

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

RHONDA L. HUTTON, O.D., *et al.*,

Plaintiffs

v.

**NAT'L BD. OF EXAM'RS
IN OPTOMETRY, INC.**

Defendant

*

*

*

*

CIVIL NO. JKB-16-3025

NICOLE MIZRAHI,

Plaintiffs

v.

**NAT'L BD. OF EXAM'RS
IN OPTOMETRY, INC.**

Defendant

*

*

*

*

CIVIL NO. JKB-16-3146

BRENDA LIANG, O.D., *et al.*,

Plaintiffs

v.

**NAT'L BD. OF EXAM'RS
IN OPTOMETRY, INC.**

Defendant

*

*

*

*

CIVIL NO. JKB-17-1964

ORDER AND FINAL JUDGMENT

**GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND
APPROVING FEES, COSTS, AND EXPENSES, AND SERVICE AWARDS**

This matter comes before the Court on Plaintiffs' Motion for Final Approval of Class Settlement (ECF No. 48) and Class Counsel's Motion for Attorneys' Fees, Costs, and Expenses, and Named Plaintiff Service Awards and Supplement thereto (ECF Nos. 47 and 48).

Procedural History

This case arises out of an alleged data breach of Defendant National Board of Examiners in Optometry, Inc. (“NBEO”)’s data systems occurring in or about the summer of 2016. NBEO is a nonprofit 501(c)(3) organization, with a stated mission “to protect the public by accurately assessing the competence of practicing optometrists.” Every optometry student must submit their personal information to NBEO to sit for certifying exams, and NBEO retains enrollment data to allow for the credentialing of optometrists that move from state to state.

On August 30, 2016, Plaintiffs Rhonda L. Hutton, O.D., and Tawny P. Kaeochinda, O.D., on behalf of themselves and all others similarly situated, filed a complaint in this Court alleging they had been victims of identity fraud after their personal information was compromised in a breach of NBEO’s data systems. ECF No. 1. On September 17, 2016, Plaintiff Nicole Mizrahi, O.D., on behalf of herself and all others similarly situated, filed a complaint in this Court making the same allegations. Case No. 16-3146 (“*Mizrahi*”), ECF No. 1. On October 22, 2016, NBEO moved to dismiss all the claims in both cases under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), ECF No. 11; *Mizrahi*, ECF No. 9. On March 22, 2017, this Court granted NBEO’s motion to dismiss pursuant to Rule 12(b)(1) for lack of standing. On April 19, 2017, Plaintiffs appealed that decision to the Fourth Circuit Court of Appeals. *See* Appeal Nos. 17-1506 and 17-1508.

On July 14, 2017, Plaintiffs Brenda Liang, O.D., Jessica Olendorff, O.D., Kristine Ferguson, O.D., Julie Wolf, O.D., Camilla Dunn, O.D., Mark Garin, O.D., Natalie West, O.D., Andrea Robinson, O.D., Priscilla Pappas-Walker, O.D., and Lauren Nelson, O.D., on behalf of themselves and all others similarly situated, filed a complaint in this Court making the same allegations against NBEO, with additional factual support and details supporting their claims. Case No. 17-1964 (“*Liang*”), ECF No. 1. On September 7, 2017, NBEO again moved to dismiss

Plaintiffs' claims pursuant to Rule 12(b)(1) and 12(b)(6). *Id.*, ECF No. 25. Following briefing, on December 18, 2017, this Court stayed *Liang* pending the resolution of the Fourth Circuit appeal, concluding the outcome of that appeal would govern further proceedings in that case. *Id.*, ECF No. 36.

On June 12, 2018, the Fourth Circuit issued an opinion vacating this Court's order dismissing the *Hutton* and *Mizrahi* cases for lack of standing and remanded the case for further proceedings. The Court of Appeals concluded the Plaintiffs had sufficiently alleged injury in fact that was fairly traceable to NBEO for the purposes of Article III standing. *See* Appeal No. 17-1506, Doc. 33; *Hutton v. Nat'l Bd. of Examiners in Optometry, Inc.*, 892 F.3d 613, 616 (4th Cir. 2018). The Court of Appeals issued its mandate on July 5, 2018. *See* Appeal No. 17-1506, Doc. 35.

On July 13, 2018, the Court lifted the stay in the *Liang* matter, ECF No. 38, and on September 28, 2018, the Court entered its order denying NBEO's motion to dismiss the *Liang* complaint pursuant to Rules 12(b)(1) and (b)(6). ECF No. 40. On October 3, 2018, the Court likewise denied NBEO's motions to dismiss the *Hutton* and *Mizrahi* complaints under Rule 12(b)(6) and its alternative motion to strike certain allegations. ECF No. 31. On November 12 and 15, 2018, NBEO filed its Answers to Plaintiffs' Complaints. ECF No. 38; *Liang*, ECF No. 43; *Mizrahi*, ECF No. 33. On November 30, 2018, this Court consolidated *Hutton*, *Liang*, and *Mizrahi* under case number 16-3025. ECF No. 40. On December 18, 2018, this Court entered the Scheduling Order that would govern the consolidated proceedings, and the parties initiated the discovery process.

Following the Fourth Circuit's decision, the parties began discussion of potential resolution of this case, participating in two full-day mediations before a mediator experienced in

complex litigation, Cathy Yanni of JAMS ADR, and negotiating directly between counsel over the course of several months. During this period, the parties exchanged preliminary discovery about the size and scope of the class, possible business practices changes by NBEO, the merits of Plaintiffs' claims, and potential mechanisms to mitigate future harm, including evaluating multiple purveyors of credit monitoring services to potentially include as part of a settlement. On January 23, 2019, the parties notified the Court that they had reached a Memorandum of Understanding resolving the litigation.

On March 4, 2019, Plaintiffs filed their unopposed motion to permit issuance of class notice of the proposed class action settlement pursuant to Federal Rule of Civil Procedure 23(e)(1). ECF No. 44. On March 7, 2019, this Court granted Plaintiffs' motion, indicating that it would likely approve the Settlement as fair, reasonable, and adequate, and that it would likely certify the Settlement Class for purposes of judgment. ECF No. 46. As part of its order, the Court appointed Norman E. Siegel and Austin Moore of Stueve Siegel Hanson as interim Class Counsel pursuant to Rule 23(g)(3), appointed Heffler Claims Group as Settlement Administrator, approved the parties' proposed form, content, and method of providing notice to class members, set deadlines for class members to object to or exclude themselves from the Settlement, and set a Final Approval Hearing for July 12, 2019. *Id.*

Direct mail and email notice began issuing to the class on March 28, 2019, informing class members of the terms of the Settlement, including how to submit a claim for cash reimbursement for out-of-pocket losses and time spent remedying issues related to the breach and for credit monitoring. The notice further informed class members that the deadline to submit an objection to the Settlement, or exclude themselves therefrom, was May 8, 2019. The notice informed class members that Class Counsel would seek their attorneys' fees from the Settlement Fund in an

amount up to 30% of the Settlement Fund, and reimbursement for costs and expenses of the litigation from the Settlement Fund of up to \$125,000. The notice also informed class members that service awards of \$2,000 for each Named Plaintiff would be sought.

On April 17, 2019, Class Counsel filed their motion for attorneys' fees, costs, and expenses, seeking 30% of the Settlement Fund, reimbursement of cost and expenses, and Service Awards for each of the 13 Named Plaintiffs of \$2,000 each. ECF No. 47. That motion and accompanying exhibits was posted to the Settlement Website the same day.

Final Approval and Judgment

Nothing has occurred that would alter the Court's initial analysis that the Settlement is fair, reasonable, and adequate. In fact, the response of the class members to the Settlement (only 16 requests for exclusion and no objections out of a directly noticed class containing over 61,000 class members) further underscores that the Settlement is, in fact, fair, reasonable, and adequate. Therefore, the Court, having reviewed the Settlement Agreement and Release, including the exhibits attached thereto (together, the "Settlement Agreement" or "Settlement"), the arguments and authorities presented by the parties and their counsel, and the record in the Action, and good cause appearing, hereby grants final approval of the class action settlement.

Accordingly,

IT IS HEREBY ORDERED:

1. Class Certification for Settlement Purposes Only.

The Settlement Agreement provides for a Settlement Class defined as follows:

All individuals who had their Personal Information stored on NBEO's systems prior to or as of November 15, 2018.¹

¹ "Personal Information" is defined in paragraph 25 of the Agreement as an individual's name combined with his or her nine-digit Social Security number. The Settlement Agreement appears at Exhibit A of Plaintiffs' motion to permit issuance of class notice. ECF No. 44. Excluded from the Settlement Class are (i) NBEO; (ii) any entity in which NBEO has a controlling interest; (iii) NBEO's officers, directors, legal representatives, successors, subsidiaries, and assigns; (iv) any judge, justice, or judicial officer presiding over the Actions and the members of

For the following reasons, the Court affirms that it is proper to certify, and hereby does finally certify, for settlement purposes only, the Settlement Class pursuant to Federal Rule of Civil Procedure 23(b)(3).

a. **Numerosity:** Rule 23(a)(1) requires that a proposed settlement class be “so numerous that joinder of all class members is impracticable.” Fed. R. Civ. P. 23(a)(1). Here, there are over 61,000 Settlement Class Members and numerosity is not in question.

b. **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). Here, the Settlement Class Members are joined by the common questions of law and fact that arise from the same alleged event—the data breach. The common questions include (1) whether NBEO’s data systems were breached; (2) if so, whether NBEO had a legal duty to adequately protect Settlement Class Members’ personal information; (3) whether NBEO breached that legal duty; and (4) whether Plaintiffs and members of the class suffered injury as a result of NBEO’s conduct or failure to act.

c. **Typicality:** Rule 23(a)(3) requires that “the claims or defenses of the representative parties [be] typical of the claims or defenses of the class.” “[T]he typicality requirement ensures that the claims of the class representative are sufficiently aligned with those of the other class members. Typicality is satisfied when the plaintiffs and the class have an interest in prevailing on similar legal claims.” *Chado v. Nat’l Auto Inspections, LLC*, No. CV ADC-17-2945, 2018 WL 3420018, at *6 (D. Md. July 13, 2018). Plaintiffs satisfy the typicality requirement because their claims arise from the same factual nexus and are based on the same legal theories as the claims of members of the Settlement Class. Like Plaintiffs, other Settlement Class members

their immediate families and judicial staff; and (v) any individual who timely and validly opts-out from the Settlement Class. Agreement, ¶ 33.

were subject to the alleged data breach and have suffered identity theft or fraud or remain at an imminent risk of future harm.

d. Adequacy of Representation: The adequacy requirement is satisfied when “the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). The Court finds that the proposed Settlement Class Representatives have fulfilled their responsibilities on behalf of the Settlement Class. The Court further finds that Plaintiffs’ Counsel have prosecuted the case vigorously and in the best interests of the Settlement Class. Adequacy of representation is satisfied.

e. Predominance and Superiority: Rule 23(b)(3) requires that “questions of law or fact common to class members predominate over any questions affecting only individual members,” and that class treatment is “superior to other available methods for fairly and efficiently adjudicating the controversy.” Where, as here, a court is “[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.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). The predominance requirement “tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Id.* at 623. Predominance does not require that all questions of law or fact be common, but rather that the “‘qualitatively overarching issue’ in the litigation is common.” *Soutter v. Equifax Information Servs., LLC*, 307 F.R.D. 183, 214 (E.D. Va. 2015) (quoting *Ealy v. Pinkerton Gov’t Servs., Inc.*, 514 F. App’x 299, 305 (4th Cir. 2013)). The many common questions of fact and law that arise from the alleged data breach and NBEO’s alleged conduct predominate over any individualized issues.

Finally, class resolution is superior to other available means for the fair and efficient adjudication of the claims in this case. Here, potential damages suffered by individual class

members are relatively low-dollar amounts and would be uneconomical to pursue on an individual basis given the burden and expense of prosecuting individual claims. Moreover, there is little doubt that resolving all class members' claims jointly, particularly through a class-wide settlement negotiated on their behalf by counsel well-versed in class action litigation, is superior to a series of individual lawsuits and promotes judicial economy.

2. Plaintiffs' Counsel and Settlement Class Representatives.

The Court concludes that Norman E. Siegel and Austin Moore of the firm of Stueve Siegel Hanson LLP have fairly and adequately represented the interests of the Settlement Class Members. Plaintiffs' Counsel have substantial experience in consumer class action litigation, and in particular data breach and privacy litigation, and were able to negotiate a well-informed Settlement that provides meaningful relief to Plaintiffs and the Class. The Court previously appointed Mr. Siegel and Mr. Moore as interim Class Counsel and now appoints them as Class Counsel pursuant to Federal Rule of Civil Procedure 23(g).

The Court further concludes that the 13 Named Plaintiffs have fairly and adequately represented the interests of the Settlement Class Members and now appoints them as Settlement Class Representatives.

3. Jurisdiction.

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d)(2) and personal jurisdiction over the parties before it. Additionally, venue is proper in this District pursuant to 28 U.S.C. § 1391.

4. Findings Concerning Notice.

The Court finds that the Notice Program has been implemented by the Settlement Administrator and the parties in accordance with the requirements of the Settlement Agreement,

and that such Notice Program, including the utilized forms of Notice, constitutes the best notice practicable under the circumstances and satisfies due process and the requirements of Rule 23 of the Federal Rules of Civil Procedure. The Court finds that the Settlement Administrator and the parties have complied with the directives of the Order Permitting Issuance of Notice, and the Court reaffirms its findings concerning notice as set forth in paragraph 5 thereof.

5. Findings Concerning Claims Process.

The Court finally approves the Claims Process as a fair and reasonable method to allocate the Settlement benefits among Settlement Class Members. The Court directs that the Settlement Administrator continue to effectuate the Claims Process according to the terms of the Settlement Agreement.

6. Requests for Exclusion and Objections to the Settlement.

Out of over 61,000 Settlement Class Members, only 16 requested exclusion from the Settlement (.026%) and none objected. This indicates strong support for the Settlement by Settlement Class Members and weighs strongly in favor of final approval.

7. Findings Concerning the Fairness, Adequacy and Reasonableness of the Settlement.

The Court finds that this Settlement reflects an outstanding result for the Class in a case that nevertheless carried some risk of lack of success for Plaintiffs. The Settlement provides significant monetary benefits to compensate class members for out-of-pocket losses and attested time spent dealing with issues related to the alleged data breach, as well as preventative relief in the form of credit monitoring services and important commitments by NBEO as to its data security practices. This relief compares favorably to settlements in other data breach class actions.

a. *The Settlement Class Representatives and Plaintiffs' Counsel Have Adequately Represented the Class.*

The Court finds that the Settlement Class Representatives and Plaintiffs' Counsel have provided excellent representation to the Settlement Class. They communicated with over 250 optometrists in the aftermath of the alleged data breach and investigated each of their circumstances. They successfully appealed the Article III standing issue to the Fourth Circuit Court of Appeals, and while that appeal was pending, they filed the *Liang* case to continue representing the interests of Class Members. Plaintiffs' Counsel negotiated a multi-faceted settlement that was well received by the Class, as evidenced by the strong class participation rate and lack of objections. Plaintiffs' Counsel's view that the Settlement is fair, reasonable, and adequate, and in the best interests of the Settlement Class, supports approval of the Settlement in light of their experience in this field.

In addition, the Court finds the 13 Settlement Class Representatives have adequately represented the class. Each of them provided detailed information of the circumstances of the fraud they each experienced and their relationship with NBEO that was vital to Counsel's investigation and litigation of the class's claims. Furthermore, each of them has remained active in the case, communicating with Plaintiffs' Counsel during subsequent phases of the case and, in particular, reviewing and approving the terms of the Settlement as being in the best interests of the class.

b. *The Settlement was Negotiated at Arm's Length.*

The Parties reached the Settlement after two in-person mediations before a mediator experienced in complex litigation, Cathy Yanni of JAMS ADR, and months of negotiations between counsel. The parties exchanged preliminary discovery during this time that allowed Plaintiffs' Counsel to effectively value the Plaintiffs' claims and the Settlement. The

circumstances surrounding the parties' negotiations, including their reliance on a neutral mediator experienced in complex litigation, indicate the Settlement is fair and that it should be approved. *See* Comment to December 2018 Amendment to Fed. R. Civ. P. 23(e) (“[T]he involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests.”).

c. *The Relief Provided for the Class is Meaningful.*

The Settlement provides multiple beneficial forms of relief to the Settlement Class, including reimbursement for out-of-pocket losses, reimbursement for attested time spent dealing with the alleged data breach, credit monitoring and identity restoration services, and business practices changes by NBEO. Recovery for time spent dealing with the data breach, in particular, is highly beneficial to data breach victims, who often have little in the way of out-of-pocket loss, but who are required to spend tremendous amounts of time dealing with the effects of a data breach. This Settlement allows class members to be reimbursed for up to 40 hours at \$25 per hour. This relief, in comparison to the likely costs, risks, and delay of trial and appeal, warrants approval of the Settlement. In addition, the Court finds that the claims process and method of distributing relief to the class supports approval of the Settlement. The Court finds that the claim form and claims process is simple and easy to understand. The claims rate in this case bolsters this finding. In addition, as discussed more fully below, the Court finds the terms of the proposed attorneys' fee award support approval.

d. *The Settlement Treats Class Members Equitably Relative to Each Other.*

Each class member has the same opportunity to claim benefits under the Settlement in relation to the harm suffered, including prospective protection for future harm. The Settlement Class Representatives, likewise, are entitled to the same opportunities as the rest of the class, with

the addition of the modest service awards Class Counsel has sought on their behalf for their important and necessary contribution to this litigation. This factor supports approval of the Settlement.

8. Final Approval Hearing.

The Court held a Final Approval Hearing on July 12, 2019. Following argument from the parties, the Court concludes as follows: (a) this matter is certified as a class action for settlement purposes pursuant to Federal Rule of Civil Procedure 23(b)(3) and (e); (b) the Settlement is approved as fair, reasonable, and adequate and is finally approved pursuant to Rule 23(e); (c) the Plaintiffs' Complaints are dismissed with prejudice pursuant to the terms of the Settlement Agreement; and (d) Settlement Class Members, except those who timely excluded themselves—Robert H. Flowers, Stephanie J. He, Emily M. Korszen, Tressa L. Larson, Lynn M. Lester, Jasmine Lynn, Shane M. Maag, Nicole A. Maierhoffer, Ingrid Mooney, Viral M. Patel, Anthony G. Podloski, Jennifer Scurlock, Christos Sierros, Cindy W. Siu, Timothy C. Thomas, and Koran L. Zehnder—are bound by the releases set forth in the Settlement Agreement.

9. Releases.

As of the Effective Date, the Releases (ECF No. 44-1 at ¶¶ 89-90) shall be deemed to have, and by operation of this Order and the Final Judgment shall have, fully and irrevocably released and forever discharged the parties from all released claims as more fully set forth in Section XII of the Settlement Agreement.

10. Final Judgment.

There is no just reason to delay entry of this Order and Final Judgment, and immediate entry by the Clerk of the Court is directed pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. For the reasons set forth herein, the Court hereby (1) certifies the Settlement Class

pursuant to Federal Rule of Civil Procedure 23(b)(3) and (e); (2) grants final approval of the Settlement; and (3) enters final judgment in this Action. The parties are ordered to carry out the Settlement as provided in the Settlement Agreement.

11. Dismissal and Continuing Jurisdiction.

The Court hereby dismisses this Action with prejudice except the Court retains jurisdiction over this action and the parties, attorneys, and Settlement Class Members for all matters relating to this action, including (without limitation) the administration, interpretation, effectuation, or enforcement of the Settlement Agreement and this Order.

Attorneys' Fees, Costs, and Expenses and Class Representative Service Awards

For the reasons set forth below, the Court finds that an attorneys' fee award in the amount of \$975,000 is fair and reasonable, along with litigation expense reimbursement in the amount of \$64,375.16 and service award payments to each of the 13 Settlement Class Representatives in the amount of \$2,000. Accordingly,

IT IS HEREBY ORDERED:

1. Attorneys' Fees:

Class Counsel seek an award of attorneys' fees of 30% of the \$3,250,000 Settlement Fund, or \$975,000. The Court finds that 30% percent is a fair and reasonable percentage of the Settlement Fund based upon the context, size, and dimensions of this particular case.² The Court also finds that \$975,000 is a reasonable award in relation to the benefits provided by the Settlement, which include not only the \$3,250,000 in benefits that will be distributed to the class in the form of (1) cash reimbursement for time spent dealing with the alleged data breach for up to 40 hours at \$25 per hour, which appears to be more than any other data breach settlement before it, (2) cash

² The Court does not endorse 30% as a rigidly required percentage in all cases because a significantly larger case may well justify a lower percentage.

reimbursement for documented out-of-pocket losses related to the alleged data breach, and (3) three-bureau credit monitoring, the retail value of which is \$720 per enrollee, but also the substantial but unquantifiable value of the injunctive relief provided by the Settlement, which is designed to protect all NBEO exam-takers' personal information going forward. As such, the fee award is reasonable as a percentage of the benefit conferred on the Settlement Class and is commensurate with percentages approved in common fund settlements in this District.

The time spent by Plaintiffs' Counsel on the case through final approval produced a lodestar of \$1,194,147.70—resulting in a negative multiplier of 0.82. The Court has reviewed the evidence Class Counsel has submitted in support of the lodestar, including the hours spent on the litigation through June 19, 2019, and the hourly rates of Plaintiffs' Counsel. The Court finds that the hours spent are reasonable, but the Court does not endorse the hourly rates. The multiplier here is less than one, which means that the requested fee is less than the amount that would be awarded using the lodestar method. However, the Court need not address the reasonableness of the lodestar amount since the amount requested—30% of the Settlement Amount—is consistent with what NBEO agreed to pay in the Settlement Agreement. The Court affirms the right of contracting parties to establish their own parameters for calculation of attorneys' fees.

The Court further finds that the requested attorneys' fee is reasonable in light of (1) the results obtained for the class, as discussed above; (2) the quality, skill, and efficiency of the attorneys involved; (3) the possibility of nonpayment; (4) the fact that no class members objected to the settlement terms and/or fees requested by counsel; (5) awards in similar cases; (6) the complex and novel nature of the case, and its duration at this Court and through appeal to the Fourth Circuit Court of Appeals; and (7) public policy, which supports compensating attorneys for their efforts in prosecuting cases to remedy large-scale problems that would not be financially

practicable to litigate on an individual basis. Thus, the Court approves Class Counsel's request for 30% of the \$3,250,000 Settlement Fund, or \$975,000.

2. Litigation Costs and Expenses:

Class Counsel has requested \$64,375.16 in litigation expenses incurred prosecuting this case. There is no objection to the reimbursement of litigation costs and expenses and the Court finds reimbursement in the amount of \$64,375.16 is appropriate and reasonable.

3. Service Awards:

Class Counsel seeks service awards of \$2,000 for each Settlement Class Representative. The Court finds this amount is fair and appropriate in this case. The thirteen Settlement Class Representatives stepped forward to represent the interests of the Settlement Class and consulted with counsel in the assertion of their claims and are, therefore, entitled to modest awards to compensate them for their time and effort on behalf of the Settlement Class.

Therefore, for the reasons set forth above, the Court hereby awards (1) attorneys' fees in the amount of \$975,000 to be allocated and distributed among lawyers representing Plaintiffs at the sole discretion of Class Counsel; (2) reimbursement of costs and expenses in the amount of \$64,375.16; and (3) service awards in the amount of \$2,000 for each of the Settlement Class Representatives, with each of the foregoing payments to be made from the Settlement Fund.

The Clerk SHALL CLOSE these cases.

DATED this 15 day of July, 2019.

BY THE COURT:



James K. Bredar
Chief Judge