

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

IN RE: U.S. OFFICE OF PERSONNEL
MANAGEMENT DATA SECURITY
BREACH LITIGATION

This Document Relates To:
ALL CASES

Misc. Action No. 15-1394 (ABJ)
MDL Docket No. 2664

**DECLARATION OF DANIEL C. GIRARD IN SUPPORT OF PLAINTIFFS' MOTION
FOR AN ORDER GRANTING PRELIMINARY APPROVAL OF CLASS ACTION
SETTLEMENT AND PROVIDING FOR NOTICE**

I, Daniel C. Girard, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following is true and correct:

1. I am at partner of Girard Sharp LLP and Interim Lead Class Counsel in this action. I submit this declaration in support of Plaintiffs' motion for preliminary approval of the class action settlement with Defendants U.S. Office of Personnel Management ("OPM") and Peraton Risk Decision Inc. ("Peraton"). I make this declaration based on my own personal knowledge, and if called upon to do so, could testify competently to the matters set forth herein.

The Litigation and Settlement Negotiations

2. This litigation stems from OPM's announcements beginning June 4, 2015 that its electronic systems had been breached, resulting in the compromise of personal information of over 21 million current, former, and prospective federal employees and members of their families (the "Data Breaches"). After OPM's initial announcement, several class actions were filed asserting claims against OPM for failing to reasonably safeguard their information in violation of the Privacy Act of 1974, 5 U.S.C. § 552a, and against Peraton for negligence, among other allegations. The Plaintiffs included the two largest federal employee unions, AFGE and NTEU, and individuals who were subject to the Data Breaches.

3. In September 2015 OPM made identity theft protection and credit monitoring and restoration services available to the breach victims at no charge. Congress later extended these services through September 2026. As of March 31, 2022, 3,222,987 people had signed up for these services. By September 2026 the Government will have spent approximately one billion dollars on the services.

4. On October 9, 2015, the Judicial Panel for Multidistrict Litigation granted a motion under 28 U.S.C. § 1407 to centralize this litigation in a single district. *In re U.S. Office of Pers. Mgmt.*

Data Sec. Breach Litig., 138 F. Supp. 3d 1379 (J.P.M.L. 2015). On January 28, 2016, the Court appointed interim lead and liaison counsel along with a Plaintiffs' steering committee. (Dkt. # 58.) Plaintiffs filed their consolidated amended complaint on March 14, 2016. (Dkt. # 63.) Defendants separately moved to dismiss on May 13, 2016 (Dkt. # 70, 72), and the Court heard argument on those motions on October 31 and November 10, 2016 (Dkt. # 98, 104).

5. On September 19, 2017, the Court dismissed Plaintiffs' claims without leave to amend. *In re U.S. Office of Pers. Mgmt. Data Sec. Breach Litig.*, 266 F. Supp. 3d 1 (D.D.C. 2017). Plaintiffs appealed, and on June 21, 2019, the Court of Appeals reinstated the claims in part and remanded. *In re U.S. Office of Pers. Mgmt. Data Sec. Breach Litig.*, 928 F.3d 42 (D.C. Cir. 2019) (per curiam).

6. Following remand, this Court held a case management conference at which it commented that this case "cries out for ADR" and referenced "many reasons for both sides to be open-minded and thoughtful and to initiate this process and to start it soon." (12/3/19 Hr'g Tr., Dkt. # 163 at 17-18.) On January 27, 2020, the Court referred the litigation to private mediation to be supervised by retired federal District Judge Lawrence F. Stengel, an accomplished mediator agreed upon by the parties.

7. The parties held separate conference calls and video sessions with Judge Stengel in 2020 to discuss their positions and potential paths forward in the negotiations. The parties exchanged relevant information under Judge Stengel's supervision, and Plaintiffs sent Defendants detailed supporting materials. The parties were fully informed of the strengths and weaknesses of the case, including through scrutiny of the report issued September 7, 2016 by the House Committee on Oversight and Government Reform.

8. With Judge Stengel's assistance, the parties made considerable progress in negotiating a framework for a potential class-wide resolution. Several factors complicated the negotiations,

however, including OPM's immunity, subject to the Privacy Act exception described in *FAA v. Cooper*, 566 U.S. 284 (2012); which factual scenarios may make an individual eligible to recover under the Act; the evidentiary support that would be needed to recover; and whether the Government and Peraton would agree to settle on the basis of a narrowed class.

9. After Judge Stengel's referral expired, the parties continued negotiating and the Court approved extensions of time that allowed their discussions to proceed. Further progress was slow, and at several points the parties reached what seemed to be insurmountable impasses.

10. In a Joint Status Report filed on July 19, 2021, the parties jointly requested a referral to Senior U.S. District Judge John D. Bates. (Dkt. # 174.) The Court held a telephonic conference on July 28, 2021, and referred the negotiations to Judge Bates on July 30, 2021 for consultation on several issues as to which the parties remained at impasse.

11. The parties ultimately agreed that the settlement class would be limited to individuals who incurred objectively-defined forms of pecuniary loss derived from the Data Breaches. The parties continued negotiating and drafting settlement documentation in 2022, and executed their Settlement Agreement ("SA") on May 5, 2022.

The Parties' Settlement

12. The Settlement Agreement incorporates five exhibits: the proposed Notice (Ex. 1), Claim Form (Ex. 2), Preliminary Approval Order (Ex. 3), Final Approval Order and Judgment (Ex. 4), and Notice Plan (Ex. 5).

13. The Settlement Agreement provides that within seven days after final approval, OPM will provide the U.S. Department of Treasury, Bureau of Fiscal Service Judgment Fund ("Judgment Fund") with all necessary documentation to effect payment of \$60,000,000 into the Settlement Account. (SA § III.A.) Within 14 days after the Judgment Fund has deposited OPM's payment,

Peraton will pay an additional \$3,000,000. (SA § III.B.) Any service payments awarded by the Court to the Named Plaintiffs will be paid out of Peraton's contribution. (SA § VI.B.)

14. The Settlement Account will be funded through two accounts, a qualified settlement fund maintained by the Claims Administrator (funded by Peraton's contribution) and an account maintained by the Treasury Department (funded by the Government's contribution). Upon the Effective Date, an amount sufficient to pay all valid claims, less any offsets required by federal law, will be disbursed from the Treasury Department to the qualified settlement fund, from which the Claims Administrator will pay claimants.

15. OPM will pay the costs of notice and claims administration, and attorneys' fees as awarded by the Court, separately from the settlement fund. (SA §§ II.B.12, V.A, VI.A.) OPM and Class Counsel together selected Epiq Class Action & Claims Solutions, Inc. ("EPIQ") to serve as Claims Administrator. EPIQ personnel have specialized knowledge and expertise with managing class action notice and claims processes, including in previous settlements involving the Government. EPIQ in this case participated in the final rounds of settlement discussions, advising the parties on administrative matters, such as optimizing class notice and the form and content of the claim form. In addition to managing the notice program and receiving and processing claims, EPIQ will maintain a dedicated Settlement Website—www.opmdatabreach.com has been reserved—containing links to the Notice, Claim Form, and all other relevant documents.

16. The proposed Notice (SA, Ex. 1) provides all information required by Rule 23(c)(2)(B) and directs potential Class members to the Settlement Website, where they can make a claim and learn more about the Settlement and their rights and options. The Notice Plan contemplates a multifaceted program for notifying Class members of the Settlement. (SA, Ex. 5.) The Class of breach victims who experienced economic loss is far narrower than the group of all

victims, and attempting to mail notice to that full group (many of whose addresses are now outdated) would result in notice expenses significantly out of proportion to the settlement fund. There is no centralized or readily obtainable list of emails for the approximately 22 million breach victims. In contrast, the approximately 3.2 million victims who have accepted OPM's offer of free identity protection and credit restoration services demonstrated an interest in protecting themselves from the consequences of the Data Breaches, which makes them comparatively more likely to be Class members than other victims. This group will receive direct notice of the Settlement via email, based on contact information maintained by the vendor for these services, IDX. For emails that bounce back as undeliverable, a postcard version of the notice will be sent via U.S. mail to the corresponding address in IDX's database. Additional email notices will be sent to Class members using the AFGE and NTEU listservs.

17. The Claims Administrator also will implement a publication campaign tailored to reach the Class that will extend for several weeks. This campaign will include digital ads algorithmically targeted based on the demographic composition of the federal workforce; digital ads on social media platforms and other websites that Class members are likely to visit, such as federaloup.com; a press release; radio ads; and print ads in such publications as *Stars and Stripes*, which serves the United States Armed Forces. The Claims Administrator's notice expert, Cameron Azari, estimates that this notice campaign will reach at least 80% of the Class.

18. Class Counsel have ensured that the Settlement notice and claim procedures include a series of coordinated measures to facilitate claims. The continuing notice efforts through social media, federal employee unions, and other channels will lead to increased awareness of the Settlement over time. Likewise, the claim period will extend for longer than usual—until 200 days after Preliminary Approval. (SA § V.C.1.) The Claim Form also has been carefully designed for

ease of understanding and use. (SA, Ex. 2.) Class members can file online and call live agents toll-free with questions or for help with filing a claim, and Class Counsel will also be available to assist claimants and answer their questions.

19. Any member of the Class may submit a completed Claim Form for review. (SA § V.) Section V of the Settlement Agreement sets out the criteria that the Claims Administrator will use in evaluating claims. The Recovery Period extends from May 7, 2014 through January 31, 2022. (SA § II.B.20.)

20. Valid claims will be paid from the Settlement Account after the Effective Date. (SA § V.C.2.) Each valid claim will be paid at \$700, except if the actual amount of documented loss exceeds \$700, the claim will be paid in that amount, up to \$10,000. (SA § V.C.7.) Valid claims will be paid out of the Peraton Contribution until it is exhausted, and then out of the OPM Contribution. (SA § V.C.7.) If the balance in the Settlement Account does not cover all valid claims, each will be reduced *pro rata* before payment. (SA § V.C.8.) If a balance remains after all valid claims are paid, and the Court finds that the Notice Plan has been implemented in accordance with the Preliminary Approval Order and that Class members had an opportunity to submit claims and participate in Settlement distributions, the remaining amount will be returned to the U.S. Treasury. (SA § V.C.9.)

21. Any Class member may opt out of the Class or object to the Settlement or to Plaintiffs' request for attorneys' fees, reimbursement of expenses, and service awards. (SA §§ IX.C, IX.E.) Any person who opts out or objects must provide information sufficient for the Claims Administrator to verify that the person is a Class member. (SA §§ IX.C.1, IX.E.1.) Opt-outs and objections are due no later than 35 days before the Court's final fairness hearing. (SA §§ IX.C.1, IX.E.1.) Opt-outs must be submitted in writing to the Claims Administrator, which will compile a

list of valid opt-outs for submission to the Court. (SA § IX.C.1.) Objections must be filed with the Court and provide the information required under Rule 23(e)(5)(A). (SA § IX.E.1.)

22. Plaintiffs will move for an award of reasonable attorneys' fees, reimbursement of litigation expenses, and approval of service awards to the Named Plaintiffs. (SA § VI.A-B.) Defendants may oppose that motion. (SA § VI.A-B.) OPM will submit to the Judgment Fund for payment—separate from the Settlement Claims Amount—attorneys' fees and expenses as awarded by the Court. (SA § VI.A.) Peraton will have no obligation with respect to an award of attorneys' fees and expenses, but any service awards approved by the Court will be paid out of the Peraton Contribution. (SA § VI.A-B.)

* * *

23. The Settlement has been carefully negotiated by the parties over a period of more than two years. Class Counsel believe, based on claim levels in similar cases, that the Settlement Claims Amount will be adequate, and the Settlement adequately accounts for the risks and unique aspects of this litigation and is reasonable and fair in all respects. The Settlement is supported by each Named Plaintiff and Class Representative regardless of whether they are eligible to make a claim or the Court approves any service awards.

24. Based on the facts stated above and the points and authorities set forth in their accompanying motion, Plaintiffs respectfully request that the Court grant preliminary approval, direct that notice be given in accordance with the notice plan, and set a date for the Fairness Hearing.

I declare under penalty of perjury that the foregoing is true and correct. Executed May 6, 2022.

By: /s/ Daniel C. Girard
Daniel C. Girard