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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

ALABAMA DOE 1, ALABAMA DOE 2, INDIANA DOE, MISSOURI DOE, AND FLORIDA DOE, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

GILEAD SCIENCES, INC.,

Defendant.

Case No.: 20-CIV-03699

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Dept: 22
Judge: Hon. Danny Chou
Date: December 1, 2022
Time: 11:00 a.m.

CLASS ACTION

Action Filed: September 1, 2020
Trial Date: None Set

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I. INTRODUCTION

Plaintiffs Alabama Doe 1, Alabama Doe 2, Indiana Doe, Missouri Doe, and Florida Doe (collectively, "Plaintiffs"), individually and as proposed representatives of the Settlement Class,[1] seek preliminary approval of the proposed Settlement Agreement with Defendant Gilead Sciences, Inc. ("Gilead" or "Defendant"), which resolves this class action. The Settlement Agreement between Plaintiffs and Defendant (collectively, the "Parties"), if approved, will resolve all claims related to the mailer containing "HIV Prevention Team" on the outside of the envelope (the "Mailer") that Gilead sent to Plaintiffs and the Settlement Class in exchange for Defendant's agreement to pay $4,000,000 into a non-reversionary, common settlement fund. All 18,192 Settlement Class Members will receive a base payment of $100 without having to submit a claim form. Settlement Class Members will also be able to submit claims for up to $2,000 for economic harms and $500 for non-economic harms resulting from the Mailer. Payments will be paid out of the common settlement fund after deductions for attorneys' fees and costs, settlement administration costs, and Plaintiffs' service awards.

The Parties' Settlement Agreement is the product of hard-fought litigation, extensive formal discovery, and ongoing arm's-length negotiations overseen by experienced and informed counsel, including a two-day mediation facilitated by an experienced class action mediator, Jill Sperber, Esq. The settlement terms are fair, reasonable, and adequate. Accordingly, Plaintiffs request that the Court: (1) preliminarily approve the proposed Settlement; (2) conditionally certify the Settlement Class for settlement purposes only; (3) appoint Plaintiffs as Class Representatives; (4) appoint Plaintiffs' counsel as Co-Lead Class Counsel; (5) direct notice to be distributed to the Settlement Class; and (6) schedule a final approval hearing. Defendant does not oppose the relief sought in this motion.

II. BACKGROUND

A. The Parties Reached Settlement Only After Extensive Litigation.

Plaintiffs Alabama Doe 1, Indiana Doe, and Missouri Doe initiated this action on September 1, 2020. They alleged that in April 2020 Gilead sent Plaintiffs and Class Members, individuals who were prescribed Gilead's HIV-prevention medications and enrolled in Gilead's Advancing Access Program, a Mailer that included in the return address "HIV Prevention Team." Plaintiffs allege that by sending the Mailers through the U.S. Mail, Defendant violated the California Confidentiality of Medical Information Act, Cal. Civ. Code § 56 *et seq*. ("CMIA"), breached contractual privacy obligations, violated Mo. Rev. Stat. § 191.656, negligently breached its duties to protect their medical information,

[1] Unless otherwise explicitly defined herein, all capitalized terms have the same meanings as those set forth in the Parties' Settlement Agreement. (Declaration of Shanon J. Carson ("Carson Decl."), Ex. A.)

and violated their privacy.

Gilead filed a demurrer and motion to strike class allegations on October 20, 2020, arguing, in part, that Plaintiffs failed to allege particular facts sufficient to meet the CMIA's requirement that the protected information had been actually viewed by a third party. Plaintiffs opposed. On January 4, 2021, the Court overruled in part and sustained in part Gilead's demurrer and denied the motion to strike, holding that Plaintiffs had sufficiently pled actual viewing in their Complaint. On March 4, 2021, Gilead filed a petition for writ of mandate challenging the Court's order denying the demurrer and motion to strike as to Plaintiffs' CMIA claims. The Court of Appeals denied the petition for writ of mandate on June 16, 2021.

On April 13 and 14, 2021, the Parties participated in two full-day mediation sessions via Zoom with an experienced mediator, Jill Sperber, Esq. Prior to the mediation process, Defendant produced documents and information requested by Plaintiffs' counsel to ensure that any potential settlement would be informed and based on an adequate factual record. The April 2021 mediation was unsuccessful, and the Parties returned to litigation and formal discovery efforts.

On August 25, 2021, Plaintiffs filed the operative First Amended Complaint ("FAC"), adding the claims of Alabama Doe 2 and Florida Doe, and naming Gilead's mail vendor, Lahlouh, Inc., as an additional defendant. Plaintiffs subsequently agreed to dismiss Lahlouh without prejudice following Lahlouh's production of documents and responses to written discovery requests. The Court granted Plaintiffs' request to dismiss Lahlouh on February 23, 2022.

The Parties' have engaged in extensive formal discovery efforts, with both sides serving and responding to written discovery. Defendant produced thousands of documents between September 16, 2021, and February 14, 2022, and responded to interrogatories. Plaintiffs also produced documents and responded to interrogatories, and three Plaintiffs were deposed. During this time, the Parties engaged in numerous meet-and-confer conferences to negotiate various discovery issues and litigated a motion to compel filed by Defendant and granted by the Court on October 29, 2021. The motion to compel implicated the CMIA's actual viewing requirement and the scope of discovery Defendant could pursue in an effort to show that Plaintiffs' lacked evidence that third parties actually viewed Plaintiffs' Mailers, key legal and factual issues in the case. Before reaching this settlement, the Parties were continuing to address several discovery disputes, including Defendant's privilege assertions, the sufficiency of Plaintiffs' discovery responses, and a protocol for third party depositions. Depositions of two Plaintiffs and three Gilead current or former employees were calendared for late March and early April, 2022.

In March 2022, the Parties resumed their arm's-length settlement negotiations, picking up

largely where the Parties ended the April 2021 mediation. The Parties exchanged several counterproposals before reaching an agreement on the core terms of the Settlement. Thereafter, the Parties engaged in subsequent negotiations to reach and execute the full Settlement Agreement.

B. The Parties' Settlement Agreement

1. Overview of Terms and Settlement Administration

The proposed Settlement Class consists of all persons to whom Gilead sent the Mailer and that was not returned as undeliverable. (Settlement Agreement § 1.1.W.) Gilead has represented and produced data evidencing that there are 18,192 Settlement Class Members located throughout the United States. (*Id.*)

The Settlement requires Defendant to create a non-reversionary, common fund for Settlement Class Members consisting of $4,000,000.00. (*Id.* §§ 1.1.X, 4.1.) Defendant also represents that it no longer uses the term "HIV Prevention Team" in the return addresses or otherwise on the face of envelopes sent to individuals enrolled in Gilead's Advancing Access Program. (*Id.*, Recital H.) All Settlement Class Members will receive an automatic payment of $100 without the need to submit a Claim Form. (*Id.* § 4.2.a.) After deductions for any Court-awarded attorneys' fees and costs, settlement administration costs, and service awards for Plaintiffs, the Net Settlement Fund will be made available for Claimant Awards. (*Id.* § 1.1.H.)[2] A Claimant Award of up to $2,000 will be provided to each Settlement Class Member who submits a valid and timely Claim Form for reasonable non-reimbursed out-of-pocket expenses that were directly caused by the Mailer, including, for example, any moving costs, medical or counseling costs, loss of income, or expenses upon a showing of reasonable proof. (*Id.* § 4.2.b.) A further Claimant Award of up to $500 will also be provided to Settlement Class Members who set forth information on their Claim Form credibly declaring under oath that they experienced non-economic harm, as described more fully herein, as a direct result of the Mailer. (*Id.* § 4.2.c.) If the Net Settlement Fund does not cover the total collective amount of all base payments and all valid Claimant Awards, then each totaled Claimant Award (not including the base payment) shall be reduced *pro rata* to be paid out of the remaining amount in the Net Settlement Fund. (*Id.* § 4.2.d.) If a claim is rejected for any reason, the Claimant will be provided another opportunity to establish their eligibility or cure the deficiency. (*Id.* § 4.5.)

No portion of the Settlement Fund will revert to Defendant in any circumstance. (*Id.* § 4.1.) If there are any remaining funds from Net Settlement Fund and/or uncashed checks after the Settlement

[2] Plaintiffs' Counsel estimates that, if the Court approves the requested attorneys' fees and service awards, approximately $601,602 will be available for Claimant Awards.

has been distributed to Settlement Class Members, then the remaining amounts shall be distributed, subject to the approval of the Court, to Positive Women's Network-USA (*Id.* § 4.8.) This *cy pres* recipient meets the requirements of Cal. Code Civ. Proc. § 384. The Parties chose Positive Women's Network-USA because it is a non-profit national organization of women living with HIV that combats the ongoing stigma associated with HIV. The *cy pres* distribution will benefit the entire Class through Positive Women's Network-USA's local, state and federal advocacy efforts. The Parties and their counsel have no interest in Positive Women's Network-USA. (Carson Decl. ¶ 9.)

In consideration of the settlement benefits set forth above, the Settlement Class Members will release the claims that were raised, or could have been raised, related to the Mailer and/or the facts alleged in the action regarding the Mailer. (Settlement Agreement §§ 6.1–6.4.)

2. Form of Notice to Settlement Class Members

The Parties agreed to a Notice Plan providing for Notice of the Settlement to be sent via first-class U.S. Mail (where available) and email (where available and first-class U.S. Mail is not available), a Settlement Website, and a toll-free telephone number. (*Id.* § 3.6.) To accomplish the Notice Plan and administer the Settlement, the Parties conducted a request for proposal and bidding process, and agreed based upon the proposals that were received, to use an experienced settlement administrator, Kroll Settlement Administration LLC. (Carson Decl. ¶ 10.) The precise amount of settlement administration expenses will depend on the number of Settlement Class Members who submit claims. Kroll Settlement Administration LLC has agreed that its costs will not exceed $160,865.66. (Declaration of Shanon J. Carson ("Carson Decl.") ¶ 10; Settlement Agreement § 3.2.) To accomplish direct notice, Defendant agreed to, within five business days after the Preliminary Approval Date, provide to the Settlement Administrator the information necessary to provide notice (name, last known address, and email address (if available)). (Settlement Agreement § 3.1.3.)

Not later than 35 days after entry of the Court's Preliminary Approval Order, the Settlement Administrator will disseminate the Notice of Settlement and Claim Form to the Settlement Class by first-class postage prepaid U.S. Mail (where available) and email (where available and first-class U.S. Mail is not available). (*Id.* §§ 3.6, 3.7.) Prior to mailing the Notice, the Settlement Administrator will update Settlement Class Members' addresses using the National Change of Address database. (*Id.* § 3.7.) All Notices will be sent using practices intended to maintain the confidentiality of Settlement Class Members' confidential medical information. (*Id.* § 3.6.)

In addition to direct notice, the administrator will also establish a Settlement Website within 10 days of the Preliminary Approval Order. (*Id.* § 3.3.) The Settlement Website shall provide, at a

minimum: (a) information concerning all relevant deadlines and the dates and locations of relevant Court proceedings, including the Final Approval Hearing; (b) all contact information including the Settlement Administrator's email address and toll-free phone number applicable to the Settlement; (c) copies of the Settlement Agreement, Notice of Settlement, Claim Forms, Court Orders regarding this Settlement, and other relevant Court documents, including the Motion for Attorneys' Fees and Expenses; (d) information concerning the submission of Claim Forms, including the ability to submit Claim Forms electronically on the Settlement Website and by email or U.S. mail; and (e) a Frequently Asked Questions page regarding the Settlement with content approved by the Parties. (*Id.*) The Settlement Administrator will also establish a toll-free telephone number within 10 days of the Preliminary Approval Order that Settlement Class Members may utilize to obtain information. (*Id.* § 3.4.)

3. Opt-Out Right

Settlement Class Members may opt out of the Settlement by submitting a request for exclusion via mail. (*Id.* § 5.4.) The deadline for Settlement Class Members to postmark any opt-out of the settlement will be 60 days after the Notice of Settlement is sent to Settlement Class Members. (*Id.*)

4. Right to Object

Settlement Class Members may also mail a written objection to the Settlement Administrator. (*Id.* § 5.5.) The deadline for Settlement Class Members to postmark any objection to the Settlement will be 60 days after the Notice of Settlement is sent to Settlement Class Members. (*Id.*) The Notice also informs Settlement Class Members of their option to appear at the Final Approval Hearing. (*Id.*, Ex. C.)

5. Attorneys' Fees, Expenses, and Service Award

The Settlement Agreement provides that Co-Lead Class Counsel's fees and expenses, and Plaintiffs' service awards, are to be deducted from the Settlement Fund subject to Court approval. (*Id.* § 7.1.) Co-Lead Class Counsel will file a motion with the Court for approval of one-third of the Settlement Fund as attorneys' fees ($1,333,333.33), as well as documented, customary expenses, and a modest service award of up to $5,000 for each Plaintiff. (*Id.* §§ 7.1-7.2.) Co-Lead Class Counsel will file this motion no later than 14 days prior to the deadline for opt-outs and objections, so the papers are available to Settlement Class Members prior to the deadline. (*Id*. § 7.1.)

III. STANDARD FOR PRELIMINARY APPROVAL

A class action may not be settled or compromised without "the approval of the court after hearing." Cal. Rules of Court, Rule 3.769(a). The purpose of this requirement is "[t]o prevent fraud, collusion or unfairness to the class," and the court must determine whether "the settlement is fair, adequate, and reasonable." *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1795 (1996) (citation and

internal quotation marks omitted). "Public policy generally favors the compromise of complex class action litigation." *In re Cellphone Termination Fee Cases*, 104 Cal. Rptr. 3d 275, 281 (2009) (citation and internal quotation marks omitted).

Review is accomplished through a two-step process. At the preliminary approval stage, the Court need only determine whether the proposed settlement is within the range of reasonableness, and thus whether notice to the class of the settlement terms and conditions and the scheduling of a formal fairness hearing is worthwhile. *See* Cal. Rules of Court, Rule 3.769(c); Newberg on Class Actions § 13:13 (5th ed.) ("[C]ourts will grant preliminary approval where the proposed settlement is neither illegal nor collusive and is within the range of possible approval.") (citation and internal quotation marks omitted). In the event a court finds that the settlement falls within the range of possible approval, notice is issued and a final approval hearing is scheduled.

For the reasons set forth below, the Court should: (1) preliminarily approve the Parties' proposed Settlement, (2) certify the Settlement Class for settlement purposes only, (3) approve the Notice of Settlement for distribution, (4) appoint the Settlement Administrator, (5) appoint Plaintiffs as Class Representatives and Plaintiffs' counsel as Co-Lead Class Counsel, and (6) schedule the Final Approval Hearing.

IV. THE SETTLEMENT TERMS ARE FAIR, REASONABLE, AND ADEQUATE.

"In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as 'the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.'" *Wershba v. Apple Comput., Inc.*, 91 Cal. App. 4th 224, 245 (2001), *disapproved of on other grounds by Hernandez v. Restoration Hardware, Inc*., 4 Cal. 5th 260 (2018) (citation and internal quotation marks omitted). In the class settlement context "a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." *Dunk*, 48 Cal. App. 4th at 1803. Under these factors, the Settlement should be preliminarily approved.

A. The Proposed Settlement Was Reached After Extensive Litigation, Discovery, And Substantial Arm's-Length Negotiations.

A presumption of fairness applies to the Settlement Agreement. *See Dunk*, 48 Cal. App. 4th at

1803. The Settlement was reached only after extensive hard-fought litigation, an unsuccessful mediation in 2021 with an experienced mediator, formal discovery conducted by both sides, and substantial settlement discussions. The information Plaintiffs' counsel gathered through this process allowed them to act intelligently and exercise professional judgment in negotiating the Settlement in light of the maximum damages available to the Settlement Class and the significant risks presented by the litigation. (Carson Decl. ¶ 7.) A settlement in principle was reached only after numerous communications between counsel for the Parties and extensive discovery. (*Id.* ¶¶ 3-5.) Thereafter, the Parties engaged in substantial negotiations to finalize the details of the Settlement Agreement. (*Id.* ¶ 6.)

Further, both Plaintiffs and Defendant are represented by counsel who have significant experience in class action litigation and settlements, including cases concerning the alleged breach of confidential medical information. (*Id.* ¶ 11.) Plaintiffs here are represented by the non-profit AIDS Law Project of Pennsylvania which has provided legal services to people living with HIV for 34 years. (*See also id.* ¶ 12; Exs. B, C.; Declaration of John Grogan.) The judgment of Plaintiffs' counsel is deserving of deference. *See Kullar v. Foot Locker Rental, Inc*., 168 Cal. App. 4th 116, 129 (1998) ("The court . . . should give considerable weight to the competency and integrity of counsel and the involvement of a neutral mediator in assuring itself that a settlement agreement represents an arm's-length transaction entered without self-dealing or other potential misconduct.").

B. The Settlement Is Well Within The Range Of Approval.

1. The Recovery for the Class Is Substantial.

Plaintiffs believe the Settlement benefits are impressive when considering the number of hurdles between Plaintiffs and a final judgment. *See Kullar v. Foot Locker Retail, Inc*., 168 Cal. App. 4th 116, 133 (2008) (court should consider "the nature and magnitude of the claims being settled, as well as the impediments to recovery, to make an independent assessment of the reasonableness of the terms to which the parties have agreed."); *see also Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal. App. 4th 399, 409 (2010) (finding *Kullar* does not require "an explicit statement of the maximum amount the plaintiff class could recover if it prevailed on all its claims," rather "it requires a record which allows 'an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.'") (quoting *Kullar*, 168 Cal. App. 4th at 120).

Plaintiffs' claims, collectively, seek to compensate the Settlement Class for the alleged breach of their confidential medical information when Gilead sent a Mailer containing in bold red letters in the return address "HIV Prevention Team." The Settlement provides that Defendant shall pay $4,000,000.00 into a non-reversionary Settlement Fund. (Settlement Agreement § 2.1.) Gilead has also represented that

it no longer uses "HIV Prevention Team" in the return address or otherwise on the face of envelopes sent to enrollees in Gilead's Advancing Access Program. (*Id.*, Recital H.)

Of the $4 million Settlement Fund, $1,819,200 will be automatically paid to Settlement Class Members in the form of $100 base payments. (*Id*. § 4.2.a.) If successful litigation could lead to each Settlement Class Member recovering up to $1,000 in statutory damages under the CMIA, by providing an automatic $100 base payment, the proposed Settlement recovery is well within the range of an acceptable recovery for settlement approval. Every Settlement Class Member will receive the base payment without having to submit a claim form—a substantial benefit ensuring that the Settlement benefits will actually be received by the highest possible percentage of the Settlement Class.

Further, to address damages that could be obtained through successful litigation on Plaintiffs' tort claims, such as invasion of privacy, the Settlement makes an estimated $601,602 available for Claimant Awards—up to $2,000 for economic harms and up to $500 for non-economic harms for each Settlement Class Member. (*Id*. § 4.2.b-c.) Economic harms that Settlement Class Members can submit claims for include reasonable non-reimbursed out-of-pocket expenses that were directly caused by the Mailer, including, for example, any moving costs, medical or counseling costs, loss of income, etc. Non-economic harms that Settlement Class Members can submit claims for include harms Settlement Class Members credibly allege under oath that they experienced constituting emotional distress, anxiety, or fear Settlement Class Members may have experienced as a direct result of the Mailer. Depending on how many claims are submitted and what economic harms they suffered, Settlement Class Members could receive a Claimant Award compensating them for 100% of the out-of-pocket expenses they incurred as a result of the Mailer.

A claims process is appropriate for these harms because not all Settlement Class Members may have experienced these harms and because there is great variation in the possible harms each Settlement Class Member may have suffered depending on the circumstances in which they received the Mailer. (Carson Decl. ¶ 20.) Plaintiffs' Counsel have taken steps to ensure that Settlement Class Members can easily submit Claim Forms. For example, Claim Forms can be submitted online, by email, or by mail.

In light of the potential recovery, the recovery provided by the Settlement is substantial. *See Wershba*, 91 Cal. App. 4th at 250 ("A settlement need not obtain 100 percent of the damages sought in order to be fair and reasonable . . . [T]he public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation.") (internal quotations omitted).

Taken all together, the gross recovery, the per-class member recovery, and the method of distributing the settlement proceeds are fair and reasonable and warrant preliminary settlement approval.

See In Re Toys R Us-Delaware, Inc.--Fair & Accurate Credit Transactions Act (FACTA) Litig., 295 F.R.D. 438, 454 (C.D. Cal. 2014) ("Viewed from the perspective of each class member, had the class member sued Toys individually and proved that it acted wil[l]fully, he or she could have recovered between $100 and $1,000 in statutory damages. . . . A $5 or $30 award, therefore, represents 5% to 30% of the recovery that might have been obtained. This is not a *de minimis* amount. Given the likelihood that plaintiffs would have been unable to prove actual damages and the risk that they would have been unable to prove willfulness and recover any damages at all, the court finds that the amount of the settlement weighs in favor of approval.").

2. Plaintiffs faced significant risks in the absence of settlement.

The impressive nature of this Settlement—and the work put into it—comes into even sharper focus when the risks of further litigation are considered. Plaintiffs had yet to survive class certification or summary judgment. Plaintiffs are confident that these obstacles could have been overcome, but as the Court knows well, each of these phases of litigation presents risks and represents significant time and costs, which the Settlement allows the Settlement Class to avoid. *See, e.g.*, *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997) ("Litigation inherently involves risks."). A settlement, of course, "represents a compromise in which the highest hopes for recovery are yielded in exchange for certainty and resolution." *In re Johnson & Johnson Deriv. Litig.*, 900 F. Supp. 2d 467, 484 (D.N.J. 2012) (internal quotations and citations omitted).

For example, Plaintiffs would have confronted risks on class certification on each of their claims, including the argument that that no class could be certified under the CMIA without evidence proving that a third party actually viewed each class member's confidential medical information. *See, e.g.*, *Sutter Health v. Super. Ct.*, 227 Cal. App. 4th 1546, 1550 (2014) (in order to prevail on a CMIA claim, plaintiffs must adequately allege their confidential medical information "was actually viewed by an unauthorized person"); *Regents of Univ. of Cal. v. Super. Ct.*, 220 Cal. App. 4th 549, 570 (2013) (dismissing CMIA claim because plaintiff did not "allege her medical records were, in fact, viewed by an unauthorized individual"). Defendant already raised this argument in its demurrer and motion to compel, and the Court stated the actual viewing requirement was established by "controlling case law." As shown by discovery, the evidence relating to each Plaintiff's allegations that third parties viewed the Mailers varied. (Carson Decl. ¶ 7.) A protocol for third party depositions being negotiated by the parties after the Court's grant of the motion to compel would have permitted Defendant to pursue deposition testimony from third parties that would have potentially supported its assertion that Plaintiffs lacked evidence that third parties viewed Plaintiffs' Mailers. Defendant maintains that it would have been able

to make such a showing.

Achieving class certification and final judgment on Plaintiffs' tort claims, such as invasion of privacy, would also have been complicated by the fact that the circumstances under which class members received the Mailer could vary greatly. For example, among Plaintiffs, some alleged that family members had seen the Mailer, some alleged that neighbors or coworkers may have seen the Mailer, and some alleged only that U.S. postal workers saw the Mailer. Such variation across class members would have resulted in class members contending that they experienced varying degrees of uncomfortable or unwanted conversations and social stigma. Defendant would have contended that this too presented individual issues that would prevent class certification.

Although Plaintiffs believe that these arguments could have been overcome in litigation, these arguments demonstrate that there were serious risks and obstacles to recovery in this case, a fact that weighs heavily in favor of preliminary approval. Defendant was prepared to vigorously defend the lawsuit at every possible turn. The settlement amount appropriately accounts for the risks Plaintiffs would face related to these issues in litigation, including the time necessary to complete both the litigation itself and an appeal of any adverse decision on any of these issues.

V. THE COURT SHOULD APPROVE DISSEMINATION OF THE CLASS NOTICE.

The Court should approve the proposed Notice of Settlement (Settlement Agreement, Ex. C). The Notice of Settlement includes the content required by Cal. Rules of Court, Rule 3.766(d) and "fairly apprise[s] 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." *7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135, 1164 (2000) (internal quotations omitted). Among other things, the Settlement Notice describes the nature of the claims, explains the Settlement, identifies the maximum deductions from the Settlement Fund, informs Settlement Class Members of the $100 automatic payment, instructs Settlement Class Members on how to submit a Claim Form and the maximum amounts they could obtain, informs Settlement Class Members of their options to opt out of or object to the Settlement, and provides Settlement Class Members information about the Final Approval Hearing.

The Court should also approve the proposed methods of distributing notice. "In determining how to disseminate class notice of settlement—whether by direct mail, e-mail, publication, or something else—the standard is whether the notice has 'a reasonable chance of reaching a substantial percentage of the class members.'" *Duran v. Obesity Rsch. Inst., LLC*, 1 Cal. App. 5th 635, 648 (2016) (citation and internal quotation marks omitted). Here, the Parties have retained a qualified Settlement Administrator to send the Notice to Settlement Class Members via First Class Mail (where available)

and email (where available and First Class Mail is not available). The Settlement Administrator will receive the postal and email addresses from Defendant and update the postal addresses using the National Change of Address database. If Notices are returned as undeliverable, the Settlement Administrator will attempt to re-mail the Notice to any forwarding address provided or located through skip tracing. The Notice of Settlement will reach a substantial percentage of the Settlement Class because the contact information comes from the information provided to Defendant and used for the Mailer itself. The Settlement Administrator will also establish and maintain a Settlement Website with information and documents regarding the Settlement, including copies of the Notice of Settlement and Claim Form. Also, the Settlement Administrator will implement a toll-free telephone number that will provide Settlement Class Members with information about the Settlement.

These proposed notice procedures are appropriate and provide the best practicable notice of the Settlement under the circumstances. Prior to the Final Approval Hearing, the Settlement Administrator will submit a declaration about the efficacy of the notice process.

VI. PROVISIONAL CERTIFICATION OF THE SETTLEMENT CLASS IS WARRANTED.

Plaintiffs request that the Court provisionally certify the Settlement Class for settlement purposes. *See* Cal. Rules of Court, Rule § 3.769(d) ("The court may make an order approving or denying certification of a provisional settlement class after the preliminary settlement hearing."). Cal. Code Civ. Proc. § 382 authorizes a class action where "the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." "To obtain certification, a party must establish the existence of both an ascertainable class and a well-defined community of interest among the class members." *Linder v. Thrifty Oil Co*., 23 Cal. 4th 429, 435 (2000), *as modified* (Aug. 9, 2000). "In addition, the assessment of suitability for class certification entails addressing whether a class action is superior to individual lawsuits or alternative procedures for resolving the controversy." *Bufil v. Dollar Fin. Grp., Inc*., 162 Cal. App. 4th 1193, 1204 (2008), *disapproved of on other grounds by Noel v. Thrifty Payless, Inc*., 7 Cal. 5th 955, 986 n.15 (2019).

When certification is for settlement purposes only, California courts apply a "lesser standard of scrutiny" to certification. *Dunk*, 48 Cal. App. 4th at 1802 n.19; *see also Luckey v. Superior Court*, 228 Cal. App. 4th 81, 93 (2014) (in the settlement context, "the court's evaluation of the certification issues is somewhat different from its consideration of certification issues when the class action has not yet settled"). This is because no trial is anticipated in the settlement-only context, so the case management issues inherent in the ascertainable class determination need not be confronted. *Luckey*, 228 Cal. App.

4th at 93-94. For the same reason, the trial court need not inquire whether the case, if tried, would present intractable management problems because the proposal is that there be no trial. *See Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Whether the class should be provisionally certified is left to the Court's discretion. *See Wershba*, 91 Cal. App. 4th at 234-35.

Plaintiffs request that the Court certify a Settlement Class consisting of "all persons to whom a Mailer was sent by Gilead and that was not returned as undeliverable." (Settlement Agreement § 1.1.W.) Here, each requirement for class certification is met and certification of the Settlement Class is warranted. Defendant has indicated it will not oppose certification of the Settlement Class as part of its agreement to settle this dispute on the terms described herein. However, in doing so, Defendant has also indicated that, if the settlement is not consummated, it reserves all of its arguments in opposition to class certification.

A. The proposed Class is ascertainable and numerous.

Numerosity is satisfied if the class is so large that joinder of all members would be impracticable. Cal. Code Civ. Proc. § 382. "No set number is required as a matter of law for the maintenance of a class action" and classes of as few as 28 members have been certified. *Rose v. City of Hayward*, 126 Cal. App. 3d 926, 934 (1981), *disapproved of on other grounds by Noel*, 7 Cal. 5th at 955. Here, there are an estimated 18,192 Settlement Class Members. Numerosity is satisfied. As for ascertainability, one method of establishing an ascertainable class is by reference to a defendant's records where class members "may be readily identified without unreasonable expense or time by reference to official records." *Noel*, 7 Cal. 5th at 986 n.15 (citations omitted). Here, the Settlement Class Members are identifiable from Defendant's records. (Settlement Agreement § 3.1.3.) Thus, the Class is ascertainable.

B. The community of interest requirements are met.

The "community of interest" requirements involve three factors: "(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." *Richmond v. Dart Indus., Inc*., 29 Cal. 3d 462, 470 (1981). Here, each element is met.

First, "to determine whether common questions of fact predominate the trial court must examine the issues framed by the pleadings and the law applicable to the causes of action alleged." *Hicks v. Kaufman & Broad Home Corp.*, 89 Cal. App. 4th 908, 916 (2001). "As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." *Id.* at 916. Here, Plaintiffs and Settlement Class

Members all received the same Mailer. Whether the Mailer contained their confidential medical information, whether Defendant had a duty to keep that information confidential, whether U.S. postal workers saw the Mailer, and whether Settlement Class Members sustained cognizable harm are all questions Plaintiffs assert are capable of resolution by common evidence.

Typicality is also met. "The test of typicality 'is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" *Johnson v. GlaxoSmithKline, Inc.*, 166 Cal. App. 4th 1497, 1509 (2008) (quoting *Seastrom v. Neways, Inc.*, 149 Cal. App. 4th 1496, 1502 (2007)). Typicality requires that the named plaintiff's interests in the action be significantly similar to those of other class members. When the same underlying conduct affects the named plaintiff and the class sought to be represented, the typicality requirement is met irrespective of varying fact patterns that may underlie individual claims. *See also Classen v. Weller*, 145 Cal. App. 3d 27, 46 (1983) ("[I]t has never been the law in California that the class representative must have *identical* interests with the class members."). In this case, the Plaintiffs received the same Mailer from Defendant as the Settlement Class. Plaintiffs also allegedly suffered the same or similar injuries as the rest of the class members—their confidential medical information was improperly disclosed, and their privacy invaded.

The adequacy requirement is also satisfied. To show adequacy, class representatives must establish that: (1) the representative plaintiffs and their counsel do not have any conflicts of interest with other class members, and (2) the representative plaintiffs and their counsel will prosecute the action vigorously on behalf of the class. *Janik v. Rucfy, Exelrod & Zief*, 119 Cal. App. 4th 930, 944 (2014). Here, Plaintiffs have represented the interests of the putative class throughout this litigation and have continued to represent those interests through settlement negotiations. They do not have any conflicts with the Settlement Class. Plaintiffs have engaged qualified counsel who are deeply experienced in complex class action litigation. (*See* Carson Decl. ¶¶ 11-15 & Exs. C-D).

C. A class action is the superior vehicle for adjudication.

Finally, a class action is a superior method of adjudication. Superiority is satisfied if "the class action proceeding is superior to alternate means for a fair and efficient adjudication of the litigation." *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 332 (2004). In a matter such as this, where the claims of all Settlement Class Members are identical and based on the same facts, but involve a modest amount of damages, it is clear that resolving this matter as a class action settlement will achieve economies of time, effort, and expense, and promote uniformity of results. *See Basurco v. 21st Century Ins.*, 108 Cal. App. 4th 110, 120-21 (2003).

VII. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court grant this motion and enter the proposed Preliminary Approval Order.

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Respectfully submitted,

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