

1 Gretchen Nelson (SBN: 112566)
gnelson@nflawfirm.com
2 Gabriel S. Barenfeld (SBN: 224146)
gbarenfeld@nflawfirm.com
3 **NELSON & FRAENKEL LLP**
4 601 So. Figueroa Street, Suite 2050
Los Angeles, CA 90017
5 Phone: (844) 622-6469

6 Matthew Righetti (SBN 121012)
matt@righettilaw.com
7 **RIGHETTI GLUGOSKI, P.C.**
8 The Presidio of San Francisco
9 220 Halleck Street, Suite 220
San Francisco, CA 94129
10 Tel: (415) 983-0900

11 Attorneys for Plaintiffs and the Proposed Class

12
13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

14 **IN AND FOR THE COUNTY OF SAN FRANCISCO**

15 RICHARD DANIELE, RICHARD GOSS
16 and STEVE LANDI, individually, and on
behalf of a class of similarly situated persons,

17 Plaintiffs,

18 v.

19 10UP, INC., a California Corporation; and
20 DOES 1-50 inclusive,

21 Defendants.
22
23
24
25
26
27
28

Case No. CGC-20-586506
Hon. Richard B. Ulmer Jr., Dept. 302
CLASS ACTION

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR FINAL APPROVAL
OF CLASS ACTION SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

[Filed concurrently with the Barenfeld
Declaration ISO Final Approval; [Proposed]
Order Granting Final Approval; [Proposed]
Final Judgment; and Motion ISO Request for
Attorney Fees, Litigation Costs and Class
Representative Enhancements, as well as the
documents in support thereof]

Date: January 18, 2024

Time: 9:30 a.m.

Dept: 302

Case Filed: September 11, 2020

Trial Date: Not set

**ELECTRONICALLY
FILED**

*Superior Court of California,
County of San Francisco*

**11/20/2023
Clerk of the Court**

BY: RONNIE OTERO
Deputy Clerk

1 **NOTICE OF MOTION AND MOTION**

2 TO THE COURT AND ALL INTERESTED PARTIES: PLEASE TAKE NOTICE
3 THAT, on January 18, 2024, at 9:30 a.m., or as soon thereafter as the matter may be heard in
4 the courtroom of the Hon. Richard B. Ulmer, Jr., Superior Court for the State of California,
5 County of San Francisco, located at the Civic Center Courthouse, 400 McAllister Street, San
6 Francisco, CA 94102-4514, Department 302, Plaintiffs Richard Daniele, Richard Goss And
7 Steve Landi (together, "Plaintiffs") will and hereby do move the Court for final approval of the
8 proposed class action settlement. This proposed settlement would resolve the lawsuit in its
9 entirety.

10 Through this Motion, brought under California Rules of Court, rule 3.769, Plaintiffs
11 request that the Court: (1) grant final approval of the proposed class action settlement; (2)
12 grant, by separate order, the concurrently submitted request for payment of attorneys' fees, cost
13 reimbursement, and enhancement awards; (3) approve the Costs of Administration; and (4)
14 approve distribution of the settlement funds to the Class.

15 This Motion is based upon this Notice of Motion and Motion for Final Approval of
16 Class Action Settlement and the Memorandum of Points and Authorities in Support Thereof;
17 the Declaration of Gabriel S. Barenfeld in Support of Final Approval; the [Proposed] Order
18 Granting Final Approval; the [Proposed] Final Judgment; the Motion in Support of Request for
19 Attorney Fees, Litigation Costs and Class Representative Enhancements, as well as the
20 documents in support thereof; the Class Action Settlement Agreement and Release, including
21 the Amendment thereto; any argument; and on the complete files and records in the above-
22 captioned matter, and such additional matters as the Court may consider.

23 DATED: November 20, 2023

24 **NELSON & FRAENKEL LLP**

Gabriel Barenfeld

25 _____
26 Gretchen Nelson
27 Gabriel Barenfeld
28 *Attorneys for Plaintiffs*

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES 1

I. INTRODUCTION 1

II. Summary of the Litigation 2

 A. The Complaint and Underlying Facts 2

 B. Overview of the Relevant Procedural History 3

 C. The Settlement Was Achieved After Extensive Investigation and Discovery 5

 D. Settlement Negotiations Were Conducted Before and Experienced Mediator 5

III. GENERAL TERMS OF THE SETTLEMENT 6

 A. The Class Definition 6

 B. The Release 6

 C. No Confidentiality Provisions Exist 7

 D. The Monetary Terms of the Settlement 7

 E. Residual Recipient (“Cy Pres”) 8

IV. ADMINISTRATION OF THE SETTLEMENT 8

 A. Notice to Class Members 9

 B. Claims Response and Processing 10

 C. Administration Costs 13

 D. Resolving Disputed Extraordinary Loss Claims 13

V. THE COURT SHOULD GRANT FINAL APPROVAL 13

 A. The Settlement Is Presumptively Fair 14

 B. The Settlement Is Fair Under the Circumstances 14

 C. The Proposed Order and Final Judgment 15

VI. CONCLUSION 16

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page(s)

Cases

Cellphone Termination Fee Cases,
(2009) 180 Cal.App.4th 1110 13

Dunk v. Ford,
(1996) 48 Cal.App.4th 1794. 14, 15

In re Microsoft I-V Cases,
(2006) 135 Cal.App.4th 706 14, 15

Stambaugh v. Superior Court,
(1976) 62 Cal.App.3d 231 14

Wershba v. Apple Computer, Inc.,
(2001) 91 Cal.App.4th 224 14

Statutes

Bus. & Prof. Code, § 17200..... 3

California Civil Procedure Code section 384(b)..... 15

Rules

California Rules of Court, rule 3.769..... 2, 13

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiffs Richard Daniele, Richard Goss, and Steve Landi (together, “Plaintiffs”)
3 respectfully submit the following Memorandum in Support of their Motion for Final Approval
4 of the Proposed Class Action Settlement.

5 **I. INTRODUCTION**

6 Plaintiffs and 10UP have reached a settlement (“Settlement”) of this data-breach
7 lawsuit, resolving all claims on behalf of a settlement class comprised of current and former
8 SFERS Members (“Class”). The Settlement provides substantial benefits to the Class: (1) a
9 cash payment of \$60 to Class Members who submit a claim; (2) administrative costs; (3) the
10 opportunity to receive twelve months of Credit Monitoring; and (4) the ability to recoup actual
11 damages from the data breach. (Barenfeld PA Decl., Ex. 7, SAR § III, pp. 7-8.)¹

12 By its June 27, 2023 Order, the Court granted Plaintiffs’ preliminary approval of the
13 Settlement (“PA Order”). Nothing has changed since then to alter the Court’s analysis or
14 conclusion that the Settlement is fair, and benefits are reasonable when measured against the
15 risks. If anything, the evidence is even stronger now.

16 The Settlement has been well received, with high participation and claims rates by a
17 very interested Class who wish to obtain the significant benefits that will flow to them upon
18 final approval. The Settlement Website has 17,539 unique views with 70,828 web-page views.
19 (Barenfeld FA Decl., Ex. G (Epiq Decl., L. Meyer), at ¶ 8.) Epiq has received 6,060 Claim
20 Forms. Of those, it has processed and approved 5,662 Claims. (Barenfeld FA Decl., Ex. G at ¶
21 13-14.)

22 With about 93% of the Claims having been processed, there are no objections and only
23 6 Requests for Exclusion. (*Id.* at ¶ 13.) The Class currently includes 66,580 Class Members:

24
25 _____

26
27 ¹ “Barenfeld PA Decl.” shall refer to the Declaration of Gabriel S. Barenfeld in Support of
28 **Preliminary** Approval of Class Action Settlement, filed June 2, 2023. “Barenfeld FA Decl.” shall refer to the concurrently submitted Declaration of Gabriel S. Barenfeld in Support of **Final** Approval.

1 comprised of the 66,586 potential Class Members² less the 6 Requests for Exclusion.
2 (Barenfeld FA Decl. at ¶¶ 12-13.) As a result, the Claims rate will be over 11% at a minimum.³

3 This Settlement represents a fair and efficient resolution of Plaintiffs' claims. Class
4 Members faced years of additional litigation and trial and a real risk of recovering zero if a
5 class could not be certified, if they could not overcome 10UP's summary judgment motion, or
6 if a jury found against them or that their damages were *de minimus*. The Settlement is entitled
7 to a presumption of fairness because it is the product of arm's length bargaining after two
8 separate mediation sessions and months of negotiations.

9 For these reasons and those set forth below and in the Preliminary Approval Motion,
10 the Court should: (1) grant the motion for final approval of the Settlement; (2) grant, by
11 separate order, the request for payment of attorneys' fees, out-of-pocket costs, and incentive
12 awards; (3) approve payment of the Costs of Administration; and (4) approve distribution of
13 the other Benefits to Class Members.

14 **II. Summary of the Litigation**

15 **A. The Complaint and Underlying Facts**

16 10UP, a website consultant, contracted with SFERS to provide its Members with online access
17 to their account information. (Compl. ¶ 1.) This lawsuit arises from a data security incident.
18 Plaintiffs allege that their personal identifiable information ("PII") was subjected to
19 unauthorized access and exfiltration, theft, or disclosure. During the Data Breach, an

20
21
22 ² At the time we sought preliminary approval, we estimated that there were 68,754 Class
23 Members. (Barenfeld PA Decl., ¶ 8 & n. 1.) During the notice process, SFERS identified 66,586
24 Class Members to whom notice was sent. (Barenfeld FA Decl., Ex. D (Brazelton Decl.) at ¶
25 2(d) and 2(e).) When SFERS updates its rolls periodically, there can be attrition, due to (among
other things) deaths for which no beneficiary is identified. This explains the marginal disparity
between the estimated and actual number of Class Members.

26 ³ Historical data suggests that the average would be about a 4% response rate to this type of
27 claims-made notice campaign. (See Federal Trade Commission, "Consumers and Class Actions:
28 A Retrospective and Analysis of Settlement Campaigns," Sept. 2019, pp. 21, 27, *available at*
[https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-
analysis-settlement-campaigns/class_action_fairness_report_0.pdf](https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class_action_fairness_report_0.pdf).)

1 unauthorized party gained access to PII stored on a staging server that 10UP used to test
2 computer code. (Compl., ¶¶ 2, 18; Barenfeld PA Decl., Exs. 1—3.) The Class Members are
3 current and former SFERS Members to whom SFERS sent its Notice of Data Breach.
4 (Barenfeld PA Decl., Ex. 7, SAR, § I.N, pp. 2-3.)

5 In the Notice of Data Breach, SFERS states that 10UP’s server had been accessed by
6 “an outside party on February 24, 2020.” (Compl., ¶¶ 18-20 & n. 3; see also Barenfeld PA
7 Decl., Exs. 1, 2.) According to the Notice, after 10UP “promptly shut down the server,” it
8 “began an investigation” and purportedly “found no evidence that the information of SFERS
9 Members was removed from its server.” (*Id.*, Ex. 1.) Some or all of the following categories of
10 information pertaining to SFERS Members were stored on the compromised server: (1) Full
11 Name; (2) Full Home Address; (3) Date of Birth; (4) Designated Beneficiary Full Name (if
12 any); (5) Designated Beneficiary Date of Birth; (6) Designated Beneficiary Relationship to
13 Member; (7) IRS Form 1099R Information, excluding SSN; (8) Bank ABA (routing) Number;
14 and (9) SFERS Website User Name, Security Questions and Answers. (*Ibid.*)

15 The three lead Plaintiffs in this lawsuit are San Francisco Police Department retirees and
16 Members of SFERS. They have asserted claims for (1) violation of the California Consumer
17 Privacy Act (“CCPA”) (Civil Code, § 1798.150, et seq); (2) negligence; and (3) violation of the
18 UCL (Bus. & Prof. Code, § 17200). (Compl., ¶ 5.)

19 **B. Overview of the Relevant Procedural History**

20 Prior to filing suit, Plaintiffs served a Notice and Cure letter under the CCPA. (Barenfeld
21 PA Decl., ¶ 10.) 10UP responded with a letter dated August 19, 2020, asserting that “[a]ny
22 violation...has been cured and no further violations shall occur.” (*Id.*, Ex. 4 (10UP Response to
23 Notice and Cure Letter).)

24 On September 11, 2020, Plaintiffs filed the Class Action lawsuit. After 10UP demurred
25 to the original complaint, Plaintiffs filed the First Amended Complaint (“FAC”), which is the
26 operative pleading. (Barenfeld PA Decl., ¶ 11.) 10UP answered the FAC without filing a further
27 pleading challenge.

28

1 In addition to obtaining documents through California Public Records Act requests,
2 Plaintiffs conducted written and document discovery. Plaintiffs also served 10UP with a person
3 most qualified notice, but that deposition was later deferred pending the parties' mediation.
4 (Barenfeld PA Decl., ¶ 12.)

5 In December of 2021, 10UP moved for summary judgment or adjudication in the
6 alternative ("MSJ"), which was set for hearing on March 8, 2022. That motion was filed before
7 Plaintiffs sought class certification.

8 As explained below, on December 3, 2021, the parties participated in two mediation
9 sessions with JAMS. Although the parties reached a tentative settlement at the second mediation
10 session, even then it took several months of negotiations for the parties to finally agree on the
11 terms of the Settlement. (Barenfeld PA Decl. ¶ 18.)

12 On February 2, 2022, Plaintiffs filed a Notice of Settlement. We describe the settlement
13 process in Section II.D, *infra*.

14 Counsel for the parties then continued to engage in extensive negotiations and
15 discussions with City Counsel representing SFERS, regarding SFERS's participation in the
16 Notice process. These discussions lasted several months, and 10UP and SFERS entered a
17 separate contract to compensate SFERS for its role in providing Notice to the Class. Throughout
18 these discussions, Class Counsel navigated various issues, including (among other things)
19 compliance with statutory privacy requirements for SFERS' Members, coordinating the roles
20 and functions of the Notice process between SFERS (and its agents) and the Claims
21 Administrator (Epiq), and reaching agreement on the reasonable costs for the Claims
22 Administrator, given that the Claim Administrator's functions had to be modified from the
23 original scope given SFERS's expanded role in the Notice process. (Barenfeld FA Decl. ¶ 14.)

24 In June 2023, the Court granted preliminary approval of the Class Settlement. The Court
25 found the Settlement "within the range of possible approval as fair, reasonable, and adequate"
26 and approved the Notice plan. (PA Order at p. 2.) The Court also certified the Class, appointed
27 Epiq Class Action & Claims Solutions, Inc. ("Epic") as the Settlement Administrator, appointed
28 Class representatives and Class Counsel, and authorized SFERS and its designated agent, KCC,

1 to participate in providing notice to current and former SFERS members. (*Id.* at p. 3.) As part of
2 the Final Approval schedule, it was anticipated that, to the extent there were any disputes as to
3 claim approval, the final decision on those claims by the Settlement Umpire may occur after the
4 January 8, 2024, Final Approval hearing. (*Id.* at p. 3 [stating that the “deadline for the
5 Settlement Umpire to rule on disputed claims” is “[w]ithin 210 days after entry of preliminary
6 approval,” which falls on January 22, 2024.])

7 **C. The Settlement Was Achieved After Extensive Investigation and Discovery**

8 The parties engaged in extensive written discovery prior to Settlement, which involved
9 extensive meet and confer exchanges. In addition, Plaintiffs’ counsel served public records act
10 requests, under Government Code section 6250, to obtain relevant documents and information.
11 (Barenfeld PA Decl. ¶¶ 16-17.) Plaintiffs’ counsel has spent numerous hours developing facts
12 and investigating the claims to prepare for mediation, class certification, opposing summary
13 judgment, and, eventually, for trial. The parties also exchanged information, informally, to
14 facilitate mediation. (*Ibid.*) Moreover, Plaintiffs retained a data security and forensic consultant,
15 Matthew Strebe, Chairman and Founder of Connetic, in July of 2021, to assist with their
16 investigation of the Data Breach. (*Id.*, Ex. 5 (M. Strebe’s Qualifications and Background).)

17 **D. Settlement Negotiations Were Conducted Before and Experienced Mediator**

18 On December 3, 2021, the parties participated in a mediation session before Bruce A.
19 Friedman, Esq. of JAMS. (Barenfeld PA Decl. ¶ 17.) Mr. Friedman is an experienced litigator
20 and mediator, who focusses his mediation practice on data breach and other complex cases.⁴
21 Counsel for the parties exchanged information before the mediation, submitted and exchanged
22 extensive materials and briefing, and engaged in a full day of mediation. With the mediator’s
23 assistance, the parties exchanged competing settlement proposals and discussed their respective
24 assessment of the merits. They disagreed, however, over the path to resolution. (*Ibid.*)

25
26
27
28

⁴ See <<https://www.jamsadr.com/bruce-friedman/>> [last visited, July 22, 2022].

1 Believing that settlement prospects would benefit from a second session, the parties
2 agreed to conduct a further mediation session before Mr. Friedman on January 18, 2022. (*Id.* ¶
3 18.) During the second mediation session, Mr. Friedman and the parties worked on a settlement
4 structure that bridged the significant gaps between the parties. The parties reached a tentative
5 agreement on the principal terms of a settlement. Even then it took several months of
6 negotiations for the parties to finally agree on the terms of the SAR. (*Ibid.*)

7 **III. GENERAL TERMS OF THE SETTLEMENT**

8 **A. The Class Definition**

9 The Class is defined as⁵:

10 All San Francisco Employees Retirement System (“SFERS”) Members to whom
11 SFERS sent its Notice of Data Breach disclosing that on March 21, 2020, 10up
12 Inc. learned that a test server had been accessed by an outside party on February
13 24, 2020.

14 (Barenfeld PA Decl., Ex. 7, SAR, § I.N, pp. 2-3.) There are no subclasses.

15 **B. The Release**

16 The scope of the release in the SAR is appropriately tailored to the claims alleged in this
17 lawsuit. (Barenfeld PA Decl., Ex. 7, SAR § XIV, pp. 18-19.) Class Members who did not submit
18 a timely Request for Exclusion have released 10UP “from any and all claims actually alleged in
19 the Litigation and all potential claims reasonably arising out of the same set of operative
20 facts....” (*Ibid.*) Further, only the Class Representatives, not the absent Class Members, are
21 subject to a Civil Code section 1542 release and waiver of unknown claims. (*Ibid.*) The Release
22 becomes effective upon Final Approval of the Settlement Agreement.⁶

23
24
25
26 ⁵ Capitalized terms not otherwise defined herein shall have the same meanings as set forth in the
27 Settlement Agreement.

28 ⁶ The “Settlement Agreement” as used herein refers to the Class Action Settlement Agreement
and Release (see Barenfeld PA Decl., Ex. 7), as modified, in part, by the Amendment to Class
Action Settlement Agreement and Release (see Barenfeld PA Decl., Ex. 14).

1 **C. No Confidentiality Provisions Exist**

2 The Settlement contains no confidentiality provisions, and thus no provisions that bar or
3 could otherwise impede Class Counsel from discharging their fiduciary duties to the Class.

4 **D. The Monetary Terms of the Settlement**

5 The Settlement Agreement provides that 10UP will pay a \$60 cash payment to Class
6 Members who submit a claim, as well as attorneys’ fees, expenses, incentive awards, and
7 administration costs. 10UP is also affording an opportunity for Class Members to enroll, for no
8 cost to the Class, to receive twelve months of Credit Monitoring. (Barenfeld PA Decl., Ex. 7,
9 SAR § III, pp. 7-8.) Those who enroll will receive one year of identity protection services
10 offered by IDX™, which includes the following services: Triple Bureau Credit Monitoring &
11 Alerts, Cyberscan Dark Web Monitoring, \$1 Million Reimbursement Insurance, and Fully-
12 Managed Identity Restoration. (*Ibid.*) Also, each Class Member who allegedly was the victim of
13 actual identity theft could submit an Extraordinary Loss Claim.

14 **1. Attorney Fees and Costs**

15 Under the Settlement Agreement, Class Counsel may apply to the Court for an award of
16 reasonable attorneys’ fees and costs incurred in connection with the lawsuit, in an amount not to
17 exceed \$500,000. (Barenfeld PA Decl., Ex. 7, SAR, § V at p. 9.) As set forth in Plaintiffs’
18 concurrently filed Motion in Support of Request for Attorney Fees, Litigation Costs and Class
19 Representative Enhancements (“Fee Motion”), Plaintiff’s Counsel are seeking \$500,000 for
20 their fees and costs. They are also requesting \$30,000 for Incentive awards: \$10,000 per named
21 Plaintiff. (See, generally, Fee Motion.) The amount requested for fees, costs, and incentive
22 awards will not diminish the \$60 payment to Class Members.

23 **2. The Floor and Ceiling on 10UP’s Payment Obligations**

24 10UP’s Payment Obligation is subject to an aggregate cap (or a maximum amount) and
25 various floors (or a minimum amount). The Payment Obligation includes the Costs of
26 Administration, Credit Monitoring, Class Member Claims, service awards, fees, and costs.
27 (Barenfeld PA Decl., Ex. 7, SAR, § VI-VII, pp. 10-11.) In essence, it is the all-in Settlement
28 obligation to 10UP.

1 The cap on 10UP’s aggregate Payment Obligation is \$1.9 million. If 10UP’s obligations
2 exceed the \$1.9 million cap, Costs of Administration and credit monitoring would be paid as a
3 first and second priority, and all other claims, awards, fees, and costs are “summed and reduced
4 on a pro rata basis” so that the aggregate cost amounts to \$1.9 million. (*Id.* at p. 11.)

5 The aggregate floors depend on the number of claims made:

6 Number of Claims	7 Floor
8 Less than 2,200	\$700,000
9 Between 2200 and 3700	\$800,000
10 More than 3,700	\$1,000,000

11 As shown below, the number of claims easily exceeds 3,700, which triggers the \$1
12 million floor. But the total Settlement Benefits will not exceed the \$1.9 million cap, so there
13 will be *no* need to apply a pro rata reduction of the benefits to the Class Members.

14 **E. Residual Recipient (“Cy Pres”)**

15 10UP is not entitled to any reversion of the settlement funds. Epic—no relationship to
16 Settlement Administrator, Epic—is the De Minimis Residual Distribution Recipient. Epic is a
17 non-profit entity whose stated mission is to “secure the fundamental right to privacy in the
18 digital age for all people through advocacy, research, and litigation.” It is a 501(c)(3) non-profit
19 research and advocacy center, with no clients, no customers, and no shareholders.” (See
20 <https://epic.org/about/>.) For the additional reasons set forth in the Epic Declaration, it is an
21 appropriate *cy pres* recipient. (Barenfeld PA Decl., Ex. 13.)

22 To the extent any check or payment issued by the Settlement Administrator remains
23 uncashed 90 days after issuance, and the Settlement Administrator has no reasonable means to
24 re-issue the check or payment, unpaid funds are forfeited by a Class member and will be
25 distributed by the Settlement Administrator to Epic. (Barenfeld PA Decl., Ex. 7, ¶ 7, VIII.B.)

26 **IV. ADMINISTRATION OF THE SETTLEMENT**

27 SFERS takes the position that its Members’ contact information is confidential under
28 Government Code section 31532. To address SFERS’s concerns, 10UP and SFERS entered an

1 agreement whereby SFERS and its own agent, KCC, would email and mail the Class Notice to
2 Class Members. (PA Order, p. 5.) That way, SFERS did not have to disclose its Members’
3 contact information to Epiq, the Settlement Administrator, or any other third party that is not an
4 agent of SFERS. (Gov. Code, § 31532.) 10UP will be reimbursing SFERS its costs, as a Cost of
5 Administration under the Settlement Agreement. (Barenfeld FA Decl., Ex. G at ¶¶ 4, 7.)

6 Epiq assisted SFERS with preparing the Notice and handled other administrative tasks,
7 such as, but not limited to, establishing and maintaining a Settlement Website and toll-free
8 number and reviewing and processing Claims. (Barenfeld FA Decl., Ex.G.)

9 **A. Notice to Class Members**

10 To begin the Notice process, SFERS provided to Epiq a list of the names of all 66,586
11 potential Class Members, so that Epiq could add a unique claim number associated with each
12 Class Member. (Barenfeld FA Decl., Ex. G at ¶ 5.) Epiq returned to SFERS the list of Class
13 Members with their unique Claim numbers. On August 11, 2023, ReproMail, SFERS’s
14 contractor, mailed the postcards to 25,442 Class Members. (Barenfeld FA Decl., Ex. A (SFERS
15 Decl., J. Braelton) at ¶ 2(a) through 2(d).)

16 SFERS then emailed the Notice to 41,144 Class Members. (Barenfeld FA Decl., Ex. D
17 (Email Notice Exemplar).) Due to certain complications, SFERS sent the email notice out on
18 August 14, 2023, one business day after the August 11, 2023 date specified in the Court’s PA
19 Order. (Barenfeld FA Decl., Ex. A at ¶ 2(e).)

20 On August 24, 2023, ReproMail mailed postcards to an additional 12,705 Class
21 Members for whom SFERS either (1) received a “bounce-back” or (2) did not receive notice
22 that the email had been opened within seven days of being sent. (*Id.* at ¶ 2(f); Barenfeld FA
23 Decl., Ex. E (Postcard Notice Exemplar).) SFERS also provided to KCC, which was responsible
24 for re-mailing undeliverable postcards, 16,000 postcards. (Barenfeld FA Decl., Ex. A at ¶ 2(g)
25 and 2(h).)

26 KCC received and re-sent undeliverable postcards to Class Members’ current addresses.
27 (Barenfeld FA Decl., Ex. B at ¶ 2 (KCC Decl. (Z. Cooley).) To do that, KCC established a Post
28 Office Box to receive postcards returned as undeliverable, which was printed as the return

1 address on the postcards. In total, KCC received 1,205 undeliverable postcards, none of which
2 had a forwarding address label. KCC scanned these postcards and searched for the Class
3 Member’s current address by performing a skip trace. It located addresses for 463 Class
4 Members through that process, and obtained contacts for an additional 12 Class Members from
5 SFERS. KCC then re-mailed the additional 475 postcards whose initial mailings were returned
6 as undeliverable. The process was completed by KCC on October 6, 2023. (*Id.* at ¶¶ 3-4.)

7 In sum, Notice was initially mailed or emailed to **66,586** Class Members, of whom only
8 730 Class Members—comprising about 1% of the Class—could not be reached after skip
9 tracing and other efforts to locate a valid address.

10 **B. Claims Response and Processing**

11 The Claims process was designed to be simple. (Barenfeld FA Decl., Ex. C (Claim Form
12 Exemplar).) Class Members were able to submit a Claim Form either by mail or by completing
13 an online Claim form and uploading any supporting documentation, as necessary, using secure
14 website maintained by the Settlement Administrator. (Barenfeld FA Decl., Ex. F (Long Form
15 Notice Exemplar - available on the settlement website).)

16 Class Members had until October 25, 2023, to submit claims, request Credit Monitoring,
17 submit documentation of Extraordinary Loss, object to final approval of the Settlement, and/or
18 to opt-out. (PA Order, pp. 5-6.) The deadlines for Epiq to approve claims are (1) November 23,
19 2023, for a claim not involving Extraordinary Loss, and (2) December 8, 2023, for
20 Extraordinary Loss Claims. (*Ibid.*)

21 The Class Members showed strong interest and have been highly engaged in the
22 Settlement process. As of November 14, 2023, the Settlement Website has been visited by
23 17,539 unique visitors and 70,828 website pages have been viewed, while the toll-free number
24 has received 1,411 calls for 4,407 total minutes. (Barenfeld FA Decl., Ex. G at ¶¶ 8, 10.)

25 As of November 9, 2023, Epiq has received 6,060 Claim Forms, which includes all
26 Claims that were submitted by the October 25 deadline. Of the 6,060 Claim Forms Epiq
27
28

1 received, it has processed and approved 5,662 Claims, 6 Claims have been rejected, and 392
2 Claims are still undetermined. (*Id.* at ¶ 13-14.)⁷

3 With about 93% of the Claims having been processed, there have been **no objections**,
4 and only **6 Requests for Exclusion**. (*Id.* at ¶ 13.) Thus, the Class currently includes 66,580
5 Class Members: the 66,586 potential Class Members less the 6 Requests for Exclusion.
6 (Barenfeld FA Decl at ¶¶ 12-13.)

7 Also, 133 Class Members have requested reimbursement for out-of-pocket expenses.
8 These out-of-pocket damage claims are capped at \$1,000 under the Agreement.⁸ There were
9 also 5,033 Claim Forms that requested credit monitoring, 4,878 of which have been processed
10 and approved. (Barenfeld FA Decl, Ex. G, at ¶ 14.)

11 The following summarizes the potential Settlement Benefits as of the time of the
12 Settlement, as well as the Settlement Benefits based on the actual Claim response to date: based
13 on the Claim response **to date**. The amounts are subject to change as noted below.

14 **\$60 Claim Payments:**

- 15 • Potential Benefits Available to Class (Before Claims): **\$1.9 million**
 - 16 ○ Explanation: Multiplying the total number of Class Members by \$60 exceeds the
 - 17 \$1.9 million aggregate cap.
- 18 • Benefits Based on Current Claims: **\$339,720**
 - 19 ○ Explanation: This is based on 5,662 claims at \$60 per claim. But an additional
 - 20 392 Claims have not been processed (6 have been rejected). (Barenfeld FA
 - 21 Decl., Ex. G at ¶ 13.)

22
23
24 ⁷ Class Members could elect to receive Credit Monitoring and claim Extraordinary Loss (i.e.,
25 actual damages) on the same Claim Form that they request the \$60 payment. The 5,562
26 processed Claims refer to the Claims requesting the \$60 payment. We discuss below the status
of the Credit Monitoring and Extraordinary Loss Claims.

27 ⁸ It was anticipated that the review and final determinations for the actual damage claims, also
28 referred to as “Extraordinary Loss” claims, will not be completed by the Court-ordered deadline
for Final Approval. (See e.g., 6/27/23 Order Granting Preliminary Approval, p. 6.)

1 **Credit Monitoring:**

- 2 • Potential Benefits Available to Class (Before Claims): **\$1.9 million**
- 3 ○ Explanation: Multiplying the total number of Class Members by \$32.50—the
- 4 value of the credit monitoring service if Class Members were to purchase it on
- 5 their own—exceeds the \$1.9 million aggregate cap. The approximate cost to
- 6 10UP to purchase Credit Monitoring is \$21 per claim. (Barenfeld FA Decl. at ¶
- 7 12.) If 10UP had to purchase Credit Monitoring for all Class Members, it would
- 8 have cost close to \$1.4 million.
- 9 • Value to Class Based on Current Claims: **\$160,486**
- 10 ○ Explanation: This is based on 4,878 approved credit monitoring claims. There
- 11 are additional pending credit monitoring claims that have been received but have
- 12 not been processed. (Barenfeld FA Decl.,Ex. G at ¶ 14.)

13 **Administrative Costs:**

- 14 • Estimated Administrative Costs: **\$165,082.36**
- 15 ○ Explanation: This is based on SFERS’s current costs combined with Epiq’s
- 16 estimated costs and fees. (Barenfeld FA Decl.,Ex. G at ¶ 15; see also Barenfeld
- 17 FA Decl. at ¶ 10.)

18 **Actual Damages:**

- 19 • Potential Benefits Available to Class (Before Claims): **\$1.9 million**
- 20 ○ Explanation: Multiplying the total number of Class Members by the \$1,000
- 21 actual damage cap, exceeds the \$1.9 million aggregate cap.
- 22 • Potential Value to Class Based on Current Claims: **\$133,000**
- 23 ○ This is the potential actual damage amount based on the 133 extraordinary loss
- 24 claims, which have a \$1,000 cap. These claims have **not** been processed or
- 25 approved, and there may be additional Class Members whose claims have not
- 26 been processed that seek actual damages. (Barenfeld FA Decl.,Ex. G at ¶ 14.)

27 **Attorneys’ Fees and Costs:**

- 28 • Requested Amount: **\$500,000**

- Explanation: Plaintiffs will be requesting this amount in the concurrently filed Fee Motion.

Incentive Award:

- Requested Amount: **\$30,000**
 - Explanation: The three named Plaintiffs are requesting \$10,000 each in the concurrently filed Fee Motion.

The Settlement Administrator will make disbursements from the Qualified Settlement Fund that will be funded by 10UP. (*Id.*, § VI.F at p. 11; see also *id.*, § XI at pp. 15-16.) Class Members will receive Settlement Benefits not later than 30 days after the Effective Date, defined as after the time for any appeal of Final Approval has lapsed. (Barenfeld PA Decl., Ex. 7, SAR § II at p. 5.) Upon the granting of final approval of the Settlement, notice of entry of the Order and Final Judgment will be posted on the Settlement Website.

C. Administration Costs

Epiq estimates that its administrative expenses for the entire case will be \$139,420.08. (Barenfeld FA Decl., Ex. G at ¶ 15). SFERS’s charges will range from \$25,662.28 to \$27,113.52. (Barenfeld FA Decl. at ¶ 10.)

D. Resolving Disputed Extraordinary Loss Claims

If a Class Member challenges Epiq’s claim decision, the matter will be referred to the Settlement Umpire, who has until January 22, 2024, to rule on all disputed claims. (PA Order at p. 6.)

V. THE COURT SHOULD GRANT FINAL APPROVAL

Class action settlements require court approval. (Cal. Rules of Court, rule 3.769(a).) Rule 3.769 establishes a two-step process for court approval. First, “the court preliminarily approves the Settlement and the Class Members are notified as directed by the court,” and second, “the court conducts a final approval hearing to inquire into the fairness of the proposed settlement.” (*Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1118.) The Court already took the first step and granted preliminary approval. Plaintiffs request that this Court take the last step by granting final approval of the Settlement.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

A. The Settlement Is Presumptively Fair

Settlements, in general, are highly favored by the courts. (*Stambaugh v. Superior Court* (1976) 62 Cal.App.3d 231, 236.) Public policy generally favors the compromise of complex class-action litigation. (*In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 723 n. 14.)

To determine fairness, the Court “should consider relevant factors, such as the strength of plaintiffs’ case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the benefits offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement. [Citation.] The list of factors is not exhaustive and should be tailored to each case. Due regard should be given to what is otherwise a private consensual agreement between the parties.” (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801.)

Further, a “‘presumption of fairness exists where: (1) the settlement is reached through arm’s-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small.’ [Citation.]” (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 245 [quoting *Dunk, supra*, 48 Cal.App.4th at p. 1802].) The presumption of fairness applies here.

The Court found that the first three elements are satisfied when it granted preliminary approval. (See PA Order.) The parties reached the Settlement through the assistance of a highly experienced mediators skilled in resolving complex class action litigation and only after discovery, investigation, and motion practice. There is no evidence of collusion. And counsel for both Plaintiffs and Defendant are experienced in class action litigation and claims involving data breaches at issue here. (*Ibid.*) There have been no changes of law or fact since then to cause the Court to change that finding. Moreover, as of the filing of this motion, there are no objectors and only a very small number of Class Members have opted out.

B. The Settlement Is Fair Under the Circumstances

In evaluating the fairness, adequacy, and reasonableness of a class settlement, the Court

1 considers the strength of plaintiffs’ case, the risk, expense and likely duration of further
2 litigation, the settlement amount, the stage of the proceedings, the views of class counsel, and
3 the reaction of the class members. (*In re Microsoft I-V Cases, supra*, 135 Cal.App.4th at p. 723;
4 *Dunk, supra*, 48 Cal.App.4th at 1801.)

5 The Settlement meets the criteria for final approval because it represents the product of
6 reasoned judgment and extensive negotiation assisted by the best efforts of an experienced
7 mediator. Plaintiffs believe in the merits of the case. But as described in the Preliminary
8 Approval brief, Plaintiffs faced real risks of an adverse outcome absent approval of the
9 Settlement, including the risk that the Class Members receive nothing. Moreover, any favorable
10 merits-based resolution will take years of complex and expensive litigation to achieve.

11 In sum, the Settlement has no deficiencies that would require the Court to reject it. The
12 benefits obtained under the Settlement are substantial, especially when weighed against the
13 risks that 10UP would prevail at the class certification stage, at summary judgment, at trial, or
14 on appeal and the considerable expense and delay of continued litigation. The proposed
15 Settlement, moreover, is presumptively fair and does not disclose grounds to doubt its fairness
16 or other obvious deficiencies, such as unduly preferential treatment of the class representatives
17 or of segments of the class, or excessive compensation for attorneys, and it falls within the
18 range of possible approval. What’s more, Class Members response and reaction has been
19 positive.

20 **C. The Proposed Order and Final Judgment.**

21 The [Proposed] Order Granting Final Approval and [Proposed] Final Judgement are
22 being lodged concurrently. The [Proposed] Order provides that, pursuant to California Civil
23 Procedure Code section 384(b), within 365 days of the Effective Date, Class Counsel shall
24 submit to the Court a final report that contains: (i) the total amount of the checks cashed; and
25 (ii) the total amount of any un-cashed checks that shall be distributed to the Cy Pres Recipient.
26 The opt outs are identified in the [Proposed] Final Judgment. (The current forms of the
27 [Proposed] Order and [Proposed] Final Judgment will be updated prior to the Final Approval
28 hearing to incorporate relevant current claims information, such as opt-outs).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

VI. CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court grant this Motion and enter a Final Judgment.

Respectfully Submitted,

DATED: November 20, 2023

NELSON & FRAENKEL LLP

Gabriel Barenfeld

Gretchen Nelson
Gabriel Barenfeld

Attorneys for Plaintiffs