

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

IN RE: U.S. OFFICE OF PERSONNEL
MANAGEMENT DATA SECURITY
BREACH LITIGATION

This Document Relates To:
ALL CASES

Misc. Action No. 15-1394 (ABJ)
MDL Docket No. 2664

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

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INTRODUCTION

Plaintiffs respectfully request the Court grant final approval of their settlement with Defendants U.S. Office of Personnel Management and Peraton Risk Decision Inc. benefitting those who suffered pecuniary harm from the OPM data breaches. Since the Court granted preliminary approval on June 16th, the Claims Administrator has carried out the notice program, causing emails to be sent to more than 3 million victims of the breach, and implementing the publication notice campaign that will continue for several weeks. AFGE has sent notice to its membership as well. There have been 8,482 claims to date. Additionally, as of this filing, the Claims Administrator has received one objection and 32 opt-out requests. *See* Declaration of Cameron Azari (“Azari Decl.”), ¶¶ 46-47. Plaintiffs will update the Court on the number of opt-outs and respond to all objections in their reply brief due September 23rd.

Because the settlement disposes of this litigation in a fair and adequate manner, the Court should grant final approval, allowing the claim process to conclude. The settlement was reached after hard-fought litigation that gave the parties a sound understanding of the facts and the strengths and weaknesses of the case. A product of lengthy negotiations assisted by two experienced judges, the settlement will compensate breach victims who suffered economic loss from the data breaches. The parties agree these individuals are eligible to pursue claims under the Privacy Act. The parties’ compromise, forged over time, is fair to all concerned: those without actual damages will not be releasing their claims, and all breach victims remain eligible for the Government’s offer of free identity protection services, reiterated in the notice. The current number of claims—closing in on ten thousand—suggests that while thousands of class members will participate, the fund should be adequate to pay all claims in full. Moreover, while settlements often provide only a small fraction of the potential recovery, the \$700 recoveries here represent 70% of available statutory damages and

class members may also recover their actual damages up to \$10,000. The terms of the settlement also fairly balance Plaintiffs' interest in facilitating claims with the parties' common concern that the settlement fund be protected from meritless or fraudulent claims. The settlement is particularly favorable considering the risks of continued litigation: Plaintiffs would have faced class certification issues and likely state secrets confidentiality barriers to evidence of OPM's data security practices and protocols, as well as risks related to the Privacy Act's actual-damage limitation, and questions of causation. Class Counsel have also applied for attorneys' fees and reimbursement of litigation expenses, but these will be paid separately by OPM and will not reduce the class recovery.

For the reasons stated further below, the Court should grant final approval of the settlement.

FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiffs' Allegations and Case Background

In the summer of 2015, OPM announced that its electronic systems had been breached and hackers had taken the personal information of over 21 million current, former, and prospective federal employees and members of their families. Am. Compl., Dkt. # 189, ¶¶ 1-2, 123-26. The hackers obtained sensitive information such as birthdates, Social Security numbers, fingerprints, personal histories, and even psychological and emotional health information. *Id.* ¶¶ 52, 129. At the time of the Data Breaches, OPM contracted with Peraton (then known as KeyPoint) to perform investigative work for federal background and security clearance checks. *Id.* ¶¶ 60-61; OPM Answer, Dkt. # 154, ¶ 76. OPM's and Peraton's systems were electronically linked. On November 1, 2013, hackers infiltrated OPM's network and stole documents showing how its systems were structured. Am. Compl. ¶¶ 61, 110. The next month, hackers used the stolen information to breach Peraton's systems—it remains unknown if any of the Plaintiffs' information was taken in this breach. *Id.* ¶ 99. Hackers then used Peraton log-in credentials to infiltrate OPM's electronic network. *Id.* ¶¶ 4, 6, 112. These intrusions affected approximately 22 million people. *Id.* ¶ 141.

In September 2015, OPM made identity theft protection and credit monitoring and restoration services available to the breach victims at a cost of \$154 million. *Id.* ¶¶ 134-35. Congress extended these services through September 2026. *Id.* ¶ 136. As of March 31, 2022, 3,222,987 people had signed up for the free identity protection services. *See* Declaration of Daniel C. Girard (“Girard Decl.”), ¶ 6; Declaration of Marcus J. Glasgow (“Glasgow Decl.”), Dkt. # 188-10, ¶ 16.

After OPM announced the data breaches in June 2015, a number of class actions were filed against OPM and Peraton. On October 9, 2015, the Judicial Panel for Multidistrict Litigation ordered the centralization of these related cases in this Court. Girard Decl. ¶ 7. On January 18, 2016, the Court appointed interim lead and liaison counsel together with a Plaintiffs’ steering committee. Dkt. # 58. Plaintiffs filed their consolidated amended complaint on March 14, 2016. Dkt. # 63.

B. The Court’s Ruling on the Motions to Dismiss and Appeal

On May 13, 2016, Defendants separately moved to dismiss Plaintiffs’ claims. Dkt. # 70, 72. The Court heard argument on those motions on October 31 and November 10, 2016. Dkt. # 98, 104. On September 19, 2017, the Court dismissed Plaintiffs’ claims for lack of Article III standing and failure to state a claim under the Privacy Act, the Administrative Procedure Act, and the Little Tucker Act, and also dismissed Plaintiffs’ claims against Peraton as barred by derivative sovereign immunity. *In re U.S. Office of Pers. Mgmt. Data Sec. Breach Litig.*, 266 F. Supp. 3d 1 (D.D.C. 2017). Plaintiffs appealed, and the D.C. Circuit reversed in part in a *per curiam* decision issued June 21, 2019. *In re U.S. Office of Pers. Mgmt. Data Sec. Breach Litig.*, 928 F.3d 42 (D.C. Cir. 2019).

C. Parties’ Mediation and Negotiations

After remand, on January 27, 2020, the Court referred the parties to private mediation with retired federal District Judge Lawrence F. Stengel. Girard Decl. ¶ 13. The parties held separate conference calls and video sessions with Judge Stengel in 2020 to discuss their positions and exchanged relevant information under his supervision. *Id.* After the referral to Judge Stengel expired,

the parties continued negotiating and the Court approved extensions of time for these discussions to proceed. *Id.* ¶ 15. Progress was slow, and at several points the parties reached what seemed to be insurmountable impasses, but they continued talking and eventually jointly requested a referral to Judge Bates, to whom this Court referred the negotiations on July 30, 2021. *Id.* The parties ultimately agreed that the settlement class would be limited to individuals who incurred specific forms of pecuniary loss resulting from the Data Breaches, and that claimants would receive minimum payments of \$700. *Id.* ¶ 16.

D. The Settlement

1. The Settlement Class and Settlement Release

On May 5, 2022, the parties signed the Settlement Agreement (“SA”).¹ The Settlement is made on behalf of:

All U.S. citizens and permanent residents whose personal information was compromised as a result of the breaches of the U.S. Office of Personnel Management’s electronic information systems in 2014 and 2015 or the breach of Peraton’s electronic information systems in 2013 and 2014, and who, after May 7, 2014, suffered out-of-pocket expense or loss of compensable time: (1) to purchase a credit monitoring product, credit or identity theft protection product, or other product or service designed to identify or remediate the data breaches at issue in this case; (2) to access, freeze or unfreeze a credit report with a credit reporting agency; or (3) as a result of an identity theft incident or to mitigate an identity theft incident.

SA § II.B.2. The settlement Class is limited to individuals who incurred actual damages because only those individuals have a claim against OPM under the Privacy Act of 1974, 5 U.S.C. § 552a, the only available avenue of relief against OPM on remand. Class members will release all claims that were or could have been asserted in the case. SA § IV.B.1. Those who did not suffer economic loss from the Data Breaches are not members of the settlement Class and will not release any claims.

¹ Unless otherwise noted, all capitalized terms have the meaning ascribed to them in the Settlement Agreement.

2. The Settlement Consideration

Under the Settlement, Defendants will pay a total of \$63,000,000 into the settlement fund: OPM will pay \$60,000,000 and Peraton will pay \$3,000,000. SA §§ III.A, III.B. OPM also agreed to pay the costs of settlement notice and claims administration, and attorneys' fees and expenses as awarded by the Court, but these will be paid separately from the settlement fund. Peraton will not be responsible for any attorneys' fees or expenses (SA §§ II.B.12, V.A, VI.A), but any service payments awarded by the Court will be paid out of Peraton's contribution to the fund (SA § VI.B).

The minimum payment for valid claims under the Settlement will be \$700, but a Class member with a documented loss exceeding \$700 will be paid according to the proof submitted, up to \$10,000. SA § V.C.7. The Settlement compensates Class members for their unreimbursed monetary expenses and lost compensable time between May 7, 2014 through January 31, 2022. SA §§ II.B.20, V.C.4.a. The categories of compensable harm cover the forms of "actual damage" caused by the Data Breaches: costs, expenses, losses, or charges incurred as a result of identity theft or identity fraud; costs of placing or removing a credit freeze on a Class member's credit file with any credit reporting agency; credit or identity theft protection costs; and the costs of other products or services designed to identify identity theft or remediate the effects of the Data Breaches. SA § V.C.4.c. Lost time will also be compensable if it resulted in quantifiable harm, such as taking time off from hourly work or using paid time off from salaried work, and if the lost time constitutes reasonable time spent in connection with purchasing credit monitoring or identity theft protection services, freezing or unfreezing a credit report with a credit reporting agency, or responding to an identity theft incident. *Id.*

3. Notice and Administration

The Court's Preliminary Approval Order appointed Epiq Class Action & Claims Solutions, Inc. ("EPIQ") as the Claims Administrator and approved the Notice Plan. Dkt. # 193 at 6. The Notice

Plan lays out a multistep program for notifying Class members of the Settlement and their rights. The Notice provides all information required by Rule 23(c)(2)(B) and directs potential Class members to the dedicated Settlement Website, where they can make a claim and learn more about the Settlement and their options. *See* www.opmdatabreach.com.

After preliminary approval, the Claims Administrator caused the email and U.S. mail notices to be sent and implemented the publication campaign, which will run for several weeks. Azari Decl. ¶¶ 9-42. Between the 2,761,698 emails sent by IDX (the company providing credit monitoring to breach victims) and the 921,264 emails sent by EPIQ to AFGE union members, well over 3.6 million emails have been sent to potential Class members notifying them of the Settlement. *Id.* ¶¶ 9-14. Postcard notices also have been and will continue to be sent. *Id.* ¶¶ 15-18. With respect to the digital advertising campaign, the banner notices will generate more than 734 million impressions, and the sponsored search listings will continue through the December 23rd claim-filing deadline. *Id.* ¶¶ 27, 30. As of July 19th, the Settlement Website has experienced 172,713 unique visits and there have been 1,243 calls to the toll-free number, with live operators handling 385 incoming calls and 113 outbound calls. *Id.* ¶¶ 42, 44. The Claims Administrator has received 32 opt-out requests, one objection, and 8,482 claims. *Id.* ¶¶ 46-47.

ARGUMENT

As recognized in the Preliminary Approval Order, the Settlement “confers substantial benefits upon the Class” and “is the product of non-collusive arm’s-length negotiations,” and is “fair, reasonable, and adequate, and in the best interest of Named Plaintiffs and Class Members[.]” Dkt. # 193 at 5. The Court further concluded that it would likely be able to certify the settlement Class under Federal Rules of Civil Procedure 23(a) and (b)(3). *Id.* at 3. Nothing has occurred since then that would change the Court’s preliminary conclusions regarding the Settlement. *See Stephens*

v. Farmers Rest. Grp., No. CV 17-1087 (TJK), 2019 WL 2550674, at *3 (D.D.C. June 20, 2019) (“ . . . no reason to depart from the conclusion here”).

The Settlement provides substantial relief beyond the Government-funded free identity protection services, and is adequate in all respects. A result of protracted negotiations, the Settlement provides minimum cash payments of \$700 for Class members’ compensable lost time and the out-of-pocket losses they are most likely to have incurred on account of the Data Breaches: the costs of credit monitoring or identity theft protection services, or of freezing or unfreezing a credit report, or costs incurred as a result of taking any other self-protective or identity-theft mitigating action as a result of the Data Breaches (however small the expense). The Settlement thus appropriately limits recovery to claims recognized under the Privacy Act. Claims will be paid upon a showing of economic loss from the Data Breaches sustained at any time over nearly eight years.

As noted above, since the Court granted preliminary approval, notice has been given to Class members via email to millions of breach victims, supplemented by union efforts and a targeted publication campaign. Azari Decl. ¶¶ 9-42. Lead Counsel have also directly advised dozens of claimants on how they can make a claim. Girard Decl. ¶ 19.

I. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE.

“Federal Rule of Civil Procedure 23(e)(2) directs that the Court may approve a proposed class action settlement ‘only after a hearing’ and ‘only on finding that it is fair, reasonable, and adequate[.]’” *Banks v. Booth*, No. 1:20-CV-849 (CKK), 2022 WL 1091212, at *2 (D.D.C. Apr. 12, 2022); see *Kinard v. E. Capitol Fam. Rental, L.P.*, 331 F.R.D. 206, 212 (D.D.C. 2019) (discussing standard for final approval). “Whether to approve a proposed settlement agreement is ultimately within the discretion of the reviewing court” and the court’s consideration should be “constrained by the ‘principle of preference’ favoring and encouraging settlement in appropriate cases.” *Stephens*,

2019 WL 2550674, at *3 (quoting *In re Vitamins Antitrust Litig.*, 305 F. Supp. 2d 100, 103 (D.D.C. 2004)); see *In re Domestic Airline Travel Antitrust Litig.*, 378 F. Supp. 3d 10, 16 (D.D.C. 2019) (noting the strong public policy in favor of settlement). “In this Circuit, there is no single test for evaluating a proposed settlement under Rule 23(e)” but courts generally “examine[] the following factors: (a) whether the settlement is the result of arms-length negotiations; (b) the terms of the settlement in relation to the strength of plaintiffs' case; (c) the stage of the litigation proceedings at the time of settlement; (d) the reaction of the class; and (e) the opinion of experienced counsel.” *Greenberg v. Colvin*, No. 13-1837 (RMC), 2015 WL 4078042, at *3 (D.D.C. July 1, 2015) (citation omitted) (alterations in original). The Settlement satisfies all requirements of Rule 23(e).

A. The Settlement Is the Product of Informed Negotiations.

A presumption of “fairness, adequacy, and reasonableness” applies when a settlement follows arm’s length negotiations between experienced counsel who are fully informed of the merits of the claims and defenses in the case. *Kinard*, 331 F.R.D. at 215 (citations omitted). The Settlement here is the result of lengthy efforts by experienced counsel after more than two years of negotiations assisted at times by two veteran federal judges. Girard Decl. ¶¶ 13-17; see *Little v. Wash. Metro. Area Transit Auth.*, 313 F. Supp. 3d 27, 36 (D.D.C. 2018) (“The parties provided a detailed description of the settlement negotiations, which took place over a two-year period and included multiple days of discussions with an experienced, neutral mediator.”); *Howard v. Liquidity Servs. Inc.*, No. CV 14-1183 (BAH), 2018 WL 4853898, at *4 (D.D.C. Oct. 5, 2018) (“The sophistication and experience of counsel support the arm’s-length nature of the negotiations in this case, and the length and nature of the settlement negotiations further support this conclusion.”); see also Fed. R. Civ. P. 23(e)(2) advisory committee’s note (2018) (stating that “involvement of a neutral” in negotiations “may bear on whether they were conducted in a manner that would protect and further the class interests.”).

Plaintiffs, the Government, and Peraton reached the Settlement only after being fully informed of the strengths and weaknesses of the claims and defenses in this case through analysis of the 231-page Congressional report and of information exchanges conducted under the mediator's supervision. Girard Decl. ¶ 13. The negotiations addressed the complex nature of the issues implicated by this case, such as the Government's partial immunity under the Privacy Act. *Id.* ¶¶ 14-16. Class Counsel had sufficient information to assess the risks of litigation and the probability of success and the potential range of recovery. The resulting Settlement is, therefore, reasonable. *See Hubbard v. Donahoe*, 958 F. Supp. 2d 116, 121 (D.D.C. 2013); *see, e.g., Kinard*, 331 F.R.D. at 216 (“Both parties represent that they have now exchanged sufficient information to accurately assess the relative strengths of their claims and defenses, and the risks of continuing the litigation.”).

B. The Payments to Class Members Under the Settlement Are Adequate Given the Risks of Litigation.

The “most important factor in evaluating a proposed class settlement” is consideration of its terms in relation to the strength and weakness of the plaintiffs’ case. *Ceccon*, 2016 WL 5107202, at *9; *Rogers v. Lumina Solar, Inc.*, No. 18-CV-2128 (KBJ), 2020 WL 3402360, at *9 (D.D.C. June 19, 2020). Only a handful of data breach class actions have been certified for trial, and Plaintiffs confronted risks associated with proving liability and damages at trial and in any post-trial appeal. This Court recognized the obstacles Plaintiffs would need to overcome in order to gain any recovery, noting that this case “is different in marked ways from the kinds of cases” involving more common data breaches. Indeed, even if Plaintiffs could prevail on the question of Article III standing, that still would not “necessarily mean a monetary injury at the end of the day.” Dkt. # 57, 1/28/2016 Hr’g Tr. at 29:11-17. Significant hurdles are raised by the Privacy Act’s requirement of establishing “willful or intentional conduct” and by OPM’s defenses, including its possible assertion of state secrets privilege. Prevailing against Peraton would have required overcoming its contractor preemption

defense, the economic loss rule, and difficulties with showing causation given the circumstances. Dkts. # 70, 148. Although a settlement may be reasonable even if it provides a small fraction of total damages, the \$63 million fund provides a minimum payment of 70% of available statutory damages for valid claims, as well as payment of claimants' actual damages up to \$10,000. *See Rogers*, 2020 WL 3402360, at *9 (approving settlement even though it provided only a small percentage of possible damages); *Howard*, 2018 WL 4853898, at *5 (granting final approval of settlement providing "approximately 4 percent to 14 percent of potentially recoverable damages"). Additionally, while the claims period is ongoing, all indications based on the early claims data are that the fund will be adequate to compensate all claimants in the agreed amounts. Girard Decl. ¶ 29.

Comparing the risks with the rewards thus weighs in favor of the settlement. *See Ceccone*, 2016 WL 5107202, at *10 (granting final approval of settlement and noting that class members were eligible to receive \$717.60, which was at the high end of statutory damages).

C. The Plan of Allocation Is Fair, Reasonable, and Adequate.

The Settlement treats all Class members equitably relative to each other under Federal Rule of Civil Procedure 23(e)(2)(D). "As with settlement agreements, courts consider whether distribution plans are fair, reasonable, and adequate"—such a plan need not be "perfect." *In re Fed. Nat'l Mortg. Ass'n Sec., Deriv., & "ERISA" Litig.*, 4 F. Supp. 3d 94, 107 (D.D.C. 2013) (citations omitted). A plan for distributing a settlement fund is "sufficient," as here, if "there is 'a rough correlation' between the settlement distribution and the relative amounts of damages recoverable by Class Members." *Howard*, 2018 WL 4853898, at *7 (citations and alteration omitted).

Under the plan of allocation, only individuals with standing against OPM can make a claim. *See FAA v. Cooper*, 566 U.S. 284, 296 (2012) (requiring a pecuniary loss for recovery under Privacy Act); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021) (only class members with standing may recover). The Settlement's payment provisions balance the need for a straightforward

claim process that uses understandable, objective criteria with the obligation to protect the fund from meritless claims. SA § V. Valid claims for economic loss will be paid at \$700, but claimants whose documented damages are greater will receive the actual amount (up to \$10,000). SA § V.C.7. In the event the total claims exceed the available settlement funds, they will be reduced *pro rata* with no Class member obtaining any greater relative benefit over another. SA § V.C.8. This allocation structure “correlat[es]” with the Privacy Act’s damage provision, 5 U.S.C. § 552a(g)(4)(A), and accordingly is fair, reasonable, and adequate. *Howard*, 2018 WL 4853898, at *7.

D. Plaintiffs and Class Counsel Support the Settlement.

The “reaction of the class” and the “opinion of experienced counsel” should also factor into the Court’s determination of the Settlement’s reasonableness. *In re Vitamins Antitrust Litig.*, 305 F. Supp. 2d at 105. All Plaintiffs support the Settlement. *See Howard*, 2018 WL 4853898, at *6 (noting that all the class representatives fully supported the settlement). EPIQ carried out the Notice Plan and, as of July 19th, has received only one objection. Azari Decl. ¶ 46; Dkt. # 195. Class members have until September 9th to opt out or object. Dkt. # 193 at 2. Class Counsel will respond to objections and update the Court on the number of opt-outs and objections in their reply due September 23rd. *Id.* at 3.

Further, it is “well established that the opinion of experienced counsel should be afforded substantial consideration by a court in evaluating the reasonableness of a proposed settlement.” *Alvarez v. Keystone Plus Constr. Corp.*, 303 F.R.D. 152, 164 (D.D.C. 2014) (citation omitted). Because Class Counsel—who are experienced in data breach and other complex litigation—support the Settlement, “this factor also weighs in favor of approval.” *Id.* at 165.

For these reasons, the Settlement satisfies Rule 23(e) and should be granted final approval.

II. THE SETTLEMENT CLASS MEETS THE REQUIREMENTS OF RULE 23.

The requirements of Rule 23(a) and Rule 23(b)(3) are satisfied for settlement purposes.

A. Rule 23(a) Is Met.

1. The Class members are sufficiently numerous.

The numerosity requirement under Rule 23(a)(1) is met because the Data Breaches exposed the personal information of approximately 22 million individuals (Glasgow Decl. ¶ 9), raising an inference that there are at least thousands of Class members. *See Hoyte v. District of Columbia*, 325 F.R.D. 485, 490 (D.D.C. 2017); *Ceccone*, 2016 WL 5107202, at *4 (finding “little doubt that the joinder of so many members would be impracticable, and that the interests of judicial economy would best be served by allowing these thousands of consumers to receive relief via a single action”).

2. The commonality requirement is satisfied.

Commonality requires a “common contention . . . capable of classwide 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.” *Brown v. District of Columbia*, 928 F.3d 1070, 1080 (D.C. Cir. 2019) (citation omitted); *see In re District of Columbia*, 792 F.3d 96, 100 (D.C. Cir. 2015) (a single common question may suffice). In this case, the commonality requirement of Rule 23(a)(2) is met because questions common to all Class members, such as whether OPM violated the Privacy Act’s safeguards provision, and whether Peraton committed actionable state-law violations, rest at the heart of Plaintiffs’ claims and a class-wide proceeding can generate common answers. *See Ceccone*, 2016 WL 5107202, at *5 (commonality met because “[t]he class members’ possible avenues of recovery all arise from the basic questions of fact . . . and law”).

3. Plaintiffs’ claims are typical of the Class.

Under Rule 23(a)(3), a claim is “typical if it arises from the same event or practice or course of conduct that gives rise to a claim of another class member’s where his or her claims are based on the same legal theory.” *Hardy v. District of Columbia*, 283 F.R.D. 20, 25 (D.D.C. 2012) (citation omitted). Plaintiffs’ claims are typical of the Class members’ claims with all arising from the Data

Breaches and from Defendants' common course of conduct and involving the same legal theories. *See Ceccone*, 2016 WL 5107202, at *5 (finding typicality met because the plaintiffs' claims were based on the same legal theory as other class members); *Kinard*, 331 F.R.D. at 214 (similar).

4. Plaintiffs are adequate Class representatives.

“Two criteria for determining the adequacy of representation are generally recognized: 1) the named representative must not have antagonistic or conflicting interests with the unnamed members of the class, and 2) the representative must appear able to vigorously prosecute the interests of the class through qualified counsel.” *Prince v. Aramark Corp.*, No. 16-CV-1477 (CKK), 2017 WL 9471949, at *3 (D.D.C. Mar. 14, 2017). Both criteria of Rule 23(a)(4) are met here. First, Plaintiffs will adequately represent the Class as they have no antagonistic or conflicting interest with other Class members. *See Rogers*, 2020 WL 3402360, at *4 (plaintiffs were adequate class representatives where there was “no indicia in the record in this matter that there are any conflicts of interest between the named plaintiff and the other members of the class”). All Plaintiffs support the Settlement, regardless of whether they are eligible to make a claim or the Court approves their service awards. Girard Decl. ¶ 32. Second, Class Counsel are experienced in data breach and other complex litigation and have demonstrated their skills, creativity, and commitment to pursuing the Class members' best interests for seven years, including by negotiating a fair and adequate resolution of their claims and holding out against OPM's initial settlement offers. *In re APA Assessment Fee Litig.*, 311 F.R.D. 8, 15 (D.D.C. 2015) (“[T]he Court has no concerns about the quality or vigor of class counsel, who have an extensive background in complex litigation and class actions, and have been appointed class counsel in prior cases.”); *Rogers*, 2020 WL 3402360, at *6 (similar).

B. Rule 23(b)(3) Is Satisfied.

The predominance and superiority requirements of Rule 23(b)(3) are satisfied as well.

Generally, “predominance is met when there exists generalized evidence which proves or

disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class members' individual position." *Alvarez*, 303 F.R.D. at 162 (citation omitted). In this case, "everybody put their data in the same box," the Court observed, and "[t]he box was either protected or unprotected in accordance with the necessary statutes or reasonable man standards"—so "[w]hether there was a breach of a duty isn't different from plaintiff A and plaintiff B." 12/3/19 Hr'g Tr., Dkt. # 163, at 37-38. Thus, because all Class members had information in the breached databases, and the information security practices at issue did not vary from person to person, key liability questions in the case are the same for each Class member and predominate. *See Rogers*, 2020 WL 3402360, at *7 ("Given this unified course of conduct and singular legal theory, there is no need to examine the claims of each and every class member . . .").

A class action is superior because the potential recovery for any individual Class member is relatively small and, as a result, each lacks incentive to retain separate counsel to pursue claims individually against the federal government. In sum, "the size of the class, the uniformity of issues regarding defendants' liability, and the impracticability—as a matter of cost versus reward—of individualized prosecution of these claims all weigh in favor of finding that class action adjudication is superior to other forms of adjudication." *In re APA*, 311 F.R.D. at 18.

III. THE SETTLEMENT CLASS HAS RECEIVED THE BEST NOTICE PRACTICABLE UNDER THE CIRCUMSTANCES.

Any class certified under Rule 23(b)(3) is entitled to the "best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The notice must "clearly and concisely state in plain, easily understood language" several components of the action and the settlement. Fed. R. Civ. P. 23(c)(2)(B); *see In re Black Farmers Discrimination Litig.*, 856 F. Supp. 2d 1, 28 (D.D.C. 2011) ("When a class is certified and a settlement is proposed, the parties are required to provide class

members with the best notice practicable under the circumstances.”) (quotation marks omitted).

The Court previously found the Notice Plan sufficient to apprise Class members of the proposed Settlement and their rights. Dkt. # 193 at 6. Following the Court’s approval, EPIQ carried out the plan and estimates that at least 80% of the Class will be reached and apprised of the Settlement through these notice efforts. Azari Decl. ¶¶ 8, 52. Faced with national security and other practical limitations that prevented notifying all 22 million victims, the parties in consultation with EPIQ crafted a robust plan of notice with a large direct-notice effort. Girard Decl. ¶¶ 24-25. The notice has now been emailed or mailed to 2,761,983 people who signed up for the Government’s free credit monitoring services, whose emails are known and whose interest in self-protection makes them more likely to be Class members. Azari Decl. ¶ 9. Notice has also been directly emailed to almost a million people using AFGE’s email listserv. *Id.* ¶ 11; Girard Decl. ¶ 25. These direct notices are being supplemented by digital ads algorithmically targeted based upon the demographic composition of the federal workforce, including on social media platforms and other websites that Class members are likely to visit, as well as a press release, radio ads, and print ads. Azari Decl. ¶¶ 19-45; Girard Decl. ¶ 26. The Settlement Website, www.opmdatabreach.com, has hosted 172,713 unique visits, and the call center has received 1,243 calls. Azari Decl. ¶¶ 42, 44.

Class members have received the best notice practicable under the circumstances. *See In re Black Farmers*, 856 F. Supp. 2d at 28; *Rogers*, 2020 WL 3402360, at *8 (granting final approval after concluding that the class notice met requirements of Rule 23(c)(2)).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant final approval of the Settlement and enter the [Proposed] Final Approval Order and Judgment, submitted herewith, which is Exhibit 4 to the Settlement Agreement.

DATED: July 21, 2022

Respectfully submitted,

GIRARD SHARP LLP

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

IN RE: U.S. OFFICE OF PERSONNEL
MANAGEMENT DATA SECURITY
BREACH LITIGATION

Misc. Action No. 15-1394 (ABJ)
MDL Docket No. 2664

This Document Relates To:
ALL CASES

DECLARATION OF CAMERON R. AZARI, ESQ. ON NOTICE PLAN AND NOTICES

I, Cameron R. Azari, Esq., hereby declare and state as follows:

1. My name is Cameron Azari. I have personal knowledge of the matters set forth herein, and I believe them to be true and correct.

2. I am a nationally recognized expert in the field of legal notice and have served as an expert in hundreds of federal and state cases involving class action notice plans.

3. I am the Senior Vice-President of Epiq Class Action and Claims Solutions, Inc. (“Epiq”) and the Director of Legal Notice for Hilsoft Notifications, a firm that specializes in designing, developing, analyzing, and implementing large-scale, un-biased, legal notification plans. Hilsoft Notifications is a business unit of Epiq.¹

4. This Declaration will describe the current implementation of the Settlement Notice Plan (“Notice Plan”) and the notice (the “Notice” or “Notices”) for the settlement in *In re: U.S. Office of Personnel Management Data Security Breach Litigation*, MDL No. 2664, Case No. 15-1394 in the United States District Court for the District of Columbia. I previously executed my *Declaration of Cameron R. Azari, Esq. on Notice Plan and Notices* on May 6, 2022, in which I described the Notice Plan, detailed Epiq’s and Hilsoft’s class action notice experience, and attached Hilsoft’s *curriculum vitae*. I also provided my educational and professional experience relating to class actions and my ability to render opinions on overall adequacy of notice programs.

¹ References to Epiq in this declaration include Hilsoft Notifications.

That prior declaration is available at Docket No. 188-9.

OVERVIEW

5. On June 7, 2022, the Court approved the Notice Plan designed by Hilsoft and appointed Epiq as the Claims Administrator in the *Preliminary Approval Order*. In the Preliminary Approval Order, the Court certified the following “Class”:

All U.S. citizens and permanent residents whose personal information was compromised as a result of the breaches of the U.S. Office of Personnel Management’s electronic information systems in 2014 and 2015 or the breach of Peraton’s electronic information systems in 2013 and 2014, and who, after May 7, 2014, suffered out-of-pocket expense or loss of compensable time: (1) to purchase a credit monitoring product, credit or identity theft protection product, or other product or service designed to identify or remediate the data breaches at issue in this case; (2) to access, freeze or unfreeze a credit report with a credit reporting agency; or (3) as a result of an identity theft incident or to mitigate an identity theft incident.

Excluded from the Class are Class Counsel and their employees; any judicial officers to whom this case is assigned and their respective staffs; mediators and their respective staffs; and attorneys from the Department of Justice and the Office of Personnel Management, and their respective staffs, who worked directly and personally on this matter.

6. After the Court’s Preliminary Approval Order was entered, we began to implement the Notice Plan. This Declaration will detail the notice activities undertaken and currently being implemented and explain how and why the Settlement Notice Plan is comprehensive and well-suited to the Class. This Declaration will also discuss the administration and claims activity to date. The facts in this declaration are based on my personal knowledge, as well as information provided to me by my colleagues in the ordinary course of my business at Hilsoft and Epiq.

NOTICE PLAN IMPLEMENTATION SUMMARY

7. Federal Rules of Civil Procedure, Rule 23 directs that notice must be “the best notice that is practicable under the circumstances,” must include “individual notice to all members who can be identified through reasonable effort,” and that “the notice may be by one or more of the following: United States mail, electronic means, or other appropriate means.”² The Notice

² Fed. R. Civ. P. 23(c)(2)(B).

Plan here satisfies these requirements. Name, physical address, and/or email address information were available (it was anticipated that contact information would be available for approximately 3.23 million potential Class Members). These records corresponded to participants in the OPM credit monitoring program that was initiated in 2015 following the breaches of the U.S. Office of Personnel Management's electronic information systems in 2014 and 2015, and the breach of Peraton's electronic information systems in 2013 and 2014. Further, Epiq and the settling parties arranged with government employee labor unions American Federation of Government Employees ("AFGE") and National Treasury Employees Union ("NTEU") to assist with supplementing the individual notice effort with their members' contact information.

8. To reach the remainder of the Class, Epiq is still in the process of implementing a comprehensive, nationwide media notice effort using magazines, digital banners, social media, and radio, among other media. The individual notice and media notice are being supplemented with sponsored search listings, an informational release, and a Settlement Website, www.OPMDataBreach.com. The Notice Plan was designed to reach the greatest practicable number of Class Members, with the media notice effort on its own estimated to reach at least 80% of the members of the Class. In my experience, this reach of the Notice Plan is consistent with, and exceeds that of other court-approved notice programs, and the Notice Plan has been designed to satisfy the requirements of due process, including its "desire to actually inform" requirement.³

NOTICE PLAN

Individual Notice

9. In accordance with the timeline for the Settlement, individual notice efforts are currently underway to provide Notice to all potential Class Members for whom email and/or physical address information is reasonably available. OPM and Class Counsel put Epiq in touch

³ *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950) ("But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected . . .").

with IDX, the vendor that provided credit monitoring services following the breaches of the U.S. Office of Personnel Management's electronic information systems in 2014 and 2015 and the breach of Peraton's electronic information systems in 2013 and 2014. Epiq worked cooperatively with IDX, which has executed the emailed notice according to schedule and will be executing the postal mailed notice efforts under its agreement with OPM for those potential Class Members who have enrolled in credit monitoring services through IDX. Epiq was initially advised that the IDX database contains name, physical address and/or email address information for approximately 3.23 million potential Class Members. However, upon IDX completing its pre-notice confirmations, 2,761,698 records were identified with a viable email address and 285 records were identified with a physical address only. Further, Epiq and the settling parties reached out to the large government employee labor unions AFGE and NTEU, who either independently notified their members of the Settlement (NTEU) or provided to Epiq their email addresses and other relevant contact information (AFGE) for Epiq to notify their members directly. These efforts resulted in more than 900,000 additional potential Class Members being sent individual notice.

10. The Notice Plan provided for IDX to first send individual notice via email ("Email Notice") to all identified potential Class Members with a valid email address in the relevant IDX database. For those records where a valid email address was neither provided nor appended via a reverse look-up process, but for whom there is an associated physical address (or one can be identified), or for whom the email is undeliverable after multiple attempts, IDX will mail a Postcard Notice via United States Postal Service ("USPS") first-class mail.

11. On May 12, 2022, Epiq received two data files with 1,004,731 records for current and former AFGE members. Of these records, 1,003,684 records included a valid email address, which were sent an Email Notice by Epiq. After de-duplication across the two files, 921,264 unique emails remained. For those AFGE records where a valid email address was neither provided nor appended via a reverse look-up process, but for whom there is an associated physical address (or one can be identified), or for whom the email was undeliverable after multiple attempts, IDX or Epiq will mail a Postcard Notice via USPS first-class mail.

Individual Notice – Email

12. From July 2, 2022, through July 5, 2022, IDX sent 2,761,698 Email Notices to all identified potential Class Members for whom a valid email address was available in the relevant IDX database. From July 5, 2022, through July 6, 2022, Epiq sent 921,264 Email Notices to all identified potential Class Members for whom a valid email address was available in the data provided to Epiq by AFGE. Industry standard best practices were followed for these Email Notice efforts. The Email Notice was drafted in such a way that the subject line, the sender, and the body of the message overcame SPAM filters and ensured readership to the fullest extent reasonably practicable. For instance, the Email Notice used an embedded html text format. This format provided easy-to-read text without graphics, tables, images, attachments, and other elements that could have increased the likelihood that the message would be blocked by Internet Service Providers (ISPs) and/or SPAM filters. The Email Notices were sent from an IP address known to major email providers as one not used to send bulk “SPAM” or “junk” email blasts. Each Email Notice was transmitted with a digital signature to the header and content of the Email Notice, which allowed ISPs to programmatically authenticate that the Email Notices were sent from authorized mail servers. Each Email Notice was also transmitted with a unique message identifier. The Email Notice included an embedded link to the Settlement Website. By clicking the link, recipients were able to easily file an online claim and access the Long Form Notice, Settlement Agreement, and other information about the Settlement.

13. If the receiving email server could not deliver the message, a “bounce code” was returned along with the unique message identifier. For any Email Notice for which a bounce code was received indicating that the message was undeliverable for reasons such as an inactive or disabled account, the recipient’s mailbox was full, technical autoreplies, etc., at least two additional attempts were made to deliver the Notice by email.

14. To date, 1,037,471 Email Notices sent by IDX remain undeliverable and 223,026 Email Notices sent by Epiq remain undeliverable.

Individual Notice – U.S. Mail

15. On July 5, 2022, IDX sent 285 Postcard Notices via USPS first-class mail to Class Members for whom no email address was available in IDX's database. IDX and/or Epiq will also be sending a Postcard Notice to all identified Class Members with an associated physical address for whom the available email address was undeliverable after multiple attempts. The Postcard Notice will be sent via USPS first-class mail. The Postcard Notice clearly and concisely summarizes the case, the Settlement, and the legal rights of the Class Members. The Postcard Notice also directs the recipients to the Settlement Website where they can access additional information.

16. Prior to sending the Postcard Notice, all mailing addresses will be checked against the National Change of Address ("NCOA") database maintained by the USPS to ensure Class Member address information is up-to-date and accurately formatted for mailing.⁴ In addition, the addresses will be certified via the Coding Accuracy Support System (CASS) to ensure the quality of the zip code and will be verified through Delivery Point Validation (DPV) to verify the accuracy of the addresses. This address updating process is standard for the industry and for the majority of promotional mailings that occur today.

17. Postcard Notices returned as undeliverable will be re-mailed by IDX and/or Epiq to any new address available through USPS information or to addresses that may be found using a third-party lookup service. Upon successfully locating such addresses, Postcard Notices will be promptly re-mailed.

18. Given our experience with similar notice efforts, we reasonably expect the combined Email and Postcard Notice efforts will successfully deliver notice to over 90% (and likely higher) of all potential Class Members for whom email and/or physical address information is reasonably available in the IDX database or the AFGE data.

Media Plan

⁴ The NCOA database is maintained by the USPS and consists of approximately 160 million permanent change-of-address (COA) records consisting of names and addresses of individuals, families, and businesses who have filed a change-of-address with the Postal Service™. The address information is maintained on the database for 48 months and reduces undeliverable mail by providing the most current address information, including standardized and delivery-point-coded addresses, for matches made to the NCOA file for individual, family, and business moves.

19. In accordance with the timeline for the Settlement, Epiq is currently implementing the Media Plan, which is now well underway. I will provide a Supplemental Declaration to the Court once all aspects of the Media Plan have been fully implemented.

Publication Notice

20. The Notice Plan includes publication of a print Publication Notice in the national editions of numerous publications, including notice in highly circulated consumer magazines that the Class Members are more likely to read. The Notice Plan also includes publication of the Publication Notice in top magazines serving the United States Armed Forces. All print ads have been placed and are confirmed to appear.

21. More details regarding the publications, circulation, insertions, frequency, and ad sizes are provided in the following table.

<i>Publication⁵</i>	<i>Insertions</i>	<i>Frequency</i>	<i>Ad Sizes</i>	<i>Circulation</i>
<i>Parade Magazine</i>	1	Weekly	2/5 Page	16,000,000
<i>Sports Illustrated</i>	1	Monthly	1/2 Page	1,200,000
<i>People</i>	1	Weekly	1/2 Page	3,400,000
<i>Stars & Stripes (U.S. Edition)</i>	2	Weekly	1/2 Page	All military bases in the U.S.
<i>Marine Corps Times</i>	1	Monthly	1/2 Page	20,488
<i>Army Times</i>	1	Monthly	1/2 Page	52,678
<i>Navy Times</i>	1	Monthly	1/2 Page	38,757
<i>Air Force Times</i>	1	Monthly	1/2 Page	30,441
TOTAL	9			20,742,364

⁵ The Notice Plan included one insertion in *NARFE Magazine* (National Active and Retired Federal Employees Association). On June 9, 2022, after much discussion, *NARFE Magazine* declined to publish the Publication Notice in its print magazine. Instead, however, *NARFE Magazine* agreed to provide online banner noticing for the same cost.

Internet Notice Campaign

22. The Notice Plan includes Banner Notice advertising on the *Google Display Network* and *Yahoo! Audience Network* that is targeted to Class Members. The Banner Notices link directly to the Settlement Website, allowing visitors easy access to relevant information and documents. Consistent with common practice, the Banner Notices use language from the Notice headline, which allows users to identify themselves as potential Class Members. As an additional way to draw the interest of the Class Members, and to adhere to the Federal Judicial Center's recommendation that a picture or graphic may help class members self-identify, the Banner Notices prominently features high-resolution image(s). The Banner Notices are also running on the social media sites *Facebook, Instagram, Twitter, LinkedIn, and Reddit*.

23. Banner Notices are also running on the *Military Times Network* and on *NARFE.org*. The *Military Times Network* is a group of websites dedicated to news about service members both within the United States and deployed globally. *NARFE.org* is the official website for the National Active and Retired Federal Employees Association.

24. Notice via email newsletters is being sent by *JCR Weekly, Federal Soup, and NARFE.org*. *JCR Weekly's* Newsletter is published by The National Court Reporters Association⁶. In place of Banner Notices on *Federal Soup Newsletters*, *Federal Soup* is sending an eblast to its members once a week for three consecutive weeks,⁷ which contains the contents of the Email Notice. The *Federal Soup* Newsletter provides federal employees with information on numerous aspects of their career. NARFE's Newslines email is sent to current members.⁸ Furthermore, the Notice is sponsored on *Top Class Actions*. *Top Class Actions* is a legal news source reporting on current class actions and lawsuits. Notice provided by *Top Class Actions* includes the following.

⁶ *JCR Weekly* sent emails out July 6, 2022, and July 13, 2022, with two additional emails scheduled for July 20, 2022, and July 27, 2022.

⁷ *Federal Soup* sent an eblast to its members, which contained the contents of the Email Notice on July 7, 2022, and July 13, 2022. A third is scheduled for July 20, 2022.

⁸ NARFE sent emails out July 5, 2022, and July 12, 2022. Additional emails are scheduled for July 19, 2022, July 26, 2022, and August 2, 2022.

- *Top Class Actions*' website (TopClassActions.com) "Settlement" page as a page listing/article.
- *Top Class Actions*' Newsletters, distributed with information regarding the Settlement to *Top Class Actions*' more than 900,000 subscribers.
- *Top Class Actions*' social media posts and ads on *Facebook, Instagram, Twitter, LinkedIn, and/or YouTube* to *Top Class Actions*' more than 200,000 followers.
- All the forms of notice provided by *Top Class Actions* direct or link the reader to the Settlement Website, to easily obtain detailed information about the Settlement.

25. All Banner Notices appear on desktop, mobile, and tablet devices and are distributed to the selected targeted audiences nationwide. Internet Banner Notices are also targeted (re-marketed) to people who visit the Settlement Website after clicking on a Banner Notice.

26. More details regarding the planned target audiences, distribution, and specific ad sizes of the Banner Notices are provided in the following table.

<i>Network/Property</i>	<i>Target</i>	<i>Ad Sizes</i>	<i>Estimated Impressions</i>
<i>Google Display Network</i>	Adults 18+	728x90, 300x250, 300x600, 970x250	55,000,000
<i>Google Display Network</i>	Affinity Audiences: Federal Government Employees, US Military & US Veterans ⁹	728x90, 300x250, 300x600, 970x250	55,000,000
<i>Google Display Network</i>	Intent Audiences: Federal Government Employees, US Military & US Veterans ¹⁰	728x90, 300x250, 300x600, 970x250	55,000,000
<i>Google Display Network</i>	Select Site Targeting on career, government, and military sites ¹¹	728x90, 300x250, 300x600, 970x250	15,000,000
<i>Yahoo! Audience Network</i>	Adults 18+	728x90, 300x250, 300x600, 970x250	175,000,000

⁹ Custom Affinity Audiences allow Banner Notices to be targeted to specific website content, here meaning websites, blogs, and other platforms that include information on federal government jobs, law and government, the military and armed forces, and retirement and pensions.

¹⁰ Custom Intent Audiences allow Banner Notices to be targeted to consumers who are actively researching these specific topics across the web.

¹¹ Select Site Targeting focuses on websites such as: military.com, federaljobs.net, federalgovernmentjobs.us, ask.fedweek.com, and careers.org, among others.

<i>Facebook</i>	Adults 18+	Newsfeed & Right Hand Column	55,000,000
<i>Facebook</i>	A18+ and Interest in US Armed Forces, US Army, US Navy, US Marine Corps, US Coast Guard, National Guard of the US or Civil Service	Newsfeed & Right Hand Column	65,000,000
<i>Facebook</i>	A18+ and Demographics = US Veteran or Government Employee	Newsfeed & Right Hand Column	20,000,000
<i>Facebook</i>	A18+ and Interest in U.S. Government Departments ¹²	Newsfeed & Right Hand Column	31,625,000
<i>Instagram</i>	Adults 18+	Newsfeed	25,000,000
<i>Instagram</i>	A18+ and Interest in US Armed Forces, US Army, US Navy, US Marine Corps, US Coast Guard, National Guard of the US or Civil Service	Newsfeed	35,000,000
<i>Instagram</i>	A18+ and Demographics = US Veteran or Government Employee	Newsfeed	10,000,000
<i>Instagram</i>	A18+ and Interest in various U.S. Government Departments	Newsfeed	22,000,000
<i>Twitter</i>	Adults 18+	Twitter Feed Ads	20,000,000
<i>Twitter</i>	A18+ and interest in US Military, US Veterans or Government Careers	Twitter Feed Ads	30,000,000
<i>Twitter</i>	A18+ and Interest in U.S. Government Departments	Twitter Feed Ads	19,415,000
<i>LinkedIn</i>	A18+ and Job Titles in Military and/or Government Categories	LinkedIn Feed Ads	25,000,000
<i>LinkedIn</i>	A18+ and Job Profile includes U.S. Government Department	LinkedIn Feed Ads	13,915,000
<i>Reddit</i>	A18+ and subreddits r/usajobs, r/military, r/army, r/navy or r/airforce	Reddit Feed Ads	7,000,000
<i>Military Times Network</i>	Run of Site	300x250	333,333
<i>JCR Weekly Newsletter</i>	NCRE Members and Industry Professionals	300 x 250	10,000
<i>Federal Soup Newsletter</i>	Newsletter Subscriber List	3x eBlasts	n/a
<i>Top Class Actions Sponsorship</i>	Adults 18+	Various	n/a
<i>NARFE Online</i>	Run of Site	728x90 & 300x 250	n/a

¹² Departments include Justice, Commerce, Education, Agriculture, Homeland Security, Transportation, Energy, Veterans Affairs, Health & Human Services, Housing & Urban Development, and Labor. The Securities & Exchange Commission is included as well.

<i>NARFE e-Newsletter (Newsline)</i>	Newsletter Subscriber List	Custom	n/a
TOTAL			734,298,333

27. Combined, more than 734 million impressions nationwide will be generated by the Banner Notices.¹³ The internet advertising campaign started on July 5, 2022, and will run for approximately five weeks. Clicking on the Banner Notices takes a user to the Settlement Website, where the person can readily obtain detailed information about the case, the Settlement, and their rights.

Radio

28. Thirty-second radio spots have been purchased and will run nationwide on AM/FM stations, as well as XM stations via Sirius satellite radio, covering a variety of music, sports, news, and talk formats. Radio spots have also been purchased and will run on Spanish-language radio where available. An estimated 800 total spots will air over a period of 14 to 21 days.

Internet Sponsored Search Listings

29. To facilitate locating the Settlement Website, sponsored search listings have been acquired nationwide through highly visited internet search engines: *Google*, *Yahoo!*, and *Bing*. When search-engine visitors search using common keyword combinations related to the litigation or Settlement, the sponsored search listing typically appears at the top of the page, above the non-sponsored search results, or in the upper right-hand column of the web-browser screen. A list of keywords was developed in conjunction with Class Counsel. All sponsored search listing ads link directly to the Settlement Website.

30. The sponsored search listings began on July 5, 2022, and will run through the December 23, 2022, claim filing deadline. As of July 19, 2022, the sponsored listings were

¹³ The third-party ad-management platform ClickCease is being used to audit any digital Banner Notice ad placements. This platform tracks all Banner Notice ad clicks to provide real-time ad monitoring and fraud traffic analysis, blocks clicks from fraudulent sources, and quarantines dangerous IP addresses. These services help reduce wasted, fraudulent, or otherwise invalid traffic (e.g., ads being seen by ‘bots’ or non-humans, ads not being viewable, etc.).

displayed 11,586 times, which resulted in 857 clicks that displayed the Settlement Website.

Union and Association Targeting

31. In addition to the individual notices sent to AFGE and NTEU members, additional efforts are being employed to contact members of government employee unions, management associations, and other federal employee groups, such as through outreach by the unions, management associations, and other employee groups directly by such means as notification emails, newsletter articles, announcements on websites, and addition of information to meeting agendas. Epiq created a list of some of the largest labor unions for government employees, including, in addition to AFGE and NTEU, National Federation of Federal Employees (“NFFE”) and National Active and Retired Federal Employees Association (“NARFE”), as well as numerous others. Information was disseminated to these unions, management associations, and other federal employee groups with a request that they provide further notification to their members to publicize the Settlement.

32. AFGE is the largest federal employee union, which represents over 700,000 federal government workers nationwide and overseas, including employees from virtually all government agencies including the Department of Defense, Department of Justice, Department of the Treasury, Department of Agriculture, Health and Human Services, Department of the Interior, Department of Agriculture, Social Security Administration, Department of Labor, Department of Energy, Department of State, and more.¹⁴

33. NTEU similarly represents federal employees in 34 different government departments and agencies, including the Department of Agriculture, Department of Commerce, Department of Defense, Department of Energy, Department of Health and Human Services, Department of the Treasury, and more.¹⁵

34. NFFE is a national union representing approximately 110,000 government workers across the United States. NFFE represents employees in numerous government departments and

¹⁴ <https://www.afge.org/about-us/>.

¹⁵ <https://www.nteu.org/who-we-are/our-agencies>.

agencies, including the Department of Agriculture, Department of Commerce, Department of State, Department of Defense, Department of Homeland Security, Department of Transportation, and more.¹⁶

35. NARFE is an association devoted to all federal workers and retirees, with a membership totaling around 300,000. Membership is open to civilians in any government agency who have a federal retirement plan under either the Civil Service Retirement System or the Federal Employment Employees Retirement System.¹⁷

36. OPM has reached out to multiple other labor unions, management associations, and other federal employee groups representing hundreds of thousands of current and retired federal employees and potential members of the Class to assist in the noticing effort. To date, 11 of these groups agreed to distribute the Court-approved Notice to their membership, inform their membership about the Settlement, and/or post it to their websites (not all have email addresses for their membership). It is my understanding that the Department of Justice reached out to all labor contacts identified by OPM as willing to assist and provided a copy of the Court-approved Email Notice with instructions to disseminate the information to their memberships on or after July 7, 2022. This allowed the Court-approved Email Notices sent by IDX and Epiq to be received by Class Members ahead of any labor organization follow up. The following are the 11 groups of the original 19 identified groups that agreed to disseminate the information.

- National Association of Government Employees (NAGE)
- National Federation of Federal Employees (NFFE)
- International Federation of Professional and Technical Engineers (IFPTE)
- Federal Education Association (FEA)
- Senior Executives Association (SEA)
- Federal Managers Association (FMA)
- American Postal Workers Union (APWU)
- National Association of Letter Carriers (NALC)
- National Postal Mail Handlers Union (NPMHU)
- International Association of Fire Fighters (IAFF)
- National Weather Service Employees Organization (NWSEO)

¹⁶ <https://nffe.org/about/>.

¹⁷ <https://www.narfe.net/site/chapter2181/?fa=content&id=4512>.

37. Epiq also identified several associations related to the judicial and legal field that likely include members of the Class. Each was notified about the Settlement and provided the Long Form Notice to share with their members. These Associations include:

- National Conference of Bankruptcy Clerks
- National Association for Court Management
- Federal Probation and Pretrial Officers Association
- Federal Judicial Assistants Association
- National Court Reporters Association

38. Epiq provided the full list of government unions it identified to counsel for OPM at the Department of Justice, who worked with Epiq to help coordinate with the unions to provide an official notice or announcement to their members alerting them of this Settlement and directing them to the Settlement Website. This process reinforced the other elements of the Notice Plan.

Informational Release

39. To build additional reach and extend exposures, on July 5, 2022, a party-neutral Informational Release was issued broadly over *PR Newswire* to approximately 5,000 general media (print and broadcast) outlets, including local and national newspapers, magazines, national wire services, and television and radio broadcast media across the United States as well as approximately 4,500 websites, online databases, internet networks, and social networking media. The Informational Release was also issued over *PR Newswire*'s national Hispanic Newswire in English and Spanish.

40. The Informational Release included the address of the Settlement Website and the toll-free telephone number. The Informational Release served a valuable role by providing additional notice exposures beyond that provided by the paid media campaign.

Settlement Website

41. On June 13, 2022, Epiq established a dedicated website for the Settlement with an intuitive, easy-to-remember domain name: www.OPMDataBreach.com, which is maintained, as well as OPMDataBreachSettlement.com and other variations which, when entered into a browser, take the user to the main Settlement Website. All relevant documents are posted on the Settlement Website, including the Long Form Notice (in both English and Spanish), Postcard Notice,

Publication Notice, Claim Form (in both English and Spanish), Settlement Agreement, Amended Complaint, Preliminary Approval Order, Memorandum in Support of Motion for Preliminary Approval Order, and (after their filing) Motion for Final Approval, Motion for Attorneys' Fees, Costs, and Service Awards, Final Approval Order and Judgment, and any other Settlement-related Orders of the Court. At the Settlement Website Class Members can file an online Claim Form. In addition, the Settlement Website includes relevant dates, answers to frequently asked questions ("FAQs"), contact information for the Settlement Administrator, instructions for how Class Members may opt out (request exclusion) from or object to the Settlement, and how to obtain other case-related information. All notice documents prominently display the Website address.

42. As of July 19, 2022, there have been 172,713 unique visitor sessions to the Settlement Website and 457,410 website pages presented.

Toll-free Telephone Number and Other Contact Information

43. On July 1, 2022, a toll-free telephone number (1-855-917-3567) was established for the Settlement. During normal business hours, callers have the option to speak to a live operator and receive individualized answers and direction. Callers are able to hear an introductory message, have the option to learn more about the Settlement in the form of recorded answers to FAQs, and can request that a Notice and Claim Form Package be mailed to them. This automated phone system is available 24 hours per day, 7 days per week. All notice documents prominently display the toll-free telephone number.

44. As of July 19, 2022, there have been 1,243 calls to the toll-free telephone number representing 7,313 minutes of use, and live operators have handled 385 incoming calls representing 5,404 minutes and 113 outbound calls representing 654 minutes. As of July 19, Epiq has mailed 75 Notice and Claim Form Packages as a result of requests from the toll-free telephone number.

45. A postal mailing address and an email address have been established giving Class Members the opportunity to request additional information or ask questions.

Requests for Exclusion, Objections, and Claims

46. The deadline to request exclusion from the Settlement or to object to the Settlement is September 9, 2022. As of July 19, 2022, Epiq has received 32 unique requests for exclusion, which it is evaluating for compliance with the requirements in the Preliminary Approval Order for requesting exclusion. As of July 19, Epiq has received one objection to the Settlement, which has been filed with the Court pursuant to the Preliminary Approval Order; as noted in the *Declaration of Michelle M. La Count Regarding Notice and Settlement Administration* (Docket No. 195), that objection did not conform with all requirements for filing an objection. I will provide a Supplemental Declaration to the Court prior to the Fairness Hearing to provide updated information regarding any requests for exclusion and/or objections to the Settlement.

47. The deadline for Class Members to file a claim is December 23, 2022. As of July 19, 2022, Epiq has received 8,482 claims (8,414 electronic claims and 68 paper claims) under the Settlement. Since there is still more than five months for Class Members to file a claim before the claim filing deadline, these numbers are preliminary. As the claim filing deadline approaches, it is expected that additional claims will be filed by Class Members. As standard practice, Epiq is in the process of conducting a complete review and audit of all claims received.

PLAIN LANGUAGE NOTICE DESIGN

48. The Notices and Claim Form have been carefully designed in consultation with counsel for the settling parties, to be “noticed,” reviewed, and—by presenting the information in plain language—understood by Class Members. The design of the Notices follows the principles embodied in the Federal Judicial Center’s illustrative “model” notices, posted at www.fjc.gov. Many courts, and the FJC itself, have approved notices that Epiq has written and designed in a

similar fashion. The Notices contain substantial, easy-to-read summaries of all key information about Class Members' rights and options under the Settlement. Consistent with our standard practice, all notice documents underwent a final edit for grammar and accuracy prior to their dissemination and publication.

49. The Long Form Notice provides substantial information to Class Members. The Long Form Notice includes (i) details regarding the Class Members' ability to opt out or object to the Settlement Agreement, (ii) instructions on how to submit a Claim Form, (iii) the deadline to submit a Claim Form, opt out, or object, and (iv) the date, time, and location of the Fairness Hearing, among other information.

Claim Submission Options

50. The Notices provide a detailed summary of the relevant information about the Settlement, including the Settlement Website address (www.OPMDataBreach.com) and how Class Members can file a Claim Form online or by mail. The Email Notice included a direct link to the claim-filing portal on the Settlement Website, where Class Members can file a Claim Form online. With any method of filing a Claim Form, Class Members are automatically given the option of receiving a digital payment (such as Venmo, PayPal, Direct Deposit, Digital Mastercard or other options) if they provide an email address. If they decide not to receive digital payment or did not provide an email address when filing a claim, the Class Member claimant will receive a traditional paper check.

CONCLUSION

51. In class action notice planning, execution, and analysis, we are guided by due process considerations under the United States Constitution, by federal and local rules and statutes, and further by case law pertaining to notice. This framework directs that the notice plan be designed to reach the greatest practicable number of potential class members and, in a settlement class action notice situation such as this, that the notice or notice plan itself does not limit knowledge of the availability of benefits—nor the ability to exercise other options—to class members in any way. All of these requirements are being met in this case.

52. The Notice Plan includes an extensive individual notice effort to millions of identified Class Members and a comprehensive media notice effort. We reasonably expect the media portion of the Notice Plan alone will reach at least 80% of the potential Class, using as a reasonable proxy the group of federal government employees, active-duty U.S. military personnel, and military veterans. The individual notice and media notice are supplemented with sponsored search listings, an informational release, and a dedicated Settlement Website. The FJC’s Judges’ Class Action Notice and Claims Process Checklist and Plain Language Guide states that “the lynchpin in an objective determination of the adequacy of a proposed notice effort is whether all the notice efforts together will reach a high percentage of the settlement class. It is reasonable to reach between 70–95%.”¹⁸ Here, the Notice Plan we have developed and are implementing will achieve a reach toward the high end of that standard.

53. The Notice Plan follows the guidance for satisfying due process obligations that a notice expert gleans from the United States Supreme Court’s seminal decisions, which emphasize the need: (a) to endeavor to actually inform the settlement class, and (b) to ensure that notice is reasonably calculated to do so:

- a. “[W]hen notice is a person’s due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it,” *Mullane v. Central Hanover Trust*, 339 U.S. 306, 315 (1950); and
- b. “[N]otice 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,” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (citing *Mullane*, 339 U.S. at 314).

54. The Notice Plan in this case provides the best notice practicable under the circumstances, conforms to all aspects of Federal Rule of Civil Procedure 23 regarding notice,

¹⁸ FED. JUDICIAL CTR., JUDGES’ CLASS ACTION NOTICE AND CLAIMS PROCESS CHECKLIST AND PLAIN LANGUAGE GUIDE 3 (2010), available at <https://www.fjc.gov/content/judges-class-action-notice-andclaims-process-checklist-and-plain-language-guide-0>.

comports with the guidance for effective notice articulated in the Manual for Complex Litigation, Fourth and applicable FJC materials, and exceeds the requirements of due process, including its “desire to actually inform” requirement.

55. The Notice Plan schedule affords enough time to provide full and proper notice to Class Members before any opt-out and objection deadline.

56. After the Notice Plan is fully implemented and prior to the Fairness Hearing, I will provide a Supplemental Declaration to the Court, which will provide updated notice and settlement administration statistics.

I declare under penalty of perjury that the foregoing is true and correct. Executed July 20, 2022.



Cameron R. Azari, Esq.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

IN RE: U.S. OFFICE OF PERSONNEL
MANAGEMENT DATA SECURITY
BREACH LITIGATION

This Document Relates To:
ALL CASES

Misc. Action No. 15-1394 (ABJ)
MDL Docket No. 2664

[PROPOSED] FINAL APPROVAL ORDER AND JUDGMENT

This matter came before the Court for hearing pursuant to the Order Preliminarily Approving Class Action Settlement and Providing for Notice, dated June 7, 2022 (“Preliminary Approval Order”) (Dkt. # 193), on the motion of Class Representatives¹ Travis Arnold, Tony Bachtell, Gardell Branch, Myrna Brown, Lilian Colon-McKnight, Paul Daly, Jon Decker (formerly John Doe III), Jane Doe, Jane Doe II, John Doe II, Kelly Flynn, Alia Fuli, Johnny Gonzalez, Orin Griffith, Jennifer Gum, Michael Hanagan, Deborah Hoffman, Cynthia King-Meyers, Todd Kupferer (formerly John Doe), Ryan Lozar, Teresa J. McGarry, Charlene Oliver, Mario Sampedro, Zachary Sharper, Robert Slater, Nancy Wheatley, and Kimberly Winsor and Defendants U.S. Office of Personnel Management (“OPM”) and Peraton Risk Decision, Inc. (“Peraton”) for approval of a proposed class action settlement (the “Settlement”). Due and

¹ Unless otherwise noted, all capitalized terms have the meaning ascribed to them in the Settlement Agreement.

adequate notice having been given of the Settlement as required by the Preliminary Approval Order, the Court having considered all papers filed and proceedings conducted herein, and good cause appearing therefor, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

1. This Final Approval Order and Judgment incorporates by reference the definitions in the Settlement Agreement dated May 5, 2022 (the “Settlement Agreement”), and all defined terms used herein have the same meanings ascribed to them in the Settlement Agreement.

2. This Court has jurisdiction over the subject matter of this litigation and over all Parties thereto.

3. The Court affirms its findings, rendered in the Preliminary Approval Order, that for purposes of the Settlement, all prerequisites for maintenance of a class action set forth in Federal Rules of Civil Procedure 23(a) and (b)(3) are satisfied. The Court hereby makes final its appointments of Class Counsel and the Class Representatives and its preliminary certification of the Class consisting of:

All U.S. citizens and permanent residents whose personal information was compromised as a result of the breaches of the U.S. Office of Personnel Management’s electronic information systems in 2014 and 2015 or the breach of Peraton’s electronic information systems in 2013 and 2014, and who, after May 7, 2014, suffered out-of-pocket expense or loss of compensable time: (1) to purchase a credit monitoring product, credit or identity theft protection product, or other product or service designed to identify or remediate the data breaches at issue in this case; (2) to access, freeze or unfreeze a credit report with a credit reporting agency; or (3) as a result of an identity theft incident or to mitigate an identity theft incident.

Excluded from the Class are Class Counsel and their employees; any judicial officers to whom this case is assigned and their respective staffs; mediators and their respective staffs; and attorneys from the Department of Justice and the Office of Personnel Management, and their respective staffs, who worked directly and personally on this matter.

4. Pursuant to Federal Rule of Civil Procedure 23(e), the Court hereby grants final approval of the Settlement and finds that it is, in all respects, fair, reasonable, and adequate, and in the best interests of the Class.

5. The Court finds that notice of the Settlement was given to Class Members in accordance with the Preliminary Approval Order and constituted the best notice practicable of the matters set forth therein, including the Settlement, to all individuals entitled to such notice, and that this notice satisfied the requirements of Federal Rule of Civil Procedure 23 and of due process.

6. The Court directs the Claims Administrator to process and pay all Valid Claims in a prompt manner according to the terms and conditions of the Parties' Settlement Agreement.

7. Upon the Effective Date, all Class Members shall be deemed to have, and by operation of this Final Approval Order and Judgment shall have, fully, finally, and forever released, relinquished, and discharged the Releasees as set forth in the Settlement Agreement.

8. The individuals identified in Appendix 1 hereto requested exclusion from the Class as of the Opt-Out Deadline. These individuals shall not share in the benefits of the Settlement, and this Final Approval Order and Judgment does not affect their legal rights to pursue any claims they may have against Defendants. All other members of the Class are hereinafter barred and permanently enjoined from prosecuting any released claims in any court, administrative agency, arbitral forum, or other tribunal.

9. Any appeal from an order relating solely to Class Counsel's application for an award of attorneys' fees, costs, and expenses, and/or to Class Counsel's application for incentive awards, or any reversal or modification of any such order, shall not operate to terminate or cancel the Settlement or to affect or delay the finality of this Final Approval Order and Judgment.

10. Neither the Settlement, nor any act performed or document executed pursuant to or in furtherance of the Settlement, is or may be deemed to be or may be used as an admission of, or evidence of, (a) the validity of any released claim, (b) any liability or wrongdoing of Defendants, or (c) any fault or omission of Defendants in any proceeding in any court, administrative agency, arbitral forum, or other tribunal.

11. Without affecting the finality of this Final Approval Order and Judgment, this Court reserves exclusive jurisdiction over matters related to administration, consummation, enforcement, and interpretation of the Settlement, its associated agreements, and this Final Approval Order and Judgment, including (a) distribution or disposition of the Settlement Fund, including of any unclaimed funds therein, and (b) further proceedings, if necessary, on the application for attorneys' fees, reimbursement of litigation expenses and incentive awards.

12. The Defendants will have no role in, nor will they be held liable in any way for, the determination of monetary relief to be accorded each Claimant. No Class Member or any other person will have any claim against the Named Plaintiffs, Class Counsel, any person designated by Class Counsel, or the Claims Administrator arising from or relating to the Settlement, the Action, or determinations or distributions made substantially in accordance with the Settlement or Orders of the Court, including this Final Approval Order and Judgment.

13. If any Party fails to fulfill its obligations under the Settlement, the Court retains authority, upon motion of the other Party or Parties, to vacate the provisions of this Final Approval Order and Judgment releasing, relinquishing, discharging, and barring and enjoining the prosecution of the released claims against the Releasees and to reinstate the released claims against the Releasees.

14. If the Settlement does not become effective under the terms of the Settlement Agreement, then this Final Approval Order and Judgment shall be rendered null and void to the extent provided by and in accordance with the Settlement Agreement and shall be vacated and, in such event, all orders entered and releases delivered in connection herewith shall be null and void to the extent provided by and in accordance with the Settlement Agreement.

15. The Action is hereby dismissed, with prejudice.

IT IS SO ORDERED.

DATE:

HON. AMY BERMAN JACKSON
UNITED STATES DISTRICT JUDGE