Matthew J. Preusch (SBN 298144)
mpreusch@kellerrohrback.com
KELLER ROHRBACK L.L.P.
1129 State Street, Suite 8
Santa Barbara, CA 93101
T: (805) 456-1496
F: (805) 456-1497

Lynn Lincoln Sarko, *admitted pro hac vice*
lsarko@kellerrohrback.com
KELLER ROHRBACK L.L.P
1201 Third Avenue, Suite 3200
Seattle, WA 98101
T: (206) 623-1900
F: (206) 623-3384

Daniel C. Girard (SBN 114826)
dcg@girardgibbs.com
GIRARD GIBBS LLP
601 California Street, 14th Floor
San Francisco, CA 94108
T: (415) 981-4800
F: (415) 981-4846

Michael W. Sobol (SBN 194857)
msobol@lchb.com
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
T: (415) 956-1000
F: (415) 956-1008

Interim Co-Lead Class Counsel

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL CORONA, CHRISTINA MATHIS, et al., individually and on behalf of others similarly situated,

Plaintiffs,

vs.

SONY PICTURES ENTERTAINMENT, INC.,

Defendant.

CASE NO. 2:14−CV−09600−RGK−E

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

Hearing Date: September 14, 2015
Time: 9:00 a.m.
Courtroom: 850
Judge: Hon. R. Gary Klausner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. Introduction

This case arises out of the breach of Sony Pictures Entertainment, Inc.'s computer networks that was first publicized in November 2014. The hackers obtained the personally identifiable information ("PII") of thousands of current and former SPE employees and subsequently posted the PII of tens of thousands of employees on the Internet. Plaintiffs' expert describes those now publicly-available files as a "treasure trove of high-risk information" for cyber criminals. The data breach is unprecedented both in its breadth and the sensitive nature of the PII that was compromised and publicly revealed, exposing SPE employees to a substantial and long-term risk of identity fraud.

Plaintiffs, who are eight of the affected SPE employees, move for certification under Federal Rule of Civil Procedure 23(a) and (b)(3) of a class of all current and former SPE employees in the United States whose PII was compromised and posted on the Internet as a result of the data breach. Class certification is appropriate because the proposed class satisfies the Rule 23(a) prerequisites. The class is too numerous for joinder to be practicable. Several common questions of law and fact exist, including whether SPE's data security was adequate. Because Plaintiffs and class members were all victims of the same data breach and are harmed in the same manner, Plaintiffs are typical of the class. The adequacy requirement is also satisfied, as Plaintiffs have no conflicts with class members, have retained experienced counsel, and are vigorously pursuing class members' claims. Finally, the proposed class is ascertainable because Plaintiffs have defined the class based on objective criteria and class members can be identified from available records.

The proposed class also satisfies the predominance and superiority requirements of Rule 23(b)(3). The focus of all of Plaintiffs' claims is SPE's conduct and the claims will therefore be proven with common evidence. The resolution of common questions, using common proof, will predominate at trial over any individualized inquiries, including with respect to damages, as Plaintiffs' experts have provided an appropriate model for determining classwide damages. Resolving class members' claims in a single proceeding

is superior to a multitude of individual suits, particularly given the prohibitive costs of litigating separate suits against SPE. Because the proposed class satisfies the requirements of Rule 23(a) and (b)(3), Plaintiffs request that the Court grant their motion.

II. Factual Background

A. Class Members' PII Was Exposed on the Internet

On November 24, 2014, reports began to appear in the press of a massive data breach at SPE. A few days later, the hackers began publicly releasing large portions of the stolen data. Over the next several weeks, the hackers posted an estimated 38 million files containing, among other things, SPE employees' names, addresses, birth dates, Social Security numbers, visa and passport numbers, federal tax records, payroll and other compensation data, performance reviews, bank account and credit card information, criminal background checks, and information about benefits, data that "provides a treasure trove of high-risk information and is precisely what cyber criminals need in order to commit sophisticated identity theft crimes for many years." ¶¶ 23-26, 29, 65;[1] Ponemon Report, ¶¶ 17, 35;[2] Girard Decl., Ex. 4; Ex. 5 at 56:11-23, 57:7-11, 76:23-77:22, 78:12-24, 147:24-148:2, 148:9-13. The files also contained medical information of SPE employees and their family members, including details about their health conditions, diagnosis, and other HIPAA-protected health information. ¶¶ 30, 65, 67; Ponemon Report, ¶¶ 17, 26-27; Girard Decl., Ex. 4; Ex. 5 at 56:24-25, 148:3-8, 148:15-20, 155:11-156:2, 173:16-175:8; Ex. 6.[3] The hackers also used the PII to threaten SPE employees, including with the release of more of their PII. ¶¶ 27-28.

[1] "¶ __" refers to paragraphs in Plaintiffs' Amended Class Action Complaint, ECF No. 43.

[2] The report of Dr. Larry Ponemon is attached as exhibit 1 to the Girard Declaration.

[3] *See also* Sharon Pettypiece, *Sony Hack Reveals Health Details on Employees, Children*, Bloomberg (Dec. 11, 2014 12:27 pm), http://www.bloomberg.com/news/articles/2014-12-11/sony-hack-reveals-health-details-on-employees-and-their-children; Daniela Hernandez & Kashmir Hill, *The Sony Pictures hack included many employees' detailed medical information*, fusion.net (Dec. 4, 2014 6:27 pm), http://fusion.net/story/31541.

B. The Data Breach Resulted from SPE's Deficient Data Security

Plaintiffs allege that SPE's failure to take reasonable care in securing its employees' PII caused the data breach and subsequent exposure of class members' PII. ¶¶ 42-60. As the chief security strategist for FireEye, the company SPE hired to help investigate the breach, candidly told the Wall Street Journal, "what's unfortunate about this breach is the techniques that were used are not particularly sophisticated."[4]

SPE knew its data security was inadequate. SPE and its sister companies experienced multiple prior data breaches that exposed significant weaknesses in the Sony companies' security measures, including the 2011 breach of the Sony PlayStation Network that compromised information from over 75 million customer accounts, and which experts attributed to an unsophisticated method of hacking that would not have been successful if the most basic security measures had been in place. ¶ 33.[5] Hackers were able to breach SPE's network in 2011 and steal the unencrypted account information of over one million customers. ¶ 37. Another breach of SPE's network in February 2014 compromised the data of hundreds of individuals. ¶ 40. The Sony companies were such a frequent target that PCWorld referred to Sony as "the target du jour for hackers everywhere" and cautioned other companies to "follow security best practices and data security compliance requirements. Don't be a Sony." ¶ 38.[6]

In addition, audits conducted both internally and by outside companies identified significant vulnerabilities in SPE's data security, including the methods SPE used to protect its employees' PII. ¶¶ 43-46, 50-53, 58; *see also* Ponemon Report, ¶ 36

[4] *See How the Sony Data Breach Changes Cybersecurity*, The Wall Street Journal (Feb. 9, 2015 11:00 pm), http://www.wsj.com/articles/how-the-sony-data-breach-signals-a-paradigm-shift-in-cybersecurity-1423540851.

[5] *See* Fahmida Y. Rashid, *Sony Networks Lacked Firewall, Ran Obsolete Software: Testimony*, eWeek (May 6, 2011), http://www.eweek.com/c/a/Security/Sony-Networks-Lacked-Firewall-Ran-Obsolete-Software-Testimony-103450.

[6] *See* Tony Bradley, *Sony Hacked Again: How Not to Do Network Security*, PCWorld (June 3, 2011 9:58 am), http://www.pcworld.com/article/229351.

(explaining that SPE did not follow "prudent security practices").[7] Nonetheless, SPE devoted meager resources to data security, assigning only eleven employees to its information security team, and repeatedly ignored warnings about security gaps and violations. ¶¶ 45-46, 51. SPE's view, as explained by its senior vice president of information security, was that "it's a valid business decision to accept the risk" of a security breach. ¶ 43.[8]

C. Class Members Face Long-Term Risk of Identity Fraud

As this Court recognized, "it is reasonable to infer that the data breach and resulting publication of [class members'] PII has drastically increased their risk of identity theft, relative to both the time period before the breach, as well as to the risk born by the general public. It is commonly known that the consequences resulting from identity theft can be both serious and long-lasting." ECF No. 97 at 5. Plaintiffs' expert Larry Ponemon, Ph.D., one of the foremost experts on data privacy and identity theft, confirms that all class members face an increased risk of identity fraud for many years to come since their exposed PII "is precisely what cyber criminals need in order to commit sophisticated identity theft crimes for many years." Ponemon Report, ¶ 35; *see also id.*, ¶¶ 24-32, 37-39. SPE itself acknowledged that the data breach put class members at a heightened risk of identity fraud when it enrolled all of its current and former employees in credit monitoring services in the wake of the breach, and provided them with information about how to prevent identity fraud. *Id.*, ¶ 22; Girard Decl., Ex. 4. While a step in the right direction, the limited services SPE offered are insufficient because they will not prevent identity fraud and are only available for a year even though class members will face an increased risk of identity fraud for many years to come. Ponemon Report, ¶¶ 22, 28-31, 39.

[7] *See* Peter Elkin, *Inside the Hack of the Century*, Fortune (June 27, 2015), http://www.fortune.com/sony-hack-part-two (detailing lax data security practices at SPE).

[8] *See* Kashmir Hill, *Sony Pictures hack was a long time coming, say former employees*, fusion.net (Dec. 4, 2014 10:46 am), http://fusion.net/story/31469.

Class members face a particularly heightened risk given the sensitive and irreplaceable nature of the PII that was exposed, which can never be made private again. Unlike the credit and debit card numbers stolen in some of the other recent high-profile data breaches, this type of information cannot simply be changed. Class members are at a heightened risk of credit card fraud, financial identity fraud, medical identity fraud, social identity fraud, and income tax fraud. Ponemon Report, ¶¶ 24-27, 30-31.

Not surprisingly, several of the plaintiffs have already been victims of identity fraud. Ms. Bailey and Ms. Archibeque were notified that their PII was available for purchase on black market websites. ¶¶ 98, 115. An identity thief attempted to open a PayPal credit card using Mr. Forster's PII. ¶ 93. Plaintiff Shapiro was notified by Chase that someone tried to make a large purchase using his account, and discovered credit card accounts opened in his name on his credit report. Shapiro Decl., ¶ 4. And an identity thief charged a $3,845.50 purchase to Mr. Corona's credit card. Corona Decl., ¶ 4.

III. Class Certification Should Be Granted

Plaintiffs requesting class certification must demonstrate "that they have met each of the four requirements of Federal Rule of Civil Procedure 23(a) and at least one of the requirements of Rule 23(b)." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979-80 (9th Cir. 2011). Courts must "engage in a 'rigorous analysis' of each Rule 23(a) factor when determining whether plaintiffs seeking class certification have met the requirements of Rule 23." *Id.* at 980 (quoting *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982)). "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen Inc. v. Conn. Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1195 (2013). Courts have broad discretion to certify a class "[w]here the party seeking class certification has met its burden." *In re Heritage Bond Litig.*, Nos. MDL 02-ML-1475, et al., 2004 WL 1638201, at *2 (C.D. Cal. July 12, 2004). "Neither the possibility that a plaintiff will be unable to prove his allegations, nor the possibility that the later course of the suit might unforeseeably prove the original decision to certify the

class wrong, is a basis for declining to certify a class which apparently satisfies Rule 23." *United Steel, Paper & Forestry, Rubber, Manufacturing Energy, Allied Industrial & Service Workers Int'l Union v. ConocoPhillips Co.*, 593 F.3d 802, 809 (9th Cir. 2010) (brackets omitted) (quoting *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975)).

Plaintiffs request certification of a class of all current and former SPE employees in the United States whose PII was compromised and posted on the Internet as a result of the data breach publicized in November 2014. As discussed below, the proposed class satisfies the requirements of Rule 23(a) and (b)(3).

A. The Class Is So Numerous That Joinder Is Impracticable

Plaintiffs satisfy the numerosity requirement because the class "is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Plaintiffs do not have to know the exact number of class members to satisfy the numerosity requirement. "Impracticable" does not mean "impossible." *Cervantez v. Celestica Corp.*, 253 F.R.D. 562, 569 (C.D. Cal. 2008). "[A] proposed class of at least forty members presumptively satisfies the numerosity requirement." *Nguyen v. Radient Pharmaceuticals Corp.*, 287 F.R.D. 563, 569 (C.D. Cal. 2012). The precise number of class members can and will be demonstrated through available records—including the files that were posted on the Internet, collected by SPE, and produced to Plaintiffs. Ponemon Report, ¶ 27. Media reports have placed the number of SPE employees whose PII was posted on the Internet in the tens of thousands. *See, e.g.*, Peter Elkin, *Inside the Hack of the Century*, Fortune (June 27, 2015), http://www.fortune.com/sony-hack-part-1 (files with 47,000 Social Security numbers and salary information were posted on file-sharing sites); Kevin Roose, *More from the Sony Pictures hack: budgets, layoffs, HR scripts, and 3,800 social security numbers*, Fusion (Dec. 2, 2014), http://fusion.net/story/30850 (the files posted on the Internet included 3,803 employees' names, birth dates and Social Security numbers).[9]

[9] SPE's Rule 30(b)(6) designee on the topic of the PII that was posted on the Internet would not provide an exact number, but acknowledged the numbers reported by the media and testified that she thought those estimates seemed "reasonable." Girard Decl.,

Because joining thousands of class members is impracticable, the proposed class is sufficiently numerous.

B. There Are Questions of Law and Fact Common to the Class

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." The commonality requirement has "'been construed permissively' and '[a]ll questions of fact and law need not be common to satisfy the rule.'" *Ellis*, 657 F.3d at 981 (alteration in original) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)); *see also Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010) (noting that "common" does not mean "complete congruence"). "That 'commonality only requires a single significant question of law or fact' was recently recognized by both the Supreme Court and the Ninth Circuit." *Vietnam Veterans of America v. C.I.A.*, 288 F.R.D. 192, 212-13 (N.D. Cal. 2012)) (citations omitted) (citing cases). As the Supreme Court has explained, the common questions must "generate common *answers*" that are "apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (citation omitted). Commonality is thus satisfied where the claims of all class members "depend upon a common contention ... of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*

The common factual question of what efforts SPE took to safeguard its employees' PII satisfies the commonality requirement. *See In re Heartland Payment Systems, Inc. Customer Data Security Breach Litig.*, 851 F. Supp. 2d 1040, 1054 (S.D. Tex. 2012).). SPE's practices "uniformly affect[ed] every data breach victim" and "SPE made no attempt to differentiate victims after the data breach incident." Ponemon Report, ¶¶ 18, 21. Additional common questions include (1) whether SPE had a duty to maintain

---

Ex. 5 at 80:23-81:7, 91:9-16, 112:10-113:22. It was apparent from the designee's testimony that SPE, or a third party consultant working at SPE's direction, has already determined the number of SPE employees affected, although SPE's counsel asserted that information was privileged and refused to allow SPE's designee to testify about it. *Id.* at 81:8-15, 100:23-101:5, 116:17-120:5.

adequate security for its employees' PII; (2) whether SPE breached its duty to safeguard its employees' PII; (3) whether SPE negligently released class members' PII; (4) whether the harm of SPE's conduct outweighed its utility; and (5) whether SPE knew and failed to disclose that its data security was inadequate and vulnerable to attack.

C. Plaintiffs' Claims Are Typical of the Class

Rule 23(a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." The typicality requirement is intended "to assure that the interest of the named representative aligns with the interests of the class." *Wolin v. Jaguar Land Rover North America*, 617 F.3d 1168, 1175 (9th Cir. 2010) (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). Typicality exists when the class representatives and the class members are subject to and injured by the same course of conduct. *Ellis*, 657 F.3d at 984. "Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." *Id*. (quoting *Hanon*, 976 F.2d at 508). Therefore, "[l]ike the commonality requirement, the typicality requirement is 'permissive' and requires only that the representative's claims are 'reasonably co-extensive with those of absent class members; they need not be substantially identical.'" *Rodriguez*, 591 F.3d at 1124 (quoting *Hanlon*, 150 F.3d at 1020). "[I]t is not necessary that all class members suffer the same injury as the class representative." *Lozano v. AT&T Wireless Services, Inc.*, 504 F.3d 718, 734 (9th Cir. 2007).

Plaintiffs' claims are typical of the claims of all proposed class members because they all provided SPE with their PII during the course of their employment, their PII was compromised in the data breach and posted on the Internet, and they are all subject to "an increase in exposure to identity theft crimes" as a result. ¶¶ 78, 80, 84, 86, 90-91, 96, 100-01, 106-07, 112, 119, 122; Ponemon Report, ¶¶ 20, 24-32, 37-39. Plaintiffs and class members were therefore all subject to and injured by the same conduct, and have the same interest in pursuing their claims against SPE. The typicality requirement is satisfied.

D. Plaintiffs Are Adequate Representatives of the Class

Rule 23(a)(4) is satisfied when the class representatives will "fairly and adequately protect the interests of the class." To make this determination, "courts must resolve two questions: '(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?'" *Ellis*, 657 F.3d at 985 (quoting *Hanlon*, 150 F.3d at 1020). "Adequate representation depends on, among other factors, an absence of antagonism between representatives and absentees, and a sharing of interest between representatives and absentees." *Id.* In considering the adequacy of plaintiffs' counsel, the court must consider "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A).

Because Plaintiffs' claims are typical of the class, they have no conflicts with class members. Plaintiffs have also committed to prosecute the case vigorously on behalf of all class members. Plaintiffs' Declarations, ¶ 3. Plaintiffs have retained counsel with substantial experience in litigating privacy claims and class actions generally.[10] Plaintiffs' counsel have devoted a significant amount of time to identifying and investigating the potential claims and pursuing discovery in this matter, and will continue to commit the resources necessary to represent the class. Girard Decl., ¶ 2. Plaintiffs and their counsel have demonstrated their commitment to prosecuting this case on behalf of all class members and thus satisfy the adequacy requirement.

E. The Proposed Class Is Ascertainable

Courts have implied a requirement that the class to be certified be ascertainable. *Allen v. Hyland's Inc.*, 300 F.R.D. 643, 658 (C.D. Cal. 2014). To satisfy this requirement,

[10] Information about the firms' experience can be found on their websites: lchb.com, girardgibbs.com, and krcomplexlit.com.

"[a] class definition should be precise, objective, and presently ascertainable," although "the class need not be so ascertainable that every potential member can be identified at the commencement of the action." *O'Connor v. Boeing North America, Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998). "An ascertainable class exists if it can be identified through reference to objective criteria, and subjective standards such as a class member's state of mind should not be used when defining the class." *Guido v. L'Oreal, USA, Inc.*, Nos. CV 11-1067 CAS, 1105465 CAS, 2013 WL 3353857, at *18 (C.D. Cal. July 1, 2013). "The identity of class members need not, however, be known at the time of class certification." *Allen*, 300 F.R.D. at 658. The ascertainability requirement is satisfied in this case because the proposed class is defined by objective criteria (SPE employees whose PII was compromised in the data breach and posted on the Internet), and the identity of class members can be determined from available records that show the PII that was posted on the Internet. Ponemon Report, ¶ 27. SPE has gathered the files containing employee PII that were posted on the Internet and produced them to Plaintiffs. SPE's Rule 30(b)(6) designee confirmed that the employees whose PII was posted on the Internet can be identified by reference to these files. Girard Decl., Ex.5 at 89:15-90:2.

F. Common Issues Predominate

The predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997). Predominance is satisfied when "[a] common nucleus of facts and potential legal remedies dominate [the] litigation." *Hanlon*, 150 F.3d at 1022. Plaintiffs are not required to prove that each element of their claims is "susceptible to classwide proof." *Amgen*, 133 S. Ct. at 1196 (citation omitted). Rather, "[w]hen common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon*, 150 F.3d at 1022. (citation omitted). In addition, "[t]he amount of damages is invariably an individual question and does not defeat class action treatment." *Blackie*, 524 F.2d at 905; *see also*

Leyva v. Medline Industries Inc., 716 F.3d 510, 513-14 (9th Cir. 2013) (holding that the district court abused its discretion in finding that individualized issues of damages precluded class certification).

1. A Common Nucleus of Facts and Potential Legal Remedies Dominates the Litigation

In this case, all class members' claims stem from a single event, the data breach. The focus of each of Plaintiffs' claims is on SPE's conduct: whether SPE had reasonable security measures in place and adequately protected class members' PII. The core issues will be resolved through common proof and resolution of these central common issues will predominate at trial over any individualized inquiries. *See, e.g., In re Countrywide Financial Corp. Customer Data Security Breach Litig.*, No. 3:08-MD-01998, 2009 WL 5184352, at *6-7 (W.D. Ky. Dec. 22, 2009) (finding the predominance requirement satisfied in a data breach case because the required proof would focus on the defendant's conduct both before and during the theft of the class members' PII); *see also Local Joint Executive Board of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir. 2001) (reversing denial of certification because a "common nucleus of facts" dominated the litigation where the class members were all subject to a single event: termination of their employment on the same day with inadequate notice).

The predominance analysis "begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Haliburton Co.*, 131 S. Ct. 2179, 2184 (2011). "To determine whether common issues predominate, this Court must first examine the substantive issues raised by Plaintiffs and second inquire into the proof relevant to each issue." *Galvan v. KDI Distribution Inc.*, No. SACV 08-0999-JVS, 2011 WL 5116585, at *8 (C.D. Cal. Oct. 25, 2011) (citation omitted). An analysis of the elements of each of Plaintiffs' claims confirms that common issues predominate.

Negligence. To prove their claim for negligence, Plaintiffs must show that SPE had a duty to exercise reasonable care in protecting class members' PII, that SPE breached that duty, and that SPE's breach was a proximate cause of their injury. *See Ileto*

v. Glock Inc., 349 F.3d 1191, 1203 (9th Cir. 2003). Moreover, the elements of negligence claims vary little, if any, among states. As this district has previously recognized when examining Georgia law, the elements of a negligence claim are "almost universally … the existence of a legal duty; breach of that duty; a causal connection between the defendant's conduct and the plaintiff's injury; and damages." *In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, & Products Liability Litig.*, 978 F. Supp. 2d 1053, 1100 (C.D. Cal. 2013) (citation omitted). The issues of duty and breach are common to all class members because they focus on SPE's classwide data security policies and practices and will be proven with common evidence, including SPE's internal documents, testimony of its employees, and expert analysis. *See In re Hannaford Bros. Co. Customer Data Security Breach Litig.*, 293 F.R.D. 21, 30 (D. Me. 2013) (finding that the issue of the defendant's liability for negligence raised common issues).[11] Expert testimony will also establish class members' injuries, as discussed below. Causation is also common to all class members in this case, since Plaintiffs allege that SPE's failure to maintain adequate security was a substantial factor in causing their injury. *See Glock*, 349 F.3d at 1206-07.

CMIA. Like Plaintiffs' other claims, the focus of the CMIA claim is on SPE's conduct. Plaintiffs allege that SPE violated the CMIA by failing to "establish appropriate procedures to ensure the confidentiality and protection from unauthorized use" of class members' medical information, Cal. Civ. Code § 56.20(a), and by negligently releasing class members' medical information, Cal Civ. Code § 56.36(b). To prove their claim, Plaintiffs must show that SPE negligently maintained their medical information and that it was viewed or accessed by an unauthorized third party. *See Regents of the University of California v. Superior Court*, 220 Cal. App. 4th 549, 561-64, 570 (Cal. Ct. App. 2013); *see also Falkenberg v. Alere Home Monitoring, Inc.*, No. 13-cv-00341-JST, 2015 WL

[11] In *Hannaford*, the court denied class certification because the plaintiffs failed to provide the opinion of an expert who had looked at the data and stated his ability to testify as to the total damages. *Id.* at 33. As discussed below, Plaintiffs have provided the reports of Dr. Henry Fishkind and Dr. Larry Ponemon on classwide damages.

800378, at *3-4 (N.D. Cal. Feb. 23, 2015). Plaintiffs will prove these elements with common evidence of SPE's data security practices and the data breach, and with evidence of the SPE employees who had their medical information compromised. In addition to actual damages, Plaintiffs seek common injunctive relief and statutory damages under the CMIA, which are available to class members whose medical information was compromised even absent proof of actual damages. Cal. Civ. Code § 56.36(b)(1).

UCL. Plaintiffs allege that SPE's conduct violated the unfair, fraudulent and unlawful prongs of the UCL. SPE's conduct will be considered "unfair" if, after weighing the utility of the conduct against its harm, the Court determines that on balance SPE's conduct was unethical, unscrupulous, or "substantially injurious" to class members. *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1169 (9th Cir. 2012). The balancing test focuses on SPE's conduct. *See Gaudin v. Saxon Mortgage Services, Inc.*, 297 F.R.D. 417, 430 (N.D. Cal. 2013); *In re National Western Life Insurance Deferred Annuities Litig.*, 268 F.R.D. 652, 699 (S.D. Cal. 2010). Plaintiffs will prove this claim with common evidence, including documents, testimony, and expert analysis relating to SPE's data security practices.

Claims under the fraudulent prong are also well suited to class certification because "[r]elief under the UCL … is available 'without individualized proof of deception, reliance, and injury,' so long as the named plaintiffs demonstrate injury and causation." *Guido*, 2013 WL 3353857, at*10 (citation omitted); *see also Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1020 (9th Cir. 2011) (explaining that "the UCL's focus is on the defendant's conduct" and is "distinct from common law fraud" (citation omitted)). The central issue is whether SPE knew about and failed to disclose its deficient security practices, and Plaintiffs can prove their claim by presenting "generalized evidence" that SPE's conduct was "likely to deceive." *Keegan v. American Honda Motor Co., Inc.*, 284 F.R.D. 504, 533 (C.D. Cal. 2012).

Finally, SPE's conduct will be considered "unlawful" if it was negligent or violated the CMIA. Because each of these claims is independently appropriate for

certification, so is Plaintiffs' claim for violation of the UCL's unlawful prong. In addition, Plaintiffs seek only injunctive relief that is common to all class members in the form of changes to SPE's data security practices and the provision of identity theft protection, monitoring and recovery services. ¶ 217.

Declaratory judgment. Plaintiffs assert a claim under the federal Declaratory Judgment Act, which provides that "[i]n a case of actual controversy within its jurisdiction … any court of the United States … may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is our could be sought." 28 U.S.C. § 2201(a). Plaintiffs allege that an actual controversy exists because, in the wake of the data breach, SPE has an obligation to maintain reasonable security for class members' PII, and seek a declaration that SPE must implement certain industry-standard security practices to provide reasonable protection to class members' PII. ¶¶ 223-25. Whether there is an actual controversy requiring SPE to establish and maintain improved security measures is common to all class members, and will turn on common evidence of SPE's security practices and expert testimony.

Damages. Class members' damages "are capable of measurement on a classwide basis." *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013); *see also Guido v. L'Oreal, USA, Inc.*, Nos. 2:11-cv-01067-CAS, 2:11-cv-05465, 2014 WL 6603730, at *10-14 (C.D. Cal. July 24, 2014) ("the plaintiffs need only 'show that they *can* prove, through common evidence, that all class members were in fact injured'" (citation omitted)). First, the fixed statutory penalty under the CMIA of $1,000 per violation is available to all class members whose medical information was compromised. Cal. Civ. Code § 56.36(b)(1); Fishkind Report, ¶¶ 19, 52.[12] Second, Dr. Ponemon has explained that all class members will be subjected to heighted risk of identity fraud going forward for years to come, and Plaintiffs' economist, Dr. Henry Fishkind, has provided an appropriate and common model for measuring the reasonable costs (discounted to present value) that class members will incur to monitor and protect themselves from identity

[12] The report of Dr. Henry Fishkind is attached as exhibit 2 to the Girard Declaration.

fraud. Ponemon Report, ¶¶ 20, 24-32, 37-39; Fishkind Report, ¶¶ 12-53. Both the model and the sources of inputs that will be used in applying the model are common to the class.

SPE's defenses. Because SPE filed its answer at 11 p.m. on the eve of this filing, Plaintiffs do not yet have much information about SPE's affirmative defenses. Many appear to be common to class members, including SPE's first, third, fifth, seventh, tenth, eleventh, fourteenth, fifteenth, seventeenth, and eighteenth affirmative defenses. *See* Answer (ECF No. 104) at 28-30. Several of SPE's other affirmative defenses may be susceptible to common proof as well, including its defenses of comparative negligence, apportionment of fault, failure to mitigate, lack of proximate cause, and waiver, since SPE may make the same or similar arguments with respect to all class members. To the extent any of SPE's affirmative defenses raise individualized issues, the many common issues that are the focus of Plaintiffs' claims outweigh them. *See Rodman v. Safeway, Inc.*, No. 11-cv-3003-JST, 2015 WL 2265972, at *3 (N.D. Cal. May 14, 2015) ("[C]ourts traditionally have been reluctant to deny class action status under Rule 23(b)(3) simply because affirmative defenses may be available against individual members." (citation omitted)). In addition, the Court has several case management tools at its disposal to address individualized issues, if needed. *See, e.g., Brown v. Kelly*, 609 F. 3d 467, 486 (2d Cir. 2010); *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (identifying "imaginative solutions" courts may use to address individualized issues).

2. The Court May Apply California Law to All Class Members' State Law Claims

The Court may apply California law to all class members' claims for negligence, violation of the CMIA, and violation of the UCL. District courts must apply the choice-of-law principles of the state in which they sit for claims over which they exercise supplemental or diversity jurisdiction. *Klaxon v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 496 (1941); *Paracor Financial, Inc. v. General Electric Capital Corp.*, 96 F.3d 1151, 1164 (9th Cir. 1996). As the California Supreme Court has explained, "California law may be used on a classwide basis so long as its application is not arbitrary or unfair

with respect to nonresident class members" and "the interests of other states are not found to outweigh California's interest in having its law applied." *Washington Mutual Bank v. Superior Court*, 24 Cal. 4th 906, 921 (2001). "Under California's choice of law rules, the class action proponent bears the initial burden to show that California has 'significant contact or significant aggregation of contacts' to the claims of each class member." *Mazza v. American Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012) (quoting *Washington Mutual*, 24 Cal. 4th at 921). The burden then shifts to the defendant to demonstrate that the law of another state should apply. *Id.* at 590.

a. Application of California Law Is Not Arbitrary or Unfair

Application of California law to all class members is not arbitrary or unfair because California has "a significant contact or significant aggregation of contacts to the claims asserted by each member of the plaintiff class, contacts creating state interests." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985) (citation omitted). "[C]onduct by a defendant within a state that is related to a plaintiff's alleged injuries and is not 'slight and casual' establishes a 'significant aggregation of contacts, creating state interests, such that choice of its laws is neither arbitrary nor fundamentally unfair.'" *AT&T Mobility LLC v. AU Optronics Corp.*, 707 F.3d 1106, 1113 (9th Cir. 2013) (citations omitted). Examples of significant contacts include the location of the defendant's headquarters and the location of the challenged conduct. *In re Charles Schwab Corp. Securities Litig.*, 264 F.R.D. 531, 538 (N.D. Cal. 2009) ("California courts interpret *Shutts* to be satisfied where the defendant is headquartered in-state and the challenged conduct occurred within the state.").

This requirement is established in this case because SPE's headquarters is located in Culver City, California. The conduct at issue took place in California, since that is where SPE is headquartered, where its decision-makers are located, and where Plaintiffs and other class members were employed by SPE and provided SPE with their PII. ¶¶ 77, 83, 89, 95, 99, 105, 118; Girard Decl., Ex. 5 at 152:19-25. In addition, SPE's information security team is located in California. Girard Decl., Ex. 5 at 155:8-10, 183:18-184:5.

Many courts have found that similar contacts with California establish that application of California law to the claims of residents of other states is not arbitrary or unfair. *See, e.g.*, *Allen*, 300 F.R.D. at 656-57 (finding that the plaintiffs "sufficiently demonstrated that this action is tied to California, such that the application of California law would not be arbitrary or unfair" where the defendant was located in California and "engaged in a substantial amount of business in California"); *Wolph v. Acer America Corp.*, 272 F.R.D. 477, 485 (N.D. Cal. 2011) ("[W]here Acer is incorporated in California and has its principal place of business and headquarters in San Jose, California, consumers who purchase an Acer notebook would have some expectation that California law would apply to any claims arising from alleged defects such that the application of California law would not be arbitrary or unfair."); *Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365, 379 (N.D. Cal. 2010) ("Defendants are headquartered in California and their misconduct allegedly originated in California. With such significant contacts between California and the claims asserted by the class, application of the California consumer protection laws would not be arbitrary or unfair to defendants.").

b. No Other State Has a Greater Interest Than California in Having Its Laws Applied to These Claims

Because Plaintiffs have shown that California law can be constitutionally applied to all class members, the burden shifts to the defendants to demonstrate that the law of another state should apply. *Mazza*, 666 F.3d at 590; *see also Washington Mutual*, 24 Cal. 4th at 921. To determine whether the interests of other states outweigh California's interest, courts apply California's three-step government interest test: first, the court determines whether there are differences in the laws of the states that could apply; second, the court determines whether a "true conflict" exists; and third, if there is a true conflict, the court "compares the nature and strength" of the interest of each state in having its law applied to determine which state's interest would be most impaired if it was not applied. *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191, 1202 (2011).

Even if SPE is able to establish that there are material variations among the laws of the states where class members reside, SPE cannot show that any other state has a greater interest in having its law applied than California. Courts have recognized that California has a strong interest in regulating conduct that occurs within its borders, particularly when the defendant is located in California. *See Pecover v. Electronic Arts*, No. C 08-2820 VRW, 2010 WL 8742757, at *20 (N.D. Cal. Dec. 21, 2010) (explaining that California courts "have recognized California's interest in entertaining claims by nonresident plaintiffs against resident defendants" and citing cases); *Wolph*, 272 F.R.D at 486 (finding that California's interest in having its law applied outweighed other states' interests in having their laws applied because the all of the key conduct at issue occurred in California); *Parkinson v. Hyundai Motor America*, 258 F.R.D. 580, 598 (C.D. Cal. 2008) (finding that California's interest in having its law applied was greater than other states' interests when the wrongful acts underlying the plaintiffs' claims emanated from the defendant's California headquarters).

The interest of other states in having their laws applied is much more limited. While SPE has some current employees in other states, the majority of class members work in California or worked in California when they were employed by, and provided their PII to, SPE. Girard Decl., Ex. 5 at 152:19-25, ¶¶ 77, 83, 89, 95, 99, 105, 118. No other state has an interest in regulating SPE's data security practices within California. Nor does any state have an interest in shielding a California company from liability to its residents for conduct occurring entirely in California, particularly where greater protections may be available under California law. *See Galvan*, 2011 WL 5116585, at *14 ("To the extent that California laws conflict with any other state's law implicated in this matter, there is no evidence that a non-forum state has any interest in applying their laws over California's with respect to a California-based company, where the California law will likely afford the out-of-state customers greater protection."); *Pecover*, 2010 WL 8742757, at *20-21 ("Applying the laws of foreign states will not vindicate California's legitimate interests in deterring harmful conduct within its borders, whereas applying

California law to nonresident plaintiffs will vindicate foreign states' interests in compensating their residents.").

While the Ninth Circuit reached a different conclusion in *Mazza*, that case involved consumer protection claims based on consumers' purchases of products sold pursuant to misrepresentations in the consumers' home states. *Mazza*, 666 F.3d at 593. The court recognized that California emphasizes "the place of the wrong"—"the state where the last event necessary to make the actor liable occurred"—as having the predominant interest. *Id.* In *Mazza*, the place of the wrong was each class member's home state, where the alleged misrepresentations were communicated to and relied upon by the class members. *Id.* at 593-94. Under those circumstances, each consumer's home state had an interest in regulating the sale of products within its borders and protecting its residents from the allegedly wrongful conduct occurring within its borders. *Id.*; *see also McCann v. Foster Wheeler LLC*, 48 Cal.4th 68, 91-92 (2010) (recognizing that a state may have an interest in applying its "'business friendly' statute or rule of law" but only to "the activities of out-of-state companies within the jurisdiction"). In this case, the "place of the wrong" is California, where SPE is headquartered and where the data breach occurred. Under these circumstances, the interests of other states does not outweigh California's interest in having its laws applied, and the states' interests in protecting the rights of their residents are served by providing class members with the protections afforded by California law.

c. Alternatively, the Court May Certify a National Class for Declaratory Relief and State Subclasses

While Plaintiffs believe that certification of a nationwide class for all of their claims is appropriate, the Court may, in the alternative, certify subclasses of California, Colorado and Virginia residents in addition to a nationwide class. Because Plaintiffs' declaratory judgment claim is brought under federal law, certification of a nationwide class for that claim is appropriate. If the Court determines that Plaintiffs' other claims cannot be certified on behalf of a nationwide class, California subclass members would pursue claims for negligence, violation of the CMIA, and violation of the UCL, and

Colorado and Virginia subclass members would pursue claims for negligence under their state's law. The proposed subclasses satisfy the requirements of Rule 23(a) and (b)(3) and would be represented by plaintiffs who reside in the respective states.

G. Class Certification Is Superior to a Multitude of Individual Cases

Class certification is also the superior method for litigating class members' claims. The superiority requirement considers "whether the objectives of the particular class action procedure will be achieved in the particular case." *Hanlon*, 150 F.3d at 1023. Courts examine four factors: "(A) the class members' interests in individually controlling the prosecution … of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by … class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3).

All four factors support class certification. Plaintiffs are not aware of any individual suits filed by class members, who are unlikely to take on the cost of litigating these types of claims on an individual basis against their employer. *See Leyva*, 716 F.3d at 515; *see also Las Vegas Sands*, 244 F.3d at 1163 ("If plaintiffs cannot proceed as a class, some—perhaps most—will be unable to proceed as individuals because of the disparity between their litigation costs and what they hope to recover."). It is desirable to concentrate the litigation of class members' claims before this Court, which has presided over the case since December 2014. Because the issue of SPE's liability is common to all class members, resolving their claims on a classwide basis is superior to "filing hundreds of individual lawsuits that could involve duplicating discovery and costs that exceed the extent of proposed class members' individual injuries." *Wolin*, 617 F.3d at 1176.

IV. Conclusion

Plaintiffs respectfully request that the Court grant their motion for class certification, appoint the Plaintiffs as representatives of the class, and appoint Girard Gibbs, Lieff Cabraser and Keller Rohrback as co-lead class counsel.

Dated: June 30, 2015

Respectfully submitted,

GIRARD GIBBS LLP

By: */s/ Daniel C. Girard*

Daniel C. Girard
dcg@girardgibbs.com
Amanda M. Steiner
as@girardgibbs.com
Linh G. Vuong
lgv@girardgibbs.com
601 California Street, 14th Floor
San Francisco, CA 94108
Telephone: (415) 981-4800
Facsimile: (415) 981-4846

KELLER ROHRBACK L.L.P.

By: */s/ Lynn Lincoln Sarko*

Lynn Lincoln Sarko, *Admitted pro hac vice*
lsarko@kellerrohrback.com
Gretchen Freeman Cappio, *Admitted pro hac vice*
gcappio@kellerrohrback.com
Cari Campen Laufenberg, *Admitted pro hac vice*
claufenberg@kellerrohrback.com
1201 Third Avenue, Suite 3200
Seattle, WA 98101
Telephone: (206) 623-1900
Facsimile: (206) 623-3384

Matthew J. Preusch
mpreusch@kellerrohrback.com
1129 State Street, Suite 8
Santa Barbara, CA 93101
Telephone: (805) 456-1496
Facsimile: (805) 456-1497

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

By: */s/ Michael W. Sobol*
Michael W. Sobol
msobol@lchb.com
RoseMarie Maliekel
rmaliekel@lchb.com
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
Facsimile: (415) 956-1008

Nicholas Diamand
ndiamand@lchb.com
250 Hudson Street, 8th Floor
New York, NY10013-1413
Telephone: (212) 355-9500
Facsimile: (212) 355-9592

Interim Co-Lead Class Counsel

Hank Bates
hbates@cbplaw.com
Allen Carney
acarney@cbplaw.com
David Slade
dslade@cbplaw.com
CARNEY BATES & PULLIAM, PLLC
11311 Arcade Drive
Little Rock, AR 72212
Telephone: (501) 312-8500
Facsimile: (501) 312-8505

Raúl Pérez
Raul.Perez@Capstonelawyers.com
Jordan L. Lurie
Jordan.Lurie@capstonelawyers.com
Robert Friedl
Robert.Friedl@capstonelawyers.com

Tarek H. Zohdy
Tarek.Zohdy@capstonelawyers.com
Cody R. Padgett
Cody.Padgett@capstonelawyers.com
CAPSTONE LAW APC
1840 Century Park East, Suite 450
Los Angeles, CA 90067
Telephone: (310) 556-4811
Facsimile: (310) 943-0396

John H. Gomez
john@gomeztrialattorneys.com
John P. Fiske
jfiske@gomeztrialattorneys.com
Deborah Dixon
ddixon@gomeztrialattorneys.com
GOMEZ TRIAL ATTORNEYS
655 West Broadway, Suite 1700
San Diego, CA 92101
Telephone: (619) 237-3490
Facsimile: (619) 237-3496

Joseph G.Sauder
jgs@chimicles.com
Matthew D. Schelkopf
mds@chimicles.com
Benjamin F. Johns
bfj@chimicles.com
Joseph B. Kenney
jbk@chimicles.com
CHIMICLES & TIKELLIS LLP
One Haverford Centre
361 West Lancaster Avenue
Haverford, PA 19041
Telephone: (610) 642-8500
Facsimile: (610) 649-3633

Richard A. Maniskas, Esquire
rmaniskas@rmclasslaw.com
RYAN & MANISKAS, LLP
995 Old Eagle School Road, Suite 311
Wayne, PA 19087
Telephone: (484) 588-5516
Facsimile: (484) 450-2582

Steven M. Tindall
stindall@rhdtlaw.com
Valerie Bender
vbrender@rhdtlaw.com
RUKIN HYLAND DORIA & TINDALL LLP
100 Pine Street, Suite 2150
San Francisco, CA 94111
Telephone: (415) 421-1800
Facsimile: (415) 421-1700

Katrina Carroll
kcarroll@litedepalma.com
Kyle A. Shamberg
kshamberg@litedepalma.com
LITE DEPALMA GREENBERG, LLC
211 W. Wacker Drive, Suite 500
Chicago, IL 60613
Telephone: (312) 750-1265
Facsimile: (312) 212-5919

Additional Plaintiffs' Counsel