IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

IN RE: MARRIOTT INTERNATIONAL CUSTOMER DATA SECURITY BREACH LITIGATION	*	MDL NO. 19-md-2879
	*	HON. PAUL W. GRIMM
	*	

* * * * * * * * * * * *

MEMORANDUM IN SUPPORT OF BELLWETHER PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

PUBLICLY-AVAILABLE, REDACTED VERSION

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

RULES

OTHER AUTHORITIES

I. INTRODUCTION

Hotels collect reams of Personally Identifiable Information ("PII") from their customers—data like financial and credit card information, addresses and phone numbers, passports, travel companions, room preferences, and travel locations. That information has significant and measurable economic value. [redacted] And like any priceless jewelry, this data is also highly coveted by thieves and scam artists, who trade and sell it on an illicit, multibillion-dollar black market, fueling credit card scams, identity theft, espionage, fraudulent health care schemes, and blackmail. For that reason, Marriott[2] also explicitly promised to protect this valuable data to reassure hotel guests (who spend significant amounts of money on stays) that their information would remain protected. Unfortunately for Marriott's customers, Defendants completely failed in that regard.

Despite this data's significant value, Marriott and Accenture (collectively, "Defendants") never bothered to ensure the security of those crown jewels in their "safe" (the trusted zone on Starwood's internal server). It was not properly protected to prevent unauthorized access to the crown jewels, too many people had access to the safe who didn't need it, Defendants failed to monitor the safe to see if thieves were taking consumer's PII, and Defendants failed to properly encrypt the data in the safe. Attackers got away with hundreds of millions of pieces of the most sensitive types of customer records, having free reign within Starwood's systems without detection for years. This was not merely predictable, but predicted: [redacted]

---

[1] Tab 7 ([redacted]) at 1. An index of exhibits that includes the dates and bates numbers of the exhibits is attached hereto.

[2] As used throughout this brief, "Marriott" refers to Marriott and its predecessor Starwood.

[redacted]

While Defendants knew of these security deficiencies and deliberately chose not to address them (particularly during the period of integration of the two companies' systems), for purposes of this motion, what matters is not the degree to which Defendants bungled their information security—although the mixture of audacity and ineptitude is astonishing—but whether a jury can determine if Defendants are liable for their incompetence in a single, classwide trial with common proof. It can: Defendants breached their obligations to all members of the various state classes or none of them. And Marriott did not make special promises to certain class members and not others; its data security promises were the same across-the-board. This is the paradigmatic case suitable for class certification because a class trial will be straightforward: uniform law applied to common evidence will lead to a classwide verdict that advances the resolution of this litigation.

Plaintiffs respectfully ask this Court to certify the Classes and Subclasses described in this motion.

II. LEGAL STANDARD

When plaintiffs seek class certification for money damages, as they do here, they must affirmatively prove six prerequisites to class certification:

> (1) **Numerosity**. Class certification is only appropriate if it is not practical to join all potential claimants in one litigation. Fed. R. Civ. P. 23(a)(1).
>
> (2) **Commonality**. At least one legal or factual question must be common to every member of the class. Fed. R. Civ. P. 23(a)(2).

---

[3] Tab 8 ([redacted], [redacted]) at 4.

> (3) **Typicality**. The named plaintiffs must have the same type of claim as other class members. Fed. R. Civ. P. 23(a)(3).
>
> (4) **Adequacy**. The named plaintiffs and their counsel must represent the interests of absent class members. Fed. R. Civ. P. 23(a)(4).
>
> (5) **Predominance**. Legal and factual issues that can be resolved on a classwide basis must be more important than those that could only be resolved on an individual basis. Fed. R. Civ. P. 23(b)(3).
>
> (6) **Superiority**. A class action must be superior to many individual lawsuits. Fed. R. Civ. P. 23(b)(3).

See, e.g., *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 423 (4th Cir. 2003). District courts have "an independent obligation to perform a 'rigorous analysis' to ensure that all of the [above] prerequisites have been satisfied." *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014) (citing *Wal-Mart v. Dukes*, 564 U.S. 338, 350-51 (2011)).

Plaintiffs seek certification of claims here under Rule 23(b)(3) for classwide damages related to diminishment in the value of their PII ("PII Value Damages"), the overpayment related to staying at hotels that did not secure their data as promised ("Benefit of the Bargain Damages"), statutory damages, and nominal damages. These are all easily measurable on a classwide basis using common proof. In addition, Plaintiffs seek certification under Rule 23(c)(4) of the state classes for liability purposes only for Plaintiffs seeking individualized damages related to identity fraud, time spent responding to the breach, and other out-of-pocket losses. Finally, Plaintiffs also seek certification under Rule 23(b)(2) of their claims for injunctive relief.

This motion is supported by the accompanying expert reports of Mary Frantz, the founder and partner of Enterprise Knowledge Partners, LLC, where she provides a wide range of technology, compliance, and data security services to corporate clients; Jeffrey Prince, the Professor and Chair of Business Economics and Public Policy at the Kelley School of Business at

Indiana University; and Sarah Butler, a managing director at NERA Economic Consulting and Chair of the Survey and Sampling Practice.

III. THE PROPOSED CLASSES

Plaintiffs, Marriott, and Accenture each selected bellwether claims to allow "an unbiased valuation of claims and the likelihood of successes of defenses." ECF No. 248 at 1 (quoting *Bellwether Trials in MDL Proceedings: A Guide for Transferee Judges* 22 (Fed. J. Ctr. 2019)). A few of those claims were dismissed, *see* ECF Nos. 540, 541, 671, 672, and some Bellwether Plaintiffs sought voluntary dismissal—some for personal reasons, and others because they felt Marriott's discovery was even more intrusive than the Breach, itself. *See* ECF Nos. 678, 833, 850.[4] Plaintiffs seek certification solely of the remaining causes of action the Parties initially selected for bellwether treatment: (A) the Negligence Classes, (B) the Consumer Protection Classes, and (C) the Breach of Contract Classes.

A. Plaintiffs ask the Court to certify negligence classes in Florida, Georgia, Maryland, and Connecticut.

- *Florida Negligence Class*

  All natural persons residing in Florida whose Personal Information, given to Starwood in connection with the making of a reservation at a Starwood property, was compromised in a data breach announced by Marriott on or about November 30, 2018.

  The proposed Class Representatives are Irma Lawrence, Michaela Bittner, and Kathleen Frakes Hevener.

[4] Tab 1 (Declaration of A. Friedman, A. Keller, and J. Pizzirusso ("Decl. of Class Counsel")) ¶¶ 23-24.

- *Georgia Negligence Per Se Class*

  All natural persons residing in Georgia whose Personal Information, given to Starwood in connection with the making of a reservation at a Starwood property, was compromised in a data breach announced by Marriott on or about November 30, 2018.

  The proposed Class Representatives are Brent Long and David Viggiano.

- *Maryland Negligence Class (Against Accenture Only)*

  All natural persons residing in Maryland whose Personal Information, given to Starwood in connection with the making of a reservation at a Starwood property, was compromised in a data breach announced by Marriott on or about November 30, 2018.

  The proposed Class Representative is Peter Maldini.

- *Connecticut Negligence Class (Against Accenture Only)*

  All natural persons residing in Connecticut whose Personal Information, given to Starwood in connection with the making of a reservation at a Starwood property, was compromised in a data breach announced by Marriott on or about November 30, 2018.

  The proposed Class Representative is Anne Marie Amarena.

- *Connecticut Negligence Per Se Class (Against Accenture Only)*

  All natural persons residing in Connecticut whose Personal Information, given to Starwood in connection with the making of a reservation at a Starwood property, was compromised in a data breach announced by Marriott on or about November 30, 2018.

  The proposed Class Representative is Anne Marie Amarena.

B. <u>Plaintiffs ask the Court to certify consumer protection classes in California, Maryland, Michigan, and New York.</u>

- *California UCL Class (Against Marriott Only)*

  All natural persons residing in California who paid for a stay at a Starwood property and whose Personal Information, given to Starwood in connection with the making of a reservation at a Starwood property, was compromised in a data breach announced by Marriott on or about November 30, 2018.

  The proposed Class Representatives are Robert Guzikowski, Denitrice Marks, and Maria Maisto.

- *Maryland Consumer Protection Act Class (Against Marriott Only)*

  All natural persons residing in Maryland who paid for a stay at a Starwood property and whose Personal Information, given to Starwood in connection with the making of a reservation at a Starwood property, was compromised in a data breach announced by Marriott on or about November 30, 2018.

  The proposed Class Representative is Peter Maldini.

- *Michigan Identity Theft Protection Act Class (Against Marriott Only)*

  All natural persons residing in Michigan whose Personal Information, given to Starwood in connection with the making of a reservation at a Starwood property, was compromised in a data breach announced by Marriott on or about November 30, 2018.

  The proposed Class Representatives are Bryan Wallace and Laura Gononian.

- *New York GBL Class (Against Marriott Only)*

  All natural persons residing in New York who paid for a stay at a Starwood property and whose Personal Information, given to Starwood in connection with the making of a reservation at a Starwood property, was compromised in a data breach announced by Marriott on or about November 30, 2018.

  The proposed Class Representatives are: Roger Cullen, Eric Fishon, and Paula O'Brien.

C. <u>Plaintiffs ask the Court to certify contract claims in Maryland and New York.</u>

- *Maryland Breach of Contract Class (Against Marriott Only)*

  All natural persons residing in Maryland who had a Starwood Preferred Guest ("SPG") membership and whose Personal Information, given to Starwood in connection with the making of a reservation at a Starwood property, was compromised in a data breach announced by Marriott on or about November 30, 2018.

  The proposed Class Representative is Peter Maldini.

- *Maryland Breach of Contract Benefit of the Bargain Subclass (Against Marriott Only)*

  All natural persons residing in Maryland who had a Starwood Preferred Guest ("SPG") membership and who paid for a stay at a Starwood property and whose Personal Information, given to Starwood in connection with the making of a reservation at a Starwood property, was compromised in a data breach announced by Marriott on or about November 30, 2018.

  The proposed Class Representative is Peter Maldini.

- *New York Breach of Contract Class (Against Marriott Only)*

  All natural persons residing in New York who had a Starwood Preferred Guest ("SPG") membership and whose Personal Information, given to Starwood in connection with the making of a reservation at a Starwood property, was compromised in a data breach announced by Marriott on or about November 30, 2018.

  The proposed Class Representatives are: Roger Cullen, Eric Fishon, and Paula O'Brien.

- *New York Breach of Contract Benefit of the Bargain Subclass (Against Marriott Only)*

  All natural persons residing in New York who had a Starwood Preferred Guest ("SPG") membership and who paid for a stay at a Starwood property and whose Personal Information, given to Starwood in connection with the making of a reservation at a Starwood property, was compromised in a data breach announced by Marriott on or about November 30, 2018.

  The proposed Class Representatives are: Roger Cullen, Eric Fishon, and Paula O'Brien.

* * *

The above classes exclude Defendants, any entity in which any Defendant has a controlling interest, and Defendants' officers, directors, legal representatives, successors, subsidiaries, and assigns. They also exclude any judicial officer presiding over this matter, members of their immediate family, and members of their judicial staff.

IV. RELEVANT BACKGROUND

In 2015, Marriott agreed to buy Starwood Hotels and Resorts Worldwide, Inc., for $12.2 billion.[5] At the time, Starwood and its IT provider, Accenture, had allowed Starwood's systems to fall into complete disrepair, [redacted] As one of Starwood's IT executives put it, [redacted] Little wonder that Marriott's cybersecurity leaders [redacted] The insecure and out-of-date system that held most of the PII for Starwood's customers was called the "New" Data Storage ("NDS").

[redacted]

---

[5] *See* Marriott News Center, *Marriott International to Acquire Starwood Hotels & Resorts Worldwide, Creating the World's Largest Hotel Company* (Nov. 16, 2015), https://news.marriott.com/news/2015/11/16/marriott-international-to-acquire-starwood-hotels-resorts-worldwide-creating-the-worlds-largest-hotel-company.

[6] Tab 9 [redacted] at 5 [redacted]).

[7] Tab 10 [redacted]) at 1.

[8] Tab 11 [redacted]).

[redacted] A former senior vice president asked [redacted] But Marriott's senior leadership [redacted] Marriott lost that bet and hundreds of millions of its customers suffered as a result.[12] [redacted]

A. Four easily preventable security failures lead to a catastrophic data breach.

Defendants committed at least four major security failures that directly contributed to the data breach, as detailed in reports [redacted]

---

[9] Tab 12 ([redacted]; Tab 13 [redacted]; *see also* Tab 14 ([redacted]) at 16 [redacted]

[10] Tab 15 ([redacted].

[11] Tab 15 [redacted]

[12] *See, e.g.*, Tab 17 [redacted]).

[13] Tab 18 ([redacted].

[redacted] These failures include:

> (1) Defendants failed to adequately implement Multifactor authentication ("MFA") to control access to Starwood's internal servers containing PII.
>
> (2) Defendants allowed too many accounts to have excess privileges and unnecessary access to areas on its servers where sensitive data was stored.
>
> (3) Defendants failed to properly monitor, log, or alert on accounts that accessed sensitive PII.
>
> (4) Defendants' encryption of sensitive PII was insufficient.

Along with Marriott's own outside investigators, nationally-renowned cybersecurity expert Mary Frantz discusses these failures in more extensive detail.[17] What is most relevant for present purposes, however, is that this evidence (summarized below) is common to all class members; *i.e.*, Plaintiffs will establish Defendants' security failures with common evidence at a single trial.

1. <u>Defendants did not use multifactor authentication properly, which made it significantly easier for attackers to steal Plaintiffs' PII.</u>

Multifactor authentication is a powerful, easy-to-implement security tool that requires users to enter more than a simple password to get access to sensitive information.[18] For example, when a user enters a password, the system can text or e-mail the user a code that he or she must also enter to gain access to information. Ironically, [redacted]

---

14 Tab 17 [redacted].

15 Tab 19 [redacted].

16 Tab 20 [redacted].

17 Tab 4 (July 12, 2021 Expert Report of Mary Frantz ("Frantz Report")).

18 Tab 4 (Frantz Report), at ¶¶ 85-88 (defining MFA).

[redacted] MFA is a critical type of security for sensitive information because it means that, even if a criminal gains access to an individual's password, an extra layer of protection thwarts further use of that account on the devices requiring MFA.

MFA is not new, cutting-edge technology. To the contrary, MFA has been around for years [redacted]

---

[19] Tab 21 [redacted]

[20] Tab 22 [redacted].

[21] Tab 23 [redacted].

[22] Tab 24 [redacted].

[23] Tab 14 [redacted]

[24] Tab 25 [redacted]

[redacted]

Tab 27 [redacted] *see also* Tab 28 [redacted] *See* Tab 16 [redacted] Tab 29 [redacted] Tab 30 [redacted].

[25] Tab 28 [redacted].

[26] Tab [redacted]

[27] Tab 28 [redacted].

[redacted]

---

28 Tab 13 [redacted]

29 Tab 32 [redacted]

30 Tab 14 [redacted]

31 Tab 8 [redacted]

32 *Id.*

33 Tab 3 [redacted]

34 Tab 34 [redacted]

35 Tab 35 [redacted] Tab 28 [redacted]

3. Marriott's poor monitoring meant that attackers could move throughout their systems without detection.

The third critical security failure at issue is that neither Marriott nor Accenture properly monitored their systems for attackers. Having overprivileged accounts, without MFA, Defendants could have at least closely monitored the activities of those accounts for suspicious activities outside their normal duties. But they did not. The United Kingdom's official report explained correctly: "That Marriott did not detect the Attack . .. is indicative of Marriott failing regularly to test, assess, and evaluate the effectiveness of its security measures."[36]

There were several obvious, easy-to-fix problems with Defendants' monitoring systems.

[redacted]

[36] Tab 17 [redacted]

[37] Tab 28 [redacted] Tab 31

[38] Tab 22 [redacted]

[39] Tab 36 [redacted]

The above problems were exacerbated further because Marriott did not properly "segment" the Starwood network. Network segmentation refers to the ability to isolate the sensitive information within a network from the rest of the network.[47] It means that even if an attacker gets into one portion of the network, he or she cannot access all of it.

---

40 According to a document cited by Accenture in its interrogatory responses,

41 Tab 36

42 Tab 38

43 Tab 39

44 Tab 36

45 Tab 36

46 Tab 36

Tab 40

Tab 38

Tab 19

ab 18

Tab 41

Tab 42

Not

47 Tab 4 (Frantz Report), ¶¶ 89-92 (network segmentation definition).

[redacted] This failure is perplexing, [redacted]

4. Defendants did not encrypt all PII.

The fourth major security issue is that Defendants' encryption was woefully insufficient. Encryption is an extremely basic security precaution dating back decades: implemented fully, it means that if an attacker does manage to access secure information, she sees only gibberish. [redacted]

---

48 Tab 12 [redacted]

49 Tab 18 [redacted]

50 Tab 12 [redacted] Tab 14 [redacted]

51 Tab 22 [redacted]

52 Tab 19 [redacted]

53 Tab 44 [redacted]

[redacted] And, as a result, Marriott *cannot* definitively tell consumers that the hacker *did not* unencrypt their sensitive data and will never know the full scope of what was taken or accessed.

B. Defendants' security failures that led to the breach were a direct consequence of years of neglect from both Marriott and Accenture.

Marriott and Accenture may attempt to defend themselves by arguing that there is no such thing as truly "perfect" security. This tautology should not be used to obscure how woeful any one of the above security failures would be individually, much less collectively. Those failures did not happen by chance: they were the inevitable consequence of years of neglect. The record is plain that neither Marriott nor Accenture took anything close to proper responsibility to secure Plaintiffs' information.

Marriott is responsible for all of Starwood's failures as its successor. But Marriott had its own fault here, as well, outside of merely being the purchaser of Starwood's ineptitude. Marriott knew that Starwood had a huge cybersecurity problem, but did nothing to fix it because it didn't want to spend the money updating legacy systems it was phasing out. [redacted]

---

[54] Tab 45 [redacted] Tab 43 [redacted]

[55] Tab 30 [redacted]

[redacted]

---

56 Tab 46 [redacted]

57 Tab 15 [redacted]

58 *Id.*

59 Tab 47 [redacted].

60 Tab 48 [redacted]

61 *Id.* at 40:8-25.

62 *Id.* at 160:7-20.

63 *Id.* at 30:22-23; 161:6-164:14; Tab 36 [redacted] Tab 49 [redacted]

[redacted] Instead of protecting Plaintiffs' data that it was under contract to secure, Accenture bowed to Marriott's business mantra of profitability. Accenture repeatedly chose lesser means to remediate Starwood's vulnerabilities [redacted]

Plaintiffs' security expert, Mary Frantz has submitted an expert report that confirms all of the above in much greater detail. Ms. Frantz, who has been retained as an expert in 32 data breach actions, concluded here that "If Starwood and Marriott had abided by industry standards and requirements, it is highly likely a breach, especially of this duration and magnitude, would not have been successful or the attacks would have been detected long before an attacker was able to compromise confidential consumer information."[69]

The liability issues here are uniform to the class and this case can be prosecuted (and defended) using common, classwide evidence like that detailed above and in Ms. Frantz's report.

---

64 Tab 36 [redacted]

65 Tab 47 [redacted]

66 *Id.* at 207:14-21; 212:2-12; Tab 49 [redacted]

67 Tab 49 [redacted]

68 Tab 48 [redacted]

69 Tab 4 [redacted]

V. PLAINTIFFS HAVE ESTABLISHED THE SIX PREREQUISITES FOR CLASS CERTIFICATION

A. Plaintiffs have satisfied numerosity because there are at least tens of thousands of members in each of the proposed Classes.

Plaintiffs must demonstrate that each "class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Plaintiffs have established numerosity for each of the proposed classes because each contains no less than tens of thousands of class members; indeed, Marriott announced to the public that its data breach affected hundreds of millions of consumers, and Marriott concedes readily that the NDS database contained billions of records.[70] The numerosity prong requires that joinder of all class members be impracticable. This low threshold is easily met here. *E.g.*, *Stanley v. Central Garden and Pet Corp.*, 891 F. Supp. 2d 757, 770 (D. Md. 2012) ("Classes of as few as 25 to 30 have been found to 'raise the presumption that joinder would be impracticable[]'"); *In re Zetia (Ezetimibe) Antitrust Litig.*, 481 F. Supp. 3d 571, 574 (E.D. Va. 2020) ("Generally, class sizes of forty or more are considered sufficiently numerous to satisfy Rule 23(a)'s numerosity requirement. . . ."). The proposed Classes and Subclasses are sufficiently numerous.

B. There is at least one issue common to members of the proposed classes.

Plaintiffs also must demonstrate that there is a question of fact or law common to the class. Fed. R. Civ. P. 23(a)(2). In particular, Plaintiffs must show that there is at least one common question such that "a classwide proceeding [can] generate common *answers* apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350 (emphasis in original) (citation omitted); *see*

---

[70] *See* Marriott Announces Starwood Guest Reservation Database Security Incident (Nov. 30, 2018), https://news.marriott.com/news/2018/11/30/marriott-announces-starwood-guest-reservation-database-security-incident. Marriott refused to produce transactional data from the NDS system for all of its guests, except for the named Plaintiffs. ECF No. 751.

also Bryant v. King's Creek Plantation, L.L.C., No. 20-cv-00061, 2020 WL 6876292, at *4 (E.D. Va. June 22, 2020) (quoting same). And "even a single common question will do." *Dukes*, 564 U.S. at 350; *Ealy v. Pinkerton Gov't Servs., Inc.*, 514 F. App'x 299, 304 (4th Cir. 2013) (quoting same). All of the proposed classes here meet this standard.

The reason each of the proposed classes meet this standard is simple: every proposed class member was subject to the same conduct. That is, Defendants failed to protect their data in the same way. A jury can conclude whether Defendants were negligent, breached a contract, or violated state consumer protection statutes by examining evidence that pertains to all class members. Because each class member's PII was compromised in the Breach due to Defendants' numerous failures to remedy multiple known technical vulnerabilities, proof of what Defendants knew and what they did or did not do to address these vulnerabilities is common to all class members. Furthermore, proof that the attacker exploited these vulnerabilities to exfiltrate their PII is common to all class members. These common answers will drive the resolution of the litigation. *See Brown v. Nucor*, 785 F.3d 895, 909 (4th Cir. 2015). Commonality should not be disputed seriously for any proposed Classes or Subclasses.[71]

C. The proposed class representatives' claims are typical.

Plaintiffs must also show that the representative plaintiffs' claims are typical. *See* Fed. R. Civ. P. 23(a)(3). The Fourth Circuit has explained that typicality is satisfied when "the representative party's interest in prosecuting his own case [] simultaneously tend[s] to advance the interests of the absent class members." *Dieter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006); *accord Salim Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, 659 F.3d 234, 252 (2d Cir.

[71] As discussed below in the section on "predominance," there are many other common issues that will also drive the resolution of this litigation.

2011). Typicality does not require "that the plaintiff's claim and the claims of the class members be perfectly identical or perfectly aligned." *Dieter*, 436 F.3d at 467. However, where "the facts on which the plaintiff would necessarily rely to prove [his *prima facie* case] . . . would also prove the claims of the absent class members," typicality is satisfied. *Id.* "The test for determining typicality is whether the claim or defense arises from the same course of conduct leading to the class claims, and whether the same legal theory underlies the claims or defenses." *Peoples v. Wendover Funding*, 179 F.R.D. 492, 498 (D. Md. 1998) (*citing Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 143 F.R.D. 628, 637 (D.S.C. 1992)).

Typicality, like the other prerequisites to class certification, is not a close call here. The proposed representative plaintiffs do not merely make arguments that are *similar* to the legal arguments of other class members (which is all that Rule 23 requires), the representative plaintiffs make the *same* legal arguments as other class members. Every Plaintiff alleging negligence alleges the exact same duty as all members of the proposed class (to protect sensitive information), the exact same breach (failing to take even basic precaution), and the exact same harm (exfiltration of their sensitive data). Every Plaintiff alleging breach of contract alleges the same material contract terms that applied to every other class member (the SPG agreement), the same breach (failure to protect PII), and the same harm (exfiltration of sensitive data). So too with the consumer fraud claims—Plaintiffs allege that Marriott failed to disclose the major security failings in its systems, and guests would not have made reservations at those properties or paid what they did had they known. Put another way, typicality is met for the same reason that commonality is met: Marriott either owed every member of a given proposed class better data security or it did not. That Plaintiffs may have different damage amounts stemming from that harm does not make their claims atypical. *See, e.g.*, *Morris v. Wachovia Sec., Inc.*, 223 F.R.D. 284, 295 (E.D. Va. 2004)

(holding that "differences in the claimed damages or the availability of certain defenses do not defeat typicality, as long as the class claims are generally based on the same legal or remedial theory"). And any damages that cannot be resolved on a classwide basis can be handled through certification under Federal Rule 23(c)(4).

D. The proposed representatives and their counsel will adequately represent the class.

Rule 23(a)(4) requires the class representative to show that they "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "[B]asic due process requires that named plaintiffs possess undivided loyalties to absent class members." *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 338 (4th Cir. 1998). "Representation is adequate if: (1) the named plaintiff's interests are not opposed to those of other class members, and (2) the plaintiff's attorneys are qualified, experienced, and capable." *Boyd v. Coventry Health Care, Inc.*, 299 F.R.D. 451, 459 (D. Md. 2014).

The proposed class representatives and their counsel have met Rule 23's "adequacy" prong. *See Boyd*, 299 F.R.D. at 459. First, there is no conflict of interest between the proposed representative plaintiffs and other class members because the class representatives' claims are not antagonistic to the claims of any other class member. Among other things, the proposed class representatives would not recover damages unless the other class members also recovered damages, and no class member would be worse off if the proposed class representatives should prevail.

Second, there should be no serious doubt that the proposed class representatives and their counsel have and will continue to vigorously pursue the claims of the class. Bellwether Plaintiffs have participated actively in this case by reviewing pleadings, responding to significant discovery (including enduring forensic scans of their electronic devices, engaging in supplemental document

collections to address questions from defense counsel, supplementing their discovery responses several times, and reviewing extensive productions of documents from third parties revealing their most private personal and financial information—some of which the defendants would not have had access to *but for this litigation*), and sitting for lengthy depositions, all of which demonstrate their "requisite level of knowledge and control of the litigation."[72]

Under Rule 23(a)(4), a court must also find that class counsel is "qualified, experienced and generally able to conduct the proposed litigation." *McLaurin v. Prestage Foods, Inc.*, 271 F.R.D. 465, 476 (E.D.N.C. 2010) (citation omitted). Proposed Class Counsel, selected by this Court, including interim Co-Lead Counsel Andrew Friedman, Amy Keller, and James Pizzirusso, an eight-person Plaintiffs' Steering Committee ("PSC") including MaryBeth V. Gibson, Megan Jones, Jason Lichtman, Gary Lynch, Timothy Maloney, Daniel Robinson, Norman Siegel, and Ariana Tadler, and liaison counsel James Ulwick and Veronica Nannis, have each demonstrated their commitment to representing the absent class members in this litigation. Collectively, Class Counsel propounded and responded to discovery and engaged in over two years of discovery motion practice with the abled assistance of Special Master Judge John Facciola (ret.); successfully defended against Defendants' Motions to Dismiss and Motions to Certify or for Interlocutory Appeal; reviewed hundreds of thousands of documents, including documents produced in response to subpoenas plaintiffs served upon 71 third parties; deposed over 20 current and former employees of Accenture and Marriott, including corporate representatives under Rule 30(b)(6); defended at least one (and sometimes two) depositions of every proposed class representative; engaged experts and served three expert reports totaling hundreds of pages relating to Defendants' negligent

---

72 Tab 1 (Decl. of Class Counsel ¶ 25).

security practices, models for class members' recovery, and Plaintiffs' damages and risk of harm; and funded the entirety of the litigation without guarantee of payment or recovery.[73] Thus, the proposed class representatives and Rule 23(g) class counsel meet the adequacy requirement.

E. The class is ascertainable because it is defined with reference to objective criteria.

Rule 23 contains an implied requirement of ascertainability. *Soutter v. Equifax Info. Servs., LLC*, 307 F.R.D. 183, 196 (E.D. Va. 2015) (citing *EQT Prod.*, 764 F.3d at 358). In particular, a "class is ascertainable when defined by objective criteria that are administratively feasible and when identifying its members would not require a mini-hearing on the merits of each case." *Brecher v. Republic of Argentina*, 806 F.3d 22, 24-25 (2d Cir. 2015). The proponents of class certification, however, "need not be able to identify every class member at the time of certification." *EQT Prod. Co.*, 764 F.3d at 358.

Ascertainability here cannot be contested meaningfully. That is so because each class is defined generally as people who, because they gave their Personal Information to Starwood and it wound up in Starwood's NDS database, had that information compromised as a result of the announced Data Breach. Put simply, ascertainability is not in doubt when the defendant has a database that contains *the actual identity* of most class members. *See, e.g.*, *Dover v. Brit. Airways, PLC (UK)*, 321 F.R.D. 49, 59 (E.D.N.Y. 2017); *Vu v. Diversified Collection Servs., Inc.*, 293 F.R.D. 343, 355 (E.D.N.Y. 2013). Indeed, Marriott already identified the members of the proposed classes in order to send them breach notification letters.[74] *See, e.g.*, *Soutter*, 307 F.R.D. at 196-97

---

[73] Tab 1 (Decl. of Class Counsel ¶¶ 26-30).

[74] *See* Marriott Amend. Ans. to Second Amend. Consol. Compl., ECF No. 620 at ¶ 199.

(class ascertainable where list of class members could be derived from defendant's records); *Krakauer v. Dish Network L.L.C.*, 311 F.R.D. 384, 393 (M.D.N.C. 2015) (same).

F. Common issues predominate over individual ones.

Common questions of law or fact predominate "if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *In re U.S. Foodservice Pricing Litig.*, 729 F.3d 108, 118 (2d Cir. 2013); *see also, e.g.*, *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016); Fed. R. Civ. P. 23(b)(3). While this is a "more demanding" inquiry than commonality, "Rule 23(b)(3) does *not* require a plaintiff seeking class certification to prove that each elemen[t] of [her] claim [is] susceptible to classwide proof.'" *Sykes v. Mel. S. Harris & Assocs., LLC*, 780 F.3d 70, 81 (2d Cir. 2015) (citation and quotation marks omitted) (emphasis in original). Indeed, "[a]n issue 'central to the validity of each one of the claims' in a class action, if it can be resolved 'in one stroke,' can justify class treatment." *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013) (Posner, J.), *cert. denied*, 134 S. Ct. 1277 (2014) (citation omitted). In this case, common issues predominate over individual ones as Plaintiffs' claims do not turn on any individual issues.

1. Common questions predominate in Plaintiffs' Breach of Contract Classes against Marriott.

The contract claims are brought under New York and Maryland law for purposes of the bellwether process. *See* ECF No. 537 ¶¶ 312-28. Under the law of both states, the elements of a claim for breach of contract are largely overlapping and include "'contractual obligation, breach, and damages.'" *Tucker v. Specialized Loan Servicing, LLC*, 83 F. Supp. 3d 635, 655 (D. Md. 2015) (Grimm, J.) (quoting *Kumar v. Dhanda*, 17 A.3d 744, 749 (Md. Ct. Spec. App. 2011) (discussing Maryland contract law)); *see also Alloy Advisory, LLC v. 503 West 33rd Street Assoc., Inc.*, 144

N.Y.S.3d 854, 854 (N.Y. App. 1st 2021) (Mem.) (under New York law, the elements of a claim for breach of contract are: (1) the existence of a contract, (2) the plaintiff's performance, (3) the defendant's breach, and (4) resulting damages).

All SPG members agreed to Starwood's standardized contract terms, which provided that Defendants would abide by a corresponding Privacy Statement.[75] The Privacy Statement, in turn, provided that Starwood was [redacted] that it would not [redacted] and that "[redacted][76] Plaintiffs contend that Marriott is bound by the Starwood policy and other explicit promises. Thus, the next issue is whether the question of Marriott's liability for breach of these agreements has a common answer for every class member to whom it applies. The answer is "yes," because the terms were standardized, non-negotiated adhesion contracts, and Marriott's deficient performance under those terms is common to all class members.

Courts routinely conclude that cases involving an alleged breach of a form contract meet the requirements for class certification because each contract will be interpreted the same way, one way or the other, for each class member. *See In re TD Bank, N.A. Debit Card Overdraft Fee Litig.*,

---

[75] *See, e.g.*, Tab 50 (exemplar terms) (the terms and conditions were subject to evergreen clauses, providing that the Defendants could [redacted] the terms).

[76] *See, e.g.*, Tab 50 (exemplar terms) (noting that Starwood [redacted]). Notably, all iterations of the terms applicable to Plaintiffs and class members from Defendants contained promises of security and privacy.

325 F.R.D. 136, 157 (D.S.C. 2018) (certifying class as to the claim defendant bank breached "contracts of adhesion, involving non-negotiable terms and a vast bargaining/information imbalance between the parties," stating the "common sense principle" that "standardized agreements should be 'interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.'") (quoting Restatement (Second) of Contracts § 211(2)); *In re Med. Cap. Sec. Litig.*, No. 10-2145, 2011 WL 5067208, at *3 (C.D. Cal. July 26, 2011) ("Courts routinely certify class actions involving breaches of form contracts.") (citing *Sacred Heart Health Systems, Inc. v. Humana Military Healthcare*, 601 F.3d 1159, 1171 (11th Cir. 2010) ("It is the form contract, executed under like conditions by all class members, that best facilitates class treatment")); *Smilow v. Southwestern Bell Mobile Sys., Inc.*, 323 F.3d 32, 42 (1st Cir. 2003) ("Overall, we find that common issues of law and fact predominate here. The case turns on interpretation of the form contract, executed by all class members and defendant.").[77] To the extent Marriott believes that contractual terms provide it a defense, those issues will also be common the class.

---

[77] *See also Allapattah Servs. v. Exxon Corp.*, 333 F.3d 1248, 1261 (11th Cir. 2003); *Dupler v. Costco Wholesale Corp.*, 249 F.R.D. 29, 37-38 (E.D.N.Y. 2008) (collecting cases for the proposition that class certification is typically appropriate in cases involving form contracts); *Winkler v. DTE, Inc.*, 205 F.R.D. 235, 243 (D. Ariz. 2001) (rejecting argument that individual issues would predominate in breach of contract claim where standard form contracts were used); *Mortimore v. F.D.I.C.*, 197 F.R.D. 432, 438 (W.D. Wash. 2000) ("Since this case involves the use of form contracts, it is particularly appropriate to use the class action procedure."); *Haroco, Inc. v. American Nat'l Bank and Tr. Co. of Chicago*, 121 F.R.D. 664, 669 (N.D. Ill. 1988) ("Since plaintiffs' claims arise from allegations of common practice and rights derived from form contracts, the case appears to present the classic case for treatment as a class action.") (internal quotations omitted); *Kleiner v. First Nat'l Bank of Atlanta*, 97 F.R.D. 683, 692 (N.D. Ga. 1983) (noting that "claims arising from interpretations of a form contract appear to present the classic case for treatment as a class action, and breach of contract cases are routinely certified as such," and citing numerous cases in which such claims were certified).

Therefore, the essential questions for breach of contract—a legally enforceable obligation, Plaintiffs' performance (paying money to stay at a Starwood property), and Marriott's breach—have a common answer for all class members, making Marriott's liability for breach of contract appropriate for class certification. In addition, as noted in Section V.G., *infra*, the question of class members' remedies attributable to Marriott's breach of contract can also be resolved on a classwide basis.

2. Common questions predominate concerning Plaintiffs' Negligence Classes.

The elements of an action in negligence in the various states at issue are also generally similar. They are "(1) that the defendant was under a duty to protect the plaintiff from injury, (2) that the defendant breached that duty, (3) that the plaintiff suffered actual injury or loss, and (4) that the loss or injury proximately resulted from the defendant's breach of the duty." *In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig.*, No. 19-md-2879, 2020 WL 6290670, at *6 (D. Md. Oct. 27, 2020) (quoting *Valentine v. On Target, Inc.*, 727 A.2d 947, 949 (Md. 1999)); *see also Virgilio v. Ryland, Grp., Inc.*, 680 F.3d 1329, 1339 (11th Cir. 2012) (citing *Curd v. Mosaic Fertilizer, LLC*, 39 So.3d 1216, 1227 (Fla. 2010)); *Ruiz v. Victory Props., LLC*, 315 Conn. 320, 328 (2015). "In Georgia, negligence *per se* arises when a defendant violates a statute or ordinance, satisfying, as a matter of law, the first two elements [duty and breach] of a negligence claim." *Amick v. BM & KM, Inc.*, 275 F. Supp. 2d 1378, 1381 (N.D. Ga. 2003) (citations omitted); *Gore v. People's Savings Bank*, 235 Conn. 360, 375-76, 665 A.2d 1341 (1995) (same as to Connecticut).

This Court has already recognized that Defendants owed a duty of care to Plaintiffs under the facts alleged. *See, e.g.*, *In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig*, 440 F. Supp. 3d 447, 478-79 (D. Md. 2020) (finding Marriott owed duty of care under Florida and Georgia law); *Marriott*, 2020 WL 6290670, at *8-9 (finding Accenture owed duty of care under Maryland and

Connecticut laws). The necessary factual proof related to that tort duty uncovered in discovery will focus on the conduct of Marriott and Accenture, and not individualized facts relating to class members. The same is true of the breach element. And, for negligence *per se* claims, Plaintiffs will show that Marriott's actions violated Section 5 of the FTC Act. *See* ECF No. 540 at 47.

Plaintiffs will present common evidence of Defendants' conduct to prove that Marriott and Accenture, aware of the vulnerabilities and risks associated with Marriott's servers on which it stored Plaintiffs' PII, failed to take reasonable care to protect Plaintiffs' PII from unauthorized access, increasing the risk of harm. Because all class members transferred their PII to Starwood/Marriott (as overseen by Accenture) and all suffered theft of their PII, whether Defendants employed inadequate data security, and whether that inadequate security was a cause of the Breach, are common, predominating questions that will be answered the same way for each class member.

Common evidence also supports causation. First, whether Defendants' inadequate security caused the Breach and harmed Plaintiffs is a common question with a common answer. Additionally, causation related to Plaintiffs' loss of inherent market value of their personal data is directly tied to the Breach. While Defendants will undoubtedly contend that there is no current evidence that Plaintiffs' PII was sold or transferred on the "Dark Web"—a contention that is not provable one way or another—that causation-related question also applies to and has a common answer for all class members, reinforcing the propriety of Rule 23(b)(3) certification. While Defendants may challenge proximate cause by asserting, for example, that other data breaches break any causal link between the criminal exfiltration from Marriott and the subsequent injuries to Plaintiffs and the class, the concurrent cause doctrine prevents such a harsh result, and such issues would go toward a damages calculation—and not liability. *See, e.g.*, *In re Brinker Data*

Incident Litig., No. 3:18-CV-686-TJC-MCR, 2021 WL 1405508, at *12 (M.D. Fla. Apr. 14, 2021) (certifying a negligence class action, entering an order that "the Court finds the multiple breach issue not a disqualifying causation issue, but rather to be determined at the damages phase"); *In re Sonic Corp. Customer Data Breach Litig.*, No. 1:17-MD-02807-JSG, 2020 WL 6701992, at *6 (N.D. Ohio Nov. 13, 2020) (certifying class action, finding that defendants' "contributory negligence" defense related to "issues of damages, not liability"); *Stollenwerk v. Tri-W. Health Care All.*, 254 F. App'x 664, 668 (9th Cir. 2007) (examining Arizona law in a data breach case on appeal from a ruling on summary judgment, finding that "proximate cause is supported not only by the temporal, but also by the *logical*, relationship between" data breaches and subsequent injuries and damages).[78]

3. Predominance is satisfied as to the Bellwether Consumer Protection Claims.

Plaintiffs' claims on behalf of the respective state Classes for violations of the Bellwether Consumer Protection Claims, should also be certified. As explained above, all class members provided their PII to Marriott and all suffered the theft of that PII in the Breach. Whether Defendants' inadequate data security and/or uniform misrepresentations or omissions regarding

[78] *See also In re Equifax, Inc. Customer Data Sec. Breach Litig.*, 362 F. Supp. 3d 1295, 1318 (N.D. Ga. 2019) ("The Plaintiffs need not explicitly state that other breaches did *not* cause these alleged injuries, since their allegations that this Data Breach *did* cause their injuries implies such an allegation."); *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 16-md-02752-LHK, 2017 WL 3727318, at *19 (N.D. Cal. Aug. 30, 2017) ("The existence of other potential data breaches or causes for Plaintiffs' injuries does not defeat Plaintiffs' standing to sue Defendants."); *In re Anthem, Inc. Data Breach Litig.*, 162 F. Supp. 3d 953, 988 (N.D. Cal. 2016) ("[U]nder Defendants' theory, a company affected by a data breach could simply contest causation by pointing to the fact that data breaches occur all the time, against various private and public entities. This would, in turn, create a perverse incentive for companies: so long as enough data breaches take place, individual companies will never be found liable.").

that data security violated these statutes is a common, predominating question that will be answered the same way for each class member.

Likewise, whether class members' harm was caused by Defendants' misrepresentations or omissions regarding the adequacy of their data security can be proved class-wide because class members are entitled to a presumption of reliance on uniform misrepresentations or failures to disclose material information. *See In re Arris Cable Modem Consumer Litig.*, 327 F.R.D. 334, 364-65 (N.D. Cal. 2018) (class members in UCL actions "are not required to prove their individual reliance on the allegedly misleading statements. Instead, the standard in actions under both the CLRA and UCL is whether members of the public are likely to be deceived," making such claims "ideal for class certification because they will not require the court to investigate class members' individual interaction with the product") (internal quotations omitted); *Hasemann v. Gerber Prod. Co.*, 331 F.R.D. 239, 257 (E.D.N.Y. 2019) (the GBL "does not require proof that a consumer actually relied on the misrepresentation"); *Willis v. Bank of Am. Corp.*, No. ELH-13-02615, 2014 WL 3829520, at *22 (D. Md. Aug. 1, 2014) ("'[A] consumer relies on a material omission under the [Maryland CPA] where it is substantially likely that the consumer would not have made the choice in question had the commercial entity disclosed the omitted information.'") (quoting *Bank of Am., N.A. v. Jill P. Mitchell Living Tr.*, 822 F. Supp. 2d 505, 535 (D. Md. 2011)).

In addition, courts routinely conclude that the practice of maintaining deficient data security for customer PII itself violates unfair business practices statutes without regard to any misrepresentations or omissions. *See In re Adobe Sys., Inc. Privacy Litig.*, 66 F. Supp. 3d 1197, 1226-27 (N.D. Cal. 2014) (maintaining deficient data security violates the UCL's unlawful and unfair prongs); Md. Comm. Code § 14-3508 (violation of the Maryland Personal Information Protection Act is an unfair or deceptive trade practice within the meaning of the Maryland statute);

New York v. Feldman, 210 F. Supp. 2d 294, 302 (S.D.N.Y. 2002) (interpreting a violation of Section 5 of the FTC Act as a violation of the New York statute).

The Michigan Identity Theft Protection Act ("ITPA"), Mich. Comp. Laws §§ 445, *et seq*., "requires businesses to provide notice of a security breach 'without unreasonable delay' to a Michigan resident if that resident's unencrypted and unredacted 'personal information' was accessed by an unauthorized person." *Marriott*, 440 F. Supp. 3d at 490 (citing Mich. Comp. Laws § 445.72(1)). As this Court previously recognized, "discovery may establish that Marriott did act reasonably promptly, or that it did not" in failing to disclose the breach to affected class members for more than two months. *Id*. at 488. This is a binary question the answer to which will apply uniformly to all members of the Michigan Identity Theft Protection Act.[79]

G. Damages can be resolved on a classwide basis.

While class certification would be appropriate even if all damages were individualized, *see, e.g.*, *Carriuolo v. Gen. Motors Co*., 823 F.3d 977, 987-89 (11th Cir. 2016); *Butler*, 727 F.3d at 801, Plaintiffs' damages can largely be resolved on a classwide basis. In particular, their claims for statutory damages, nominal damages, benefit of the bargain damages, and PII value damages are uniform and/or formulaic.

---

[79] "Courts have found that consumers may bring a civil action to enforce Michigan's data-breach notice statute through Michigan's consumer-protection statute or other laws." *In re Solara Med. Supplies, LLC Customer Data Sec. Breach Litig*., No. 3:19-CV-2284-H-KSC, 2020 WL 2214152, at *14 (S.D. Cal. May 7, 2020); *see also Equifax*, 362 F. Supp. 3d at 1339; *In re Target Corp. Data Sec. Breach Litig.*, 66 F. Supp. 3d 1154, 1169 (D. Minn. 2014) (same). As there is no Michigan Consumer Protection Act bellwether claim, Plaintiffs seek to enforce the Act under the other laws they have brought. The Maryland Consumer Protection Act does not have a specific statutory damages provision, but "authorizes the plaintiff to 'recover for injury or loss sustained by him as the result' of an unfair or deceptive trade practice, C.L. § 13–408(a), as well as an award of 'reasonable attorney's fees.'" *Sager v. Hous. Comm'n of Anne Arundel Cty*., 855 F. Supp. 2d 524, 548 (D. Md. 2012).

1. A jury does not need to consider individual evidence to award statutory damages.

Plaintiffs bring consumer statutory claims that allow for different types of damages and are easily certifiable on a classwide basis. For purposes of this bellwether motion, the Bellwether Plaintiffs brought a claim under the New York General Business Law, which authorizes "any person who has been injured by reason of any violation of this section [to] bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions." N.Y. Gen. Bus. Law § 349(h). "It is not disputed that statutory damages under GBL § 349 can be assessed on the basis of common proof, as they are capped at $50." *Sykes*, 780 F.3d at 87 (citing N.Y. Gen. Bus. Law § 349(h)); *see also Madden v. Midland Funding, LLC*, 237 F. Supp. 3d 130, 161 (S.D.N.Y. 2017) ("class seeks statutory damages under GBL § 349" which "can be assessed on the basis of common proof"); *Jermyn v. Best Buy Stores, L.P.*, 256 F.R.D. 418, 435 (S.D.N.Y. 2009) (holding GBL premised on omission appropriate for class certification where "that same omission is the gravamen of every class member's claim" and "fact that the mechanical calculation of each member's damages will have individualized aspects does not preclude class certification").

2. Nominal damages are uniform.

Plaintiffs are also entitled to claim nominal damages. *E.g.*, *Yacoubou v. Wells Fargo Bank, N.A.*, 901 F. Supp. 2d 623, 638 (D. Md. 2012) ("Maryland law is clear that a breach of contract, in the absence of actual damages, will entitle the plaintiff to nominal damages") (collecting cases), *aff'd sub nom. Adam v. Wells Fargo Bank*, 521 F. App'x 177 (4th Cir. 2013); *Compania Embotelladora Del Pacifico, S.A. v. Pepsi Cola Co.*, 976 F.3d 239, 247 n.10 (2d Cir. 2020) ("Under New York law, nominal damages are always available in a breach of contract action even if a party cannot prove general or consequential damages."); *Atl. Co. v. Orendorff*, 22 So. 2d 260, 263 (Fla.

1945) (plaintiff who established negligence claim "was entitled to at least nominal damages"); *Fossler v. Blair*, 90 F. Supp. 574, 576-77 (S.D. Fla. 1950) (where negligence is established "plaintiff is entitled to recover at least nominal damages"); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-MD-2800-TWT, 2020 WL 256132, at *13 (N.D. Ga. Mar. 17, 2020) ("Further minimizing any risk of individual damages predominating over common issues, the consolidated amended complaint seeks nominal damages on behalf of all class members, which may be available under Georgia law even where no evidence is given of any particular amount of loss.") (collecting cases), *aff'd in pertinent part*, 999 F.3d 1247 (11th Cir. 2021); *see also* Ga. Code § 51-12-4 (authorizing nominal damages where "injury is small or the mitigating circumstances are strong"); *Hall v. Bergman*, 994 A.2d 666, 675 n.10 (Conn. 2010) (nominal damages available in negligence action upon showing of "actual injury") (*citing Right v. Breen*, 890 A.2d 1287 (Conn. 2006)).

Such claims are certified routinely because they involve *no* individual questions or expert testimony. For example, in *Opperman v. Path, Inc.*, 13-cv-00453, 2016 WL 3844326, at *15-16 (N.D. Cal. July 15, 2016), the court certified a Rule 23(b)(3) class seeking nominal damages for a privacy tort claim precisely because "the problems of proof which attend Plaintiffs' claims for compensatory damages are absent in regard to their claim for nominal damages," where the amount of damages is necessarily uncertain. *Id.* at *16; *see also Davis v. Abercrombie*, 11-cv-00144, 2014 WL 4956454, at *25 (D. Haw. Sept. 30, 2014) (certifying damages class; stating "Plaintiffs and each class member will be entitled to an award of nominal damages") (citing *Cummings v. Connell*, 402 F.3d 936 (9th Cir. 2005)).

3. Plaintiffs' "benefit of the bargain" damages are formulaic and certified routinely for class treatment.

Plaintiffs also seek "benefit of the bargain" damages: the straightforward contention that the market price of Marriott's hotel rooms would have been lower had Marriott disclosed its woefully inadequate security.[80] Courts certify such damages routinely. *See, e.g.*, *Hays v. Nissan N. Am., Inc.*, No. 4:17-CV-00353-BCW, 2021 WL 912262, at *6 (W.D. Mo. Mar. 8, 2021) (cars); *Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084, 1104-05 (N.D. Cal. 2018) (Koh, J.) (breakfast cereal); *Arris*, 327 F.R.D. at 366 (Koh, J.) (cable modems). This is particularly so where, as here, Plaintiffs have submitted two careful, rigorous reports from well-respected experts explaining in detail how to measure such damages.[81]

First, Plaintiffs have attached a report from consumer survey expert Sarah Butler. She conducted what is known as a "conjoint analysis" to determine consumer response if Marriott had disclosed that it did not have appropriate data security.[82] *Accord, e.g.*, *Apple Inc. v. Samsung Elecs. Co.*, 735 F.3d 1352, 1366-68 (Fed. Cir. 2013) (reversing trial court for excluding a conjoint analysis). Her data shows that "consumer preferences for Marriott Brand Family hotels decline significantly" if they know that Marriott will not secure their PII appropriately.[83] *Accord, e.g.*, *In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 45 F. Supp. 3d 724, 753-54 (N.D. Ohio 2014) (relying on such testimony from Butler).

---

80 *See* Tab 5 (Expert Report of Sarah Butler ("Butler Report")).

81 *See* Tab 5 (Butler Report), Tab 6 (Expert Report of Jeffrey T. Prince, Ph.D. ("Prince Report")). This is also an appropriate measure of restitution under the UCL because it is a measure of the difference between the value Marriott promised Plaintiffs and the value Marriott provided them.

82 *See* Tab 5 (Butler Report). *See*

83 Tab 5 (Butler Report), ¶ 13.

Second, Plaintiffs have attached an expert report from Professor Jeffrey Prince, Chairperson of Business Economics and Public Policy at the Kelley School of Business, Indiana University and former Chief Economist for the Federal Communications Commission.[84] Professor Prince has submitted a report in which he explains that he can use the results of Ms. Butler's survey, Marriott's data (once it is provided in later stages of the litigation, as Marriott refused to provide non-Plaintiff data during the bellwether process), and standard econometric techniques to formulaically calculate the amount that proposed class members overpaid for their hotel stays because of Defendants' allegedly wrongful conduct.[85] As explained above, courts routinely accept such testimony.

4. A jury can determine the market value of Plaintiffs' stolen PII in a single trial.

Professor Prince has also measured the market value of the information that Marriott and Accenture allowed the attackers to steal.[86] Professor Prince's straightforward measure allows the jury to award damages formulaically to all class members (or none) based on the value of the data that was stolen.[87] Professor Prince will explain to the jury: (1) the market prices for which one can legitimately offer and sell personal information; (2) the market for sensitive personal and financial information on the Dark Web; and (3) the prices for which personal data is sold on third-party markets.[88] A jury can apply this objective, market based analysis to determine all class members' losses.

---

84 Tab 6 (Prince Report).

85 *Id*.

86 *Id.*

87 *Id.*

88 *Id.*

H. A class action is superior to any other type of action.

Rule 23(b)(3) requires that a class action be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Factors the district court should consider include: "(A) the class members' interest in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against 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 the class action." Fed. R. Civ. P. 23(b)(3)(A)-(D). The "superiority" prong is "designed to ensure that the class action 'achieve[s] economies of time, effort, and expense, and promote[s] . . .uniformity of decision as to persons similarly situated, without sacrificing procedural fairness of bringing about other undesirable results.'" *Ginwright v. Exeter Fin. Corp.*, 280 F. Supp. 3d 674, 686 (D. Md. 2017) (quoting *Gunnells*, 348 F.3d at 424). Superiority is satisfied here.

First, the vast majority of class members have minimal interest in individually controlling the prosecution of their claims because the monetary value of their damages is "dramatically outweighed by the cost of litigating an individual case." *See TD Bank*, 325 F.R.D. at 162 (citing Fed. R. Civ. P. 23(b)(3)(A)). "Here, as in many consumer protection lawsuits, 'the low amount of . . . damages available means no big . . . damages award on the horizon, thus making an individual action unattractive from a plaintiff's perspective.'" *Id.* (quoting *Stillmock v. Weis Markets, Inc.*, 385 F. App'x 267, 274 (4th Cir. 2010)) (alternations in original). "In other words, for most class members the only realistic alternative to a class action is no action at all." *Id.* Conversely, "[i]f any individual class member does wish to retain control of his claim, or seek actual damages where a different remedy might be imposed upon him, the opt-out mechanism will allay such a presumption upon his individual interests." *Id.*

Second, "numerous putative class action lawsuits based on the same facts and containing substantively identical claims have already been filed against" Defendants, and the Judicial Panel on Multidistrict Litigation concluded it was appropriate to consolidate the handling of those common claims in this Court, "which favors a consolidated disposition generally." *Id.* (citing Fed. R. Civ. P. 23(b)(3)(B)); *see also* Fed. R. Civ. P. 23(b)(3)(C).

Third, "the difficulties that would necessarily be presented by thousands upon thousands of individual actions far outweigh any difficulties the Court may encounter in managing a class action in this case." *Id.* (citing Fed. R. Civ. P. 23(b)(3)(D)). "Put simply, '[a] class action is the only realistic way Plaintiffs' claims can be adjudicated. Separate actions by each of the class members would be repetitive, wasteful, and an extraordinary burden on the courts.'" *Id.* (quoting *In re Checking Account Overdraft Litig.*, 286 F.R.D. 645, 659 (S.D. Fla. 2012)). Superiority is satisfied here.

VI. THE COURT SHOULD CERTIFY A CLASS FOR INJUNCTIVE OR DECLARATORY RELIEF.

Certification of a claim for declaratory relief is appropriate when, in addition to the four requirements of Rule 23(a) discussed above, "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "When a class seeks an indivisible injunction benefiting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute." *Dukes*, 564 U.S. at 362-63. Accordingly, the "key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'"

Id. at 360 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)).

"[T]here is no *per se* rule prohibiting class certification under Rule 23(b)(2) when monetary damages are sought." *Olvera-Morales v. Int'l Labor Mgmt. Corp.*, 246 F.R.D. 250, 259 (M.D.N.C. 2007); *see also Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 331-32 (4th Cir. 2006) ("[W]e do not hold, nor have we ever held, that monetary relief is fundamentally incompatible with Rule 23(b)(2)."). "Rather, the Fourth Circuit has held 'only that relief that is neither injunctive nor declaratory may not predominate over the injunctive and declaratory relief in a proper Rule 23(b)(2) action.'" *Olvera-Morales*, 246 F.R.D. at 259 (quoting *Thorn*, 445 F.3d at 331). As explained above, Plaintiffs' monetary related certification requests are all sought under Rule 23(b)(3), and thus the line of Fourth Circuit cases related to whether such monetary damages are "incidental" to the request for injunctive or declaratory relief under Rule 23(b)(2) is inapposite.[89] Plaintiffs only seek certification of their injunctive and declaratory relief claims under Rule 23(b)(2).

While Plaintiffs were not afforded the opportunity to conduct discovery into data security measures adopted by Marriott after the Breach (as that issue was reserved until some later point in the litigation by ruling of the Special Master), Plaintiffs' declaratory relief claim meets the Rule

---

[89] *See, e.g.*, *Fisher v. Virginia Elec. & Power Co.*, 217 F.R.D. 201, 213 (E.D. Va. 2003) ("Nevertheless, Rule 23(b)(2) certification remains available when a claim for injunctive or declaratory relief *also includes* a claim for money damages so long as the requested damages are 'incidental' to the requested injunctive or declaratory relief. Incidental damages are those that flow directly from liability to the class as a whole on the claims that form the basis of the injunctive or declaratory relief. Such damages are distinguishable in that they do not depend in any significant way on the intangible, subjective differences of each class member's circumstances and do not require additional hearings to resolve the disparate merits of each individual's case.") (emphasis added) (internal citations and quotation marks omitted); *Olvera-Morales*, 246 F.R.D. at 258 (same).

23(b)(2) standard because Defendants acted in a manner common to the class. Defendants subjected all class members' PII to the same security vulnerabilities; class members' PII was compromised as a result of those vulnerabilities; Defendants are still in possession of class members' PII; and Defendants still have not adequately secured the PII.[90] Plaintiffs seek certification of declaratory and injunctive relief claims, the substance of which will be reserved for a later time deemed appropriate by the Court. Given Defendants' uniform ongoing treatment of the PII at issue, this is an ideal case for certification of claims for declaratory and injunctive relief under Rule 23(b)(2). *See Adkins v. Facebook, Inc.*, 424 F. Supp. 3d 686, 697-99 (N.D. Cal. 2019) (certifying Rule 23(b)(2) class seeking declaration of insufficient data security practices and corresponding injunctive relief); *see also Equifax*, 2020 WL 256132, at *3, *aff'd in pertinent part*, 999 F.3d 1247 (11th Cir. 2021) (certifying settlement class including injunctive relief component requiring a financial commitment to spent $1 billion on data security and related technology).

VII. THE COURT CAN CERTIFY LIABILITY ISSUES TO RESOLVE ANY INDIVIDUALIZED DAMAGES.

Certification of particular issues is proper pursuant to the express language of Rule 23(c)(4). For example, in *Good v. American Water Works Co., Inc.*, the court stated, "[t]here is no impediment to certifying particular issues in a case as opposed to entire claims or defenses. That is the very approach urged by the authoritative Manual for Complex Litigation." 310 F.R.D. 274, 296 (S.D. W. Va. 2015). "Rule 23(c)(4)(A) permits a class to be certified for *specific issues or elements of claims* raised in the litigation." *Id.* (quoting Manual for Complex Litig., § 21.24 (4th 2004)) (emphasis in original). "An issues-class approach contemplates a bifurcated trial where the

---

[90] Injunctive relief is also available and can be resolved on a class-wide basis for the respective classes' claims under the UCL (Cal. Bus. & Prof. § 17204) and NY GBL (N.Y. Gen. Bus. Law § 360-l).

common issues are tried first, followed by individual trials on questions such as proximate causation and damages." *Id*. (quoting Manual for Comp. Litig.). "If otherwise compliant with Rule 23, the proposed liability issue certifications provide an orderly means to resolve some of the central issues in the case. That is an approach that is encouraged by our court of appeals." *Id*. (citing *In re A.H. Robins*, 880 F.2d 709, 740 (4th Cir. 1989)). Thus, in *Good*, the court held that, "the proposed liability issue certification is appropriate under Rule 23(c)(4)." 310 F.R.D. at 296. "Absent the proposed liability issues certification, the issue of fault, for one, would have to be tried seriatim in every case for which a jury is empaneled." *Id*. at 297.

As in *Good*, this Court here should certify liability questions to resolve any non-classwide damages such as time spent responding to the breach, out-of-pocket fraud losses, and other individualized damages. *See, e.g.*, *Kay Co., LLC v. EQT Prod. Co.*, 2017 WL 10436074, at *16 (N.D. W. Va. Sept. 6, 2017) ("Rule 23(c)(4) permits courts to certify a class with respect to particular issues and contemplates possible class adjudication of liability issues with 'the members of the class . . . thereafter . . . required to come in individually and prove the amounts of their respective claims."). Absent a class-wide determination of the issues most burdensome to prove in terms of time, experts, and court resources, wronged consumers may be left with no practicable route to a remedy. *Cf. Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010) (resolution of common liability questions "has the potential to eliminate the need for multiple, potentially expensive expert testimony and proof that would cost considerably more to litigate than the claims would be worth to the plaintiffs").

In order for a court to certify a particular issue in a case for class treatment, "the 'subclass' on each issue still 'must independently meet all the requirements of [subsection 23(a)] and at least one of the categories specified in [subsection 23(b)].'" *Cent. Wesleyan Coll. v. W.R. Grace & Co.*,

6 F.3d 177, 189 (4th Cir. 1993) (quotation omitted). This requirement is met here, where, in addition to a full liability and damages class, Plaintiffs seek certification of common liability issues, which otherwise meet the requirements of Rule 23 and the resolution of which would significantly advance this litigation. In the event that the Court denies class certification of any particular class under Rule 23(b)(3) or agrees that individualized damages can be resolved separately, Plaintiffs ask the Court to certify the following issues for that class:

1. Were Marriott or Accenture Negligent?
    a. Did they owe a common law duty to the class;
    b. Did they breach that duty; and
    c. Did the breach of that duty cause harm to the class.
2. Were Marriott or Accenture Negligent Per Se?
    a. Did they owe a statutory duty to the class;
    b. Did they breach that duty; and
    c. Did the breach of that duty cause harm to the class.
3. Did Marriott and Starwood breach their contracts?
    a. Did the companies' Privacy Policies create contractual obligations?
    b. Did the companies breach those obligations?
    c. Did those breaches cause harm?
4. Did Marriott violate state consumer protection statutes?
    a. Did Marriott and Starwood make actionable representations or omissions about their security?
    b. Did they fail to meet those representations?
    c. Did those failures cause harm?

The jury can consider and rule on any of Marriott's or Accenture's common defenses as well. Those findings would then be *res judicata* to the class, as a whole. And if the jury finds in favor of Plaintiffs on those issues, the Court can then appoint a special master or magistrate judge to preside over individual damages hearings for those class members who step forward to pursue those claims where Marriott can present individualized defenses or challenges or utilize other management tools.

VIII. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Class Certification should be granted.

Dated: July 12, 2021

Respectfully submitted,

/s/ Amy E. Keller
Amy E. Keller (D. Md. Bar No. 20816)
DiCELLO LEVITT GUTZLER LLC Ten North Dearborn Street, Sixth Floor
Chicago, Illinois 60602
Tel. 312-214-7900
akeller@dicellolevitt.com

/s/ James J. Pizzirusso
James J. Pizzirusso (D. Md. Bar No. 20817)
HAUSFELD LLP
888 16th St., NW, Suite 300
Washington, D.C. 20006
Tel. 202-540-7200
jpizzirusso@hausfeld.com

/s/ Andrew N. Friedman
Andrew N. Friedman (D. Md. Bar No. 14421)
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Avenue, NW, Suite 500
Washington, D.C. 20005
Tel. 202-408-4600
afriedman@cohenmilstein.com

Consumer Plaintiffs' Co-lead Counsel

Norman E. Siegel
STUEVE SIEGEL HANSON LLP
460 Nichols Road, Suite 200
Kansas City, Missouri 64112
Tel: 816-714-7100
siegel@stuevesiegel.com

MaryBeth V. Gibson
THE FINLEY FIRM, P.C.
3535 Piedmont Road, Bldg. 14, Suite 230
Atlanta, GA 30305
Tel: 404-320-9979
mgibson@thefinleyfirm.com

Ariana J. Tadler
TADLER LAW LLP
22 Bayview Ave., Ste. 200
Manhasset, NY 11030
Tel: 212-946-9300
atadler@tadlerlaw.com

Jason Lichtman
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10013
Tel: 212-355-9500
jlichtman@lchb.com

Daniel Robinson
ROBINSON CALCAGNIE, INC.
19 Corporate Plaza Drive
Newport Beach, CA 92660
Tel: 949-720-1288
drobinson@robinsonfirm.com

Megan Jones
HAUSFELD LLP
600 Montgomery Street, Suite 3200
San Francisco, CA 94111
Tel: 415-633-1908
mjones@hausfeld.com

Timothy Maloney
JOSEPH GREENWALD & LAAKE, P.A.
6404 Ivy Lane, Suite 400
Greenbelt, MD 20770
Tel: 301-220-2200
tmaloney@jgllaw.com

Gary F. Lynch
CARLSON LYNCH LLP
1133 Penn Avenue, 5th Floor
Pittsburgh, PA 15222
Tel: 412-322-9243
glynch@carlsonlynch.com

Consumer Plaintiffs' Steering Committee

Veronica Nannis
JOSEPH GREENWALD & LAAKE, P.A.
6404 Ivy Lane, Suite 400
Greenbelt, MD 20770
Tel: 301-220-2200
vnannis@jgllaw.com

James Ulwick
KRAMON & GRAHAM PA
1 South Street, Suite 2600
Baltimore, MD 21202
Tel: 410-347-7426
julwick@kg-law.com

Consumer Plaintiffs' Liaison Counsel