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17
 18 **UNITED STATES DISTRICT COURT**
 19 **NORTHERN DISTRICT OF CALIFORNIA**
 20 **SAN JOSE DIVISION**

21 *In Re Anthem, Inc. Data Breach Litigation*

Case No. 15-MD-02617-LHK

22 **PLAINTIFFS' MEMORANDUM IN**
 23 **SUPPORT OF PRELIMINARY APPROVAL**
 24 **OF CLASS ACTION SETTLEMENT**

25 Date: August 17, 2017
 Time: 1:30 p.m. _____
 Judge: Hon. Lucy H. Koh
 26 Crtrm: 8, 8th Floor

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1 **I. INTRODUCTION**

2 In early 2015, Anthem acknowledged that it had been the target of a cyberattack and that
3 information related to approximately 78.8 million people had been compromised. Names, dates of
4 birth, Social Security numbers, and health care ID numbers were among the stolen data. Anthem
5 offered those affected by the data breach two years of credit monitoring, but has denied that the
6 stolen information has ever been misused.

7 After two years of litigation that included two motions to dismiss, over two hundred
8 depositions, ten expert witnesses, full briefing on class certification, and three days of mediation,
9 the parties accepted a mediator's proposal that—if approved by the Court—would result in the
10 largest data breach settlement in history. The proposed settlement requires Anthem to establish a
11 \$115-million non-reversionary settlement fund for the benefit of the class. The fund will be used
12 to purchase at least two years of credit monitoring services for class members, which will help
13 protect them from fraud and ensure that any identity theft is detected and remedied quickly. Were
14 class members to purchase these credit monitoring services themselves, they would have to pay
15 between \$9 and \$20 per month, but the parties can obtain them for a fraction of that cost by
16 purchasing them in bulk. The fund will also be used to individually notify class members about
17 the settlement, to encourage class members to sign up for credit monitoring, and to explain that *all*
18 class members will remain eligible for fraud-resolution services for at least two years, even if they
19 choose to forego credit monitoring. In addition, \$15 million of the fund will be set aside to pay
20 out-of-pocket expenses incurred as a result of the data breach. For those class members who
21 already have their own credit monitoring service and do not wish to enroll in the service provided
22 by the settlement, the Settlement provides for alternative compensation, as much as \$50 per class
23 member.

24 The proposed settlement also requires Anthem to spend at least [REDACTED] to help protect
25 class members' personal information over the next three years. Anthem will additionally be
26 required to implement or maintain meaningful, specific changes to its data security practices that
27 directly address the security elements that Plaintiffs believe contributed to the breach.

28 Plaintiffs believe that the proposed settlement is a favorable one for the class and seek

1 preliminary approval of the settlement. Declaration of Eve Cervantez (“Cervantez Decl.”) at ¶ 9.
 2 By settling now, the class is able to take advantage of remedies that, as a practical matter, would be
 3 unavailable or worth substantially less by the time this case could be litigated to a final judgment.
 4 *Id.* Plaintiffs believe that credit monitoring services are most critical in the first five years after a
 5 data breach, and the two years of free credit monitoring provided by Anthem have recently
 6 expired. *Id.* Similarly, changes to Anthem’s data security practices will be most effective the
 7 sooner they are implemented. *Id.* By providing class members with extended credit monitoring
 8 and requiring enhanced data security *now*, the proposed settlement helps preserve the
 9 confidentiality of class members’ private information in ways that a later monetary judgment could
 10 not. *Id.* Accordingly, Plaintiffs respectfully request that the Court preliminarily approve the
 11 parties’ Settlement Agreement – attached as Exhibit A to the accompanying Declaration of Eve H.
 12 Cervantez and cited hereafter as “SA” or “Settlement” – and enter an order that:

- 13 1. Certifies the proposed settlement class under Rule 23(b)(3);
- 14 2. Preliminarily approves the proposed settlement as fair, reasonable, and adequate;
- 15 3. Directs notice to be disseminated to class members in the form and manner
 16 proposed by the parties as set forth in the Settlement and Exhibits 4-7 thereto;
- 17 4. Appoints KCC to serve as the Settlement Administrator; and
- 18 5. Sets a hearing date and schedule for final approval of the settlement and
 19 consideration of Class Counsel’s fee application.

20 **II. BACKGROUND**

21 **A. Plaintiffs’ Claims**

22 After Anthem announced the data breach in early 2015, over 100 lawsuits were filed and
 23 centralized before this Court for pre-trial proceedings, and several hundred claims arising out of
 24 the laws of all 50 states were consolidated into a single complaint. Fourth Consol. Am. Compl.
 25 [ECF 714-4]. Plaintiffs’ claims follow diverse legal paths to recovery, but all of them begin with
 26 the same premise: that Anthem’s data security was inadequate. Plaintiffs’ case depends, above all,
 27 on proving their allegations that the data breach was possible only because Anthem had aggregated
 28 80 million people’s private information into a central data warehouse that was not properly

1 secured. On behalf of those individuals, Plaintiffs have sought both equitable and monetary relief.

2 **1. Equitable Remedies**

3 Plaintiffs requested several types of equitable relief. The first was aimed at reforming
4 Anthem's data security. Mot. for Class Cert. ("Class Cert.") [ECF 743-12] at 10-11. Plaintiffs
5 submitted an expert report setting forth several security controls needed to protect the private
6 information already stored by Anthem into the future. Strebe Report [ECF 744-17] at 73-82. Had
7 the case not settled, Plaintiffs planned to request that the Court enter an injunction requiring
8 Anthem to implement those additional measures and also to maintain the security reforms that
9 Anthem had already begun during the litigation. *See* Cervantez Decl. ¶ 7.

10 The second form of equitable relief Plaintiffs sought was extended credit monitoring.
11 Shortly after acknowledging the data breach, Anthem offered class members two years of AllClear
12 credit monitoring and identity repair services. *See* Opp. to Mot. for Class Cert ("Class Cert Opp.")
13 [ECF 797-8] at 3. That credit monitoring has recently expired for most of the class, however, and
14 because Plaintiffs believe it is important to protect against identity theft or other forms of
15 impersonation in the first five years following a data breach, Plaintiffs sought additional credit
16 monitoring. Class Cert. at 10; Van Dyke Report [ECF 744-25] ¶ 46. Plaintiffs also wanted that
17 credit monitoring to be more extensive than the AllClear services offered by Anthem, which, for
18 example, only monitored one of the three major credit bureaus for potential fraudulent activity.
19 Van Dyke Report ¶ 50(b); *see also* Cervantez Decl. ¶ 7.

20 Because not all class members were Anthem insureds, presenting privity and other
21 potential defenses to certain claims, Plaintiffs also named The Blue Cross and Blue Shield
22 Association ("BCBSA") and 17 non-Anthem Blue Cross Blue Shield companies as co-defendants
23 with Anthem, to ensure that these class members would be entitled to monetary remedies for
24 breach of contract and state consumer protection act statutes. Plaintiffs also sought to ensure that
25 these other BCBSA licensees employ adequate security measures before conveying their insured's
26 private information to other licensees such as Anthem. Following the public announcement of the
27 Anthem data breach, the BCBSA Membership Standards were amended to further define certain
28 guidelines for the protection and cyber security of personal information. *See* LoPresti Decl. in

1 Support of Class Cert [ECF No. 749-1] ¶ 3. For settlement purposes only, Plaintiffs determined
2 that this change sufficiently addressed their concerns. Cervantez Decl. ¶ 8.

3 2. Monetary Remedies

4 Plaintiffs requested monetary relief in the Complaint under three theories: Benefit of the
5 Bargain, Loss of Value of PII, and Consequential Out-of-Pocket Expenses. *See* 2nd MTD Order
6 [ECF 524] at 22-29. The Benefit of the Bargain theory would compensate class members based on
7 the difference in value between the health insurance Anthem provided (which Plaintiffs allege
8 lacked adequate data security) and the value of the health insurance that Anthem should have
9 provided (which would have included adequate data security). Class Cert. at 12. Plaintiffs have
10 proposed isolating the value of adequate data security through a conjoint analysis, which would
11 use surveys and statistical analyses to estimate how consumers value different product attributes.
12 *Id.*; Rossi Report [ECF 744-22]. Because the parameters of the conjoint surveys would depend on
13 the classes ultimately certified by the Court, Plaintiffs' expert had not completed his conjoint
14 analysis prior to settlement. *See* Cervantez Decl. ¶ 8.

15 The Loss of Value of PII theory approaches damages from a different direction, and
16 attempts to measure the economic cost of losing the confidentiality of one's private information.
17 One way of doing this is to look at the price certain types of PII fetch on the black market.
18 Plaintiffs' expert put that price at a minimum of \$10 per individual, while Defendants' expert
19 placed it at \$4 per individual. Class Cert. at 13. Another way to measure Loss of Value of PII is to
20 look at the retail price of protecting data-breach victims from identity fraud. Plaintiffs' expert put
21 that cost at \$9 to \$20 per month for five years. Class Cert. at 13; Van Dyke Report ¶ 53.

22 Plaintiffs' third measure of damages—the Consequential Out of Pocket Expenses theory—
23 would allow class members to recover any out-of-pocket expenses they incurred as a result of the
24 data breach. These costs include money spent to rectify identity fraud, including delayed tax
25 refunds, and fees for fraud-prevention and detection services. Class Cert. at 22. Unlike the other
26 measure of damages, however, the evidence needed to prove out-of-pocket damages is in class
27 members' possession and would need to be set forth on an individualized basis. *Id.* at 22-23.
28 In addition to Plaintiffs' three theories for assessing class members' actual damages, a few

1 of Plaintiffs' claims authorized statutory damages. For example, the New York GBL § 349 claim
2 at issue in Plaintiffs' pending motion for class certification provides for an award of \$50 per
3 violation or actual damages, whichever is greater. N.Y. Gen. Bus. Law § 349(h).

4 **B. History of the Litigation and Settlement Negotiations**

5 After Plaintiffs' lawsuits were centralized and their claims consolidated into a single
6 complaint, the Court implemented a bellwether process to adjudicate those claims. ECF 326 at 2-
7 3. Five claims chosen by Plaintiffs and five chosen by Defendants were subjected to two rounds of
8 briefing on the pleadings. Four of the five claims were dismissed (Indiana negligence, Kentucky
9 consumer protection, Kentucky data breach, and Georgia insurance privacy), while the remaining
10 six claims largely survived (California, New Jersey, and federal breach of contract, California and
11 New York consumer protection, and New York unjust enrichment). *See* Order on 1st MTD [ECF
12 468]; Order on 2nd MTD [ECF 524].

13 The Court further streamlined the bellwether process by ordering that Plaintiffs move for
14 class certification on only four claims: California and federal breach of contract and California
15 and New York consumer protection. ECF 601 at 1. The parties have now fully briefed class
16 certification and related *Daubert* motions. Plaintiffs have also reviewed 3.8 million pages of
17 documents; litigated 14 discovery motions; deposed 18 percipient fact witnesses, 62 corporate
18 designees, and six expert witnesses; produced 105 plaintiffs and four expert witnesses for
19 deposition (with 29 of the plaintiffs also producing their computers for forensic imaging); and
20 exchanged interrogatories, RFAs, and expert reports with Defendants. Cervantez Decl. ¶ 2.
21 Plaintiffs' extensive discovery provided them with a deep understanding of Anthem's highly-
22 complex IT systems, the numerous technical and administrative controls involved in Anthem's
23 data security system, and the deficiencies within that system that Plaintiffs allege contributed to the
24 data breach and should be remedied. *Id.* ¶ 3.

25 While the parties were briefing class certification, they were also engaging in a series of
26 mediation sessions with Judge Layn R. Phillips (Ret.). *Id.* ¶ 6. After three full-day mediations
27 over the course of three months—on February 28, April 20, and May 22, 2017—the parties still
28

1 had not reached a deal. *Id.* Judge Phillips ultimately made a mediator’s proposal, which both
2 sides accepted over Memorial Day weekend. *Id.*

3 **C. Terms of the Settlement**

4 **1. The Proposed Settlement Class**

5 If approved, the parties’ settlement would offer relief to the following proposed class:

6 Individuals whose Personal Information was maintained on Anthem’s Enterprise
7 Data Warehouse and are included in Anthem’s Member Impact Database and/or
8 received a notice relating to the Data Breach; provided, however, that the following
9 are excluded from the Settlement Class: (i) Defendants, any entity in which
10 Defendants have a controlling interest, and Defendants’ officers, directors, legal
11 representatives, successors, subsidiaries, and assigns; (ii) any judge, justice, or
12 judicial officer presiding over this matter and the members of their immediate
13 families and judicial staff; and (iii) any individual who timely and validly opts-out
14 from the Settlement Class.

15 SA ¶ 1.36. This proposed class covers the approximately 78.8 million individuals whose personal
16 information was compromised by the Anthem data breach, and parallels the class definitions
17 suggested in Plaintiffs’ Fourth Amended Complaint and motion for class certification, but it does
18 so through a single nationwide class rather than a series of state-wide classes.

19 **2. Changes to Anthem’s Data Security Practices**

20 One of the primary benefits of the proposed settlement is that it requires Anthem to
21 improve its data security. In the years before the breach, Anthem was devoting approximately [REDACTED]
22 [REDACTED] to information security. It will now be required to spend at least [REDACTED]
23 [REDACTED] over the next three years—a figure that represents a three-fold increase over Anthem’s pre-
24 breach allocation. SA Ex. 2 ¶ 8. Anthem will also be required to make or maintain over the next
25 three years a number of specific changes to the manner in which it secures class members’
26 personal information. *See* Settlement Ex 2. These measures were derived in consultation with
27 security professionals based on Plaintiffs’ extensive discovery, and squarely address the five
28 categories that Plaintiffs had focused on in the litigation (*see* Class Cert. at 3-4):

- (i) Failure to require [REDACTED]: Anthem expanded its implementation of [REDACTED] after the breach. It will be required to maintain that [REDACTED], and additionally will be required to ensure through [REDACTED] when accessing Anthem’s network. SA Ex. 2 ¶ 5.

- 1 (ii) Failure to [REDACTED] Enterprise Data Warehouse: Anthem will
2 be required to maintain its recently implemented [REDACTED] for its database
environments that use [REDACTED] to flag suspicious events. *Id.* ¶ 13.
- 3 (iii) Failure to monitor suspicious network activity: Anthem has increased the network
4 logs it generates by five-fold and is now required to monitor its logs by feeding them
into software tools. *Id.* ¶ 6.
- 5 (iv) Failure to [REDACTED]: Anthem's [REDACTED]
6 [REDACTED] are now stored in [REDACTED]
7 [REDACTED]. *Id.* ¶ 13.
- 8 (v) Failure to [REDACTED] data stored on the Enterprise Data Warehouse: [REDACTED]
9 [REDACTED] Enterprise Data Warehouse will be [REDACTED], with other [REDACTED]
[REDACTED] to be [REDACTED]. *Id.* ¶ 3.

10 Plaintiffs also alleged that Anthem's failure to remove old member data from the Enterprise Data
11 Warehouse was a factor that exacerbated the scope of the data breach, which included [REDACTED]
12 [REDACTED]. Class Cert. at 2. Under the settlement, Anthem will be required to retain no more
13 than the latest [REDACTED] in the Enterprise Data Warehouse; to archive older data in a
14 separate database that will be subject to enhanced access controls; and to permanently delete data
15 that no longer needs to be retained on an annual basis. SA Ex. 2 ¶¶ 1-2.

16 To ensure that Anthem maintains enhanced security measures, and that those measures are
17 operating effectively, Anthem will be required both to retain independent consultants to undertake
18 an annual IT security risk assessment and an annual settlement compliance review, and to provide
19 the results of the annual settlement compliance review and its annual SOC 2 Type 2 assessment to
20 Plaintiffs' counsel for review. SA ¶¶ 2.3-2.4 & Ex. 2 ¶ 7. Anthem will also conduct adversarial
21 simulations at least twice a year, which will mimic a malicious attacker with internal access to
22 Anthem's network. SA Ex. 2 ¶ 10. And whereas Plaintiffs contend Anthem previously failed to
23 spend the money required to address potential vulnerabilities identified internally or by outside
24 auditors, Anthem will now be required to follow specific remediation schedules to address
25 potential vulnerabilities. *Id.* ¶¶ 9 & 11.

26 These immediate fortifications to Anthem's systems represent significant improvements in
27 Anthem's security practices, and move substantially towards closing the many security issues
28 Plaintiffs identified as deficient. Although Anthem's specific obligations under this part of the

1 settlement necessarily expire after three years because the pace of technology and evolving
2 security standards make it difficult to prescribe appropriate measures on a longer-term basis, the
3 settlement is formulated to ensure that Anthem not only deploys the up-front resources needed to
4 address existing security vulnerabilities, but institutionalizes the consistent costs, practices, and
5 accountability needed for long-term, proactive data security. Further, the cost and public nature of
6 this litigation, including this Court's rulings, serve as long term incentives for Anthem to deploy
7 appropriate data security, and also serve as a deterrent to regressing to past practices.

8 **3. Settlement Fund**

9 In addition to addressing the security deficiencies that Plaintiffs believe contributed to the
10 data breach, and ensuring that Anthem takes proactive measures to prevent against future attacks,
11 the proposed settlement requires Anthem to pay \$115 into a Qualified Settlement Fund. SA ¶ 3.1.
12 From the net settlement fund, \$15 million will be set aside to reimburse Settlement Class Members
13 who had verifiable out-of-pocket losses, and the rest will be distributed equally to Settlement Class
14 Members who choose between Credit Monitoring Services or cash (if they already have Credit
15 Monitoring Services) as follows. *Id.* ¶¶ 5.3 & 6.4.

16 **a.) Fraud Protection and Credit Monitoring.** Settlement funds will first be
17 used to provide class members with two years of identity fraud prevention and detection services
18 from Experian, including:

- 19 • Daily credit monitoring at all three major credit reporting agencies;
- 20 • An Experian (1B) Credit Report upon enrollment;
- 21 • Experian Credit Reports;
- 22 • ID Theft Insurance, which covers certain identity theft related expenses up to a limit
23 of \$1 million;
- 24 • “Dark Web” monitoring for personal information;
- 25 • Identity Validation monitoring and alerts;
- 26 • Fraud Resolution Services that provide professional fraud resolution assistance to
27 Settlement Class Members who experience identity theft or fraud, helping them with
28 identity recovery and restoration.

26 *Id.* ¶ 4.1. Class members will receive protections beyond what Anthem had offered them through
27 AllClear – including triple-bureau monitoring – and those protections will extend the total duration
28 of fraud detection services offered to class members to at least four years, perhaps more.

1 Class members will be encouraged to sign up for these credit services, regardless of
2 whether they previously signed up for AllClear credit monitoring, and will be able to claim
3 services easily: either by filling out and returning the tear-off portion of the postage-prepaid
4 postcard notice they will receive from the Settlement Administrator, by visiting the Settlement
5 Website and completing an online claim form, or by calling the telephone number listed on the
6 postcard notice. *Id.* ¶ 4.3 & Exs. 5(a), 7. Class members will be encouraged to sign up for credit
7 monitoring, and educated about the benefits of doing so. SA ¶ 4.5 & Exs. 4, 5. Significantly, even
8 if Settlement Class Members choose to forego credit monitoring for now, if they experience
9 identity theft or fraud at any time while Credit Services are being offered, they will be eligible for
10 fraud-resolution services from a trained Experian fraud resolution specialist, without ever filing a
11 claim form. *Id.* ¶ 4.9.

12 **b.) Alternative Compensation.** Class members who already have credit
13 monitoring services can instead select alternative cash compensation. *Id.* ¶ 5.1. Class members
14 will receive up to a maximum of \$50. *Id.* ¶ 5.3. As an initial matter, the Net Settlement Fund
15 (after paying all other claims, fees, and expenses) will be used to distribute up to \$36 to each
16 Settlement Class Member (to be reduced *pro rata* if necessary). *Id.* ¶ 5.3. If, however, the
17 aggregate amount of all claims for Alternative Compensation is less than \$13 million, then the
18 amount distributed will be increased *pro rata*, to a maximum amount of \$50 per Settlement Class
19 Member. *Id.* To request the Alternative Compensation, class members will simply need to
20 confirm the timing and type of credit monitoring services they already have and that they wish to
21 receive the alternative compensation instead through the on-line claims process. *Id.* ¶ 5.2;
22 Settlement Ex. 7.

23 **c.) Out-of-Pocket Costs.** The Settlement Administrator will reserve \$15
24 million from the Settlement Fund to compensate class members who incurred out-of-pocket costs
25 connected to the data breach. *Id.* ¶ 6.4. Reimbursable expenses may include unreimbursed
26 claimed fraud losses or charges; time spent remedying issues related to the breach, at \$15 per hour
27 or unpaid time off work, whichever is greater; professional fees incurred in connection with
28 identity theft or falsified tax returns; credit freezes; credit monitoring ordered between January

1 2015 and the date credit monitoring becomes available under the Settlement; and
2 miscellaneous expenses, such as notary, fax, postage, copying, mileage and long-distance charges.
3 *Id.* ¶ 1.23.

4 Class members can submit claims for up to \$10,000 by completing a simple claim form,
5 accompanied by an attestation regarding the expenditures incurred and simple documentation (i.e.
6 letter from IRS if claiming IRS tax fraud expenses). *Id.* ¶ 6.4; Settlement Ex. 6. So long as the
7 claimed fraud is fairly traceable to the Anthem Data Breach – meaning it involved possible mis-
8 use of the type of Personal Information accessed in the Data Breach, Settlement Class Members
9 will not have to prove “causation”—i.e., that the claimed fraud stemmed from the Anthem data
10 breach as opposed to from some other breach. SA ¶¶ 1.23, 6.3. Claims can be submitted for up to
11 a year after Final Approval or until the \$15 million allocated for out-of-pocket reimbursements is
12 exhausted, whichever occurs first. *Id.* ¶¶ 6.1 & 6.4. Plaintiffs expect that \$15 million allocated
13 will be more than enough to accommodate all out-of-pocket claims, but if those funds are
14 exhausted, class members will be so informed through the Settlement Website. *Id.* ¶ 6.4;
15 Cervantez Decl. ¶ 12. The Settlement Administrator will review claims as they are submitted and
16 will have authority to determine whether and to what extent a claim for out-of-pocket costs is
17 valid. SA ¶ 6.2.

18 **d) Class Notice and Settlement Administration.** Due to the large size of the
19 class and the importance of encouraging class members to sign up for the credit monitoring
20 services offered by the Settlement, Plaintiffs expect the costs of notice and settlement
21 administration to be substantial—approximately \$23 million (with a large percentage of this
22 amount to cover the cost of postage on a postcard notice that will allow tear-off and return claims
23 for credit monitoring services). Cervantez Decl. ¶ 16. The parties have retained KCC to serve as
24 the Settlement Administrator, subject to Court approval.

25 Notice will be mailed to approximately 50 million class members for whom addresses are
26 available, via a double-postcard with a detachable claim form that includes business return mail
27 postage. SA Ex. 4 at 13. Additionally, email notification will be sent to the approximately five
28 million class members for whom email addresses are available. *Id.* Notice will also be published

1 in *People* and *Good Housekeeping*. *Id.* at 14. Significantly, in addition to these traditional
2 forms of notice, the parties have agreed to an additional innovative notice plan using internet
3 media ads, which will involve 180 million impressions distributed over Google Display Network
4 and social media sites (Facebook, Instagram, LinkedIn, and Twitter) on mobile and desktop
5 devices. *Id.* at 15-16. The digital media campaign will be actively monitored to continuously post
6 on sites that have proven successful at reaching class members throughout the course of the
7 campaign. *Id.* The point of the internet campaign is not only to reach class members for whom the
8 parties lack addresses, but also to encourage class members who received postcard notice to file a
9 claim for credit monitoring services (or cash) and out of pocket expenses incurred. Cervantez
10 Decl. ¶ 17.

11 **e) Service Awards to Named Plaintiffs.** Plaintiffs will separately petition the
12 Court to award each named plaintiff up to \$7,500 (for those whose computers were forensically
13 imaged) and \$5,000 (for all other named plaintiffs) from the Settlement Fund in recognition of the
14 time, effort, and expense they incurred pursuing claims against Defendants that ultimately
15 benefited the entire class. Defendants have agreed not to oppose any such application.

16 **f) Attorney Fees and Costs.** Plaintiffs will also separately petition for an
17 award of attorneys' fees and reimbursement of litigation expenses from the Settlement Fund.
18 Plaintiffs will not seek more than 33% of the Settlement Fund (\$37,950,000) for attorney fees,
19 which as counsel pledged at the onset of the litigation will amount to considerably less than 1.75
20 times their reasonable lodestar, already reduced in the exercise of billing judgment. Cervantez
21 Decl. ¶ 18. They will also will not seek more than \$3,000,000 in expense reimbursements, and
22 will support their application with detailed lodestar information and an accounting of their
23 expenses. *Id.* ¶ 19. Defendants have agreed not to oppose Plaintiffs' application.

24 **g) Residual Distribution.** In no event will any of the Settlement Fund revert
25 to Defendants. Instead, it will be used to extend the duration of the credit monitoring provided to
26 class members for up to two additional years. SA ¶ 4.8. If the residual funds are insufficient to
27 extend credit monitoring for at least one month, or if there are funds remaining after credit
28 monitoring is extended, the remainder will be distributed *cy pres* to the Center for Education and

1 Research in Information Assurance Security at Purdue University and the Electronic
 2 Frontier Foundation. SA ¶ 7.1. The Center for Education and Research in Information Assurance
 3 Security at Purdue University is a national center for research and education in areas of
 4 information security. The Electronic Frontier Foundation is a nonprofit organization that
 5 champions user privacy and technology development. These two entities are appropriate recipients
 6 of *cy pres* awards because their missions are related to the class's interests and they take into
 7 account the nationwide geographic scope of the class.

8 **4. Release**

9 In exchange for the benefits provided under the Settlement, Settlement Class
 10 Representatives and Settlement Class Members will release any legal claims that may arise from or
 11 relate to the facts alleged in the complaints filed in this litigation.¹ See SA ¶¶ 1.32 & 13.1-13.3.

12 **III. ARGUMENT**

13 **A. The Proposed Settlement Class Should Be Certified**

14 **1. The Class Meets The Requirements of Rule 23(a)**

15 Before assessing the parties' settlement, the Court should first confirm that the underlying
 16 settlement class meets the requirements of Rule 23. See *Amchem Prods. v. Windsor*, 521 U.S. 591,
 17 620 (1997); Manual for Complex Litigation, § 21.632. The prerequisites for class certification
 18 under Rule 23(a) are numerosity, commonality, typicality, and adequacy—each of which is
 19 satisfied here. Fed. R. Civ. P. 23(a).

20 The proposed settlement class, set forth above in Section II.C.1, includes approximately
 21 78.8 million people, and so readily satisfies the numerosity requirement. See Fed. R. Civ. P.
 22 23(a)(1). The proposed class also satisfies the commonality requirement of Rule 23(a), which
 23 requires that class members' claims "depend upon a common contention," of such a nature that
 24 "determination of its truth or falsity will resolve an issue that is central to the validity of each
 25 [claim] in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). The central
 26 question behind every claim in this litigation is whether Anthem adequately secured its data

27 _____
 28 ¹ In MDL proceedings, it is proper to release claims based on facts alleged in the underlying
 MDL complaints. See, e.g., *In re: Volkswagen "Clean Diesel,"* Case No. 3:15-md-02672-CRB,
 PACER Dkt. No. 3230 at 5-6 (N.D. Cal. May 17, 2017).

1 warehouse where class members’ personal information was stored. *See* Class Cert at 6-7;
2 Class Cert Reply [ECF 832-6] at 2-5. The answer to that question depends on common evidence
3 that does not vary from class member to class member, and so can be fairly resolved—whether
4 through litigation or settlement—for all class members at once. *See id.*

5 The final requirements of Rule 23(a)—typicality and adequacy—are likewise satisfied
6 here. The proposed class representatives each had personal information that was stored on
7 Anthem’s data warehouse and was exfiltrated during the data breach, and so were affected by the
8 same inadequate data security that Plaintiffs allege harmed the rest of the class. *See* Class Cert. at
9 7-9; *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1118 (9th Cir. 2017) (“it is sufficient for typicality if
10 the plaintiff endured a course of conduct directed against the class”). The proposed class
11 representatives also have no conflicts with the class; have participated actively in the case,
12 including by sitting for depositions and allowing their personal computers to be examined; and are
13 represented by experienced attorneys who were previously appointed by the Court to represent
14 class members’ interests. *See* Class Cert. at 7-9; *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir.
15 2003) (adequacy satisfied if plaintiffs and their counsel lack conflicts of interest and are willing to
16 prosecute the action vigorously on behalf of the class).

17 2. The Class Meets The Requirements Of Rule 23(b)(3)

18 “In addition to meeting the conditions imposed by Rule 23(a), the parties seeking class
19 certification must also show that the action is maintainable under Fed. R. Civ. P. 23(b)(1), (2) or
20 (3).” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998). Here, the proposed class is
21 maintainable under Rule 23(b)(3), as common questions predominate over any questions affecting
22 only individual members and class resolution is superior to other available methods for a fair
23 resolution of the controversy. *Id.* Plaintiffs’ liability case depends, first and foremost, on whether
24 Anthem used reasonable data security to protect their PII. *See* Class Cert. at 11-13; Class Cert.
25 Reply at 9-11. That question can be resolved using the same evidence for all class members, and
26 thus is the precise type of predominant question that makes a class-wide adjudication worthwhile.
27 *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (“When ‘one or more of the
28 central issues in the action are common to the class and can be said to predominate, the

1 action may be considered proper under Rule 23(b)(3) ...”).

2 Certification is particularly appropriate in this context because manageability
3 considerations do not need to be taken into account: “the proposal is that there be no trial,” and so
4 manageability considerations have no impact on whether the proposed settlement class should be
5 certified. *Amchem*, 521 U.S. at 620. There is only the predominant issue of whether Anthem
6 properly secured the personal information taken from its data warehouse, such that Anthem’s
7 security should be improved and class members affected by the data breach provided with a
8 remedy. As a practical matter, that issue cannot be resolved through individual trials or settlement
9 negotiations: the amount at stake for individual class members is too small, the technical issues
10 involved are too complex, and the required expert testimony and document review too costly. *See*
11 *Just Film*, 847 F.3d 1108 at 1123. A class action is thus the superior method of adjudicating
12 consumer claims arising from this data breach—just as in other data breach cases where a class-
13 wide settlement has been approved. *See, e.g., In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573,
14 585 (N.D. Cal. 2015); *In re the Home Depot, Inc., Customer Data Sec. Breach Litig.*, 2016 WL
15 6902351, at *2 (N.D. Ga. Aug. 23, 2016); *In re Countrywide Fin. Corp. Customer Data Sec.*
16 *Breach Litig.*, 2009 WL 5184352, at *6–7 (W.D. Ky. Dec. 22, 2009).

17 **B. The Proposed Settlement Should Be Preliminarily Approved**

18 Before the parties’ settlement can be approved, the class members who will be bound by its
19 terms must be notified and given an opportunity to object or otherwise react to the proposed
20 settlement. Fed. R. Civ. P. 23(e). This notification process takes time and can be quite expensive,
21 so it has become customary for courts to first conduct a preliminary fairness review. *See* Newberg
22 on Class Actions § 13:10 (5th ed.). There is “relatively scant appellate authority regarding the
23 standard that a district court must apply in reviewing a settlement at the preliminary approval
24 stage.” *In re High-Tech Employee Antitrust Litig.*, 2014 WL 3917126, at *3 (N.D. Cal. Aug. 8,
25 2014). In the past, courts have focused only on whether the proposed agreement appears to be
26 non-collusive, is free of “obvious deficiencies,” and generally falls within the range of “possible”
27 approval. *See, e.g., In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079-80 (N.D. Cal.
28 2007). More recently, however, several courts in this district have criticized the notion that review

1 of proposed class settlements at the preliminary approval stage need only involve a “quick
 2 look,” or a watered-down version of final approval. *See Cotter v. Lyft, Inc.*, 193 F. Supp. 3d 1030,
 3 1036 (N.D. Cal. 2016); *O’Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1122 (N.D. Cal.
 4 2016); *Viceral v. Mistras Grp., Inc.*, 2016 WL 5907869, at *6 (N.D. Cal. Oct. 11, 2016).

5 Plaintiffs agree that a reduced level of scrutiny at the preliminary approval stage “makes
 6 little practical sense, from anyone’s standpoint,” and undercuts the “more exacting review” that
 7 must ultimately be applied to class settlements reached prior to certification. *Cotter*, 193 F. Supp.
 8 3d at 1036; *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012).

9 Accordingly, Plaintiffs address each of the following settlement factors articulated by the
 10 Ninth Circuit (while recognizing that at least one of those factors—the reaction of class
 11 members—is not yet known) and submit that they collectively weigh in favor of judicial approval:

- 12 (1) the strength of the plaintiff’s case;
- 13 (2) the risk, expense, complexity, and likely duration of further litigation;
- 14 (3) the risk of maintaining class action status throughout the trial;
- 15 (4) the amount offered in settlement;
- 16 (5) the extent of discovery completed and the stage of the proceedings;
- 17 (6) the experience and views of counsel;
- 18 (7) the presence of a governmental participant;
- 19 (8) the reaction of the class members to the proposed settlement; and
- 20 (9) whether the settlement is a product of collusion among the parties.

21 *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575-76 (9th Cir. 2004); *In re Bluetooth Headset*
Products Liab. Litig., 654 F.3d 935, 946 (9th Cir. 2011).

22 **1. The Strength of Plaintiffs’ Case**

23 Plaintiffs believe they have built a strong case for liability. As detailed in their class
 24 certification papers and discussed briefly above, Plaintiffs submit that the evidence suggests
 25 Anthem failed to take a number of industry-standard measures to secure the private information
 26 stored in its data warehouse; that Anthem ignored warnings and underfunded its data security; and
 27 that Anthem missed numerous opportunities to detect and stop hacker activity while the data
 28 breach was underway. *See Class Cert* at 2-4. The liability case is not ironclad, however. Anthem

1 argued that it had assembled a robust IT security program that had a track record of
2 warding off attempted attacks and had been lauded by independent cybersecurity organizations.
3 *See* Class Cert. Opp. at 3-5. It characterized the data breach as an unstoppable state-sponsored
4 attack that used never-before-seen technology, and pointed out that Anthem's quick response to the
5 attack had earned praise from federal officials and industry experts alike. *Id.* Plaintiffs believe
6 they had answers to those contentions (*see* Class Cert Reply at 4-5), and a reasonably good chance
7 of proving that Anthem's data security was inadequate. Plaintiffs further believe that if they
8 establish that central factual issue, Anthem is likely to be found liable under at least some of the
9 liability theories and state laws Plaintiffs had pled in their complaint.

10 Plaintiffs believe their damages theories also stand a good chance of succeeding in some
11 form, as they had withstood vigorous legal challenges at the motion-to-dismiss stage and Plaintiffs
12 had supported the theories with reports from highly qualified expert witnesses. The range of
13 potential outcomes is large, however. Anthem had challenged both the Benefit of the Bargain
14 theory and the Loss of Value of PII theory through *Daubert* motions, and also raised additional
15 legal and factual arguments regarding Plaintiffs' damages theories. Further, while Plaintiffs'
16 theories were sound in principle, their application to data breach litigation was untested beyond the
17 pleading stage. Cervantez Decl. ¶ 11. The scope of damages depended in large part on the scope
18 of class certification, which had yet to be decided. *Id.* The Benefit of the Bargain theory depended
19 upon the results of a conjoint study that could not be completed until after class certification, and
20 there was no guarantee that Plaintiffs would ultimately have found this type of damage at all. *Id.*
21 And it is possible that both the Benefit of the Bargain theory and the Loss of Value of PII theory
22 could yield large numbers that would be unpalatable to a jury. *Id.* If applied across all potential
23 class members, Plaintiffs' most conservative measure (based on black-market rates of at least \$4
24 per individual) would yield a figure of \$316 million or more, while the most expansive measure
25 (based on at least \$9 of monthly credit monitoring costs) would yield much higher numbers.
26 While the legal theory behind the larger numbers may be sound, it is untested, and, as a practical
27 matter, Plaintiffs' counsel recognize that taking such large numbers to a jury presents substantial
28 strategic risks. *Id.* Even a number in the mid-hundreds of millions potentially risks

1 offending a jury, and leading to a nominal award—or no monetary award at all.

2 The Out-of-Pocket Consequential Damages theory, which is more tangible, applies to only
3 a relatively small subset of the class, and would have required class members to come forward
4 individually and document their losses with respect to a breach that happened years before trial.
5 *See* Class Cert. at 22-23; Order on 2nd MTD at 22-29. Anthem also had presented evidence
6 raising doubts about the source of any identity fraud, having forensically examined Plaintiffs’
7 computers to test for the possibility that malicious software compromised their personal
8 information, catalogued other data breaches that involved Plaintiffs’ data, and retained an expert to
9 attempt to demonstrate that Plaintiffs’ private information being offered for sale on the Dark Web
10 was unrelated to the Anthem data breach. Class Cert. Opp. at 21-23.

11 2. **The Risk, Expense, Complexity, and Likely Duration of Further** 12 **Litigation**

13 Overall, it is fair to characterize this litigation as a strong data breach case, but a very
14 complex one that still faces numerous hurdles, a well-funded and committed defense, and a wide
15 range of possible outcomes. The case involves millions of people, hundreds of legal claims that
16 implicate several different legal doctrines and the laws of all fifty states, highly technical subject
17 matter, ten expert witnesses, and a pending class certification motion and related *Daubert* motions.
18 Plaintiffs have spent over \$2 million on the litigation to date, and those expenses would only
19 continue to mount if the litigation were to continue. Cervantez Decl. ¶ 19.

20 Almost all class actions involve a high level of risk, expense, and complexity, which is one
21 reason that judicial policy so strongly favors resolving class actions through settlement. *Linney v.*
22 *Cellular Alaska P’ship*, 151 F.3d 1234, 1238 (9th Cir. 1998). But this is an especially complex
23 class proceeding in an especially risky field of litigation. Historically, data breach cases faced
24 substantial hurdles in making it past the pleading stage. *See Hammond v. The Bank of N.Y. Mellon*
25 *Corp.*, 2010 WL 2643307, at *1 (S.D.N.Y. June 25, 2010) (collecting cases and noting that “every
26 court to [analyze data breach cases] has ultimately dismissed under Rule 12(b)(6) ... or under Rule
27 56 following the submission of a motion for summary judgment); *In re Countrywide Fin. Corp.*
28 *Customer Data Sec. Breach Litig.*, 2010 WL 3341200, at *6 (W.D. Ky. Aug. 23, 2010) (approving

1 data breach settlement, in part, because “proceeding through the litigation process in this
2 case is unlikely to produce the plaintiffs’ desired results”). The law has gradually adapted to this
3 relatively new type of litigation, and through cases like this one, precedent has been mounting for
4 holding corporations responsible when they collect private data without adequately securing it.
5 But the path to a class-wide monetary judgment remains untrodden, and it will take some time
6 before litigants and courts navigate all the unique issues posed by data breach lawsuits and some
7 level of certainty sets in—particularly in the area of damages. For now, data breach cases are
8 among the most risky and uncertain of all class action litigation, making settlement the more
9 prudent course when a reasonable deal is on the table.

10 By settling now, practical remedies also become available to class members that will soon
11 disappear. What typical class members want most is not their share of a hypothetical billion-dollar
12 judgment (which would amount to about \$13 per class member), but for their private information
13 to remain confidential and secure. Extended credit monitoring services and immediate changes to
14 Anthem’s data-security practices can help achieve that goal. Credit monitoring works to prevent
15 and detect misuse of information taken in the data breach, while changes in data-security practices
16 work to reduce the risk of future breaches. Plaintiffs had requested both as equitable relief, but by
17 the time that Plaintiffs obtained a judgment and Anthem had exhausted its appeals, neither would
18 be of as much value to class members. Credit monitoring services are needed most in the first four
19 to five years after a data breach occurs, and security measures are most effective the sooner they
20 can be implemented. *See* Class Cert. at 13; Cervantez Dec. ¶ 9. This is a case, in other words,
21 where delay hurts class members. There is nothing they can individually do to make the personal
22 information stored in Anthem’s data warehouse more secure, and the only way that they could
23 obtain credit monitoring is to purchase it themselves—at the high retail cost of \$9-\$20 per month
24 (which they may not be able to afford). *Id.*

25 3. The Risk of Maintaining Class Action Status Through Trial

26 None of the hundreds of claims involved in this litigation have been certified yet. Plaintiffs
27 have filed a motion to certify four bellwether claims, and Anthem has opposed, with the two sides
28 submitting hundreds of exhibits and reports from ten expert witnesses. *See* Plaintiffs’ Revised

1 Index of Evidence [ECF No. 752]; Defendants’ Index of Evidence [ECF No. 805-1]. But
2 while Plaintiffs believe they have made a strong showing on the four bellwether claims, as with
3 other aspects of data breach litigation, there is little directly analogous precedent to rely upon.
4 Class certification has been denied in other consumer data breach cases. *See* Class Cert. Opp. at
5 21. Indeed, it was only a few months ago that the first litigation class was certified in a consumer
6 data breach case. *See Smith v. Triad of Alabama, LLC*, 2017 WL 1044692, at *6 (M.D. Ala. Mar.
7 17, 2017). Plaintiffs expect that there should and will be more data breach certifications to come,
8 and see no reason why Plaintiffs’ claims should be treated differently than the contract and
9 consumer protection claims that are regularly certified in non-data breach cases. But the dearth of
10 direct precedent adds to the risks posed by continued litigation.

11 **4. The Amount Offered In Settlement**

12 In light of the risks and uncertainties presented by data breach litigation, the \$115 million
13 settlement fund achieved for the class in this case is truly groundbreaking. An insurance company
14 that specializes in data breaches, and publishes a regular newsletter on data breach legal issues and
15 trends, wrote last year: “[D]efendants are unlikely to pay *anywhere close* to \$1 per class member to
16 settle an action brought by a class on behalf of 100 million potentially affected individuals.”
17 Marcello Antonucci et al., *Post-Spokeo, Data Breach Defendants Can’t Get Spooked – They*
18 *Should Stand Up To The Class Action Plaintiff Bogeyman*, Beazley Breach Insights, Oct. 27, 2016,
19 <https://www.beazley.com/documents/Insights/201610-data-breach-class-action-settlements.pdf>
20 (emphasis added). Yet, in this case, Defendants have agreed to pay \$1.46 per class member—by
21 far the highest figure any defendant has ever paid as the result of a large data breach affecting
22 millions of consumers, and has also agreed to comprehensive, and costly, business practice
23 changes to improve its data security. Likewise, the overall settlement fund far exceeds what has
24 been paid in data breach settlements to date. By way of example:

- 25 • The Home Depot data breach, which involved the theft of approximately 40 million
26 consumers’ payment data and 53 million consumers’ email addresses, resolved with
27 Home Depot creating a \$13 million fund for consumers, paying an additional \$6.5
28 million for internet and dark web monitoring services (which was eligible to be repaid

1 from the fund), and \$7.5 million in attorney fees. *See In re the Home Depot, Inc.,*
2 *Customer Data Sec. Breach Litig.*, No. 1:14-MD-02583-TWT, ECF No. 181-2 (March
3 7, 2016) (Settlement Agreement); *id.*, 2016 WL 6902351, at *6 (N.D. Ga. Aug. 23,
4 2016) (order approving settlement).

- 5 • The Target data breach, which compromised the personal information of nearly 100
6 million consumers, resolved with Target establishing a settlement fund of \$10 million
7 and separately paying \$6.75 million in attorney fees. *See In re Target Corp. Customer*
8 *Data Sec. Breach Litig.*, No. MDL 14-2522-PAM, ECF No. 358-1 (March 18, 2015)
9 (Settlement Agreement); *id.*, 2017 WL 2178306, at *2 (D. Minn. May 17, 2017) (order
10 approving settlement on remand from the 8th Circuit)

11 These comparisons are not intended to disparage the settlements achieved in those cases,
12 but to underscore that Plaintiffs have capitalized on the strength of their case and achieved good
13 value for the class. The benefits offered to class members are particularly timely as well, coming
14 right as the two years of credit monitoring initially offered by Anthem is expiring. By acting now,
15 the class can use the settlement fund to purchase credit monitoring services in bulk at a fraction of
16 the services' retail cost. *See SA* ¶ 4.6; Cervantez Decl. ¶ 9. In this way, the proposed settlement is
17 able to offer 78.8 million class members the opportunity to receive – for free – what they would
18 otherwise cost them \$9-20 per month in the retail market. *See Class Cert* at 13. Class members
19 will receive a minimum of two additional years of credit monitoring, with a possibility that the
20 credit monitoring will be extended for an additional two years if funds remain in the Settlement
21 Fund after other distributions, such that the Settlement may meet or exceed the amount of credit
22 monitoring recommended by Plaintiffs' expert. *See SA* ¶ 7.1 And for those class members who
23 have already purchased credit monitoring for themselves, or otherwise incurred expenses as a
24 result of the data breach, they will now be able to recover those expenses – and they will be able to
25 do so using a relaxed causation standard. *See id.* ¶¶ 1.23, 6.3. The proposed settlement will also
26 allow all class members – even those who fail to enroll in the monitoring services – to seek
27 assistance with fraud resolution if they should fall victim to identity theft during the period while
28 credit monitoring services are in effect. *Id.* ¶ 4.9.

1 The proposed settlement will also reduce the risk that the private information class
 2 members have entrusted to Anthem – and continue to entrust to Anthem – is compromised by
 3 future attacks. SA Ex. 2. Anthem will be required to spend [REDACTED] over the next three years
 4 to help protect class members’ personal information – [REDACTED] more than it would have spent
 5 if Anthem’s data-security budget remained at pre-breach levels. *Id.* ¶ 8. When combined with the
 6 \$115 million settlement fund, the two years of credit monitoring that Anthem purchased for class
 7 members during the litigation, and the outlays Anthem has already made to upgrade its security
 8 during the litigation, Plaintiffs are confident that this litigation has created strong incentives not
 9 only for Anthem, but for the many other companies who collect vast amounts of the public’s
 10 private information, to invest in appropriate levels of data security.

11 **5. The Extent of Discovery Completed and The Stage of Proceedings**

12 Before entering into settlement discussions on behalf of class members, counsel should
 13 have “sufficient information to make an informed decision.” *Linney*, 151 F.3d at 1239. In the
 14 twenty months since Plaintiffs’ counsel filed the consolidated class complaint, they have litigated
 15 two motions to dismiss, 14 discovery motions before this Court and one in D.C. to compel
 16 production of federal government documents; reviewed 3.8 million pages of documents; deposed
 17 18 percipient fact witnesses, 62 corporate designees, and five defense experts; produced reports
 18 from four experts and defended their depositions; produced 105 plaintiffs for depositions and
 19 produced 29 of those plaintiffs’ computers for forensic examinations; and fully briefed class
 20 certification and related *Daubert* motions. Cervantez Decl., ¶ 2. They know the strengths and
 21 weaknesses of the class’s claims, have worked extensively with experts to value those claims and
 22 to understand the business practice changes necessary to protect class members’ data in the future,
 23 and are well-equipped to negotiate a settlement on behalf of the class. *Id.* ¶ 3.

24 **6. The Experience and Views of Counsel**

25 The Court appointed experienced and qualified counsel with substantial experience
 26 litigating complex class actions of all kinds, including data breach cases, to serve as Plaintiffs’
 27 Lead Counsel and Steering Committee. *See* 9/11/15 Order [ECF 284]; ECF Nos. 751-14 to 761-
 28 17. Those attorneys have represented Plaintiffs and putative class members in that role for nearly

1 two years, devoting tens of thousands of hours to the case, and have no reservations in
2 recommending the Settlement as a very good deal for the class. Cervantez Decl., ¶ 2.

3 **7. The Presence of a Government Participant**

4 No governmental agency is involved in this litigation, but the Attorney General of the
5 United States and Attorneys General of each of the States will be notified of the proposed
6 settlement pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715, and given an opportunity
7 to raise any objections or concerns they may have.

8 **8. The Reaction of Class Members to the Proposed Settlement**

9 The class has yet to be notified of the settlement and given an opportunity to object, so it is
10 premature to assess this factor. Before the final approval hearing, the Court will receive and have
11 a chance to review all objections or other comments received from class members, along with a
12 full accounting of all opt-out requests.

13 **9. Lack of Collusion Among the Parties**

14 When a proposed settlement is negotiated prior to class certification, the Ninth Circuit has
15 emphasized that “consideration of th[e] eight *Churchill* factors alone is not enough to survive
16 appellate review,” and that the district court should also scrutinize the settlement for subtle signs of
17 collusion or conflicts of interest. *In re Bluetooth*, 654 F.3d at 946. Signs that the Ninth Circuit has
18 said may indicate that plaintiffs’ counsel may have allowed pursuit of their own self-interests to
19 infect negotiations include:

- 20 (1) when counsel receive a disproportionate distribution of the settlement, or when
21 the class receives no monetary distribution but class counsel are amply
22 rewarded
23 (2) when the parties negotiate a “clear sailing” arrangement providing for the
24 payment of attorneys’ fees separate and apart from class funds
25 (3) when the parties arrange for fees not awarded to revert to defendants rather than
be added to the class fund

26 *Id.* at 947 (internal quotation marks omitted). None of those warning signs are present here.

27 Plaintiffs’ counsel will be paid from the same non-reversionary Settlement Fund as class members,
28 and so had every reason to negotiate the largest fund possible. Plaintiffs’

1 counsel promised at the outset of this litigation that they would not request fees amounting to any
2 more than 1.75 times their lodestar, and while their obligations are far from finished, they intend to
3 request a multiplier substantially below 1.75. Cervantez Decl. ¶ 18. Plaintiffs’ fee request will
4 also constitute no more than 33% of the Settlement Fund, which is within the range of permissible
5 percentage-based awards—particularly considering the additional value provided by the
6 settlement’s non-monetary relief and the relatively modest multiplier. Of course, the Court will
7 have ultimate discretion over how much of the Settlement Fund should go toward fees after
8 reviewing counsel’s detailed lodestar data and considering all applicable factors. Finally, it bears
9 mentioning that the settlement was negotiated over the course of several full-day mediation
10 sessions with Judge Layn R. Phillips (Ret.), and the final terms stemmed from Judge Phillips’
11 mediator’s proposal. *See G. F. v. Contra Costa Cty.*, 2015 WL 4606078, at *13 (N.D. Cal. July
12 30, 2015) (“[T]he assistance of an experienced mediator in the settlement process confirms that the
13 settlement is non-collusive.” (internal quotation marks omitted)).

14 **C. The Proposed Notice Plan Should Be Approved**

15 **1. The Settlement Provides for the Best Method of Notice Practicable**
16 **Under the Circumstances.**

17 The federal rules require that before finally approving a class settlement, “[t]he court must
18 direct notice in a reasonable manner to all class members who would be bound by the proposal.”
19 FRCP 23(e)(1). Where the settlement class is certified pursuant to Rule 23(b)(3), the notice must
20 also be the “best notice that is practicable under the circumstances, including individual notice to
21 all members who can be identified through reasonable effort.” FRCP 23(c)(2)(B).

22 The parties have agreed on a notice plan that would provide class members with direct mail
23 notice and direct email notice to the extent that mail and email addresses are available, publication
24 notice in two popular magazines, and an innovative social media campaign designed to both reach
25 more class members, and encourage them to claim services under the Settlement. Plaintiffs request
26 that the Court approve this method of notice as the best practicable under the circumstances.

1 **2. The Proposed Form Of Notice Adequately Informs Class Members Of**
 2 **The Settlement And Their Right To Object.**

3 The notice provided to class members should “clearly and concisely state in plain, easily
 4 understood language” the nature of the action; the class definition; the class claims, issues, or
 5 defenses; that the class member may appear through counsel; that the court will exclude from the
 6 class any member who requests exclusion; the time and manner for requesting exclusion; and the
 7 binding effect of a class judgment on class members. Fed. R. Civ. P. 23(c)(2)(B). The form of
 8 notice proposed by the parties complies with those requirements. Class members will receive a
 9 postcard in the mail designed to catch their attention and alert them to the settlement and available
 10 remedies. *See SA, Ex. 5(a)*. It will also direct them to the Settlement Website, where more
 11 information—including a detailed long-form notice and other case documents including the
 12 operative consolidated class action complaint and Settlement Agreement—will be made available.
 13 *See id.*, Ex. 5(b). Plaintiffs believe that this is the most effective way to alert class members to the
 14 existence of the settlement and convey detailed information about the settlement approval process,
 15 and accordingly ask that the Court approve the proposed forms of notice. Cervantez Decl. ¶ 16;
 16 *see Schaffer v. Litton Loan Servicing, LP*, 2012 WL 10274679, at *8 (C.D. Cal. Nov. 13, 2012)
 17 (approving similar postcard notice plan). Class members will also be alerted to the Settlement by
 18 publication in two popular magazines and an internet advertising campaign. SA Exs. 4, 5(d).

19 **3. Notice of the Settlement Will Be Provided to Appropriate Federal and**
 20 **State Officials.**

21 Anthem will provide notice of the proposed settlement to the U.S. Attorney General and
 22 appropriate regulatory officials in all 50 states, as required by the Class Action Fairness Act, 28
 23 U.S.C. § 1715. SA ¶ 9.7. Anthem will provide these government officials with all required
 24 materials so that the states and federal government may make an independent evaluation of the
 25 settlement and bring any concerns to the Court’s attention prior to final approval.

26 **D. Appointment of a Settlement Administrator**

27 In connection with the Court’s preliminary approval of the Settlement, the parties are also
 28 asking the Court to appoint Kurtzman Carson Consultants, LLC (“KCC”) to serve as Settlement

1 Administrator. KCC has over a decade of experience serving as a Settlement Administrator
2 in many large and complex class action lawsuits, including in other data breach lawsuits in which
3 it handled similar duties with respect to assisting class members avail themselves of credit
4 monitoring services, and resolving claims for out of pocket expenses. Cervantez Decl. Ex. C. The
5 cost of notice and claims administration – anticipated to be approximately \$23 million, the vast
6 bulk of which is direct mail postage to 50 million Settlement Class Members and pre-paid postage
7 return cards to request credit monitoring services – will be drawn from the Settlement Fund, and
8 will serve not only to inform Settlement Class Members of their due process rights to object or opt
9 out, but to inform them of the important credit monitoring services and other valuable
10 compensation of which they can and should avail themselves. *See, e.g., SA Ex. 5a.*

11 **E. The Schedule for Final Approval**

12 The next steps in the settlement approval process are to schedule a final approval hearing,
13 notify the class of the Settlement and hearing, allow class members an opportunity to file any
14 objections or comments regarding the Settlement, and allow the parties to conduct appropriate
15 objector discovery, if necessary. *See, e.g., In Re: MagSafe Apple Power Adapter Litig., 2015 WL*
16 *428105, at *2 (N.D. Cal. Jan. 30, 2015) (objector depositions authorized to inquire into objectors’*
17 *membership in the class and ability to post an appellate bond). Accordingly, Plaintiffs have*
18 *provided an agreed-upon proposed schedule in their Motion for Preliminary Approval.*

19 **IV. CONCLUSION**

20 Plaintiffs respectfully request that the Court enter the accompanying Proposed Order
21 certifying the proposed settlement class; granting preliminary approval of the proposed settlement;
22 directing dissemination of notice to the class pursuant to the proposed notice plan; appointing a
23 Settlement Administrator for the dissemination of notice and establishment of a Settlement Fund;
24 and setting a schedule for final approval and related deadlines.

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Respectfully Submitted,

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