

The Honorable James L. Robart

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UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

VERIDIAN CREDIT UNION, on behalf of itself  
and a class of similarly situated financial  
institutions,

Plaintiff,

v.

EDDIE BAUER LLC,

Defendant.

NO. 2:17-cv-00356-JLR

**PLAINTIFF’S UNOPPOSED  
MOTION FOR PRELIMINARY  
APPROVAL OF CLASS ACTION  
SETTLEMENT**

NOTE ON MOTION CALENDAR:

May 24, 2019

PLAINTIFF’S UNOPPOSED MOT. FOR PRELIMINARY APPROVAL OF CLASS  
ACTION SETTLEMENT (2:17-cv-00356-JLR)

1 **I. INTRODUCTION**

2 Plaintiff Veridian Credit Union (“Plaintiff” or “Veridian”) moves under Fed. R. Civ. P.  
3 23(e) for preliminary approval of a proposed class action settlement entered into with Defendant  
4 Eddie Bauer, LLC’s (“Defendant” or “Eddie Bauer”). The Settlement Agreement between  
5 Veridian and Eddie Bauer was reached after almost two years of litigation, discovery, and  
6 negotiation, culminating in mediation supervised by a neutral mediator.

7 Under the agreement, Eddie Bauer will pay between \$1 million and \$2.8 million to Class  
8 Members, enough to ensure that all Class Members who submit claims will receive a minimum  
9 of \$2.00 per “Alerted on Payment Card.” In the event that the aggregate value of claims submitted  
10 is less than \$1 million using the \$2.00 per card, the amount will be increased *pro rata* until the  
11 aggregate value of claims reaches \$1 million. In addition, Eddie Bauer will commit up to \$2  
12 million to pay costs of settlement administration, attorney fees and expenses, and a service award  
13 to Plaintiff for its time and commitment to the action. Notably, as part of the Settlement, Eddie  
14 Bauer will implement specific security enhancements for a minimum of two years at an expected  
15 cost totaling approximately \$5,000,000. In exchange, Plaintiff and all Class Members who do  
16 not opt out of the settlement will release Eddie Bauer from liability for the claims asserted in this  
17 litigation and any claims related to or arising out of the cyber attack on Eddie Bauer’s stores.

18 Plaintiff moves the Court to: (1) preliminarily approve the Settlement Agreement as fair,  
19 reasonable, and adequate; (2) provisionally certify the Class under Rule 23(b)(3) and (e) for  
20 settlement purposes; (3) preliminarily approve the form, manner, and content of the proposed  
21 notices to the Class; (4) conditionally appoint Veridian as Class Representative for settlement  
22 purposes; (5) conditionally appoint Scott + Scott Attorneys at Law, LLP and Carlson Lynch, LLP  
23 as Class Counsel for settlement purposes; (6) set the date and time of the Final Fairness Hearing;  
24 and (7) stay all proceedings in the Action until final approval of the settlement.

25 Plaintiff requests that the Motion, which Eddie Bauer’s does not oppose, be granted. The  
26 Settlement meets all of the standards for preliminary approval. The information provided is  
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1 sufficient to permit the Court to provisionally certify the Settlement Class under Rule 23 and  
2 direct Plaintiff to have notice disseminated. The Notice Program – consisting of individualized  
3 mailed notice, publication notice, and a toll-free number and website maintained by the  
4 Settlement Administrator – is the best practicable notice and comports with both Rule 23 and due  
5 process. For the reasons argued below, the Court should grant the motion and authorize notice of  
6 the proposed settlement to be disseminated to proposed class members.

## 7 **II. FACTUAL BACKGROUND**

### 8 **A. History of the Litigation**

9 Plaintiff alleges that in January 2016, hackers accessed Eddie Bauer’s POS systems and  
10 installed malicious software (often referred to as “malware”) that infected every Eddie Bauer  
11 store in the United States and Canada (hereinafter, the “Cyber Attack”). CAC (Dkt. # 36) at ¶ 29.  
12 With this malware, hackers allegedly stole payment card data from Eddie Bauer’s systems and  
13 sold it to other individuals who made fraudulent transactions on those payment cards. CAC ¶¶ 7,  
14 25, 29, 32, 35–36, 96–97. Plaintiff, like the proposed nationwide class of financial institutions,  
15 issued payment cards allegedly compromised in the Cyber Attack, and suffered financial loss in  
16 connection with covering customers’ fraud losses and reissuing the compromised cards. ¶¶ 8, 22,  
17 96–98, 135. Plaintiff brought suit against Eddie Bauer, filing the original complaint on March 7,  
18 2017. (Dkt. # 1).

19 Plaintiff alleged the Cyber Attack and Plaintiff’s injury were the foreseeable result of  
20 Eddie Bauer’s minimalistic data security measures—which were known within the company to  
21 be insufficient to protect against recognized threats—and refusal to implement industry-standard  
22 security measures because they cost too much. ¶¶ 39–92. Plaintiff brought this action to recover  
23 its losses caused by Eddie Bauer’s negligence and violations of the Washington Consumer  
24 Protection Act (“CPA”) and data breach notification law, Wash. Rev. Code (“RCW”) §  
25 19.255.020, and for declaratory and injunctive relief.

1 On June 15, 2017, Eddie Bauer moved to dismiss the Complaint (the “Motion to  
2 Dismiss”). (Dkt. # 40). On July 24, 2017, Veridian filed its opposition to the Motion to Dismiss.  
3 (Dkt. # 53). On November 9, 2017, the Court denied Eddie Bauer’s Motion to Dismiss (“Order”).  
4 (Dkt. # 69). On November 27, 2017, Plaintiff filed its Second Amended Class Action Complaint  
5 to conform to the Court’s Order. (Dkt. # 70).

6 Thereafter, the Parties engaged in significant motion practice and discovery. In particular,  
7 Plaintiff served Eddie Bauer with document requests, and Eddie Bauer produced hundreds of  
8 thousands of pages of documents, which Plaintiff’s counsel reviewed. Lynch Decl. ¶ 9. Plaintiff  
9 also deposed Eddie Bauer’s corporate representatives pursuant to Federal Rule of Civil Procedure  
10 30(b)(6) and deposed nine party and non-party fact witnesses. *Id.* Additionally, Plaintiff obtained  
11 and reviewed tens of thousands of pages of documents from numerous third parties in response  
12 to subpoenas Plaintiff served, including subpoenas served on the major card brands. *Id.* Eddie  
13 Bauer served Plaintiff with 164 document requests, to which Veridian responded with the  
14 production of thousands of pages of responsive documents. *Id.* Eddie Bauer also deposed  
15 Veridian’s corporate representative pursuant to Federal Rule of Civil Procedure 30(b)(6). *Id.*

#### 16 **B. Negotiations and Settlement**

17 The proposed settlement is the result of good faith, arm’s-length negotiations. During the  
18 litigation, the Parties engaged in multiple direct discussions about possible resolution. *Id.* at ¶ 10.  
19 The Parties then participated in a full-day, in-person mediation session before Hon. Jay C. Gandhi  
20 (Ret.) on February 15, 2019 in Los Angeles. *Id.* Prior to the mediation, the parties exchanged  
21 detailed confidential mediation statements setting forth their respective positions as to liability  
22 and damages. At the mediation, the parties were able to reach agreement on the core terms  
23 necessary to resolve the case on a class-wide basis. *Id.*

24 The parties did not discuss with one-another attorneys’ fees, costs, or expenses prior to  
25 reaching agreement on the essential terms of the settlement. *Id.* at ¶ 11. The parties then  
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1 formalized the terms of their proposed settlement in a full settlement agreement, which is  
 2 attached as Exhibit A to the Declaration of Gary F. Lynch. *Id.* at ¶ 10, Ex. A.

### 3 **III. TERMS OF THE PROPOSED SETTLEMENT**

#### 4 **A. The Settlement Class**

5 For settlement purposes only, the Parties agree that the Court should certify the following  
 6 “Settlement Class” under Fed. R. Civ. P. 23(b)(3), defined as:

7 All banks, credit unions, financial institutions, and other entities in the United  
 8 States (including its Territories and the District of Columbia) that issued Alerted  
 9 on Payment Cards. Excluded from the Settlement Class is the judge presiding over  
 10 this matter and any members of his judicial staff, Eddie Bauer, and persons who  
 11 timely and validly request exclusion from the Settlement Class.

12 SA ¶ 34. For purposes of the settlement and interpreting the class definition, the term “Alerted  
 13 on Payment Card” means any payment card (including debit and credit cards) that was identified  
 14 as having been at risk as a result of the Cyber Attack in an alert or similar document by Visa,  
 15 MasterCard, Discover, or JCB, including without limitation: (i) in an alert in the Visa US-2016-  
 16 0665 series (*e.g.*, US-2016-0665a-PA, US-2016-0665b-PA, US-2016-0665c-PA, US-2016-  
 17 0665d-PA, US-2016-0665e-IC, US-2016-0665f-IC, US-2016-0665g-IC, US-2016-0665h-IC);  
 18 (ii) in an alert in the MasterCard ADC001253-16 series; (iii) in an alert in the Discover DCA-  
 19 USA-2016-6710 series; or (iv) in an alert or similar document by JCB similar to the foregoing  
 20 Visa and MasterCard alerts. SA ¶ 1. Based on information learned in discovery, there are  
 21 approximately 1.4 million Alerted on Payment Cards. Lynch Decl. ¶ 13.

#### 22 **B. Benefits to the Settlement Class**

23 Under the proposed settlement, Eddie Bauer agrees to pay class members a minimum  
 24 total of \$1,000,000 and a maximum total of \$2,800,000. SA ¶ 33a. The monetary relief will be  
 25 distributed on a “claims made” basis. Each settlement class member that submits an approved  
 26 claim will receive \$2.00 per Alerted on Payment Card. *Id.* If the value of all approved claims is  
 27 less than \$1,000,000 (using the \$2.00-per-card rate), then the per-card payment amount will be

1 increased *pro rata* until the total value of claims reaches \$1,000,000. *Id.*; see also Lynch Decl.  
2 at ¶ 13 (describing example formulas).

3 Eddie Bauer has also agreed to injunctive relief for a period of two years from the  
4 Effective Date. Consistent with its obligations to comply with the Payment Card Industry Data  
5 Security Standard (PCI DSS), Eddie Bauer will maintain a comprehensive information security  
6 program that is reasonably designed to protect the security, integrity, and confidentiality of  
7 payment cardholder data. This compliance will continue to contain administrative, technical, and  
8 physical safeguards consistent with the PCI DSS, which are intended to protect the cardholder  
9 data environment. These measures described in detail at SA ¶ 42. These measures will be  
10 maintained for at least two years following the Effective Date of the Settlement, subject to  
11 reasonable exceptions. SA ¶ 43. Eddie Bauer expects that the costs associated with maintaining  
12 these provisions and compliance with PCI DSS since the Cyber Attack, combined with the costs  
13 of these measures for at least two years, exceeds \$5 million. SA ¶¶ 33c, 42.

#### 14 C. Releases

15 In exchange for the consideration above, Plaintiff and the class members who do not  
16 timely and validly exclude themselves from the Settlement will be deemed to have released Eddie  
17 Bauer and related persons and entities from claims arising from or related to the Cyber Attack at  
18 issue in this Litigation. SA ¶¶ 61–62, 64. In turn, Eddie Bauer and its affiliated persons and  
19 entities will also release any potential claims or counterclaims against Plaintiff, Settlement Class  
20 Members, and their affiliated entities relating to the initiation, prosecution, or settlement of the  
21 Litigation. SA ¶ 63.

#### 22 D. Proposed Notice Plan

23 Subject to the Court's approval, the Parties propose to individually notify each Settlement  
24 Class Member through U.S. Mail and to have the Settlement Administrator establish a toll-free  
25 number and Settlement Website to provide information about the Settlement. SA ¶¶ 49–50;  
26 Simmons Decl. ¶¶ 14, 18–19. Settlement Class Members will be able to file claims both  
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1 electronically and by mail. SA ¶¶ 34, 50(b), 50(f). Publication notice through digital media also  
2 will be utilized. SA ¶ 50(c). During the claims period, Settlement Class Members that have not  
3 filed claims will receive at least one reminder notice. SA ¶ 50(d).

#### 4 **1. Direct Mail Notice**

5 For purposes of effectuating individualized Mail Notice, Class Counsel have arranged for  
6 Visa and MasterCard to submit to the Settlement Administrator the legal address of the financial  
7 institutions that issued an Alerted on Payment Card. Lynch Decl. ¶ 14. Class Counsel also will  
8 provide relevant contact information to the Settlement Administrator for financial institutions  
9 that issued Discover and JCB Alerted on Payment Cards. *Id.* The Settlement Administrator will  
10 use this data, along with other reasonably available sources, to compile a final list of potential  
11 Settlement Class Members to which Mail Notice will be issued. SA ¶¶ 50(a)-(b); Simmons Decl.  
12 ¶ 13.

13 For any Mail Notices that are returned undeliverable with forwarding address  
14 information, the Settlement Administrator shall re-mail the Mail Notice to the updated address  
15 as indicated. SA ¶ 50(b); Simmons Decl. ¶ 15. For any Mail Notices that are returned  
16 undeliverable without forwarding address information, the Settlement Administrator shall use  
17 reasonable efforts to identify updated mailing addresses (such as running the mailing address  
18 through the National Change of Address Database) and re-mail the Mail Notice to the extent  
19 updated addresses are identified. SA ¶ 50(b); Simmons Decl. ¶¶ 14-15. The Settlement  
20 Administrator need only make one attempt to re-mail any Mail Notices that are returned as  
21 undeliverable. SA ¶ 50(b). However, during the claims period, Settlement Class Members that  
22 have not filed claims will receive a postcard reminder. SA ¶ 50(d).

23 Mail Notice will consist of the Long-Form Notice, as well as the Claim Form. The Long-  
24 Form Notice (SA Ex. 2) includes a description of the material terms of the Settlement; a date by  
25 which Settlement Class Members may object to or opt out of the Settlement; the date upon which  
26 the Final Approval Hearing will occur; and the address of the Settlement Website at which  
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1 Settlement Class Members can submit a Claim Form and access the Settlement Agreement and  
2 other related documents and information.

3 The Claim Form (SA Ex. 1, Attachment A) clearly informs the Settlement Class Members  
4 of the process they must follow. It is only two pages long and requires Settlement Class Members  
5 to provide very basic information: the name of the financial institution; the person filing out the  
6 form; the financial institution's contact information; and the number and brands of Alerted on  
7 Payment Cards. This information will be easy for financial institution employees to locate and  
8 provide. A substantially similar form will appear on the Settlement Website for purposes of  
9 electronically submitting a claim.

## 10 **2. Publication Notice**

11 The Settlement Administrator will cause the proposed Summary Notice to be published  
12 in digital publications typically read by bank and credit union executives, such as the *ABA*  
13 *Banking Journal*, in the form depicted in SA Ex. 3. SA ¶ 50(c); Simmons Decl. ¶ 17.

## 14 **3. Settlement Website and Telephone Support**

15 The Settlement Administrator also will establish the Settlement Website, which will  
16 contain all the information included in the other forms of notice and will provide links to pertinent  
17 case documents. SA ¶¶ 34, 46, 47(c), 49, 50(f); Simmons Decl. ¶¶ 19–20. The Settlement Website  
18 will permit Settlement Class Members to file claims electronically and will allow Settlement  
19 Class Members to submit questions regarding the Settlement to customer support personnel. SA  
20 ¶¶ 34, 50(f); Simmons Decl. ¶¶ 19–20. The Settlement Administrator also will establish a toll-  
21 free number Settlement Class Members can call for information about the Settlement. SA ¶¶ 46,  
22 47(d), 50(e); Simmons Decl. ¶ 18.

## 23 **4. Opt-Out and Objection Deadlines**

24 All forms of notice: (1) explain the procedure by which a Settlement Class Member can  
25 exclude itself from the Settlement prior to the Opt-Out Deadline (SA ¶ 51); and (2) explain the  
26 procedure for a Settlement Class Member to object to the Settlement or Class Counsel's  
27 applications for awards of attorneys' fees, expenses, or Service Awards to Settlement Class



1 Representatives prior to the Objection Deadline. SA ¶ 53. The proposed Opt-Out and Objection  
 2 Deadlines are 90 and 114 days, respectively, after the date the Court enters a Preliminary  
 3 Approval Order. SA ¶¶ 19–20.

4 **E. Attorneys’ Fees and Expenses, Administration Expenses, & Service Award**

5 In addition to the settlement consideration available for direct distribution to claiming  
 6 Settlement Class Members, Eddie Bauer agrees to pay up to \$2,000,000 to cover the following  
 7 items: 1) costs of settlement administration; 2) any Court-approved service award to the Plaintiff,  
 8 not to exceed \$10,000; and 3) any Court-approved attorneys’ fees, costs, and expenses. SA ¶¶  
 9 33(b), 39(b), 40, 66. The effectiveness of the Settlement Agreement is not contingent on the  
 10 Court’s awarding of the full amounts of the requested service award or attorneys’ fees, costs, or  
 11 expenses. SA ¶¶ 67.

12 **IV. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED**

13 **A. Standard for Preliminary Approval of the Settlement**

14 The Ninth Circuit recognizes the “strong judicial policy that favors settlement,  
 15 particularly where complex class action litigation is concerned.” *In re Syncor ERISA Litigation*,  
 16 516 F.3d 1095, 1101 (9th Cir. 2008); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1277 (9th  
 17 Cir. 1992). The strong preference for class action settlements is precipitated by the overwhelming  
 18 uncertainties of the outcome, expense, management, and difficulties in proof inherent in class  
 19 action lawsuits. *See Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976) (noting  
 20 that class action settlements are especially favorable in light of “an ever increasing burden to so  
 21 many federal courts and which frequently present serious problems of management and  
 22 expense.”).

23 Approval of class action settlement “take[s] place over three stages. First, the parties  
 24 present a proposed settlement asking the Court to provide ‘preliminary approval’ for both (a) the  
 25 settlement class and (b) the settlement terms.” *Rinky Dink Inc. v. Electronic Merchant Systems*  
 26 *Inc.*, No. C13-1347, 2015 WL 11234156 \*1 (W.D. Wash. Dec. 11, 2015). “Second, if the court  
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1 does preliminarily approve the settlement and class, (i) notice is sent to the class describing the  
2 terms of the proposed settlement, (ii) class members are given an opportunity to object or opt  
3 out, and (iii) the court holds a fairness hearing at which class members may appear and support  
4 or object to the settlement.” *Id.* “Third, taking account of all of the information learned during  
5 the aforementioned processes, the court decides whether or not to give final approval to the  
6 settlement and class certification.” *Id.*; see also *In re Toys R Us-Delaware, Inc.—Fair and*  
7 *Accurate Credit Transactions Act (FACTA) Litigation*, 295 F.R.D. 438, 448 (C.D. Cal. 2014). At  
8 the final approval stage, the court considers the settlement in light of a non-exhaustive list of  
9 factors, including:

10 (1) the strength of the plaintiff’s case; (2) the risk, expense, complexity, and likely  
11 duration of further litigation; (3) the risk of maintaining class action status  
12 throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery  
13 completed and the stage of the proceedings; (6) the experience and views of  
counsel; (7) the presence of a governmental participant; and (8) the reaction of the  
class members of the proposed settlement.

14 *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004); see also *Hanson v. MGM*  
15 *Resorts Int’l*, No. 16-cv-1661-RAJ, 2018 WL 3630284 at \*4 (W.D. Wash. July 31, 2018)  
16 (utilizing first six factors to assess fairness for purposes of preliminary approval).

17 At the preliminary approval stage, the focus is simply on whether the settlement is “within  
18 the range of possible judicial approval.” *In re M.L. Stern Overtime Litigation*, No.07-CV-0118-  
19 BTM (JMA), 2009 WL 995864 at \*3 (S.D. Cal. Apr. 13, 2009) (citations and quotation marks  
20 omitted); *Rinky Dink*, 2015 WL 11234156 at \*4. Accordingly, the court need not scrutinize every  
21 detail of the settlement at this juncture, since “class members will subsequently receive notice  
22 and have an opportunity to be heard” at the time before final approval. *In re M.L. Stern*, 2009  
23 WL 995864 at \*3.

24 The standard inquiry the trial court explores is whether the proposed settlement “is  
25 fundamentally fair, adequate, and reasonable.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026  
26 (9th Cir. 1998); Fed. R. Civ. P. 23(e)(2). “It is the settlement taken as a whole, rather than the  
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1 individual component parts, that must be examined for overall fairness.” *Hanlon*, 150 F.3d at  
2 1026 (citing *Officers for Justice v. Civil Serv. Com’n of City and County of San Francisco*, 688  
3 F.2d 615, 628 (9th Cir. 1982)); *see also Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 665 (E.D. Cal.  
4 2008) (“[A] full fairness analysis is unnecessary” at the preliminary approval stage).  
5 Accordingly, the court does not have “the ability to delete, modify or substitute certain  
6 provisions.” *Id.* (citing *Officers for Justice*, 688 F.2d at 630). In other words, the “settlement must  
7 stand or fall in its entirety.” *Id.*

8         Before the Court can grant preliminary approval and direct notice to the class, a plaintiff  
9 must “show[] that the court will likely be able to . . . approve the proposal under Rule 23(e)(2)[.]”  
10 Fed. R. Civ. P. 23(e)(1)(B) (eff. Dec. 1, 2018). Approval under amended Rule 23(e)(2) requires  
11 that the settlement be fair, reasonable, and adequate, taking into consideration the following  
12 factors: (1) whether “the class representatives and class counsel have adequately represented the  
13 class”; (2) whether the settlement “was negotiated at arm’s length”; (3) whether “the relief  
14 provided for the class is adequate”; and (4) whether the settlement “treats class members  
15 equitably relative to each other.” *Id.* (e)(2)(A)-(D); *see also In re Chrysler-Dodge Jeep Ecodiesel*  
16 *Marketing, Sales Practices, and Prods. Liab. Litig.*, No. 17-md-2777, 2019 WL 536661 at \*8  
17 (N.D. Cal. Feb. 11, 2019). There is, not surprisingly, overlap between the 2018 amendment’s  
18 fairness, reasonableness, and adequacy considerations and those set out in the Ninth Circuit test  
19 in *Churchill Vill.*, 361 F.3d at 575. Indeed, these factors are substantially similar to those that  
20 were already considered by courts in the Ninth Circuit. *E.g.*, *In re Tableware Antitrust Litig.*, 484  
21 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007) (considering preliminary approval appropriate “where  
22 [1] the proposed settlement appears to be the product of serious, informed, non-collusive  
23 negotiations, [2] has no obvious deficiencies; [3] does not improperly grant preferential treatment  
24 to class representatives or segments of the class, and [4] falls within the range of possible  
25 approval . . .”) (internal quotation and citation omitted) (emphasis added).

1 Amended Rule 23(e)(2), however, establishes a uniform set of core approval factors that  
2 the Advisory Committee Note states “should always matter to the decision” of the district court  
3 as to whether to approve the proposal. Fed. R. Civ. P. 23(e)(2) advisory committee’s note to 2018  
4 amendment. Plaintiff will predominantly address the amended Rule 23(e) factors now and fully  
5 address each of the *Churchill Vill.* factors in its motion for final approval of the Settlement.

6 For the reasons set forth in detail below, the proposed Settlement is fundamentally fair,  
7 adequate, and reasonable—falling squarely into the range of preliminary approval.

8 **B. The Negotiation Process Supports Preliminary Approval**

9 The Ninth Circuit instructs courts to ensure that “the agreement is not the product of fraud  
10 or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken  
11 as a whole, is fair, reasonable and adequate to all concerned.” *Hanlon*, 150 F.3d at 1027 (quoting  
12 *Officers for Justice*, 688 F.2d at 625). Perhaps the most critical inquiry to the assist the court is  
13 determining whether the settlement is “the product of an arms-length, non-collusive, negotiated  
14 resolution.” *Id.* If the answer is yes, courts will presume the settlement is fair and reasonable.  
15 *Spann II*, 314 F.R.D. at 324. “The assistance of an experienced mediator in the settlement process  
16 confirms that the settlement is non-collusive.” *Satchell v. Federal Express Corp.*, Nos. C03-2659  
17 SI, C03-2878 SI, 2007 WL 1114010, at \*4 (N.D. Cal. Apr. 13, 2007).

18 Here, there is no evidence that this Settlement was founded in collusion or fraud. Rather,  
19 agreement was reached after dispositive motions practice, significant discovery, and an in-person  
20 mediation session facilitated by a highly-experienced mediator, Hon. Jay C. Gandhi (Ret.). Lynch  
21 Decl., at ¶ 10. Moreover, both parties were represented by counsel highly-experienced in  
22 complex class litigation, which lent to the careful consideration of all strengths and weaknesses  
23 in order to achieve efficient resolution. Thus, the Parties were well-versed with the relevant law,  
24 the challenges present in calculating damages on a class-wide basis, and the risks of continued  
25 litigation and recovery. Accordingly, all evidence indicates that this Settlement was *not* “the  
26 product of fraud or overreaching by, or collusion between, the negotiating parties.” *Spann II*, 314  
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1 F.R.D. at 324–25.

2 **C. The Settlement Falls Within the Range of Possible Judicial Approval Because**  
 3 **the Value of the Settlement Benefits Are Significant in Light of the Risks of**  
 4 **Continued Litigation**

5 This Settlement provides significant relief to the Class and clearly falls within the range  
 6 of possible judicial approval. “To evaluate the range of possible approval criterion, which focuses  
 7 on substantive fairness and adequacy, courts primarily consider plaintiff’s expected recovery  
 8 balanced against the value of the settlement offer.” *In re Tableware Antitrust Litig.*, 484 F. Supp.  
 9 2d at 1080. “As the Ninth Circuit has noted, ‘the very essence of a settlement is compromise, a  
 10 yielding of absolutes and an abandoning of highest hopes.’” *Spann II*, 314 F.R.D. at 325 (quoting  
 11 *Officers for Justice*, 688 F.2d at 624).

12 When considering whether “the relief provided for the class is adequate,” amended Rule  
 13 23(e)(2)(C) requires the Court to take into account: “(i) the costs, risks, and delay of trial and  
 14 appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including  
 15 the method of processing class-member claims; [and] (iii) the terms of any proposed award of  
 16 attorney’s fees, including timing of payment[.]” Fed. R. Civ. P. 23(e)(2)(C)(i)-(iii) (eff. Dec. 1,  
 2018).<sup>1</sup>

17 **1. The Relief Provided to the Settlement Class Is Substantial**

18 The Settlement provides substantial relief to the Settlement Class. Class Members who  
 19 submit claims will receive no less than \$2.00 per Alerted on Payment Card. SA ¶ 33a. In addition,  
 20 Eddie Bauer has agreed to implement certain security enhancements for at least two years, which  
 21 Eddie Bauer has spent or will spend approximately \$5 million to implement and which will  
 22 benefit Class Members by reducing the risk of a similar security breach in the future. SA ¶¶ 41–  
 23 43. This relief compares favorably with settlements obtained in similar litigation, namely the  
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25 <sup>1</sup> Rule 23(e) also requires the Court to consider “any agreement required to be identified under Rule 23(e)(3)[.]”  
 26 Other than the settlement agreement at issue, and the separate agreement referenced in SA ¶ 70 regarding Eddie  
 27 Bauer’s discretion to terminate the Agreement in the event that Settlement Class Members representing a certain  
 number of Alerted on Payment Cards elect to opt out of the Settlement Class, there are no other agreements to  
 disclose. Lynch Decl. ¶ 22.

1 settlements negotiated by financial institution plaintiffs with Target and Home Depot. Those  
2 settlements—both of which received final approval—provided financial institutions with \$1.50  
3 and \$2.00 fixed per-card recovery, respectively, without documentation of loss (with an option  
4 to obtain a percentage of documented losses). *See In re Target Customer Data Sec. Breach Litig.*,  
5 No. 0:14-md-02522, Dkt. # 747-1, Ex. A at 4–5 (D. Minn. Apr. 11, 2016); *In re Home Depot*  
6 *Customer Data Sec. Breach Litig.*, No. 1:14-md-02583, Dkt. # 336-1 at 25 (N.D. Ga. Aug. 23,  
7 2017). The per-card relief offered by this settlement is reasonable in light of these prior results.

## 8                   2.       **The Risks of Continued Litigation Are Significant**

9           This recovery is significant not only because of the valuable benefit obtained for the  
10 Class, but also because Plaintiff would have faced a significant risk in litigating this case through  
11 trial. *See Hanson*, 2018 WL 3630284 at \*4–5 (finding that uncertain outcome of litigated class  
12 certification motion, difficulty of proving damages, and limited legal precedent on unique issues  
13 posed risks to plaintiff’s case and weighed in favor of settlement approval). Although the Court  
14 denied in part Eddie Bauer’s motion to dismiss and permitted Plaintiff’s primary negligence  
15 claim to proceed, numerous procedural hurdles and risks remained before Plaintiff or Settlement  
16 Class Members could recover at trial. Class actions initiated by financial institutions against  
17 merchants after data breaches are a relatively new form of litigation. While some cases ended in  
18 settlements, such as *Target* and *Home Depot*, some have been dismissed, *e.g.*, *Cnty. Bank of*  
19 *Trenton v. Schnuck Mkts., Inc.*, 887 F.3d 803, 817-18 (7th Cir. 2018), and class certification has  
20 been denied in others. *E.g.*, *In re TJX Cos. Retail Sec. Breach Litig.*, 246 F.R.D. 389 (D. Mass.  
21 2007) (denying class certification because necessity of individualized inquiries regarding  
22 causation, comparative negligence, and damages precluded a finding of predominance). To date,  
23 no similar case has ever gone to trial.

24           Accordingly, although Plaintiff is confident in the strength of its case against Eddie Bauer  
25 and the likelihood of success at each stage, the outcome is nonetheless uncertain. Moreover, even  
26 if Plaintiff was successful the class certification and trial stages in the district court, there would  
27

1 very likely be one or more lengthy appeals, including potentially an interlocutory appeal under  
2 Fed. R. Civ. P. 23(f). The degree of uncertainty supports preliminary approval of the proposed  
3 Settlement Agreement.

4 Class Counsel have considered: (1) the complexities of this litigation; (2) the risks and  
5 expense of continuing this case through discovery, class certification, summary judgment, and  
6 trial against Eddie Bauer; and (3) the likely appeal(s) if Plaintiff does prevail at trial or earlier  
7 stages. After weighing these against the guaranteed recovery to the Settlement Class, and what  
8 Class Counsel believe to be the significant monetary benefits to the Settlement Class, Class  
9 Counsel firmly believe the Settlement represents a desirable resolution of this litigation. Lynch  
10 Decl. ¶ 19.

### 11 **3. The Proposed Method of Distributing Relief to the Settlement Class 12 Is Fair and Effective**

13 Under the Distribution Plan (SA Ex. 1) that governs payments from the Settlement Fund,  
14 Settlement Class Members that file an Approved Claim will receive a Cash Payment Award per  
15 Claimed-On Card without having to provide supporting documentation or prove their losses. SA  
16 ¶ 39(a); SA Ex. 1 ¶¶ 2, 2.1. The amount of the cash payment will be \$2.00 per Claimed-On Card,  
17 subject to a *pro rata* increase if the value of all approved claims does not meet the minimum  
18 payment amount of \$1 million. SA Ex. 1 ¶¶ 2.1, 4.2. This Distribution Plan is straightforward  
19 and treats all Claiming Class Members identically.

20 The Claim Form is only two pages long and requires Settlement Class Members to  
21 provide very basic information: the name of the financial institution; the person filing out the  
22 form; the financial institution's contact information; and the number of Alerted on Payment  
23 Cards. *See* SA Ex. 1, Attachment A. This information will be easy for financial institution  
24 employees to locate and provide. No additional documentation is required. Furthermore,  
25 Settlement Class Members can chose to submit their claims electronically through the Settlement  
26 Website. SA ¶¶ 34, 50(f); Simmons Decl. ¶ 20(f). Based on their experiences with the settlement  
27

1 of other class action data breach cases on behalf of financial institutions, Class Counsel believes  
 2 that the simplicity of the Claim Form will increase participation from Settlement Class Members.

3 Lynch Decl. ¶ 15.

4 **4. Counsel's Request for Attorneys' Fees, Expenses, and Costs Will Be**  
 5 **Subject to Approval by the Court**

6 Finally, the Settlement requires that any award for payment of attorneys' fees, expenses,  
 7 and costs is subject to proper motion to, and approval by, the Court. Class Counsel will apply to  
 8 the Court for an award of no more than \$2 million inclusive of costs of settlement administration,  
 9 a service award to Plaintiff (not to exceed \$10,000), attorneys' fees, costs, and expenses. SA ¶¶  
 10 39(b), 40, 66. Importantly, the Parties did not discuss attorneys' fees, costs, and expenses prior  
 11 to agreeing to the essential terms of the Settlement. SA ¶ F; Lynch Decl. ¶ 11. No less than thirty  
 12 days prior to the hearing on whether the Court should grant final approval to the Settlement,  
 13 Class Counsel will submit a motion for attorneys' fees, expenses, and costs. SA ¶ 59. Settlement  
 14 Class Members that have objected to the Settlement by the Objection Deadline will have an  
 15 opportunity to file a brief in response to Class Counsel's request for attorneys' fees, expenses,  
 16 and costs. *Id.* Thus, all the considerations under Rule 23(e)(2)(C) support preliminary approval.

17 **D. The Proposed Releases Are Appropriately Tailored to the Claims at Issue**

18 "Beyond the value of the settlement, courts have rejected preliminary approval when the  
 19 proposed settlement contains obvious substantive defects such as . . . overly broad releases of  
 20 liability." *Newberg on Class Actions* § 13:15, at p. 326 (5th ed. 2014); *see e.g., Fraser v. Asus*  
 21 *Computer Int'l*, 2012 WL 6680142, \*3 (N.D. Cal. 2012). The releases in the proposed  
 22 settlement are not overly broad. Class Members who do not timely exclude themselves from the  
 23 Settlement will be deemed to have released Eddie Bauer from claims:

24 based upon, resulting from, or arising out of (1) Eddie Bauer's information security  
 25 policies and practices; (2) the allegations, facts, and/or circumstances described in  
 26 the Litigation and/or Complaint; (3) Eddie Bauer's response to and notices about  
 27 the Data Breach; (4) the fraudulent use of any Alerted on Payment Cards; (5) the  
 cancellation and reissuance of any Alerted on Payment Cards; and (6) any expenses  
 incurred investigating, responding to, or mitigating potential damage from the theft



1 or illegal use of Alerted on Payment Cards or information relating to such cards.

2 SA ¶ 61. Since the Release is limited to the scope of the litigation, it is fair and adequate for  
3 preliminary approval. *See e.g., Spann II*, 314 F.R.D. at 327–28 (“With this understanding of the  
4 release, i.e., that it does not apply to claims other than those related to the subject matter of the  
5 litigation, the court finds that the release adequately balances fairness to absent class members  
6 and recovery for plaintiffs with defendants’ business interest in ending this litigation with  
7 finality.”).

8 **E. Equitable Treatment of Class Members Relative to Each Other Supports  
9 Preliminary Approval**

10 The Settlement Agreement authorizes Plaintiff Veridian to seek a Service Award in an  
11 amount no greater than \$10,000 for its service to the Class in bringing and pressing the lawsuit.  
12 SA ¶ 66. Importantly, Plaintiff’s incentive award is to be paid separate and apart from the Class  
13 award, and any reduction of the incentive award by the Court shall not affect the rights and  
14 obligations under the Settlement. *Id.* at ¶ 67. The Parties negotiated this aspect of the Settlement  
15 Agreement only after reaching agreement on all other material terms of the settlement. *Id.* at ¶  
16 68. In all other respects, the Settlement Agreement treats all Class Members, including Plaintiff,  
17 identically and gives all Class Members the same opportunity to receive payments using the same  
18 distribution method. SA ¶ 39(a); SA Ex. 1 ¶¶ 2, 2.1

19 The Ninth Circuit recognizes that service awards given to named plaintiffs are “fairly  
20 typical” in class actions. *Rodriguez*, 563 F.3d at 958. Incentive awards serve “to compensate  
21 class representatives for work done on behalf of the class, to make up for financial or reputation  
22 risk undertaken in bringing the action, and sometimes, to recognize their willingness to act as a  
23 private attorney general.” *Id.* at 958–59. In evaluating whether the Settlement grants preferential  
24 treatment to Plaintiff, “the court must examine whether there is a ‘significant disparity between  
25 the incentive awards and the payments to the rest of the class members’ such that it creates a  
26 conflict of interest.” *Spann II*, 314 F.R.D. at 328 (citing *Radcliffe v. Experian Info. Solutions  
27 Inc.*, 715 F.3d 1157, 1165 (9th Cir. 2013)). In arriving at such determination, courts will consider

1 “the number of named plaintiffs receiving incentive payments, the proportion of the payments  
2 relative to the settlement amount, and the size of each payment.” *In re Online DVD-Rental*, 779  
3 F.3d 934, 947 (9th Cir. 2015) (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003).

4 Here, the requested award is unlikely to create a conflict of interest between Plaintiff  
5 Veridian and absent Class Members because the Settlement Agreement will remain in full force  
6 and effect, notwithstanding any reduction of the awards. See SA ¶ 67; *Spann II*, 314 F.R.D. at  
7 328–29. Veridian’s requested award was not predicated on the existence of any special treatment  
8 or promise from Class Counsel. Lynch Decl. at ¶ 21. The basis for such award is purely to  
9 compensate Plaintiff for its time and efforts in initiating the lawsuit, staying abreast of all aspects  
10 of the litigation, cooperating in discovery, and fairly and adequately protecting the interests of  
11 the absent class members. *Id.* The award is also small compared to the overall settlement relief,  
12 representing just 0.33% of the minimum total cash Eddie Bauer is required to pay under the  
13 Agreement. Thus, the award is purely a service award and does not constitute preferential  
14 treatment.

## 15 V. THE SETTLEMENT CLASS SHOULD BE CERTIFIED

### 16 A. The Proposed Class Satisfies the Rule 23(a) Requirements

17 At the preliminary approval stage, the Court’s threshold task is to determine whether the  
18 proposed class satisfies the Rule 23(a) requirements: (1) numerosity, (2) commonality, (3)  
19 typicality, and (4) adequacy, and the requirements set forth in Rule 23(b)(3). *Id.*, citing *Amchem*  
20 *Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997). Here, when ruling on class certification in  
21 the settlement context, the court need not explore the issue of manageability, “for the proposal is  
22 that there be no trial.” *Amchem*, 521 U.S. at 620. Here, provisional certification of the proposed  
23 Class for purposes of the Settlement is warranted because Plaintiff satisfies all requirements set  
24 forth in Rule 23.

1                   **1. Numerosity**

2                   Numerosity is satisfied if “the class is so numerous that joinder of all members is  
3 impracticable.” Fed. R. Civ. P. 23(a); *Wiener v. Dannon Co., Inc.*, 255 F.R.D. 658, 664 (C.D.  
4 Cal. 2009); *see also Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913–14 (9th Cir.  
5 1964) (“impracticability” exists where there is a “difficulty or inconvenience of joining all  
6 members of the class”). “While no exact numerical cut-off is required for the numerosity  
7 requirement, numerosity is presumed where the plaintiff class contains forty or more members.”  
8 *Chester*, 2017 WL 6205788, at \*5 (internal quotation marks and citations omitted).

9                   Numerosity is clearly established here. The Parties conducted pre-mediation discovery  
10 and investigation, wherein Defendant confirmed there are approximately 1.4 million potential  
11 Alerted on Payment Cards, and documents obtained in discovery allow Class Counsel to estimate  
12 that the Alerted on Payment Cards were issued by approximately 4,000 different financial  
13 institutions. *See Lynch Decl.* ¶ 13. Accordingly, because the Class Members are certainly  
14 too numerous to join as plaintiffs, the numerosity requirement is met.

15                   **2. Commonality**

16                   Commonality is satisfied if “there are any questions of law or fact common to the class.  
17 Fed. R. Civ. P. 23(a)(2); *see Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012)  
18 (noting all that is required is a “*single* significant question of law or fact.”) (emphasis added);  
19 *Hanson*, 2018 WL 3630284 at \*2 (same). The inquiry regarding commonality involves whether  
20 Plaintiff can show a common contention such that “determination of its truth or falsity will  
21 resolve an issue that is central to the validity of each one of the claims in one stroke.” *Wal-Mart*  
22 *Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). “The existence of shared legal issues with  
23 divergent factual predicates is sufficient, as is a common core of salient facts coupled with  
24 disparate legal remedies within the class.” *Hanlon*, 150 F.3d at 1019.

25                   Here, the Class Members share common legal and factual questions vis-à-vis Eddie  
26 Bauer’s liability, for instance, whether Eddie Bauer owed Class Members a duty to use  
27

1 reasonable payment card security practices, whether the duty was breached, and whether Eddie  
2 Bauer's actions caused Class Members' alleged damages. As to damages, the proposed Class  
3 Members each suffered the same general forms of injury: they all issued payment cards that were  
4 alerted-on as potentially compromised in the Cyber Attack and incurred costs related to reissuing  
5 the affected cards or reimbursing customers for fraudulent transactions on the card accounts. ¶¶  
6 8, 22, 96–98, 135. These questions suffice to satisfy the commonality prong.

### 7 3. Typicality

8 Typicality is satisfied if the class representative's claims or defenses are typical to those  
9 of the Class. Fed. R. Civ. P. 23(a)(3). The Ninth Circuit applies the typicality requirement  
10 liberally: "representative claims are typical if they are reasonably coextensive with those of  
11 absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020;  
12 *Hanson*, 2018 WL 3630284 at \*2. The "typicality" requirement is essential to ensure that the  
13 claims of the class representative is aligned with those of the class as a whole. *Wolin v. Jaguar*  
14 *Land Rover North America, LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010). "The test of typicality is  
15 whether other members have the same or similar injury, whether the action is based on conduct  
16 which is not unique to the named plaintiffs, and whether other class members have been injured  
17 by the same course of conduct." *Id.*

18 As addressed immediately above, Plaintiff Veridian's claims are typical to those of the  
19 Class because they are based upon the same facts and the same legal and remedial theories as  
20 those of the Class. Plaintiff's and Settlement Class Members' claims arise from Eddie Bauer's  
21 alleged failure to maintain adequate payment card data security measures at its retail stores. The  
22 exposure of Plaintiff's and the Class's payment card data occurred through the same mechanism  
23 during the same time period. Every Settlement Class Member suffered the same varieties and  
24 types of risks and losses as a result of the Cyber Attack, and the only notable variation among  
25 Settlement Class Members is the amount of damages each one suffered.

#### 4. Adequacy

Adequacy is satisfied if the class representative “will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). The Ninth Circuit utilizes two questions to determine legal adequacy: “(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?” *Hanlon*, 150 F.3d at 1020.

Plaintiff Veridian is an adequate class representative because it shares common goals with Class Members of pursuing litigation to obtain recovery for Cyber Attack-related losses and to incentivize merchants to improve payment card data security. There is no evidence in the record that Plaintiff harbors any interest antagonistic to the interests of the Class. Lynch Decl. at ¶ 18. Plaintiff has been proactive in this litigation, participating in extensive discovery efforts and maintaining close contact with Class Counsel regarding the progress of the litigation. *Id.* at ¶ 18. Therefore, the adequacy requirement is satisfied.

#### B. The Proposed Class Satisfies the Rule 23(b)(3) Requirements

Class actions under Rule 23(b)(3) must also satisfy the following two requirements, which are commonly referred to as “predominance” and “superiority,” respectively: (1) “the questions of law and fact common to class members predominate over any questions affecting only individual members, and” (2) “that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). Plaintiff has satisfied both of these requirements.

##### 1. Predominance

The predominance prong turns on “whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Hanlon*, F.3d at 1022 (citing *Amchem*, 521 U.S. at 623). Although predominance is inherently related to commonality in that it assumes a prerequisite of common issues of law and fact, “Rule 23(b)(3) focuses on the relationship between the common and individual issues.” *Id.* (emphasis added). Where the core question driving the litigation

1 “would require the separate adjudication of each class member’s individual claim or defense, a  
2 Rule 23(b) action would be inappropriate.” *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d  
3 1180, 1189 (9th Cir. 2001) (internal citation omitted).

4 Individualized damage variations among class members do not by themselves preclude a  
5 finding of predominance. *See Hanson*, 2018 WL 3630284 at \*3. First, a class may be certified  
6 for liability purposes only, leaving individual damages calculations to subsequent proceedings.  
7 *See Taha v. Cty. of Bucks*, 862 F.3d 292, 309 (3d Cir. 2017); W. Rubenstein, *NEWBERG ON*  
8 *CLASS ACTIONS* §4:54, 206-08 (5th ed. 2012). Second, a plaintiff class may prove classwide  
9 damages through use of representative evidence and statistical modeling, provided that the  
10 methodology offered is mathematically sound and comports appropriately with the plaintiffs’  
11 liability theory. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1047-49 (2016); *Comcast*  
12 *Corp. v. Behrend*, 569 U.S. 27, 35-37 (2013). Apportionment and disbursement of the classwide  
13 damages to individual class members can be accomplished at a later stage without undermining  
14 the propriety of class certification during earlier phases. *See Tyson Foods*, 136 S. Ct. at 1049–  
15 50.

16 The predominate legal and factual issues in this litigation concern the nature of the Cyber  
17 Attack and Eddie Bauer’s degree of responsibility. The most significant remaining issues to be  
18 litigated or tried with respect to liability were the extent of Eddie Bauer’s legal duty to Plaintiff  
19 to protect payment card data; whether Eddie Bauer breached the duty of reasonable care; whether  
20 Eddie Bauer’s acts or omissions were the proximate cause of Plaintiff’s injuries; and proof of  
21 damages. All of these issues could have been resolved on a classwide basis, with little to no  
22 emphasis on unique circumstances of any individual Plaintiff or Class Member. *See, e.g., Target*,  
23 309 F.R.D. at 486-89. These issues predominate, and the Settlement and Distribution Plan  
24 proposed by Plaintiff ensure that individualized damage calculations do not pose a problem.  
25 Settlement Class Members will receive fixed distributions from the Settlement Fund based on  
26  
27

1 the number Alerted on Payment Cards, a methodology that is objective, easy to calculate, and  
2 offers fair and equal treatment to all Settlement Class Members.

## 3 2. Superiority

4 Superiority examines whether the class action device “is superior to other available  
5 methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). “[T]he  
6 purpose of the superiority requirement is to assure that the class action is the most effective means  
7 for resolving the controversy. Where recovery on an individual basis would be dwarfed by the  
8 cost of litigating on an individual basis, this factor weighs in favor of class certification.” *Wolin*,  
9 617 F.3d at 1175–76 (citation and internal quotation marks omitted). In the settlement context,  
10 manageability of the class action device is not a concern. *See Spann II*, 314 F.R.D. at 323 (“the  
11 other requirements of Rule 23(b)(3) such as the desirability or undesirability of concentrating the  
12 litigation of the claims in the particular forum and the likely difficulties in managing a class  
13 action, are rendered moot and irrelevant”); *see also Amchem Prods., Inc.*, 521 U.S. at 620.

14 Although Settlement Class Members collectively suffered significant damages as a result  
15 of the Cyber Attack, those losses are distributed among several thousand card-issuing financial  
16 institutions. Lynch Decl. ¶ 13. Settlement Class Members who issued only a few Alerted on  
17 Payment Cards will have no incentive to litigate against Eddie Bauer individually, as their  
18 damages may only be a few hundred dollars. Even for larger issuers, the distributions offered by  
19 this Settlement likely provide better net recoveries than the Settlement Class Members could  
20 obtain by suing Eddie Bauer individually, after costs of litigation are considered. *See Hanson*,  
21 2018 WL 3630284 at \*3 (finding superiority prong met where individual class members’  
22 damages would be up to \$1,000 because “many members would most likely refrain” from  
23 individual litigation due to disparity between litigation costs and expected recoveries).  
24 Accordingly, because each Class Members’ claim is common to the class and relatively small in  
25 amount, a class action is the superior method for efficiently adjudicating Plaintiff’s claims.  
26  
27

1 **VI. THE PROPOSED NOTICE PROGRAM SATISFIES RULE 23 AND DUE**  
2 **PROCESS, AND SHOULD BE APPROVED**

3 Rule 23(e) requires the trial court to “direct notice in a reasonable manner to all class  
4 members who would be bound by the proposal.” Fed. R. Civ. P. 23(e)(1). This requirement  
5 contemplates that class notice be “reasonably calculated, under all the circumstances, to apprise  
6 interested parties of the pendency of the action and afford them an opportunity to present their  
7 objections.” *In re Toys R Us*, 295 F.R.D. at 448 (citing *Mullane v. Central Hanover Bank & Trust*  
8 *Co.*, 339 U.S. 306, 314 (1950)). A class action settlement notice is deemed “satisfactory if it  
9 generally describes the terms of the settlement in sufficient detail to alert those with adverse  
10 viewpoints to investigate and to come forward and be heard.” *Churchill Vill.*, 617 F.3d at 575.

11 The proposed notices provide sufficient information to satisfy these standards. *See SA*  
12 *Exs. 2, 3*. Each Notice clearly and conspicuously: identifies who is a Class Member; describes  
13 the factual background of the litigation and the Parties to the action; outlines Class Members’  
14 legal rights, including the right to either participate in the Settlement, exclude themselves, or  
15 object, and deadlines to pursue each available course of action; provides the amount of the benefit  
16 and details of the relief; states the amount of attorneys’ fees and Plaintiff’s incentive award  
17 requested by Class Counsel; and sets forth the contact information of the Claims Administrator.  
18 *See generally id.* The Full Notice includes a table of contents modeled in a “frequently asked  
19 questions” format and includes answers to questions such as, “How does a financial institution  
20 know if it is part of the settlement?” “What is the difference between objecting and  
21 excluding/opting out?,” and “How can my financial institution get a payment?” *See SA Ex. 2*.  
22 This format constitutes adequate notice in that it is conducive to providing essential Settlement  
23 information to the Class. *See 4 Newberg on Class Actions* § 11:53, at p. 167 (4th ed. 2013)  
24 (“[N]otice is adequate if it may be understood by the average class member.”).

25 Moreover, the multiple methods of providing notice to Class Members including direct  
26 mail and publication, are adequate and reasonably likely to ensure all Class Members are apprised  
27 of the Settlement terms and given an opportunity to file a claim, object, opt out, or be heard. *E.g.*,



1 *Hanson*, 2018 WL 3630284 at \*6 (finding direct notice and a settlement website to be best  
2 practicable notice); *Brotherson v. Prof'l Basketball Club, L.L.C.*, No. C07-1787 RAJ, 2010 WL  
3 11523895, at \*2 (W.D. Wash. Feb. 12, 2010) (finding notice by first class mail to be the best  
4 notice practicable under the circumstances).

5 **VII. PLAINTIFF SHOULD BE APPOINTED CLASS REPRESENTATIVE AND**  
6 **PROPOSED CLASS COUNSEL SHOULD BE APPOINTED CLASS COUNSEL**

7 Plaintiff also requests that the Court designate Plaintiff Veridian Credit Union as Class  
8 Representative to implement the terms of the Settlement. As detailed above, Plaintiff will fairly  
9 and adequately represent and protect the interests of the Class. Plaintiff's counsel Gary F. Lynch  
10 and Joseph P Guglielmo should be appointed as Class Counsel. Rule 23(g) enumerates four  
11 factors for evaluating the adequacy of proposed class counsel: (1) "the work counsel has done  
12 in identifying or investigating potential claims in the action"; (2) "counsel's experience in  
13 handling class actions, other complex litigation, and types of claims of the type asserted in the  
14 action"; (3) "counsel's knowledge of the applicable law"; and (4) "the resources counsel will  
15 commit to representing the class[.]" Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv).

16 All of these factors militate in favor of appointing Mr. Lynch and Mr. Guglielmo as  
17 Class Counsel. They have devoted significant time and resources to prosecuting this action on  
18 behalf of Plaintiff and the proposed class. Lynch Decl. ¶ 17. Mr. Lynch and Mr. Guglielmo have  
19 extensive experience in class actions, particularly those involving financial institution card data  
20 breaches, as demonstrated by the numerous times their respective firms have been appointed to  
21 leadership positions in similar actions. *Id.* at Exs. B & C (Firm Resumes). Accordingly, Mr.  
22 Lynch and Mr. Guglielmo will adequately represent the interests of the Class and should be  
23 appointed as Class Counsel.

1 **VIII. CONCLUSION**

2 For the foregoing reasons, Plaintiff respectfully requests that the Court certify the  
3 proposed class for settlement purposes, preliminarily approve the proposed settlement as fair and  
4 reasonable, authorize notice to the class, and schedule a final fairness hearing.

5  
6 Respectfully submitted, this 26th day of April, 2019.

7  
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***Attorneys for Plaintiff***

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2  
3 **CERTIFICATE OF SERVICE**

4 I hereby certify that on April 26, 2019, I electronically filed the foregoing with the Clerk  
5 of the Court using the CM/ECF system which will send notification of such filing to all parties  
6 registered on the CM/ECF system. All other parties (if any) shall be served in accordance with  
7 the Federal Rules of Civil Procedure.  
8

9 DATED at Seattle, Washington, this 26th day of April, 2019.

10  
11 /s/ Chase C. Alvord  
12 Chase A. Alvord WSBA #26080  
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