UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JAMES BARR, MARY BIRDOES, JEFF BOWLIN, and RYAN LANDIS, on behalf of themselves all other persons similarly situated, Plaintiffs, vs. DRIZLY, LLC f/k/a DRIZLY, INC., and THE DRIZLY GROUP, INC. Defendants.	**Case No. 1:20-CV-11492** **The Honorable Leo T. Sorokin** **Magistrate Judge Donald L. Cabell**

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF THE PROPOSED CLASS ACTION SETTLEMENT

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INTRODUCTION

Plaintiffs[1] respectfully submit this memorandum in support of their motion for preliminary approval of the proposed Settlement with Drizly. The Settlement provides timely and significant benefits to Settlement Class Members whose information was exposed as a result of the Data Breach and was achieved after hard-fought extensive negotiations mediated in part by the Honorable Diane M. Welsh (Ret.), U.S.M.J. (E.D. Pa.). Notice of this Settlement may be issued as the Court is likely to find that the Settlement is procedurally and substantively fair under Rule 23(e) of the Federal Rules of Civil Procedure and that the proposed class may be certified.

Accordingly, pursuant to Rule 23, Plaintiffs ask that the Court enter an order that:

(a) Preliminarily approves the Settlement, subject to later final approval;

(b) Conditionally certifies the Settlement Class with respect to the claims against Drizly;

(c) Appoints Plaintiffs as class representatives for the Settlement Class;

(d) Appoints Plaintiffs' Co-Counsel in the Action, Lowey Dannenberg, P.C., Carlson Lynch LLP, Keller Lenkner, LLC, Thompson Consumer Law Group, PC, and Block & Leviton LLP, as Class Counsel for the Settlement Class;

(e) Appoints A.B. Data, Ltd. as the Settlement Administrator;

(f) Approves the proposed Notice Plan and proposed forms of Class Notice (attached as Exhibits 2-5 to the Levis Decl.);

(g) Sets a schedule leading to the Court's evaluation of whether to finally approve the Settlement, including: (i) the date, time and place for a hearing to consider the fairness, reasonableness, and adequacy of the Settlement (the "Fairness Hearing"); (ii) the deadline for Settlement Class Members to exclude themselves (*i.e.*, opt out) from the Settlement; (iii) the deadline for Class Counsel to submit their petition for attorneys' fees and expenses and for Plaintiffs to file their application for an Incentive Award; and (iv) the deadline for Settlement Class Members to object to the Settlement and any of the related petitions; and

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[1] Unless otherwise defined, capitalized terms have the same meaning as in the Stipulation and Agreement of Settlement ("Settlement Agreement" or "SA") annexed as Exhibit 1 to the Declaration of Christian Levis ("Levis Decl."). Unless otherwise indicated, internal citations and quotation marks are omitted and ECF citations are to the docket.

(h) Stays all proceedings in the Action except those relating to approval of the Settlement.

See [Proposed] Preliminary Approval Order, filed herewith.

SUMMARY OF RELEVANT FACTUAL BACKGROUND[2]

I. The Litigation

Drizly operates an alcohol e-commerce platform that facilitates the delivery of beer, wine, and liquor to consumers in over 30 U.S. States, as well as Alberta, Canada. Plaintiffs are consumers and allege that their personally identifiable information was accessed by an unauthorized party in a data intrusion security incident that Drizly made public on July 28, 2020 (the "Data Breach"). *See* First Amended Class Action Complaint ("Compl.") (ECF No. 35) at ¶¶ 2-6, 39.

Plaintiff James Barr filed the initial complaint against Drizly on August 7, 2020 in this Court. ECF No. 1. On August 20, 2020, Plaintiffs Mary Birdoes and Jeff Bowlin (the "*Birdoes* Plaintiffs") filed a lawsuit against Drizly in the United States District Court for the District of Arizona asserting similar claims as Plaintiff Barr.[3] After conferring with Drizly and receiving leave from the Court, Plaintiffs filed their First Amended Class Action Complaint on October 28, 2020 adding the *Birdoes* Plaintiffs and Plaintiff Ryan Landis, and asserting causes of action in negligence, negligence per se, breach of implied contract, unjust enrichment, and violations of state consumer protection statutes. Levis Decl. ¶¶ 16-17. The *Birdoes* Plaintiffs subsequently dismissed their action in the District of Arizona. *Id.* ¶ 18.

On November 18, 2020, Drizly filed a motion to compel arbitration and supporting evidence, arguing that its terms of service contained an arbitration provision and class action waiver that required Drizly users to arbitrate their claims individually. *Id.* ¶ 19.

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[2] A fuller description of the background of the Action is provided in the Levis Decl. ¶¶ 12-24.

[3] *See Birdoes v. Drizly*, LLC, No. 2:20-cv-01639 (D. Ariz.).

II. Settlement Negotiations

After Drizly filed their motion to compel arbitration, the Parties began discussing the possibility of a settlement and agreed to mediate their dispute. *Id.* ¶ 20-21. In preparation for the mediation, the Parties entered a mutual confidentiality and non-disclosure agreement to facilitate the exchange of information regarding Plaintiffs' claims and Drizly's potential defenses. Pursuant to this agreement, the Parties produced documents and information responsive to requests for information on December 30, 2020. *Id.* ¶ 22.

Prior to the mediation session, Plaintiffs' Co-Counsel conducted an investigation into the Data Breach, including interviewing potentially impacted individuals, analyzing public disclosures and reports concerning the Data Breach, and determining whether Drizly customers' information was available for purchase on the Dark Web. *Id.*

The Parties submitted their respective mediation statements to Judge Welsh and participated in a full-day mediation session via video conference on January 15, 2021. *Id.* ¶ 23. After more than twelve hours of negotiations during the initial mediation, the parties were unable to reach a resolution. *Id.* ¶ 23. The Parties continued their negotiations throughout the weekend with Judge Welsh's assistance. *Id.* On January 19, 2021, the Parties reached an agreement in principle on the proposed Settlement and executed a binding term sheet on January 22, 2021. *Id.* After several more weeks of settlement discussions, the Parties executed the Settlement Agreement on March 26, 2021. *Id.* ¶ 24. The negotiations leading to the Settlement were contentious and hard-fought, with Plaintiffs' Co-Counsel and Drizly's Counsel each advocating for the best interests of the Class and Drizly respectively. The resulting Settlement reflects an agreement reached at arm's length, in good faith, and free of any collusion.

III. The Settlement Terms

The Parties agree to the certification of the following Settlement Class (subject to certain exclusions):

> All Persons in the United States whose customer data was compromised in the data intrusion security incident that Drizly made public on July 28, 2020, in which an unauthorized party accessed certain personally identifiable information of Drizly's customers (the "Data Breach").

See SA § 1(F). Each eligible Class Member that files a timely and valid Proof of Claim and Release ("Claim Form") will receive an individual cash payment of $14.00, that may be adjusted upward if the total amount due to all Authorized Claimants does not exceed $1,050,000, and adjusted downward in the event that the aggregate cash payments to all Authorized Claimants exceeds $3,150,000. *Id.* § 3(A).[4] They will also receive a *pro rata* portion of a pool of up to $447,750 in the form of a credit against the cost of service fees for future orders on Drizly's platform (the Settlement Service Credit Amount). *Id.* § 3(C). Proof of actual losses is not required to receive the individual cash payment or a service credit. Drizly will separately pay all administration costs associated with the Settlement, attorneys' fees and expenses, and Incentive Awards (subject to certain limitations). *Id*. §§ 5(A), 5(B), 6(I). Drizly will also implement and maintain certain data security measures for two years. *Id.* § 4. In exchange, Releasing Parties agree to provide Drizly with a release of claims relating to the Data Breach and dismiss their claims. *Id.* § 8.

ARGUMENT

I. This Court Should Preliminarily Approve the Settlement

This Settlement satisfies all of the relevant considerations for approval. At the preliminary approval stage, courts evaluate whether a proposed settlement is likely to be approved as fair,

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[4] If there are unclaimed cash payments after one year, the remaining funds may be donated to the Identity Theft Resource Center. SA, Appendix B § 6.

reasonable, and adequate, and whether the Settlement Class is likely to be certified for settlement purposes at the final approval stage. FED. R. CIV. P. 23(e)(1). A settlement may be approved where the Court finds "(A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate . . . ; and (D) the proposal treats class members equitably relative to each other." FED. R. CIV. P. 23(e)(2). Rules 23(e)(2)(A) and (B) focus on procedural fairness, *i.e.*, the "conduct of the litigation and of the negotiations leading up to the proposed settlement." FED. R. CIV. P. 23 advisory committee's note 2018 amendment. Rules 23(e)(2)(C) and (D) focus on the substantive fairness of the settlement, the "relief that the settlement is expected to provide to class members" compared with "the cost and risk involved in pursuing a litigated outcome." *Id.*

A. The Settlement Is Procedurally Fair

1. Plaintiffs and Plaintiffs' Co-Counsel have adequately represented the interest of the Class

Procedural fairness is satisfied, in part, because Plaintiffs' and Plaintiffs' Co-Counsel's interests are aligned with the interest of the Class. *See Nat'l Ass'n of the Deaf v. Mass. Inst. of Tech.*, No. 3:15-cv-30024-KAR, 2020 WL 1495903, at *3 (D. Mass. Mar. 27, 2020).[5] Each Plaintiff is a Drizly consumer whose personal information was compromised as a result of the Data Breach. Drizly's alleged failure to implement reasonable data security measures impacted not just Plaintiffs' privacy, but the privacy of all Class Members, and as a result, Plaintiffs and the Class seek the same relief from the same injury. *See Reid v. Donelan*, 297 F.R.D. 185, 191 (D. Mass. 2014) (holding plaintiff was an adequate class representative despite certain factual differences between plaintiff and class members because each sought the same relief).

[5] Courts analyze the adequacy of representation requirement of FED. R. CIV. P. 23(e)(2)(A) using the same considerations for representative adequacy under FED. R. CIV. P. 23(a)(4). *See Nat'l Ass'n of the Deaf*, 2020 WL 1495903, at *2-3.

"The duty of adequate representation [also] requires counsel to represent the class competently and vigorously and without conflicts of interest with the class." *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 36 n.12 (1st Cir. 2009). Plaintiffs satisfy this requirement when their attorneys demonstrate that they can "fairly and adequately protect the interests of the class." *Connor B. ex rel. Vigurs v. Patrick*, 272 F.R.D. 288, 297 (D. Mass. 2011); *accord* FED. R. CIV. P. 23(g). Plaintiffs' Co-Counsel have prosecuted this Action from its inception and negotiated the proposed Settlement. The firms representing Plaintiffs have decades of experience leading some of the most complex class actions, including data breach class actions on behalf of consumers and financial institutions as well as consumer arbitrations. *See* Levis Decl. Ex. 6-10 (firm resumes). To approve a settlement, "[t]he court must be satisfied . . . that Plaintiffs' counsel are qualified and experienced." *Nat'l Ass'n of the Deaf*, 2020 WL 1495903, at *3. Plaintiffs' Co-Counsel's extensive class action experience, combined with their extensive efforts in this litigation, provide direct evidence of Plaintiffs' Co-Counsel's adequacy.

2. The Settlement is the product of arm's length negotiations

Courts may presume that a proposed settlement is procedurally fair when it is the result of arm's length negotiations. *See Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 325, 343 (D. Mass. 2015), *aff'd,* 809 F.3d 78 (1st Cir. 2015). This Settlement bears all of the qualities of arm's length negotiations. First, Judge Welsh's participation in the settlement process is among the indicia of the Settlement's fairness. *See* William B. Rubenstein, 4 NEWBERG ON CLASS ACTIONS § 13:50 (5th ed. 2020) ("Evidence of a truly adversarial bargaining process helps assuage this concern [of collusive settlements] and there appears to be no better evidence of such a process than the presence of a neutral third party mediator"); *accord Roberts v. TJX Companies, Inc.*, No. 13-cv-13142, 2016 WL 8677312, at *5 (D. Mass. Sept. 30, 2016).

Second, prior to negotiating the Settlement, Plaintiffs and Plaintiffs' Co-Counsel were well-informed about the strengths and weaknesses of their claims against Drizly, including Drizly's argument in support of their motion to compel. Levis Decl. ¶ 25. Plaintiffs' Co-Counsel's negotiating strategy benefited from the information obtained from Drizly's public disclosures, their independent investigation, and the pre-mediation information requests. *Id.*

Last, skilled and experienced counsel engaged in adversarial negotiations for each of the Parties. Drizly is represented by counsel from one of the top privacy and data security law firms in the country, with extensive experience in litigating technology-related actions.
Settlement negotiations took several weeks and included a full-day mediation on January 15, 2021 that did not initially result in a settlement. *Id.* ¶¶ 20-24. When viewed in their totality, the circumstances fully support the conclusion that the Settlement is procedurally fair.

B. The Settlement Is Substantively Fair

In the First Circuit, the substantive fairness of a settlement is determined by "balancing the advantages and disadvantages of the proposed settlement as against the consequences of going to trial or other possible but perhaps unattainable variations on the proffered settlement." *Nat'l Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund*, 582 F.3d 30, 44 (1st Cir. 2009). Among the factors the Court may use to apply this balancing test include:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Roberts, 2016 WL 8677312, at *6 (quoting *Detroit v. Grinnell Corp*, 495 F.2d 448, 463 (2d Cir. 1974) ("*Grinnell*")). The *Grinnell* factors overlap with guidance provided by amended Rule

23(e)(2)(C), which focuses on whether, "the relief provided for the class is adequate." FED. R. CIV. P. 23(e)(2)(C). The Court is also required to confirm that the Settlement "treats class members equitably relative to each other." FED. R. CIV. P. 23(e)(2)(D). These factors are likely to weigh in favor of the Settlement's approval.

1. The *Grinnell* factors and Rule 23(e)(2)(C)(i) support approval of the Settlement

a. The costs, risks, and delay of trial and appeal favor the Settlement

To determine whether a settlement provides adequate relief to the class, the Court must evaluate "the costs, risks, and delay of trial and appeal," FED. R. CIV. P. 23(e)(2)(C)(i), which involves "consider[ing] the likely complexity, expense, and duration of the litigation, were this case to proceed to trial, as well as the plaintiffs' likelihood of success on the merits." *Bezdek*, 79 F. Supp. 3d at 344. The likelihood of success on the merits necessarily implicates other *Grinnell* factors as well, including the risks of establishing liability, the risks of establishing damages, and the risks of maintaining the class through the trial. Therefore, it is appropriate to address Rule 23(e)(2)(C)(i) in conjunction with these *Grinnell* factors.

There are several risks in this case that could pose obstacles to achieving a favorable outcome for Plaintiffs and the Settlement Class. *See Bezdek*, 79 F. Supp. 3d at 345 (holding that this factor weighs in favor of approval when there is a "palpable uncertainty that a more favorable result could be obtained through litigation"). If not for the Settlement, Plaintiffs would immediately be faced with the potential for an adverse ruling on Drizly's motion to compel arbitration. The case law in the First Circuit is mixed regarding whether a consumer is bound by a terms of service provided through a link during the registration process. *Compare Theodore v. Uber Technologies, Inc.*, 442 F. Supp. 3d 433, 440-42 (D. Mass. 2020) (holding browse-wrap agreement was not inconspicuous and did not bind consumers to arbitration), *with In re Daily Sports Litig.*, No. MDL 16-02677-GAO, 2019 WL 6337762, at *10 (D. Mass. Nov. 27, 2019)

(finding consumers agreed to arbitrate claims through browse-wrap agreement). A successful motion to compel would effectively defeat any opportunity to litigate this Action on a class-wide basis, forcing arbitration and foreclosing many, if not all, Settlement Class Members from recovery unless they were willing to pursue their claims in individual arbitration.

If Drizly's motion to compel were denied, Drizly would likely file a motion to dismiss. While Plaintiffs believe they would have prevailed, there are risks involved in data breach litigation—a relatively new area of law—including proving standing and causation. *See In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 260 (D.N.H. 2007) (noting that, because the case "involved a greater risk of non-recovery" due to "still-developing law," this factor weighed in favor of approval); *see also In re Sonic Corp. Customer Data Sec. Breach Litig.*, No. 1:17-md-2807, 2019 WL 3773737, at *7 (N.D. Ohio Aug. 12, 2019) ("Data breach litigation is complex and risky. This unsettled area of law often presents novel questions for courts."). These are just a few of the substantive hurdles to prevailing on the merits.

Plaintiffs likely would have incurred significant costs to prove their case through fact and expert discovery. *See, e.g.*, *In re Yahoo! Inc. Customer Data Security Breach Litig.*, No. 16-MD-02752, 2020 WL 4212811, at *9 (N.D. Cal. July 22, 2020) (listing "more discovery" as one of the significant expenses for continuing a data breach litigation); *see also In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 212 (D. Me. 2003) (explaining that, absent settlement, "[m]ore experts will have to be hired at great expense"). Given the alleged misconduct, this Action would necessarily involve a battle of experts with respect to damages and other issues, likely escalating the litigation costs. The costs and risks would only further increase as the parties contest class certification and motions *in limine*, and proceed through to trial and any related appeals. In this Action, achieving total success on the merits and obtaining the full measure of

Plaintiffs' asserted damages is by no means guaranteed. The proposed Settlement, if approved, exchanges the extensive costs and a lengthy litigation timeline with prompt financial recovery and certainty for the Class, injunctive relief, finality as to the Parties, and the preservation of Court's time and resources that can be redirected elsewhere. The Settlement—valued between $3,350,000.00 and $7,105,750.00[6]— is an appropriate balance against the strength of Plaintiffs' case. *See Roberts*, 2016 WL 8677312, at *8 (finding settlement more favorable where "claimants would be able to receive funds more immediately than if the case went to trial"). Because of the substantial costs, risks and delay in recovery associated with continued litigation, the first, fourth, fifth, and sixth *Grinnell* factors and Rule 23(e)(2)(C)(i) support approval of the Settlement.

b. The remaining *Grinnell* factors also support approval of the Settlement

Given the present posture of the Action, it is too early to evaluate the second *Grinnell* factor concerning the reaction of the proposed Settlement Class. If the Court grants preliminary approval of this Settlement, Class Notice (as described *infra*) will be issued to Settlement Class Members, advising them of their opportunities to voice their reaction to the Settlement. Notably, Plaintiffs whose interests are aligned with the Settlement Class, support the Settlement.

The third *Grinnell* factor asks whether Plaintiffs have completed sufficient discovery "to provide the parties with adequate information about their respective litigation positions." *In re M3 Power Razor Sys. Mktg. & Sales Practice Litig.*, 270 F.R.D. 45, 63 (D. Mass. 2010). This does not require the parties to complete formal discovery; it is sufficient that they "conduct[ ] discovery in tandem with their settlement efforts" and are able to make an informed decision as to settlement. *Walsh v. Popular, Inc.*, 839 F. Supp. 2d 476, 481 (D.P.R. 2012). Plaintiffs' Co-Counsel's

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[6] *See* SA § 1(MM).

investigation with the information developed during the mediation process gave Plaintiffs a firm basis to evaluate the conduct at issue and the possible settlement value. Levis Decl. ¶ 25.

The seventh *Grinnell* factor, the ability to withstand a greater judgment, is only relevant if "the settlement is less than what it might otherwise be but for the fact that the defendant's financial circumstances do not permit a greater settlement." *In re Namenda Direct Purchaser Antitrust Litig.*, 462 F. Supp. 3d 307, 314 (S.D.N.Y. 2020). Where, as here, those circumstances are not present, courts give this factor little weight. *Id.*; *accord In re Lupron Mktg. and Sales Practices Litig.*, 228 F.R.D. 75, 97 (D. Mass. 2005) (the seventh *Grinnell* factor is a "defendant oriented factor" that is "neutral" when dealing with defendants with "classic deep pockets").

Finally, the Settlement should also be approved because it is reasonable "in light of the best possible recovery" and the "in light of all the attendant risks of litigation." *Grinnell*, 495 F.2d at 463. The reasonableness inquiry compares "the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, [against] the amount of the proposed settlement." *In re Lupron*, 228 F.R.D. at 97. In the First Circuit specifically, there is scant case law regarding key issues in data breach litigation, including whether an imminent risk of future harm is sufficient to establish Article III standing and what is required to establish causation. As discussed above, Plaintiffs likely faced numerous risks to prevailing, resulting in a steep discount of the present value of the case. In light of these risks, the Settlement is within the bounds of what is reasonable.

2. The Settlement provides an effective method for distributing relief and treats class members equitably, thereby satisfying Fed. R. Civ. P. 23(e)(2)(C)(ii) and (e)(2)(D)

Approval of the Settlement also requires the Court to assess whether the allocation of funds among class members is "fair, reasonable and adequate." *Hochstadt v. Boston Sci Corp.*, 708 F. Supp. 2d 95, 109 (D. Mass. 2010). In this case, the Settlement provides a simple, straight-forward

method for Class Members to file a claim and receive a payment, thus incentivizing participation. *See* William B. Rubenstein, 4 NEWBERG ON CLASS ACTIONS § 13:53 (5th ed. 2020) ("the goal of any distribution method is to get as much of the available damages remedy to class members as possible and in as simple and expedient a manner as possible"). Class Members will be required to submit a Claim Form providing their name, email address associated with their Drizly account, and a unique claimant ID code (designed to deter fraudulent claims). *See* SA, Appendix A, § 2. This information is typical of what courts have permitted in other cases.[7]

Substantively, the Settlement Cash Payment and the Settlement Service Credit Amount will be distributed equally to Authorized Claimants. Each Authorized Claimant will receive an individual cash payment of $14, an amount which may be increased or decreased *pro rata* depending on the total volume of Approved Claims. SA § 3(A). Furthermore, each Authorized Claimant will receive a $1.99 service fee credit for the Drizly platform, which may be decreased *pro rata* depending on the total volume of Approved Claims. *Id.* § 3(C). In similar consumer class actions, courts routinely accept allocation plans that grant *pro rata* relief to class members. *See, e.g.*, *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 292 F. Supp. 2d 184, 186 (D. Me. 2003) (approving a settlement granting relief in the form of equally-distributed cash and retail discounts); *Giroux v. Essex Property Trust*, No. 16-cv-01722, 2019 WL 1207301, at *1 (N.D. Cal. Mar. 14, 2018) (approving a settlement granting class members a *pro rata* share of a settlement fund). Settlement Class Members are not required to submit documentary proof of losses to recover under the Settlement.

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[7] *See* Claim Form, *In re TJX Companies, Inc.*., No. 1:07-cv-10162, (D. Mass. Dec. 20, 2007) (ECF No. 293-4) (claim form requiring submission of name, mailing address, and supporting documentation).

Any potential inequity in the Settlement is avoided through the use of a notice program that advises Class Members of their rights, including the impact of the releases. Should a Class Member wish not to be bound by the release, that Class Member may opt out of the Settlement. Because the distribution of the Settlement Fund and the Settlement's release wholly avoid any improper preferences, these factors weigh in favor of preliminary approval of the Settlement.

3. The requested attorneys' fees and other awards are paid separately to ensure that the Settlement Class receives adequate relief

The Settlement Agreement provides that Plaintiffs' Co-Counsel's attorneys' fee award shall be paid separate and apart from the Settlement Cash Payment and thus, does not take away from any benefit to Settlement Class Members. Plaintiffs' Co-Counsel will limit their attorneys' fee and expenses request to no more than $1,200,000, which may be paid upon final approval. *See* SA § 5(A). Similarly, any Incentive Award that Plaintiffs request is limited to $2,000 each and will be paid directly by Drizly. *Id.* § 5(B).

4. There are no unidentified agreements that impact adequacy of relief for the Settlement Class

An additional consideration in the context of a settlement approval is whether there are other agreements that would have an impact on a settlement. *See* FED. R. CIV. P. 23(e)(2)(C)(iv), 23(e)(2)(D). Here, all of the relevant terms for the Settlement have been disclosed in the Settlement Agreement, including Drizly's qualified right to terminate the Settlement Agreement under certain circumstances before final approval. *See* SA § 16. This "blow" provision is common in class action settlements. *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 948 (9th Cir. 2015).

5. Plaintiffs' Co-Counsel strongly supports this Settlement

Courts in this Circuit also "g[i]ve significant weight" to the opinion of "attorneys with extensive experience" when evaluating a settlement. *Gulbankian v. MW Mfrs., Inc.*, No. 10-10392,

2014 WL 7384075, at *3 (D. Mass. Dec. 29, 2014). In determining the weight of counsel's opinion, a court will consider counsel's experience litigating similar claims, their efforts, and their depth of knowledge and observations about the claims and issues in the action at bar. *Id.* at *3. As described *supra*, and in their accompanying resumes, Proposed Class Counsel all have extensive experience litigating cases of this type, and all strongly support the approval of this Settlement.

II. The Court Should Conditionally Certify the Proposed Settlement Class

For a settlement class to be certified, it must satisfy each requirement delineated in Rule 23(a), as well as at least one of the separate divisions of Rule 23(b). As explained below, the Settlement Class meets the requirements of Rule 23(a) and Rule 23(b)(3) for preliminary and final approval. Accordingly, the Court should conditionally certify the Settlement Class.

A. The Requirements of Fed. R. Civ. P. 23(a) are Satisfied

Class certification under Rule 23(a) requires: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a). The Settlement Class satisfies each of these requirements.

1. The Settlement Class is so Numerous the Joinder of Individual Members is Impracticable

Rule 23(a)(1) requires that the class be so numerous to make joinder of its members "impracticable." FED. R. CIV. P. 23(a)(1). No minimum number of plaintiffs is required to maintain a suit as a class action and "[t]he threshold for numerosity is not high." *Nat'l Ass'n of the Deaf*, 2020 WL 1495903, at *1 (internal citation omitted). There are approximately 2.5 million

geographically dispersed individuals within the Settlement Class. Because joinder would be impracticable, Rule 23(a)(1) is satisfied.[8]

2. There are Questions of Law and Fact Common to the Settlement Class

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). Plaintiffs must show that resolution of an issue of fact or law "is central to the validity of each" class member's claim and "[e]ven a single [common] question will" satisfy the commonality requirement. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011). "The threshold of commonality is not a difficult one to meet." *Hochstadt*, 708 F. Supp. 2d at 102.

Several questions of law and fact are common to all Settlement Class Members, including (i) whether Drizly violated common law duties, consumer protection laws, or other legal obligations and industry standards; (ii) whether Drizly failed to properly secure and safeguard Settlement Class Members' personal information; (iii) whether Settlement Class Members are entitled to damages, injunctive relief, or other equitable relief; and (iv) the appropriate measure of such damages and relief. The proof required to establish Drizly's alleged unlawful conduct is common to all members of the Settlement Class and therefore satisfies Rule 23(a)(2).

3. Representative Plaintiffs' Claims are Typical of the Claims of the Settlement Class

Rule 23(a)(3) requires that class representatives' claims be "typical" of Settlement Class Members' claims. FED. R. CIV. P. 23(a)(3). "Typicality is not a demanding test" and does not require that Plaintiffs' claims be identical to those of absent class members. *In re Lupron*, 228 F.R.D. at 89. It is enough that "the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory." *In re Relafen Antitrust Litig*., 231 F.R.D. 52, 69 (D. Mass. 2005). Plaintiffs' claims and injuries arise from the

[8] *See Hochstadt*, 708 F. Supp. 2d at 102 (finding proposed settlement class of 12,000 "easily met" numerosity requirement).

same conduct, Drizly's alleged failure to adopt and maintain reasonable security measures to protect customer personal information and, as a result, rely on the same legal theories as the Settlement Class. This is sufficient to satisfy Rule 23(a)(3).

4. The Interest of Plaintiffs and Plaintiffs' Co-Counsel are Aligned with the Interests of the Settlement Class

Under Rule 23(a)(4), the court must find that "the representative parties will fairly and adequately protect the interest of the class." FED. R. CIV. P. 23(a)(4). As described in Argument I.A.1, *supra*., Plaintiffs and Plaintiffs' Co-Counsel satisfy the adequacy requirement. Under Rule 23(g), the Court should appoint Plaintiffs' Co-Counsel as Class Counsel for the Settlement Class.

B. The Requirements of Rule 23(b)(3) are Satisfied

Under Rule 23(b)(3), Plaintiffs must establish: (1) "that the questions of law or fact common to class members predominate over any questions affecting only individual members;" and (2) "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3). These requirements are satisfied here.

1. Questions Common to All Settlement Class Members Predominate Over Any Potential Individual Questions

The predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *In re M3*, 270 F.R.D. at 56. "The First Circuit has held that this requirement is satisfied where, notwithstanding individualized concerns, a sufficient constellation of common issues binds class members together." *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 275 (D. Mass. 2004).

Several courts have found that common issues, such as whether a defendant maintained reasonable security measures, predominate over individualized issues in data breach cases. *See, e.g.*, *In re Yahoo!*, 2020 WL 4212811, at *7; *In re: Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-md-2800-TWT, 2020 WL 256132, at *13 (N.D. Ga. Mar. 17, 2020); *In re Anthem, Inc.*

Data Breach Litig., 327 F.R.D. 299, 312 (N.D. Cal. 2018) ("[T]he focus would remain on the extent and sufficiency of the specific security measures that [defendant] employed. This is the precise type of predominant question that makes class-wide adjudication worthwhile."). At the heart of Plaintiffs' claims is whether Drizly failed to adopt and maintain reasonable security measures to protect personal information, promptly detect the Data Breach, remedy and mitigate the effects of the Data Breach, and provide timely notification to affected persons. These questions are common and predominate over individualized issues.

2. A Class Action is the Superior Method to Fairly and Efficiently Adjudicate the Matter

Plaintiffs must show that a class action is superior to individual actions, which is evaluated by considering:

> (A) the interest of the members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of the class action.

In re Relafen Antitrust Litig., 231 F.R.D. at 70. In the context of a proposed settlement-only class, courts need not inquire about the case manageability for trial purposes. *See Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

Here, the interest of any one class member in controlling the prosecution of a separate action is likely low, considering that the costs of litigating a claim would most likely exceed any individual recovery. *See In re Relafen Antitrust Litig*., 231 F.R.D. at 71 (class action method was superior "[e]specially for the individual consumer, where the individual losses are low [and] the transaction costs in bringing suit are likely prohibitive"). Further, there are no other litigations pending against Drizly arising out of the Data Breach that would require the Court's consideration. Thus, the superiority requirement is satisfied.

III. The Notice Plan and Class Notice Should Be Approved

Upon preliminarily approving the Settlement, the Court must "direct notice in a reasonable manner to all class members who would be bound by the proposal." FED. R. CIV. P. 23(e)(1). Notice need not reach every class member, but must be "the best notice practicable" under the circumstances. *Nat'l Ass'n of the Deaf*, 2020 WL 1495903, at *4.

The Class Notice will inform Settlement Class Members of the substantive terms of the settlement as well as: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

The proposed Notice Plan and related forms of notice (*see* Levis Decl. Exs. 2-5) are "reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). The Notice Plan includes sending the summary notice (Levis Decl. Ex. 3) in the body of an email to Settlement Class Members for which Drizly has working emails. *See* Levis Decl. Ex. 2. The email will contain a link to the long form notice, the Proof of Claim and Release form and the Settlement Website. Levis Decl. Ex. 4-5. Email has become a commonly accepted means of notice sufficient to satisfy the requirements of due process. *See, e.g., In re Equifax*, 2020 WL 256132, at *28 ("[C]ourts have increasingly approved utilizing email to notify class members of proposed class settlements, and such notice was appropriate in this case."); *Nat'l Ass'n of the Deaf*, 2020 WL 1495903, at *4 (finding email notice and a link of the notice on each entities respective websites to be "the most reasonable manner to ensure that class members receive word of the settlement.").

Drizly will also direct Class Members to the Class Notice directly from its website and mobile application, and a Settlement Website will be created, providing additional means to notify Class Members. *Nat'l Ass'n of the Deaf*, 2020 WL 1495903, at *4 ("Online publication of the notice is particularly appropriate here because the class . . . consists of individuals who access online content and have at least some familiarity with the Internet."). On the Settlement Website, Class Members can review and obtain: (i) a blank Proof of Claim and Release form for the Settlement; (ii) the Class Notice; (iii) the Settlement Agreement; and (iv) key pleadings and Court orders. The Settlement Administrator will also operate a toll-free telephone number with automated answers to Settlement Class Members' questions.

Plaintiffs' Co-Counsel recommend that A.B. Data, Ltd. ("A.B. Data") be appointed as Settlement Administrator. A.B. Data developed the Class Notice plan and has significant experience in administering class action settlements. *See* Levis Decl. Ex. 2.

IV. Proposed Schedule

Plaintiffs propose the following schedule leading to Final Approval of the Settlement:

Event	Date
Class Notice commences	No later than thirty (30) days after entry of this Preliminary Approval Order (the "Notice Date")
Deadline to file Settlement Administrator's Declaration regarding implementation of Notice Plan	No later seventy-five (75) days after the Notice Date
Deadline to file Motion for Final Approval of the Settlement	No later than seventy-five (75) days after the Notice Date.
Motion for Attorneys' fees, reimbursement of costs and expenses, and service awards to be filed by Class Counsel	No later than seventy-five (75) days after the Notice Date.
Postmark/Email Deadline for Requests for Exclusion (Opt-Outs)	No later than ninety (90) days after the Notice Date ("Exclusion Bar Date").
Filing and Service Deadline for Objections	No later than ninety (90) days after the Notice Date.
Claim Filing Deadline	No later than ninety (90) days after the Notice Date.

Deadline to File Opt-Out List and Settlement Administrator Declaration	No later than ten (10) business days after Exclusion Bar Date
Deadline to Complete Discovery Concerning Objections	No later than thirty (30) days after the Deadline for Objections.
Deadline to File Oppositions to Objections	No later than forty-five (45) days after the Deadline for Objections.
Deadline to File Settlement Administrator Declaration to Distribute the Claims Payments	No later than forty-five (45) days after the Claims Filing Deadline.
Fairness Hearing	At least two hundred ten (210) days after entry of the Preliminary Approval Order.

CONCLUSION

For the foregoing reasons, the proposed Settlement warrants the Court's preliminary approval. Plaintiffs respectfully request that the Court enter the accompanying proposed order that among other things: (a) preliminarily approves the Settlement, subject to later, final approval; (b) conditionally certifies a Settlement Class on the claims against Drizly; (c) appoints Plaintiffs as representatives of the Settlement Class; (d) appoints Plaintiffs' Co-Counsel as Class Counsel for the Settlement Class; (e) appoints A.B. Data as the Settlement Administrator for the Settlement; (f) approves the proposed forms of Class Notice to the Settlement Class of the Settlement and the proposed Class Notice plan; (g) sets a schedule leading to the Court's consideration of final approval of the Settlement; and (h) stays all proceedings as to Drizly except with respect to approval of the Settlement.

Dated: March 29, 2021

Respectfully submitted,

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LOCAL RULE 7.1(A)(2) CERTIFICATION

I, Christian Levis, counsel for Plaintiffs, certify that Plaintiffs conferred with counsel for Defendants Drizly, LLC f/k/a Drizly, Inc., and The Drizly Group, Inc. in a good faith effort to resolve or narrow the issues presented in this motion between March 26 – 29, 2021.

/s/ Christian Levis
Christian Levis

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 2021, this document was electronically filed with the Clerk of the Court using the CM/ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), pursuant to Local Rule 5.4(C).

/s/ Jason M. Leviton
Jason M. Leviton