 2021, and July 8, 2021, cybercriminals had accessed SOA's patients' personal health information ("PHI") and personally identifiable information ("PII"), including names and Social Security numbers of 106,910 patients (the "Data Incident"). The Complaint alleged that SOA's action with respect to the Data Breach gave rise to claims by patients for negligence, breach of contract, unjust enrichment, violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS § 505/1 et seq., breach of fiduciary duty, and invasion of privacy.

On October 5, 2022, SOA filed an Answer and Affirmative Defenses to the Complaint in which it denied all liability and requested entry of judgment in its favor, as well as asserted affirmative defenses that Plaintiff Restive-Conley lacked standing and was barred by the economic loss doctrine as to the claim for negligence.

On October 26, 2022, Plaintiff Restive-Conley filed her reply to SOA's Affirmative Defenses.

Meanwhile, on August 16, 2022, Plaintiff Melinda Fleet filed a Class Action Complaint in the United States District Court for the Western District of Kentucky against Southern Orthopedic Associates, P.S.C. d/b/a Orthopaedic Institute of Western Kentucky on behalf of a nationwide class and Kentucky subclass relating to the same Data Incident negligence and alleging claims for breach of implied contract, breach of fiduciary duty, violation of the Kentucky Consumer Protection Act, KRS 367.110 et seq., and invasion of privacy.

On October 12, 2022, Southern Orthopedic Associates, P.S.C. filed a motion to dismiss Plaintiff Fleet's Class Action Complaint.

On December 2, 2022, Plaintiff Fleet and Plaintiff Christiansen filed a First Amended Class Action Complaint that added an additional Plaintiff, Sally Christiansen and brought claims on behalf of a nationwide class and Kentucky and Illinois subclasses relating to the same Data Incident and bringing the same claims with an additional claim under the Illinois Consumer Fraud Act, 815 ILCS § 505/1 et seq.

On January 13, 2023, Southern Orthopedic Associates, P.S.C. filed a partial motion to dismiss the First Amended Class Action Complaint ("FAC"), on February 22, 2023, Plaintiff Fleet and Plaintiff Christiansen filed a response, and on March 7, 2023, Southern Orthopedic Associates, P.S.C. filed a reply.

II. The parties mediate and thereafter reach an agreement to resolve the litigation, subject to Court approval.

Plaintiff Restivo-Conley, Plaintiff Fleet, and Plaintiff Christiansen agreed to coordinate to discuss potential resolution of their cases relating to the Data Incident, and on May 25, 2023, Plaintiffs and SOA engaged in a full-day mediation with retired judge and mediator, the Honorable Wayne R. Andersen, of JAMS. Despite the parties' efforts, no agreement was reached at the mediation, but the next day Judge Andersen made a mediator's proposal to resolve the case, to be accepted or rejected by June 16, 2023. Both parties accepted the mediator's proposal, subject to negotiating a final detailed settlement agreement and receiving Court approval of the settlement. Following acceptance of the mediator's proposal, counsel for the parties in the federal court action in Kentucky jointly moved to stay the federal court action pending the approval of the Settlement in this Court. On July 7, 2023, the federal court granted the joint motion to stay the case.

III. The proposed Settlement provides substantial relief to the Settlement Class.

Under the terms of the Settlement, in exchange for a release of claims relating to the Data Incident, Defendants will pay $660,000.00 into a non-reversionary Settlement Fund. Settlement § 1.35. After deduction of any Court-approved fees, expenses, and service awards, the Net Settlement Fund will be used to provide Class Members who submit valid claims with: (1) one year of single-bureau credit monitoring services with $1,000,000.00 in identity theft protection services; (2) reimbursement of up to $350.00 per Class Member for ordinary losses resulting from the Data Incident, such as bank fees, fees for credit monitoring, and up to 4 hours of lost time (at $20/hour) attributable to dealing with the Data Incident; (3) reimbursement of up to $5,000.00 for extraordinary losses resulting from the Data Incident, such as unreimbursed fraud or misuse. *Id.* §§ 3.1–3.2. In addition, Defendants will, at their own cost, implement security measures designed to protect against future data breaches. *Id.* § 3.3. As part of the Settlement, Defendants also agree to certification of the Settlement Class, defined as: All persons whose Private Information was compromised in the Data Breach. Settlement §§ 1.32, 2.

LEGAL STANDARD

Under 735 ILCS 5/2-806, a class action "shall not be compromised . . . except with the approval of the court and . . . upon notice as the court may direct." Court approval of a class action settlement is a staged process. *See generally GMAC Mortg. Corp. of Pa. v. Stapleton*, 236 Ill. App. 3d 486, 492, 603 N.E.2d 767, 772 (1992) (describing the process of preliminary approval, notice, and final approval); 4 *Newberg on Class Actions* § 13:10 (5th ed.) (same).

In the first stage, a court determines whether the proposed class may be certified under 735 ILCS 5/2-801 for settlement purposes and evaluates, on a preliminary basis, whether the settlement appears to be generally within the range of a fair, reasonable, and adequate compromise. *GMAC Mortg. Corp. of Pa.*, 236 Ill. App. 3d at 492, 603 N.E.2d at 772. This is called preliminary approval.

If the Court grants preliminary approval, then notice is issued to the class informing class members of the settlement terms and their rights to object to or opt out of the settlement, or to do nothing and receive the benefits of the settlement. *Id.* at 492, 603 N.E.2d at 772.

In the second stage, after notice has been completed, the Court holds a final approval hearing where it considers objections to the settlement, if any, from class members, and the parties make arguments as to why the settlement is fair, reasonable, and adequate and should become effective. *Id.* at 492, 603 N.E.2d at 773. This is called final approval. If the Court grants final approval, then the settlement agreement is formally approved and binding, and the benefits of the settlement are then provided to the class members and the litigation is resolved. *Id.* at 492, 603 N.E.2d at 773.

A. A class is properly certified when it meets the four requirements of 735 ILCS 5/2-801, commonly known as numerosity, commonality, adequacy of representation, and appropriateness.

In determining whether a class may be certified for settlement purposes, Illinois courts will certify the class if it meets the four requirements under 735 ILCS 5/2-801, which are "generally known as numerosity, commonality, adequacy of representation, and appropriateness." *Shackelford v. Allstate Fire & Cas. Ins. Co.*, 2021 IL App (1st) 210195-U, ¶ 15 (citation omitted). Numerosity is satisfied where the class consists of 40 or more members. *Id.* ¶ 19 (citation omitted). Commonality "is met where (1) there are questions of fact or law common to the class and (2) these common questions predominate over questions affecting only individual members of the class." *Bueker v. Madison Cnty.*, 2016 IL App (5th) 150282, ¶ 25, 61 N.E.3d 237, 249. Adequacy of representation is satisfied where "the interests of those who are parties are the same as those who are not joined," "the litigating parties [will] fairly represent those not joined," and the attorneys for the representative party are "qualified, experienced and generally able to conduct the proposed litigation." *CE Design Ltd. v. C & T Pizza, Inc.*, 2015 IL App (1st) 131465, ¶ 16, 32

N.E.3d 150, 156 (internal citations and quotations omitted). Finally, appropriateness is satisfied where "a class action is better suited than individual small claims for securing a more fair and efficient means of adjudication." *Shackelford*, 2021 IL App (1st) 210195-U, ¶ 31. In evaluating these factors, "[t]he decision regarding certification is within the discretion of the circuit court," and "[i]n exercising its discretion, the court should err in favor of granting class certification." *Bueker*, 2016 IL App (5th) 150282, ¶ 25, 61 N.E.3d at 249.

B. Preliminary approval is warranted where the proposed settlement is within the range of a fair, reasonable, and adequate compromise.

Once a court determines that a class can be certified, preliminary approval is properly granted if the court finds the proposed settlement is "within the range of possible approval" as a fair, reasonable, and adequate compromise. *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982) (citations omitted)[1]; *People ex rel. Wilcox v. Equity Funding Life Ins. Co.*, 61 Ill. 2d 303, 317, 335 N.E.2d 448, 456 (1975) ("Approval should be given if the settlement offer is fair, reasonable and adequate."); *GMAC Mortg. Corp. of Pa.*, 236 Ill. App. 3d at 493, 603 N.E.2d at 773 (same). When ruling on preliminary approval, a court should bear in mind that courts "naturally favor the settlement of class action litigation." *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996); *Opper v. Brotz*, 277 Ill. App. 3d 1024, 1028, 661 N.E.2d 1159, 1162 (1996) ("Illinois public policy favors the voluntary resolution of disputes"). As the Seventh Circuit has described the standard, preliminary approval "is simply a determination that there is, in effect, 'probable cause' to submit the proposal to members of the class and to hold a full scale hearing on its fairness at which all interested parties will have an opportunity to be heard after which a formal finding of

[1] "It is settled that [Illinois courts] may consider federal case law for guidance on class action issues because the Illinois class action statute is patterned on Rule 23 of the Federal Rules of Civil Procedure." *Ballard RN Ctr., Inc. v. Kohll's Pharmacy & Homecare, Inc.*, 2015 IL 118644, ¶ 40, 48 N.E.3d 1060, 1068 (citations omitted).

fairness will be made." *In re General Motors Engine Interchange Litig.*, 594 F.2d 1106, 1133 (7th Cir. 1979). In addition, "[s]ince the result is a compromise, the court in approving it should not judge the legal and factual questions by the same criteria applied in a trial on the merits." *GMAC Mortg. Corp. of Pa.*, 236 Ill. App. 3d at 493, 603 N.E.2d at 773 (citation omitted). "To do so would defeat the purposes of a compromise such as avoiding a determination of sharply contested issues and dispensing with expensive and wasteful litigation." *Id.* at 493, 603 N.E.2d at 773 (citation omitted).

Courts have identified various factors for consideration in making a preliminary fairness determination, including:

> (1) the strength of the case for the plaintiffs on the merits, balanced against the money or other relief offered in settlement;
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> (2) the defendant's ability to pay;
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> (3) the complexity, length and expense of further litigation;
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> (4) the amount of opposition to settlement;
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> (5) the presence of collusion in reaching a settlement;
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> (6) the reaction of members of the class to the settlement;
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> (7) the opinion of competent counsel; and
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> (8) the stage of proceedings and the amount of discovery completed.

City of Chicago v. Korshak, 206 Ill. App. 3d 968, 972, 565 N.E.2d 68, 70–71 (1990) (citing *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 314 (7th Cir. 1980)). The decision on preliminary approval is within the court's discretion, which is deferred to "because of [the trial court's] familiarity with the litigants, the history of the litigation and the merits of the substantive claims asserted." *Id.* at 974, 565 N.E.2d at 72.

II. Upon certification of a class, a court must direct notice to the certified class.

Once a court has determined that a settlement class should be certified and preliminary approval granted, 735 ILCS 5/2-803 and 806 require the court to direct notice of the proposed settlement to the class, and 735 ICLS 5/2-804(b) permits class members to exclude themselves from the settlement if they so choose. In addition, it is common for the notice to include a deadline for exclusion or objections to be made and to include the date for the final approval hearing at which the court considers objections to the settlement, if any, and makes an ultimate determination about whether the settlement should be granted final approval and take effect, resolving the litigation. *See GMAC Mortg. Corp. of Pa.*, 236 Ill. App. 3d at 492, 603 N.E.2d at 772–73.

DISCUSSION

I. The Court should grant preliminary approval because the Settlement Class meet the requirements of 735 ILCS 5/2-801 and the proposed Settlement is well within the range of a fair, reasonable, and adequate compromise.

Here, the Court should grant preliminary approval because the proposed Settlement Class meets the requirements for certification under 735 ILCS 5/2-801 and because the Settlement represents a fair, reasonable, and adequate compromise that provides significant value to the Class.

A. The Settlement Class meets the requirements for class certification under 735 ILCS 5/2-801.

The Settlement Class easily meets the requirements of numerosity, commonality, adequacy of representation, and appropriateness for class certification under 735 ILCS 5/2-801. The numerosity requirement is met because the Class contains thousands of victims of the Data Incident, well more than the 40 persons that are required. *Shackelford*, 2021 IL App (1st) 210195-U, ¶ 19. Likewise, the Settlement Class meets the commonality requirement because there are predominant questions common to the Class that revolve around the Defendant's standard data security practices and how they factored into the Data Incident. *Bueker*, 2016 IL App (5th) 150282,

¶ 25, 61 N.E.3d at 249. Adequacy of representation is satisfied because the Class Representatives were victims of the Data Incident and so have the same interest in seeking a recovery as do the Class Members, and Plaintiff's counsel are highly experienced in class action litigation and data breach litigation in particular. *CE Design Ltd.*, 2015 IL App (1st) 131465, ¶ 16, 32 N.E.3d at 156. Finally, appropriateness is satisfied because "a class action is better suited than individual small claims for securing a more fair and efficient means of adjudication," as the individual damages at issue are relatively low on average and the basis for recovering those fees is the same for each Class Member. *Shackelford*, 2021 IL App (1st) 210195-U, ¶ 31. Therefore, the Court should exercise its discretion to certify the Settlement Class as the Class easily meets the requirements of 735 ILCS 5/2-801. *Bueker*, 2016 IL App (5th) 150282, ¶ 25, 61 N.E.3d at 249 ("[t]he decision regarding certification is within the discretion of the circuit court," and "[i]n exercising its discretion, the court should err in favor of granting class certification.").

B. The proposed Settlement is well within the range of a fair, reasonable, and adequate compromise.

The Court should likewise grant preliminary approval to the Settlement because the relief provided by the Settlement—a $660,000.00 cash Settlement Fund—is well within the range of a fair, reasonable, and adequate compromise, particularly considering the inherent risks and delays of litigation, the limited ability of Defendants to pay, and the substantial and guaranteed value of the Settlement. Each of the factors identified in *City of Chicago* supports that the Settlement is well within the range of possible final approval and should be preliminarily approved so that Class Members can consider the offer. 206 Ill. App. 3d at 972, 565 N.E.2d at 70–71.

First, the amount of money and relief offered compares favorably to the strength of Plaintiff's case. Data breach litigation is inherently risky and Defendants would no doubt have vigorously litigated to try to defeat class certification and to try to raise serious issues about

causation and damages. Plaintiffs still faced potential hurdles that could have resulted in no recovery whatsoever had the litigation continued. For example, the Court could have denied class certification or the Court of Appeals could have reversed any Order certifying the class, which would have meant no recovery. Or Plaintiff could have lost on summary judgment or at trial or even on appeal from a successful verdict. By contrast, the Settlement provides significant relief—credit monitoring and identity theft protection services, along with reimbursement of actual losses—without the risk of Defendant prevailing.

Second, the Defendants' ability to pay was an issue in the mediation. During mediation, Class Counsel was provided with information calling into question the ability to recover from Defendants any more than is recovered in the Settlement and the risk that even if successful the ultimate recovery from the litigation might be substantially less than provided by the Settlement.

Third, the complexity, length, and expense of further litigation favors approval of the Settlement. It would have required substantial additional resources, including additional significant expert expenses, to bring this complex data breach class action to trial. Any recovery would also have been delayed by a potential interlocutory appeal of class certification and by appeal from any verdict, depriving the Class Members of any relief for potentially several years.

Fourth, at this point there is no opposition to the Settlement. All the parties to the case support the Settlement and this factor can be considered at final approval after Class Members have received notice of the Settlement and have had an opportunity to object to it or opt out if they so choose.

Fifth, there was no collusion in reaching a Settlement, and the parties have engaged in vigorous litigation and arm's-length negotiations and mediation with the Honorable Wayne R. Andersen, of JAMS. *Id.* at 973, 565 N.E.2d at 71 ("The trial court found that the case was hard

fought by both counsel for the [parties] and that settlement was reached after vigorously contested litigation and hard bargaining. The trial court therefore concluded that there was no collusion . . . . We agree.").

Sixth, the reaction of the members of the Class to the Settlement cannot be gauged until preliminary approval is granted and Class Members receive notice.

Seventh, it is Class Counsel's opinion that the Settlement represents an excellent result for the Class and that the Court should grant preliminary approval.

Finally, while the case had not advanced significantly into litigation, the parties had sufficient information about the breach to negotiate knowledgeably. In addition, given Defendants' financial condition, further litigation may well have resulted in fewer resources available to fund settlement as those resources would have been consumed through Defendants' defense in the litigation. This factor therefore also supports preliminary approval, as the parties were aware of the strengths and weaknesses of the case both legally and factually. *Id.* at 974, 565 N.E.2d at 72.

Thus, each of the relevant factors supports that the proposed Settlement is well within the range of a fair, reasonable, and adequate compromise and that the Court should grant preliminary approval.

II. The Court should approve and direct notice to the Settlement Class, provide deadlines for objections or exclusions, and set a final approval hearing on the Settlement.

As part of granting preliminary approval, and as provided in the Preliminary Approval Order, the Court should approve and direct notice of the proposed Settlement to be distributed to the Settlement Class. The tendered forms of notice, which are to be sent by mail, as well as posted to the Settlement website, explain the Settlement terms to Class members and inform them of their rights to object to, or opt out of, the Settlement within 60 days after the notice is sent. The notice also informs Class members of the date of the final approval hearing so that Class members have

a sense of when the Settlement may become final. Plaintiffs request that the Court set the final approval for approximately 140 days after entry of the Preliminary Approval Order to allow sufficient time for notice to be disseminated and for the deadline for Class members to opt out or object to pass.

CONCLUSION

For the foregoing reasons, the Court should enter the tendered Preliminary Approval Order, which: (1) certifies the Settlement Class for purposes of settlement; (2) grants preliminary approval to the Settlement; (3) approves and directs notice of the proposed settlement to the Class; (4) establishes deadlines for Class Members to object to or exclude themselves from the Settlement; and (5) schedules a final approval hearing.

Dated: October 30, 2023

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PROOF OF SERVICE

I hereby certify that on October 30, 2023, I electronically filed "UNOPPOSED MOTION AND MEMORANDUM IN SUPPORT OF PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT" with the Clerk of the Court using the e-filing system and sent an electronic PDF copy of the foregoing document to the attorneys of record below by serving same via email.

/s/Robin Matney

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