**UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

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| IN RE: CLEVELAND BROTHERS DATA INCIDENT LITIGATION | **Case No. 1:23-cv-00501-JPW** |

**MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

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Representative Plaintiffs Randy Thomas, Gabrielle Thomas and Robert MacMichael ("Plaintiffs" or 'Representative Plaintiffs"), individually and on behalf of the Settlement Class Members, submit this Memorandum in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement.

## I. INTRODUCTION

Plaintiffs filed this Class Action against Defendant Cleveland Brothers Equipment Company, Inc. ("Defendant" or "Cleveland Brothers"), alleging that Cleveland Brothers failed to properly secure and safeguard Representative Plaintiffs and Class Members' personally identifiable information ("PII") stored within Defendant's information network. Plaintiffs also alleged that Defendant is responsible for the harms it caused and will continue to cause Representative Plaintiffs and at least 8,600 other similarly situated persons in the massive and preventable cyberattack purportedly discovered by Defendant on November 3, 2022, in which cybercriminals infiltrated Defendant's inadequately protected network servers and accessed highly sensitive PII which was kept unprotected (the "Data Breach"). Furthermore, Plaintiffs seek to hold Defendant responsible for not ensuring that the PII was maintained in a manner consistent with industry and other relevant standards. Cleveland Brothers denied each of Plaintiffs' allegations and asserted several defenses.

After over a year of litigation, Plaintiffs and Cleveland Brothers entered into a Settlement Agreement and Release ("Settlement Agreement" or "Settlement"). ECF 29-1. The proposed Settlement affords significant relief to the Settlement Class Members, if approved. Under the terms of the proposed Settlement, Cleveland Brothers will pay $450,000 into a non-reversionary Settlement common fund to pay benefits to Settlement Class Members, including (1) reimbursement for Out-of-Pocket Losses and Lost Time up to $5,000 per Settlement Class Member, (2) Alternative Cash Payments, (3) Costs of Claims Administration, including notice and administration costs, (4) service award payments approved by the Court, and (5) Attorneys' Fees and expenses awarded by the Court.

The Court preliminarily approved the Settlement Agreement on March 25, 2024 and ordered notice to the Settlement Class. ECF 30. The Settlement Administrator has now issued notice to the Class and has received no objections. In total, the Settlement Administrator has received 764 claims from Class Members and only 20 Class Members opted out.

For these reasons and the others explained below, the proposed settlement satisfies Federal Rules of Civil Procedure ("F.R.C.P.") Rule 23(e)(2)'s requirements that a class settlement be fair, reasonable, and adequate, and Plaintiffs respectfully request that the Court issue final approval of the Settlement.

## II. THE CLASS ACTION SETTLEMENT AND NOTICE PROGRAM

### A. The Settlement Class

Under the Settlement Agreement, the parties agreed to resolve the claims of Settlement Class defined as:

> All individuals within the United States of America whose personally identifiable information ("PII") was exposed to unauthorized third parties as a result of the data breach discovered on November 3, 2022.

Excluded from the Settlement Class are: (1) the Judge and Magistrate Judge presiding over the Action, any members of the Judge's respective staffs, and immediate members of the Judge's respective families, (2) officers, directors, members and shareholders of Defendant, (3) any persons who timely and validly request exclusion from and/or opt-out of the Settlement Class, (4) the successors and assigns of any such excluded persons, and (5) any person found by a court of competent jurisdiction to be guilty under criminal law of initiating, causing, aiding or abetting the criminal activity or occurrence of the Data Breach or who pleads nolo contendere to any such charge. ECF 29-1, ¶ 3. Based on data from the Settlement Administrator Postlethwaite & Netterville ("P&N"), the Settlement Classes contain 8,534 individuals. Declaration of Jordan Turner ("Turner Decl.").

### B. The Settlement Provides Significant and Meaningful Relief to Affected Class Members

The proposed class action settlement provides for a non-reversionary cash common fund of $450,000 ("The Fund") that will pay all Attorneys' Fees, settlement

costs (notice, fees, administration), and provide for two separate forms of relief to the approximately 8,534 Class Members: (1) reimbursement for fairly traceable Out-of-Pocket Losses and Lost Time, and (2) pro rata Alternative Cash Payments estimated to be $200. Representative Plaintiffs achieved the proposed settlement after the parties engaged in preliminary informal discovery and a formal mediation presided over by the preeminent data breach class action mediator Bennett Picker, Esq. of the Stradley Ronon firm in Philadelphia.

The significant size of the Settlement Fund means that, after deduction of any Court-awarded attorneys' fees and costs, service awards, and settlement administration costs, Settlement Class Members who submitted valid Claims will receive significant consideration from the Settlement Fund. Given the number of claims made, the cash payment originally estimated to be approximately $200 is now likely to be $313.17, based on the current total of 748 potentially valid Claim Forms. *See* Turner Decl. at ¶ 16. That this Settlement is more than adequate is obvious from the fact that approximately 8.8% of the Settlement Class Members submitted claims, which is well above the claims rate found in many other data breach settlements. *Id*. And, quite importantly, the Settlement will deliver relief to the Settlement Class Members far sooner than with further costly and wholly uncertain litigation.

### C. The Settlement Administrator Provided Direct Notice to Settlement Class Members

In its Preliminary Approval Order, the Court approved the proposed notice plan and ordered that the Class Notice be sent to Settlement Class Members by Settlement Administrator P&N. Consistent with the Court's Preliminary Approval Order, P&N administrated notice to the Class Members. Turner Decl. ¶ 3. Among other things, this data included the Class Members' names and contact information. P&N identified and compiled a final class list that contained 8,534 unique records of Class Members, and P&N successfully notified 8,278 Class Members, or 97% of the Class. Turner Decl. ¶15. A "reach" rate of 97.0% is well within the range of deliverable rates accepted in other class actions before district courts in Pennsylvania. *See, e.g., Kyle Stechert v. Travelers Home & Marine Ins. Co.*, No. 17-0784-KSM, 2022 U.S. Dist. LEXIS 113277, at *21 (E.D. Pa. June 27, 2022) (holding that an 89.84% deliverable rate "satisfied the requirements of Rule 23(c)(2)(B) and comports with due process"); *Wood v. Saroj & Manju Invs. Phila. LLC*, *Civil Action No.* 19-2820-KSM, 2020 U.S. Dist. LEXIS 253960, 2021 WL 1945809, at *5 (E.D. Pa. May 14, 2021) (finding that a 92.8% deliverable rate was "reasonably calculated to provide notice").

The notice program was a major success, as demonstrated by the fact that, "[a]s of August 5, 2024, P&N has received a total of 764 timely claims. Of these, P&N has determined that 748 claims (approximately 8.8% of the Class Members)

are from Class Members and are non-duplicative claims." Turner Decl. ¶16. A claims rate of 8.8% is extremely high for data breach cases such as this one. Decl. of Laura Van Note ("Van Note Decl.") ¶ 23; *see also In re Wawa, Inc., Data Sec. Litig*., No. 19-6019, 2022 U.S. Dist. LEXIS 72569, at *20 (E.D. Pa. April 20, 2022) (finding that a 2.6% claims rate "actually compares favorably with other data breach settlements" and collecting cases). Such a high claims rate indicates that the notice program was extremely effective, and the Class is happy with the Settlement's benefits.

**D. There Have Been No Objections and Minimal Opt-Outs**

No Class Members have objected to the Settlement, and only 20 Class Member opted out. Turner Decl. ¶¶ 17-18. This very small opt-out rate illustrates the success of the Settlement notice program and Class Members' satisfaction with the Settlement results.

## III. ARGUMENT

**A. The Court Should Grant Final Approval of the Settlement**

There is a strong judicial policy in favor of resolution of litigation before trial, particularly in "class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *In re CertainTeed Corp. Roofing Shingle Prods. Liab. Litig*., 269 F.R.D. 468, 484 (E.D. Pa. 2010) (quoting *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir.

2010)). "In this Circuit, a settlement is entitled to an initial presumption of fairness where it resulted from arm's-length negotiations between experienced counsel, there was sufficient discovery, and there were no objectors and only a small percentage of opt outs." *Galt v. Eagleville Hosp*., 310 F. Supp. 3d 483, 493 (E.D. Pa. 2018). That is exactly what occurred here, and as such, the Court should apply a presumption of fairness when reviewing the Settlement. *Newberg on Class Actions* §11.41 at 11-88 (3d ed. 1992 *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litig*., 55 F.3d 768, 796 (3d Cir. 1995) ("the court determines whether negotiations were conducted at arms' length by experienced counsel after adequate discovery, in which case there is a presumption that the results of the process adequately vindicate the interests of the absentees.").

Pursuant to F.R.C.P. Rule 23 (e)(2), the Court can only approve the Settlement if it finds that the Settlement is "fair, reasonable, and adequate". *Halley v. Honeywell Int'l, Inc*., 861 F.3d 481, 488 (3d Cir. 2017). In making this determination, Rule 23(e)(2) provides that the Court should consider the factors outlined in Rule 23(e)(2)(A-D). All Rule 23(e) factors are satisfied here.

Plaintiffs' claims are typical of those of other Class Members because Plaintiffs' Private Information, like that of every other Class Member, was compromised in the Data Breach. Plaintiffs have fairly and adequately represented and protected the interests of Class Members. Furthermore, Plaintiffs' counsel is

competent and experienced in litigating class actions, including data privacy litigation of this kind. Van Note Decl. ¶¶ 11-15.

Rule 23(e)(2)(B) instructs the Court to consider whether the Settlement was negotiated at arm's length. "The 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." *Alves v. Main*, No. 01-cv-789 (DMC), 2012 U.S. Dist. LEXIS 171773, at *73-74 (D. N.J. Dec. 4, 2012) (internal quotations omitted). Here, the parties reached an agreement on all material terms only after Cleveland Brother filed Motions to Dismiss both class action Complaints, the parties exchanged the necessary voluntary discovery, and they engaged in weeks of negotiation, culminating with a formal mediation on before Bennett G. Picker, an experienced data breach mediator. Subsequently, the parties continued to negotiate the details of the Settlement Agreement, which was finalized and executed on or about March 14, 2024. Because all negotiations regarding settlement in the Litigation have been conducted at arm's length, in good faith, and absolutely free of any collusion, this factor strongly favors granting final approval to the Settlement.

In satisfaction of Rule 23(e)(2)(C), the Agreement accounts for the "costs, risks, and delay of trial and appeal" by providing Class Members with substantial monetary benefits that will be actualized earlier than any benefits the Class would

receive from a lengthy and costly trial. Even though Plaintiffs are confident that they could have succeeded at trial, they acknowledge that this case presented multiple risks. Although nearly all class actions involve a high level of risk, expense, and complexity—undergirding the strong judicial policy favoring amicable resolutions, *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1238 (9th Cir. 1998)—this is an especially complex case in an especially risky practice area. Historically, data breach cases face substantial hurdles in surviving even the pleading stage. *See, e.g., Hammond v. Bank of N.Y. Mellon Corp*., No. 08-cv-6060 (RMB) (RLE), 2010 U.S. Dist. LEXIS 71996, at *2-4 (S.D.N.Y. June 25, 2010) (collecting cases). Even more notorious cases implicating data far more sensitive than at issue here have been found wanting at the district court level. *In re U.S. Office of Pers. Mgmt. Data Sec. Breach Litig*., 266 F.Supp.3d 1, 19 (D.D.C. 2017) ("The Court is not persuaded that the factual allegations in the complaints are sufficient to establish . . . standing."), reversed in part, 928 F.3d 42 (D.C. Cir. 2019) (holding that plaintiff had standing to bring a data breach lawsuit). As one federal district court recently observed in finally approving a data breach settlement with similar class relief: "Data breach litigation is evolving; there is no guarantee of the ultimate result." *Fox v. Iowa Health Sys*., No. 3:18-cv-00327-JDP, 2021 U.S. Dist. LEXIS 40640, at *5 (W.D. Wis. Mar. 4, 2021) (citing *Gordon v. Chipotle Mexican Grill, Inc*., No. 17-cv-01415-CMA-SKC, 2019 U.S.

Dist. LEXIS 215430, at *3 (D. Colo. Dec. 16, 2019) ("Data breach cases ... are particularly risky, expensive, and complex.")).

To the extent the law has gradually accepted this relatively new type of litigation, the path to a class-wide monetary judgment remains unforged. For now, data breach cases are among the riskiest and most uncertain of all class action litigations, making settlement the more prudent course when, as here, a reasonable one can be reached. The damages methodologies, while theoretically sound in Plaintiffs' view, remain mostly untested in a disputed class certification setting and unproven before a jury. And as in any data breach case, establishing causation on a class-wide basis is rife with uncertainty. Thus, this factor favors approval.

Under Rule 23(e)(2)(D), the Court must consider whether the Settlement treats Class Members equitably relative to each other. Here, the Settlement favors no group or individual with preferential treatment. All Class Members are entitled to the same options for recovery, either reimbursement or a simple cash payment. As such, this factor also supports final approval of the Settlement.

**B. The *Girsh* Factors Support Final Approval**

The Third Circuit has traditionally evaluated class action settlements under the nine factors outlined in *Girsh v. Jepson*, 521 F.2d 153, 156 (3d Cir. 1975). "These factors are a guide and the absence of one or more does not automatically render the settlement unfair." *In re Am. Family Enters.*, 256 B.R. 377, 418 (D.N.J.

2000). Here, the applicable *Girsh* factors support final approval.

**1. The Complexity, Expense, and Likely Duration of the Litigation**

The first *Girsh* factor considers "the probable costs, in both time and money, of continued litigation." *In Re Cendant Corporation Litig*., 264 F.3d 201, 233-34 (3d Cir. 1992) (*Cendant II*) (internal quotation marks omitted). This factor undoubtedly weighs in favor of settlement. Here, as discussed above, due to the factual and legal complexities involved in this case, continued litigation would necessarily be expensive and time-consuming. The Settlement Agreement secures substantial benefits for the Class with none of the delay, risk, excessive costs, and uncertainty of continued litigation.

**2. Reaction of the Settlement Class**

The Parties provided notice to 97.0% Settlement Class Members, and their reaction was very positive, with a very high claims rate of 8.8%, no objections, and minimal opt-outs. This positive response strongly supports granting final approval of the Settlement.

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

The third factor also supports final approval. "Even settlements reached at a very early stage and prior to formal discovery are appropriate where there is no evidence of collusion and the settlement represents substantial concessions by

both parties." *In re Impinj, Inc. Derivative Litig*., No. 18-1686-RGA, 2021 U.S. Dist. LEXIS 224687, at *8 (D. Del. Nov. 22, 2021) *In re Impinj*, 2021 U.S. Dist. LEXIS 224687, at *8. Here, prior to entering settlement negotiations, Plaintiffs' Counsel conducted informal discovery and gained "sufficient information to make an informed decision regarding settlement." *In re Johnson & Johnson Derivative Litig.*, 900 F. Supp. 2d 467, 483 (D.N.J. 2012). Furthermore, Plaintiffs' counsel's experience in litigating data breach and privacy class actions provided them with substantive knowledge to efficiently evaluate the strengths and weaknesses of the case, which led to a timely resolution. Van Note Decl. ¶¶ 11-15.

**4. The Risks of Establishing Liability and Damages at Trial**

The fourth, fifth, and sixth *Girsh* factors take into account the risks of establishing liability, establishing damages, and maintaining certification throughout the trial. These factors "balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of immediate settlement." *In re Krell v. Prudential Ins. Co. of Am. (In re Prudential)*, 148 F.3d 283, 319 (3d Cir. 1998). Here, as detailed above, Plaintiffs faced significant risks because their claims are relatively novel and have not been tested at trial. The Settlement removes all doubt and provides the Class with an excellent risk-adjusted recovery, including a non-reversionary $450,000 Settlement Fund. This Settlement provides a substantial benefit to the Settlement Class Members

that would otherwise be uncertain if this case proceeded to trial. Therefore, these factors support final approval of the Settlement.

**5. The Ability of Cleveland Brothers to Withstand a Greater Judgment**

Public sources indicated Cleveland Brothers annual revenue is $430 million.[1] As such, Defendant could have withstood a greater judgment. Nevertheless, the seventh *Girsh* factor is neutral because although "continuing the action to trial might result in a larger award for class members, . . . this possibility does not outweigh the risks of establishing liability, damages, and loss causation." *O'Hern v. Vida Longevity Fund, LP*, No. 21-402, 2023 U.S. Dist. LEXIS 76789, at *23 (D. Del. May 3, 2023). "[T]he neutrality of this factor does not weigh against final approval of the settlement where, as here, the other *Girsh* factors support a conclusion that the settlement is fair, reasonable, and adequate." *Id*.

**6. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and the Attendant Risks of Litigation**

The eighth and ninth *Girsh* factors assess the range of reasonableness of the Settlement fund in light of the best possible recovery and the attendant risks of litigation. As courts in this Circuit have noted, "in conducting the analysis, the court must guard against demanding too large a settlement based on its view of

[1] https://www.zippia.com/cleveland-brothers-equipment-careers-19360/revenue/

the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution." *Sullivan v. DB Investments, Inc*., 667 F.3d 273, 324 (3d Cir. 2011). "The proposed settlement amount does not have to be dollar-for-dollar the equivalent of the claim…. and a satisfactory settlement may only amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *In re Shop Vac Mktg. & Sales Practices Litig*., No. 4:12-MD-2380, 2016 U.S. Dist. LEXIS 69345, at *11 (M.D. Pa. May 26, 2016).

Here, the Settlement Agreement creates a $450,000 non-reversionary Settlement Fund. This non-reversionary structure is highly beneficial to the Settlement Class Members because all of the Class Funds not used for fees and expenses will be distributed among the claimants—rather than reverting to Defendant. Furthermore, the benefit conferred by the Settlement in this case is substantial and represents a better option than little or no recovery at all in this disputed and risky case. Settlement Class Members could claim recovery of up to $5,000 in Out-of-Pocket Losses, and pro rata Alternative Cash Payments. Moreover, the overall value of the Settlement is well within the range of data breach class action settlements approved across the country. Van Note Decl. ¶ 14.

### C. The Settlement Satisfies the *Prudential* Factors

The Third Circuit has also identified additional nonexclusive factors for

courts to consider in evaluating proposed class action settlements. *See In re Prudential*, 148 F.3d at 232-24. The *Prudential* factors often overlap with the *Girsh* factors, and those that do not overlap also support final approval here. *Prudential* "[f]actors two and three look at the outcomes of claims by other classes and other claimants." *Vista Healthplan, Inc. v. Cephalon, Inc*., 2020 U.S. Dist. LEXIS 69614, *67 (E.D. Pa. April 20, 2020). Here, there are no additional open cases or subclasses involving similar allegations, therefore all individual Settlement Class Members are being treated fairly under the same Settlement Agreement which supports final approval. The fourth *Prudential* factor is satisfied because Settlement Class Members were provided with robust notice and the opportunity to opt-out or file objections to the Settlement – and no Class Member has objected and only 20 elected to opt-out. The Settlement satisfies the fifth factor because Class Members were able to review Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards with sufficient time to object to those requests, and yet no objections were raised. Lastly, the procedure for processing claims under the Settlement is also fair and reasonable, with a 90-day claims period and claims evaluation by P&N. All of the applicable *Prudential* factors further support granting final approval of the Settlement.

## IV. CONCLUSION

For all of these reasons, Plaintiffs respectfully request the Court grant final approval of the class action settlement.

Dated: August 13, 2024

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that, on August 14, 2024, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify the foregoing document is being served today on all counsel of record in this case via transmission of Notice of Electronic Filing generated by CM/ECF and on counsel in the related cases to their respective emails per the below service list.

/s/Laura Grace Van Note
Laura Grace Van Note, Esq.