IN THE CIRCUIT COURT OF DAVIDSON COUNTY, TENNESSEE FOR THE TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

JOSIAH AREND, and BREANNA AREND, individually, and on behalf of all others similarly situated, *Plaintiffs*, v. NEWCOURSE COMMUNICATIONS, INC. -and- FIRST UNITED BANK AND TRUST CO. *Defendants*.	)	Case No. 23C303

PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Pursuant to Rule 23.05 of the Tennessee Rules of Civil Procedure, Plaintiffs, Josiah Arend and Breanna Arend, on behalf of themselves, individually, and on behalf of all others similarly situated, now respectfully move this Court on an unopposed basis for an Order: (1) conditionally certifying the Settlement Class, for purposes of the Settlement Agreement only, under Tenn. R. Civ. P. 23.02(3); (2) appointing Plaintiffs as representatives of the Class; (3) appointing J. Gerard Stranch, IV and Andrew Mize, of Stranch, Jennings & Garvey, PLLC, and Lynn A. Toops and Amina A. Thomas of Cohen & Malad, LLP as Settlement Class Counsel; (4) preliminarily approving the proposed Class Action Settlement with Defendant Newcourse Communications, Inc. ("Newcourse) and Defendant First United Bank and Trust Co. ("First United Bank") (collectively referred to as Defendants), the terms of which are set forth in the "Settlement Agreement", attached hereto as **Exhibit 1**; (5) approving the proposed form and method of Notice to the proposed Settlement Class; (6) directing that notice to the Class be disseminated by the Settlement Administrator, in the manner provided for in the Settlement Agreement; (7)

establishing a deadline for Class members to request exclusion from the Settlement Class or file objections to the Settlement; and (8) setting the proposed schedule for completion of further settlement proceedings, including scheduling the Final Approval Hearing.

BACKGROUND

A. Factual Background

This case relates to a data security incident on Newcourse's computer systems that occurred on or around April 27, 2022, to May 3, 2022, wherein cybercriminals were able to unauthorizedly access Newcourse's computer networks in an external system breach hacking attack. Newcourse's investigation of the incident determined that, through this attack, the cybercriminals accessed or acquired documents containing the personal information of certain individuals, including customers of First United Bank and/or other Newcourse clients (the "Data Breach" or "Breach").

Newcourse provides printing services to companies and financial institutions, including First United Bank, and sometimes receives personal identifying information ("PII") of First United Bank's customers and the customers of Newcourse's other clients in order to provide its services. Josiah Arend and Breanna Arend ("Proposed named Plaintiffs" or "Plaintiffs"), are two customers of First United Bank whose PII was in the custody of Newcourse and First United Bank and who received notice that their information may have been affected by the Data Breach. *See* Class Action Complaint ("CAC"), ¶¶ 3, 6. The Data Breach may have included information such as full names, addresses, loan account numbers, details included in 1098 mortgage statement, and Social Security numbers. *Id*. ¶ 47. By October 31, 2022, Newcourse sent out a letter to the individuals affected by the Data Breach, informing them of the timeline of the attack, as well as offering them twenty-four months of complimentary identify theft protection. *Id*. ¶ 56.

The Plaintiffs in this case allege that they have suffered from Defendants' omissions. After the Data Breach, Josiah Arend alleges that his Social Security number was fraudulently used by

cybercriminals to open an account with Chase Bank, and that he was the victim of identity theft with cybercriminals using his PII to pose as him. *Id*. ¶¶ 71–74. Plaintiffs are a married couple and have spent time changing emails and passwords, calling various institutions, and researching and obtaining identity protection and monitoring services. *Id*. ¶ 76. Given Plaintiffs are just two of the individuals affected by the Data Breach, they believe others have been similarly harmed.

B. **Class Action Lawsuit**

After learning of the Data Breach, Plaintiffs, Josiah Arend and Breanna Arend, on February 8, 2023, filed a Class Action Complaint against Newcourse and First United Bank in the Circuit Court of Davidson County, Tennessee – *Arend et al. v. Newcourse Communications, Inc. et al.*, Case No. 23C303. The Class Action Complaint asserted claims for 1) negligence; 2) negligence *per se*; 3) invasion of privacy – intrusion upon seclusion; 4) breach of implied contract; 5) third-party beneficiary; and 6) unjust enrichment.

C. Plaintiffs and Defendants Reach a Settlement

Plaintiffs and Defendants (collectively "Parties") reached their proposed settlement as a product of arms-length negotiations between the Parties. The extensive arm's length settlement negotiations included the exchange of informal discovery related to the merits of Plaintiffs' claims and class certification. Under the Settlement Agreement, Plaintiffs would represent themselves as well as all others similarly situated who meet the proposed class definition:

> All individuals whose Social Security numbers were compromised by the Data Breach and who were mailed notification of the Data Breach by or on behalf of Newcourse on or about October 31, 2022; and all individuals whose Social Security numbers were not compromised by the Data Breach but who were mailed notification of the Data Breach by or on behalf of Newcourse or First United Bank and who have asserted a claim against Newcourse and/or First United Bank on or before the date of this Agreement for alleged misuse of their personal information resulting in harm because of the Data Breach.

(the "Settlement Class") CAC ¶ 103; *see also*, Settlement Agreement ¶ 33. Defendants have denied

all liability and do not assume liability under the Settlement Agreement's terms. *See* Settlement Agreement at pg. 1.

SETTLEMENT TERMS

This proposed Settlement provides benefits which are calculated to address the harms alleged in this lawsuit, by providing the Settlement Class with identity theft protection. Notable terms of the Settlement Agreement are described *infra*.

A. The Class

Under the Settlement Agreement, Plaintiffs would represent themselves as well as all others similarly situated who meet the proposed class definition:

> All individuals whose Social Security numbers were compromised by the Data Breach and who were mailed notification of the Data Breach by or on behalf of Newcourse on or about October 31, 2022; and all individuals whose Social Security numbers were not compromised by the Data Breach but who were mailed notification of the Data Breach by or on behalf of Newcourse or First United Bank and who have asserted a claim against Newcourse and/or First United Bank on or before the date of this Agreement for alleged misuse of their personal information resulting in harm because of the Data Breach.

(the "Settlement Class") CAC ¶ 103; *see also*, Settlement Agreement ¶ 33. Excluded from the Settlement Class are the following groups of people:

> (a) any judge or magistrate presiding over this action and members of their families; (b) Defendants, Defendants' subsidiaries, parents, successors, predecessors, affiliated entities, and any entity in which Defendants or their parents have a controlling interest, and their current or former officers and directors; (c) persons who properly execute and file a timely request for exclusion from the Class; (d) persons whose claims in this matter have been finally adjudicated on the merits or otherwise released; (e) Plaintiffs' counsel and Defendants' counsel; and (f) the legal representatives, successors, and assigns of any such excluded person.

CAC ¶ 104. The Settlement Class is made up of 49,747 individuals, including Plaintiffs.

B. Settlement Benefits Provided by Settlement Agreement

a. Compensation for Attested Time, Out-of-Pocket Expenses, and Financial Losses

Persons who choose not to opt-out from the Settlement Agreement will be eligible for compensation for up to five (5) hours of Attested Time at the rate of $20 per hour (maximum total of $100 per person), if at least one full hour was spent remedying the Data Breach. *See* the Settlement Agreement, ¶ 39. Settlement Class Members will also receive up to a maximum total of $500 per person, upon submission of a Claim Form with an attestation and supporting documentation, for costs or expenditures actually incurred because of the Data Breach. *Id*. ¶ 39(a). Out-of-pocket expenses include bank fees, phone charges, professional fees including attorneys' fees and accountants' fees, and costs for additional credit reports, credit monitoring, or other identity theft insurance products. *Id*. ¶ 39(b). Individuals will also be compensated for financial losses, up to a maximum total of $4,000 per person for proven monetary losses from financial fraud or identity theft. *Id*. ¶ 39(c). The maximum claims payout obligation for Defendants is in the amount of $600,000 but which shall not include the costs associated with identity theft monitoring services, settlement administration expenses, service award payments, and the fee award and costs. *Id*. ¶ 19.

b. Identity Theft Monitoring Services

Persons who choose not to opt-out from the Settlement Agreement will also be eligible for identity theft monitoring services as a Class benefit. Under the terms of the Settlement Agreement, each eligible class participant will be offered the opportunity to enroll in identity theft monitoring services which shall consist of real time monitoring of the credit file at all three credit bureaus, $1 million of identity theft insurance, and access to fraud resolution agents to help investigate and resolve identity for a period of two years from the date of enrollment. *Id*. ¶ 43.

This relief represents a substantial prospective benefit for the Settlement Class. Plaintiffs allege that the Data Breach, as well as Defendants' alleged delay in notifying consumers, has created the potential for years-long, if not, lifelong credit, identity, and financial monitoring requirements for each member of the Settlement Class. This award will provide them with the ease of mind to protect themselves during the most turbulent period when their data has been freshly sold or traded on the Dark Web or through other illicit identity markets.

c. Prospective Relief

In addition to identity theft monitoring services, the Settlement Agreement requires Newcourse to make changes to their business practices. *See id*. ¶ 49. Newcourse has improved information security enhancements to date and will commit to additional information security enhancements in 2024 and 2025. *Id*. ¶ 49. "The enhancements include third-party security monitoring, third party logging, network monitoring, firewall enhancements, email enhancements and equipment upgrades." *Id*.

C. Release

In exchange for the above consideration, Class Members who do not timely and validly exclude themselves from the Settlement will be deemed to have released Defendants and additional released parties, defined as "Releasees" in the Settlement Agreement, from claims arising out of the Data Breach. *Id*. ¶ 65.

D. Settlement Administration

The Parties have chosen to use Kroll Settlement Administration, LLC ("Kroll"), as the settlement administrator for the Settlement Agreement. *See id*. ¶ 1.3. Costs associated with administration of the settlement will be covered by Newcourse on behalf of the Defendants. *See id*. ¶ 2.5.

E. Attorneys' Fees and Costs and Representative Service Awards

Under the terms of the Settlement Agreement, the Parties have agreed to cap fee requests at $250,000.00. *Id*. ¶ 70. Similarly, Plaintiffs will seek Service Awards for Plaintiffs of $2,500.00 each ($5,000 total), which award will be submitted to the Court for approval, but such award will not be tied to approval of the Settlement Agreement. *Id*. ¶ 68-69.

LEGAL ARGUMENT

A. LEGAL STANDARD

Tennessee courts have a long-standing policy in favor of settlement. *See in re High Pressure Laminate Antitrust Litig.*, No. M2005-01747-COA-R3-CV, 2006 WL 3681147, at *3 (Tenn. Ct. App. Dec. 13, 2006). "Tennessee Rule of Civil Procedure 23.05 does not specify the legal standard for trial court approval of a class action settlement," but the Court of Appeals has "directed trial courts to consider various factors, such as 'the risk and likely return to the class of continued litigation, the range of possible outcomes and probability of each, [and] whether class counsel's fees are proportional to the incremental benefits conferred on the class members.'" *In re Pacer Int'l., Inc.,* No. M2015-00356-COA-R3-CV, 2017 WL 2829856, at *5 (Tenn. Ct. App. June 30, 2017) (affirming approval of class action settlement) (quoting *Posey v. Dryvit Sys. Inc.*, No. E2004-02013-COA-R9-CV, 2005 WL 17426, at *2 (Tenn. Ct. App. Jan. 4, 2005)). Courts may also examine "whether settlement negotiations were at arm's length, the number of objectors, the objectors' access to information, and the experience of the parties' counsel." *Id*. (quoting *In re High Pressure Laminate Antitrust Litig.*, 2006 WL 3681147, at *4–5). Ultimately, the Court must "focus on the fairness of the proposed settlement." *Id*. (*Denver Area Meat Cutters & Emp'rs Pension Plan*, 209 S.W.3d 584, 591 (Tenn. Ct. App. 2006).

When evaluating a settlement for preliminary approval, the court should "determine not

whether the settlement represents the best outcome, but whether it falls within the 'range of reasonableness.'" *Id*. At the preliminary approval stage, the Court need not evaluate the ultimate fairness of the Settlement. Rather, the question for the Court to resolve is "simply whether the settlement is fair enough that it is worthwhile to expend the effort and costs associated with sending potential class members notice and processing opt-outs and objections." *Hillson v. Kelly Servs. Inc.*, No. 2:15-cv-10803, 2017 WL 279814, at *6 (E.D. Mich. Jan. 23, 2017). Accordingly, at the preliminary approval stage, "the bar to meet the 'fair, reasonable, and adequate' standard is lowered," and the Court need only determine whether the proposed settlement discloses "obvious deficiencies" and "whether it appears to fall within the range of possible approval." *In re Regions Morgan Keegan Secs.*, No. 08-cv-2260, 2015 WL 11145134, at *3 (W.D. Tenn. Nov. 30, 2015); *Johnson v. W2007 Grace Acquisition I, Inc.*, No. 13-2777, 2015 WL 12001268, at *4 (W.D. Tenn. Apr. 30, 2015). Class Counsel here has negotiated a settlement that Class Counsel, with their wealth of experience litigating and settling cases of this type, and the Class Representatives believe will make Class Members whole. *See* Stranch Decl. ¶¶ 14–15.

B. ARGUMENT

a. The Proposed Settlement Satisfies the Standard for Preliminary Approval

First, the terms of the Settlement are reasonable and well within the range of possible approval. Although Plaintiffs believe that the claims asserted in the Class Action are meritorious and the Class would ultimately prevail at trial, continued litigation against Defendants poses significant risks that would make any recovery for the Class uncertain.

As described above, Defendants have agreed to make a significant settlement offer to Plaintiffs of compensation for attesting time, out-of-pocket expenses, and financial losses, as well as two years of identity theft monitoring services with three credit bureaus with $1 million identity

theft protection, as well as prospective changes to their business data retention policies and safeguards to prevent such an egregious breach event from occurring again in the future. This offer provides substantial value to the Class in protecting the Settlement Class Members from the dangers attendant to this kind of data exfiltration event—offering nearly thrice the offer provided by Defendants in their October 2022 notice letter in addition to the fraud protection.

Arms-length negotiations conducted by competent counsel constitute *prima facie* evidence of fair settlements. *See e.g.*, *Roland v. Convergys Cust. Mgmt. Grp. Inc.*, No. 1:15-CV-00325, 2017 WL 977589, at *1 (S.D. Ohio Mar. 10, 2017) (noting that settlement was "reached after good faith, arms' length negotiations, warranting a presumption in favor of approval"); *Brotherton v. Cleveland*, 141 F. Supp. 2d 894, 906 (S.D. Ohio 2001) (absence of any evidence suggesting collusion or illegality "lends toward a determination that the agreed proposed settlement was fair, adequate and reasonable").

In this case, the Settlement was reached through arms' length negotiation between experienced counsel with extensive class action litigation experience and who have knowledge of the legal and factual issues of this case in particular. The parties vigorously negotiated all aspects of the Settlement, there is no evidence of collusion between the Parties. Courts routinely grant approval for settlements, like this one, where a court finds that they are the product of informed, non-collusive, arm's-length negotiations. *See in re Se. Milk Antitrust Litig.*, No. 2:08-MD-1000, 2011 WL 3878332, at *2 (E.D. Tenn. Aug. 31, 2011). The Parties' Counsel support the Settlement as fair and reasonable, and all certify that it was reached at arm's length. Stranch Decl. ¶¶ 11, 13.

For the purposes of this Settlement, Class Counsel and Class Representatives have adequately represented the Class. Plaintiffs have maintained contact with counsel, assisted in the investigation of the case, reviewed the Complaint, remained available for consultation throughout

the settlement negotiations, reviewed the Settlement Agreement, and answered counsel's relevant questions. *Id*. ¶¶ 14–15. For the purpose of this Settlement, Plaintiffs do not have any conflicts with the proposed class and have adequately represented Settlement Class Members in the litigation. *Id.* ¶ 15.

Proposed Class Counsel have extensive experience in class action litigation, particularly data breach cases. *See id*. ¶ 15, Ex. A–B. In negotiating the settlement, Class Counsel was thus well-positioned and able to benefit from years of experience and familiarity with the factual and legal bases for this case. Proposed Class Counsel carried out a thorough investigation of the claims, and settlement negotiations included a significant exchange of information, allowing both parties to evaluate the strengths and weaknesses of Plaintiffs' claims and Defendants' defenses. *See id*. ¶ 4. Accordingly, for purposes of this Settlement Plaintiffs and Proposed Class Counsel have adequately represented the Class, which weighs in favor of approval.

Finally, this Settlement is particularly favorable in light of the risks of continued litigation. *Id*. ¶ 13. Although Plaintiffs believe their claims have merit, they could face difficult substantive challenges if the Court were not to approve this settlement. Defendants would no doubt leverage numerous case dispositive motions, and if the Court or a jury were to side with Defendants, this could result in a final judgment against the Settlement Class. Further, continued litigation would leave Plaintiffs and the proposed Settlement Class at continued risk of further financial fraud by unscrupulous actors and would harm Plaintiffs and the proposed Settlement Class as they spend significant time and money attempting to mitigate and curtail the frauds on their own. Additionally, further litigation could result in the Plaintiffs and the proposed Settlement Class receiving no relief for their injuries. Even a judgment in favor of the Settlement Class could be reversed on appeal. *See West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743–44 (S.D.N.Y. 1970), *aff'd* 440

F.2d 1079 (2d Cir. 1971) ("In considering the proposed compromise, it seems also to be of importance that (if approved) the substantial amounts of money are available for class members now, and not at some distant time in the future . . . .It has been held proper to take the bird in the hand instead of a prospective flock in the bush.").

Class Counsel therefore believes that the Settlement reached here appropriately balances the significant risk and uncertainty of litigation with the recovery of benefits for the Settlement Class. *See Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) (quoting *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 425 (1968)) (stating that determining whether a proposed settlement is fair, reasonable and adequate necessarily requires a judgment and evaluation by the attorneys for the parties based upon a comparison of "the terms of the compromise with the likely rewards of litigation"). Courts have recognized that the opinion of experienced counsel supporting the settlement is entitled to considerable weight. *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 175 (5th Cir. 1983).

In sum, the Settlement provides identity theft protection for the most critical years following Defendants' Data Breach without the need for lengthy and costly litigation. The Settlement is well within the range of possible approval and should be preliminarily approved.

b. Certification of the Settlement Class is Appropriate

The U.S. Supreme Court has recognized that the benefits of a proposed settlement class action can be realized only through the certification of a settlement class. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997). Here, Plaintiffs apply for certification of this case as a class action pursuant to Tenn. R. Civ. P. 23.01 and 23.02(3), on behalf of a class consisting of:

> All individuals whose Social Security numbers were compromised by the Data Breach and who were mailed notification of the Data Breach by or on behalf of Newcourse on or about October 31, 2022; and all individuals whose Social Security numbers were not compromised by the Data Breach but who were mailed

> notification of the Data Breach by or on behalf of Newcourse or First United Bank and who have asserted a claim against Newcourse and/or First United Bank on or before the date of this Agreement for alleged misuse of their personal information resulting in harm because of the Data Breach.

Plaintiffs further apply to the Court to certify Plaintiffs as the Class Representatives and to appoint: J. Gerard Stranch, IV and Andrew Mize of Stranch, Jennings & Garvey, PLLC, and Lynn A. Toops and Amina A. Thomas of Cohen & Malad, LLP as Class Counsel. In determining whether to certify the class here, the Court must determine that Plaintiffs satisfy the four requirements of Rule 23.01 and that the Class satisfies Rule 23.02(3).

i. The Proposed Class Meets the Standards Required Under Tenn. R. Civ. P. 23.01

Under Rule 23.01, a litigant seeking to represent a class must show:

(1) The class is so numerous that joinder of all members is impracticable;

(2) There are questions of law or fact common to the class;

(3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) The representative parties will fairly and adequately protect the interest of the class.

Meighan v. U.S. Sprint Comms. Co., 924 S.W.2d 632, 635, n.1 (Tenn. 1996) (quoting Tenn. R. Civ. P. Rule 23.01). As further explained below, all prerequisites have been met for the purposes of this Settlement.

1. Numerosity

The facts of the case guide a Court's determination that the class is sufficiently large to make joinder impractical. *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 570 (6th Cir. 2004). "There is no specific number below which class action relief is automatically precluded. Impracticability of joinder is not determined according to a strict numerical test but upon the

circumstances surrounding the case." *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 523 n.24 (6th Cir. 1976); *see also In re Am. Med. Sys. Inc.*, 75 F.3d 1069, 1076 (6th Cir. 1996) ("[T]he Sixth Circuit has previously held that a class of 35 was sufficient to meet the numerosity requirement." (internal quotation marks omitted)). "Generally, the numerosity requirement is fulfilled when the number of class members exceeds forty." *Isabel v. Velsicol Chem. Corp.*, No. 04-2297 DV, 2006 WL 1745053, at *4 (W.D. Tenn. June 20, 2006). Here, for purposes of Settlement, the class size is 49,747 total individuals, well above the minimum threshold followed by most courts.

2. Typicality & Commonality

Under Rule 23.01, commonality exists where "there are questions of law or fact common to the class"; typicality is shown where "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Tenn. R. Civ. P. 23.01. These requirements—commonality and typicality—"tend to merge [because] both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiffs' claims and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349, n.5 (2011) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147m 157–58 n.13 (1982)). The Supreme Court has stated that Rule 23(a)(2)'s commonality requirement is satisfied where the plaintiffs assert claims that "depend upon a common contention" that is "of such a nature that it is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350. Both the majority and dissenting opinions in that case agreed that "for purposes of 23(a)(2) even a single common question will do." *Id.* (internal quotation marks and citations omitted). As the Tennessee Court of Appeals explained in *Freeman v. Blue Ridge*

Papers Prods., Inc., 229 S.W.3d 694, 703–04 (Tenn. Ct. App. 2007), when a class representative's claims address the "same course of conduct" and raise the same legal issue, typicality has been shown.

Here, for purposes of this Settlement, Plaintiffs' claims are borne from the same course of conduct—the Data Breach and its fallout. Additionally, Plaintiffs share legal theories like the sufficiency of Newcourse's cybersecurity program, the reasonableness of Newcourse's alleged delay in noticing victims, and the foreseeability of the kind of identity and financial fraud as a result of Newcourse's lax cybersecurity protocols. Determination of even one of those theories revolves around evidence that does not vary from class member to class member, and can, thus, be fairly resolved for all Settlement Class Members. The nature of this case obviates the need to distinguish individual class members—each class member's PII was stored by Newcourse or First United; each class member's PII was potentially stolen in the same Data Breach; and each class member is at-risk of the same type of outcome: identity theft and financial fraud by unscrupulous actors through the purchase and use of their exfiltrated PII on the digital black market. Damages arise out of the same negligence and, thus, the disposition of Plaintiffs' claims will "resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350. For these reasons, the commonality and typicality requirements are plainly met for this Settlement.

3. **Adequacy of Representation**

Adequacy is determined according to two criteria: "1) the representative must have common interests with unnamed members of the class, and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 543 (6th Cir. 2012). Both criteria are satisfied here. For purposes of this Settlement, Plaintiffs have no conflicts with the Settlement Class and

have participated actively in this case. Stranch Decl. ¶ 14. Moreover, proposed Class Counsel are well qualified to represent the Settlement Class, as they possess significant experience leading the prosecution of complex class action matters. The firm resumes of Proposed Counsel: J. Gerard Stranch, IV and Andrew Mize of Stranch, Jennings & Garvey, PLLC, and Lynn A. Toops and Amina A. Thomas of Cohen & Malad, LLP detailing their experience and qualifications are attached to the supporting declaration of J. Gerard Stranch, IV, as Exhibits A & B.

C. The Proposed Settlement Class Meets the Requirements of Rule 23.02(3) Because All Material Questions of Law and Fact Arising in This Litigation Affect Each Settlement Class Member in the Same Manner.

If, as in this case, the four prerequisites for Rule 23.01 are satisfied, then the Class is certified if the case falls into any one of the three categories detailed in Rule 23.02. Here, the proposed Settlement Class meets the requirements of Rule 23.02(3). The Tennessee Supreme court has succinctly summarized this basis for resolving litigation on a class-wide basis:

> The third situation in which class actions may be maintained are those situations in which questions of law or fact predominate over individual issues making a class action the superior method for a fair resolution of the controversy. Tenn. R. Civ. P. 23.02(3). This provision is the most general, arguably encompasses all class actions, and is based on principles of judicial economy.

Meighan, 924 S.W.2d at 636. Certification for a settlement class is appropriate under Rule 23.02(3) because it governs "those situations in which [common] questions of law or fact predominate over individual issues." *Id*. As detailed above, the core issues of this Settlement are common to each and every putative class member. A class action is the superior method of resolving the present claims for all parties as Class Members need not bring individual actions to obtain relief and Defendants can resolve all related claims through the Settlement as outlined in the Settlement Agreement. Accordingly, Rule 23.02(3) is satisfied here.

D. The Court Should Approve the Proposed Form and Method of Notice of the Settlement to Settlement Class Members

Under Rule 23.05, notice of a proposed settlement must be sent to all class members in a manner directed by the trial court. Due process also gives unnamed members of a class the right to notice of a class action settlement. To comport with due process, notice must be "reasonably calculated to reach interested parties." *Fidel v. Farley*, 534 F.3d 508, 514 (6th Cir. 2008). Due process does not require actual notice to each party to be bound by the adjudication of the class action. *Id*. Rather, the inquiry is into the substance of the notice itself, which must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Does 1–2 Déjà vu Servs., Inc.*, 925 F.3d 886, 900 (6th Cir. 2019). "All that the notice must do is 'fairly apprise [the] prospective members of the class of the proposed settlement' so that class members may come to their own conclusions about whether the settlement serves their interests." *Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 423 (6th Cir. 2012) (quoting *Int'l Union, UAW v. Gen. Motors Corp.*, 497 F.3d 615, 630 (6th Cir. 2007).

The Notice Plan set forth in the Agreement provides the best notice practicable under the circumstances. The Parties will enlist the experienced Settlement Administrator, Kroll Settlement Administration, LLC, who will ensure that the Notice is disseminated in a way that is reasonably calculated to reach Settlement Class Members. The Notice will be disseminated to all persons who fall within the definition of the Class and whose names and addresses can be identified with reasonable effort from Newcourse's records, and through databases tracking nationwide addresses and address changes. In addition, the Settlement Administrator will administer a Settlement Website containing important and up-to-date information about the settlement and contact information for the Settlement Administrator and counsel that Class Members can call to receive

additional information.

E. The Court Should Approve the Deadlines for Class Members to Object or Opt Out of the Settlement, and Set a Final Approval Hearing

As part of the Settlement, Settlement Class Members have the right to (a) do nothing and receive the benefits of the Settlement in exchange for a release of their claims, if the Settlement receives final approval; (b) exclude themselves from the Settlement if they do not wish to obtain the benefits of the Settlement or release their claims; or (c) remain part of the Settlement Class but object to the Settlement. Settlement Agreement ¶¶ 52–53. Settlement Class Members have forty-five (45) days from the date that notice is sent to them to decide among these options. *Id*. This is a reasonable amount of time for Settlement Class Members to make an informed decision, while also not unduly delaying consideration of final approval for Settlement Class Members who wish to timely receive the benefits for the Settlement. Therefore, the Court should approve this as the opt-out and objection deadline.

A Final Approval Hearing will be held after notice has been given to the Settlement Class and Settlement Class Members have had an opportunity to opt-out of or object to the Settlement. The notice to Settlement Class Members will include the date of the Final Approval Hearing, and Class Counsel and counsel for Defendants will appear at that to further explain why the Settlement should be granted final approval. Settlement Class Members who timely and properly object to the Settlement will have the opportunity to appear at this hearing to have their objections heard. The Class Representatives request that the Court set a final approval hearing at least 120 days after the Preliminary Approval Order is entered, as the Court's calendar permits.

CONCLUSION

For all the reasons stated above, Class Counsel respectfully asks this Court to enter an Order: (1) certifying the Class for purposes of settlement; (2) appointing Plaintiffs as

representatives of the Class; (3) appointing J. Gerard Stranch, IV and Andrew Mize, of Stranch, Jennings & Garvey, PLLC, and Lynn A. Toops and Amina A. Thomas of Cohen & Malad, LLP as Settlement Class Counsel; (4) granting preliminary approval of the proposed Settlement; (5) approving the proposed form and manner of notice to the class; (6) directing that the notice to the Class be disseminated by the Settlement Administrator, in the manner described in the Settlement Agreement; (7) establishing a deadline for Class members to request exclusion from the Settlement Class or file objections to the Settlement; and (8) setting the proposed schedule for completion of further settlement proceedings, including scheduling the Final Approval Hearing.

Dated: April 17, 2024

Respectfully submitted,

/s/ J. Gerard Stranch, IV

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of April, 2024 a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system and/or U.S. Mail to:

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