

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION**

JONATHAN PHELPS, individually and on behalf of all others similarly situated	:	Case No: 6:22-cv-00106
	:	
Plaintiff,	:	Judge Claria Horn Boom
	:	Magistrate Hanly A. Ingram
	:	
v.	:	<u>PLAINTIFF’S UNOPPOSED</u>
	:	<u>MOTION FOR PRELIMINARY</u>
TOYOTETSU NORTH AMERICA,	:	<u>APPROVAL OF CLASS ACTION</u>
	:	<u>SETTLEMENT</u>
Defendant.	:	
	:	<u>(Filed Electronically)</u>
	:	

Plaintiff respectfully moves the Court for preliminary approval of class action settlement under Rule 23 of the Federal Rules of Civil Procedure. Plaintiff’s efforts have resulted in a proposed \$400,000.00 non-reversionary common fund settlement on behalf of himself and the Class that was negotiated at arm’s-length. As explained in the accompanying memorandum, this proposed settlement is fair, reasonable, adequate, and in the Class’s best interest. A proposed order granting this Motion is attached as **Exhibit 1**. The Settlement Agreement and Release Agreement (“Settlement Agreement”) is attached as **Exhibit 2**, which includes reference to the Notice that will be distributed to potential Class Members via regular U.S. mail (attached as **Exhibit 3**). Further attached are the proposed Claim Form (attached as **Exhibit 4**) and Long Form Notice (attached as **Exhibit 5**), which will be posted on the Settlement Website, www.toyotetsusdatasettlement.com. The affidavit of Terence R. Coates in Support of Preliminary Approval is attached as **Exhibit 6** (“Coates Affidavit”) and the Declaration of Christopher Longley

on Adequacy of Notice Plan from Atticus Administration, LLC is attached as **Exhibit 7** (“Atticus Declaration”). Defendant has reviewed this filing and does not oppose this Motion.¹

MEMORANDUM IN SUPPORT

Plaintiff Jonathan Phelps and the proposed Class he represents have reached a nationwide class action settlement with Defendant Toyotetsu America, Inc. (named in the complaint as Toyotetsu North America) (“Defendant” or “Toyotetsu”) for a \$400,000 non-reversionary common fund to resolve claims arising from the October 2021 Data Breach that impacted approximately 12,453 of its current and former employees (the “Data Breach”). *See* Settlement Agreement attached as **Exhibit 2**; *see also* Coates Affidavit, at ¶ 6. The Data Breach included current and former employees’ names, addresses, dates of birth and Social Security numbers. ECF No. 25, Amended Class Action Complaint, at ¶1. The Settlement provides significant relief to Settlement Class Members and lies well within the range of reasonableness necessary for this Court to grant preliminary approval of the class action settlement under Rule 23(e). The Court should, therefore, preliminarily approve the Settlement, direct that notice be sent to all Class Members in the reasonable manner outlined below, set deadlines for exclusions, objections, and briefing on Plaintiff’s Motion for Final Approval and petition for the class representative service award, attorneys’ fees, and expenses, and set a date for the Final Approval Hearing.

¹ Defendant’s non-opposition does not constitute an admission as to the validity of any of Plaintiff’s factual allegations, causes of action, and claims for relief. Defendant denies Plaintiff’s factual allegations contending, directly or indirectly, that Defendant engaged in wrongful conduct, denies the causes of action, and denies Plaintiff and putative class are entitled to the relief raised in the pleadings, except for as stated in the Settlement Agreement.

I. Background

A. History of Litigation

On April 14, 2022, Plaintiff Phelps filed a class action complaint against Defendant in the 28th Judicial Circuit of Kentucky, Pulaski Circuit Court, alleging that Defendant was liable for the Data Breach, as a result of its failure to implement and maintain reasonable data security measures. On May 13, 2022, Defendant filed a notice of removal, removing this case to the United States District for the Eastern District of Kentucky under the Class Action Fairness Act, 28 U.S.C. § 1332(d). ECF No. 1. On August 26, 2022, Defendant filed a Motion to Dismiss under Rule 12(b)(6) for failure to state a claim. ECF No. 22. Following the motion to dismiss, Plaintiff amended his complaint. ECF No. 25. The First Amended Complaint asserts claims against Defendant on behalf of Plaintiff and the putative nationwide class for (1) negligence, (2) invasion of privacy, (3) unjust enrichment, and (4) breach of implied contract. On October 10, 2022, the parties filed a joint notice of settlement and motion to stay this action. ECF. Nos. 28, 29. On October 12, 2022, the Court dismissed this action without prejudice, but allowed the parties to file a motion to redocket this action by November 28, 2022. ECF No. 30.

B. Negotiations and Settlement

The settlement is the result of months of arms'-length negotiation and hard bargaining. Both parties exchanged informal discovery, including, but not limited to, the allegations in the Amended Complaint, the class size, the types of data impacted in the Data Breach, the amount of insurance coverage Toyotetsu has available for the Data Breach, and information supporting Plaintiff's damages allegations. Coates Affidavit, ¶ 7. Through the informal discovery process, Plaintiff was able to properly evaluate damages on a class-wide basis. *Id.* ¶ 8. After the exchange of a series of offers and demands, the Parties were able to resolve the matter for a non-reversionary

common fund of \$400,000, plus Defendant's commitment to implement and/or to keep in place, for a period of two years, certain cybersecurity business practices to further limit the potential for future data security incidents. *Id.* at ¶ 10. This settlement would resolve all claims related to the Data Breach on behalf of the Class. *See generally* Settlement Agreement. The Settlement Agreement further provides that Defendant must produce additional confirmatory discovery within 30 days of its execution. *See* Settlement Agreement, ¶ 53.

C. Summary

Under the proposed Settlement, Defendant will pay \$400,000 to establish the Settlement Fund to be distributed to Class Members under the Settlement Agreement. Furthermore, under the Settlement Agreement, Defendant agreed to implement and maintain certain cybersecurity enhancements to Defendant's network. The Settlement defines the Class as follows:

All persons who were sent notice of the Data Breach.²

Settlement Agreement, ¶ 47. It is estimated that the Class is comprised of approximately 12,453 individuals nationwide. FAC, ECF No. 25, ¶ 3. Under the Proposed Settlement, Defendant agrees to pay a total of \$400,000 into the Settlement Fund, which will be used to make payments to Class Members and to pay the costs of Settlement Administration, attorneys' fees and expenses, and a Service Award to Plaintiff. *See* Settlement Agreement, ¶¶ 46, 52.

1. Compensation

The Settlement Fund will be used to pay \$250 to each Class Member submitting a valid claim under the Settlement. This \$250 cash payment will be increased pro rata or decreased pro rata after the payment of any documented monetary losses as identified below, and for attorneys'

² "Data Breach" shall mean the October 2021 cybersecurity incident against Toyotetsu giving rise to the action.

fees and expenses, the proposed \$5,000 Class Representative Service Award, and the costs of Settlement Administration.

The Settlement Fund will provide the reimbursement of up to \$5,000 per claimant for documented monetary losses that are fairly traceable to the Data Breach. Settlement Agreement, ¶ 52(c). Such monetary losses may include, without limitation, unreimbursed losses relating to fraud or identity theft; professional fees including attorneys' fees, accountants' fees, and fees for credit repair services; costs associated with freezing or unfreezing credit with any credit reporting agency; credit monitoring costs that were incurred on or after the Data Breach through the date of claim submission; and miscellaneous expenses such as notary, fax, postage, copying, mileage, and long-distance telephone charges. *Id.*

The Settlement Fund will also be used to pay for any attorneys' fees, expenses, a Service Award to Plaintiff, and the cost of Settlement Administration, as approved by the Court. *Id.* at ¶ 52(b).

2. Remedial Measures and Security Enhancements

Separate from and in addition to the Settlement Fund, Defendant agrees to adopt and implement certain data security measures for a period of two (2) years following the effective date of the Settlement Agreement. The cybersecurity enhancements will be filed separately under seal so that Defendant's future cybersecurity is not unduly compromised. *Id.* at ¶ 56. Costs associated with these data security measures shall be paid by Defendant separate and apart from the Settlement Amount. *Id.* at ¶ 57.

3. Scope of the Release

In exchange for consideration above, Plaintiff and Class Members who do not timely and validly exclude themselves from the Settlement will be deemed to have released Defendant from

claims arising from or related to the Data Breach at issue in this litigation. *Id.* at ¶ 17, 68(b). The Settlement’s finality is not dependent on the Court awarding attorney’s fees and expenses to Class Counsel. *Id.* at ¶ 81. The scope of the release is defined as follows:

On the Effective Date, all Releasors, including but not limited to Settlement Class Members and Plaintiff, shall be deemed to have and do fully and finally release, acquit, and forever discharge Toyotetsu and any of its past or present parents, subsidiaries, related or affiliated entities, assigns, directors, officers, employees, shareholders, members, partners, principals, owners, divisions, partnerships, attorneys, insurers, and reinsurers, and each of those individuals’ or entities’ respective predecessors, successors, directors, officers, employees, principals, assigns, and transferees (collectively “Released Parties”) from any past, present or future claims, demands, lawsuits, set-offs, costs, expenses, attorneys’ fees, losses, rights, charges, complaints, suits, petitions, penalties, damages, or liabilities of any nature, whether known or unknown, liquidated or unliquidated, matured or unmatured, in law, equity, or any other form whereby legal or equitable relief could be sought, that has been asserted or pled, could have been asserted or pled, or was asserted or pled by any Settlement Class Member, including Plaintiff, arising out of or in any way related to the Data Breach and/or Released Parties’ recordkeeping or data security policies and practices (“Released Claims”).

Id. at ¶ 58.

4. The Notice and Administration Plans

Under the Settlement Agreement, Class Counsel, with Defendant’s approval, has selected Atticus Administration (“Atticus”) to be the Settlement Administrator, who will provide the Class with notice and administer the claims. Defendant, with the assistance of the Settlement Administrator, shall create a “Class List” of all names, emails, and/or mailing addresses of potential Settlement Class Members, to the extent such information was contained in the original list used to send to Class Members notice about the Data Breach. *Id.* at ¶ 65. Defendant will cooperate with Plaintiff concerning reasonable requests for information specific to the identification of Class Members and to the extent such information is readily available from a cost, resource, and access perspective. *Id.* at ¶ 65(b). Class Counsel received quotes from three separate settlement administrators before selecting Atticus as the best settlement administrator for this case. Coates

Affidavit, ¶ 13. Class Counsel's decision to select Atticus was based on the scope of settlement administration Atticus proposed balanced against the cost for such services. *Id.* Class Counsel understand that any settlement administration costs and expenses will be deducted from the Settlement Fund and endeavored to select the settlement administrator for this case offering the best service for the best price. *Id.*

Atticus will first provide a written notice that will be mailed to each Class Member for whom valid mailing addresses are known and/or an email notice to Class Members for whom valid email addresses are known. Settlement Agreement, ¶ 66(c), 67(a). The Short Form Notice in the form of a postcard notice with a tear off claim form clearly and concisely informs Class Members of the amount of the Settlement Fund, that they may do nothing and be bound by the Settlement, object to the Settlement, exclude themselves by completing the exclusion form and not be bound by the Settlement, or make a claim by completing and returning a claim form and be bound by the Settlement. *Id.* at ¶ 66(b). Atticus will also publish a Long Form Notice and Claim Form on the Settlement Website established and administered by the Settlement Administrator, which shall contain information about the Settlement, including copies of the notice, the Settlement Agreement, and all court documents related to the Settlement. *Id.* at ¶ 65(d). Atticus will also be responsible for accounting for all of the claims made and exclusions requested, determining eligibility, and disbursing funds from the Settlement Escrow Account directly to Class Members. *Id.* at ¶ 53. Class Counsel was able to work with Atticus to get Atticus to agree to cap its quote for Settlement Administration at \$35,000 for this case. Coates Affidavit, at ¶ 15.

5. Attorneys' Fees, Costs, Expenses, and Service Award

Plaintiff will also separately seek an award of attorneys' fees not to exceed 1/3 of the Settlement Fund (*i.e.*, \$133,333.33), and for reimbursement of Class Counsel's reasonable costs

and litigation expenses not to exceed \$15,000, which shall be paid from the Settlement Fund. *Id.* at ¶¶ 79, 80. The motion will be filed at least fourteen (14) days before Objection/Opt-Out Deadline. *Id.* at ¶ 79. The Settlement Agreement further provides for a payment of \$5,000 to Plaintiff as a Service Award for his services in representing the Class. *Id.* at ¶ 82.

II. LEGAL STANDARD

Settlement of class actions is generally favored and encouraged. *Franks v. Kroger Co.*, 649 F.2d 1216, 1224 (6th Cir. 1981). Federal Rule of Civil Procedure (“Rule”) 23(e) provides three steps for the approval of a proposed class action settlement: (1) the Court must preliminarily approve the proposed settlement; (2) members of the class must be given notice of the proposed settlement; and (3) a fairness hearing must be held, after which the court must determine whether the proposed settlement is fair, reasonable, and adequate. *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 372 (S.D. Ohio 2006); *see also Amos v. PPG Indus.*, No. 2:05-cv-70, 2015 WL 4881459, at *1 (S.D. Ohio Aug. 13, 2015) (same). Plaintiff Phelps requests that the Court preliminarily approve the proposed settlement, the first step in the three-step process.

During the preliminary approval proceedings, “the questions are simpler, and the court is not expected to, and probably should not, engage in analysis as rigorous as is appropriate for final approval.” David F. Herr, ANNOTATED MANUAL FOR COMPLEX LITIGATION (Fourth) § 21.662 (2012). Instead, the Court should evaluate only whether the proposed settlement “appears to be the product of serious, informed, non-collusive negotiation, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval.” *Hyland v. Homeservs. of Am., Inc.*, No. 3:05-CV-612-R, 2009 WL 2525587, at *2 (W.D. Ky. Aug. 17, 2009) (citing *In re*

Nasdaq Market-Makers Antitrust Litig., 176 F.R.D. 99, 102 (S.D.N.Y.1997)).³ In essence, the Court should preliminarily determine that the settlement is sufficiently fair, reasonable, and adequate so that it can “direct the preparation of notice of certification, proposed settlement, and date of the final fairness hearing” to all those affected by it. *In re Skechers Toning Shoe Prod. Liab. Litig.*, No. 3:11-MD-2308-TBR, 2012 WL 3312668, at *7 (W.D. Ky. Aug. 13, 2012).⁴

III. ARGUMENT

A. The Proposed Settlement Satisfies the Standard for Preliminary Approval.

1. The proposed Settlement was reached after serious, informed, and arm’s-length negotiations.

Arm’s-length negotiations conducted by competent counsel constitute *prima facie* evidence of fair settlements. *See, e.g., Roland v. Convergys Customer Mgmt. Grp. Inc.*, No. 1:15-CV-00325, 2017 WL 977589, at *1 (S.D. Ohio Mar. 10, 2017) (noting that settlement was “reached after good faith, arms’ length negotiations, warranting a presumption in favor of approval”); *Brotherton v. Cleveland*, 141 F. Supp. 2d 894, 906 (S.D. Ohio 2001) (absence of any evidence suggesting collusion or illegality “lends toward a determination that the agreed proposed settlement was fair, adequate and reasonable”).⁵

³ *See also Bautista v. Twin Lakes Farms, Inc.*, No. 104-CV-483, 2007 WL 329162, at *4 (W.D. Mich. Jan. 31, 2007) (“The court’s role in reviewing settlements must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between the negotiating parties, and that the settlement taken as a whole is fair, reasonable, and adequate to all concerned.”) (internal quotes omitted).

⁴ *See also In re Prandin Direct Purchaser Antitrust Litig.*, No. 2:10-CV-12141-AC-DAS, 2014 WL 8335997, at *3 (E.D. Mich. Oct. 2, 2014) (“The ultimate approval of a class action settlement requires a finding that the settlement is fair, adequate, and reasonable.”); *Brotherton v. Cleveland*, 141 F. Supp. 2d 894 (S.D. Ohio 2001); *In re Southern Ohio Corr. Facility*, 173 F.R.D. 205, 211 (S.D. Ohio 1997).

⁵ *See also Mangone v. First USA Bank*, 206 F.R.D. 222, 226 (S.D. Ill. 2001); 1 Herbert B. Newberg & Alba Conte, *NEWBERG ON CLASS ACTIONS* § 11.41 at 90 (4th Ed. 2002).

In this case, the Settlement was the result of intensive, arm's-length negotiations between experienced attorneys who have extensive class action litigation experience and who have knowledge of the legal and factual issues of this case in particular. Settlement negotiations in this case took place over the course of several months. Coates Affidavit, ¶¶ 7-8. There is no evidence that any collusion or illegality existed during the settlement process. *Id.* at ¶ 8. The Parties' counsel support the Settlement as fair and reasonable, and all certify that it was reached at arms'-length. *Id.*

2. The proposed Settlement falls within the range of reasonableness and warrants issuance of notice and a hearing on final approval of settlement.

Although Plaintiff believes that the claims asserted in the Class Action are meritorious and the Class would ultimately prevail at trial, continued litigation against Defendant poses significant risks that make any recovery for the Class uncertain. The fairness and adequacy of the Settlement is underscored by consideration of the obstacles that the Class would face in ultimately succeeding on the merits, as well as the expense and likely duration of the litigation. *See Amos*, 2015 WL 4881459, at *1 (“In general, most class action are inherently complex, and settlement avoids the costs, delays, and multitude of other problems associated with them.”) (internal citations and quotations omitted); *Miracle v. Bullitt Cnty., Ky.*, No. CIV.A. 05-130-C, 2008 WL 3850477, at *6 (W.D. Ky. Aug. 15, 2008) (the “uncertainty of the outcome of the litigation makes it more reasonable for the plaintiffs to accept the settlement offer from the defendant”).⁶

⁶ Courts within this District have experienced the protracted litigation often required to simply get past the pleading stage in similar actions. *See, e.g., Savidge v. Pharm-Save, Inc.*, No. 3:17-CV-00186-TBR, 2017 WL 5986972, at *13 (W.D. Ky. Dec. 1, 2017) (granting in part and denying in part motion to dismiss complaint in data breach action involving employee PII); *Savidge v. Pharm-Save, Inc.*, No. 3:17-CV-186-CHB, 2020 WL 265206, at *7 (W.D. Ky. Jan. 17, 2020) (dismissing all additional claims brought by the plaintiffs in amended complaint); *Savidge v. Pharm-Save, Inc.*,

Despite the risks involved with further litigation, the Settlement Agreement provides outstanding benefits. Moreover, Class Members have the ability to claim documented losses up to \$5,000.

3. The Proposed Settlement Has No Obvious Deficiencies

There are no grounds to doubt the fairness of the proposed settlement or other obvious deficiencies, such as unduly preferred treatment of the Plaintiff or excessive attorney compensation. *Thacker v. Chesapeake Appalachia, LLC*, 259 F.R.D. 262, 271 (E.D. Ky. 2009). Plaintiff, like all other Class Members, will receive his settlement benefit in accordance with a claims process that will be presented to the Court for approval.

The matter of attorneys' fees and payment of expenses, as well as any Service Award for Plaintiff, will be determined by the Court. Proposed Class Counsel has agreed to limit their attorneys' fee request to one-third of the Common Fund (\$133,333.33), which is well within the range of fees awarded within the Sixth Circuit. *See In re Cincinnati Gas & Elec. Co. Sec. Litig.*, 643 F. Supp. 148, 150 (S.D. Ohio 1986) (in the Sixth Circuit, attorneys' fees "typically ... range from 20% - 50%"); *In re Automotive Parts Antitrust Litigation*, No. 12-md-02311, 2022 WL 4385345, at *2 (E.D. Mich. Sept. 22, 2022) (noting that a fee request of 1/3 of the class action settlement fund "is within the range of fee awards made by courts in this Circuit."); *Walker v. Nautilus, Inc.*, No. 2:20-cv-3414-EAS (S.D. Ohio) (awarding attorneys' fees of 1/3 of the \$4.25 million common fund); *Bechtel v. Fitness Equipment Services, LLC*, No. 1:19-cv-726-KLL (S.D. Ohio) (awarding attorneys' fees of 1/3 of the \$3.65 million common fund); *Fields v. KTH Parts Industries, Inc.*, No. 3:19-cv-8, 2022 WL 3223379, at * 7-8 (S.D. Ohio Aug. 9, 2022) (finding that

No. 3:17-CV-00186-CHB, 2021 WL 3076786, at *1 (W.D. Ky. July 1, 2021) (granting leave to file second amended complaint over defendant's objection).

attorneys' fees that are 1/3 of the class action settlement fund are "normal"); *Davis v. Omnicare, Inc.*, No. 5-18-CV-142-REW, 2021 WL 1214501, at *11 (E.D. Ky. Mar. 30, 2021) (preliminarily approving attorneys' fees of 1/3 of the class action settlement fund); *see also* Coates Affidavit, at ¶ 21. Importantly, here, Class Counsel's fees were not negotiated until after Class Counsel agreed upon Class Members' relief. Settlement Agreement, at ¶ 79. Plaintiff further seeks a modest Service Award of Five Thousand Dollars (\$5,000.00) for his active involvement in this litigation. Because Plaintiff and Class Counsel will move for an award of costs, fees, expenses, and the Plaintiff service award at least 14 days before the objection and opt out deadlines, the Court will have the ability to consider these payments before granting final approval. Currently, Class Counsel have expended more than 100 hours pursuing this matter on behalf of Plaintiff and the Class totaling more than \$60,000.00 and have incurred approximately \$609.73 in litigation. Coates Affidavit, at ¶ 22.

For the foregoing reasons, the Court should find that the proposed settlement is fair, reasonable, and adequately protects the interests of the proposed Class.

B. Certification of the Settlement Class is Appropriate.

The Supreme Court has recognized that the benefits of a proposed settlement of a class action can be realized only through the certification of a settlement class. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997). For the Court to certify a class, Plaintiff must satisfy all of the requirements of Rule 23(a), and one of the requirements of Rule 23(b). *See Pelzer v. Vassalle*, 655 F. App'x 352, 363 (6th Cir. 2016). The four requirements of Rule 23(a) are numerosity, commonality, typicality, and adequacy. Here, Plaintiff seeks certification of the Settlement Class under Rule 23(b)(3), which provides that certification is appropriate where "the court finds that the questions of law or fact common to class members predominate over any questions affecting

only individual members [predominance], and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy [superiority].” Fed. R. Civ. P. 23(b)(3). As discussed below, these requirements are met for purposes of settlement in this case.

1. Numerosity

The numerosity requirement under Rule 23(a)(1) is satisfied where the class is so numerous that joinder of all Class Members is impracticable. Fed. R. Civ. P. 23(a)(1). “There is no specific number below which class action relief is automatically precluded. Impracticability of joinder is not determined according to a strict numerical test but upon the circumstances surrounding the case.” *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 523 n.24 (6th Cir.1976); *see also In re Am. Med. Sys. Inc.*, 75 F.3d 1069, 1076 (6th Cir. 1996) (“the Sixth Circuit has previously held that a class of 35 was sufficient to meet the numerosity requirement” (internal quotation marks omitted)); *Basile v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 105 F.R.D. 506, 508 (S.D. Ohio 1985) (certifying 23-person class and stating “there is no reason to encumber the judicial system with 23 consolidated lawsuits when one will do.”). Here, the 12,453 Class Members satisfies this element.

2. Commonality

Rule 23(a)(2) requires that there be “questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). The Supreme Court has stated that Rule 23(a)(2)’s commonality requirement is satisfied where the plaintiffs assert claims that “depend upon a common contention” that is “of such a nature that it is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556 (2011). Both the majority and dissenting opinions in that case agreed that “for purposes of Rule 23(a)(2) even a single common question will do.” *Id.* (Internal quotation marks and citation omitted).

Here, Plaintiff's claims turn on whether Defendant's security environment was adequate to protect Settlement Class Members' Private Information. Resolution of that inquiry revolves around evidence that does not vary from class member to class member, and so can be fairly resolved—at least for purposes of settlement—for all Settlement Class Members at once.

3. Typicality

To satisfy the typicality requirement of Rule 23(a)(3), the claims or defenses of the representative parties must be typical of the claims or defenses of the class. "The typicality requirement ensures that the representative's interests will be aligned with those of the represented group and that the named plaintiff will also advance the interests of the class members." *Chesher v. Neyer*, 215 F.R.D. 544, 549 (S.D. Ohio 2003). "A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *Id.*; *see also Am. Med. Sys.*, 75 F.3d at 1082 (same). Typicality seeks to ensure that there are no conflicts between the class representatives' claims and the claims of the Class Members represented

Here, the claims all involve Defendant's conduct toward the Settlement Class members, and Plaintiff's and the Class's claims are based on the same legal theories. Thus, Plaintiff's claims are typical of those of the claims of the Settlement Class, and he is an appropriate Settlement Class Representative.

4. Adequacy of Representation

The final requirement of Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). There are two criteria: 1) the "representative must have common interests with unnamed members of the class," and 2) "it must appear that the representatives will vigorously prosecute the interests of the class through

qualified counsel.” *Am. Med. Sys.*, 75 F.3d at 1083 (quoting *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976)). Rule 23(a)(4) “serves to uncover conflicts of interest between named parties and the class they seek to represent.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 594 (1997).

Plaintiff Phelps has no conflicts with the Settlement Class and has participated actively in the case. Coates Affidavit, ¶ 9. Moreover, Class Counsel have significant experience in class and complex litigation, including more than 100 data breach class actions in state and federal courts throughout the country. *Id.* at Exhibit A (Class Counsel’s firm biography); *see also Shy v. Navistar Int’l Corp.*, No. 3:92-CV-00333, 2022 WL 2125574, at *4 (S.D. Ohio June 13, 2022) (citing *Bechtel v. Fitness Equipment Servs., LLC*, 339 F.R.D. 462, 480 (S.D. Ohio 2021) (“Class Counsel, the law firm Markovits, Stock & DeMarco, LLC, are qualified and are known within this District for handling complex cases including class action cases such as this one.”); *Schellhorn v. Timios, Inc.*, No. 221CV08661VAPJCX, 2022 WL 4596582, at *4 (C.D. Cal. May 10, 2022) (granting preliminary approval of settlement in data breach action and noting that “Terence R. Coates of Markovits, Stock & DeMarco, LLC [has] extensive experience litigating consumer protection class actions”).

5. Certification under Rule 23(b)(3) is appropriate.

Plaintiff seeks to certify a Class under Rule 23(b)(3), which has two components: predominance and superiority. “The Rule 23(b)(3) predominance requirement parallels the Rule 23(a)(2) commonality requirement in ‘that both require that common questions exist, but subdivision (b)(3) contains the more stringent requirement that common issues ‘predominate’ over individual issues.’” *In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.*, No. 3:08-MD-01998, 2009 WL 5184352, at *6 (W.D. Ky. Dec. 22, 2009) (quoting *In re Am. Med. Sys., Inc.*,

75 F.3d at 1084 (6th Cir. 1996)). When assessing predominance and superiority, the court may consider that the class will be certified for settlement purposes only, and that a showing of manageability at trial is not required. *See Amchem*, 521 U.S. at 620 (“Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, *see* Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial.”).

With respect to predominance, the Sixth Circuit has explained that “named plaintiffs must show, and district courts must find, that questions of law or fact common to members of the class predominate over any questions that affect only individual members.” *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 860 (6th Cir. 2013). With respect to superiority, the court considers whether a class action is “superior to other methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). Rule 23(b)(3) provides a non-exhaustive list of factors to be considered when making this determination. These factors include: (i) the class members’ interests in individually controlling the prosecution or defense of separate actions; (ii) the extent and nature of any litigation concerning the controversy already begun by or against class members; (iii) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (iv) the likely difficulties in managing a class action. *Willis v. Big Lots, Inc.*, No. 2:12-CV-604, 2017 WL 1063479, at *2 (S.D. Ohio Mar. 17, 2017) (citing Fed. R. Civ. P. 23(b)(3)).

a. Common Questions of Law and Fact Predominate.

In this case, the common factual and legal questions all cut to the issues “at the heart of the litigation.” Indeed, the answers to these questions are not tangential or theoretical such that the litigation will not be advanced by certification. Rather, they go right to the center of the

controversy, and the answers will be the same for each Settlement Class Member. As such, because the class-wide determination of this issue will be the same for everyone and will determine whether any class member has a right of recovery, the predominance requirement is readily satisfied.

b. A Class is the Superior Method of Adjudicating this Case.

The second prong of Rule 23(b)(3)—that a class action is superior to other available methods for the fair and efficient adjudication of the controversy—is also readily satisfied. *See* Fed. R. Civ. P. 23(b)(3). The Agreement provides members of the Settlement Class with quick, simple, and certain relief, and contains well-defined administrative procedures to ensure due process. This includes the right of any Class Member who is dissatisfied with the settlement to object to it or to request exclusion from the Class. Moreover, the cost of litigating each Class Member’s case on an individual basis would be substantial for each Class Member; the most reasonable and economically feasible method of litigating and resolving these hundreds of claims is through the class device. *See Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 545 (6th Cir. 2012) (“Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.” (internal quotations omitted)).

Adjudicating individual actions here is impracticable: the amount in dispute for individual class members is too small, the technical issues involved are too complex, and the required expert testimony and document review too costly. In no case are the individual amounts at issue sufficient to allow anyone to file and prosecute an individual lawsuit—at least not with the aid of competent counsel. Instead, the individual prosecution of Settlement Class Members’ claims would be prohibitively expensive, and, if filed, would needlessly delay resolution and lead to inconsistent rulings. Because this Action is being settled on a class-wide basis, such theoretical inefficiencies

are resolved, and the Court need not consider further issues of manageability relating to trial. *See Amchem*, 521 U.S. at 620 (“[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there will be no trial”).

Thus, the Court may certify the Class pursuant to Rule 23(b)(3).

C. The Court should appoint the proposed Class Representatives, Class Counsel, and Class Action Administrator.

Plaintiff seeks to be appointed as Class Representative for the Settlement Class. As discussed above, Plaintiff has cooperated with counsel, provided informal discovery, and assisted in the preparation of the Complaints. Moreover, Plaintiff is committed to continuing to vigorously prosecute this case, including overseeing the notice program, and defending the Settlement Agreement against any objectors, all the way through the Court’s final approval. Because he is an adequate representative, the Court should appoint him as class representative.

Second, for the reasons previously discussed with respect to adequacy of representation, the Court should designate Terence R. Coates, Jonathan T. Deters, and Dylan J. Gould of the law firm Markovits, Stock & DeMarco, LLC and Joseph B. Venters of Venters Law Office as Class Counsel.

Finally, the parties have agreed that Atticus shall act as Class Action Administrator. Atticus and its principals have a long history of successful settlement administrations in class actions. Atticus Declaration, at ¶ 6. The Court should appoint Atticus as Class Action Administrator here.

D. The proposed form and manner of notice to the Class is reasonable and should be approved.

Under Rule 23(e), the Court must “direct notice in a reasonable manner to all class members who would be bound” by the proposed settlement. Fed. R. Civ. P. 23(e)(1). Notice of a

proposed settlement to class members must be the “best notice practicable.” Fed. R. Civ. P.23(c)(2)(B). “[B]est notice practicable” means “individual notice to all members who can be identified through reasonable effort.” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173, 94 S. Ct.2140, 2150, 40 L. Ed. 2d 732 (1974). To satisfy these standards and “comport with the requirements of due process, notice must be ‘reasonably calculated to reach interested parties.’” *In re Countrywide*, 2009 WL 5184352, at *12 (quoting *Fidel v. Farley*, 534 F.3d 508, 514 (6thCir. 2008)).

The Notice Plan set forth in the Agreement provides the best notice practicable under the circumstances. The Parties negotiated the form of the Settlement Notice with the aid of a professional notice provider, Atticus. That Settlement Notice will be disseminated to all persons who fall within the definition of the Class and whose names and addresses can be identified with reasonable effort from Toyotetsu’s records, and through databases tracking nationwide addresses and address changes. In addition, Atticus will administer the Settlement Website containing important and up-to-date information about the settlement. Atticus Declaration, at ¶ 10.

In addition, Rule 23(h)(1) requires that “[n]otice of the motion [for attorneys’ fees] must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.” Here, the proposed Notice Plan satisfies the requirements of Rule 23(h)(1), as it notifies Class Members that Class Counsel will apply to the Court for attorneys’ fees of no more than 1/3 of the common fund, plus reimbursement of litigation costs and expenses up to \$15,000. The proposed Notice Plan complies with Fed. R. Civ. P. 23 and due process because, among other things, it informs Class Members of: (1) the nature of the action; (2) the essential terms of the settlement, including the definition of the Settlement Class, the claims asserted, and the benefits offered; (3) the binding effect of a judgment if the Class Member does not request

exclusion; (4) the process for objection and/or exclusion, including the time and method for objecting or requesting exclusion and that Class Members may make an appearance through counsel; (5) information regarding the Class Representative's request for a service award; (6) information regarding the payment of proposed Class Counsel fees; and (7) how to make inquiries. Fed. R. Civ. P. 23(c)(2)(B).

Accordingly, the Notice Plan and Settlement Notice "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Wal-Mart Stores, Inc. v. Visa USA Inc.*, 396 F.3d 96, 114 (2d Cir. 2005). The manner of providing notice, which includes individual notice by mail or email to all Class Members who can be reasonably identified, represents the best notice practicable under the circumstances and satisfies the requirements of due process and Rule 23. *See Frost v. Household Realty Corp.*, 61 F. Supp. 3d 740, 745 (S.D. Ohio 2004); *see also Weinberger v. Kendrick*, 698 F.2d 61, 71 (2d Cir. 1982) (notice sent to individuals' last known address and notice published in the Wall Street Journal constituted adequate notice, even though some members of the class did not receive actual notice). Thus, the Notice Plan should be approved. Fed. R. Civ. P. 23(c)(2)(A).

E. The Court Should Provide a Schedule Leading Up to the Fairness Hearing

Named Plaintiff requests that the Court set a schedule, leading up to a Fairness Hearing, that would include, *inter alia*, deadlines for notice to Class Members, for Class Members to object to the Settlement, to opt out of the Settlement, and to make claims under the Settlement; and deadlines for the filing of papers in support of final approval, and in support of attorneys' fees and expenses. A proposed schedule is included in the proposed Preliminary Approval Order. At the Fairness Hearing, the Court may hear all evidence and argument necessary to make its final

evaluation of the Settlement. *See* Fed. R. Civ. P. 23(e)(2). Proponents of the Settlement may offer argument in support of final approval. In addition, Class Members who have properly objected to the Settlement may be heard at this hearing. The Court will determine through the Fairness Hearing whether the Settlement should be approved, and whether to enter a judgment and order of dismissal under Rule 23(e).

CONCLUSION

For these reasons, Class Settlement Counsel respectfully ask the Court to enter an Order: (1) certifying the Class for purposes of settlement; (2) appointing Plaintiff as representative of the Class; (3) appointing the undersigned counsel as Class Counsel; (4) granting preliminary approval of the proposed Settlement; (5) approving the proposed form and manner of notice to the Class; (6) directing that the notice to the Class be disseminated by the Settlement Administrator, in the manner described in the Settlement; (7) establishing a deadline for Class members to request exclusion from the Settlement Class or file objections to the Settlement; and (8) setting the proposed schedule for completion of further settlement proceedings, including scheduling the Final Approval Hearing. A proposed Order Granting Preliminary Approval of Class Action Settlement is attached as **Exhibit 1**.

Respectfully submitted,

/s/ Terence R. Coates

Terence R. Coates (*pro hac vice*)

Jonathan T. Deters (*pro hac vice*)

Dylan J. Gould (*pro hac vice*)

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Attorneys for Plaintiff and the proposed Class

CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2023, I served a copy of the foregoing via electronic filing in the ECF system.

/s/ Terence R. Coates
Terence R. Coates

EXHIBIT 1

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION**

JONATHAN PHELPS, individually and on behalf of all others similarly situated,	:	Case No: 6:22-cv-00106
	:	
Plaintiff,	:	Judge: Claria Horn Boom
	:	Magistrate: Hanly A. Ingram
	:	
v.	:	
	:	<u>[PROPOSED] ORDER GRANTING</u>
TOYOTETSU NORTH AMERICA,	:	<u>PRELIMINARY APPROVAL OF</u>
	:	<u>CLASS ACTION SETTLEMENT</u>
Defendant.	:	
	:	

Before this Court is Plaintiff’s Unopposed Motion for Preliminary Approval of Class Action Settlement (“Motion”). The Court has reviewed the Motion and Settlement Agreement between Plaintiff and Defendant Toyotetsu America, Inc. After reviewing Plaintiff’s unopposed request for preliminary approval, this Court grants the Motion and preliminarily concludes that the proposed Settlement is fair, reasonable, and adequate.

IT IS HEREBY ORDERED THAT:

1. The Settlement Agreement,¹ including the proposed notice plan and forms of notice to the Class, the appointment of Plaintiff Jonathan Phelps as the Class Representative, the appointment of Class Counsel for Plaintiff and the Class, the approval of Atticus Administration, LLC as the Settlement Administrator, the various forms of class relief provided under the terms of the settlement and the proposed method of distribution of settlement benefits, are fair, reasonable, and adequate, subject to further consideration at the Fairness Hearing described below.

2. The Court does hereby preliminarily and conditionally approve and certify, for settlement purposes, the following Class:

¹ All capitalized terms used in this Order shall have the same meanings as set for in the Settlement Agreement.

All persons who were sent notice of the Data Breach.²

3. Based on the information provided: the Class is ascertainable; it consists of roughly 12,453 Class Members satisfying numerosity; there are common questions of law and fact including whether Defendant failed to implement and maintain reasonable security procedures and practices appropriate to the nature and scope of the information compromised in the Data Breach, satisfying commonality; the proposed Class Representative's claims are typical in that he is a member of the Class and allege he has been damaged by the same conduct as the other members of the Class; the proposed Class Representative and Class Counsel fully, fairly, and adequately protect the interests of the Class; questions of law and fact common to members of the Class predominate over questions affecting only individual members for settlement purposes; and a class action for settlement purposes is superior to other available methods for the fair and efficient adjudication of this Action.

4. The Court appoints Plaintiff Jonathan Phelps as the Class Representative.

5. The Court appoints Terence R. Coates, Dylan J. Gould, and Jonathan T. Deters of Markovits, Stock & DeMarco, LLC; and Joseph B. Venters of Venters Law Office as Class Counsel for the Class.

6. The Court appoints Atticus Administration, LLC as the Settlement Administrator.

7. A Fairness Hearing shall be held before the Court on ____[date]_____, 2023 at ____[time]_____ for the following purposes:

a. To determine whether the proposed Settlement is fair, reasonable, and adequate to the Class and should be approved by the Court;

b. To determine whether to grant Final Approval, as defined in the Settlement

² "Data Breach" shall mean the cybersecurity incident against Toyotetsu giving rise to the action.

Agreement;

- c. To determine whether the notice plan conducted was appropriate;
- d. To determine whether the claims process under the Settlement is fair, reasonable and adequate and should be approved by the Court;
- e. To determine whether the requested Class Representative Service Award of \$5,000.00, and Class Counsel's combined attorneys' fees, of up to 1/3 of the Settlement Fund (\$133,333.33), litigation expenses up to \$15,000.00 should be approved by the Court;
- f. To determine whether the settlement benefits are fair, reasonable, and adequate; and,
- g. To rule upon such other matters as the Court may deem appropriate.

8. The Court approves, as to the form and content, the Notices (including the Short Form Notice). Furthermore, the Court approves the implementation of the Settlement Website and the proposed methods of mailing or distributing the notices substantially in the form as presented in the exhibits to the Motion for Preliminary Approval of Class Action Settlement, and finds that such notice plan meets the requirements of Fed. R. Civ. P. 23 and due process, and is the best notice practicable under the circumstances, and shall constitute due and efficient notice to all persons or entities entitled to notice.

9. The Court preliminarily approves the following Settlement Timeline for the purposes of conducting the notice plan, settlement administration, claims processing, and other execution of the proposed Settlement:

SETTLEMENT TIMELINE

<u>From Order Granting Preliminary Approval</u>	
Toyotetsu provides list of Class Members to the Settlement Administrator	+7 days
Long Form and Short Form Notices Posted on the	+14 days

Settlement Website	
Notice Deadline	+30 days
Counsel's Motion for Attorneys' Fees, Reimbursement of Litigation Expenses, and Class Representative Service Award	+76 days
Objection Deadline	+90 days
Exclusion Deadline	+90 days
Settlement Administrator Provide List of Objections/Exclusions to the Parties' counsel	+100 days
Claims Deadline	+120 days
Initially Approved Claims List	+165 days
<u>Final Approval Hearing</u>	+180 (at minimum)
Motion for Final Approval	-14 days
<u>From Order Granting Final Approval</u>	
Settlement Administrator provides W-9 to Toyotetsu	+30 days
Effective Date	+35 days
Payment of Attorneys' Fees and Expenses Class Representative Service Award	+42 days
Settlement Website Deactivation	+120 days

10. In order to be a timely claim under the Settlement, a Claim Form must be either postmarked or received by the Settlement Administrator no later than 90 days after the Notice Date. Class Counsel and the Settlement Administrator will ensure that all specific dates and deadlines are added to the Class Notice and posted on the Settlement Website after this Court enters this Order in accordance with the timeline being keyed on the grant of this Order.

11. Additionally, all requests to opt out or object to the proposed Settlement must be received by the Settlement Administrator no later than 60 days after the Notice Date. Any request to opt out of the Settlement should, to the extent possible, contain words or phrases such as “opt-out,” “opt out,” “exclusion,” or words or phrases to that effect indicating an intent not to participate in the settlement or be bound by this Agreement) to Atticus Administration. Opt-Out notices shall not be rejected simply because they were inadvertently sent to the Court or Class Counsel so long as they are timely postmarked or received by the Court, Atticus Administration, or Class Counsel.

Class Members who seek to Opt-Out shall receive no benefit or compensation under this Agreement.

12. Class Members may submit an objection to the proposed Settlement under Federal Rule of Civil Procedure 23(e)(5). For an Objection to be valid, it must be filed with the Court within 60 days of the Notice Date and include each and all of the following:

- (i) his/her full name, address, and current telephone number;
- (ii) the name and number of this case;
- (iii) all grounds for the objection, with factual and legal support for the stated objection, including any supporting materials;
- (iv) the identification of any other objections he/she has filed, or has had filed on his/her behalf, in any other class action cases in the last four years; and,
- (v) the objector's signature. If represented by counsel, the objecting Settlement Class Member must also provide the name and telephone number of his/her counsel. If the objecting Settlement Class Member intends to appear at the Final Approval Hearing, either with or without counsel, he/she must state as such in the written objection, and must also identify any witnesses he/she may call to testify at the Final Approval Hearing and all exhibits he/she intends to introduce into evidence at the Final Approval Hearing, which must also be attached to, or included with, the written objection.

Any Objection failing to include the requirements expressed above will be deemed to be invalid. Furthermore, any Class Member objecting to the Settlement agrees to submit to any discovery related to the Objection. Any Class Member objection to the Settlement agrees to submit to any discovery related to the Objection.

13. All Settlement Class Members shall be bound by all determinations and judgments in this Action concerning the Settlement, including, but not limited to, the release provided for in the Settlement Agreement, whether favorable or unfavorable, except those who timely and validly request exclusion from the Class. The persons and entities who timely and validly request exclusion from the Class will be excluded from the Class and shall not have rights under the Settlement Agreement, shall not be entitled to submit Claim Forms, and shall not be bound by the Settlement Agreement or any Final Approval order as to Toyotetsu in this Action.

14. Pending final determination of whether the Settlement Agreement should be approved, Plaintiff and the Class are barred and enjoined from commencing or prosecuting any claims asserting any of the Released Claims against Toyotetsu.

15. The Court reserves the right to adjourn the date of the Fairness Hearing without further notice to the potential Class Members, and retains jurisdiction to consider all further requests or matters arising out of or connected with the proposed Settlement. The Court may approve the Settlement, with such modification as may be agreed to by the Parties or as ordered by the Court, without further notice to the Class.

IT IS SO ORDERED.

United States District Judge

EXHIBIT 2

SETTLEMENT AGREEMENT AND RELEASE AGREEMENT

This Settlement Agreement and Release (“Settlement Agreement”) is entered into by and between (i) Toyotetsu America, Inc. (“Toyotetsu”) and (ii) Jonathan Phelps (“Plaintiff”), both individually and on behalf of the Settlement Class, in the case of *Jonathan Phelps v. Toyotetsu North America*; Case No. 6:22-cv-00106; United States District Court, Eastern District of Kentucky. Toyotetsu and Plaintiff are each referred to as a “Party” and are collectively referred to herein as the “Parties.”

I. BACKGROUND AND RECITALS¹

1. On April 14, 2022, Plaintiff filed a class action lawsuit in the 28th Judicial Circuit, Pulaski Circuit Court against Toyotetsu based on a data security incident Toyotetsu experienced in October 2021 (the “Incident”), alleging claims of negligence, breach of implied contract, unjust enrichment, and negligence per se (“Complaint”).
2. On May 13, 2022, Toyotetsu removed the state court case to the United States District Court, Eastern District of Kentucky – London Division.
3. On August 26, 2022, Toyotetsu filed a motion to dismiss Plaintiff’s complaint. In response, Plaintiff filed a First Amended Class Action Complaint.
4. Before the motion to dismiss was filed, the Parties began engaging in arm’s length settlement negotiations. The Parties extensively negotiated a term sheet including the potential settlement benefits. These settlement negotiations started in May 2022 and resulted in a settlement in principle in October 2022. The settlement in principle was articulated in a term sheet the Parties finalized in November 2022. The term sheet was used as the foundation for drafting and finalizing this Settlement Agreement.
5. The Parties negotiated a settlement by which the Parties agree and hereby wish to resolve all matters pertaining to, arising from, or associated with the Litigation, including all claims Plaintiff and Class Members have or may have had against Toyotetsu and related persons and entities, as set forth herein.
6. The Parties have agreed to settle the Litigation on the terms and conditions set forth herein in recognition that the outcome of the Litigation is uncertain and that achieving a final result through litigation would require substantial additional risk, uncertainty, discovery, time, and expense for both of the Parties.
7. Toyotetsu denies all charges of wrongdoing or liability that Plaintiff, Class Members, or anyone else have asserted in this Litigation or may assert in the future. Despite Toyotetsu’s belief that it is not liable for, and has good defenses to, the claims alleged in the Litigation, Toyotetsu desires to settle the Litigation, and thus avoid the

¹ Some defined terms are used prior to being defined. Terms used prior to definition are to be interpreted as defined.

expense, risk, exposure, inconvenience, uncertainty, and distraction of continued litigation of any action relating to the matters being fully settled and finally put to rest in this Settlement Agreement. Neither this Settlement Agreement, nor any negotiation or act performed or document created in relation to the Settlement Agreement or negotiation or discussion thereof is, or may be deemed to be, or may be used as, an admission or evidence of, any wrongdoing or liability.

8. Following arm's length negotiations, the Parties now enter into this Settlement Agreement. Plaintiff and Class Counsel have conducted an investigation into the facts and the law regarding the Litigation and have concluded that a settlement according to the terms set forth below is fair, reasonable, and adequate, and beneficial to and in the best interests of Plaintiff and the Settlement Class, recognizing: (1) the existence of complex and contested issues of law and fact; (2) the risks inherent in litigation; (3) the likelihood that future proceedings will be unduly protracted and expensive if the proceeding is not settled by voluntary agreement; (4) the magnitude of the benefits derived from the contemplated settlement in light of both the maximum potential and likely range of recovery to be obtained through further litigation and the expense thereof, as well as the potential of no recovery whatsoever; and (5) Plaintiff's determination that the settlement is fair, reasonable, adequate, and will substantially benefit the Class Members.
9. Considering the risks and uncertainties of continued litigation and all factors bearing on the merits of settlement, the Parties are satisfied that the terms and conditions of this Settlement Agreement are fair, reasonable, adequate, and in their respective best interests.
10. In consideration of the covenants, agreements, and releases set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, it is agreed by and among the undersigned that the Litigation be settled and compromised, and that the Releasors release the Released Parties of the Released Claims, without costs as to Released Parties, Plaintiff, Class Counsel, or the Settlement Class, except as explicitly provided for in this Settlement Agreement, subject to the approval of the Court, on the following terms and conditions.

II. DEFINITIONS

As used in this Settlement Agreement, the following terms have the meanings specified below:

11. "**Administrative Expenses**" shall mean expenses associated with the Settlement Administrator, including but not limited to costs in providing notice, communicating with Class Members, and disbursing payments to the proposed Settlement Class Members. Administrative Expenses, other than the cost for the CAFA Notice, shall be paid through and using the Settlement Fund.
12. "**Approved Claims**" shall mean complete and timely Claim Forms submitted by Settlement Class Members that have been approved by the Settlement Administrator.

13. “**CAFA Notice**” means a notice of the proposed Settlement in compliance with the requirements of the Class Action Fairness Act, 28 U.S.C. Sec. 1711, et seq. (“CAFA”), to be served upon the appropriate State official in each State where a Class Member resides and the appropriate federal official. Costs for preparation and issuance of the CAFA Notice will be paid by Toyotetsu.
14. “**Claim Form**” shall mean the form that Class Members may submit to obtain compensation under this Settlement Agreement.
15. “**Claims Deadline**” shall mean the date by which all Claim Forms must be postmarked (if mailed) or submitted (if filed electronically) to be considered timely and shall be set as a date fourteen days after the Final Approval Hearing. The Claims Deadline shall be clearly set forth in the Preliminary Approval Order, as well as in the Notice and the Claim Form.
16. “**Class Member**” or “**Class Members**” means all individuals residing in the United States to whom Defendant or its authorized representative sent or attempted to send a notice concerning the Data Breach. “Class Members” excludes Toyotetsu; any entity in which Toyotetsu has a controlling interest; the affiliates, attorneys, successors, heirs, and assigns of Toyotetsu; and any members of the judiciary to whom this case is assigned, their families and members of their staff.
17. “**Settlement Class**,” or “**Settlement Class Member**” shall mean each Class Member who does not timely elect to be excluded from the Settlement. Plaintiff is a Settlement Class Member.
18. “**Class Counsel**” shall mean Terence R. Coates, Dylan J. Gould, and Jonathan T. Deters of Markovits, Stock & DeMarco, LLC.
19. “**Counsel**” or “**Counsel for the Parties**” means both Class Counsel and Defendant’s Counsel, collectively.
20. “**Court**” shall mean Judge Claria Boom of the United States District Court, Eastern District of Kentucky, or any other judge who shall have jurisdiction over the Litigation.
21. “**Defendant**” or “**Toyotetsu**” shall mean Toyotetsu America Inc. (identified in the Complaint as Toyotetsu North America).
22. “**Defendant’s Counsel**” shall mean Christopher Wood, Morgan Salisbury, and Judd Uhl from Lewis, Brisbois, Brisgaard & Smith LLP.

23. “**Effective Date**” shall mean the date when the Settlement Agreement becomes Final, which is 35 days after the Court’s grant of the Final Approval Order assuming no appeals have been filed. If an appeal is filed, the Effective Date will be 35 days from when the appeal is decided and a final judgment is entered in this case.
24. “**Fee and Expense Application**” shall mean the motion to be filed by Class Counsel, in which they seek approval of an award of attorneys’ fees, as well as a Service Award for the Class Representative.
25. “**Fee Award**” means the amount of attorneys’ fees awarded by the Court to Class Counsel. The Fee Award shall be paid using and through the Settlement Fund.
26. “**Final Approval Hearing**” means the hearing before the Court where the Plaintiff will request a judgment to be entered by the Court approving the Settlement Agreement, approving the Fee Award, and approving a Service Award to the Class Representative.
27. “**Final Approval Order**” shall mean an order entered by the Court that:
- i. Certifies the Settlement Class pursuant to Federal Rule of Civil Procedure 23;
 - ii. Finds that the Settlement Agreement is fair, reasonable, and adequate, was entered into in good faith and without collusion, and approves and directs consummation of this Settlement Agreement;
 - iii. Dismisses Plaintiff’s claims pending before it with prejudice and without costs, except as explicitly provided for in this Settlement Agreement;
 - iv. Approves the Release provided in Section VII and orders that, as of the Effective Date, the Released Claims will be released as to Released Parties;
 - v. Reserves jurisdiction over the Settlement and this Settlement Agreement; and
 - vi. Finds that there is no just reason for delay of entry of final judgment with respect to the foregoing and constitutes a final judgment for appeal purposes.
28. “**Frequently Asked Questions**” or “**FAQs**” are questions and answers to those questions that are frequently posed by Class Members about class action settlement and specially about this Settlement.

29. “**Litigation**” shall mean the action captioned *Jonathan Phelps, on behalf of himself and all others similarly situated, v. Toyotetsu North America*, Case 6:22-cv-00106 currently pending in the United States District Court, Eastern District of Kentucky.
30. “**Long Form Notice**” is the content long form notice that will be posted on the Settlement Website that will include robust details about the Settlement.
31. “**Notice**” means the direct notice of this proposed Settlement, which is to be provided substantially in the manner set forth in this Settlement Agreement, and is consistent with the requirements of Due Process.
32. “**Objection/Exclusion Deadline**” means the date by which a written objection to this Settlement Agreement or a request for exclusion from this Settlement submitted by a Class Member must be postmarked and/or filed with the Court, which shall be designated as a date approximately ninety days after entry of the Preliminary Approval Order, or such other date as ordered by the Court.
33. “**Plaintiff**” or “**Class Representative**” shall mean the named class representative, Jonathan Phelps.
34. “**Preliminary Approval Order**” shall mean the Court’s Order preliminarily approving the Settlement Agreement, certifying a class for purposes of settlement only, and directing notice of the Settlement to the Class Members substantially in the form of the Notice set forth in this Settlement Agreement.
35. “**Released Claims**” shall have the meaning ascribed to it as set forth in Section VII of this Settlement Agreement.
36. “**Released Parties**” shall have the meaning ascribed to it as set forth in Section VII of this Settlement Agreement.
37. “**Releasor**” or “**Releasors**” shall refer, jointly and severally, and individually and collectively, to Plaintiff and to Settlement Class Members (conversely, Class Members who do not timely exclude himself/herself from the Settlement by the Objection/Exclusion Deadline), and to each of their predecessors, successors, heirs, executors, administrators, and assigns of each of the foregoing, and anyone claiming by, through, or on behalf of them.
38. “**Remainder Funds**” means any funds that remain in the Settlement Fund after settlement payments for Approved Claims. The funds remaining in the Settlement Fund after settlement payments have been distributed and the time for cashing and/or depositing checks has expired will be Remainder Funds. The Remainder Funds will be sent to one or more court-approved charitable organizations as a *cy pres* distribution. The Parties will jointly recommend the entity or entities to the Court that will be the recipients of the *cy pres* distribution.

39. “**Service Award**” shall have the meaning ascribed to it as set forth in Section XV of this Settlement Agreement. The Service Award requested in this matter will be \$5,000.00, subject to court approval and will be in addition to any other Settlement benefits Class Representative Phelps may receive. The Service Award shall be paid using and through the Settlement Fund.
40. “**Settlement Administrator**” means, subject to Court approval, the entity jointly selected and supervised by Class Counsel and Toyotetsu to administer the settlement. The Settlement Administrator shall be paid using and through the Settlement Fund.
41. “**Settlement Fund**” means a settlement fund in the amount of Four Hundred Thousand Dollars (\$400,000), which includes the Fee Award, Administrative Expenses, Class Counsel’s Litigation Expenses, and Service Award. In no event shall Toyotetsu be required to pay more than the Settlement Fund as part of this Settlement, excepting amounts to be paid for the CAFA Notice. Beyond the Settlement Fund, Defendant shall have no obligation or liability to make further payments or other monetary contributions as part of this Settlement, whether to the Settlement Class, to Plaintiff, Releasers, or Class Counsel.
42. “**Settlement Website**” means a website established and administered by the Settlement Administrator, which shall contain information about the Settlement, including electronic copies the Notices (or any forms of these notices that are approved by the Court), this Settlement Agreement, and all Court documents related to the Settlement. The Settlement Website, www.ToyotetsuDataSettlement.com, will be publicly viewable and contain broad information about the Settlement, including but not limited to, copies of the material pleadings filed in this matter, a copy of the Long Form Notice, Short Form Notice, FAQs, Claim Form that may be submitted online through the Settlement Website or mailed to the Settlement Administrator, and the deadlines for filing a Claim, Objection, Exclusion requests, and the date of the Fairness Hearing. The Settlement Website is viewed as an important piece of the notice plan to Class Members. The Settlement Website will remain active until 120 days after the Effective Date. Class Members shall be able to submit Claim Forms via the Settlement Website. The Settlement Website shall remain active through the Claims Deadline.
43. “**Short Form Notice**” is the postcard notice that will be mailed to each available Class Member and/or emailed to the Class Members. Short Form Notice will include a copy of the Claim Form.

III. SETTLEMENT CLASS CERTIFICATION

44. For the purposes of the Settlement only, the Parties stipulate and agree that: (1) the Class to be certified for this settlement and for settlement purposes only shall be certified in accordance with the definition contained in Paragraph 45, below; (2)

Plaintiff shall represent the Class for settlement purposes and shall be the Class Representative; and (3) Plaintiff's Counsel shall be appointed as Class Counsel.

45. Toyotetsu does not consent to certification of the Class for any purpose other than to effectuate the Settlement. If the Court does not enter preliminary or final approval of the Settlement, or if for any other reason final approval of the Settlement does not occur, final approval is successfully objected to, or final approval is successfully challenged on appeal, any certification of any Class will be vacated, unless the Parties agree otherwise in writing, and the Parties will be returned to their positions with respect to the Action as if the Settlement Agreement had not been entered into. In the event that Final Approval of the Settlement is not achieved: (1) any Court orders preliminarily or finally approving the certification of any class contemplated by this Settlement Agreement shall be null, void, and vacated, and shall not be used or cited thereafter by any person or entity; (2) the Settlement Agreement, including any exhibits, shall not be used or cited thereafter by any person or entity; and (3) the fact of the settlement reflected in this Settlement Agreement, that Toyotetsu did not oppose the certification of a Class under this Settlement Agreement, or that the Court preliminarily approved the certification of a Settlement Class, shall not be used or cited thereafter by any person or entity, including in any manner whatsoever, including without limitation any contested proceeding relating to the certification of any class.
46. **Settlement Structure:** The settlement shall be administered upon the distribution of a non-reversionary Settlement Fund in the amount of \$400,000 (Four Hundred Thousand Dollars) on a claims-made basis. To receive any relief, Class Members, must submit a valid and timely claim to the Settlement Administrator to receive benefits from the Settlement Fund.
47. Subject to Court approval, the following class ("Class") shall be certified for settlement purposes only:

All persons who were sent notice of the Data Breach.²
48. Excluded from the Class is Toyotetsu; any entity in which Toyotetsu has a controlling interest; and the affiliates, attorneys, successors, heirs, and assigns of Toyotetsu. Excluded also from the Class are members of the judiciary to whom this case is assigned, their families and members of their staff.
49. It is estimated that the Class is comprised of approximately 12,453 individuals.
50. If for any reason the Settlement is not granted preliminary and/or final approval, Toyotetsu's agreement to certification of the Settlement Class shall not be used for any purpose, including in any request for class certification in the Litigation or any other proceeding.

² "Data Breach" shall mean the cybersecurity incident against Toyotetsu giving rise to the action.

IV. SETTLEMENT OF LITIGATION AND RELEASES OF ALL CLAIMS AGAINST RELEASED PARTIES

51. Final approval of this Settlement Agreement will settle and resolve with finality, on behalf of the Plaintiff and the Settlement Class, the Litigation and the Released Parties will be released, on the Effective Date, from the Released Claims, as described in Section VII.

V. SETTLEMENT FUND ALLOCATION

52. **Settlement Benefits**³

- a. The Settlement Fund will make the following compensation available to Class Members who submit valid and timely claim forms, including documentation as specified. Claims will be subject to review for completeness and plausibility by a Settlement Administrator, and Claimants will have the opportunity to seek review by the Parties' Counsel, if they dispute the Settlement Administrator's initial determination.
- b. **Cash Compensation**: The Settlement Fund will provide \$250.00 to each Settlement Class Member upon submission of a claim. To the extent there are any amounts remaining in the Settlement Fund after the distribution of attorneys' fees, Class Counsel's Litigation Expenses, Administrative Fees, Service Award, and Compensation for monetary losses, the settlement payments to Settlement Class Members will be increased or decreased pro rata under this paragraph until the Settlement Fund is exhausted.
- c. **Compensation for Losses**: The Settlement Fund will provide compensation for unreimbursed losses, up to a total of \$5,000 per person, upon submission of a claim and supporting documentation, such as the following categories of claimed losses:
 - i. Monetary losses may include, without limitation, unreimbursed losses relating to fraud or identity theft; professional fees including attorneys' fees, accountants' fees, and fees for credit repair services; costs associated with freezing or unfreezing credit with any credit reporting agency; credit monitoring costs that were incurred on or after Data Security Incident through the date of claim submission; and miscellaneous expenses such as notary, fax, postage, copying, mileage, and long-distance telephone charges.
 - ii. Settlement Class Members with monetary losses must submit documentation supporting their claims. This can include receipts or

³ Settlement benefits will be increased or decreased pro-rata should claims exceed the Maximum Payout under the Settlement in Paragraph 52, with attorneys' fees, Class Counsel's Litigation Expenses, Settlement Administration Fees, and Service Award deducted first.

other documentation not “self-prepared” by the claimant that document the costs incurred. “Self-prepared” documents such as handwritten receipts are, by themselves, insufficient to receive reimbursement, but can be considered to add clarity or support other submitted documentation.

53. **Settlement Subject to Confirmatory Discovery:** Toyotetsu, for a period of 30 days running from the execution of the Settlement Agreement, agrees to provide reasonably tailored confidential confirmatory discovery regarding the Settlement including, but not limited to, the provision of a list that identifies each Class Member and, as available class member addresses. Within 21 days of the Effective Date, and receipt of payee instructions and a Form W-9 for the payee, Toyotetsu or its insurer shall pay to the Settlement Administrator the Settlement Fund. The funds provided by Toyotetsu to the Settlement Administrator will be maintained by an escrow agent as a Court-approved Qualified Settlement Fund pursuant to Section 1.468B-1, et seq., of the Treasury Regulations promulgated under Section 468B of the Internal Revenue Code of 1986, as amended, and shall be deposited in an interest-bearing account.

54. **Procedure for Approving Settlement**

- a. **Unopposed Motion for Preliminary Approval of the Settlement by the Court.** Plaintiff will file an unopposed motion for an order conditionally certifying the Settlement Class, giving Preliminary Approval of the Settlement, setting a date for the Final Approval Hearing, and approving the Class Notice and Claim Form (the “Unopposed Motion for Preliminary Approval”).
- i. At the hearing on the Unopposed Motion for Preliminary Approval, the Parties will jointly appear, support the granting of the Unopposed Motion for Preliminary Approval, and submit a proposed order granting conditional certification of the Class and preliminary approval of the Settlement; appointing the Class Representative and Class Counsel; approving the Claim Form and the forms of notice to the Settlement Class; and setting the Final Approval Hearing.
- ii. For the purposes of the Settlement and the proceedings contemplated herein only, the Parties stipulate and agree that the Class shall be conditionally certified in accordance with the definition contained above, that Plaintiff shall be conditionally appointed class representative for the Class, and that Class Counsel shall be conditionally appointed as counsel for the Class. Should the Court decline to preliminarily approve any material aspect of the Settlement, the Settlement will be null and void, the Parties will have no further obligations under it, and the Parties will revert to their prior positions in the Action as if the Settlement had not occurred.
- iii. Defendant does not oppose but does not take a position on any request for a Fee Award or Service Award.

55. **Submission and Evaluation of Claims**

- a. **Claims Period**: The Parties agree that the period for filing claims shall be set at a date certain at no more than 90 days from the date that notice is mailed to the Settlement Class.
- b. **Claim Form**: All claims must be submitted on a Claim Form. The Claim Form will require the Settlement Class Member to provide his or her full name, home mailing address, email address, and telephone number; an affirmation that he/she is a member of the Settlement Class; and a signature.
- c. The Claim Form shall provide Class Members with the ability to receive \$250 in cash payment (subject to pro rata increase or reduction) and up to \$5,000 for reimbursement of out-of-pocket expenses mitigating the asserted effects of the Data Breach upon provision of appropriate documentation, as discussed above.
- d. The Claim Form must be submitted (either electronically submitted or postmarked) on or before the Claims Deadline.
- e. Completed Claim Forms shall be submitted directly to the Settlement Administrator either electronically via the Settlement Website, via electronic mail, or via U.S. Mail for processing, assessment, and payment (when properly submitted).
- f. Any Claim Form that lacks the requisite information will be deemed to be incomplete and ineligible for payment.
- g. A Class Member is not entitled to any compensation if he or she submits a Claim Form after the Claims Deadline, and/or if the Claim Form is incomplete after an opportunity to cure any error(s) and/or omission(s) or contains false information.
- h. Within twenty-one days after the Claims Deadline, the Settlement Administrator shall process all Claim Forms submitted by Settlement Class Members and shall determine which claims are valid and initially approved and which claims are initially rejected. The Settlement Administrator, for purposes of initial approval only, may accept or reject any Claim Form submitted upon its sole discretion, and may request additional information prior to initially accepting or rejecting any Claim Form submitted. The Settlement Administrator shall employ reasonable procedures to screen Claim Forms for abuse and/or fraud and shall deny Claim Forms which are materially incomplete and/or where there is evidence of abuse and/or fraud, or where the Claim Form does not meet the requirements set forth in this Agreement, including Paragraph 52.

- i. Within forty-five days of the Claims Deadline, the Settlement Administrator will submit to Counsel for the Parties a report listing all initially approved claims (“Initially Approved Claims List”) and shall include an electronic PDF copy of all such initially approved Claim Forms. Within forty-five days after the Claims Deadline, the Settlement Administrator will also submit to the Parties a report listing all initially rejected Claims (“Initially Rejected Claims List”) and shall include an electronic PDF copy of all such initially rejected Claim Forms.
- j. Counsel for the Parties shall have thirty days after the date they receive the Initially Approved Claims List and related Claim Forms to audit and challenge any initially approved claims. Within those thirty days, Counsel for the Parties shall serve opposing counsel via email with a Notice of Claim Challenges identifying by claim number any initially approved claim they wish to challenge and the reasons for the challenge.
- k. Similarly, Counsel for the Parties may challenge any claim initially rejected by the Settlement Administrator. Counsel for the Parties shall have thirty days after the date they receive the Initially Rejected Claims List and related Claim Forms to audit and challenge any initially rejected claims. Within those thirty days, Counsel for the Parties shall serve opposing counsel via email with a Notice of Claim Challenges identifying by claim number any initially rejected claim they wish to challenge and the reasons for the challenge.
- l. Counsel for the Parties shall meet and confer in an effort to resolve any disputes over any challenged claims. If the challenges are not withdrawn or resolved, the decision of the Settlement Administrator will be upheld. The date all claims are finalized without any further dispute shall be referred to as the “**Claims Finalization Date.**” If neither Class Counsel nor Toyotetsu’s Counsel have any challenges to the initial claim determinations reached by the Settlement Administrator, then the Claims Finalization Date shall be the date both Class Counsel and Toyotetsu’s Counsel inform each other by email that the Parties do not have any objection to the claims determination made by the Settlement Administrator or the time for informing each other of such challenges has lapsed.
- m. Within twenty-one days of the Claims Finalization Date, the Settlement Administrator shall provide Counsel for the Parties a spreadsheet setting forth the claim number, claimant name, and claimant address, and totaling the amount to be paid for each claimant under Paragraph 52 above (the “Final Claims List”). Within thirty days of the Claims Finalization Date, the Settlement Administrator shall send a check by First Class U.S. Mail or via electronic means to each Settlement Class Member on the Final Claims List.
- n. The Settlement Administrator shall notify the Parties that all Approved Claims have been paid within five business days of the last such payment.

- o. In the event that checks sent to Settlement Class Members are not cashed within ninety days after their date of issuance, those checks will become null and void, and will revert to the Settlement Fund.
- p. The Settlement Administrator will treat Settlement Class Member information as personally identifiable information and afford it corresponding confidential treatment, including when communicating with counsel for the Parties.

VI. PROSPECTIVE RELIEF

- 56. **Remedial Measures/Security Enhancements:** Toyotetsu agrees, consistent with the intent of this Settlement, to implement and/or to keep in place the data security enhancements to be identified through a filing made under seal with the Court for a period of 2 years from the date of the settlement agreement.
- 57. Costs associated with these business practice commitments should be paid by Toyotetsu separate and apart from the Settlement Fund. Toyotetsu's use of these security enhancements is not construed by the Parties as indicative of whether Toyotetsu's data security systems prior to the Data Breach were reasonable and adequate.

VII. RELEASE

- 58. On the Effective Date, all Releasors, including but not limited to Settlement Class Members and Plaintiff, shall be deemed to have and do fully and finally release, acquit, and forever discharge Toyotetsu and any of its past or present parents, subsidiaries, related or affiliated entities, assigns, directors, officers, employees, shareholders, members, partners, principals, owners, divisions, partnerships, attorneys, insurers, and reinsurers, and each of those individuals' or entities' respective predecessors, successors, directors, officers, employees, principals, assigns, and transferees (collectively "Released Parties") from any past, present or future claims, demands, lawsuits, set-offs, costs, expenses, attorneys' fees, losses, rights, charges, complaints, suits, petitions, penalties, damages, or liabilities of any nature, whether known or unknown, liquidated or unliquidated, matured or unmatured, in law, equity, or any other form whereby legal or equitable relief could be sought, that has been asserted or pled, could have been asserted or pled, or was asserted or pled by any Settlement Class Member, including Plaintiff, arising out of or in any way related to the Data Breach and/or Released Parties' recordkeeping or data security policies and practices ("Released Claims").
- 59. Each Releasor waives, to the fullest extent permitted by law, any and all defenses, rights, and benefits that may be derived from the provisions of applicable law in any jurisdiction that, absent such waiver, may limit the extent or effect of the release contained in this Settlement Agreement, including as to the Released Claims. Settlement Class Members expressly waive and relinquish, to the fullest extent permitted by law, the provisions, rights, and benefits of Section 1542 of the

California Civil Code (or any like or similar statute or common law doctrine). Section 1542 reads as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

Settlement Class Members acknowledge that they may hereafter discover facts in addition to or different from those that they now know or believe to be true with respect to the subject matter of this release, including the Released Claims, but that it is their intention to finally and forever settle and release the Released Claims and that, notwithstanding the discovery or existence of any such additional or different facts, as to which the Releasing Parties expressly assume the risk, they freely and voluntarily release the Released Claims.

VIII. PRELIMINARY APPROVAL ORDER AND FINAL APPROVAL ORDER

60. This Settlement Agreement shall be subject to approval of the Court. As set forth in Section V, Toyotetsu shall have the right to withdraw from the Settlement Agreement if the Court does not approve any material aspects of the Settlement Agreement.
61. Plaintiff, through Class Counsel, shall submit this Settlement Agreement to the Court and shall move the Court for Preliminary Approval of the settlement set forth in this Settlement Agreement, certification of the Settlement Class, appointment of Class Counsel and the Class Representative, and entry of the Preliminary Approval Order which order shall seek a Final Approval Hearing date and approve the Notices and Claim Form for dissemination in accordance with the Notice Plan.
62. At the time of the submission of this Settlement Agreement to the Court as described above, the Parties shall request that, after Notice is given, the Court hold a Final Approval Hearing approximately 180 days after entry of the Preliminary Approval Order and approve the settlement of the Litigation as set forth herein.
63. At least twenty-one days before the Final Approval Hearing, or by some other date if so directed by the Court, Plaintiff will move for (1) final approval of the Settlement; (2) final appointment of the Class Representatives and Class Counsel; and (3) final certification of the Settlement Class, including for the entry of a Final Approval Order, and file a memorandum in support of the motion for final approval.

IX. NOTICE TO CLASS MEMBERS

64. Settlement Administrator

- a. Costs of Settlement Administration shall be provided from the Settlement Fund.

65. Class List

- a. Toyotetsu, with the assistance of the Settlement Administrator as appropriate, shall provide the Settlement Administrator a “Class List” based on the original list used to send notice to Class Members about the Data Breach.
- b. The Class List shall include the names and last known email and/or mailing addresses of potential Settlement Class Members, to the extent such information was contained in the original list used to send to Class Members notice about the Data Breach. Defendant will cooperate with Plaintiff concerning reasonable requests for information specific to the identification of Class Members and to the extent such information is readily available from a cost, resource, and access perspective.
- c. Toyotetsu shall provide the Class List to the Settlement Administrator and Class Counsel within seven days after entry of the Preliminary Approval Order.

66. Type of Notice Required

- a. Within 10 business days following the Court’s entry of the Preliminary Approval Order and pursuant thereto, the Settlement Administrator on behalf of the Defendant shall cause a CAFA Notice to be served upon the appropriate State and Federal officials. All expenses incurred in connection with the preparation and service of the CAFA Notice shall be borne by Defendant and under no circumstances will be borne by Plaintiff, or Class Counsel, and will not be payable from the Settlement Fund.
- b. The Notice shall be used to inform proposed Settlement Class Members, prior to the Final Approval Hearing, that there is a pending settlement and to further inform Settlement Class Members how they may: (1) obtain a copy of the Claim Form; (2) protect their rights regarding the settlement; (3) request exclusion from the Settlement Class and the proposed settlement, if desired; (4) object to any aspect of the proposed settlement, if desired; and (5) participate in the Final Approval Hearing, if desired. The Notice shall provide that Settlement Class Members may submit Claims Forms and be eligible for (1) a \$250.00 payment or (subject to pro rata increase or reduction based on the amount of valid claims submitted); and (2) the ability to claim up to \$5,000.00 for reimbursement of out-of-pocket expenses or lost time mitigating the effects of the Data Breach, upon provision of appropriate documentation. Additionally, the Notice shall make clear

the binding effect of the Settlement on all persons who do not timely request exclusion from the Settlement Class.

- c. Dissemination of the Notice shall be the responsibility of the Settlement Administrator. The text of the Notice shall be agreed upon by the Parties.
- d. Notice of the settlement) shall be posted on the Settlement Website within fourteen (14) days of the entry of the Preliminary Approval Order.

67. Notice Deadline

- a. Within thirty days of entry of the Preliminary Approval Order, the Settlement Administrator shall disseminate by U.S. Mail the Notice to Settlement Class Members identified on the Class List.

X. EXCLUSIONS

68. Exclusion Period

- a. Settlement Class Members will have up to and including 90 days following entry of the Preliminary Approval Order (60 days after the Notice Date) to exclude themselves from the Settlement in accordance with this Section.
- b. If the Settlement is finally approved by the Court, all Settlement Class Members will be bound by the Settlement and will be deemed a Releasor of the Released Parties as defined herein, and the relief provided by the Settlement will be their sole and exclusive remedy for the claims alleged by the Settlement Class.

69. Exclusion Process

- a. A Class Member may request to opt-out and be excluded from the Settlement Class in writing. The writing is to be sent to the Settlement Administrator through a request postmarked on or before the Objection/Exclusion Deadline and to a mailing address established by the Settlement Administrator and identified in the Claim Form.
- b. In order to exercise the right to be excluded, a Class Member must timely send a written request for exclusion to the Settlement Administrator providing his/her name, address, and telephone number; the name and number of this case; a statement that he/she wishes to be excluded from the Settlement Class; and a signature. A request to be excluded that is sent to an address other than that designated in the Class Notice, or that is not postmarked within the time specified, shall be invalid and the person serving such a request shall be considered a member of the Settlement Class and shall be bound by the Settlement Agreement.

- c. Any Class Member who elects to be excluded shall not: (1) be bound by any order entered after valid exclusion, including the Final Approval Order; (2) be entitled to relief under this Settlement Agreement; (3) gain any rights by virtue of this Settlement Agreement; or (4) be entitled to object to any aspect of this Settlement Agreement.
- d. The request for exclusion must be personally signed by the person requesting exclusion. So-called “mass” or “class” exclusion requests shall not be allowed.
- e. Within ten business days after the Exclusion Deadline, the Settlement Administrator shall provide Class Counsel and Defendant’s Counsel a written list reflecting all timely and valid exclusions from the Settlement Class.
- f. A list reflecting all individuals who timely and validly excluded themselves from the Settlement Class shall also be filed with the Court at the time of the motion for final approval of the Settlement.
- g. In the event that within 10 days after the Objection/Exclusion Deadline as approved by the Court, more than two percent (2%) of Class Members have timely and validly submitted exclusion requests, Defendant may, by notifying Settlement Class Counsel and the Court in writing, within 21 days after the Objection/Exclusion Deadline, void this Settlement Agreement. If Defendant voids the Settlement Agreement, Defendant shall be obligated to pay all settlement expenses already incurred, excluding any attorneys’ fees, costs, and expenses of Class Counsel or service awards. Plaintiffs’ Counsel shall not, at any time, seek recovery of same from any other party to the Litigation or from counsel to any other party to the Litigation.

XI. OBJECTIONS

70. Objection Period

- a. Settlement Class Members will have up to and including 90 days following entry of the Preliminary Approval Order (60 days after the Notice Date) to object to the Settlement in accordance with this Section.

71. Objection Process

- a. The Notice shall advise Class Members of their rights, including the right to be excluded from or object to the Settlement Agreement and its terms. The Notices shall specify that any objection to this Settlement Agreement, and any papers submitted in support of said objection, shall be received by the Court at the Final Approval Hearing only if, on or before the Objection/Exclusion Deadline approved by the Court, the person making an objection shall file notice of his/her intention to do so and at the same time: (1) file copies of such papers he/she proposes to submit at the Final Approval Hearing with the Clerk of the Court;

and (2) send copies of such papers via U.S. Mail or overnight delivery to both Class Counsel and Defendant's Counsel. A copy of the objection must also be mailed to the Settlement Administrator at a mailing address established by the Settlement Administrator and identified in the Claim Form.

- b. Any Settlement Class Member who intends to object to this Settlement must include in any such objection: (1) his/her full name, address, and current telephone number; (2) the name and number of this case; (3) all grounds for the objection, with factual and legal support for the stated objection, including any supporting materials; (4) the identification of any other objections he/she has filed, or has had filed on his/her behalf, in any other class action cases in the last four years; and (5) the objector's signature. If represented by counsel, the objecting Settlement Class Member must also provide the name and telephone number of his/her counsel. If the objecting Settlement Class Member intends to appear at the Final Approval Hearing, either with or without counsel, he/she must state as such in the written objection, and must also identify any witnesses he/she may call to testify at the Final Approval Hearing and all exhibits he/she intends to introduce into evidence at the Final Approval Hearing, which must also be attached to, or included with, the written objection.
- c. Within 10 business days after the Objection Deadline, the Settlement Administrator shall provide Class Counsel and Defendant's Counsel a written list reflecting all timely and valid exclusions from the Settlement Class.
- d. Any Settlement Class Member who fails to timely file and serve a written objection and notice of intent to appear at the Final Approval Hearing pursuant to this Settlement Agreement, shall not be permitted to object to the approval of the Settlement at the Final Approval Hearing and shall be foreclosed from seeking any review of the Settlement or the terms of the Settlement Agreement by appeal or other means.

XII. FINAL APPROVAL HEARING

- 72. The Parties will jointly request that the Court hold a Final Approval Hearing approximately one hundred and eighty (180) days after entry of the Preliminary Approval Order. At the Final Approval Hearing, the Parties will request that the Court consider whether the Settlement Class should be certified as a class pursuant to Federal Rule of Civil Procedure 23 for settlement and, if so, (1) consider any properly filed objections, (2) determine whether the Settlement is fair, reasonable and adequate, was entered into in good faith and without collusion, and should be approved, and shall provide findings in connections therewith, and (3) enter the Final Approval Order, including final approval of the Settlement Class and the Settlement Agreement, and a Fee Award.

XIII. FINAL APPROVAL ORDER

73. The Parties shall jointly seek entry of a Final Approval Order, the text of which the Parties shall agree upon. The dismissal orders, motions, or stipulation to implement this Section shall, among other things, seek or provide for a dismissal with prejudice and waive any rights of appeal.
74. The Parties, through Class Counsel, shall jointly submit to the Court a proposed Final Approval Order that, without limitation:
 - a. Approves finally this Settlement Agreement and its terms as being a fair, reasonable, and adequate settlement as to the Settlement Class Members and directing its consummation according to its terms;
 - b. Dismisses Defendant with prejudice and releases Defendant from the Released Claims, without costs and fees except as explicitly provided for in this Settlement Agreement; and
 - c. Reserves continuing and exclusive jurisdiction over the Settlement and this Settlement Agreement, including but not limited to the Litigation, the Settlement Class Members, Toyotetsu, and the Settlement for the purposes of administering, consummating, supervising, construing, and enforcing the Settlement Agreement and the Settlement Fund.
75. Class Counsel shall use their best efforts to assist Toyotetsu in obtaining dismissal with prejudice of the Litigation and take all reasonable steps necessary and appropriate to otherwise effectuate all aspects of this Settlement Agreement.

XIV. TERMINATION OF THE SETTLEMENT

76. The Settlement is conditioned upon preliminary and final approval of the Parties' written Settlement Agreement, and all terms and conditions thereof without material change, material amendments, or material modifications by the Court (except to the extent such changes, amendments or modifications are agreed to in writing between the Parties).
77. Either Party may elect to terminate and cancel this Settlement Agreement as set forth in Paragraph 69(g) or within ten days of any of the following events:
 - a. The Court refuses, in any material respect, to grant preliminary approval of this Settlement Agreement consistent with the terms of the Settlement Agreement;
 - b. The Court refuses, in any material respect, to grant final approval of this Settlement Agreement consistent with the terms of the Settlement Agreement; or

- c. The Court refuses, in any material respect, to enter a final judgment in this Litigation consistent with the Settlement Agreement.

78. In the event the Settlement Agreement is not approved or does not become final, or is terminated consistent with this Settlement Agreement, the Parties, pleadings, and proceedings will return to the *status quo ante* as if no settlement had been negotiated or entered into, and the Parties will negotiate in good faith to establish a new schedule for the Litigation. No Settlement materials, including the Settlement Agreement, shall be used in the Litigation.

XV. ATTORNEYS' FEES, COSTS AND EXPENSES, AND SERVICE AWARD

- 79. **Attorneys' Fees:** At least fourteen days prior to the Objection/Exclusion Deadline, Class Counsel will move the Court for an award of attorneys' fees and costs in an amount not to exceed 1/3 of the Settlement Fund. The attorneys' fee award will be provided from the Settlement Fund. Toyotetsu agrees not to oppose an application for attorneys' fees by Class Counsel in such an amount. Class Counsel, in turn, agree not to seek or accept attorneys' fees in excess of such amount from the Court. Attorneys' fees and expenses awarded by the Court shall be provided outside of and separate from the settlement. This amount was negotiated after the primary terms of the settlement were negotiated.
- 80. **Class Counsel's Litigation Expenses:** Furthermore, from the Settlement Fund, Class Counsel shall be reimbursed their reasonable litigation expenses not to exceed \$15,000.00 (Fifteen Thousand Dollars). Class Counsel shall submit their expenses to the Court for reimbursement approval if requested by the Court.
- 81. Notwithstanding any contrary provision of this Settlement Agreement, the Court's consideration of the Fee Award is to be conducted separately from the Court's consideration of the fairness, reasonableness, and adequacy of the Settlement Agreement, and any award made by the Court with respect to Class Counsel's attorneys' fees or expenses, or any proceedings incident thereto, including any appeal thereof, shall not operate to terminate or cancel this Settlement Agreement or be deemed material thereto.
- 82. **Service Award to Plaintiff:** Before or at the same time as Plaintiff seeks final approval of the Settlement Agreement, Class Counsel shall move the Court for a Service Award for the Named Plaintiff in an amount not to exceed \$5,000.00. Toyotetsu agrees not to oppose such a request. Service Awards approved by the Court will be provided from the Settlement Fund. This amount was negotiated after the primary terms of the settlement were negotiated.
- 83. In no event will Toyotetsu's liability hereunder for the Fee Award, Administration Expenses, Class Counsel's Litigation Expenses, and/or a Service Award or any other fees, costs or expenses exceed its funding obligations set out in this Settlement Agreement. Toyotetsu shall have no financial responsibility for this Settlement Agreement except as explicitly set out in this Settlement Agreement. Toyotetsu

shall have no further obligation for attorneys' fees or expenses to any counsel representing or working on behalf of one or more individual Settlement Class Members. Toyotetsu will have no responsibility, obligation, or liability for allocation of fees and expenses among Class Counsel.

84. **Maximum Payout Under Settlement:** The maximum payout obligation for Toyotetsu under this Settlement will be \$400,000 and the cost of any required notice under the Class Action Fairness Act ("CAFA").

XVI. MISCELLANEOUS REPRESENTATIONS

85. The Parties agree that the Settlement Agreement provides fair, equitable, and just compensation, and a fair, equitable, and just process for determining eligibility for compensation for any given Class Member related to the Released Claims.
86. The Parties (1) acknowledge that it is their intent to consummate this Settlement Agreement, and (2) agree, subject to their fiduciary and other legal obligations, to cooperate to the extent reasonably necessary to effectuate and implement all terms and conditions of this Settlement Agreement and to exercise their reasonable best efforts to accomplish the foregoing terms and conditions of this Settlement Agreement. Class Counsel and Toyotetsu's Counsel agree to cooperate with each other in seeking Court approval of the Preliminary Approval Order, the Settlement Agreement, and the Final Approval Order, and with reasonable haste to agree upon and execute all such other documentation as may be reasonably required to obtain final approval of the Settlement.
87. The Parties intend this Settlement Agreement to be a final and complete resolution of all disputes between them with respect to the Released Claims. The Parties agree not to assert in any forum that the Litigation was brought by Plaintiff or defended by Toyotetsu in bad faith or without a reasonable basis.
88. The Parties agree not to identify, describe, disclose, testify, convey, or discuss with any individual, person, organization, corporation, or other entity the subject matter, amount, facts, terms, and conditions of this Settlement Agreement, including but not limited to any negotiations leading up to the actual resolution of this matter except where disclosure is compelled by law. In such case, reasonable notice will be provided to the other Party before disclosure is made. The Parties further agree that they will not issue, nor cause to be issued, any statements to the public or media regarding the claims and allegations leading up to this Settlement Agreement or regarding the Settlement Agreement or any of its terms, including statement on any website or via social media, unless prior written consent of the other Party is given.
89. Nothing express or implied in this Settlement Agreement is intended or shall be construed to confer upon or give any person or entity other than the Parties, Released Parties, and Settlement Class Members any right or remedy under or by reason of this Settlement Agreement. Each of the Released Parties is an intended third-party beneficiary of this Settlement Agreement with respect to the Released

Claims and shall have the right and power to enforce the release of the Released Claims in his, her, or its favor against all Releasers.

90. The Parties have relied upon the advice and representation of counsel, selected by or provided to them, concerning their respective rights in and legal liability for the Released Claims. The Parties have read and understand fully this Settlement Agreement and have been fully advised as to the legal effect thereof by their counsel and intend to be and are legally bound by the same.
91. Any headings used herein are used for the purpose of convenience only and are not meant to have legal effect.
92. The waiver by one Party of any breach of this Settlement Agreement by any other Party shall not be deemed as a waiver of any prior or subsequent breach of this Settlement Agreement.
93. This Settlement Agreement constitutes the entire agreement and understanding of the Parties with respect to the Settlement, and supersedes all prior negotiations, agreements, arrangements, and undertakings with respect to the Settlement. No representations, warranties, or inducements have been made to any Party concerning this Settlement Agreement other than the representations, warranties, and covenants contained and memorialized in this Settlement Agreement.
94. This Settlement Agreement may not be amended, modified, altered, or otherwise changed except by a written instrument signed by or on behalf of all Parties or their respective successors-in-interest.
95. The Parties may agree, subject to the approval of the Court where required, to reasonable extensions of time to carry out the provisions of the Settlement Agreement.
96. Except as otherwise provided herein, each Party shall bear its own costs.
97. Plaintiff represents and warrants that Plaintiff has not assigned any claim or right or interest therein as against the Released Parties to any other person or party.
98. The Parties represent that they have obtained the requisite authority to enter this Settlement Agreement in a manner that binds all Parties to its terms.
99. The Parties specifically acknowledge, agree and admit that this Settlement Agreement, along with all related drafts, motions, pleadings, conversations, negotiations, correspondence, orders, or other documents shall be considered a compromise within the meaning of Federal Rule of Evidence 408, and any other equivalent or similar rule of evidence, and shall not (1) constitute, be construed, be offered, or received into evidence as an admission of the validity of any claim or defense, or the truth of any fact alleged or other allegation in the Litigation or in

any other pending or subsequently filed action, or of any wrongdoing, fault, violation of law, or liability of any kind on the part of any Party, or (2) be used to establish a waiver of any defense or right, or to establish or contest jurisdiction or venue.

100. The Parties also agree that this Settlement Agreement, along with all related drafts, motions, pleadings, conversations, negotiations, correspondence, orders, or other documents entered in furtherance of this Settlement Agreement, and any acts in the performance of this Settlement Agreement, are not intended to establish grounds for certification of any class involving any Settlement Class Member other than for certification of the Settlement Class for this Settlement.
101. This Settlement Agreement, whether approved or not approved, revoked, or made ineffective for any reason, and any proceedings related to this Settlement Agreement and any discussions relating thereto, shall be inadmissible as evidence of any liability or wrongdoing whatsoever and shall not be offered as evidence of any liability or wrongdoing in any court or other tribunal in any state, territory, or jurisdiction, or in any manner whatsoever. Further, neither this Settlement Agreement, the Settlement contemplated by it, nor any proceedings taken under it, will be construed, offered, or received into evidence as an admission, concession, or presumption that class certification is appropriate, except to the extent necessary to consummate this Settlement Agreement and the binding effect of the Final Approval Order.
102. The provisions of this Settlement Agreement, and any orders, pleadings or other documents entered in furtherance of this Settlement Agreement, may be offered or received in evidence solely (1) to enforce its terms and provisions, (2) as may be specifically authorized by a court of competent jurisdiction after an adversary hearing upon application of a Party hereto, (3) to establish payment, or an affirmative defense of preclusion or bar in a subsequent case, (4) in connection with any motion to enjoin, stay, or dismiss any other action, and/or (5) to obtain Court approval of the Settlement Agreement.
103. This Settlement Agreement may be executed in one or more counterparts exchanged by hand, messenger, facsimile, or PDF as an electronic mail attachment. All executed counterparts and each of them shall be deemed to be one and the same instrument, provided that counsel for the Parties to this Settlement Agreement all exchange signed counterparts.
104. This Settlement Agreement shall be binding upon, and inure to the benefit of, the successors and assigns of the Parties hereto and the Released Parties.
105. The Court shall retain jurisdiction with respect to implementation and enforcement of the terms of this Settlement Agreement, and the Parties hereby submit to the jurisdiction of the Court for purposes of implementing and enforcing the settlement embodied in this Settlement Agreement.

106. This Settlement Agreement shall be governed by and construed in accordance with the laws of the state of Kentucky.
107. This Settlement Agreement is deemed to have been prepared by counsel for all Parties as a result of arms-length negotiations among the Parties. Whereas all Parties have contributed substantially and materially to the preparation of this Settlement Agreement, it shall not be construed more strictly against one Party than another.
108. Unless otherwise agreed to by the Parties in writing, any notice required or provided for under this Settlement Agreement shall be in writing and shall be sent by electronic mail or hand delivery, as follows:

If to Class Counsel:

Dylan J. Gould
Terence R. Coates
Jonathan T. Deters
MARKOVITS STOCK &
DEMARCO, LLC
119 E. Court Street
Suite 530
Cincinnati, OH 45002
Tel: 513.651.3700
dgould@msdlegal.com
tcoates@msdlegal.com
jdeters@msdlegal.com

Joseph B. Venters
VENTERS LAW OFFICE
P.O. Box 1749
Somerset, KY 42502
Tel: 606.451-0332
joey@venterslaw.com

If to Toyotetsu's Counsel:


Christopher Wood
Morgan Salisbury
Judd Uhl
LEWIS, BRISBOIS, BISGARRD & SMTIH
250 E. Fifth Street, Suite 2000
Cincinnati, OH 45202
judd.uhl@lewisbrisbois.com
morgan.salisbury@lewisbrisbois.com
christopher.wood@lewisbrisbois.com

109. This Settlement Agreement shall be deemed executed as of the date that the last party signatory signs the Agreement.

[The remainder of this page is intentionally left blank.]

IN WITNESS HEREOF, the undersigned have caused this Settlement Agreement to be executed as of the dates set forth below.

JONATHAN PHELPS, individually and as Class Representative

Signature: 
Jonathan Phelps (Jan 19, 2023 05:05 EST)

Date: Jan 19, 2023

TOYOTETSU

By: _____

Print Name: _____

Title: _____

Date: _____

APPROVED AS TO FORM BY:

LEWIS, BRISBOIS, BISGAARD & SMITH, as Toyotetsu's Counsel

By: _____

Print Name: _____

Date: _____

MARKOVITS, STOCK & DEMARCO, LLC, as Class Counsel

By: 
Dylan J. Gould (Jan 19, 2023 11:48 EST)

Print Name: Dylan J. Gould

Date: 01/19/2023

IN WITNESS HEREOF, the undersigned have caused this Settlement Agreement to be executed as of the dates set forth below.

JONATHAN PHELPS, individually and as Class Representative

Signature: _____

Date: _____

TOYOTETSU

By: Don Slagle

Print Name: Don Slagle

Title: Vice President

Date: 1/19/23

APPROVED AS TO FORM BY:

LEWIS, BRISBOIS, BISGAARD & SMITH, as Toyotetsu's Counsel

By: [Signature]

Print Name: Christopher Wood

Date: 01/19/23

MARKOVITS, STOCK & DEMARCO, LLC, as Class Counsel

By: _____

Print Name: _____

Date: _____

SETTLEMENT TIMELINE

<u>From Order Granting Preliminary Approval</u>	
Toyotetsu provides list of Class Members to the Settlement Administrator	+7 days
Long Form and Short Form Notices Posted on the Settlement Website	+14 days
Notice Deadline	+30 days
Counsel's Motion for Attorneys' Fees, Reimbursement of Litigation Expenses, and Class Representative Service Award	+76 days
Objection Deadline	+90 days
Exclusion Deadline	+90 days
Settlement Administrator Provide List of Objections/Exclusions to the Parties' counsel	+100 days
Claims Deadline	+120 days
Initially Approved Claims List	+165 days
<u>Final Approval Hearing</u>	+180 (at minimum)
Motion for Final Approval	-14 days
<u>From Order Granting Final Approval</u>	
Settlement Administrator provides W-9 to Toyotetsu	+30 days
Effective Date	+35 days
Payment of Attorneys' Fees and Expenses Class Representative Service Award	+42 days
Settlement Website Deactivation	+120 days

EXHIBIT 3

Phelps v. Toyotetsu North America
c/o Settlement Administrator
PO Box XXXX
Mendota Heights, MN 55120

FIRST-CLASS MAIL
U.S. POSTAGE PAID
CITY, ST
PERMIT NO. XXXX

NOTICE OF CLASS ACTION
SETTLEMENT

**If you received a notice of data
breach from Toyotetsu America,
Inc., you are entitled to submit a
claim for monetary compensation
under a class action settlement.**

www.toyotetsudatasettlement.com

<<Barcode>>

Class Member ID: <<Refnum>>

<<FirstName>> <<LastName>>

<<BusinessName>>

<<Address>>

<<Address2>>

<<City>>, <<ST>> <<Zip>>-<<zip4>>

WHO IS A CLASS MEMBER?

6-22-v-00106-CY-B-J-A-I Doc # 37-3 Filed 01/20/23 Page 3 of 5 Page ID# 1
In the lawsuit *Phelps v. Toyotetsu*, No. 6:22-cv-00106 (E.D. Ky.), you are a class member if your personal information was potentially compromised as a result of the Cyber-Attack that Toyotetsu discovered in October 2021 (the "Settlement Class").

WHAT ARE THE SETTLEMENT BENEFITS AND TERMS?

Under the Settlement, Toyotetsu has agreed to pay \$400,000 into a Settlement Fund which will be distributed to Class Members who submit valid claims, after deducting the named Plaintiff's Service Awards, class counsel's attorneys' fees and expenses, and settlement administration notice and administration costs, if such award is approved by the Court. All Class Members may submit claims to receive cash payments of approximately \$250. In addition to these cash payments, Class Members who believe they suffered out-of-pocket expenses as a result of the Data Breach may claim up to \$5,000 (subject to pro rata adjustment) for the reimbursement of sufficiently documented expenses. Claims for the \$250 cash payment option will be pro rata adjusted up or down based on the remaining balance of the Settlement Fund after payments for valid out-of-pocket expense claims, settlement administration costs and expenses, attorneys' fees and expenses, and any class representative service award. Toyotetsu has also agreed to implement or continue a series of cybersecurity enhancements to limit the likelihood of a future cyberattack. You must timely submit a valid Claim Form to receive compensation from the \$400,000 Settlement Fund. More information about the types of Claims and how to file them is available at the Settlement Website.

WHAT ARE YOUR RIGHTS AND OPTIONS?

Submit a Claim Form. To qualify for a cash payment, you must timely mail a Claim Form that is attached to this notice or timely complete and submit a Claim Form online at www.toyotetsudatasettlement.com ("Settlement Website"). Your Claim Form must be postmarked or submitted online no later than [REDACTED], 2023. Atticus Administration, LLC is the Settlement Administrator.

Opt Out. You may exclude yourself from the settlement and retain your ability to sue Toyotetsu on your own by mailing a written request for exclusion to the Settlement Administrator that is post marked no later than [REDACTED], 2023. If you do not exclude yourself, you will be bound by the settlement and give up your right to sue regarding the released claims.

Object. If you do not exclude yourself, you have the right to object to the settlement. Written objections must be signed, postmarked no later than [REDACTED], 2023, and provide the reasons for the objection. Please visit Settlement Website for more details.

Do Nothing. If you do nothing, you will not receive a Settlement payment and will lose the right of sue regarding the released claims. You will be bound by the Court's decision because this is a conditionally certified class action.

Attend the Final Approval Hearing. The Court will hold a **Final Approval Hearing on [REDACTED], 2023 at [time]**. All persons who timely object to the settlement by [REDACTED], 2023 may appear at the Final Approval Hearing.

Who is the Class Representative? Jonathan Phelps is the Plaintiff and Class Representative in this lawsuit. He has remained engaged in representing the Class's interests during this litigation and reviewed and approved the terms of the proposed settlement. He will seek a Service Award of \$5,000.00. There are approximately 12,453 Class Members whose personal information may have been impacted in Toyotetsu's October 2021 data breach.

Who are the attorneys for the Plaintiffs and the proposed Class? Class Counsel are Terence R. Coates, Dylan J. Gould, and Jonathan T. Deters, Markovits, Stock & De Marco, LLC, and Joseph B. Venters of Venters Law Office. These attorneys have decades of experience handling class action lawsuits and are respected by courts and counsel throughout the United States for handling data breach class actions, such as this one.

Do I have any obligation to pay attorneys' fees or expenses? No. The attorneys' fees and expenses will be paid exclusively from the Settlement Fund as awarded and approved by the Court. The attorneys' fees will be in an amount not to exceed 1/3 of the \$400,000 Settlement Fund (*i.e.* no more than \$133,333.33) and the expenses will not exceed \$15,000.00. The motion for attorneys' fees and expenses will be posted on the Settlement Website after it is filed with the Court.

When is the Final Approval Hearing? The final approval hearing, where the Court will determine if the settlement is fair, reasonable, and adequate, will be conducted on [REDACTED] 2023 at [time].

Who is the Judge overseeing this settlement? Judge Claria Horn Boom, United States District Judge, Eastern District of Kentucky.

Where may I locate a copy of the settlement agreement, learn more about the case, or learn more about submitting a Claim? www.toyotetsudatasettlement.com.

*** Please note that if you wish to submit a claim for compensation for out-of-pocket losses on the attached Claim Form, you will likely need to submit your claim online so you may attach all information necessary to support your request for payment for such out-of-pocket expenses. If you wish to receive just the cash payment, the attached tear off claim form should suffice. A longer version of the Claim Form may be accessed on the Settlement Website.

This Notice is a summary of the proposed settlement.

Postage
Required

Phelps v. Toyotetsu North America
c/o Settlement Administrator
PO Box XXXX
Mendota Heights, MN 55120

CLAIM FORM

Claims must be postmarked no later than [REDACTED], 2023. You may also submit a Claim Form online no later than [REDACTED], 2023.

NAME: _____

ADDRESS: _____

Monetary Compensation

1. **Cash Payment:** Would you like to receive a cash payment under the Settlement? (circle one) Yes No

If you are a Settlement Class Member, you may receive a \$250 cash payment, which will may be increased or decreased *pro rata* from funds remaining in the Settlement Fund after all claims are submitted.

2. **Verified Ordinary and/or Extraordinary Expenses:** I am submitting a claim for either ordinary or extraordinary monetary losses in the amount of \$_____ (not more than \$5,000.00) on account of out-of-pocket expenses and/losses I incurred as a result of the Data Incident. I understand that I am required to provide supporting third-party documentation and to support my claim for out-of-pocket losses, such as providing copies of any receipts, bank statements, reports, or other documentation supporting my claim. I understand this can include receipts or other documentation not “self-prepared.” I understand that “self-prepared” documents such as handwritten receipts are, by themselves, insufficient to receive reimbursement, but can be considered to add clarity or support other submitted documentation. I understand the settlement administrator may contact me for additional information before processing my claim. I understand that if I lack information supporting my claim for out-of-pocket expenses, I will likely not receive compensation for this settlement benefit. I understand any monetary compensation I may receive under the settlement is capped at \$5,000.00.

By signing my name below, I swear and affirm that the information included on this Claim Form is true and accurate, and that I am completing this claim form to the best of my personal knowledge.

_____ (signature)

EXHIBIT 4

CLAIM FORM

***Phelps v. Toyotetsu North America*, Case No. 6:22-cv-00106**
United States District Court, Eastern District of Kentucky
SUBMIT BY _____, 2023
ONLINE AT WWW.TOYOTETSUDATASETTLEMENT.COM
OR MAIL TO:
Atticus Administration
1250 Northland Drive NE Suite 240
Mendota Heights, MN 55120

GENERAL CLAIM FORM INFORMATION

This Claim Form should be filled out online or submitted by mail if your personal information was potentially compromised through Toyotetsu America's October 2021 Data Breach and your personal information potentially was maintained on Defendant Toyotetsu's system ("Settlement Class").

If you wish to submit a Claim by mail, please provide the information requested below. Please print clearly in blue or black ink. This Claim Form must be mailed and postmarked by **no later than DD, MM, 2023**.

Monetary Compensation

Cash Payment: Would you like to receive a cash payment under the Settlement? **(circle one)**

Yes

No

** The Parties estimate that payments under this option will be \$250. However, the value of payments under this option will be increased or decreased pro rata based on the balance of the Settlement Fund after the payment of other benefits, fees, expenses.

Out-of-Pocket Expenses (if any): I am submitting a claim for either ordinary or extraordinary monetary losses in the amount of \$_____ on account of out-of-pocket expenses and/or extraordinary losses I incurred as a result of the Data Incident. I understand that I am required to provide supporting third-party documentation and to support my claim for out-of-pocket losses, such as providing copies of any receipts, bank statements, reports, or other documentation supporting my claim. This can include receipts or other documentation that I have not "self-prepared." I understand that "self-prepared" documents such as handwritten receipts are, by themselves, insufficient to receive reimbursement, but can be considered to add clarity or support other submitted documentation. I understand the settlement administrator may contact me for additional information before processing my claim. If I do not have information supporting my claim for ordinary or extraordinary expenses, I likely will not receive compensation for this settlement benefit. **I understand that any monetary compensation I may receive under the settlement is capped at \$5,000.00 for out-of-pocket expenses.**

Please provide copies of any receipts, bank statements, reports, or other documentation supporting your claim. This can include receipts or other documentation not “self-prepared” by you. “Self-prepared” documents such as handwritten receipts are, by themselves, insufficient to receive reimbursement, but can be considered to add clarity or support other submitted documentation. You may mark out (also known as redact) any information that is not relevant to supporting your claim before sending in the documentation. The settlement administrator may contact you for additional information before processing your claim.

Description of the unreimbursed, out-of-pocket loss or expenses incurred, and the documents attached to support this claim:

Please sign below indicating that you are submitting this Claim for Out-of-Pocket Expenses and your representations of these losses are true and correct to the best of your knowledge and belief, and are being made under penalty of perjury.

Signature_____

Date_____

Claimant Information

Full Name of Class Member

Unique Identifier

(Can be found on the postcard or Email Notice you received informing you about this Settlement. If you need additional help locating this ID, please contact the Settlement Administrator.)

Street/P.O. Box

City

State

Zip Code

Phone Number

Email Address

Signature

EXHIBIT 5

NOTICE OF PROPOSED CLASS ACTION SETTLEMENT

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY
Phelps v. Toyotetsu North America, Case No. 6:22-cv-00106

A court has authorized this notice. This is not a solicitation from a lawyer.

If You Were Subject to the Toyotetsu America, Inc. Data Breach and Previously Received a Notice Letter Notifying You of the Data Breach, You Could be Eligible for a Payment from a Class Action Settlement

- You may be eligible to receive a payment from a proposed \$400,000 class action settlement.
- The class action lawsuit concerns the October 2021 data breach of Toyotetsu America, Inc. (“Toyotetsu” or “Defendant”) in which it was determined that an unauthorized third party gained access to certain Toyotetsu files containing current and former employees’ sensitive personal information including names, mailing addresses, and Social Security numbers. Toyotetsu denies that it did anything wrong and disputes that it has any liability but has agreed to settle the lawsuit on a class wide basis.
- To be eligible to make a claim, you must have received a notice letter of the Toyotetsu data breach that occurred in October 2021.
- Eligible claimants under the Settlement Agreement will receive \$250 (subject to a pro rata increase or reduction based on the amount of claims received). Claimants can receive further compensation for the actual amount of unreimbursed out-of-pocket losses up to \$5,000, with supporting documentation to prove the monetary losses.
- For more information or to submit a claim visit www.ToyotetsuDataSettlement.com or call [settlement admin telephone number] Monday through Saturday, between 8:30 a.m. and 5:00 p.m. Central Standard Time.
- **Please read this notice carefully. Your legal rights will be affected, and you have a choice to make at this time.**

	Summary of Legal Rights	Deadline(s)
SUBMIT A CLAIM FORM	The only way to receive payment.	Submitted or Postmarked on or Before [Month/Date], 2023
EXCLUDE YOURSELF BY OPTING OUT OF THE CLASS	Receive no payment. This is the only option that allows you to keep your right to bring any other lawsuit against Defendant for the same claims.	Submitted or Postmarked on or Before [Month/Date], 2023

Questions! Go to www.ToyotetsuDataSettlement.com or call 1-800-XXX-XXXX.

OBJECT TO THE SETTLEMENT AND/OR ATTEND THE HEARING	You can write the Court about why you agree or disagree with the Settlement. You can also ask to speak to the Court at the Final Approval Hearing on [Month/Date], 2023 about the fairness of the Settlement, with or without your own attorney.	Received on or Before [Month/Date], 2023
DO NOTHING	Receive no payment. Give up rights if you are a Class Member.	

- Your rights and options as a Class Member – and the deadlines to exercise your rights – are explained in this notice.
- The Court still will have to decide whether to approve the Settlement. Payments to class members will be made if the Court approves the Settlement and after any possible appeals are resolved.

What This Notice Contains

Class Notice Information.....	3
Who is Included in the Settlement.....	4
The Settlement Benefits.....	4
How to Get a Payment – Making a Claim.....	5
The Attorneys Representing You.....	6
Excluding Yourself from the Settlement.....	7
Objecting to or Commenting on the Settlement.....	8
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If I Do Nothing.....	9
Getting More Information.....	10

CLASS NOTICE INFORMATION

1. Why did I get this notice?

Defendant's records indicate that you may have been part of a data breach of Toyotetsu's systems in October 2021 that may have exposed certain personal information of yours. If you qualify, you could be eligible to receive a payment as part of the Settlement.

For more information, go to: www.ToyotetsuDataSettlement.com

The person who has sued Toyotetsu is called the Plaintiff. Toyotetsu is the Defendant that has been sued in the lawsuit.

2. What is this lawsuit about?

In October 2021, Toyotetsu determined a data breach occurred whereby cybercriminals may have accessed certain Toyotetsu files containing the personal information of Settlement Class Members. Upon receiving notice that his information was part of the data breach, Plaintiff brought this lawsuit on behalf of himself and all potential Class Members alleging Toyotetsu was negligent for failing to implement adequate data security safeguards, which allowed cybercriminals to access to his private personal information. Defendant denies that it acted negligently in protecting Plaintiff's private personal information.

3. What is a class action?

In a class action lawsuit, one or more people called "Class Representatives" have sued on behalf of themselves and other people who have similar claims. These people and entities together are called a "Class" or "Class Members." The company Plaintiff sued on behalf of himself and all others similarly situated —Toyotetsu — is called the Defendant. In a class action, one court resolves the issues for all Class Members, except for those who choose to exclude themselves.

4. Why is there a settlement?

The Court did not decide in favor of Plaintiff or Defendant. Instead, both parties agreed to a Settlement to resolve the claims. A class wide settlement avoids the costs and risk of a trial, and Class Members can receive the available settlement compensation benefits. The Class Representative and Class Counsel believe the Settlement is in the best interest of the Class.

WHO IS INCLUDED IN THE SETTLEMENT

5. Who is in the Settlement?

You have been identified through Toyotetsu's records as a Class Member, and are included in the Settlement, if you received a data breach notice letter from Defendant indicating you may be part of the Toyotetsu data breach that occurred in October 2021. The Class is defined for settlement purposes as:

All persons who were sent notice of the Data Breach.¹

Excluded from the Class is Toyotetsu; any entity in which Toyotetsu has a controlling interest; the affiliates, attorneys, successors, heirs, and assigns of Toyotetsu. Also excluded from the Class are members of the judiciary to whom this case is assigned, their families and members of their staff.

6. What should I do if I am not sure whether I am included?

If you are not sure whether you are included in the Class, you can request free assistance by calling the Settlement Administrator or calling **1-800-XXX-XXXX** for more information.

THE SETTLEMENT BENEFITS

7. What does the Settlement provide?

The Defendant will pay \$400,000 into a Settlement Fund, which will be distributed to Class Members who submit valid claims, after deducting the named Plaintiff's Service Award, class counsel's attorneys' fees and expenses, and Administrative Expenses, if such award is approved by the Court.

The Settlement Fund will provide:

- **\$250** to each Class Member upon submission of a valid claim (subject to a pro rata increase or reduction based on the amount of claims submitted);
- **Up to \$5,000** in compensation to each valid claim for proven monetary loss;
 - If the loss is an actual, documented, and unreimbursed monetary loss;
 - The loss was more likely than not caused by the Toyotetsu data breach;
 - The loss occurred between October 2021 and the present;
 - The loss is not already covered by unreimbursed ordinary losses category;
 - The Settlement class member made reasonable efforts to avoid, or seek reimbursement for, the loss, including but not limited to exhaustion of all available credit monitoring insurance and identity theft.

¹ "Data Breach" shall mean the cybersecurity incident against Toyotetsu giving rise to the action.

8. Who can get money from the Settlement, and how much?

To receive money from the Settlement, you must be a class member – meaning that you received a notice of the October 2021 Data Breach from Toyotetsu. The determination of settlement funds available to each valid claimant is described in Question #7 above.

9. What am I giving up if I stay in the Class?

If you are a Class Member (*see* Question #5 above), unless you exclude yourself with an opt-out request (*see* Questions #17-19 below), you cannot sue, continue to sue, or be part of any other lawsuit against Defendant concerning the same issues as in this lawsuit. The “Release” section in the Settlement Agreement (VII) describes the legal claims that you are giving up if you remain in the settlement class. The Settlement Agreement can be viewed at www.ToyotetsuDataSettlement.com.

HOW TO GET A PAYMENT – MAKING A CLAIM

10. How can I get a payment?

By submitting a valid claim form by on or before the claim deadline of [Month/Date], 2023. If you received a notification letter from Toyotetsu regarding the October 2021 data breach, you can make a claim by filling out and submitting the claim form available at www.ToyotetsuDataSettlement.com.

You can also contact the Settlement Administrator to request a paper claim form by telephone (1-800-XXX-XXXX), email (info@ToyotetsuDataSettlement.com), or U.S. mail (Settlement Administrator, Toyotetsu Data Breach Settlement, (address, city) , MN (Zip)).

11. What is the deadline for submitting a claim form?

To be eligible for payment from the Settlement, your valid claim form **must be received or postmarked no later than** [Month/Date], 2023.

12. When will I get my payment?

The Court will hold a hearing on [Month/Date], 2023 at ##:00 a.m., to decide whether to approve the Settlement. Payments will be made after the Settlement is approved and becomes final, meaning there is no appeal from the Court’s order approving the Settlement, or any appeal filed was resolved in a manner that allows the settlement to proceed as approved by the Court.

Updates regarding the Settlement will be posted on the Settlement website, www.ToyotetsuDataSettlement.com.

THE ATTORNEYS REPRESENTING YOU

13. Do I have an attorney in the case?

Yes. The Court appointed the following attorneys to represent you and other Settlement Class Members as “Class Counsel.”

Terence R. Coates Dylan J. Gould Jonathan T. Deters MARKOVITS, STOCK & DEMARCO, LLC 119 E. Court Street, Suite 530 Cincinnati, OH 45202 (513) 651-3700	Joseph B. Venters THE VENTERS LAW OFFICE P.O. Box 1749 Somerset, KY 42502 (606) 451-0332
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------

You will not be charged by these attorneys for their work on the case. If you want to be represented by your own attorney

14. Should I get my own attorney?

You do not need to hire your own attorney. If you want your own attorney, you may hire one, but you will be responsible for any payment for that attorney’s services. For example, you can ask your own attorney to appear in court for you if you want someone other than Class Counsel to speak on your behalf. You may also appear for yourself without an attorney.

15. How will the attorneys be paid?

Class Counsel have undertaken this case on a contingency-fee basis, meaning they have paid for all of the expenses in the case and have not been paid any money in relation to their work on this case. Accordingly, Class Counsel will ask the Court to award them attorneys’ fees of up to 1/3 (\$133,333.33) of the Settlement Fund and reimbursement for costs and expenses not to exceed \$15,000 to be paid from the Settlement Fund. The Court will decide the amount of fees and costs and expenses to be paid. You will not have to separately pay any portion of these fees yourself. Class Counsel’s request for attorneys’ fees and costs will be filed by [Month/Date], 2023 and will be available to view on the settlement website at www.ToyotetsuDataSettlement.com.

EXCLUDING YOURSELF FROM THE SETTLEMENT

If you are a Class Member and you do not want to receive the benefits from the Settlement, and you want to keep your right, if any, to sue Defendant on your own about the legal issues at issue in this lawsuit, then you must take affirmative steps to get out of the Settlement. This is called excluding yourself from – or “Opting Out” of the Class.

16. How do I Opt-Out of the Settlement?

A Class Member may request to be excluded from the Settlement in writing by a request postmarked on or before the Objection/Exclusion deadline (60 days after Notice Date) of [Month/Date], 2023. The timely exclusion Opt-Out must include:

- Your name;
- Address; and
- Telephone number;
- Name and number of this case;
- A statement that he/she wishes to be excluded from the Settlement; and
- Signature.

A request to be excluded that is sent to an address other than that designated as the settlement administrator address (Question #26 below), or postmarked within the time specified, shall be invalid and the person serving such a request shall be considered a member of the Settlement class and shall be bound by the terms of the Settlement.

17. If I am a class member and don't Opt-Out, can I sue the Defendant for the same thing later?

No. If you are a Class Member (*see* Question #5 above), unless you opt-out, you give up the right to sue Toyotetsu for the claims resolved by the Settlement. So if you are a class member and you want to try to pursue your own lawsuit, you must opt out.

18. What happens if I Opt-Out?

If you opt-out of the Settlement, you will not have any rights as a member of the Class under the Settlement terms; you will not receive any payment as part of the Settlement; you will not be bound by any further orders or judgments in this case; and you will keep the right, if any, to sue on the claims alleged in this lawsuit at your own expense.

OBJECTING TO OR COMMENTING ON THE SETTLEMENT

19. How do I tell the Court if I don't agree with the Settlement terms?

If you are a class member and you do not Opt-Out of the Settlement, you can ask the Court to deny approval of the Settlement by filing an objection. You can't ask the Court to order a different settlement; the Court can only approve or deny this Settlement. If the Court denies approval, no settlement payments will be sent out and the lawsuit will continue.

You will have up to and including 90 days following entry of the Preliminary Approval Order (60 days after the Notice Date) to object to the Settlement. You may also appear at the Fairness Hearing, either in person or through your own attorney. If you appear through your own attorney, you are responsible for paying that attorney. To object, you must file a document with the Court indicating that you object to the proposed Settlement in *Phelps v. Toyotetsu North America*, Case No. 6:22-cv-00106, United States District Court, Eastern District of Kentucky. You must include copies of such papers in your Objection that you propose to submit at the Final Approval Hearing with the Clerk of the Court; and send copies of such papers via U.S. Mail or overnight delivery to both Class Counsel and Defendant's Counsel.

A copy of the objection must also be mailed to the Settlement Administrator at the address that the Settlement Administrator has established to receive requests for exclusion or objections, Claim Forms, and any other communication relating to the Settlement.

Any class member who intends to object to this Settlement must include in any such objection:

- Your full name, address, and current telephone number;
- Name and number of this case - *Phelps v. Toyotetsu North America*, Case No. No. 6:22-cv-00106, United States District Court, Eastern District of Kentucky;
- All grounds for the objection, with factual and legal support for the stated objection, and supporting material;
- Identification of any other objections you have filed, or have had filed on your behalf in any other class action case in the last four years; and
- Signature.

You must also include whether you intend to appear at the Final Approval Hearing, with or without counsel, and identify any witnesses you may call to testify at the Final Approval Hearing along with all exhibits you intend to introduce into evidence at the Final Approval Hearing.

20. What's the difference between objecting and opting out?

Objecting is telling the Court that you don't like something about the Settlement. You can object to the Settlement only if you are a Class Member and do not opt-out of the Settlement. Opting-out of the Settlement indicates to the Court that you do not want to be part of the Settlement. If you

opt-out of the Settlement, you cannot object to it because it does not affect you. You cannot both opt-out of the Settlement and also object to the Settlement.

THE COURT'S FAIRNESS HEARING

21. When and where will the Court decide whether to approve the Settlement?

The Court will hold a Fairness Hearing at ##:## a.m. on [Month/Date], 2023, at United States District Court, Eastern District of Kentucky, 310 South Main Street, London, KY 40741. At this hearing, the Court will consider whether the Settlement is fair, reasonable, and adequate. If there are objections, the Court will consider them and listen to any arguments presented. The Court may also decide how much Class Counsel should receive in fees and expense reimbursements. After the hearing, the Court will decide whether to approve the Settlement.

The Court may reschedule the Fairness Hearing or change any of the deadlines described in this notice. The date of the Fairness Hearing may change without further notice to the Class Members. Be sure to check the website, www.ToyotetsuDataSettlement.com, for news of any such changes.

22. Do I have to come to the Final Approval Hearing?

No. Class Counsel will answer any questions the Court may have. You may attend at your own expense if you wish. If you send an objection, you do not have to come to the hearing to talk about it. As long as you mailed or filed your written objection on time, the Court will consider it. You may also pay your own lawyer to attend, but it is not necessary.

23. May I speak at the Final Approval Hearing?

You may ask the Court for permission to speak at the Final Approval Hearing. To do so, you must include a statement in your written objection (discussed above at Question #19) that you intend to appear at the hearing. Be sure to include your name, address, and signature as well.

You cannot speak at the hearing if you exclude yourself from the Class

IF I DO NOTHING

24. What happens if I do nothing?

If you do nothing and you are a class member, you will get no money from this Settlement, and you will not be able to sue Toyotetsu for the conduct alleged in this lawsuit or released by the settlement. For further information on the releases, see Section VII of the Settlement Agreement. If you do nothing and you are not a class member, the Settlement will not affect or release any individual claim you may have.

GETTING MORE INFORMATION

25. Are more details about the Settlement available?

Yes. This notice summarizes the proposed Settlement—more details are in the Settlement Agreement and other case documents. You can get a copy of these documents at www.ToyotetsuDataSettlement.com.

PLEASE DO NOT TELEPHONE THE COURT OR THE COURT CLERK'S OFFICE TO INQUIRE ABOUT THIS SETTLEMENT OR THE CLAIM PROCESS.

26. How do I get more information?

The settlement website www.ToyotetsuDataSettlement.com has the claim form, answers to questions about the Settlement and other information, including important documents, to help you determine whether you are eligible for a payment. You can also write or call the Settlement Administrator at:

Toyotetsu Data Breach Settlement
Settlement Administrator
(address)
(City), MN 55317-2009
(Phone Number)
[info@ ToyotetsuDataSettlement.com](mailto:info@ToyotetsuDataSettlement.com)

EXHIBIT 6

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION**

JONATHAN PHELPS, individually and on behalf of all others similarly situated,	:	Case No: 6:22-cv-00106
	:	
Plaintiff,	:	Judge: Claria Horn Boom
	:	Magistrate: Hanly A. Ingram
	:	
v.	:	<u>TERENCE R. COATES'S</u>
	:	<u>AFFIDAVIT IN SUPPORT OF</u>
TOYOTETSU NORTH AMERICA,	:	<u>PLAINTIFF'S UNOPPOSED</u>
	:	<u>MOTION FOR PRELIMINARY</u>
Defendant.	:	<u>APPROVAL OF CLASS ACTION</u>
	:	<u>SETTLEMENT</u>
	:	

I, Terence R. Coates, being first duly sworn and cautioned, depose and state as follows:

1. I am the managing partner of the law firm Markovits, Stock & DeMarco, LLC ("MSD"). I am one of the members of proposed Class Counsel in this case representing Plaintiff Jonathan Phelps and the putative Class and have monitored my firm's participation in this matter from 2021 to the present. The contents of this Affidavit are based upon my own personal knowledge, my experience in handling many class action cases, and the events of this litigation.

2. As proposed Class Counsel, my firm has been centrally involved in all aspects of this litigation from the initial investigation to the present. I have been the primary point of contact for Plaintiff and proposed Class Counsel with counsel for Toyotetsu America ("Defendant" or "Toyotetsu"). Class Counsel and Toyotetsu's counsel are experienced in class action litigation.

3. The Settlement Agreement reached by the parties was negotiated at arms'-length, is the result of hard bargaining, and provides Class Members potential cash payments and a form of injunctive relief through the implementation of cybersecurity enhancements.

4. I have been practicing law since 2009 and have extensive experience handling complex class action cases. I am currently participating as a member of plaintiffs' counsel in the

over 70 data breach and data privacy cases pending around the country, including serving as co-lead counsel for plaintiffs in *John v. Advocate Aurora Health, Inc.*, No. 22-CV-1253-JPS (E.D. Wis.); *Tucker v. Marietta Area Health Care, Inc.*, No. 2:22-cv-00185 (S.D. Ohio); *Vansickle v. C.R. England, Inc.*, No. 2:22-cv-00374 (D. Utah); *Rodriguez v. Professional Finance Company, Inc.*, No. 1:22-cv-1679 (D. Colo.); *Migliaccio v. Parker Hannifin Corp.*, No. 1:22-CV-00835 (N.D. Ohio); *Sherwood v. Horizon Actuarial Services, LLC*, No. 1:22-cv-1495 (N.D. Ga); *Tracy v. Elekta, Inc.*, No. 1:21-cv-02851-SDG (N.D. Ga.); *Devine v. Health Aid of Ohio, Inc.*, No. CV-21-948117 (Cuyahoga County Court of Common Pleas, Ohio) (court-appointed class counsel in finally-approved class action settlement); *Engle v. Talbert House*, No. A 2103650 (Hamilton County Court of Common Pleas, Ohio) (court-appointed class counsel in preliminarily-approved class action settlement); *Lutz v. Electromed, Inc.*, No. 0:21-cv-02198 (D. Minn.; co-lead counsel for plaintiffs in preliminarily-approved \$825,000 settlement); and, *Morelli v. Jim Koons Management Co.*, No. 8:22-cv-00292-GJH (D. Md.; court-approved co-lead counsel in preliminarily-approved settlement). Furthermore, I hold leadership positions in many other data privacy lawsuits including *In re Luxottica of America, Inc. Data Security Breach Litigation*, No. 1:20-cv-00908-MRB (S.D. Ohio; court-approved interim co-liaison counsel); *Tate v. EyeMed Vision Care, LLC*, No. 1:21-cv-00036 (S.D. Ohio; court-approved liaison counsel); *Medina v. PracticeMax Inc.*, No. CV-22-01261 (D. Ariz.) (court-appointed Executive Leadership Committee); *In re Netgain Technology, LLC Consumer Data Breach Litigation*, No. 2:10-cv-01210 (D. Minn.; court-appointed member of plaintiffs' steering committee); *In re 20/20 Eye Care Network Inc. Data Breach Litigation*, No. 21-cv-61275 RAR (S.D. Fla.; Plaintiffs' Executive Committee); and, *Baker v. ParkMobile, LLC*, No. 1:21-cv-02182 (N.D. Ga.; Plaintiffs' Steering Committee).

5. In 2022 alone, I was a member of co-lead counsel in several non-data breach class action settlements including, *Shy v. Navistar International Corp.*, No. 92-cv-0333-WHR (S.D. Ohio) (class counsel for settlement valued at over \$742 million); *Walker v. Nautilus, Inc.*, No. 2:20-cv-3414-EAS (S.D. Ohio) (\$4.25 million settlement); *Bechtel v. Fitness Equipment Services, LLC*, No. 1:19-cv-726-KLL (S.D. Ohio) (\$3.65 million settlement); *Ryder v. Wells Fargo Bank, N.A.*, No. 1:2019-cv-00638 (S.D. Ohio) (member of class counsel in a \$12 million settlement on behalf of roughly 1,830 class members). Moreover, I have extensive experience participating in other high-profile class action cases including, *In re Fannie Mae Securities Litigation*, No. 1:04-cv-1639, (D.D.C.) (assisted in representing the Ohio public pension funds as lead plaintiffs in a Section 10b-5 class action resulting in a \$153 million settlement); *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, No. 4:09-cv-1967, (N.D. Cal.); *see also O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015) (served as counsel for NCAA, Olympic, and NBA legend Oscar Robertson in antitrust claims against the National Collegiate Athletic Association, Collegiate Licensing Company, and Electronic Arts resulting in a \$40 million settlement with Electronic Arts and Collegiate Licensing Company and the Court issuing a permanent injunction against the NCAA for unreasonably restraining trade in violation of antitrust law); *In re Toyota Motor Corp., Unintended Acceleration Marketing, Sales Practices & Products Liability Litigation*, MDL No. 2151 (C.D. Cal.) (served as a member of counsel for the economic loss class action plaintiffs against Toyota that resulted in a settlement valued at \$1.6 billion); and *Williams v. Duke Energy*, No. 1:08-cv-0046 (S.D. Ohio) (served as counsel for plaintiffs in a complex antitrust and RICO class action resulting an \$80.875 million settlement). Federal courts have recognized me and my firm as experienced in handling complex cases including class actions. *Shy v. Navistar Int'l Corp.*, No. 3:92-CV-00333, 2022 WL 2125574, at (S.D. Ohio June 13, 2022) (“Class Counsel,

the law firm Markovits, Stock & DeMarco, LLC, are qualified and are known within this District for handling complex including class action cases such as this one.”); *Bechtel v. Fitness Equip. Servs., LLC*, 339 F.R.D. 462, 480 (S.D. Ohio 2021) (“plaintiffs’ attorneys have appeared in this Court many times and have substantial experience litigating class actions and other complex matters.”); *see also* MSD biography, Ex. A.

THE DATA BREACH

6. Plaintiff Jonathan Phelps filed a class action lawsuit on April 14, 2022, in the 28th Judicial Circuit, Pulaski Circuit Court against Toyotetsu based on a data breach Toyotetsu experienced in October 2021 alleging claims of negligence, breach of implied contract, unjust enrichment, and negligence per se. Before filing the complaint, my firm investigated the Data Breach and possible claims Plaintiff Phelps could bring against Toyotetsu. Through this investigation, we determined that the Data Breach impacted approximately 12,453 individuals’ names, dates of birth, addresses and Social Security numbers.

7. After the case was removed to the Eastern District of Kentucky, the Parties began informal settlement negotiations. On June 24, 2022, Plaintiff sent Toyotetsu settlement requests for settlement purposes and a draft settlement term sheet. On July 22, 2022, Toyotetsu responded to Plaintiff’s settlement requests and provided Plaintiff with a counter to the term sheet. On July 22, 2022, Plaintiff responded with a follow up counteroffer. On August 3, 2022, Toyotetsu provided Plaintiff with additional information about the Class and other items responsive to Plaintiff’s settlement request. Defendant also requested that Plaintiff produce information supporting the allegations in several paragraphs of Plaintiff’s then operative complaint. Plaintiff confirmed to Defendant that he had documentation supporting his allegations. On August 19, 2022, Toyotetsu sent Plaintiff a counteroffer. On September 5, 2022, the Parties again communicated

about settlement. On September 5, 2022, Plaintiff sent Toyotetsu an updated common fund term sheet and a claims-made term sheet. On October 4, 2022, Toyotetsu submitted a counteroffer to Plaintiff. On October 6, 2022, Plaintiff responded to Toyotetsu's counteroffer. The Parties continued to exchange settlement communication over October 7, October 8, and October 9, ultimately reaching a settlement in principle on a common fund amount on October 9, 2022. Through these settlement negotiations, Plaintiff was able to confirm the class size of 12,453, determine the data sets potentially compromised in the Data Breach, and determine the extent there was insurance coverage for Plaintiff's claims.

8. Throughout the course of the Parties' settlement exchanges, Plaintiff's counsel and Toyotetsu's counsel also participated in many follow-up phone calls to give context to the demands and to hopefully find a way to resolve the case. These communications remained professional, yet were positional and hard fought arms'-length negotiations. From these protracted settlement discussions, the Parties were able to evaluate the strengths and weaknesses of their case and evaluate damages on a potential classwide basis. Furthermore, Plaintiff's counsel and Toyotetsu's counsel are experienced in handling data breach class actions such as this one and know the complexities of these cases. Plaintiff's counsel is currently participating in two other class actions cases where I am appointed as part of class counsel for the plaintiffs and Mr. Wood is counsel for the defendant in data breach class actions cases. This case is the only case to date where an agreement has been reached for a settlement in the cases Mr. Wood and Mr. Coates are on opposite sides which further under scores that there is no collusion between the Parties and that this Settlement was reached only after several months of protracted settlement negotiations. As a result of these negotiations, I can confirm that the Parties and their counsel support this Settlement, and believe it is fair and reasonable.

9. Plaintiff was informed about the status of settlement negotiations and remained engaged as the Class Representative at all times during the pendency of this matter. He has no conflicts with the Class he seeks to represent.

THE SETTLEMENT & ITS BENEFITS

10. The Settlement in this matter will provide tangible cash benefits to Class Members who submit valid claims, and intangible benefits to all Class Members through Toyotetsu's commitment to certain cybersecurity enhancements for a period of two years. The cost of the cybersecurity enhancements will be paid by Toyotetsu separately and apart from the \$400,000 non-reversionary Settlement Fund.

11. From the Settlement Fund, Class Members will receive a cash payment of \$250 (subject to a pro rata increase or decrease) and the ability to receive up to \$5,000 for documented out-of-pocket losses, after the deduction of the payment to Atticus Administration, LLC for Administrative Expenses, for attorneys' fees and expenses, and the Class Representative Service Award.

12. In my experience of handling many data breach class actions around the country including 5 other common fund data breach class actions from December 31, 2022 to the present, the payment of \$400,000 for a common fund settlement for roughly 12,453 class members (equivalent to over \$32 per Class Member) is a strong recovery and one that compares very favorably to other data breach class action settlements.

**ATTICUS ADMINISTRATION IS WELL QUALIFIED
TO ACT AS THE SETTLEMENT ADMINISTRATOR**

13. Understanding that settlement administration costs and expenses will be deducted from the Settlement Fund, I obtained three competitive bids from class action settlement administration firms for the scope of work in this case. I received in detail each of the quotes and

pricing and concluded that Atticus Administration, LLC offered the best services as the best possible price for the Class. Notably, Atticus's bid was the lowest price quote and still included comprehensive settlement administration services. Receiving several bids from settlement administration companies in common fund class action cases is a great practice to determine which settlement administration company is best suited to work on behalf of the class. This practice was implemented here to select Atticus.

14. Atticus is a highly-qualified class action settlement administration company, as evidenced in the documentation supporting the Declaration of Christopher Longley on Adequacy of Notice Plan.

15. Atticus agreed to complete settlement administration for approximately \$35,000.00 in this case.

THE NOTICE PROGRAM IS ADEQUATE

16. The Notice plan in this case consists of sending each Class Member the Short Form Notice with tearoff claim form included via Regular U.S. Mail, and the Long Form Notice and full Claim Form will be posted on the Settlement Website. Additional case information including import documents from this case will also be posted on the Settlement Website.

THE CLASS REPRESENTATIVE SERVICE AWARD OF \$5,000.00 IS REASONABLE

17. Plaintiff Jonathan Phelps has been a stellar class representative. He has stayed informed about this litigation, reviewed and approved all settlement the demand and final settlement amount and Settlement Agreement, and spent substantial time and effort protecting the Class's interests. Accordingly, the \$5,000.00 Class Representative Service Award to Class Representative Phelps is reasonable given his efforts on behalf of the Class in this matter. Furthermore, the Class Representative Service Award here is less than what has been preliminarily

approved in other common fund data breach class action settlements. See *Lutz v. Electromed, Inc.*, No. 0:21-cv-02198 (D. Minn.) (preliminarily approving a class representative service award of \$9,900 in a data breach class action).

**THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE
AND PRELIMINARY APPROVAL IS APPROPRIATE**

18. The offering of a \$250 cash payment (subject to a pro rata increase or decrease based on remaining funds available) and up to \$5,000 of out-of-pocket monetary losses due to their personal information being compromised in the Data Breach. The Settlement also provides broad cybersecurity enhancements to ensure that the Class's personal information is adequately protected in the future.

**CLASS COUNSEL'S PROPOSED ATTORNEYS' FEES & EXPENSES ARE
REASONABLE AND SHOULD PERMIT PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT**

19. Under the Settlement, Class Counsel may seek up to 1/3 of the Settlement Fund (\$133,333.33) as attorney's fees and up to \$15,000.00 in expenses.

20. Class Counsel have undertaken this case on a contingency fee basis and have not received any payment for their work in this case to date and have not been reimbursed for any of their litigation expenses.

21. Courts within the Sixth Circuit routinely award attorneys' fees up to 1/3 of the common fund amount in class action settlements. See e.g. *In re Automotive Parts Antitrust Litigation*, No. 12-md-02311, 2022 WL 4385345, at *2 (E.D. Mich. Sept. 22, 2022) (noting that a fee request of 1/3 of the class action settlement fund "is within the range of fee awards made by courts in this Circuit."); *Walker v. Nautilus, Inc.*, No. 2:20-cv-3414-EAS (S.D. Ohio) (awarding attorneys' fees of 1/3 of the \$4.25 million common fund); *Bechtel v. Fitness Equipment Services, LLC*, No. 1:19-cv-726-KLL (S.D. Ohio) (awarding attorneys' fees of 1/3 of the \$3.65 million

common fund); *Fields v. KTH Parts Industries, Inc.*, No. 3:19-cv-8, 2022 WL 3223379, at * 7-8 (S.D. Ohio Aug. 9, 2022) (finding that attorneys' fees that are 1/3 of the class action settlement fund are "normal"); *Davis v. Omnicare, Inc.*, No. 5-18-CV-142-REW, 2021 WL 1214501, at *11 (E.D. Ky. Mar. 30, 2021) (preliminarily approving attorneys' fees of 1/3 of the class action settlement fund).

22. To date, my firm has expended over 100 hours pursuing this matter for Plaintiff and the Class for a lodestar totaling over \$60,000.00, and incurred approximately \$609.73 in litigation expenses, including filing fees.

**THE COURT SHOULD GRANT PRELIMINARY APPROVAL
OF CLASS ACTION SETTLEMENT**

23. Through my experience in handling many class action lawsuits, my review of similar data breach class actions, and my firm's pursuit of several other data breach class actions, I have the informed opinion that the Settlement is fair, reasonable, and adequate and should receive preliminary court approval.

FURTHER AFFIANT SAYETH NAUGHT.

Executed on January 20, 2022.


TERENCE R. COATES, ESQ.

Sworn to before me, a Notary Public, this 20th day of January, 2022.


Notary Public



DYLAN JAMES GOULD, ATTORNEY AT LAW
Notary Public, State of Ohio
My Commission Expires:
My commission has no expiration date Sec. 147.03 RC.

EXHIBIT A



MARKOVITS
STOCK
DeMARCO

MARKOVITS, STOCK & DeMARCO, LLC

Markovits, Stock & DeMarco, LLC is a boutique law firm whose attorneys have successfully represented clients in some of the largest and most complex legal matters in U.S. history. Our deep and varied experience extends from representing businesses, public pension funds, and individuals in federal and state courts across the nation, to successfully arguing appeals at the highest levels of the legal system – including prevailing before the United States Supreme Court. This broad-based litigation and trial expertise, coupled with no overstaffing and overbilling that can typify complex litigation, sets us apart as a law firm. But expertise is only part of the equation.

“Legal success comes only from recognizing a client’s goals and being able to design and effectively execute strategies that accomplish those goals. We understand that every client is different, which is why we spend so much time learning what makes them tick.”

As the business world becomes increasingly complex, you need to be able to trust your law firm to help you make the right decisions. Whether you seek counsel in resolving a current conflict, avoiding a future conflict, or navigating the sometimes choppy state and local government regulatory waters, the lawyers at Markovits, Stock & DeMarco have both the experience and track record to meet your legal needs.

BILL MARKOVITS

Bill Markovits practices in the area of complex civil litigation, with an emphasis on securities, antitrust, RICO, and False Claims Act cases. Bill began his career as a trial lawyer at the U.S. Department of Justice Antitrust Division in Washington, D.C. He continued a focus on antitrust after moving to Cincinnati, where he became an adjunct professor of antitrust law at the University of Cincinnati Law School. Bill has been involved in the past in a number of notable cases, including: the Choice Care securities, antitrust and RICO class action in which the jury awarded over \$100 million to a class of physicians; a fraud/RICO case on behalf of The Procter & Gamble Company, which resulted in a settlement of \$165 million; an eleven year antitrust and RICO class action against Humana, including appeals that reached the United States Supreme Court, which culminated in a multi-million dollar settlement; and a national class action against Microsoft, in which he was chosen from among dozens of plaintiffs' attorneys to depose Bill Gates. More recently, Bill was: a lead counsel for plaintiffs in the Fannie Mae Securities Litigation that settled for \$153 million; a lead counsel for plaintiffs in a class action against Duke Energy that settled for \$80.75 million; and lead counsel for plaintiff in *Collins v. Eastman Kodak*, where he successfully obtained a preliminary injunction against Kodak on an antitrust tying claim. Based upon the result in *Collins*, Bill was a 2015 finalist in the American Antitrust Institute's Antitrust Enforcement Awards under the category "Outstanding Antitrust Litigation Achievement in Private Law Practice."

Bill has received a number of awards and designations, including current and past designations as a "Best Lawyer in America" in the fields of antitrust and commercial litigation.

Education:

Harvard Law School, J.D. (1981), cum laude

Washington University, A.B. (1978), Phi Beta Kappa

Significant and Representative Cases:

- *Collins v. Eastman Kodak*, United States District Court, Southern District of Ohio. Lead counsel representing Collins in antitrust tying claim, resulting in preliminary injunction against Kodak.
- *In Re Federal National Mortgage Association Securities, Derivative, and "ERISA" Litigation*, United States District Court, District of Columbia. Co-lead counsel representing Ohio pension funds in securities class action that settled for \$153 million.
- *Ohio Employees Retirement System v. Federal Home Loan Mortgage, aka Freddie Mac, et al.*, United States District Court, Northern District of Ohio, Eastern Division. Special counsel representing Ohio pension fund in securities class action.
- *Williams v. Duke Energy et al.*, United States District Court, Southern District of Ohio. Representing class of energy consumers against energy provider in complex antitrust and RICO class action that settled for \$80.75 million.
- *In Re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation*, United States District Court, Central District of California. Former member of economic loss lead counsel committee, representing class of consumers in litigation relating to sudden acceleration.
- *In Re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, United States District Court, Eastern District of Louisiana. RICO workgroup coordinator in class action resulting from oil spill.
- *In Re Microsoft Corp. Litigation*, United States District Court, District of Maryland. Member of co-lead counsel firm in antitrust class action.
- *Procter & Gamble v. Amway Litigation*, United States District Court, Southern District of Texas, at

Houston; United States District Court, District of Utah, at Salt Lake City. Member of trial team representing Procter & Gamble in obtaining jury verdict against Amway distributors relating to spreading of false business rumors.

- *United States ex rel. Brooks v. Pineville Hospital*, United States District Court, Eastern District of Kentucky. One of the lead counsel in successful False Claims Act litigation.
- *Procter & Gamble v. Bankers' Trust Litigation*, United States District Court, Southern District of Ohio. Co-counsel in successful \$165 million settlement; developed the RICO case.
- *United States ex rel. Watt v. Fluor Daniel*, United States District Court, Southern District of Ohio. Co-lead counsel of successful False Claims Act case.
- *Forsyth v. Humana*, United States District Court, District of Nevada. Represented class of consumers in antitrust and RICO class action; successfully argued antitrust appeal; co-chaired successful Supreme Court appeal on RICO.
- *In Re Choice Care Litigation*, United States District Court, Southern District of Ohio, Western Division. Trial attorney on largest antitrust/RICO/securities verdict.

Presentations & Publications:

- "Implications of Sixth Circuit *Collins Inkjet Corp. v. Eastman Kodak Co. Decision*," American Bar Association panel discussion, December 10, 2015
- "Defining the Relevant Market in Antitrust Litigation," Great Lakes Antitrust Seminar, October 29, 2010
- "Beyond Compensatory Damages – Tread, RICO and The Criminal Law Implications," HarrisMartin's Toyota Recall Litigation Conference, Part II, May 12, 2010
- "The Racketeer Influenced and Corrupt Organizations Act (RICO)," HarrisMartin's Toyota Recall Litigation Conference, March 24, 2010
- "The False Claims Act: Are Healthcare Providers at Risk?," presentation to Robert Morris College Second Annual Health Services Conferences, Integrating Health Services: Building a Bridge to the 21st Century, Moon Township, PA, October 9, 1997
- "The Federal False Claims Act: Are Health Care Providers at Risk?," (Co-Speaker), Ohio Hospital Association, April, 1996
- "A Focus on Reality in Antitrust," Federal Bar News & Journal, Nov/Dec 1992
- "Using Civil Rico and Avoiding its Abuse," Ohio Trial, William H. Blessing, co-author, Summer 1992
- "Antitrust in the Health Care Field," a chapter published in Legal Aspects of Anesthesia, 2nd ed., William H. L. Dornette, J.D., M.D., editor
- *Antitrust Law Update, National Health Lawyers Health Law Update and Annual Meeting (Featured Speaker)*, San Francisco, California, 1989

Affiliations:

- American Association for Justice
- American Bar Association
- American Trial Lawyers Association
- Cincinnati Bar Association
- District of Columbia Bar Association (non-active)
- Hamilton County Trial Lawyers Association
- National Health Lawyers Association
- Ohio State Bar Association
- Ohio Trial Lawyers Association

Courts Admitted:

- District of Columbia (1981)
- State of Ohio (1983)
- United States District Court, Southern District of Ohio (1983)
- U.S. Court of Appeals, 6th Circuit (1991)
- U.S. Court of Appeals, 9th Circuit (1995)
- U.S. Supreme Court, United States of America (1998)
- United States District Court, Northern District of Ohio (2008)

PAUL M. DEMARCO

Paul M. De Marco is a founding member of Markovits, Stock & DeMarco, LLC. He is an Appellate Law Specialist certified by the Ohio State Bar Association and has handled more than 100 appellate matters, including cases before the Supreme Court of the United States, six federal circuits, and five state supreme courts.

Paul's practice also focuses on class actions and other complex litigation. During his 25 years in Cincinnati, Paul has been actively involved in successful litigation related to the U.S. Department of Energy's Fernald nuclear weapons plant, the Lucasville (Ohio) prison riot, Lloyd's of London, defective Bjork-Shiley heart valves, Holocaust-related claims against Swiss and Austrian banks, the Bankers Trust derivative scheme, Cincinnati's Aronoff Center, the San Juan DuPont Plaza Hotel fire, the Procter & Gamble Satanism rumor, the Hamilton County (Ohio) Morgue photograph scandal, defective childhood vaccines, claims arising from tire delamination and vehicle roll-over, racial hostility claims against one of the nation's largest bottlers, fiduciary breach claims against the nation's largest pharmacy benefits manager, and claims arising from the heatstroke death of NFL lineman Korey Stringer.

Education:

College of Wooster (B.A., 1981)

University of the Pacific, McGeorge School of Law (J.D. with distinction, 1983)

University of Cambridge (1985)

Significant and Representative Appeals:

- *Arthur Anderson LLP v. Carlisle*, 556 U.S. 624, 129 S.Ct. 1896 (2009): In a case involving allegations of a fraudulent tax shelter and accounting and legal malpractice, the Supreme Court of the United States resolved the issue of the rights of non-parties to arbitration clauses to enforce them against parties, which had divided the circuits.
- *Williams v. Duke Energy International, Inc.*, 681 F.3d 788 (6th Cir. 2012): In a case brought as a class action by a utility's ratepayers for selective payment of illegal rebates to certain ratepayers, the United States Court of Appeals for the Sixth Circuit reversed a district court's dismissal of the excluded ratepayers' claims that the utility violated the RICO statute, the Robinson-Patman Act, and the state corrupt practices act.
- *State of Ohio ex rel. Bd. of State Teachers Retirement Sys. of Ohio v. Davis*, 113 Ohio St.3d 410, 865 N.E.2d 1289 (2007): The Supreme Court of Ohio upheld the appellate court's issuance of the extremely rare writ of procedendo commanding the trial judge to proceed with a trial on claims he mistakenly believed the previous jury had resolved.
- *Chesher v. Neyer*, 477 F.3d 784 (6th Cir. 2007): The Sixth Circuit affirmed the district court's rejection of qualified immunity defenses raised by the Hamilton County (Ohio) coroner, his chief deputy, the coroner's administrative aide, a staff pathologist, and a pathology fellow in connection with the Hamilton County Morgue photo scandal.
- *State of Ohio ex rel. CNG Fin'l Corp. v. Nadel*, 111 Ohio St.3d 149, 855 N.E.2d 473 (2006): The Supreme Court of Ohio affirmed the appellate court's refusal to issue a writ of procedendo commanding the trial judge to halt injunctive proceedings and decide an arbitration issue.
- *Smith v. North American Stainless, L.P.*, 158 F. App'x. 699 (6th Cir. 2006): Rejecting a steel manufacturer's "up-the-ladder" immunity defense, the United States Court of Appeals for the Sixth Circuit reversed the district court's dismissal of a wrongful claim brought by the widow and estate of a steel worker killed on the job.
- *Procter & Gamble Co. v. Haugen*, 427 F.3d 727 (10th Cir. 2005): The United States Court of Appeals for the Tenth Circuit reversed the district court's dismissal of Procter & Gamble's Lanham Act claims, paving the way for a \$19.25 million jury verdict in its favor.

- *Roetenberger v. Christ Hospital*, 163 Ohio App.3d 555, 839 N.E.2d 441 (2005): In this medical malpractice action for wrongful death, the Ohio court of appeals reversed the jury verdict in the physician's favor due to improper arguments by his attorney and instructional error by the trial court.
- *City of Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 768 N.E.2d 1136 (2002): In this landmark decision on public nuisance law, the Supreme Court of Ohio held that a public nuisance action could be maintained for injuries caused by a product — in this case, guns — if the design, manufacture, marketing, or sale of the product unreasonably interferes with a right common to the general public.
- *Norgard v. Brush Wellman, Inc.*, 95 Ohio St.3d 165, 766 N.E.2d 977 (2002): In an employee's intentional tort action alleging that his employer subjected him to long-term beryllium exposure, the Supreme Court of Ohio ruled that a cause of action for an employer intentional tort accrues when the employee discovers, or by the exercise of reasonable diligence should have discovered, the workplace injury and — here's the ground-breaking part of the holding — the wrongful conduct of the employer.
- *Wallace v. Ohio Dep't of Commerce*, 96 Ohio St.3d 266, 773 N.E.2d 1018 (2002): In overturning the dismissal of a suit against the state fire marshal for negligently inspecting a fireworks store that caught fire killing nine people, the Supreme Court of Ohio held for the first time that the common-law public-duty rule cannot be applied in cases against the state in the Ohio Court of Claims.

Courts Admitted:

- | | |
|--------------------------------------|--------------------------------------------------------|
| • Ohio | • U.S. Court of Appeals, 10th Circuit |
| • California | • U.S. District Court, Southern District of Ohio |
| • Supreme Court of the United States | • U.S. District Court, Northern District of Ohio |
| • U.S. Court of Appeals, 1st Circuit | • U.S. District Court, Eastern District of California |
| • U.S. Court of Appeals, 4th Circuit | • U.S. District Court, Central District of California |
| • U.S. Court of Appeals, 5th Circuit | • U.S. District Court, Southern District of California |
| • U.S. Court of Appeals, 6th Circuit | • U.S. Court of Federal Claims |
| • U.S. Court of Appeals, 7th Circuit | |
| • U.S. Court of Appeals, 9th Circuit | |

Since 1994, Paul has worked to promote professional responsibility among lawyers, serving first as a member and eventually the chair of the Cincinnati Bar Association Certified Grievance Committee, and since 2008 as a member of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio.

He also is a member of many legal organizations, including the Federal Bar Association, Ohio State Bar Association, Cincinnati Bar Association, American Bar Association, ABA Council of Appellate Lawyers, and the Cincinnati Bar Association's Court of Appeals Committee.

Paul was one of the founders of the Collaborative Law Center in Cincinnati, a member of Cincinnati's Citizens Police Review Panel (1999-2002), and a member of Cincinnati CAN and its Police and Community Subcommittee following the 2001 riots.

He currently serves on the boards of the Ohio Justice and Policy Center and the Mercantile Library and on the advisory committees of the Fernald Community Cohort and the Fernald Workers' Medical Monitoring Program.

TERENCE R. COATES

Terry Coates is Markovits, Stock & DeMarco's managing partner. His legal practice focuses on personal injury law, sports & entertainment law, business litigation and class action litigation. Mr. Coates is currently participating as a member of plaintiffs' counsel in the over 70 data breach cases pending around the country, including serving as co-lead counsel for plaintiff in *Rodriguez v. Professional Finance Company, Inc.*, No. 1:22-cv-1679 (D. Colo.; court-appointed interim lead counsel); *Migliaccio v. Parker Hannifin Corp.*, No. 1:22-CV-00835 (N.D. Ohio; court-appointed interim lead counsel); *Sherwood v. Horizon Actuarial Services, LLC*, No. 1:22-cv-1495 (N.D. Ga.; court-appointed interim class counsel); *Tracy v. Elekta, Inc.*, No. 1:21-cv-02851-SDG (N.D. Ga.; court-appointed interim class counsel); *Devine v. Health Aid of Ohio, Inc.*, No. CV-21-948117 (Cuyahoga County Court of Common Pleas, Ohio) (court appointed class counsel); *Engle v. Talbert House*, No. A 2103650 (Hamilton County Court of Common Pleas, Ohio) (court-appointed class counsel).

Education:

Thomas M. Cooley Law School, J.D. (2009)

Wittenberg University, B.A. (2005)

Representative Cases:

- *Bechtel v. Fitness Equipment Services, LLC*, No. 1:19-cv-726-KLL (S.D. Ohio) (\$3.65 million common fund settlement finally approved on September 20, 2022);
- *Bowling v. Pfizer, Inc.*, Case No. C-1-95-256, United States District Court, Southern District of Ohio (Class Counsel for recipients of defective mechanical heart valves including continued international distribution of settlement funds to remaining class members);
- *Collins Inkjet Corp. v. Eastman Kodak Company*, Case No. 1:13-cv-0664, United States District Court, Southern District of Ohio (trial counsel for Collins in an antitrust tying claim resulting in a preliminary injunction against Kodak – a decision that was affirmed by the Sixth Circuit Court of Appeals: *Collins Inkjet Corp. v. Eastman Kodak Co.*, 781 F.3d 264 (6th Cir. 2015));
- *Day v. NLO, Inc.*, Case No. C-1-90-67, United States District Court, Southern District of Ohio (Class Counsel for certain former workers at the Fernald Nuclear weapons facility; the medical monitoring program continues);
- *In re Fannie Mae Securities Litigation*, Case No. 1:04-cv-1639, United States District Court, District of Columbia (represented Ohio public pension funds as Lead Plaintiffs in Section 10b securities class action litigation resulting in a \$153 million court-approved settlement);
- *In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, & Products Liability Litigation*, MDL No. 2151, United States District Court, Southern District of California (represented plaintiffs and prepared class representatives for deposition testimony resulting in a court-approved settlement valued in excess of \$1.5 billion);
- *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, Case No. 09-1967, United States District Court, Northern District of California (represented NCAA, Olympic, and NBA legend, Oscar Robertson, in antitrust claims against the National Collegiate Athletic Association (NCAA), Collegiate Licensing Company (CLC), and Electronic Arts (EA) leading to a \$40 million settlement with EA and CLC and the Court issuing a permanent injunction against the NCAA for unreasonably restraining trade in violation of antitrust law);
- *Linneman v. Vita-Mix Corp.*, Case No. 14-cv-748, United States District Court, Southern District of Ohio (Class Counsel for a nationwide class of Vita-Mix blender consumers resulting in a nationwide settlement);
- *Ryder v. Wells Fargo Bank, N.A.*, No. 1:2019-cv-00638 (S.D. Ohio) (member of class counsel in a \$12 million settlement on behalf of roughly 1,830 class members);

- *Shy v. Navistar International Corp.*, No. 92-cv-0333-WHR (S.D. Ohio) (class counsel for a class action settlement valued at over \$742 million);
- *Walker v. Nautilus, Inc.*, No. 2:20-cv-3414-EAS (S.D. Ohio) (\$4.25 million common fund settlement finally approved on June 28, 2022);
- *Williams v. Duke Energy*, Case No. 1:08-cv-00046, United States District Court, Southern District of Ohio (representing class of energy consumers against energy provider in complex antitrust and RICO class action resulting in the court granting final approval of an \$80.875 million settlement); and,
- *Ohio Public Employees Retirement System v. Federal Home Loan Mortgage ("Freddie Mac")*, Case No. 4:08-cv-0160, United States District Court, Northern District of Ohio (Special counsel for Ohio public pension funds as Lead Plaintiffs in Section 10b-5 securities class action litigation).

Community Involvement:

- Cincinnati Academy of Leadership for Lawyers (CALL), Class XXI, *Participant* (2017)
- Cincinnati Chamber of Commerce C-Change Class 9, *Participant* (2014)
- Cincinnati Chamber of Commerce, *Ambassador* (2014)
- Cincinnati Athletic Club, *President* (2015-2017)
- Cincinnati Athletic Club, *Vice President* (2014-2015)
- Cincinnati Bar Association, Board of Trustees, *Trustee* (2019-present)
- Cincinnati Bar Association, Board of Trustees, *Executive Committee* (2021-present)
- Cincinnati Bar Association, *Membership Services & Development Committee* (2014-present)
- Cincinnati Bar Association, *Run for Kids Committee* (2009-2014)
- Cincinnati Bar Association, *Social Committee* (2011-2014)
- Clermont County Humane Society, *Board Member* (2014-2017)
- Clermont County Humane Society, *Legal Adviser* (2017-present)
- Potter Stewart Inn of Court, *Executive Director* (2021-present)
- Summit Country Day High School, *Mock Trial Adviser* (2013-2016)
- St. Peter in Chains, Cathedral, Parish Council (2014-2017)

Recognitions:

- Super Lawyers, Rising Star (2014 – present)
- Best Lawyers in America, Commercial Litigation (2020-present)
- Wittenberg University Outstanding Young Alumnus Award (2014)
- Cincinnati Bar Association, Young Lawyers Section Professionalism Award (2015)
- JDRF Bourbon & Bow Tie Bash, *Young Professional (Volunteer) of the Year* for the Flying Pig Marathon (2016)
- Cincinnati Business Courier, Forty Under 40 (2019)
- Cincinnati Cystic Fibrosis Foundation, Cincinnati's Finest Honoree (2020)

Courts Admitted:

- State of Ohio (2009)
- United States District Court, Southern District of Ohio (2010)
- United States District Court, Northern District of Ohio (2010)
- United States District Court, Eastern District of Michigan (2021)
- United States District Court, District of Colorado (2022)
- United States Court of Appeals, Sixth Circuit (2018)

JUSTIN C. WALKER

Justin C. Walker is Of Counsel at Markovits, Stock & DeMarco. Justin's practice areas are focused on complex civil litigation and constitutional law, with an emphasis on consumer fraud and defective products. Before joining Markovits, Stock & DeMarco in April 2019, Justin practiced at the Finney Law Firm, a boutique law firm specializing in complex litigation and constitutional law. At the beginning of his legal career, Justin served as a judicial extern for Senior United States District Judge Sandra S. Beckwith before taking a full-time position as a law clerk and magistrate in the Hamilton County Ohio Court of Common Pleas for the Honorable Norbert A. Nadel. After completing his clerkship, Justin took a position as a prosecutor, serving as first chair for multiple jury trials. Justin then entered private practice, shifting his practice to focus on litigation matters.

Education:

University of Cincinnati, J.D. (2005)

Miami University, B.S. (2001)

Courts Admitted:

- State of Ohio (2005)
- U.S. Court of Appeals, 6th Circuit (2017)
- U.S. District Court, Southern District of Ohio (2008)
- U.S. Bankruptcy Court, Southern District of Ohio (2009)

Representative Cases:

- *Linneman v. Vita-Mix Corp.*, Case No. 15-cv-748, United States District Court, Southern District of Ohio (Co-Class Counsel for a nationwide class of Vita-Mix blender consumers resulting in a nationwide settlement).
- *Baker v. City of Portsmouth*, Case No. 1:14-cv-512, 2015 WL 5822659 (S.D. Ohio Oct. 1, 2015) (Co-Counsel for a class of property owners, the Court ruled that City violated the Fourth Amendment when it required property owners to consent to a warrantless inspection of their property or face a criminal penalty where not valid exception to the warrant requirement exists).
- *E.F. Investments, LLC v. City of Covington, Kentucky*, Case No. 17-cv-00117-DLB-JGW, United States District Court, Eastern District of Kentucky (Lead Counsel on case brought on behalf of local property owners, contending that City's rental registration requirements violated the Fourth Amendment resulting in a settlement).
- *State of Ohio ex rel. Patricia Meade v. Village of Bratenahl*, 2018-04409, Supreme Court State of Ohio (Co-Counsel on behalf of local taxpayer contending that Defendant's violated Ohio Open Meetings Law).
- *Dawson v. Village of Winchester*, United States District Court, Southern District of Ohio (Lead Counsel represented Plaintiff claiming Federal Civil Rights violations due to unconstitutional arrest and detainment).

Affiliations and Presentations:

- Cincinnati Bar Association
- Clermont County Bar Association
- American Association for Justice
- "Municipal Bankruptcy: Chapter 9 – Should Cincinnati Consider Filing for Bankruptcy"
- "Ohio CLE Introduction to Bankruptcy for Lawyers CLE"

CHRISTOPHER D. STOCK

Chris's legal practice focuses on securities class action and multi-district products liability litigation, as well as appellate advocacy. Serving as a judicial law clerk for Ohio Supreme Court Justice Terrence O'Donnell gave Chris invaluable insight into how courts synthesize and deconstruct legal arguments. Since then, Chris has briefed and argued numerous cases before the United States Court of Appeals for the Sixth Circuit, the Ohio Supreme Court, and Ohio appellate courts, including obtaining a rare summary reversal from the United States Supreme Court.

Chris also served as both Deputy First Assistant Attorney General and Deputy State Solicitor for Ohio Attorney General Jim Petro. In these positions, Chris was principal counsel to the Attorney General on a wide variety of legal and policy-oriented issues, including numerous constitutional and regulatory matters arising from state agencies, boards, and commissions. Prior to his service in state government, Chris was an attorney at a 500-lawyer nationally-recognized law firm.

He received multiple designations as an Ohio Super Lawyers "Rising Star." This distinction is awarded to less than 2.5 percent of Ohio attorneys under the age of 40.

Education:

The Ohio State University, Moritz College of Law, J.D. (2002)

The Ohio State University, BA (1997)

Significant Cases:

- *In re Fannie Mae Securities Litigation*, Case No. 1:04-cv-1639 (D.D.C.). Representing Ohio public pension funds as Lead Plaintiffs in Section 10b-5 securities class action litigation.
- *Ohio Public Employees Retirement System v. Freddie Mac, et al.*, Case No. 4:08-cv-160 (N.D. Ohio). Representing Ohio public pension funds as Lead Plaintiffs in Section 10b-5 securities class action litigation.
- *Williams v. Duke Energy*, Case No.: 1:08-CV-00046 (S.D. Ohio). Representing class of energy consumers against energy provider in complex antitrust and RICO class action.
- *Slaby v. Wilson*, Hamilton County Court of Common Pleas. Lead trial counsel representing two private individuals who were falsely accused by a County Commissioner of murdering their child and covering up the child's death (as well as sexual abuse of child).
- *Kelci Stringer, et al. v. National Football League, et al.*, United States District Court, Southern District of Ohio, Western Division. Represented professional football player against NFL and helmet manufacturer in wrongful death/products liability litigation related to professional football player's death.
- *Susan B. Anthony List v. Driehaus*, United States District Court, Southern District of Ohio, Western Division. Represented former Congressman in defamation action against organization who published false statements about former Congressman's voting record and alleged influence over organization's commercial activities.
- *Mitchell v. Esparza*, Case No. 02-1369 (United States Supreme Court). Obtained summary reversal of Sixth Circuit decision on Eighth Amendment capital sentencing issue.
- *Cleveland Bar Association v. CompManagement, Inc.*, Case No. 04-0817 (Ohio Supreme Court). Represented the State of Ohio as amicus in landmark workers' compensation lawsuit.

Presentations:

- Class Action Boot Camp: The Basics and Beyond (2012).
- Harris Martin Toyota Sudden Unintended Acceleration Litigation Conference: TREAD Act Liability and Toyota (2010).
- Harris Martin BP Oil Spill Litigation Conference: The RICO Act's Application to the BP Oil Spill (2010).

Affiliations:

- Ohio State Bar Association
- Cincinnati Bar Association

Courts Admitted:

- State of Ohio (2002)
- United States District Court, Southern District of Ohio (2003)
- Sixth Circuit Court of Appeals, Ohio (2003)
- United States District Court, Northern District of Ohio (2007)

DYLAN J. GOULD

Dylan J. Gould is an associate attorney at Markovits, Stock & DeMarco. Dylan's practice primarily focuses on class action litigation representing consumers who have been harmed by data breaches or unfair and deceptive trade practices. Before joining Markovits, Stock & DeMarco as an attorney, Dylan spent a summer interning for the Kenton County, Kentucky, Commonwealth Attorney's Office, and clerked for both Markovits, Stock & DeMarco and another law firm, Benesch, Friedlander, Coplan & Aronoff. During law school, Dylan competed in competitions around the country as a member of both the Cincinnati College of Law Trial Practice and Moot Court teams. Since joining Markovits, Stock & DeMarco, Dylan has worked on numerous complex and class action cases against some of America's largest corporations.

Education:

University of Cincinnati, J.D. (2018)

University of Colorado at Boulder, B.A. (2015)

Courts Admitted:

- State of Ohio (2018)
- U.S. District Court, Southern District of Ohio (2019)
- U.S. District Court, Northern District of Ohio (2022)

Representative Cases:

- *Benedetto v. The Huntington National Bank*, No. A1903532, Hamilton County Court of Common Pleas, Ohio (served as member of class counsel in class action related to untimely mortgage releases that recently received final approval of class action settlement);
- *Gilbert et al v. BioPlus Specialty Pharmacy Services, LLC*, No. 6:21-CV-02158, United States District Court, Middle District of Florida (serving as a member of plaintiffs' counsel in a putative data breach class action)
- *Lutz v. Electromed, Inc.*, No. 21-cv-2198, United States District Court, District of Minnesota (serving as a member of plaintiffs' counsel in a putative data breach class action)
- *Morano v. Fifth Third Bank*, No. A2003954, Hamilton County Court of Common Pleas, Ohio (serving as member of class counsel in class action related to untimely mortgage releases that recently received preliminary approval of class action settlement);
- *Reynolds v. Concordia University*, St. Paul, No. 0:21-CV-2560, United States District Court, District of Minnesota (serving as a member of proposed class counsel for the plaintiff in case based on the unavailability of clinical experience for nursing students);
- *Voss v. Quicken Loans*, No. A 2002899, Hamilton County Court of Common Pleas, Ohio (serving as a member of proposed class counsel for the plaintiff in a putative class action against a mortgagee relating to violations of R.C. 5301.36 relating to the untimely filing of mortgage releases in Ohio).

Affiliations:

Cincinnati Bar Association

Ohio State Bar Association

JONATHAN T. DETERS

Jon is a Cincinnati native whose legal practice is focused on complex civil litigation, class action litigation, personal injury law, and sports & entertainment law. Jon has been a litigator since the start of his career, and his clients have included individuals, businesses, local governments, and government officials. Jon's experience serving as both plaintiff and defense counsel make him uniquely qualified and well-suited to represent individual and corporate clients in litigation. Jon has been designated as an Ohio Super Lawyers "Rising Star" from 2019-present, which is a distinction awarded to less than 2.5% of Ohio attorneys under the age of 40.

Before joining Markovits, Stock & DeMarco in January 2022, Jon practiced at Schroeder, Maundrell, Barbieri & Powers, an Ohio law firm specializing in civil litigation, personal injury, and constitutional law. While in law school, Jon served as a constable in the Hamilton County Ohio Court of Common Pleas for the Honorable Steven E. Martin and worked as law clerk at the Law Office of Steven R. Adams.

Education:

Salmon P. Chase School of Law at Northern Kentucky University, J.D. (2015)

Xavier University, Cincinnati, Ohio, Honors Bachelor of Arts (2012)

Representative Cases:

- *Baker v. Carnine*, No. 1:19-CV-60 (2022), United States District Court, Southern District of Ohio
- *Jones v. Vill. of Golf Manor*, No. 1:18-CV-403 (2020), United States District Court, Southern District of Ohio
- *Vaduva v. City of Xenia*, 780 F. App'x 331 (2019), United States Court of Appeals, Sixth Circuit
- *Gillispie v. Miami Twp.*, No. 3:13-CV-416 (2017), United States District Court, Southern District of Ohio
- *City of Mt. Healthy v. Fraternal Ord. of Police, Ohio Lab. Council, Inc.*, 101 N.E.3d 1163 (2017), Ohio First District Court of Appeals

Community Involvement:

- Cincinnati Bar Association, *Member*
- Ohio Bar Association, *Member*
- Boy Hope Girls Hope of Cincinnati, *Young Professionals Board Member*
- Board of Trustees of the New St. Joseph Cemetery, Cincinnati, Ohio, *Member*

Courts Admitted:

- State of Ohio
- United States District Court, Southern District of Ohio
- United States Court of Appeals, Sixth Circuit

EXHIBIT 7

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION**

JONATHAN PHELPS, individually and on behalf of all others similarly situated	:	Case No: 6:22-cv-00106
	:	
Plaintiff,	:	Judge: Claria Horn Boom
	:	Magistrate: Hanly A. Ingram
	:	
v.	:	<u>DECLARATION OF</u>
	:	<u>CHRISTOPHER LONGLEY ON</u>
TOYOTETSU NORTH AMERICA,	:	<u>ADEQUACY OF NOTICE PLAN</u>
	:	
Defendant.	:	
	:	

DECLARATION OF CHRISTOPHER LONGLEY

I, **CHRISTOPHER LONGLEY**, hereby declare as follows:

1. I am the Chief Executive Officer for Atticus Administration, LLC (“Atticus”). My business address is 1250 Northland Drive, Suite 240, Mendota Heights, Minnesota 55120. My telephone number is (612) 315-9007. I am over twenty-one years of age and am authorized to make this declaration on behalf of Atticus and myself.

2. In 2016, I, along with other experienced legal, financial, digital marketing professionals and brand managers, founded Atticus in order to provide innovative and cost-effective notice campaigns and claims administration services to the class action legal sector.

3. Prior to founding Atticus, I served as the president of Dahl Administration, LLC, a nationally recognized claims administration company, where I oversaw over three hundred (300) settlements, including some of the highest profile cases over the last few years, including, for example, *In Re Motor Fuel* (Hot Fuel) and the *Target Data Breach, Financial Institutions* class action settlement.

4. Atticus provides services in class action settlements involving, inter alia, antitrust,

consumer fraud, financial services, data breaches, insurance, ADA, civil rights, and employment matters, including wage and hour, PAGA and FLSA collective actions.

5. Atticus's core competencies include pre-certification mailings, class notification, claims administration including the processing of claim forms, claim validation and anti-fraud detection, data preparation and data management, accounting services and tax reporting, qualified settlement fund management and escrow services, and distribution of funds.

6. Since its inception, Atticus has provided administrative services in over 700 class action settlements and has disbursed approximately \$956,000,000 (See **Exhibit A**). Among the founders and team members of Atticus, collectively we have administered over 3,000 settlements and have disbursed over \$3,000,000,000 in settlement funds.

7. Typically, Atticus will send direct mail notice to class members when class members are known, as per the Federal Judicial Centers, "*Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide*" 2010. Based on my experience delivery rates for such plans can be anywhere from 64% to 98% depending on the age of the data file, and the amount of cleaning we perform on the list prior to mailing. It is in our best interest to take as many steps as feasible to ensure addresses are updated prior to mailing to minimize the return and re-mails to class members. Courts routinely approve Notice plans in my experience, when addresses and class members are known, even when the delivery rate is as low as 64% of the total class mailed. In my professional opinion, the Notice plan as outlined in the Settlement Agreement, is fair and reasonable, and provides adequate due process for class members, The plan further as outlined, meets the guidelines set forth in the Federal Judicial Center's *Guidelines for Class Action Settlements*.

8. In accordance with the terms of the Settlement Agreement in this case, Atticus will

upon preliminary approval mail the Notice of Settlement postcard (“Short Form Notice”) to respective Class Members at their last known address via first class mail through the United States Postal Service (“USPS”). Prior to mailing the Short Form Notice, Atticus will verify the last known address using the National Change of Address (NCOA) database maintained by the USPS, and if an updated address is found, that address shall be used in lieu of the address received for purposes of this mailing and subsequent mailings. Any Notices that are returned as undeliverable will be processed, skip-traced using a professional service and re-mailed as outlined in the Settlement Agreement, within three business days (3) after Notice is returned for address correction. Additionally, the Short Form Notice will be sent via electronic mail to those Class Members whose email addresses are provided in the Class List.

9. Atticus uses a variety of tools for skip- tracing purposes in order to find addresses that have no forwarding location. These tools include Experian or IDI, and other professional resources like Experian or IDI to locate Class Members. In some instances, Atticus will also hire professional skip tracing firms to locate missing Class Members for Noticing purposes and to subsequently distribute funds to Class Members. Until Atticus reviews the data file in the above captioned case, we do not yet know what the best course of action will be to contact those Class Members who do not have forwarding address information on file.

10. The Short Form Notice content will include the website URL www.toyotetsudatasettlement.com, which has already been reserved for this action, where Class Members can find additional information about the proposed Settlement. The URL will be a clickable link in the emailed Notice. The website will provide Class Members with answers to frequently asked questions, key dates and deadlines, the Long Form Notice and other Settlement documents filed with the Court, and the option to file an online Claim Form.

11. Atticus maintains insurance with AAA rated insurance carriers for professional liability and cybersecurity. Further it is Atticus' policy to warrant the work performed, on all errors and omissions, on all projects, including distribution of funds to class members, without additional charges to our clients.


12. Atticus takes its obligation to secure information systems and protect the privacy of the client data received for all administration processes very seriously. A copy of Atticus' Data Security Information & Privacy Policy that outlines the standard operating procedures for the handling the collection, storage and use of client data is attached to this Declaration as **Exhibit B**. These policies are also followed for the handling of the qualified settlement fund with access to the bank account limited to the Treasury and QSF department.

13. Atticus has agreed to a fee to administer the above captioned case, for approximately \$35,000. This fee includes all normal costs to administer a settlement, including mailing, printing, skip tracing and NCOA searches in preparation of mailing the notice packets to 12,453 Class Members. All costs associated with communications, including an interactive settlement website for claims filing, and posting of settlement information, settlement email for Class and Aggrieved Employee communications, live telephone support, and 800 toll- free call-in number. All costs associated with distribution of settlement awards, both physical checks and digital payment options. Costs projected include payment calculations, 1099 tax preparations and reporting if required, Qualified Settlement account and account management and QSF tax reporting. Project management time is included in costs, in which we estimate a total of hours of project time for this matter. The fees are reasonable in our experience considering the size of the class, the complexity of data breach cases and settlement and number of hours that the project will consume. It is our understanding that the fees will be paid out of the gross settlement fund once

the settlement has achieved final approval and funding from the defendant. The fee is fixed and capped at the quoted price, subject to no additional scope changes.

I declare under penalty of perjury under the laws of the United States of America and the State of Kentucky that the foregoing is true and correct to the best of my knowledge.

Executed this 19th day of January 2023, at Mendota Heights, Minnesota.



Christopher Longley | CEO
Atticus Administration, LLC

EXHIBIT A



Founded in August 2016, Atticus has administered 701 settlements and has distributed more than \$956 million in award payments. Collectively, the Atticus team has over 125 years of industry experience, has managed over 3,000 settlements, and has distributed more than \$3 billion. Below is a partial listing of our cases, and the cases that our team has managed during their careers.

Partial listing of Atticus' current cases and References

- Birbower v Quorn Foods Inc. -Consumer Food Labeling
- Guillen v AAA Limo-Consumer Finance
- Zamdio v Underground Rocket-CAFA
- Sears Trust-Data Breach
- Noll v Oxford-FLSA
- Moskowitz v Atlanta Hawks-FACTA
- Santos v River Credit Works
- Tirado v Deluxe Auto Sales-Consumer Finance
- Chung v Alliance One-FDCPA
- Raff v Safevia-Consumer Finance
- Diaz v Azona-Wage & Hour
- Rosinbaum v Flowers Foods
- Marroquin v Premium Packaging-FLSA
- Hernandez v So Molo CO-FLSA
- The Bakery v Kenneth Pritt et al-Mass Tort
- Ramirez v Milton Roy-Wage & Hour
- Meyers v bebe Stores-TCPA
- Isabel Marquez v Tanimura & Antle-FLSA
- Camacho v Southwest Harvesting-FLSA
- Velasquez v SMD-Wage & Hour
- Right at Home Settlement-Consumer
- Park v United Collections-FDCPA
- McGlenn v Sprint-FLSA
- Redon v La Esperanza Farms-FLSA
- Home Advisor Settlement
- Morales v OPARC-Wage & Hour
- Loness v US Legal Services-Consumer Fraud
- In Re Managed Care Solutions-Healthcare Anti-Trust
- Kruzell v Suncoast Credit Union-FCRA
- Comofort v Fernandez Brothers-Wage & Hour
- Harris v General Motors-FCRA
- Jillal v Diesel Services-FLSA
- Padilla v Valadeo-Wage & Hour



- Coyle v Flowers-FLSA
- Espinoza v Alicia Accoyo-Wage & Hour
- Santiago v Northland Group-Insurance
- Viesse v Tacoma Screw-FACTA
- Matthews v Red Hill Country Club
- Tharpe v Sprint Corp
- USI Settlement
- Benefield v Springco Metal Coatings
- Watkins v Pressler Pressler
- Thomas v Goodman Manufacturing
- Bruce v Del Monte Foods
- Best v Twins Towing Inc
- Ahmed v Beverly Hills Rehabilitation Services
- Cook v Window Nation
- Costco-46 State FLSA
- Meyers v Mathis Brothers
- Vela-Cruz v AG Transport
- Ayala et al v Olsen Brothers Ranches
- Big Saver Foods-FACTA Settlement
- Huynh v Parker -Hannifin Corp
- Soto v Vander Tuig Dairy
- Vinnitsky v LA Overnight
- Molando v Dayton Superior
- Party City-FACTA Settlement
- Wesco Aircraft Hardware Corporation Settlement
- Russell v KeHE Distributors
- Exact Staffing Settlement
- Allard v MEd Impact
- Escalata v La Tapatia Mexican Market
- Massarani v Waterman
- Martinez v Providence Farms
- Milo's Chicken Jerky Settlement (Mawbry v Milo's Kitchen-Consumer Protection)
- Wall v Hewlett Packard Industries
- Daisy Castro v Caterpillar Logistics
- Schucker v Flowers Foods International
- Vega v BAR Dairy
- Xcel Health Settlement-Data Breach
- McCurley v Derst Bakery
- Rosenbloom v Jets Pizza
- Marquez v D 'Arrigo Brothers
- Johnson v Thomson Reuters
- Caudle v Sprint Cellular
- Ciaz v ND Travel Nurses
- Sparks v Service Finance Company
- Smentek v Sheriff of Cook County (Civil Rights)
- Ibanez v OC Burger Boys



- De La Rosa v Coca Cola
- Porreca et al v Flowers Baking Company
- Event Merchandising Settlement
- Lopez c George Amaral Ranches
- JKM Trading Settlement
- Crema v New Jersey National Golf Club
- Diaz v Arcona Farms
- Flowers Texas Settlement
- Miller v Flowers Foods of North Dakota
- Flowers Global Settlement
- Ali v Sutter Valley Medical-HIPAA Breach
- Douillard v Sprint Cellular
- Patterson v Volkswagen
- Johnson v Oxnard Automotive Exchange
- Goh v NCR Corporation
- Blackburn v APTIM Services
- SIP ERISA Settlement
- Rench v HMI-Wage & Hour
- Matise v Dun & Bradstreet-Wage & Hour
- Lazy Boy Furniture Galleries Settlement-Wage & Hour
- Gruma Bakeries FLSA Settlement
- Flowers Global FLSA Settlement
- Bennett v Alorcia-PAGA
- Shachno v Pendry-PAGA/ Wage and Hour
- Gray v HCI-BIPA
- Jimenez v The Growers Company
- Supplemental Income Trust Settlement-ERISA
- Reyers v Unified Grocers
- Lyons v Green
- Manni v Lazy-Boy
- Carter v Bed Bath & Beyond-Data Breach
- Wall v Ashbritt
- Schulte-BIPA Settlement
- Carrillo v Mabry Management-PAGA/ Wage & Hour
- Fisher v Behavioral Health Services-PAGA/ Wage & Hour
- OFCCP v Sprint
- Boehm v BMW North America
- Ashe v Famers Insurance TCPA
- Gould v Farmers Insurance-TCPA
- Juarez v Laguna Farms-PAGA
- Power v Sandbox Logistics
- Andrews v Prestige Care-PAGA
- Foster v Advantage Sales
- Deak v In and Out Burger-PAGA
- EEOC v Hathaway
- Abdul-Ahad v Associated Courier



- Baudette v McDonough, Dept of Veterans (VA Settlement)
- Bethmann v County of St. Charles (Civil Rights)
- Parrish v Sheriff of Cook County (Civil Rights)
- Whitney v Sheriff of Cook County (Civil Rights)
- Kane v Sheriff of Cook County (Civil Rights)
- Carter v Michigan Department of State Police (Civil Rights)
- Clay v Sheriff of Cook County (Civil Rights)
- In Re Cottonwood Financial (DBA The Cash Store)-Consumer Financial Protection Bureau
- Isley v BMW
- In Re Galileo Learning-CFPB/Bankruptcy
- Bell v Michigan State Police (Civil Rights)
- Hernandez v City of Houston (Civil Rights)
- MacDonald v CashCall
- McNeil v Giles County (Civil Rights)
- Moore v Department of State Hospitals (Civil Rights)
- Noll v Flowers Foods
- Party City FACTA-2
- AMEX-Data Breach
- Piland v Gameface
- Spack v Transworld Entertainment
- The Body Shop FACTA
- Turner v Walmart
- Wallack v AT&T Mobility
- Williams v Equitable Acceptance Corp
- Ybarra v SIP 401k-ERISA Class Action
- Ylvisaker v Clarkson Eyewear-Complex Sales Tax
- Youmans v CPS
- Bootman Settlement
- Zamora v Walgreens-PAGA
- Wakefern Foods-NLRB Settlement
- TPH v BSFC-Medical Records HIPAA Data Breach Disclosure
- Mullins v Data Mgmt-Data Breach
- Caddick & Bertino v Tasty Foods
- USA v Omega Ent
- Williams v Equitable Acceptance Corp-Consumer Fraud, Data Breach
- Nunes v Home Depot
- Cantowine Settlement-Civil Rights
- The Cellular Connection
- Warsame v Michigan State Highway Patrol-Civil Rights
- Signature Consultants-FCRA
- Walgreens-PAGA
- Nucci v Rite Aid
- Hammond -Data Breach
- McShane HIPAA Medical Disclosure Breach
- Hudson v Valley High Hospital-Data Breach
- Rael v Intercontinental Hotel



- Shopko Settlement-Employee Data Breach
- Body Shop-FACTA
- Rough v Costco
- Baylog v Hashflare
- Medranno v Flowers Foods
- Wilk v Sketchers
- Rowe v Ulta Salon
- Guidry v Dow Chemical-Mass Tort
- Allianz Settlement-Data Breach
- Activision-PAGA
- Shami v Tubby Todd Bath Co-Data Breach
- Martin v Toyota Motor Credit- The GAP Fees Settlement
- EEOC v Activision Blizzard
- Carter v City of Ferguson (Civil Rights)
- Davis v City of Normandy (Civil Rights)
- Thomas v City of Edmundson (Civil Rights)
- Davis v City of Mission KS (Tax Abatement)
- Hernandez v City of Houston (Civil Rights)
- MMT Holdings v City of Dublin GA (Tax Abatement)
- Webb v City of Maplewood (Civil Rights)
- Atlanta Hawks-FACTA Settlement
- Bennett v Alorica Staffing
- Cannon v Huntington Hospital
- Cibulka v St. Louis County (Fees)
- CFPB v Cottonwood Financial (dba the Cash Store)
- Davis v Ominsure
- Donofrio v Auto Owners Insurance
- Fisher v Behavioral Health Services
- Gonzales v Healthcare Services Group
- Jadan v CostCo
- Lee v Porcelanosa of NY
- Martinez v CostCo
- Rodriguez v River City Bank (Civil Rights)
- Sikorski v New Jersey Venture Partners
- Ward v Tilley's



Partial listing of cases the Atticus Team has managed

- Tardiff v. Knox Count
- Nilsen v. York Count
- Tyler v. Suffolk Count
- Braun v. Walmart
- Lundeen v Canadian Pacific Railroad
- Frank v. Gold'n Plump Poultry
- Mass tort Guidant defibrillator
- Cazenave v. Sheriff Charles C. Foti
- Brecher v. St. Croix County
- McCain v. Bloomberg-Data Breach
- Carnegie v Household
- High Sulfur Gasoline Product Liability Shell Oil
- Merrill Lynch Securities Litigation
- Merrill Lynch Data Breach
- Target Data Breach-Financial Institutions
- McKesson HBOC Securities Litigation
- Raytheon Co. Securities Litigation
- Bokusky v. Edina Realty
- Applied Card Bank Credit Card Litigation-Data Breach
- Sun Country Employee Litigation
- Dupont Chemical Pollution Litigation
- Haight v Bluestem Brands, Inc. -TCPA
- Dugan v TGIF-Wage and Hour/FLSA
- Dunkel v Warrior Energy-Energy-Wage & Hour
- Shelby v Miller Investment Group-Consumer Finance
- Salas v Watkins Manufacturing-FLSA
- Dull v IPS-Energy Sector Wage & Hour
- Wallach v FFG-TCPA
- Bourgeoisie v City of Baltimore-Consumer Fees
- Brown v Alley-FLSA
- Turner v ACD-Wage & Hour
- Villa v San Francisco 49'ers-Consumer Fees
- Thomas v Solvay
- Reid v Unilever-Mass Tort
- Zeller v PDC Corporation-FLSA
- Murr v Capital One-Consumer Fraud
- Redman v City of Chicago- FACTA
- Ernst v Sterling-Dish Case-Consumer Fraud
- Ott-Publix-FLSA
- Ellsworth v US Bank-Consumer Finance
- Vidra v Midland Financial-Consumer Finance
- Vu v Performance Recovery
- Freeman v Berkeley Packaging-FLSA
- Martin v JTH-TCPA



- Walker v Core Power Yoga-Wage & Hour
- Froberg v Cumberland Packaging-Stevia in the Raw Settlement-False Labeling
- Debarsekin v L2T-FLSA & Wage and Hour
- Gay v Tom's of Maine-False Labeling
- Templeton Rye -False Labeling
- Belardes v Farm Fresh to You-FLSA
- Tin Cup Settlement-False Labeling
- Johnson v ScanSAT-Medical Billing Data Breach
- Garcia v EJ Amusement-FLSA and Wage & Hour
- Doran v Forever Grand Vacations-Consumer Fraud- Time Share
- Velasco v Chrysler Corp-Recall
- Covell v Sleep Train-Wage & Hour
- Torres v Kwon Yet Lung-FACTA
- Redman v IMAX-FACTA
- Target Data Breach-Financial Institutions
- In Re Motor Fuel- Hot Fuel Case- Consumer Fraud
- Haight v Bluestem-TCPA
- Martin v JTH-TCPA
- In Re Target Data Breach-Financial Institutions

Management Team

Chris Longley, JD – CEO and Co-Founder – Former president of Dahl Administration, a nationally recognized Claims Administration Company. Licensed Attorney (Retired Status), admitted to practice Minnesota, 8th Circuit and United States Supreme Court. During Longley's Tenure at Dahl, he successfully managed some of the highest profile cases in the last few years, including *In Re Motor Fuel* (Hot Fuel), an all- digital notice campaign with over 160 mm class members in 36 states and US Territories, and the Target Data Breach- Financial Institutions Settlement.

Bryn Bridley – Director of Project Management – Bryn has over 19 years of Project Management experience within the industry, having worked with two large Settlement Administrators, Rust Consulting and Dahl Administration. Bryn's past claims administration work included the day-to-day activities of several high- profile consumer, employment and other types of cases. Bryn has extensive experience with CAFA Notices and Class Certification campaigns. Bryn is an honor's graduate of the University of Minnesota-Duluth and enjoys running and camping in her free time.

Joel Prest – Director of Technology – Joel has 15 years of experience with software development and project management. Joel has expertise in designing scalable solutions to allow end users to work more efficiently with easy-to-use applications. Joel's prior work history includes Human Resource Management, which allows him to understand system payroll needs, HIPPA, and tax requirements necessary for employment related cases.

Jim Hardy, CPA (Inactive) – Co-Founder and CFO – Prior to co-founding Atticus, Jim held finance leadership positions over a twenty-year period in a variety of industries (contract manufacturing - implantable medical devices, sheet-fed printing, and commodity trading) where the wide-range of responsibilities and challenges from these experiences has enabled him to develop a versatile set of finance, administrative and operations skills.

Mike Gelhar – Practice Director, Employment & Treasury – Mike brings over 20 years of payroll experience in the employment law practice area. Along with his payroll knowledge, Mike is also bringing his work experience as he managed the processing and distribution of one of the nation's largest Labor and Employment administrators. These cases ranged from a few hundred claimants to over 700,000 claimants in all 50 states, including Puerto Rico.

EXHIBIT B



DATA SECURITY & INFORMATION PRIVACY POLICY

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I. OVERVIEW

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II. PURPOSE

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III. SCOPE

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IV. POLICY

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V. ENFORCEMENT

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VI. DISTRIBUTION



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.0	10/1 /2021	ol y R	Jo l r Dr oro n or a on nolo y Ja ardy O/ OO
.0	10/12/2022	ol y R	Jo l r Dr oro n or a on nolo y Ja ardy O/ OO