UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

In Re: Medical Informatics Engineering, Inc., Customer Data Security Breach Litigation (MDL 2667)	Cause No. 3:15-MD-2667
This Document Relates to All Cases	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

The Court should grant preliminary approval to the Stipulation and Agreement of Settlement (the "Settlement") between Defendants and the proposed Settlement Class under Federal Rule of Civil Procedure 23(e)(1) because the proposed Settlement represents an excellent result for the Settlement Class that is ultimately likely to be approved as fair, reasonable, and adequate for purposes of entering a final class judgment on the Settlement after a final approval hearing. The proposed Settlement includes a $2,750,000 Settlement Fund that will be used to make cash payments to proposed Settlement Class Members and to provide robust Identity Theft Protection Services to proposed Settlement Class Members. This amount compares favorably with the possible recoverable damages, the strength of the claims, and the risks, uncertainties, and delays of continued litigation, and the Defendants' ability to ultimately pay a judgment that would exceed the settlement amount after potentially years of litigation to judgment. The Settlement also requires Defendants to engage in comprehensive remedial measures and injunctive relief in the form of business practice changes and future commitments related to Defendants' IT security practices. The Court should therefore grant preliminary approval, direct notice to the proposed Settlement Class, and schedule a Final Approval Hearing to consider whether to grant final approval to the Settlement.

THE CLAIMS, THE LITIGATION, AND THE MEDIATION

Between May 7, 2015 and June 5, 2015, an unauthorized third party infiltrated and accessed Defendants' computer systems and stole the Protected Personal Information and Protected Health Information of over 3 million individuals (the "Data Breach"). More than twenty lawsuits were filed in response to the Data Breach. On December 10, 2015, the Judicial Panel on Multidistrict Litigation transferred the cases to this Court for coordinated or consolidated pretrial proceedings. (ECF No. 1.) On March 22, 2016, Plaintiffs filed their Consolidated Amended Class Action Complaint asserting claims for breach of contract, negligence, negligence per se, breach of the implied covenant of good faith and fair dealing, negligent misrepresentation, unjust enrichment, violation of state consumer laws, violation of state data breach statutes, and violation of state medical and health information privacy statutes. (ECF No. 65.)

During the course of the litigation, the Parties engaged in significant discovery and engaged in extensive, arm's-length settlement negotiations, including two full-day mediation sessions with the Honorable Sanford M. Brook (Ret.) of Judicial Arbiter Group, Inc. In June 2016, the Parties informed the Court that they had reached an agreement on the essential terms of a settlement and requested a stay. (ECF No. 94.) However, in April 2018, having determined that the regulatory inquiries and investigations had not made sufficient progress to satisfy the contingencies necessary to enter into the proposed settlement, Plaintiffs requested the Court to end the stay. (ECF No. 134.) On January 28, 2019, the Parties attended a third full-day mediation session under the supervision of Judge Brook (ret.) and with the participation of the Multi-State Attorneys General. In light of the progress made towards a comprehensive resolution, the parties continued negotiations toward a final settlement agreement and regulatory contingencies were resolved in late May, 2019, with final proposed settlement documents completed in late July,

2019. (ECF No. 172.) Lead Counsel also performed confirmatory discovery, in the form of reviewing documents and taking depositions of two of Defendants' senior management to confirm the financial position of Defendants and to confirm that Defendants had implemented and were continuing to implement certain data security enhancements and required injunctive relief.

THE SETTLEMENT TERMS

The terms of the proposed Settlement are summarized briefly below. The full terms are set forth in the proposed Settlement Agreement.

A. Class Definition. The proposed Settlement Class is defined as:

> All persons whose personal or medical information was compromised by the Medical Informatics Engineering, Inc. Data Breach.

Ex. 1 ("Settlement Agreement"), ¶ 4.1.

B. Settlement Fund and Attorneys' Fees and Expenses. The proposed Settlement Agreement creates a Settlement Fund of $2.75 million that Defendants will fund to provide monetary relief to the Class, Identity Theft Protection Services to the Class, Class Notice, Settlement Administration, and Service Awards. *See* Settlement Agreement ¶ 5.1.3. This is a non-reversionary fund, meaning that upon the Effective Date no portion of the Settlement Fund shall revert to Defendants. Settlement Agreement ¶ 5.4.1. It is estimated that approximately $750,000 in expenses for Class Notice and Settlement Administration expenses will be deducted from the Settlement Fund, leaving approximately $2 million for use as set forth below. In addition, Defendants will pay up to $1 million in attorneys' fees and expenses, which shall not diminish the relief available to the Settlement Class and which is in addition to the $2.75 million Settlement Fund. Settlement Agreement ¶ 10.

C. Monetary Compensation.

$500,000 of the Settlement Fund will be used to provide direct monetary compensation to those proposed Settlement Class Members who submit valid Claim Forms. Settlement Agreement ¶ 4.2. Each proposed Settlement Class Member may qualify for benefits and distributions from this fund for Reimbursement of Economic Losses. For proposed Settlement Class Members who submit Reimbursement Claims for reimbursement of Economic Losses actually incurred that are fairly traceable to the Data Breach (such as unreimbursed losses or charges due to identity theft, freezing or unfreezing of credit, credit monitoring costs, etc.), up to $4,000 per Settlement Class Member or $500,000 total. Settlement Agreement ¶ 5.3.7.

If the approved Reimbursement Claims exceed the Net Settlement Fund, then the Claims shall be reduced pro rata based on the amount of all approved Claims. Settlement Agreement ¶ 5.3.7. If the approved Claims are less than the Net Settlement Fund, the excess will be used to extend the Identity Theft Protection Services beyond the original termination date for as long as possible. Any residual funds not economically viable to distribute to proposed Settlement Class Members in this way will be distributed in a cy pres award to the Center for Education and Research in Information Assurance Security at Purdue University as approved by the Court. Settlement Agreement ¶ 5.4.1. No amounts of the Settlement Fund shall revert to the Defendants. *Id.*

D. Identity Theft Protection Services.

$1,368,527.25 of the Settlement Fund will be allocated to provide proposed Settlement Class Members with three years of MyIDCare™ Identity Protection Services by ID Experts, which provides each proposed Settlement Class Member who submits a valid Claim Form seeking to be enrolled in this service with:

1. Single bureau credit monitoring and alerts. Monitoring of one credit bureau for changes to the Settlement Class Members' credit file such as new credit inquiries, new accounts opened, delinquent payments, improvements in the Settlement Class Members' credit report, bankruptcies, court judgments and tax liens, new addresses, new employers, and other activities that affect the Settlement Class Members' credit record. Alerts provide notification of inquiries against the credit record;
2. CyberScan™. Dark web monitoring of underground websites, chat rooms, and malware to identify trading or selling of personal information like Social Security Numbers, bank accounts, email addresses, medical ID numbers, driver's license numbers, passport numbers, credit and debit cards, phone numbers, and other unique identifiers;
3. Identity theft insurance. Identity theft insurance will Settlement Class Members for expenses associated with restoring their identity should they become a victim of identity theft. If a Settlement Class Member's identity is compromised, the policy provides coverage up to $1,000,000, with no deductible, from an A.M. Best "A-rated" carrier. Coverage is subject to the terms, limits, and/or exclusions of the policy;
4. Fully managed identity recovery. Provides recovery and restoration for identity theft issues, including triage process for those who report suspicious activity, a personally assigned IDCare Specialist to fully manage recovery and restoration of each identity theft case and expert guidance for those with questions about identity theft and protective measures;

5. Member advisory services; and

6. Lost wallet assistance.

Settlement Agreement ¶ 5.2.1. The retail value for each proposed Settlement Class Member receiving this Identity Theft Protection Services benefit is $358.20 ($9.95 per month for 36 months). *See Pricing*, MyIDCare, https://www.myidcare.com/pricing (last visited June 11, 2019). In addition, any net Settlement Funds not reserved for Reimbursement of Economic Loss Claims, plus any uncollected funds from the amount reserved for Reimbursement of Economic Loss Claims will be used to purchase additional years of MyIDCare.

E. Non-Monetary Relief.

Defendants agree to provide equitable injunctive relief in the form of business practice commitments. Settlement Agreement ¶ 5.5.19. These business practice commitments include a variety of methods relating to information security, such as: ensuring that no generic account on Defendants' information system has administrative privileges; refraining from employing the generic accounts that can be accessed via the Internet; requiring multi-factor authentication to access any portal Defendants manage in connection with their maintenance of electronic protected health information; and implementing and maintaining a security incident and event monitoring solution to detect and respond to malicious attacks.

F. Release of Liability. In exchange for the relief described above, Defendants will receive a full and final release of all claims related to the Data Breach. *See* Settlement Agreement, ¶¶ 9.1–9.4 for the complete release language.

CERTIFICATION OF THE SETTLEMENT CLASS

The first step in approving a class action settlement is to certify a Class for settlement purposes. In doing so the Court must find that all of the elements of Rule 23(a) are met and that

any one of the subsections of Rule 23(b) is met. In this case, the parties both stipulate that a Class should be certified under Rule 23(a) and 23(b)(3) to effectuate this Settlement.

The elements of Rule 23(a) (numerosity, commonality, typicality, and adequacy) are easily met in this case. The class satisfies the "numerosity" requirement because it is made up of over 3 million people such that "joinder of all members is impracticable." *Olson v. Brown*, 284 F.R.D. 398, 407 (N.D. Ind. 2012) ("To be impracticable, joinder need not be impossible, but instead must be shown to be inconvenient and difficult."). The class satisfies the "commonality" requirement because all Class Members share questions of fact and law such as whether Defendants adequately safeguarded Plaintiffs' and the Class' personal and medical information. *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 799 (7th Cir. 2013) (commonality met where issue was whether common washer model class members purchased was defective) *cert. denied*, 134 S. Ct. 1277, 188 L. Ed. 2d 298 (2014). Plaintiffs satisfy the "typicality" requirement because their information was subject to the same IT security policies and was disclosed in the same Data Breach. *See Muro v. Target Corp.*, 580 F.3d 485, 492 (7th Cir. 2009) (typicality requirement "primarily directs the district court to focus on whether the named representatives' claims have the same essential characteristics as the claims of the class at large"). Plaintiffs also meet the "adequacy" test because their claims are typical of the Class, and they have no interests antagonistic to the Class and have advocated behalf of the Class through qualified counsel. *Gomez v. St. Vincent Health, Inc.*, 649 F.3d 583, 592 (7th Cir. 2011) (adequacy "consists of two parts: (1) the adequacy of the named plaintiffs as representatives of the proposed class' myriad members, with their differing and separate interests, and (2) the adequacy of the proposed class counsel").

The requirements of Rule 23(b)(3) are likewise met. Defendants' standardized conduct and the common Data Breach means that the common issue of whether Defendants adequately protected Plaintiffs' and the proposed Settlement Class' personal and medical information predominates over any individual issues. *See Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 815 (7th Cir. 2012) ("[P]redominance requirement is satisfied when common questions represent a significant aspect of a case and . . . can be resolved for all members of a class in a single adjudication."). Likewise, certification for settlement purposes is the superior method to adjudicate the over 3 million claims of Class Members because certification resolves all of these small-value claims in one action. *Butler*, 727 F.3d at 799; *see also Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 620 (1997) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial.").

Because Rule 23(a) and 23(b)(3) are satisfied, the Court should certify the following Class for purposes of settlement and the issuance of notice:

> All persons whose personal or medical information was compromised by the Medical Informatics Engineering, Inc. Data Breach.

STANDARD FOR PRELIMINARY APPROVAL

Under Federal Rule of Civil Procedure 23(e), a class action may be settled or compromised only with the Court's approval, but the Seventh Circuit, like other Circuits, favors the settlement of class action litigation. *See, e.g.*, *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996). Approval of a class action settlement involves two-steps, referred to as "preliminary approval" (Fed. R. Civ. P. 23(e)(1)) and "final approval." Fed. R. Civ. P. 23(e)(1)–(2). If the Court grants preliminary approval, it directs notice of the proposed settlement to the class and schedules a hearing to consider final approval after class members have had an opportunity to

exclude themselves from the settlement, object to its terms, or do nothing and assent to the settlement. Fed. R. Civ. P. 23(e).

The parties are currently seeking preliminary approval. To grant preliminary approval the Court evaluates the proposed settlement to determine whether it justifies giving notice of the proposal to the Class. Fed. R. Civ. P. 23(e)(1)(A). A proposed settlement justifies giving notice to the Class, and preliminary approval should be granted, upon a showing that the Court will likely be able to grant final approval to the settlement as "fair, reasonable, and adequate" under Rule 23(e)(2) and will likely be able to certify the class for purposes of judgment on the proposed settlement. Fed. R. Civ. P. 23(e)(1)(B).

The Court must also consider whether the proposed plan for notifying the Settlement Class of the Settlement is reasonable and comports with Rule 23(e) and Due Process. *See Manual for Complex Litig.* § 21.632. Due Process does not require that every Settlement Class member receive actual notice of the settlement. *See, e.g.*, *Fidel v. Farley*, 534 F.3d 508, 514 (6th Cir. 2008); *Mangone v. First USA Bank*, 206 F.R.D. 222, 231 (S.D. Ill. 2001). As the leading treatise on class actions explains:

> The notice of the Proposed Settlement, to satisfy both Rule 23(e) requirements and constitutional due process protections, need only be reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the settlement proposed and to afford them an opportunity to present their objections. Thus, due process does not require actual notice, but rather a good faith effort to provide actual notice. Courts have consistently recognized that due process does not require that every class member receive actual notice so long as the court reasonably selected a means likely to apprize interested parties.

Newberg § 22:91. Ultimately, courts have considerable discretion in approving an appropriate notice plan. *Eirhart v. Libbey-Owens-Ford Co.*, 921 F.2d 278, at *1 (7th Cir. 1990) (table op.) (observing that a district court "has 'virtually complete discretion' as to the manner in which notice of a proposed settlement be given."); *Manual for Complex Litig.* § 21.311 ("Determination

of whether a given notification is reasonable under the circumstances of the case is discretionary").

THE SETTLEMENT WARRANTS PRELIMINARY APPROVAL

The Settlement easily warrants preliminary approval. The Settlement is the result of arm's-length negotiations among experienced counsel and overseen by experienced mediator Judge Brook of JAG, and the recovery for Class Members is substantial, particularly given the risks, uncertainties, and delays of further litigation. Further, the Settlement requires Defendants to stop the conduct that formed the basis of Plaintiffs' claims.

First, the Settlement was the result of arm's-length negotiations conducted in multiple full-day settlement conferences with retired Chief Judge Sanford Brook. The parties vigorously negotiated all aspects of the final settlement, and Plaintiffs' counsel is highly-experienced in class action litigation. *See, e.g.*, *In re Iowa Ready-Mix Concrete Antitrust Litig.*, No. C 10-4038-MWB (N.D. Iowa Nov. 9, 2011), ECF No. 309 (Cohen & Malad, LLP achieved "fabulous results" for class with "incredible efficiency"). This weighs in favor of approval. *Isby v. Bayh*, 75 F.3d 1191, 1200 (7th Cir. 1996); *Susquehanna Corp. v. Korholz*, 84 F.R.D. 316, 320 (N.D. Ill. 1979) (a settlement proposal arrived at after arm's-length negotiations by fully informed, experienced and competent counsel may be properly presumed to be fair and adequate).

Second, the Settlement was reached after adequate information and debate of the issues in the case. In addition to a thorough pre-suit investigation, Plaintiffs' counsel obtained substantial discovery from Defendants as part of the resolution process. Thus, at the time the Settlement was reached, both sides were well-informed of the relevant facts and legal issues in the case and were armed to negotiate vigorously based on their respective positions. This too favors preliminary approval. *Isby*, 75 F.3d at 1200.

Finally, the value of the Settlement is favorable to the putative Settlement Class considering the possible recoverable damages, the strength of the claims, and the risks, uncertainties, and delays of continued litigation. Additionally, even if the Classes were certified, Defendants would have significant defenses on the merits. Continued litigation also causes additional delay to Class Members potentially receiving compensation. Thus, the $3,750,000 cash settlement and Defendants' agreement to stop the conduct at issue represents a highly meaningful recovery that is well within "the range of possible approval" and the Court should grant preliminary approval.

THE PROPOSED NOTICE IS THE BEST NOTICE PRACTICABLE

After preliminary approval, Rule 23(e) requires the Court to "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). The notice should inform Class Members of the terms of the proposed settlement and of the opportunity to present their own views on the settlement. *See Manual for Complex Litigation* § 21.633.

The notice program in the Settlement Agreement is the best notice practicable under the circumstances. All of the proposed Settlement Class Members are current or recent customers of Defendants and Defendants maintain the proposed Settlement Class Members' information. Thus, direct mailed notice to Class Members, using the last-known address provided by Defendants and updated through the USPS National Change of Address database is the best notice to actually reach Class Members. Additionally, if mail is returned undeliverable, the Settlement Agreement requires additional measures to be taken to locate and give notice to the Class Members. The form of the notice (attached to the Preliminary Approval Order) informs the Class Members of their rights and the important deadlines for exercising those rights, along with the benefits of the settlement and all possible fees and deductions from the Settlement. The

notice also directs Class Members to a settlement website and a toll-free number to obtain additional information. A long form style class notice (attached to the Preliminary Approval Order) will be on the website identified in the directed mailed class notice. Thus, the notice is the best practicable under the circumstances.

PROPOSED SCHEDULE

In connection with the preliminary approval of the Settlement, Plaintiffs ask the Court to set a date for the Fairness Hearing not less than 105 days after the entry of the Preliminary Approval Order, a deadline to send notice to the Class Members, and a schedule for filing papers relating to final approval and attorneys' fees, and deadlines for any objections to the Settlement. Plaintiffs propose the following schedule:

Event	**Time for Compliance**
Mail & E-Mail Notice	Within 30 days from entry of the Preliminary Approval Order
Deadline for Application for Attorneys' Fees by Plaintiffs' Counsel	16 days after Notice is first mailed & e-mailed
Deadline for Objections	30 days after Notice is first mailed & e-mailed
Deadline for Opt-Outs	30 days after Notice is first mailed & e-mailed
Deadline for Motion in Support of Final Approval and in Response to Any Objections	60 days after Notice is first mailed & e-mailed
Fairness Hearing	Not less than 90 days after entry of the Preliminary Approval Order

CONCLUSION

For the foregoing reasons, the Court should grant preliminary approval and enter the tendered Preliminary Approval Order, directing notice to Class Members, and scheduling a final Fairness Hearing.

Dated: July 30, 2019

Respectfully submitted,

s/Irwin B. Levin

CERTIFICATE OF SERVICE

I certify that on July 30, 2019, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to counsel of record by operation of the Court's electronic filing system.

s/Irwin B. Levin
Irwin B. Levin