IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHANTAL ATTIAS, et al.,	:	
Plaintiffs,	:	
v.	:	CASE NO. 1:15-cv-00882-CRC
CAREFIRST, et al.,	:	
Defendants.	:	

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiffs, by and through counsel, pursuant to Fed. R. Civ. P. 23, and on behalf of themselves and all others similarly situated, respectfully move this Court for an Order certifying this case to proceed as a class action on behalf of the following Classes:

The Contract Class:

All persons who reside in the District of Columbia, the State of Maryland and the Commonwealth of Virginia and have purchased and/or possessed health insurance from Carefirst, Inc., Group Hospitalization and Medical Services, Inc., Carefirst of Maryland, Inc., and/or Carefirst BlueChoice and whose personally identifiable information, personal health information, sensitive personal information, and/or financial information was breached as a result of the data breach announced on or about May 20, 2015.

The Maryland Consumer Class:

All persons who reside in the State of Maryland, and have purchased and/or possessed health insurance from Carefirst, Inc., Group Hospitalization and Medical Services, Inc., Carefirst of Maryland, Inc., and/or Carefirst BlueChoice and whose personally identifiable information, personal health information, sensitive personal information, and/or financial information was breached as a result of the data breach announced on or about May 20, 2015.

The Virginia Consumer Class:

All persons who reside in the Commonwealth of Virginia, and have purchased and/or possessed health insurance from Carefirst, Inc., Group Hospitalization and Medical Services, Inc., Carefirst of Maryland, Inc., and/or Carefirst BlueChoice and whose

personally identifiable information, personal health information, sensitive personal information, and/or financial information was breached as a result of the data breach announced on or about May 20, 2015.

Excluded from the Class are Defendants' officers, directors, agents, employees and members of their immediate families; and the judicial officers to whom this case is assigned, their staff, and the members of their immediate families.

As discussed in Plaintiffs' Memorandum in Support of Their Motion for Class Certification, incorporated fully herein by reference, Plaintiffs have satisfied all four elements of Rule 23(a), as well as the elements of Rule 23(b)(3);. For these reasons, Plaintiffs respectfully request that this case be certified as a class action for liability and damages pursuant to Fed. R. Civ. P. Rule 23(b)(3), and, in the alternative, liability-only certification pursuant to Fed. R. Civ. P. Rule 23(b)(3).

Respectfully Submitted,

/s/ Jonathan B. Nace

Jonathan B. Nace, Esq. D.C. Bar No. 985718
NIDEL & NACE, PLLC
One Church Street, Suite 802
Rockville, MD 20850
Tel: 202-780-5153
Fax: 301-963-8135
jon@nidellaw.com

Troy N. Giatras Esq. Bar No. 429086
Matthew W. Stonestreet, Esq. (Admitted PHV)
THE GIATRAS LAW FIRM, PLLC
118 Capitol Street
Suite 400
Charleston, WV. 25301
troy@thewvlawfirm.com
matt@thewvlawfirm.com
304-343-2900 (Tel.)
304-343-2942 (Fax)

Christopher T. Nace, Esq. Bar No. 977865

PAULSON & NACE, PLLC
1025 Thomas Jefferson Street, NW
Suite 810
Washington, DC 20007
ctnace@paulsonandnace.com
202-463-1999 (Tel.)
202-223-6824 (Fax)

CERTIFICATE OF SERVICE

This is to certify that on this 23rd day of August 2022, I caused a copy of the foregoing to be served upon the Court and all parties via ECF. I further certify that a hard copy with unredacted, confidential exhibits will be served upon the Court's chambers via US Mail. I further certify that a copy with unredacted confidential exhibits will be served upon opposing counsel via email only.

/s/ Jonathan B. Nace
Jonathan B. Nace, Esq. Bar No. 985718

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHANTAL ATTIAS, et al.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	CASE NO. 1:15-cv-00882-CRC
	:	
CAREFIRST, et al.,	:	
	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

TABLE OF CONTENTS

Table of Contents....................i

Table of Authorities.................... iii

Index of Exhibits vi

I. INTRODUCTION 1

II. PLAINTIFFS' CLAIMS AND RELIEF SOUGHT 2

A. Factual Background and Expert Opinions 2

B. Plaintiffs' Claims 7

C. Relief Sought 8

III. STANDARD OF REVIEW 8

IV. ARGUMENT 9

A. Plaintiffs Have Adequately Identified the Classes....................9

B. Plaintiffs Satisfy the Requirements of Rule 23(a) 12

1. The Proposed Class, Consisting of More than One Million Members, is so Numerous that Joinder of All Members is Clearly Impracticable 12

2. The Class Presents Multiple Common Questions of Law and Fact....................12

3. The Named Plaintiffs Raise Claims Typical of the Proposed Class 15

4. Adequacy of Representation: Class Representative Adequately Represents the Class; Class Counsel Adequately Represent the Class 16

C. The Named Plaintiffs Satisfy the Requirements of Rule 23(b)(3)....................18

1. Plaintiffs' Classes Satisfy the Predominance Requirement 19

a. Common Questions Predominate Each of Plaintiffs' Claims 19

b. Predominance Does Not Require Identical Facts Amongst the Class Members' Claims 22

c. Plaintiffs Can Prove Class-Wide Damages 23

i. Expert Opinion Establishes a Class-Wide Damages Model of Actual Loss 23

ii. Nominal Damages under Plaintiffs' Breach of Contract Claim are Provable Class Wide....24

iii. The VCPA Statutory Damages are Provable Class Wide....25

d. Treatment as a Class Action is Superior....25

CONCLUSION....27

TABLE OF AUTHORITIES

Cases

Affordable Elegance Travel v. Worldspan, 774 A.2d 320 (D.C. 2001) 23

Amchem Products, Inc. v. Windsor, 521 U.S. 591, 614, 117 S.Ct. 2231, 2245 (1997).9, 16, 26, 27

Amgen Inc. v. Connecticut Retirement Plans & Trust Funds, 568 U.S. 455, 133 S.Ct. 1184 (U.S. 2013) 19

Attias v. CareFirst, Inc., 518 F. Supp. 3d 43 (D.D.C. 2021) (*Attias III*)....................................22, 23

Barnes v. District of Columbia, 242 F.R.D. 113 (D.D.C. 2007) 10, 16

Bynum v. District of Columbia, 214 F.R.D. 27 (D.D.C. 2003) (*Bynum I*) ....*passim*

Bynum v. Gov't of the Dist. of Columbia, 384 F. Supp. 2d 342 (D.D.C. 2005)....................................17

Cahn v. Antioch Univ., 482 A.2d 120 (D.C. 1984) 23

Carnegie v. Household International, Inc., 376 F.3d 656 (7th Cir. 2004)....................................26

Coleman through Bunn v. District of Columbia, 306 F.R.D. 68 (D.D.C 2015)....................................24

Coleman v. Pension Benefit Guaranty Corp., 196 F.R.D. 193 (D.D.C. 2000) 13, 25

Daskalea v. Washington Humane Soc., 275 F.R.D. 346 (D.D.C. 2011)....................................15

Gunnells v. Healthplan Servs., Inc., 348 F.3d 417 (4th Cir. 2003)....................................16, 27

Hardy v. District of Columbia, 283 F.R.D. 20 (D.D.C. 2012) 16

Hooton v. Kenneth B. Mumaw P. H. Co., 271 Md. 565 (Md. 1974)....................................24

Hoyte v. District of Columbia, 325 F.R.D. 485 (D.D.C. 2017)....................................15, 16, 19

In re Federal Nat. Mortg. Ass'n Securities, Derivative and "ERISA" Litigation, 247 F.R.D. 32 (D.D.C. 2008) 8, 9

In re McCormick & Co., Inc., Pepper Prods. Mkt. & Sales Practices Litig., 422 F. Supp. 3d 194 (D.D.C. 2019) 11, 22

In re Petrobras Sec., 862 F.3d 250 (2d Cir. 2017)....................................11

In re Vitamins Antitrust Litig., 209 F.R.D. 251 (D.D.C. 2002)....................................15

J.D. v. Azar, 925 F.3d 1291 (D.C. Cir. 2019)....................................10

Kerns v. Wells Fargo Bank N.A., 296 Va. 146 (2018) 24

Lindsay v. Government Employees Ins. Co., 251 F.R.D. 51 (D.D.C. 2008) 13

Littlewolf v. Hodel, 681 F. Supp. 929 (D.D.C. 1988)....................15

Lloyd v. General Motors Corp., 397 Md. 108 (Md. 2007)....................21

Mejdrech v. Met–Coil Systems Corp., 319 F.3d 910 (7th Cir.2003)....................26

Mullins v. Direct Digital, LLC, 795 F.3d 654 (7th Cir. 2015) 11

Neal v. Moore, 1994 U.S. Dist. LEXIS 21339 (D.D.C. 1994)....................12

Noble v. 93 Univ. Place Corp., 224 F.R.D. 330 (D.N.Y. 2004)....................17

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 27

Pigford v. Glickman, 182 F.R.D. 341 (D.D.C. 1998)....................11

Radosti v. Envision EMI, LLC, 717 F.Supp.2d 37 (D.D.C. 2010)....................15

Sandusky Wellness Ctr., LLC v. Medtox Scientific, Inc., 821 F.3d 992 (8th Cir. 2016)....................11

Tsintolas Realty Co. v. Mendez, 984 A.2d 181 (D.C. 2009) 20

Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442 (2016) 22

Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) 13

Wright v. Howard Univ., 60 A.3d 749 (D.C. 2013) 20, 24

Statutes

Md. Code, Com. § 13-301 21

Va. Code § 59.1-200....................22

Va. Code § 59.1-204(A) 21, 25

Other Authorities

7A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure (3d ed. 2005)....................22

H.B. Newberg and A. Conte, *Newberg on Class Actions* Vol.6 ....9, 11, 13, 26

Rules

Fed. R. Civ. P. 23(a) 12

Fed. R. Civ. P. 23(b)(3) 25

Fed. R. Civ. P. 23(g)..17

INDEX OF EXHIBITS[1]

Exhibit 1: Mandiant Investigation Executive Summary.

Exhibit 2: Deposition of Clay House.

Exhibit 3: Expert Report of Plaintiffs' Expert Matthew Strebe.

Exhibit 4: CareFirst Internal Emails, dated May 17, 2015.

Exhibit 5: CareFirst Notice of Privacy Practices.

Exhibit 6: Letter to Connie Tringler, dated May 22, 2015.

Exhibit 7: Expert Report of Dan Korczyk.

Exhibit 8: Deposition of Defendant's Expert Ronald Yearwood.

Exhibit 9: Deposition of Chantal Attias.

Exhibit 10: Deposition of Lisa Huber.

Exhibit 11: Deposition of Connie Tringler.

Exhibit 12: Deposition of Curt Tringler.

Exhibit 13: CareFirst Discovery Responses.

Exhibit 14: Deposition of Expert Dan Korczyk.

[1] Exhibits marked or containing Confidential Information are being sent via hard copy to chambers for Judge Cooper.

I. INTRODUCTION

Plaintiffs' motion for class certification is simple. In April 2014, a single employee of CareFirst's Information Technology team downloaded a backdoor that granted data thieves access to the class members' sensitive information. This CareFirst employee downloaded this backdoor ***after*** being instructed the email was a malicious attempt to steal information, essentially opening the front door to the home after being notified thieves were attempting to pick the lock. The IT security team then failed for months to notice ongoing "lateral movement" through their system so that the thief moved freely through the "home" stealing information while Defendants failed to recognize the ongoing theft of over a million consumers' personal, sensitive information. This was both a breach of the contractual duties to the implied terms of the contract that Defendants and Plaintiffs mutually assented, and also to promises made in Defendants' Notice of Privacy Policy.

All Named Plaintiffs bring this action under Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure on behalf of a class consisting of each person who paid money to Defendants in exchange for health insurance, which included either express or implied promises to (1) protect Plaintiffs' information; (2) encrypt all confidential information given to Defendants, in accordance with Defendants' Internet Privacy Policy; (3) comply with all HIPAA standards and ensure that Plaintiffs' Personal Identifying Information (PII), Sensitive Information (SI) and Confidential Information (CI) remain protected and confidential; and (4) safeguard Plaintiffs' Confidential Information and SI from being accessed, copied, and transferred by third parties.

Due to the failures of Defendants, the PII, SI and Confidential Information of the Plaintiffs and more than one million people was accessed, stolen, and downloaded by an unauthorized threat actor. In response to the breach, the Defendants issued notices to the members of the class that

explained and apologized for the breach.[2] Defendants offered inadequate services to the members implicated in the breach for an inadequate period of time. The Plaintiffs' and class members' protected information has been compromised by a criminal actor which could be used at any time for an array of nefarious purposes.

Consequently, the victims spent and/or must spend significant time and money to protect themselves, including, but not limited to time necessary to conduct a damage assessment and researching necessary mitigation steps, and actual costs for credit monitoring and insurance to indemnify against misuse of identity all incurred as a proximate result of the breach. All of these damages are detailed by Expert Witness Daniel J. Korczyk and are fairly traceable to the actions and failures of CareFirst, as discussed *infra*. Additionally, all of the data breach victims are entitled to, at the very least, nominal damages for breach of contract. Finally, the Virginia and Maryland Classes, defined *infra*, are entitled to statutory damages for violation of the Virginia and Maryland Consumer Protection Acts, respectively.

II. PLAINTIFFS' CLAIMS AND RELIEF SOUGHT

A. Factual Background and Expert Opinions

On April 16, 2014, data thieves "gained access to the CareFirst environment through a spear phishing campaign" in which the thieves fictitiously asserted themselves as a CareFirst employee who was requesting software be updated over the web. Ex. 1, p. 108153. The phishing email, which was sent to forty-eight (48) CareFirst employees, was easily identified as a fake by multiple recipients. Ex. 2, pp. 119:22-120:09; 122:18-123:20; 124:10-21 (CareFirst Designee's testimony regarding emails of employees identifying the phishing email as fraudulent). Specifically, the phishing email sought to compel its recipients to click a URL link, causing the

---

[2] *See* https://member.carefirst.com/members/news/media-news/2015/carefirst-announces-cyberattack-offers-protection-for-affected-members.page

computer user to navigate to a fake website designed to mimic an actual website managed by Citrix, a CareFirst IT vendor. Ex. 2, pp. 131:08-132:24. At that website, the user would download what purported to be an update to a browser plugin called "Secure Input ActiveX Control." *Id*. However, the download was not an actual update, but a backdoor with the intent to allow the threat actor to "communicate directly" with the subject's computer. *Id*. The purpose of this attack was to "gain and exfiltrate data," the very data the data thieves succeeded in exfiltrating. *Id*. pp. 263:17-22; 269:17-270:02.

The phishing email was identified, and the six (6) users who downloaded the backdoor had their computers taken off-line and reimaged. *Id*. pp. 193:13-194:9. With this step, "the team concluded that they had addressed the threat." *Id*. p. 194:24-195:14. However, this was highly premature, as the team failed to take numerous available steps including failing to 1) reset passwords on all user, administrator and service accounts; 2) disable local administrator accounts; 3) perform a password reset for all Oracle applications (related to the Citrix website); 4) implement two-factor authentication; and 5) implement "application whitelisting on critical servers." *See id.*, pp. 232:04-236:03.

Due to these failures, Wesley Doyle, a CareFirst employee, navigated directly to the site as part of a personal investigation or clicked on the link. Ex. 2. pp. 139:14-140:04[3]. Mr. Doyle was "not responsible in any way for investigating this spear phishing attempt." *Id*. pp. 141:22-145:16. Mr. Doyle "actually downloaded the ActiveX Control backdoor," *id*. p. 144:18-21, and then "detonated" it. Ex. 3, p. 15. Despite not being part of the investigative team, Mr. Doyle nonetheless had an "administrator account," Ex. 2 p. 145:22-24, and downloaded the thieves'

[3] A simple erratum in the transcript refers to Mr. Wesley Doyle as "Leslie Doyle" in this specific testimony.

backdoor program while logged into his administrator account. Ex. 3, p. 24 ("Domain Admin Doyle detonated the malware under his admin credentials, that is very clear from the Mandiant report…"). Clearly, Mr. Doyle lacked the training to understand that he should not download any unnecessary software on his administrator account, and further should not have been investigating this breach.

Further, though they identified the spear phishing campaign, Defendants wholly failed to subsequently monitor their network for "lateral movement" through their system. As stated by the Chief Information Security Officer (CISO) at the time, Mr. Don Horn, CareFirst "did not look for lateral movement during this event…". Ex. 2. pp. 208:10-209:10; *see also* Ex. 4. p. 4550 ("Below I said, 'We did not look for lateral movement'. How else may I qualify that statement?"). Essentially, CareFirst prematurely determined that the threat had been neutralized and failed to monitor for evidence of continuing harm from a known attempt to gain access to CareFirst's system. *See* Ex. 3, p. 13 ("CareFirst's complete failure to detect and interrupt the actual and ongoing infiltration was the proximate cause of the exfiltration, of which evidence supports my opinion that exfiltration did occur.").

Due to Defendants' wrongful assumption, they had halted a simple spear-phishing attack, the attack became an "Advanced Persistent Threat" which is defined as "where an unauthorized person gains access to a private network and remains on the network undetected for a long period of time" due to Mr. Doyle's unexplainable act. Ex. 3, p. 7. Further, by taking any of the identified available steps, *supra*, Defendants would have prevented the exfiltration of the members' data, *i.e.* would have prevented the harm to the Plaintiffs and proposed classes. Ex. 3, pp. 17-26 (explaining how password resets, two factor authentication, application "whitelisting" and other steps would have prevented exfiltration of data and harm to the Plaintiffs and class). Additionally, Defendants

had a "lack of training in the proper use of privileged accounts," which would have prevented the harm and damage. Ex. 3 p. 24. No one disputes that these actions in Mr. Strebe's report would have more likely than not prevented the exfiltration of data that caused the harm to Plaintiffs and the class members. *See* Ex. Yearwood depo p. 167:07-20 ("So, no, I'm not challenging any of those facets of what Mr. Strebe has presented in his report.").

With this failure and with access to the network through Mr. Doyle's administrator account, the data thieves "jumped…from one user system, from one user to another, moved laterally before CareFirst could identify, contain, and remove all of the malware from the systems." Ex. 2, p. 211:01-05. Operating undetected, the thieves, ***in one swoop***, then "extracted CIAM table contents" that "contained PII -- that's personal identifiable information" "[f]or approximately 1.1 million records associated with CareFirst users who conduct CareFirst business through the CareFirst public portal." *Id*. p. 224:02-17. The extracted data included "CareFirst member data includes first and last name, date of birth, username, subscriber identification number, and optionally middle name." *Id*. p. 224:12-17. There was "no differentiation" in the members' stolen information, subjecting all members of the Proposed Classes to the same harm. *Id*. pp. 281:12:-238:20. This included member names, subscriber ID numbers, first name, last name, date of birth and email address. *Id*.

This was a violation of both the contract that Defendants had with each Plaintiff and each individual proposed class member, as well as a violation of the Maryland and Virginia Consumer Protection Acts. *First*, the contracts with the Plaintiffs and proposed class members all contain the following language:

> **7.7 Privacy Statement** The Plan shall comply with State, Federal and local laws pertaining to the dissemination or distribution of non-public personally identifiable medical or **health related data**. In that regard, the Plan will not provide to the Group or unauthorized third parties any personally identifiable medical information

> without the prior written authorization of the patient or parent/guardian of the patient or as otherwise permitted by law.

Ex. 5, p. 31 § 7.7 (emphasis added). This was an express promise to comply with numerous laws, including the Health Insurance Portability and Accountability Act (HIPAA). Defendants' failures violated this Privacy Statement term included in the contract. Further, if it is found that this express term was not breached, then the implied terms of the contract that any consumer "would expect anyone to take reasonably prudent measures to protect -- protect information" was breached. Ex. 8, p. 165:16-23. Therefore, though Plaintiffs need not prove the merits of their case at this stage, as there is a common breach of the contract's terms that give rise to the harm.

Second, the Notice of Privacy Practices, a statement given to each member "at enrollment," presents false and misleading information in violation of the CPAs.

> We maintain physical, electronic and procedural safeguards in accordance with federal and state standards to protect your health information. All of our associates receive training on these standards at the time they are hired and thereafter receive annual refresher training. Access to your protected health information is restricted to appropriate business purposes and requires pass codes to access our computer systems and badges to access our facilities. Associates who violate our standards are subject to disciplinary actions.

Ex. 5, p. 1. These safeguards, especially administrative safeguards, were actually not in place and being adequately enforced.

Because of this data breach, and with accurate knowledge of the type of information that was stolen, Defendants sent data breach notification letters to each of the affected members instructing them they "should also take the step of enrolling" in identity theft protection. Ex. 6. However, Defendants made no offer to compensate any Plaintiff or class member for their time spent researching and securing adequate identity theft protection. Second, the length of time (two years) and scope of protection were both inadequate offers to protect from the harm caused by the breach.

An appropriate hourly rate for time spent securing identity theft and mitigating the harm caused by Defendants' failures is equal to $30.13 per hour, and a reasonable estimate of that time is 4 hours per person. *See* Ex. 7, p. 12 ¶ 1 (identifying rate of $30.13 per hour); *see also id*. p. 29 ¶ 59 (identifying four hours as a reasonable "bare minimum" amount of time spent). As to ***future*** out-of-pocket mitigation expenses, a model reduced to present day value for the purchase of thirty years of adequate protection. *Id.*, p. 32-33 (model of yearly expenses reduced to present day value). Today's present-day cost of the first year of adequate insurance is $131.40. *Id*. Each future year's present-day value, *i.e.* actual loss to be compensated today, is calculated pursuant to two reasonably acceptable discount rates, creating a formulaic model that allows any individual to be compensated by a jury for the number of years a jury determines is reasonable. *Id*.

No one denies that this information has value and reasonably would cause the Named Plaintiffs and all members of all classes to seek adequate mitigation and spend time doing so. Ex. 8, pp. 86:22-87:03 ("That's correct. I did not -- it was not my intention to imply there was no value in the data itself."); *see also id*. pp. 65:14-66:07 (testifying that he had no opinion about the value of any person's time in mitigating the harm of this breach).

Finally, it should be noted that the necessity of such mitigation is illustrated by the fact that numerous Named Plaintiffs testified that, since the breach, they have had to confront ongoing attempts at identity theft and fraud. *See e.g.*, Ex. 9, pp. 42:13-43:2; Ex. 10, pp. 22:14-24:2; Ex. 11, p. 39:14-24; Ex. 12 p. 21:5-21. Because this breach is linked to several instances of identity theft or attempted identity theft, reasonable people such as the Named Plaintiffs undertook efforts and costs related to mitigation, consistent with that which Mr. Korczyk opines is reasonable, to prevent exponential harm.

B. Plaintiffs' Claims

Plaintiffs' claims fall into two basic categories: (1) breach of contract, which is brought by

all named Plaintiffs; and (2) violations of two state consumer protection acts.

The following chart summarizes Named Plaintiffs' claims, the basis for those claims, and reflects questions of law common to the class:

Claim	Representative Named Plaintiff and Proposed Class	Description of Claim
Breach of Contract	All Named Plaintiffs on behalf of the Contract Class	Whether Defendants breached an implied term of the contracts with its customers when a single breach resulted in the theft of Plaintiffs' PII, PHI, and SI
Violation of Maryland Consumer Protection Act	Curt Tringler, Connie Tringler and Lisa Huber on behalf of the Maryland Consumer Class	Whether Defendants violated the Maryland Consumer Protection Act when a single breach resulted in the theft of Plaintiffs' PII, PHI, and SI
Violation of the Virginia Consumer Protection Act	Richard Bailey and Latanya Bailey on behalf of the Virginia Consumer Class	Whether Defendants violated the Virginia Consumer Protection Act when a single breach resulted in the theft of Plaintiffs' PII, PHI, and SI

C. Relief Sought

Consistent with the Court's Order Granting in Part and Denying in Part Defendants' Motion to Dismiss (Docs. 75, 76), Plaintiffs seek certification of the remaining claims in dispute in the case *sub judice*. Plaintiffs seek class certification for all issues related to those claims, including damages for the value of Plaintiffs and class members' time and future out-of-pocket expenses each necessary to mitigate against future nefarious events. In the alternative, Plaintiffs seek certification on the issue of liability alone.

III. STANDARD OF REVIEW

The party requesting class certification under Rule 23 bears the burden of showing that all the prerequisites of Rule 23(a) are satisfied. *In re Federal Nat. Mortg. Ass'n Securities, Derivative and "ERISA" Litigation*, 247 F.R.D. 32, 36 (D.D.C. 2008). In addition to satisfying Rule 23(a)'s

prerequisites, parties seeking class certification must show that the action is maintainable under at least one subsection of Rule 23(b). *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614, 117 S.Ct. 2231, 2245 (1997). The Rule 23 factors should be broadly construed in favor of the Named Plaintiffs in this case. *Id*. at 41; *see also* H.B. Newberg and A. Conte, *Newberg on Class Actions* Vol.6, §7.17.

Rule 23(a) list four requirements for class action certification:

> (1) the class is so numerous that joinder of all members is impracticable ["numerosity"];
>
> (2) there are questions of law or fact common to the class ["commonality"];
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ["typicality"]; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class ["adequacy"].

In re Federal Nat. Mortg. Ass'n Securities, Derivative and ""ERISA" Litigation, 247 F.R.D. at 36.

Plaintiffs must also satisfy at least one of the subsections of Rule 23(b). Rule 23(b)(3) requires that:

> (1) The questions of law or fact common to the members of the class predominate over any questions affecting only individual members; and
>
> (2) A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

In re Federal Nat. Mortg. Ass'n Securities, Derivative and "ERISA" Litigation, 247 F.R.D. at 37.

IV. ARGUMENT

A. Plaintiffs Have Adequately Identified the Classes

Plaintiffs seek certification of three classes which mirror the corresponding descriptions in the Second Amended Complaint:

<u>The Contract Class:</u>

All persons who reside in the District of Columbia, the State of Maryland and the Commonwealth of Virginia and have purchased and/or possessed health insurance from Carefirst, Inc., Group Hospitalization and Medical Services, Inc., Carefirst of Maryland, Inc., and/or Carefirst BlueChoice and whose personally identifiable information, personal health information, sensitive personal information, and/or financial information was breached as a result of the data breach announced on or about May 20, 2015.

<u>The Maryland Consumer Class:</u>

All persons who reside in the State of Maryland, and have purchased and/or possessed health insurance from Carefirst, Inc., Group Hospitalization and Medical Services, Inc., Carefirst of Maryland, Inc., and/or Carefirst BlueChoice and whose personally identifiable information, personal health information, sensitive personal information, and/or financial information was breached as a result of the data breach announced on or about May 20, 2015.

<u>The Virginia Consumer Class:</u>

All persons who reside in the Commonwealth of Virginia, and have purchased and/or possessed health insurance from Carefirst, Inc., Group Hospitalization and Medical Services, Inc., Carefirst of Maryland, Inc., and/or Carefirst BlueChoice and whose personally identifiable information, personal health information, sensitive personal information, and/or financial information was breached as a result of the data breach announced on or about May 20, 2015.

These definitions objectively identify each of the classes because the definitions of the proposed classes set forth general parameters limiting the scope of the class to such a degree that it is administratively feasible for the Court to determine whether a particular individual is indeed a member of the class. *Bynum v. District of Columbia*, 214 F.R.D. 27, 31-32 (D.D.C. 2003) (*Bynum I*); *Barnes v. District of Columbia*, 242 F.R.D. 113, 120 (D.D.C. 2007).

The D.C. Circuit has not determined Rule 23 implicitly requires "ascertainability" to be present. *J.D. v. Azar*, 925 F.3d 1291, 1320 (D.C. Cir. 2019) ("our court has not addressed whether Rule 23 contains an ascertainability requirement for class certification"). Further, "the circuits 'diverge' as to the meaning of ascertainability." *In re McCormick & Co., Inc., Pepper*

Prods. Mkt. & Sales Practices Litig., 422 F. Supp. 3d 194, 241 (D.D.C. 2019) (citing *Sandusky Wellness Ctr., LLC v. Medtox Scientific, Inc.*, 821 F.3d 992, 995 (8th Cir. 2016)). However, in *McCormick*, this Court reviewed the relevant case law across the Circuits and found "[a]s a baseline, courts generally agree that ascertainability means that a class definition must render potential class members identifiable according to objective criteria." *In re McCormick*, 422 F. Supp. 3d at 241. *McCormick* drew a clear limiting principle between cases in which objective identifying criteria is used *versus* one in which a class members' "state of mind," for example, defines a person's inclusion in the class. *Id*. (citing and quoting *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015); *In re Petrobras Sec.*, 862 F.3d 250, 257 (2d Cir. 2017); 1 Newberg on Class Actions § 3:3. Ultimately, this Circuit's jurisprudence merely requires plaintiffs "establish that the proposed classes are defined by 'objective criteria.'" *In re McCormick & Co., Inc., Pepper Prods. Mkt. & Sales Practices Litig.*, 422 F. Supp. 3d 194, 243 (D.D.C. 2019).

Named Plaintiffs have sufficiently identified the class because when "looking at the class definition, counsel and putative class members can easily ascertain whether they are members of the class." *Pigford v. Glickman*, 182 F.R.D. 341, 346 (D.D.C. 1998). Here, the class has already been identified by the Defendants with the issuance of the data breach notices. Ex. 2, pp. 293:16-294:03 ("Q. So if someone were to claim that their information was subject to this breach, we could look at the information that you still have and ascertain whether or not they were actually a member whose information was subject to this breach? A. We can."); *see also id*. pp. 292:11-293:12. Customers who purchased health insurance through CareFirst in the states of Maryland and Virginia, as well as the District of Columbia, experienced actual loss when unauthorized third-parties accessed, transferred, and copied their information. There are no terms in the definition that require further clarification, and nothing in the definition would require the Court to hold

individualized hearings to decide whether a particular individual fell within the scope of the definition. *Id*.; *Bynum I*, 214 F.R.D. at 32.

B. Plaintiffs Satisfy the Requirements of Rule 23(a)

1. The Proposed Class, Consisting of More than One Million Members, is so Numerous that Joinder of All Members is Clearly Impracticable

Rule 23(a)(1) provides that a class action may be maintained only if "[t]he class is so numerous that joinder of all members is impracticable." *Bynum I*, 214 F.R.D. at 32. The party moving to certify the class need not supply the exact numbers of the class. *Bynum I*, 214 F.R.D. at 41. It is well accepted that 40 members will satisfy the numerosity requirement, but courts have noted that approximately 20 will suffice. *Neal v. Moore*, 1994 U.S. Dist. LEXIS 21339, *24 (D.D.C. 1994); *Bynum I*, 214 F.R.D. at 32-33.

Numerosity is not a barrier to class certification in this matter. The Proposed Class consists of approximately one million CareFirst customers who had their sensitive information compromised during a breach in CareFirst's system.[4] A class of more than one million members sufficiently demonstrates that joinder be impracticable. Such a large number of victims easily satisfies the Rule 23(a)(1) numerosity requirement, as separately litigating more than one million cases would be completely untenable and averse to judicial economy interests. Furthermore, Defendants have admitted numerosity of the proposed classes exists. *See* Ex. 13, Resp to Req. for Admission ¶ 1.

2. The Class Presents Multiple Common Questions of Law and Fact

Federal Rule of Civil Procedure 23(a)(2) requires the presence of "questions of law or fact common to the class," also known as the commonality requirement. To achieve commonality, the

---

[4] *See* https://member.carefirst.com/members/news/media-news/2015/carefirst-announces-cyberattack-offers-protection-for-affected-members.page.

plaintiffs must demonstrate that the class members' common contention "must be of such a nature that it is capable of class-wide resolution. . ." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2545 (2011). A matter is considered capable of class-wide resolution when the "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." *Id.* This is certainly true for the proposed class, which brings identical legal claims all arising from the same factual predicate.

"[F]or purposes of Rule 23(a)(2) even a single common question will do." *Id*. at 2556. "The commonality test is met when there is at least one issue ... the resolution of which will affect all or a significant number of the putative class members." *Lindsay v. Government Employees Ins. Co.*, 251 F.R.D. 51, 55 (D.D.C. 2008) (citing *Coleman v. Pension Benefit Guaranty Corp.,* 196 F.R.D. 193, 198 (D.D.C. 2000)). Therefore, it is not necessary that every issue of law or fact be the same for each class member. *Bynum I*, 214 F.R.D. at 33-34. As the leading treatise on class action litigation states, "when the party opposing the class has engaged in some course of conduct that affects a group of persons and gives rise to a cause of action, one or more of the elements of that cause of action will be common to all of the persons affected." *Bynum I*, 214 F.R.D. at 34 (citing *Newberg*, § 3.10).

Here, in each of the Plaintiffs' claims – regardless of the underlying theory of recovery – exists numerous common questions of law and fact. These common questions include:

- Whether protection of confidential information is a material term of the contract with all members of The Contract Class
- Whether terms of the contract were breached
- Whether the Notice of Privacy Policy was breached in violation of the MCPA and VCPA

All Class Members are customers of CareFirst who had their confidential information accessed, transferred, and copied in a single data breach, which was executed by the same "threat

actor" and impacted all Class Members simultaneously. *See* Ex. 1. The threat actor initiated the infiltration process on April 16, 2014. The attack was executed through a "phishing campaign" where CareFirst employees were sent malicious software through a deceptive email. *Id.* CareFirst's employees' failure to recognize the attack allowed the threat actor to gain control of CareFirst's system. Then, the Class Members' information was officially compromised months later, on June 19, 2014. *Id*. pp. 3-4. "CareFirst's failure to detect the ongoing persistence of threat actors inside their network and erroneous belief that they'd halted the attack allowed attackers to subsequently. . . exfiltrate the personally identifiable information belonging to their members." Ex. 3, p. 13. All Class Members were notified that they had been implicated in the breach via an identical letter from CareFirst, which was sent on May 22, 2015. Ex. 6.

CareFirst employee Wesley Doyle (hereinafter "Mr. Doyle"), despite not being employed in IT security, naively attempted to investigate the message and detonated the malware under his privileged administrator credentials. Ex. 3, pp. 24-25. The threat actor "moved laterally off of [Mr.] Doyle's system onto server systems that had no malware protection installed." *Id.*, p. 15. The threat actor then used Mr. Doyle's administrator credentials to "harvest credentials, survey the network, and move laterally through the network." *Id*., p. 25. While CareFirst was aware that there was a successful phishing attempt on April 16, 2014, its investigation into the incident was so insufficient that the breach was not discovered until April 21, 2015. Ex. 1, pp. 108153-54.

The circumstances surrounding the data breach clearly present numerous common questions of law and fact. All Plaintiffs were harmed by the Defendants' failure to recognize and appropriately respond to the data breach when infiltration began in April of 2014. **All** Class Members are customers of CareFirst who had confidential information compromised by the same threat actor simultaneously on June 19, 2014. Furthermore, all Named Plaintiffs have brought the

same breach of contract claims. Furthermore, each member of the Maryland Consumer Class received the same Notice of Privacy Policy and have the same claim for violation of the MCPA. Similarly, each member of the Virginia Consumer Class has the same claim for violation of the VCPA. Thus, the claims of the Named Plaintiffs are founded on the same facts and legal theories as those of the other class members. Accordingly, commonality is clearly established.

3. The Named Plaintiffs Raise Claims Typical of the Proposed Class

Rule 23(a)(3) mandates that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Each of the Named Plaintiffs' claims meets the typicality requirement. While commonality requires a showing that the members of the class suffered an injury resulting from the Defendant's conduct, the typicality requirement focuses on whether the representatives of the class suffered a similar injury from the same course of conduct. *Bynum I,* 214 F.R.D. at 34-35. The typicality requirement has been liberally construed by courts. *See In re Vitamins Antitrust Litig.,* 209 F.R.D. 251, 260 (D.D.C. 2002).

Courts have explained that the purpose of the typicality requirement is to "ensure[ ] that the claims of the representative and absent class members are sufficiently similar so that the representatives' acts are also acts on behalf of, and safeguard the interests of, the class." *Littlewolf v. Hodel*, 681 F. Supp. 929, 935 (D.D.C. 1988). This Court has explained that "typicality is satisfied when the plaintiffs' claims arise from the same course of conduct, series or events, or legal theories of other class members." *Hoyte v. District of Columbia*, 325 F.R.D. 485, 490 (D.D.C. 2017) (citing *Daskalea v. Washington Humane Soc.*, 275 F.R.D. 346, 358 (D.D.C. 2011)). Importantly, "[t]he facts and claims of each class member do not have to be identical to support a finding of typicality; rather, typicality refers to the nature of the claims of the representative, not the individual characteristics of the plaintiff." *Id*. (citing *Radosti v. Envision* EMI, LLC, 717 F.Supp.2d 37, 52 (D.D.C. 2010)). If the Named Plaintiffs' claims are based on the

same legal theory as the claims of the other class members, it will suffice to show that the Named Plaintiff's injuries arise from the **same course of conduct** that gives rise to the other class members' claims. *Bynum I*, 214 F.R.D. at 35 (emphasis added).

Here, typicality is firmly established because the Named Plaintiffs and the Absent Class Members are customers of CareFirst whose confidential information was compromised in the same data breach. As noted in Mr. Strebe's Expert Report, a data breach such as the one in question is particularly apt to class certification because the Class Members suffered the same loss, which resulted from a single breach that released identical data sets simultaneously. Therefore, the Named Plaintiffs "have suffered injuries in the same general fashion as absent class members." *Hoyte*, 325 F.R.D. at 490 (quoting *Hardy v. District of Columbia*, 283 F.R.D. 20, 26 (D.D.C. 2012)). Accordingly, typicality is indisputably established.

4. Adequacy of Representation: Class Representative Adequately Represents the Class; Class Counsel Adequately Represent the Class

Rule 23(a)(4) demands that the class have adequate representation to ensure that the named representatives do not have interests antagonistic to those of the class members they represent, and that they will vigorously pursue the claims of the class through qualified counsel. *Barnes v. District of Columbia*, 242 F.R.D. 113, 122 (D.D.C. 2007). Adequacy involves both adequacy of the named plaintiff(s) and adequacy of counsel. *Id*. This requirement "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Hoyte*, 325 F.R.D. at 490 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625, 117 S.Ct. 2231 (1997)). A conflict "must be fundamental" and "go to the heart of the litigation" in order to preclude certification. *Id.* (quoting *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 430–31 (4th Cir. 2003)).

In this case, no conflicts of interest exist between the representative Plaintiffs and the Proposed Class. The Named Plaintiffs seek to redress the unauthorized disclosure of their

confidential information, and their interests do not conflict with those of the putative class. The Named Plaintiffs' interests do not conflict with those of the putative class. In fact, the issues presented by the Named Plaintiffs mirror those faced by the putative class, which stands only to gain by this action.

Rule 23(g)(1)(C)(i) requires the Court to appoint adequate counsel to represent the class. Rule 23(g) requires that the court must consider the following in appointing class counsel: "[(1)] the work counsel has done in identifying or investigating potential claims in the action; [(2)] counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action; [(3)] counsel's knowledge of the applicable law; and [(4)] the resources counsel will commit to representing the class." *See e.g.*, *Bynum v. Gov't of the Dist. of Columbia*, 384 F. Supp. 2d 342, 366 (D.D.C. 2005); *Noble v. 93 Univ. Place Corp.*, 224 F.R.D. 330 (D.N.Y. 2004). The Court may consider any "other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(C)(ii).

Plaintiffs' counsel has conducted extensive research in this case, including collecting documents through subpoenas to third-parties and document requests to Defendants, reviewing well in excess of 100,000 pages of documents, retaining and preparing expert witnesses in the fields of cybersecurity and accounting, deposing Defendants and their expert, and defending their own experts' depositions. Plaintiffs' counsel has also engaged in complex motions practice and even ***twice*** pursued difficult questions of law to the D.C. Circuit Court of Appeals in zealous advocacy for their clients. The attorneys are experienced civil class action litigators who have participated in multiple class actions and have spearheaded this case since it began in 2015. Mr. Jonathan Nace routinely litigates class actions and as such has at least three motions pending for class certification as of the time of this filing, including in the District of New Jersey, the Middle

District of Florida, and in the Commonwealth of Pennsylvania. Courts have previously ruled that counsel are competent to represent the plaintiffs including appointing Mr. Jonathan Nace as class counsel in the State of Missouri and the State of Maryland. Mr. Christopher T. Nace recently served as plaintiffs liaison counsel in a matter near-completion in the United States District Court for Maryland and, in a different context, was just appointed to leadership in an MDL pending in the Northern District of Illinois.

Furthermore, numerous courts have previously ruled that counsel Troy N. Giatras and Matthew Stonestreet exceed class representation adequacy requirements, noting that Mr. Giatras and Mr. Stonestreet "represented the impacted individuals with vigor, specialized tech litigation knowledge, and applied the Firm's unique data breach law experience to achieve a positive result for the [] Class." *See* Preliminary Approval Order, *Campbell v. Zoll*, Kanawha County Circuit Court Civil Action No. 13-C-341. In the Nationwide privacy litigation of *Campbell v. Zoll*, Mr. Giatras and Mr. Stonestreet obtained relief in similar privacy matters. In addition to such privacy cases, Mr. Giatras and Mr. Stonestreet have received class certifications in a variety of consumer matters, including *Goodman, et al. v. West Virginia Public Employees Credit Union d/b/a The State Credit Union*, Logan County Circuit Court Civil Action No. 16-C-127 and *Cavalry SPV I, LLC v. Jeff Hughes, et al*, Kanawha County Circuit Court Civil Action No. 16C-1053.

Accordingly, Plaintiffs' Counsel meets the requirements of Rule 23(a) pertaining to adequacy of representation.

C. The Named Plaintiffs Satisfy the Requirements of Rule 23(b)(3)

To certify a class under Rule 23(b)(3), the court must find that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Bynum I*, 214 F.R.D. at 39. Thus, a Rule 23(b)(3) analysis is two-

pronged. First, the Court must determine that factual and legal questions common to the class members predominate over any such questions affecting only individual class members. *Id.* Then, the Court must find that maintaining the action as a class action will be superior to other available methods of adjudication. *Id*. The Court may only consider merits questions to the extent that they are relevant to determining whether the Rule 23 prerequisites for class certification are met. *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455, 466, 133 S.Ct. 1184, 1195 (U.S. 2013) (emphasis added). However, the Court should not determine who will prevail on the merits.

1. Plaintiffs' Classes Satisfy the Predominance Requirement

The first requirement is that common factual and legal issues predominate over any such issues that affect only individual class members. Such requirements are met when Plaintiffs can prove injury on a class-wide basis. *Hoyte*, 325 F.R.D. at 494. However, there is no magic formula in making this determination. *Bynum I*, 214 F.R.D. at 41.

The common questions of law and fact predominate over any questions affecting individual members in this case because the Class Members' injuries arise from identical circumstances and are impacted all Class Members in the same or similar ways. All Class Members are customers of CareFirst whose information was compromised in the same data breach, which was carried out by the same threat actor. Though not required to meet the predominance requirement, here Plaintiffs can prove damages on a class-wide basis without conducting individualized inquiries. *Hoyte*, 325 F.R.D. at 494.

a. Common Questions Predominate Each of Plaintiffs' Claims

Evaluating each of the three claims that Plaintiffs seek to certify for class treatment shows that each meets the requirement of predominance

Breach of Contract

"To prevail on a claim of breach of contract, a party must establish (1) a valid contract between the parties; (2) an obligation or duty arising out of the contract; (3) a breach of that duty; and (4) damages caused by breach." *Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 187 (D.C. 2009). Damages may be either actual or nominal, however, as "the absence of specific monetary injury does not prevent the accrual of a cause of action for breach of contract. Even where monetary damages cannot be proved, a plaintiff who can establish a breach of contract is entitled to an award of nominal damages." *Wright v. Howard Univ.*, 60 A.3d 749, 753 (D.C. 2013).

Here, the question of whether Defendants breached a "duty arising out of the contract" by failing to have proper safeguards in place overwhelms any other questions that may have disparities. Fundamentally, Defendants had the same contract with the same terms giving rise to the same duties with each Plaintiff and each and every proposed class members. The express terms of the contract state:

> **Privacy Statement** The Plan shall comply with State, Federal and local laws pertaining to the dissemination or distribution of non-public personally identifiable medical or health related data. In that regard, the Plan will not provide to the Group or unauthorized third parties any personally identifiable medical information without the prior written authorization of the patient or parent/guardian of the patient or as otherwise permitted by law.

Ex. 5. p. 29 § 7.7. As Mr. House testified, this statement is in all of its policies. Ex. 2, p. 302:05-17.

To the extent the requirement to provide adequate safeguards and comply with HIPAA is not an ***express*** term of the contract, it is an agreed upon implied term of the contract. As Mr. Yearwood, a BlueCross/Blueshield insured testified, any consumer "would expect anyone to take reasonably prudent measures to protect -- protect information." Ex. 8. p. 165:16-23.

Whether it's an implied term or an express term of the contract is of no relevance to the

Court's decision on class certification, as that is purely a merits determination for the fact-finder. However, that question predominates the litigation and overwhelms any other individualized questions that may be related to Plaintiffs' and "The Contract Class'" claim for breach of contract.

Maryland Consumer Protection Act

To prove a violation of the MCPA, Plaintiffs must show that there was a deceptive trade practice under the MCPA and "an identifiable loss, measured by the amount the consumer spent or lost as a result of his or her reliance on the sellers' misrepresentation." *Lloyd v. General Motors Corp.*, 397 Md. 108, 143 (Md. 2007). Prohibited trade practices include:

> **(1)** False, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers;
>
> **(2)** Representation that: **(i)** Consumer goods, consumer realty, or consumer services have a sponsorship, approval, accessory, characteristic, ingredient, use, benefit, or quantity which they do not have;
>
> **(3)** Failure to state a material fact if the failure deceives or tends to deceive;

Md. Code, Com. § 13-301.

Here, Defendants provided a Notice of Privacy Practices at enrollment that stated that information would be kept secure and not available to third parties without the members' consent. *Supra*, Ex. 5, p. 1. The question as to whether Defendants breached their Notice of Privacy Practices promises predominates Plaintiffs' and the Maryland Consumer Class Members' claims for violation of the MCPA because it overwhelms any other individualized issues.

Virginia Consumer Protection Act

The VCPA creates a private right of action for "[a]ny person who suffers loss as the result of a violation of this chapter shall be entitled to initiate an action to recover actual damages, or $500, whichever is greater." Va. Code § 59.1-204(A). Among the defined list of prohibited

deceptive trade practices are

> **5.** Misrepresenting that goods or services have certain quantities, characteristics, ingredients, uses, or benefits;
>
> **6.** Misrepresenting that goods or services are of a particular standard, quality, grade, style, or model;
>
> ***
>
> **14.** Using any other deception, fraud, false pretense, false promise, or misrepresentation in connection with a consumer transaction;"

Va. Code § 59.1-200. The VCPA "permits recovery of *either* actual damages *or* $500." *Attias v. CareFirst, Inc.*, 518 F. Supp. 3d 43, 55 (D.D.C. 2021) (*Attias III*) (emphasis in original) (citations omitted). Like for the Maryland Consumer Class's claim, the question as to whether Defendants breached their Notice of Privacy Practices promises predominates Plaintiffs' and the Virginia Consumer Class Members' claims for violation of the VCPA because it overwhelms any other individualized issues.

b. Predominance Does Not Require Identical Facts Amongst the Class Members' Claims

Differences among the Class Members such as the amount of time spent mitigating the risks heightened due to the breach, or the fact that some Class Members have suffered past economic loss while others have not does not defeat class certification.

> When "one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members."

Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453-54 (2016) (quoting 7A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1778, pp. 123–124 (3d ed. 2005) (footnotes omitted in original); *see also McCormick* at 243 (quoting *id*.). The assertion that different class members spent different amounts of time or suffered different quality or quantity of damages is of no

moment. This is especially true because damages may be proven with a "reasonable estimate" and does not require precision. *Infra* § IV.C.1.c.i. Class certification remains appropriate under Rule 23(b)(3) even if the Court finds that "important matters" must be tried separately.

c. Plaintiffs Can Prove Class-Wide Damages

i. Expert Opinion Establishes a Class-Wide Damages Model of Actual Loss

Here, Plaintiffs have offered the well-qualified opinion of Daniel Korczyk to offer expert testimony as to a damages model that can be applied Class-Wide. Expert Korczyk estimates that the value of Class Members' time necessary to mitigate against possible future nefarious events ensuing from the data breach is equal to $30.13 per hour per. *See* Ex. 7, p. 12 ¶ 1. The value of Plaintiffs' out-of-pocket costs from the Breach is also modeled for each of the next twenty-eight years. *Id.* These figures were calculated to be applied uniformly to all Class Members of all three proposed classes.

In the District of Columbia, this reasonable estimate of damages to each Plaintiff and absent class members establishes class-wide damages. "'[I]t is clear in contract law that a plaintiff is not required to prove the amount of his damages precisely; however, the fact of damage and a reasonable estimate must be established.'" *Attias v. CareFirst, Inc.*, 518 F. Supp. 3d 43, 52 (D.D.C. 2021) (*Attias III*) (quoting as "cleaned up" *Cahn v. Antioch Univ.*, 482 A.2d 120, 130 (D.C. 1984)); *see also Affordable Elegance Travel v. Worldspan*, 774 A.2d 320, 329 (D.C. 2001) (citations omitted) ("Under District of Columbia law, '[a] plaintiff need prove damages only with reasonable certainty.'").[5]

---

[5] There is no conflict in law on the burden in proving damages with either Maryland or Virginia. *See Thomas v. Capital Medical Mgmt*, 189 Md. App. 439, 465 (Md. Ct. Spec. App. 2009) ("'[M]ere difficulty in ascertaining the amount of damage is not fatal," and "mathematical precision in fixing the exact amount is not required.' But, [t]he evidence must . . . lay some foundation enabling the fact finder to make a fair and reasonable estimate of the amount

In his deposition, Mr. Korczyk explained why these estimates do not vary among Class Members. Such figures do not represent costs associated with identity theft. Rather, these figures represent costs necessary for an individual to mitigate the heightened risk of identity theft to *prevent* it from occurring. This includes, but is not limited to, costs associated with notifying financial institutions and retaining professional credit monitoring services.[6]

The predominance requirement is satisfied because the "central element of Plaintiffs' theory of liability ... is common to every class member," and "even the minor differences between the class members—such as the amount of total damages—are susceptible to generalized proof since a common formula is used to calculate the individual damages." *Coleman through Bunn v. District of Columbia*, 306 F.R.D. 68, 87 (D.D.C 2015).

ii. Nominal Damages under Plaintiffs' Breach of Contract Claim are Provable Class Wide

If Mr. Korcyzk's opinions are not compelling or admissible for any reason, Plaintiffs and the Contract Class's claim for breach of breach is still appropriate for class treatment due to the availability of nominal damages. *See*, in DC, *Wright v. Howard Univ.*, 60 A.3d 749, 753 (D.C. 2013) ("Even where monetary damages cannot be proved, a plaintiff who can establish a breach of contract is entitled to an award of nominal damages."); in Maryland, *Hooton v. Kenneth B. Mumaw P. H. Co.*, 271 Md. 565, 572 (Md. 1974) ("It is firmly established by our prior decisions that where a breach of contract occurs, one may recover nominal damages even though he has failed to prove actual damages.") (citations omitted); in Virginia *Kerns v. Wells Fargo Bank N.A.*, 296 Va. 146, 151 (2018) ("In Virginia...in the context of contractual disputes...when 'no evidence

---

of the damage.'") (citation omitted); *United Virginia Bank v. Ford*, 215 Va. 373, 375 (Va. 1974) ("A litigant is not required to prove his damages with precision, particularly where the violator of the contract has made it impossible for him to do so, provided the evidence permits an intelligent and reasonable estimate of the damages.") (citations omitted).

[6] *Id.*

is given of any particular amount of loss, [the law] declares the right by awarding what it terms nominal damages.'") (citation omitted). Therefore, in all three jurisdictions, nominal damages are available to all Plaintiffs and members of the Contract Class equally and are appropriate for class treatment.

iii. The VCPA Statutory Damages are Provable Class Wide

The VCPA provides statutory damages in the amount of "actual damages, or $500, whichever is greater." Va. Code § 59.1-204(A). Like nominal damages to the Breach of Contract Class, the Virginia Class Members have equally available $500 to each of them, if they cannot prove actual loss through Mr. Korczyk's testimony. Therefore, the Virginia Class is entitled to class treatment of their VCPA claim pursuant to a damages model applying $500 equally, and no individualized inquiry exists that defeat the overwhelming issue as to whether CareFirst violated the VCPA in its Notice of Privacy Practices.

d. Treatment as a Class Action is Superior

Superiority should not be a burden to class certification in this matter. In making a superiority determination, the Court should consider four factors: (1) the interests of members of the class in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in a particular forum; and (4) the difficulties likely to be encountered in the management of a class action. Fed. R. Civ. P. 23(b)(3).

"If there are genuinely common issues, issues identical across all the claimants, issues moreover the accuracy of the resolution of which is unlikely to be enhanced by repeated proceedings, then it makes good sense, especially when the class is large, to resolve those issues in one fell swoop." *Coleman*, 306 F.R.D. at 87 (quoting *Mejdrech v. Met–Coil Systems Corp.,* 319

F.3d 910, 911 (7th Cir.2003)). As stated, *supra*, Class Members' claims are identical throughout the entire class. The Proposed Class also consists of more than one million members. Therefore, Class Members pursing individual claims would risk producing inconsistent results and waste a considerable amount of judicial resources. The Class Members' have little interest in individually controlling the prosecution of these claims because their "claims [are] so closely related to the claims of [other Class Members] that litigation by others will achieve their ends without the need for their involvement." *Id.* (quoting Newberg on Class Actions § 4:69 (5th ed. 2014)). Furthermore, Plaintiffs have no knowledge of any individual claims that have been brought, and there are no foreseeable manageability issues with the Proposed Class.

More importantly, this is a case in which the costs of enforcement in an individual action would exceed the expected individual recovery. Given the small (for litigation purposes) amount of money alleged to be owed to each Class Member, there is little to no benefit in pursuing separate actions individually. The pursuit of individual actions would be prohibitively expensive to litigate and deter Class Members from bringing forth their claims. One of the core purposes of Rule 23 is to provide vindication of the rights of groups of people who individually would have difficulty bringing a claim to court at all. *Amchem Products, Inc. v. Windsor*, 52 U.S. 591, 617, 117 S.Ct. 2231, 2246 (1997). A number of courts have recognized this fundamental benefit of class actions. Judge Posner, writing for the Seventh Circuit, opines that the more claims there are, and the smaller they are, the more appropriate class certification is:

> The more claimants there are, the more likely a class action is to yield substantial economies in litigation. It would hardly be an improvement to have in lieu of this single class action 17 million suits each seeking damages of $15 to $30. . .The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.

Carnegie v. Household International, Inc., 376 F.3d 656, 661 (7th Cir. 2004); *see also Phillips*

Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) ("Class actions . . . may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. . .without class actions, plaintiffs holding minor claims would have no realistic day in court"); *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 615-17 (1997)(explaining that class actions were designed for vindication of "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all"); *Gunnells v. Healthplan Services, Inc.*, 348 F.3d 417, 426 (Fourth Cir.2003)(where individual claims are small, class actions are superior to no adjudication).

CONCLUSION

For the foregoing reasons, the motion for class action treatment pursuant to FRCP 23(a) and 23(b)(3) should be granted.

Respectfully Submitted,

/s/ Jonathan B. Nace
Jonathan B. Nace, Esq. D.C. Bar No. 985718
NIDEL & NACE, PLLC
One Church Street, Suite 802
Rockville, MD 20850
Tel: 202-780-5153
Fax: 301-963-8135
jon@nidellaw.com

Troy N. Giatras Esq. Bar No. 429086
Matthew W. Stonestreet, Esq. (Admitted PHV)
THE GIATRAS LAW FIRM, PLLC
118 Capitol Street
Suite 400
Charleston, WV. 25301
troy@thewvlawfirm.com
matt@thewvlawfirm.com
304-343-2900 (Tel.)
304-343-2942 (Fax)

Christopher T. Nace, Esq. Bar No. 977865
PAULSON & NACE, PLLC
1025 Thomas Jefferson Street, NW
Suite 810

Washington, DC 20007
ctnace@paulsonandnace.com
202-463-1999 (Tel.)
202-223-6824 (Fax)

CERTIFICATE OF SERVICE

This is to certify that on this 23rd day of August 2022, I caused a copy of the foregoing to be served upon the Court and all parties via ECF. I further certify that a hard copy with unredacted, confidential exhibits will be served upon the Court's chambers via US Mail. I further certify that a copy with unredacted confidential exhibits will be served upon opposing counsel via email only.

/s/ Jonathan B. Nace
Jonathan B. Nace, Esq. Bar No. 985718