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Superior Court of California
County of Los Angeles

JAN 15 2021

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14
15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
16 **FOR THE COUNTY OF LOS ANGELES**

17
18 KYNDAL CHRISTOFFERSON, NATALIE)
19 GERACE, AND ERIN RATELLE,)
20 individually and on behalf of all others)
similarly situated,)

21 Plaintiffs,)

22 v.)

23 CREATION ENTERTAINMENT, INC.,)

24 Defendant.)
25 _____)

Case No. 19STCV11000

**JOINT DECLARATION OF COUNSEL
FOR PLAINTIFFS IN SUPPORT OF
UNOPPOSED MOTION FOR AN
ORDER PRELIMINARILY
APPROVING CLASS ACTION
SETTLEMENT, DIRECTING NOTICE
AND SETTING FINAL APPROVAL
HEARING**

DATE: February 22, 2021
TIME: 9:00 a.m.
JUDGE: Hon. Elihu M. Berle
DEPT.: 6

1 We, Rachele R. Byrd, Benjamin F. Johns, and Tina Wolfson, declare as follows:

2 1. Rachele R. Byrd is a partner at Wolf Haldenstein Adler Freeman & Herz LLP
3 (“Wolf Haldenstein”), one of the attorneys of record for Plaintiffs.¹ Ms. Byrd submits this
4 declaration in support of Plaintiffs’ motion for preliminary approval of a class action settlement.
5 Ms. Byrd makes this declaration based on her own personal knowledge, and if called to do so, could
6 and would testify to the matters contained herein.

7 2. Benjamin F. Johns is a partner in the law firm of Chemicles Schwartz Kriner &
8 Donaldson-Smith LLP (“CSKD”), one of the attorneys of record for Plaintiffs. Mr. Johns submits
9 this declaration in support of Plaintiffs’ motion for preliminary approval of a class action
10 settlement. Mr. Johns makes this declaration based on his own personal knowledge, and if called to
11 do so, could and would testify to the matters contained herein.

12 3. Tina Wolfson is a principal and founding partner of the law firm of Ahdoot &
13 Wolfson, PC (“Ahdoot & Wolfson”), one of the attorneys of record for Plaintiffs. Ms. Wolfson is
14 also a board member of the proposed *cy pres* recipient, Public Justice, but she will not receive any
15 personal financial benefit as a result of the proposed distribution and has no control over how the
16 fund are spent. Ms. Wolfson submits this declaration in support of Plaintiffs’ motion for
17 preliminary approval of a class action settlement. Ms. Wolfson makes this declaration based on her
18 own personal knowledge, and if called to do so, could and would testify to the matters contained
19 herein.

20 **I. THE LITIGATION AND SETTLEMENT NEGOTIATIONS**

21 4. This is a proposed class action on behalf of a class brought against Creation
22 Entertainment, Inc. (“Creation”). Plaintiffs allege that sensitive financial and personal non-public
23 information, including, but not limited to, their and Class Members’ (a) names, (b) addresses,
24 (c) email addresses, and (d) payment card information (including, *inter alia*, card numbers,
25 expiration dates, and security codes (“CVV numbers”)) (collectively, “Personal Information”) was
26

27
28 ¹ Unless otherwise noted, capitalized terms have the meaning ascribed to them in the First Amended Settlement Agreement and Release dated January 15, 2021 (“Settlement Agreement” or “SA”).

1 accessed and captured from Creation’s systems by unauthorized users during a period of time that
2 ended on or around October 2018 (the “Security Incident”).

3 5. On or about April 2, 2019, Kyndal Christofferson filed a complaint in the Los
4 Angeles County Superior Court, captioned as *Kyndal Christofferson v. Creation Entertainment,*
5 *Inc.*, Case No. 19STCV11000. On that same date, Erin Ratelle filed a complaint in the Los Angeles
6 County Superior Court, captioned *Erin Ratelle v. Creation Entertainment, Inc.*, Case No.
7 19STCV10998. Plaintiff Ratelle voluntarily dismissed her complaint on April 25, 2019. On July 3,
8 2019, Plaintiffs Christofferson, Gerace and Ratelle filed a First Amended Class Action Complaint
9 (“Complaint”) in Case No. 19STCV11000.

10 6. The Complaint alleges that Creation failed to implement or maintain adequate
11 security measures to protect the confidential personal information entrusted to it by Creation
12 customers which resulted in a massive data breach of Creation’s systems from approximately
13 February 1, 2018 to October 10, 2018 (the “Security Incident”). First Amended Class Action
14 Complaint (“FAC”), ¶¶ 1-12, 44-54. The FAC brought claims against Creation for: (1) negligence;
15 (2) breach of implied contract; (3) violation of the California Data Breach Notification Act,
16 California Civil Code, § 1798.80, *et seq.*; (4) violation of the California Unfair Competition Law,
17 California Business & Professions Code, § 17200, *et seq.*; (5) violation of the California Consumer
18 Legal Remedies Act, California Civil Code, § 1750, *et seq.*; (6) violation of the Maryland
19 Consumer Protection Act, Md. Code Ann., Com. Law § 13-101, *et seq.*; and (7) unjust enrichment.
20 *Id.*, ¶¶ 87-159. Defendant filed an Answer to the Complaint on August 27, 2019.

21 7. The Parties thereafter engaged in formal discovery regarding the Security Incident,
22 Plaintiffs’ claims, and Creation’s defenses.

23 8. On October 29, 2019, the Parties participated in good faith, arm’s-length settlement
24 discussions during an all-day mediation with the Honorable Peter D. Lichtman (Ret.) of JAMS in
25 Los Angeles, California. The Parties failed to resolve the matter during that mediation session, but
26 agreed to continue settlement negotiations with the ongoing assistance of Judge Lichtman.

27 9. Though cordial and professional, the settlement negotiations were adversarial and
28 non-collusive in nature.

1 10. Following mediation, the Parties continued to engage in extensive discussions
2 through which the basic terms of a settlement were eventually negotiated and finalized.

3 11. The Parties also engaged in formal discovery, which informed the Settlement
4 discussions, as follows:

5 a. Plaintiffs propounded, and Creation responded to, a request for production of
6 documents. Creation produced 7,000 pages of documents pertaining to potential
7 Class Members, the Security Incident, and its solvency.

8 b. Creation propounded form and special interrogatories and a request for
9 production of documents, and Plaintiffs timely responded to all of Creation's
10 written discovery requests and produced responsive documents.

11 12. The Parties spent over ten months negotiating every aspect of the Settlement.

12 13. The Settlement was reached after extensive investigation and research, production of
13 documents by Defendant, including a report regarding the data breach, and a thorough evaluation of
14 Plaintiffs' claims in light of such information.

15 14. The Parties ultimately signed a Memorandum of Understanding on or about August
16 31, 2020.

17 15. At a status conference on July 8, 2020, the Parties notified the Court of the
18 Settlement.

19 16. Since then, the Parties have worked together to document the Settlement. On
20 November 9, 2020, Plaintiffs filed their motion for preliminary approval of the Parties' proposed
21 Settlement Agreement dated November 9, 2020.

22 17. On December 8, 2020, counsel for both Parties appeared at the preliminary approval
23 hearing before the Honorable Elihu M. Berle. Judge Berle directed the Parties to meet and confer
24 and discuss issues noted by the Court during the hearing.

25 18. The Parties then worked to update the Settlement Agreement and its respective
26 exhibits and declarations, and entered into a First Amended Settlement Agreement and Release
27 dated January 15, 2021, a copy of which is attached hereto as **Exhibit 1**.

28 **II. THE SETTLEMENT**

A. The Settlement Class

1 19. The Settlement Class consists of all individuals in the United States who used a debit
2 or credit card to make a purchase from Creation and whose Personal Information was accessed
3 and/or compromised by unauthorized individuals as part of the Security Incident. Excluded from
4 the Settlement Class are:

- 5 a. Creation and its officers and directors;
- 6 b. All Settlement Class Members who timely and validly request exclusion from
7 the Settlement Class;
- 8 c. The Judge assigned to evaluate the fairness of this Settlement;
- 9 d. The attorneys representing the Parties in the Litigation;
- 10 e. Banks and other entities that issued payment cards which were utilized at
11 Creation during the Security Incident; and
- 12 f. Any Person found by a court of competent jurisdiction to be guilty under
13 criminal law of initiating, causing, aiding, or abetting the criminal activity
14 occurrence of the Security Incident or who pleads *nolo contendere* to any such
15 charge.

16 SA, at § 1.30.

17 **B. The Settlement Consideration**

18 20. The parties have negotiated payment of a fixed sum of \$950,000.00 (the “Settlement
19 Fund”) in exchange for a release of all claims that were or could have been asserted in the case.

20 21. Notice and administration expenses will be deducted from the Settlement Fund,
21 along with attorneys’ fees, expense reimbursements and Representative Plaintiffs’ Awards
22 approved by the Court. The balance will be applied to pay the claims of Class Members. Plaintiffs
23 will seek up to 33% of the fund in attorneys’ fees, plus reimbursement of reasonable expenses
24 incurred not to exceed \$20,000, as well as a \$2,500 service award to each of the three Class
25 Representative Plaintiffs for their time spent in reviewing pleadings and responding to discovery
26 requests.

27 22. Notice and administration expenses are estimated to be approximately \$66,000.

28 23. If these deductions are allowed in full, the Settlement will provide approximately
\$525,000 to pay Class Member claims.

1 **C. Distribution of the Settlement Fund**

2 24. The distribution plan ensures that all Class Members are eligible to readily receive
3 payment from the Settlement Fund by submitting a claim for one of two types of Settlement
4 Payments that will be paid out from the Settlement Fund, either (i) a Basic Settlement Payment or
5 (ii) an Extraordinary Reimbursement Settlement Payment, as follows:

6 a. Basic Settlement Payment - Settlement Class Members who opt to submit a
7 claim for a Basic Settlement Payment are eligible to receive \$200.00, regardless
8 of whether they experienced any fraudulent or unauthorized charges on their
9 credit or debit cards used to make purchases from Creation and regardless of
10 whether they experienced any identity theft as a result of the Security Incident.
11 If a Settlement Class Member experienced any fraudulent or unauthorized
12 charges on his or her credit or debit card used to make a purchase from Creation,
13 this Settlement Payment includes expense reimbursement for: (a) lost time spent
14 dealing with replacement card issues or having fraudulent charges reversed;
15 (b) costs of credit reports, credit monitoring, and identity theft protection
16 purchased between February 1, 2018 and April 19, 2019 (the “Unauthorized
17 Charge Period”); and (c) other miscellaneous expenses (e.g., unreimbursed
18 charges or fees from banks or credit card companies related to reissuance of
19 cards, overdrafts, unavailability of funds, late payments; telephone/cell phone
20 charges; postage; interest on payday loans related to card cancellation and
21 replacement issues). *See SA, at § 2.2.1.*

22 b. Extraordinary Reimbursement Settlement Payment - Settlement Class Members
23 who opt to submit a claim for an Extraordinary Reimbursement Settlement
24 Payment with sufficient documentation—who: (a) during the Unauthorized
25 Charge Period experienced one or more fraudulent or unauthorized charges that
26 are claimed by the Settlement Class Member in good faith to be more likely than
27 not caused by the Security Incident on a credit or debit card he or she used to
28 make a purchase from Creation, which charges were not denied or reimbursed;
(b) has made reasonable efforts to avoid or seek reimbursement for his or her

1 losses, including but not limited to exhaustion of all available credit monitoring
2 insurance and identity theft insurance; and (c) submits an Approved Claim for an
3 Extraordinary Reimbursement Settlement Payment—shall be eligible to receive
4 reimbursement of up to \$10,000.00 for unreimbursed losses related to the
5 Security Incident, including (i) unreimbursed unauthorized charges during the
6 Unauthorized Charge Period on a credit or debit card used to make a purchase
7 from Creation that more likely than not resulted from the Security Incident;
8 (ii) over one hour and up to three hours of lost time spent dealing with
9 unauthorized charges due to the Security Incident, at a rate of \$20.00 per hour, if
10 such time can be documented with reasonable specificity by answering questions
11 on the Claim Form; and (iii) out of pocket expenses. *Id.*, at § 2.2.2.

12 25. Regardless of which option Settlement Class Members pursue, all Settlement Class
13 Members seeking a Settlement Payment must complete and submit a written claim form to the
14 Claims Administrator. *Id.*, at § 2.3.

15 26. The Claim Form must be postmarked or submitted electronically on or before the
16 Claims Deadline, which shall be 90 days after the Notice Date. *Id.*

17 27. Settlement Class Members may submit a Settlement Claim for one type of
18 Settlement Payment; if a Settlement Class Member submits a Claim Form seeking more than one
19 type of Settlement Payment, the Claims Administrator shall pay the single Settlement Payment of
20 the highest dollar value supported by a valid Claim Form and any required documentation. *Id.* at
21 § 2.2.

22 28. Settlement Class Members may only submit one Settlement Claim, and only one
23 Settlement Claim may be submitted per credit or debit card used with Creation. *Id.*

24 29. Settlement Class Members must sign the Claim Form and establish that they used a
25 credit or debit card to make a purchase from Creation by either submitting a receipt, bank statement
26 or credit card to reflect the purchase. *Id.* at § 2.3. If no such documentation is available, Settlement
27 Class Members shall attest under penalty of perjury that he or she made a debit or credit card
28 purchase from Creation, identifying the approximate date and location of purchase, and provide the
last four digits of his or her credit or debit card number. *Id.* Failure to provide such supporting

1 documentation as requested on the Claim Form will result in denial of a Settlement Claim. *Id.*
2 Additional information and documentation will be required of Class Members seeking
3 Extraordinary Reimbursement Settlement Payments in order to show unauthorized charges were
4 denied or not reimbursed, time spent on tasks related to unauthorized charges or the Security
5 Incident, out-of-pocket expenses, and attestation of reasonable efforts to avoid or seek
6 reimbursement for the loss. *Id.*

7 30. If a Settlement Class Member submits an incomplete or unsigned Claim Form, or a
8 Claim Form that is not accompanied by sufficient documentation to determine the validity of the
9 claim, the Claims Administrator shall request additional information and give the Settlement Class
10 Member thirty (30) days to cure any defect before rejecting the claim. *Id.*, at § 7.2.1.

11 31. If, after the Claims Deadline has passed and the Attorneys' Fees and Expenses
12 Award and the Representative Plaintiffs' Awards have been paid in full out of the Settlement Fund,
13 the total dollar value of all Approved Claims is less than the amount remaining in the Settlement
14 Fund, then the Claims Administrator shall increase the payment amount for all Approved Claims
15 *pro rata* among all Settlement Class Members. *See id.*, at § 7.3.1.

16 32. In this scenario, the payment amount per Settlement Class Member may be up to a
17 maximum of twice the total amounts set forth for the Basic or Extraordinary Reimbursement
18 Settlement Payments set forth in the Settlement Agreement, *i.e.*, up to a maximum of \$400.00 or
19 \$20,000, respectively. *Id.* If, at that time, the total dollar value of all Approved Claims at the
20 payment rates set forth in the Settlement Agreement exceeds the amount remaining in the
21 Settlement Fund, the payment amount for all Approved Claims shall be reduced *pro rata* among all
22 Settlement Class Members who submitted Approved Claims. *Id.*, at § 7.3.2.

23 33. Creation will deliver the Settlement Fund to the Claims Administrator within ten
24 business days following entry of the Preliminary Approval Order. *Id.*, at § 7.4.

25 34. The Claims Administrator will mail the Settlement Payment checks or electronically
26 transfer funds to Settlement Class Members within the later of 90 days after the entry of the Final
27 Approval Order or 30 days after all disputed claims have been resolved. *Id.*, at § 7.5.

28 35. If there is any balance remaining in the Settlement Fund Account 90 days after the
Claims Administrator completes the process for stopping payment on any Settlement Payment

1 checks that remain uncashed, the Claims Administrator shall donate the balance of the Fund
2 Account as a *cy pres* donation to Public Justice. *Id.*, at § 7.6. Established 35 years ago, Public
3 Justice is a national non-profit legal advocacy organization that is dedicated to fight injustices on
4 behalf of ordinary persons and preserving access to the courts in order to combat social and
5 economic injustice, protect the Earth's sustainability, and challenge predatory corporate conduct
6 and government abuses on a wide range of important civil rights and environmental issues. *See*
7 Declaration of F. Paul Bland, Executive Director of Public Justice, filed concurrently herewith; *see*
8 *also* <https://www.publicjustice.net/donate/cy-pres-awards/>. Specifically related to the operative
9 Complaint in the instant case, Public Justice regularly represents consumers who have suffered
10 privacy injuries and will use any *cy pres* award to advocate for and enforce the privacy rights of
11 consumers against corporations and institutions. *Id.*

12 36. A copy of the proposed Claim Form is attached to the Settlement Agreement as
13 Exhibit A.

14 37. We are informed by Creation's counsel and believe that, as a result of the instant
15 litigation, Creation has implemented enhanced data security measures, at a cost of \$119,337.87,
16 which provide meaningful benefits to the Class. These security measures are described in the
17 Declaration of Fred Alumyan and in the Declaration of Jack Martirosian, filed concurrently
18 herewith.

19 **III. NOTICE AND CLAIMS ADMINISTRATION**

20 38. Plaintiffs propose the appointment of CPT Group as the Claims Administrator.

21 39. Plaintiffs have proposed notice forms and a notice program that comports with due
22 process and provides the best notice practicable to Class Members.

23 40. The Settlement provides that Creation shall prepare the list of Class Members and
24 provide it to the Claims Administrator within 10 business days after entry of the Preliminary
25 Approval Order, including the name, email address and/or mailing address of each Settlement Class
26 Member. SA, at § 4.1.

27 41. Within 30 days of the Preliminary Approval Order, the Claims Administrator shall
28 provide Summary Notice to Settlement Class Members via email and shall establish a dedicated
settlement website that includes the Settlement Agreement, the Long Notice, and the Claim Form

1 approved by the Court. *Id.* at § 4.2.1.

2 42. The proposed Notices advise class members of the pendency of the action,
3 including: the nature of the action and a summary of the claims; the essential terms of the
4 settlement; the rights of class members to share in the recovery or to request exclusion from the
5 Class; the rights of class members to object to the Settlement and to appear before the Court at the
6 Final Approval Hearing; and will provide the date, time, and place of the Final Approval Hearing.
7 If the Final Approval Hearing is continued, we will ensure that the Settlement Website is updated
8 with the new Final Approval Hearing information. The Notices also contain information regarding
9 our anticipated application for an award of attorneys' fees, reimbursement of expenses and
10 Representative Plaintiffs' Awards and the Claims process.

11 43. The Settlement website will be maintained and updated by the Claims Administrator
12 throughout the Claims Period. *Id.*

13 44. Upon request, the Claims Administrator will also provide Settlement Class Members
14 copies of the Settlement Agreement, the Long Notice and the Claim Form. *Id.*

15 45. Additionally, Settlement Class Members can call a toll-free number to access
16 interactive voice recognition FAQ's. *Id.*

17 46. Also, within 30 days of entry of the Preliminary Approval Order, Publication Notice
18 shall be provided to Settlement Class Members. *Id.* at § 4.2.2.

19 47. Within 30 days of the Preliminary Approval Order, Creation shall also prominently
20 post a link to the Settlement website on the Creation home page for the entire Claims Period. *Id.* at
21 § 4.2.3.

22 48. The Notice program shall commence within 30 days of entry of the Preliminary
23 Approval Order and shall be completed within 60 days of entry of the Preliminary Approval Order,
24 unless otherwise provided in the Settlement Agreement. *Id.* at § 4.6.

25 49. A comprehensive description of the notice plan appears in Paragraphs 4.1 to 4.6 of
26 the Settlement Agreement.

27 50. The estimated cost of notice and administration is \$66,000, which Class Counsel
28 believe is reasonable because the costs of the direct email notice campaign to thousands of
Settlement Class Members represents a relatively small percentage of the Settlement Fund.

1 51. Class Counsel anticipate applying an award of attorneys' fees of up to 33% of the
2 Settlement Fund, or \$313,500, plus reimbursement of up to \$20,000 in expenses, and for
3 Representative Plaintiffs' Awards in the amount of \$2,500 for each of the three Representative
4 Plaintiffs. *See SA*, at §§ 9.1-9.2. Class Counsel have disclosed and obtained from their clients
5 written consent regarding Class Counsels' fee-sharing agreement.

6 52. If the Court approves the Settlement, the parties will request that the Court enter the
7 Final Order and Judgment, releasing all claims that were or could have been asserted against
8 Defendants in this litigation. The proposed Order Granting Plaintiffs' Motion for Preliminary
9 Approval of Class Action Settlement and Providing for Notice, and the proposed Final Order and
10 Judgment are attached to the Settlement Agreement as **Exhibits E and F**. Class Counsel will
11 ensure that the Final Order and Judgment is made available on the Settlement Website.

12 **IV. RECOMMENDATION OF CLASS COUNSEL**

13 53. Plaintiffs, as the proposed Class Representatives, have no conflicts with the
14 Settlement Class, have participated actively in the case, and are represented by attorneys
15 experienced in class action litigation.

16 54. Wolf Haldenstein, CSKD, and Ahdoot & Wolfson each have considerable
17 experience in class action litigation, including the prosecution and resolution of consumer class
18 actions. Our respective law firm resumes are attached hereto as **Exhibits 2, 3 and 4**. In negotiating
19 this Settlement, we have considered the relative risks and benefits of settlement in relation to the
20 risks of litigation. We have also negotiated this Settlement to comply in all respects with the
21 relevant case law the Federal Rules of Civil Procedure. We believe that, considering the relative
22 benefits of settlement at this time on the terms offered in comparison to the risk of a less favorable
23 outcome, taking into account the considerable risk, expense and delay attendant upon obtaining an
24 order certifying a consumer class action such as this one, and the prospects of prevailing at trial and
25 on appeal, the proposed Settlement meets the standards for preliminary approval under California
26 Rules of Court, rule 3.76 in that the Court will likely be able to approve the Settlement as fair,
27 reasonable adequate and certify the class for purposes of judgment. We respectfully request that the
28 Court grant preliminary approval so that notice can be given.

1 We declare under penalty of perjury under the laws of the State of California that the
2 foregoing is true and correct. Executed this 15th day of January, 2021 at San Diego, California,
3 Haverford, Pennsylvania, and Los Angeles, California, respectively.

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5 RACHELE R. BYRD

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7 BENJAMIN F. JOHNS

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