

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

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

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v.

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**CIVIL NO. JKB-16-3025**

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

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**NICOLE MIZRAHI,**  
**Plaintiffs**

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v.

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**CIVIL NO. JKB-16-3146**

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

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

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v.

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**CIVIL NO. JKB-17-1964**

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

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**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.<sup>1</sup>

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<sup>1</sup> "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

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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,















