

SAMUEL R. MAIZEL (Bar No. 189301)
samuel.maizel@dentons.com
TANIA M. MOYRON (Bar No. 235736)
tania.moyron@dentons.com
SAM ALBERTS (Admitted *Pro Hac Vice*)
DENTONS US LLP
601 South Figueroa Street, Suite 2500
Los Angeles, California 90017-5704
Tel: (213) 623-9300 / Fax: (213) 623-9924

Attorneys for the Chapter 11 Debtors and
Debtors In Possession

**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA - LOS ANGELES DIVISION**

In re

VERITY HEALTH SYSTEM OF
CALIFORNIA, INC., *et al.*,

Debtors and Debtors In Possession.

☒ Affects All Debtors

☐ Affects Verity Health System of California, Inc.

☐ Affects O'Connor Hospital

☐ Affects Saint Louise Regional Hospital

☐ Affects St. Francis Medical Center

☐ Affects St. Vincent Medical Center

☐ Affects Seton Medical Center

☐ Affects O'Connor Hospital Foundation

☐ Affects Saint Louise Regional Hospital
Foundation

☐ Affects St. Francis Medical Center of Lynwood
Foundation

☐ Affects St. Vincent Foundation

☐ Affects St. Vincent Dialysis Center, Inc.

☐ Affects Seton Medical Center Foundation

☐ Affects Verity Business Services

☐ Affects Verity Medical Foundation

☐ Affects Verity Holdings, LLC

☐ Affects De Paul Ventures, LLC

☐ Affects De Paul Ventures - San Jose ASC, LLC

Debtors and Debtors In Possession.

Lead Case No. 2:18-bk-20151-ER

Jointly Administered With:

Case No. 2:18-bk-20162-ER

Case No. 2:18-bk-20163-ER

Case No. 2:18-bk-20164-ER

Case No. 2:18-bk-20165-ER

Case No. 2:18-bk-20167-ER

Case No. 2:18-bk-20168-ER

Case No. 2:18-bk-20169-ER

Case No. 2:18-bk-20171-ER

Case No. 2:18-bk-20172-ER

Case No. 2:18-bk-20173-ER

Case No. 2:18-bk-20175-ER

Case No. 2:18-bk-20176-ER

Case No. 2:18-bk-20178-ER

Case No. 2:18-bk-20179-ER

Case No. 2:18-bk-20180-ER

Case No. 2:18-bk-20181-ER

Hon. Judge Ernest M. Robles

**DEBTORS' OPPOSITION TO MOTION OF IRIS LARA, TANYA
LLERA, AND JARMAINE JOHNS FOR AUTHORIZATION TO FILE A
CLASS PROOF OF CLAIM ON BEHALF OF CLAIMANTS
SIMILARLY SITUATED AND DECLARATIONS OF PASCALE-SONIA
ROY AND ANDRES ESTRADA IN SUPPORT THEREOF**

[RELATES TO DOCKET NO. 2025]

Hearing:

Date: May 8, 2019

Time: 10:00 am

Location: Courtroom 1568

255 E. Temple St., Los Angeles, CA

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300



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MEMORANDUM

I.

INTRODUCTION

Movants fall woefully short of satisfying the requirements for class certification under the Federal Rules of Civil Procedure and Federal Rules of Bankruptcy, and, thus, the motion (the “Motion”) should be denied. By way of background related to the state court complaints filed by Iris Lara, Tanya Llera, and Jarmaine Johns (collectively, the “Movants”), in late April 2016, Verity was targeted with a criminal phishing attempt, and, as a result, personal employee information (known as personally identifiable information or “PII”) was inadvertently disclosed to third parties. Upon discovery, Verity promptly notified employees and offered identity protection services.

By way of the Motion, Movants seek to certify a class claim regarding this prepetition event based on various statutory and tort legal theories. The Movants, however, cannot meet the requirements for class certification because (i) they did not provide any evidence beyond mere allegations in state court complaint, which evidence is undisputably required by Supreme Court and Ninth Circuit precedent and the Federal Rules, and (ii) the various class claims involve varied and individualized legal and factual issues that are inappropriate for class treatment, and, thus, make the Movants inappropriate representatives of the class.

Additionally, the Motion should be denied because the Debtors can address these claims through a plan of reorganization, and, thus, the proposed litigation class treatment for the Movants and proposed class members is unnecessary and premature. Specifically, the Debtors will propose a plan with specific classification for employees subject to the data breach, which will include continued credit monitoring. This solution not only provides a tangible benefit to such employees, but is done in other cases and will avoid the unnecessary cost and delays associated with the proposed class litigation.

Finally, the Debtors note that Ms. Lara, one of the Movants, is a member of the Official Committee of Unsecured Creditors, and despite having notice of the claims’ bar date, filed the Motion after the bar deadline.

For all of these reasons and those more fully set forth below, the Debtors respectfully request that the Court deny the Motion.

II.

STATEMENT OF FACTS

A. General Background.

1. On August 31, 2018, Verity Health System of California, Inc. and the above-referenced affiliated debtors, the debtors and debtors in possession in the above-captioned chapter 11 bankruptcy case (collectively, the “Debtors” or “Verity”), each filed a voluntary petition for relief under chapter 11 of title 11 of the Bankruptcy Code (the “Petition Date”). Since the commencement of their cases, the Debtors have been operating their businesses as debtors in possession pursuant to §§ 1107 and 1108.¹

2. On February 13, 2019, the Court entered an order establishing the claims bar date for filing proofs of claims and interests as April 1, 2019. Docket No. 1544. The order attached the notice of the claims bar date to be served by the Debtors (the “Bar Date Notice”).

3. On February 19, 2019 and March 2, 2019, Kurtzman Carson Consultants, LLC (“KCC”), the Debtors’ claim agent, served the Bar Date Notice on all current employees, employees potentially holding a claim against the Debtors, and those related to ongoing litigations. Docket Nos. 1864, 2001.

4. On April 1, 2019, the Movants served their proofs of claim on behalf of themselves “individually and on behalf of all others similarly situated.”

5. After the Bar Date, on April 3, 2019, the Movants filed the Motion.

B. The 2016 Data Breach.

6. On April 27, 2016, Verity was targeted with an isolated email phishing scam. *See* Declaration of Pascale-Sonia Roy (“Declaration of Roy”), ¶ 7. Specifically, an individual outside

¹ All references to § herein are to sections of the Bankruptcy Code, 11 U.S.C. §§ 101–1532; all references to “Bankruptcy Rules” are to provisions of the Federal Rules of Bankruptcy Procedure; all references to “Civil Rules” are to provisions of the Federal Rules of Civil Procedure.

1 of Verity impersonated a Verity executive requesting certain information for Verity employees. *Id.*
2 ¶¶ 7, 13; *see also* Exhibit “C,” June 1, 2016, Notice of Data Breach, at 1.

3 7. As a result of the scam, files containing information for W-2 forms for employees
4 employed between January 1, 2015 and December 31, 2015 were inadvertently sent to a third party.
5 Declaration of Roy, ¶ 8; *see also* Exhibit “A,” May 23, 2016, Memorandum, at 1. The information
6 involved included names, addresses, Social Security numbers, earnings and withholding
7 information for employees who were issued a W-2 for the 2015 tax year. *Id.* No other information
8 was compromised. *Id.*; *see also* Exhibit “C,” June 1, 2016 Notice of Data Breach, at 1. Employees
9 on the Verity Heath System and Verity Medical Foundation payrolls were not affected. *Id.* ¶ 8. No
10 patient information was involved. *Id.*; *see also* Exhibit “B,” May 26, 2016 Memorandum, at 2.

11 **C. Verity’s Immediate Response to the Data Breach Upon Discovery.**

12 8. On May 22, 2016, Verity’s senior leadership discovered that the breach had
13 occurred. *See* Declaration of Roy ¶ 9; *see also* Exhibit “A,” May 23, 2016 Memorandum, at 1.

14 9. On May 23, 2016, Mitch Creem, then the Chief Executive Officer of Verity, sent a
15 memorandum (the “First Memorandum”) to all employees and physicians alerting them to the
16 breach and advising that Verity would provide a formal notification letter, identity protection
17 systems, and a hotline for questions. *See* Declaration of Roy ¶ 11; *see also* Exhibit “A,” May 23,
18 2016, Memorandum, at 1-2.

19 10. On May 26, 2016, Mr. Cream provided an update (the “Second Memorandum”) to
20 employees, advising them that Verity contracted with Epiq, a national firm, to notify affected
21 individuals and provide identity protection services, establish a call center, and provided other
22 information and advice. *See* Declaration of Roy ¶ 12; *see also* Exhibit “B,” May 26, 2016, Second
23 Memorandum.

24 11. On June 1, 2016, Epiq mailed a notice (the “Notice of Data Breach”) to affected
25 employees on Verity’s behalf providing information on the breach, the information involved,
26 Verity’s plan of action, and advice. *See* Declaration of Roy ¶ 13. To further aid employees, Verity
27 offered every employee two years of free identity protection services through Equifax, which
28 included an “early warning system” to alert participants of changes to their credit, \$1 million in

1 identity theft insurance coverage, and credit and educational materials. *See* Declaration of Roy ¶
2 12; *see also* Exhibit “C,” June 1, 2016 Notice of Data Breach, p.1.

3 12. The Second Memorandum and Notice of Data Breach included a “Steps You Can
4 Take to Further Protect Your Information” informational sheet which advised employees (i) the
5 affected information could be used to file a fraudulent tax return and (ii) to contact the IRS or state
6 tax agency as appropriate. Declaration of Roy ¶ 14. These notifications recommended filing IRS
7 Form 14039 to alert the IRS and advised employees they would not be penalized even if the IRS
8 paid a fraudulent refund. *Id.*; *see also* Exhibit “C,” June 1, 2016 Notice of Data Breach, at 4;
9 Exhibit “B,” May 26, 2016 Memorandum at 4.

10 13. On June 20, 2016, Jane Brust, Vice President for Marketing and Communications,
11 sent another memorandum (the “Third Memorandum”) to advise employees and physicians to
12 “urg[e] each of our employees to take action in their own best interest by enrolling in the free
13 services provided by Equifax.” Declaration of Roy ¶, 15; *see also* Exhibit “D,” June 20, 2016 Third
14 Memorandum at 1. Ms. Brust also provided further detail regarding potential tax return issues. *Id.*
15 Similar information was again communicated on February 9, 2017. *Id.*; *see also* Exhibit “E,”
16 February 9, 2017 Questions and Answers.

17 14. The cut-off date for employees to enroll in the free identity protection services was
18 September 16, 2017. Declaration of Roy, ¶ 17. In total, 7,604 employees were affected by the
19 disclosure of information on April 27, 2016. *Id.* at ¶ 18. The employees received formal notice of
20 the same. *Id.* Another 112 individuals called Verity’s hotline, of which 13 were determined to be
21 affected by the disclosure and eligible for services. Declaration of Roy, ¶ 19. However, only 1,627
22 employees ever subscribed to the service. *Id.* None of the Movants signed up for the free service.
23 *Id.* at 20.

24 15. According to a preliminary investigation, Verity management was made aware first
25 or second-hand of less than 30 cases of complaints and practical issues from employees as a result
26 of the April 27, 2016 disclosure. Declaration of Roy, ¶ 21. Some employees reported fraudulent
27 tax return filings. *Id.* Moreover, of these same employees, one employee reported the use of a
28 credit card; one employee reported a fraudulent request for a second credit card; one employee

1 reported an attempt by a third party to re-finance a mortgage and draw on equity; and one employee
2 reported a false request for a mortgage payment refund. *Id.* To Verity's knowledge, none of these
3 attempts were successful. *Id.* ¶ 22. All employees received their tax returns and suffered no direct
4 damages. *Id.*

5 16. Verity received only two claims for reimbursement of out-of-pocket expenses: (i) a
6 request by six (6) nurses employed at St. Francis Medical Center for compensation for time and
7 mileage to meet in-person with the IRS; and (ii) a thirty (30) dollars reimbursement request by
8 another employee for purchasing additional identity theft protection. Declaration of Roy, ¶ 23.

9 17. St. Francis Medical Center nurses are represented by the United Nurses Associations
10 of California/ Union of Health Care Professionals ("UNAC"). Declaration of Roy, ¶ 24. St. Francis
11 Medical Center Human Resources Vice-President and Verity Labor Counsel and Outside Counsel
12 met regularly with UNAC to discuss labor issues. *Id.* UNAC requested that Verity compensate
13 nurses who had to attend IRS meetings to resolve alleged fraudulent filing of tax reports. *Id.* Verity
14 agreed to pay nurses their hourly rate for all hours claimed for attending IRS meetings and their
15 mileage. None of the other unions representing Verity employees presented claims on behalf of
16 their members. *Id.*

17 **D. The Litigation Procedural History.**

18 (a) *The Lara/Llera Litigation*

19 18. On May 12, 2017, Iris Lara and Tanya Llera filed a class action complaint in Los
20 Angeles County Superior Court against Verity alleging negligence, breach of implied contract,
21 violation of the California Customer Records Act ("CRA"), and violation of the Unfair Competition
22 Law ("UCL"), California Business & Professions Code section 17200, *et seq.* (Complaint, *Lara,*
23 *et al. v. Verity Health Sys. Of Cal.*, No. BC661000 (Cal. Super. Ct., Los Angeles Cty. May 12,
24 2017)). Declaration of Roy, ¶ 25.

25 19. At all relevant times, Iris Lara was a clerk in the Radiology Department at St. Francis
26 Medical Center and was represented by the Service Employees International Union/United
27 Healthcare Workers West ("SEIU/UHW"). Declaration of Roy, ¶ 26. In January 2018, Lara was
28

1 promoted to Patient Scheduler for the Radiology Department at St. Francis Medical Center. Lara
2 continues to be represented by SEIU/UHW. *Id.*

3 20. Until October 20, 2017, Tanya Llera was a St. Francis Medical Center Nurse and
4 was represented by UNAC. Llera resigned after being placed on investigatory suspension for her
5 medication administration practice. Declaration of Roy, ¶ 27.

6 (b) *The Johns Litigation*

7 21. On May 19, 2017, Jarmaine Johns filed a class action complaint in San Mateo
8 County Superior Court against Verity, alleging violation of the California Confidentiality of
9 Medical Information Act (Cal. Civil Code §§ 56, *et seq.*, “CMIA”), invasion of privacy, breach of
10 contract, negligence per se, negligence, and breach of implied contract. (Complaint, *Johns v. Verity*
11 *Health Sys. Of Cal.*, No. 17CIV02216 (Cal. Super. Ct., San Mateo Cty. May 19, 2017)).
12 Declaration of Roy, ¶ 28. On September 18, 2017, Johns filed an amended complaint, dropping
13 the claims for breach of contract and negligence per se and adding a claim for violation of the UCL.
14 Verity filed a demurrer to Johns’ First Amended Complaint on October 18, 2017, moving to dismiss
15 all but the implied contract claim for failure to state a claim. *Id.*

16 22. On November 21, 2017, the state court sustained Verity’s demurrer, dismissing
17 Johns’ claims for violation of the CMIA, invasion of privacy, and violation of the UCL with leave
18 to amend. Declaration of Roy, ¶ 29.

19 23. On December 6, 2017, Johns filed a Second Amended Complaint, re-alleging his
20 five previous causes of action and finally adding allegations regarding his own alleged injury, but
21 little else. Declaration of Roy, ¶ 30. Verity did not have a chance to respond before the action was
22 consolidated with the Lara action in Los Angeles Superior Court. *Id.* Jarmaine Johns is still a
23 Verity employee. *Id.* ¶ 31. At all relevant times, Jarmaine Johns has been and remains a St. Francis
24 Medical Center nurse and is represented by UNAC. *Id.*

25 (c) *The Consolidation of the Lara/Llera Litigation and the Johns Litigation.*

26 24. Verity moved to consolidate the Lara/Llera litigation with the Johns litigation in Los
27 Angeles Superior Court. On December 13, 2017, after hearing, the Coordination Motion Judge
28 granted the consolidation. Declaration of Roy, ¶ 32.

25. On June 21, 2018, the Movants filed a Consolidated Class Action Complaint (the “Complaint”) alleging negligence, breach of implied contract, violation of the CRA, violation of the CMIA, violation of the UCL, and invasion of privacy, as well as a wholly new claim for unjust enrichment. Declaration of Roy, ¶ 33. The Motion is based on the Complaint.

III.

ARGUMENT

A. Movants Cannot Meet The Requirements for Class Certification.

The Ninth Circuit has held “that the Bankruptcy Code does allow for class proofs of claim [...] However, Bankruptcy Courts have broad discretion to allow or disallow such class claims.” *Westfall v. MII Liquidation Inc.*, 2007 WL 2700951, at *4 (S.D. Cal. Sept. 11, 2007) (citing *In re Birthing Fisheries, Inc.*, 92 F.3d 939, 939 (9th Cir.1996)). Specifically, Bankruptcy Rule 7023 provides that Civil Rule 23 applies to adversary proceedings. In turn, “[a]pplication of [Civil] Rule 23 is extended to contested matters by Bankruptcy Rule 9014, which grants the Court discretion to apply [Civil] Rule 23 to contested matters, including claims objections.” *In re MF Global Inc.*, 512 B.R. 757, 762 (Bankr. S.D.N.Y. 2014) (emphasis added); *see also* Fed. R. Bankr. P. 9014(c) (“The court may at any stage in a particular matter direct that one of the other rules in Part VII [which would include Bankruptcy Rule 7023] shall apply” (emphasis added)).²

² The Movants rely heavily on *In re First All. Mortg. Co.*, 269 B.R. 428 (C.D. Cal. 2001), to support their argument that the Court should exercise its discretion to allow class treatment. Motion at 7–8. Indeed, they argue that “class proofs are favored and ‘particularly appropriate’ in bankruptcy cases” and that the opposing party bears the burden to show why invocation should not be permitted. Motion, at 7, citing 269 B.R. at 445. However, there is no such formal presumption. *First Alliance* is now 18 year-old precedent and no other court has adopted this burden. Nor do the Movants cite any other case to support this incorrect proposition. Indeed, more recently, the district court in *Circuit City*, adopted the opposite presumption of *First Alliance*, stating that “[t]he superiority and efficiency of the bankruptcy claims resolution process over class litigation is well established.” 439 B.R. at 655 (emphasis added); *see also In re Ephedra Prods. Liab. Litig.*, 329 B.R. 1, 5 (S.D.N.Y. 2005) (“superiority of the class action vanishes when the ‘other available method’ is bankruptcy, which consolidates all claims in one forum and allows claimants to file proofs of claim without counsel and at virtually no cost.”); *In re Bally Total Fitness of Greater N.Y.*, 411 B.R. 142, 145 (S.D.N.Y. 2009) (“many of the perceived advantages of class treatment drop away” in a bankruptcy proceeding).

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

Accordingly, before the named representatives of a purported class are even afforded the opportunity to demonstrate satisfaction of the general class certification requirements under Civil Rule 23 (which they must also do), they must first convince the bankruptcy court that exercising its discretion to extend those requirements to the bankruptcy claims administration process and allowing such purported class to file a single class proof of claim would be “beneficial” to that process. *See In re Chaparral Energy, Inc.*, 571 B.R. 642, 646 (Bankr. D. Del. 2017); *In re Pac. Sunwear of Cal., Inc.*, No. 16-10882 (LSS), 2016 WL 3564484, at *5 (Bankr. D. Del. June 22, 2016). In assessing the issue of discretion, courts generally consider three factors in exercising their discretion to invoke Bankruptcy Rule 7023: “(1) whether the class was certified prepetition; (2) whether the members of the putative class received notice of the bar date; and (3) whether class certification will adversely affect the administration of the estate.” *In re Musicland Holding Corp.*, 362 B.R. 644 (Bankr. S.D.N.Y. 2007); *see also Pacific Sunwear*, 2016 WL 3564484, at *5. Courts have also considered whether:

(1) the benefits of proceeding as a class outweighs the costs; (2) the class litigation causes undue delay or complication in administering the bankruptcy estate; (3) the bankruptcy court’s control over the debtor and its property render class certification unnecessary; (4) the Rule 7023 motion was timely; and (5) proceeding as a class is superior to the ordinary bankruptcy proceeding.

In re Circuit City Stores, Inc., 439 B.R. 652, 658 (E.D. Va. 2010), *aff’d in part on other grounds sub nom. Gentry v. Siegel*, 668 F.3d 83 (4th Cir. 2012); *see In re TWL Corp.*, 712 F.3d 886, 893 (5th Cir. 2013) (the court may additionally consider the benefits and costs of class litigation to the estate).

Here, these factors weigh heavily in favor of denying the Motion and support the typical claims process for filing individual claims. First, this asserted class was not certified prepetition despite adequate time to do so. Indeed, Jermaine Johns is now on his fourth version of his complaint.

Second, while it is possible all former employees did not receive hard copy notice of the bar date, this is neither dispositive nor actually persuasive to Movants’ position. The Debtors did serve (i) current employees, (ii) the Movants, and (iii) employees named in ongoing litigation. *See*

1 Declaration of Andres Estrada. Additionally, the Bar Date Notice was published (i) on March 1,
2 2019, in the Los Angeles Times, San Francisco Chronicle, and San Jose Mercury News, and (ii)
3 USA Today on March 4, 2019. ³ *Id.* The Bar Date Notice was also posted on the KCC website on
4 the Important Date, Deadlines & Documents section of the website with a link to the order and
5 remains there. *See* <http://www.kccllc.net/verityhealth/document/list/4736>. *Id.* The Bar Date Notice
6 was also posted on Verity's website at <https://verity.org/>. Further, the Debtors' filing has been well
7 publicized in the media. The foregoing notice is more than sufficient. *See In re Craft*, 321 B.R.
8 189, 199 (Bankr. N.D. Tex. 2005) ("Mirant's chapter 11 case has been well-publicized, and Mirant
9 is willing to rely on that publicity and its published notice to bar later claims by class members.").

10 Most importantly, however, the Debtors were not required to provide notice to all putative
11 class members. The proposed class consists of "[a]ll current and former employees of Verity, and
12 their spouses and dependents, whose Personally Identifiable Information was in the possession and
13 control of Verity at any time from January 2015 to the present and was compromised by the Data
14 Breach [of April 27, 2016]." Compl. ¶ 54. Identifying and locating all former employees and their
15 spouses and dependents, when considering the scale of Debtors' operation, the turnover in staff,
16 and the unlikelihood that Verity is even aware of spouses and dependents, is a herculean task that
17 would be costly to the estate on behalf of low value claims. As in *Circuit City*, "[t]he scope of
18 individuals who could potentially fall within the classes identified by the Class Claims is broad and
19 uncovering their identity and claims would require more effort than is reasonably required by the
20 circumstances" and unnecessarily "consume a disproportionate share of the Debtor's resources."
21 439 B.R. at 661; *see Monster Content, LLC v. HOMES.COM, Inc.*, 331 B.R. 438, 442 (N.D. Cal.
22 2005). All or most affected individuals have known of their claims since May 23, 2016 and there
23 has been historically low interest. Yet, even if the Bar Date Notice was somehow not sufficient,

24 ³*See Affidavit of Publication of the Notice of Bar Date for Filing Proofs of Claims and Interests*
25 *in the San Francisco Chronicle*, filed March 21, 2019 [Docket No. 1859]; *Affidavit of Publication*
26 *of the Notice of Bar Date for Filing Proofs of Claims and Interests in USA Today*, filed March 21,
27 2019 [Docket No. 1860]; *Affidavit of Publication of the Notice of Bar Date for Filing Proofs of*
28 *Claims and Interests in the San Jose Mercury News*, filed March 21, 2019 [Docket No. 1861];
Affidavit of Publication of the Notice of Bar Date for Filing Proofs of Claims and Interests in the
Los Angeles Times, filed March 21, 2019 [Docket No. 1862].

1 the appropriate remedy is not to grant a class claim, but rather to “set a reasonable bar date to allow
2 the members of the putative class to file individual claims.” *In re Connaught Grp., Ltd.*, 491 B.R.
3 88, 97 (Bankr. S.D.N.Y. 2013).

4 Third, class certification in this case would undoubtedly be more costly and burdensome
5 than normal bankruptcy processes. As further detailed below, class treatment would not affect the
6 need for individualized inquiry regarding the fact of damages and their extent. Furthermore, Verity
7 has reason to believe that only a few proposed class members would have valid claims and these
8 are eminently appropriate for the normal bankruptcy process of individual claims. Specifically,
9 fewer than 30 employees ever complained to Verity of injury and only six employees presented
10 Verity with valid out-of-pocket costs, which were dutifully paid. Despite the fact that speculative
11 future harm and risk generally does not form a basis for relief, as explained below, Verity proposes
12 that its chapter 11 plan will provide relief to affected former and current employees by including
13 an offer for a further two years of identity protection services to such a class of claims, or such
14 other similar relief as negotiated through the plan-drafting process. This would provide relief not
15 easily recoverable through class treatment and more directly address the relief that would be
16 appropriate to the vast majority of the proposed class.

17 For all these reasons, this Court should refuse to exercise its discretion under Bankruptcy
18 Rule 9014(c) to apply class treatment.

19 **1. The Movants Fail to Provide Any Kind of Showing That They Satisfy**
20 **Fed. R. Civ. P. 23—Mere Pleadings Are Not Enough.**

21 Were the Court to consider further assessment under Bankruptcy Rule 7023, it should deny
22 the Motion because the Movants cannot satisfy the prerequisites of Civil Rule 23. *In re Madison*
23 *Associates*, 183 B.R. 206, 214 (Bankr. C.D. Cal. 1995) (“[Bankruptcy Rule] 7023 specifically
24 incorporates F. Rule 23 which governs class actions”). Under Civil Rule 23(a), Movants must
25 show that “(1) the class is so numerous that joinder of all members is impracticable; (2) there are
26 questions of law or fact common to the class; (3) the claims or defenses of the representative parties
27 are typical of the claims or defenses of the class; and (4) the representative parties will fairly and
28

1 adequately protect the interests of the class.” Fed. R. Civ. P. 23(a.) The Movants must also show
2 that the class may be certifiable under Civil Rule 23(b).

3 Movants do not and cannot show that they satisfy these threshold requirements. Among
4 other things, the Motion is not supported by sufficient evidence, as the Movants improperly rely on
5 nothing more than their Complaint and the allegations therein. They do not provide any affidavits
6 or exhibits regarding Verity, their own experiences, or the experiences of other putative class
7 members. Moreover, Movants do not even provide any further detail in their memorandum to add
8 to the Complaint and as such, as guided by United States Supreme Court and Ninth Circuit
9 precedent, a class cannot be certified on this basis.

10 In assessing the requested relief, it is important to recognize that “Rule 23 does not set forth
11 a mere pleading standard. A party seeking class certification must affirmatively demonstrate his [or
12 her] compliance with the Rule—that is, he [or she] must be prepared to prove that there are *in fact*
13 sufficiently numerous parties, common questions of law or fact, etc.” *Wal-Mart Stores, Inc. v.*
14 *Dukes*, 564 U.S. 338, 350 (2011) (emphasis in original). The moving party must provide enough
15 of a showing so that the court may conduct its required “rigorous analysis” to ensure that Rule 23
16 standards are met. *Id.*; see *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982) (“[A]ctual, not
17 presumed, conformance with Rule 23(a) remains . . . indispensable.”); *Comcast Corp. v. Behrend*,
18 569 U.S. 27, 33 (2013) (“[A] party seeking to maintain a class action ‘must affirmatively
19 demonstrate his compliance’ with Rule 23.”). Additionally, the moving party must provide the
20 court with “material sufficient to form a reasonable judgment on each requirement.” *Blackie v.*
21 *Barrack*, 524 F.2d 891, 901 (9th Cir. 1975). The moving party’s burden is not lessened if the
22 analysis would require a consideration of the merits. See *Wal-Mart*, 564 U.S. at 351 (“Frequently
23 that ‘rigorous analysis’ will entail some overlap with the merits of the plaintiff’s underlying
24 claim.”); *Comcast*, 569 U.S. at 34 (reversing courts below for refusing to entertain arguments
25 touching on the merits); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011) (a
26 “court *must* consider the merits if they overlap with the Rule 23(a) requirements” (emphasis in
27 original)).
28

Here, because Movants do not even attempt to show compliance with Rule 23, they cannot meet their burden to merit class certification and, therefore, this Court should deny the Motion. In fact, although Movants acknowledge that they must “*demonstrate* that the [Rule 23(a)] requirements . . . have been met,” they offer nothing more than the allegations in the Complaint and conclusory logic based on those allegations. Motion, at 9–16.⁴ This failure makes it impossible for the Court to certify a proper class, and, as such, the Motion should be denied.

Indeed, an example of this critical failing concerns alleged claims of spouses and dependents. The claims for spouses and dependents hinge on whether their personal information was compromised through Verity. The Movants allege that Lara and Llera’s sons’ information was used in their fraudulent tax returns and that they provided such information to Verity to enroll in benefits. Compl. ¶¶ 33–35, 40, 44. However, Verity’s various contemporary notices to affected employees contradicts this claim—the only information that was disclosed was that which was related to W-2s; “no other information was accessed or obtained.” *See supra, Roy Declaration*. It should be imperative to resolve such issues before certifying a class if the existence of a large part of the class rises and falls with the question.⁵

2. The Claims Are Inappropriate for Class Treatment and Do Not Meet the Requirements of Civil Rule 23.

Even if the Court were to take the Movants’ allegations at face value, the alleged claims and circumstances do not satisfy the requirements of Civil Rule 23.

(a) Analysis of Claims

In order to properly analyze how the Movants’ claims would operate as a class action, it is necessary to analyze what is needed to make the claims valid and the showings necessary to sustain them. Note that the Movants include in the proposed class “current and former employees of

⁴ The one notable exception is that Movants provide two declarations in support of the adequacy of class counsel. Such declarations are likely more readily available to counsel and conveniently do not require an understanding of the facts in the case. This Court, however, requires such an understanding to conduct the requisite “rigorous analysis.”

⁵ Indeed, there is no non-conclusory allegation for Verity’s disclosure of spousal information.

Verity, and their spouses and dependents,” whose information was allegedly compromised. *See* Compl. ¶ 54.

1. Negligence

The elements of negligence are duty, breach, causation, and damages. *Burgess v. Superior Court*, 2 Cal. 4th 1064, 1072 (1992). In support of their negligence claim, Movants generally allege that Verity owed a duty to Movants and proposed Class Members to (1) exercise reasonable care with personal employee information, including creating systems, training, and processes for timely notification, and (2) timely disclose data breaches. Compl. ¶¶ 63, 65. Movants claim Verity breached those duties by failing to prevent the breach, failing to adopt adequate security procedures, failing to train personnel, and failing to timely notify the Movants and Class Members. They allege these breaches caused the following injuries: (1) “theft of their personal information”; (2) “costs associated with the detection and prevention of identity theft”; and (3) “costs associated with time spent and the loss of productivity from taking time to address and attempt to ameliorate and mitigate the actual and future consequences” of the data breaches; (4) unspecified “imminent and impending injury” from third-party control of the data; (5) diminution in value of the personal information; and (6) continued risk of breach to the personal information. Compl. ¶¶ 66–67.

Even a cursory inspection of these assertions demonstrate that the claim is without merit. First, there is no duty to spouses and “plaintiffs may not simply aver that a defendant owed them a duty.” *Castillo v. Seagate Tech., LLC*, No. 16-CV-01958-RS, 2016 WL 9280242, at *2 (N.D. Cal. Sept. 14, 2016). In *Castillo*, a similar W-2 data disclosure case from this circuit, the court found a duty to spouses and dependents because the plaintiff *alleged actual spousal information was used* to file a fraudulent joint tax return and the plaintiff alleged that information was asked for to enroll employees in benefits. *Id.* at *3. Here, however, the Movants *fail to allege use of spousal data* and there is no basis to otherwise believe such data was implicated. With no allegation of use and contradicted allegations that such information was disclosed, spouses cannot be included in the class.

Second, class members will each need to show “facts that plausibly connect the alleged breach of duty to the harm [they] suffered.” *Castillo*, 2016 WL 9280242, at *4. For Movants, this

1 means a temporal relationship between the April 27, 2016 disclosure and the fraudulent tax returns,
2 as well as the similarities between the information used there and the information disclosed. *Id.*;
3 *see In re Anthem, Inc. Data Breach Litig.*, 162 F. Supp. 3d 953, 987 (N.D. Cal. 2016). However,
4 this also means the showing for causation purposes will be unique to the harm alleged for each
5 individual class claimant. The connection between Verity’s disclosure and some fraud or perceived
6 threat of fraud to individuals is inherently based on a series of logical assumptions specific to each
7 situation. For example, with regard to claims based on the duty to timely inform, class members
8 would have to show that any unreasonable delay between April 27, 2016 and May 23, 2016
9 specifically resulted in out of pocket costs. *Castillo*, 2016 WL 9280242, at *5. Movants neither
10 show nor allege any such causation and as such, the action fails.

11 Third, many of Movants’ claims of damages do not present an “appreciable, non-
12 speculative, present harm” as required by California law. *In re Sony Gaming Networks & Customer*
13 *Data Sec. Breach Litig.*, 903 F. Supp. 2d 942, 962 (S.D. Cal. 2012).⁶ “[S]peculative harm or the
14 mere threat of future harm is insufficient to constitute actual loss.” *Corona v. Sony Pictures Entm’t,*
15 *Inc.*, No. 14-CV-09600 RGK EX, 2015 WL 3916744, at *3 (C.D. Cal. June 15, 2015); *see Fields*
16 *v. Napa Milling Co.*, 164 Cal. App. 2d 442, 447–48 (1958) (“It is fundamental that a negligent act
17 is not actionable unless it results in injury to another [...] Nominal damages, to vindicate a technical
18 right, cannot be recovered in a negligence action, where no actual loss has occurred.”). In *Corona*,
19 the plaintiff similarly alleged many different types of harm based on the risk of future fraud or loss
20 of control, but the court dismissed all of the damages claims except for already incurred costs. 2015
21 WL 3916744, at *3–4. “Those who have incurred such out-of-pocket expenses have pleaded
22 cognizable injuries, whereas those who claim only that they may incur expenses in the future have
23 not.” *Castillo*, 2016 WL 9280242, at *4. The only cognizable damages would be calculable,
24 traceable, out-of-pocket costs for (2) “the detection and prevention of identity theft;” and (3) “time

25
26 ⁶ This state law standard is more exacting than the minimal injury-in-fact necessary to establish
27 Article III standing. Movants’ cite to cases where putative data breach class actions were held to
28 meet Article III standing are inapposite. Motion at 10. *See In re Zappos.com, Inc.*, 888 F.3d 1020
(9th Cir. 2018); *Smith v. Triad of Alabama, LLC*, No. 1:14-CV-324-WKW, 2015 WL 5793318
(M.D. Ala. Sept. 29, 2015).

1 spent and the loss of productivity from taking time to address and attempt to ameliorate and mitigate
2 the actual and future consequences” of the data breaches.⁷ California law aligns with the traditional
3 federal court cases that credit monitoring and related harm is not a cognizable form of damages for
4 data breach cases. *See In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 996 F.
5 Supp. 2d 942, 970 n.20 (S.D. Cal. 2014) (listing cases).

6 Even these damages, however, would be barred under the current allegations and the
7 economic loss doctrine because: “*plaintiffs asserting negligence claims ordinarily may not recover*
8 *purely economic damages unconnected to physical injury or property damage.*” *Castillo*, 2016 WL
9 9280242, at *5 (emphasis added). The Movants need to show a “special relationship” to recover,⁸
10 but the court in *Castillo* correctly found that among the six relevant criteria, it was dispositive that
11 the employer could be assigned no moral blame for having been a victim to a phishing scheme. *Id.*
12 at *5–6. The plaintiff attempted to show the employer was aware of other data breaches that had
13 been publicized in the press as the Movants do here (Compl. ¶ 27), but that is simply not “enough
14 information to permit an inference that [the employer] should have been on the lookout for
15 fraudulent requests for W-2 information.” *Id.* at *6. Unlike in *Corona*, 2015 WL 3916744, at *5,
16 where previous data breaches and audits raised the inference that Sony made a conscious decision
17 not to spend money on its system, the only mention of another data breach is one that was
18 discovered only after the April 27, 2016 breach. Compl. ¶¶ 24–25.

19 With no or few cognizable damages, whether proposed class members experienced any
20 injury at all becomes an overriding question. The most plausible claims are those for out of pocket
21 costs, which should be barred by the economic loss doctrine. Even those claims, however, hinge
22
23

24 ⁷ The Movants fail to allege the necessary facts to support a diminution of value damages claim.
25 While they obliquely mention the harm of “detecting sales of PII on underground black market
26 websites” (Compl. ¶ 31), they do not provide anything to support the presence or extent of a market
27 for the PII. *See In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-02617-LHK, 2016 WL 3029783,
at *15 (N.D. Cal. May 27, 2016); *Yunker v. Pandora Media, Inc.*, No. 11-CV-03113 JSW, 2013
WL 1282980, at *4 (N.D. Cal. Mar. 26, 2013).

28 ⁸ The Movants do not actually allege a special relationship. *See In re Sony*, 903 F. Supp. 2d at 961.

on individual class members connecting their specific harm to Verity’s release of their information and as such, class certification should be denied.

2. *Breach of Implied Contract*

Similar to negligence, Movants’ claim for breach implied contract is similarly without merit. The predicate for this claim rests on an implied contract to “act reasonably to keep the employees’ PII safe.” Compl. ¶¶ 70–77. In support, Movants allege a *quid-pro-quo* that they provide their personal information “to receive compensation and other employment benefits.” Compl. ¶ 72. They then allege that Verity had an implied duty of good faith to ensure that personal information “was only used to provide the agreed-upon compensation and other employment benefits” (Compl. ¶ 73), which Verity allegedly breached by failing to reasonably safeguard and protect personal information and failing to provide timely and accurate notice. Compl. ¶ 77. The Movants add to their damages claims from the negligence cause of action “costs associated with the ability to use credit and assets frozen or flagged due to credit misuse,” “unauthorized use” of information to open new accounts, tax fraud and/or unauthorized charges to accounts and lack of access to funds while proper information is confirmed and corrected,” and “the future costs in terms of time, effort and money” to remedy the “impact of the personal information compromised.” Compl. ¶ 78.⁹

This breach of implied contract claim has similar fatal causation and damages issues as the negligence claim. “Under California law, to state a claim for breach of contract, a plaintiff must plead the contract, plaintiffs’ performance (or excuse for nonperformance), defendant’s breach, and damage to plaintiff therefrom.” *Hameed-Bolden v. Forever 21 Retail, Inc.*, No. CV1803019SJOJPRX, 2018 WL 6802818, at *3 (C.D. Cal. Oct. 1, 2018); 17A Am. Jur. 2d Contracts § 577 (“resulting damages” of nonperformance is an element of breach of contract).

⁹ This claim may fail because, as the court in *Corona*, 2015 WL 3916744, at *6, recognized when facing almost identical allegations, the Movants’ logic misperceives the nature of the employment relationship. “California law makes clear that establishing breach of the implied covenant requires proof of a conscious and deliberate act, which unfairly frustrates the agreed common purpose of the agreement.” *Id.* Here, however, the “common purpose” is “employment in exchange for compensation and benefits,” not the provision of personal information by the employee. *Id.*

1 “Implicit in the element of damage is that the defendant’s breach *caused* the plaintiff’s damage.”
2 *Agam v. Gavra*, 236 Cal. App. 4th 91, 104, 186 Cal. Rptr. 3d 295, 305 (2015) (emphasis in original).
3 Furthermore, for a breach of contract, “[n]ominal damages, speculative harm, or threat of future
4 harm do not suffice to show legally cognizable injury.” *Low v. LinkedIn Corp.*, 900 F. Supp. 2d
5 1010, 1028 (N.D. Cal. 2012). Therefore, to maintain such an action even on an individual basis,
6 class members would have to show a connection again between Verity’s disclosure and their
7 individual alleged specific harms.

8 Indeed, here the Movants allege a great variety of speculative out-of-pocket damages that
9 they indisputably did not experience, including fraudulent opening or charging of financial or
10 medical accounts. It also should be noted that “future costs” are *prohibited* as damages under
11 California law, *see id.*, and the Movants do not reasonably allege any basis for implied contracts
12 with spouses or dependents. Further, it would be impractical to find that “Verity offered
13 employment to” spouses and dependents—the employment was only offered to the employee him
14 or herself and Verity is (and should be) indifferent to whether or not the employee has a spouse of
15 dependents. Compl. ¶ 72. Nor do the Movants allege any third party beneficiary theory where the
16 spouse or beneficiary could claim a right to enforce a contract with the employee. For these reasons,
17 the Motion should be denied.

18 3. CRA

19 The Movants’ CRA cause of action based on Civil Code § 1798.81.5 fails because the
20 statute does not apply to “[a] provider of health care, health care service plan, or contractor
21 regulated by the Confidentiality of Medical Information Act.” Cal. Civ. Code § 1798.81.5(e).
22 Verity is such a provider of health care as the Movants admit. (Compl. ¶¶ 6, 27.) *See Fero v.*
23 *Excellus’ Health Plain, Inc.*, 236 F. Supp. 3d 735 (W.D.N.Y. 2017). Accordingly, no injunctive
24 relief is available.

25 With respect to Section 1798.82 that governs notices of breach, the Movants’ claim has no
26 merit and should not drive the class certification decision. Section 1798.82(a) requires disclosure
27 of a data breach “in the most expedient time possible and without unreasonable delay, consistent
28 with the legitimate needs of law enforcement . . . [o]r any measures necessary to determine the

1 scope of the breach and restore the reasonable integrity of the data system.” Here, it is indisputable
2 that Verity notified employees of the breach a day after discovery on May 22, 2016 with
3 information, advice, and efforts that Verity was undertaking. The formal notice sent on June 1,
4 2016 quickly followed and also was fully in compliance with statutory requirements. § 1798.82(d).

5 Further, contrary to Movants’ implied arguments, timeliness hinges on the discovery date,
6 not the date of breach. *See In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, 313 F. Supp. 3d
7 1113, 1145–46 (N.D. Cal. 2018). Thus, a ten-day delay cannot be unreasonable without some
8 specific showing tying harm to the delay, which is wholly absent here. *See In re Sony Gaming*
9 *Networks & Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 965 (S.D. Cal. 2014). Verity
10 is not liable under this statute and the Motion should be denied.

11 4. Confidentiality of Medical Information Act

12 Movants’ claims for damages under the CMIA similarly fail for several reasons. First, with
13 regard to the operative section of the CMIA, it only applies to employers and employees, not
14 spouses or beneficiaries. *See* Cal. Civ. Code § 56.20.

15 Second, the Movants’ CMIA cause of action fails because the statutory scheme only
16 concerns “medical information,” as the Movants admit. Compl. ¶ 95. Cal. Civ. Code § 56, *et seq.*
17 Under the statutory definitions, the personal information of employees does not qualify. “Medical
18 information” is defined as “any individually identifiable information, in electronic or physical form
19 . . . regarding a patient’s medical history, mental or physical condition, or treatment. . . [including]
20 the patient’s name, address, electronic mail address, telephone number, or social security number,
21 or other information that, alone or in combination with other publicly available information, reveals
22 the individual’s identity.” § 56.05(j). “‘Patient’ means any natural person, whether or not still
23 living, who received health care services from a provider of health care and to whom medical
24 information pertains.” § 56.05(k). Employees are not patients and there are no credible allegations
25 or showings that the data breach implicated any health information of the employees as patients.

26 Again, the Motion should be overruled.
27
28

5. UCL

Movants claim liability under the UCL. The UCL provides three ways upon which there may be liability—a business act or practice that is “unlawful, unfair or fraudulent.” Cal. Bus. & Prof. Code § 17200. Non of these options are applicable.

Preliminarily, in order to establish standing for a UCL claim, the Movants must show they personally lost money or property “as a result of the unfair competition.” Cal. Bus. & Prof. Code § 17204; *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310 (2011). The Movants do not and cannot make such a showing since “reliance on the threat of future harm does not satisfy the UCL’s ‘lost money or property’ standing requirement.” *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, 313 F. Supp. 3d 1113, 1130 (N.D. Cal. 2018); *see also Sony*, 903 F.Supp.2d at 966 (“Plaintiffs’ allegations that the heightened risk of identity theft, time and money spent on mitigation of that risk, and property value in one’s information, do not suffice as injury under the UCL.”); *Ruiz v. Gap, Inc.*, No. 07–5739 SC, 2009 WL 250481, *4 (N.D. Cal. Feb. 3, 2009) (“[I]t is far from clear that the time and expenditure associated with monitoring one’s credit is the kind of loss of money or property necessary for standing to assert a claim under section 17200.”). To the extent they have any out-of-pocket costs, they made no specific allegation or showing as to the nature or extent. Ultimately, although they were all inconvenienced by a fraudulent IRS filing, they did not suffer financial harm as a result and thus have not satisfied standing.

Furthermore, as demonstrated above, the Movants will not be able to make out a violation of the unlawful prong since there is no real liability under the CRA or CMIA.

With respect to the “unfair” option, California courts have used two different definitions of an “unfair” business practice. First, the “public policy test” requires that “the UCL claim be tethered to some specific constitutional, statutory, or regulatory provisions.” *McVicar v. Goodman Glob, Inc.*, 1 F. Supp. 3d 1044, 1054 (C.D. Cal. 2014) (citations and internal quotation marks omitted). For the reasons above, no provision governs here. Second, many courts have found a business practice “unfair” when it “is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.” *S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal. App. 4th 861, 886-87 (1999). This approach requires courts to “examine the practice’s ‘impact on its alleged victim,

1 balanced against the reasons, justifications and motives of the alleged wrongdoer.” *Id.* With
2 respect to the second test, Verity did not act “unfairly” in the breach itself as it was attacked by an
3 unknown and unauthorized criminal. Verity’s response was a proper response to the data breach.
4 Notably, the balancing test would have to be individual to each class member in order to examine
5 the “impact” on the victim. This analysis, like negligence and breach of implied contract, also
6 requires a “causal link between [the] business practice and the alleged harm” and would eliminate
7 speculative harm like future harm from a “risk.” *Campion v. Old Republic Home Prot. Co.*, 272
8 F.R.D. 517, 533 (S.D. Cal. 2011). Here, the requisite causal link cannot be shown.

9 Similarly failing is the “fraud” option. To state a claim under the UCL’s “fraud” prong,
10 Plaintiff must set forth specific allegations that (1) Verity made misrepresentations about the
11 security of class members’ personal information, and (2) class members relied on the alleged
12 misrepresentations. In other words, Movants must show actual “reliance” on Verity’s alleged
13 misrepresentation, rather than a mere factual nexus between Verity’s conduct and the injury. *See*
14 *In re Tobacco II Cases*, 46 Cal. 4th 298,326 (2009). Movants make allegations that Verity knew it
15 had deficient systems, made specific misrepresentations in the June 1, 2016 Notice Letter, and the
16 Movants detrimentally relied by giving over their personal information. This sequence, however,
17 is not only untrue, it does not make logical sense. The first breach was on April 27, 2016 and
18 discovered May 22, 2016—Verity had no reason to know of a random attack by a third party.
19 Furthermore, the Movants became employed and shared their information long before the
20 representations in the letter dated June 1, 2016.

21 The claims for restitution and injunctive relief under the UCL also fail. In *Castillo*, the court
22 properly held that restitution was unavailable to the employees because plaintiffs did not allege that
23 the employer obtained from them any money or other financial benefit. 2016 WL 9280242, at *8.
24 The court further held that the allegation that plaintiffs suffered an injury as a result of having false
25 tax returns filed in their names did not relate to any potential future harm that would support
26 standing to seek injunctive relief and “increased risk of identity theft” was speculative and thus
27 insufficient to show a cognizable threat of future harm. *Id.* On this same basis, the Movants do not
28 (and cannot) allege that Verity obtained any money or other financial benefit entitling them to

1 restitution. They also fail to allege sufficient facts of a threat of impending future harm entitling
2 them to injunctive relief.

3
4 *6. Invasion of Privacy*

5 The cause of action for invasion of privacy fails on two counts. First, the claim requires an
6 intentional intrusion into private matters in a manner highly offensive to a reasonable person, which
7 is simply not supported here. *See Hernandez v. Hillside, Inc.*, 47 Cal. 4th, 272, 286 (2009). Simply
8 put, Movants' PPI was allegedly breached by Verity's inadvertent response to a fraudulent email,
9 not due to Verity's "intentional intrusion" of class members' PPI. *See Ruiz*, 540 F. Supp. 2d at
10 1127–28 ("[e]ven negligent conduct that leads to theft of highly personal information, including
11 social security numbers, does not 'approach [the] standard' of actionable conduct under the
12 California Constitution and thus does not constitute a violation of plaintiffs' right to privacy").
13 Second, there is no "public disclosure of private facts," which requires that the information be
14 widely published. *Shulman v. Group W Productions, Inc.*, 18 Cal.4th 200, 214 (1998).

15
16 *7. Unjust Enrichment*

17 The unjust enrichment claim fails because by providing their personal information, class
18 members conferred nothing of value on Verity. "The doctrine (of unjust enrichment) applies where
19 plaintiffs, while having no enforceable contract, nonetheless have conferred a benefit on defendant
20 which defendant has knowingly accepted under circumstances that make it inequitable for the
21 defendant to retain the benefit without paying for its value." *Hernandez v. Lopez*, 180 Cal. App.
22 4th 932, 938, 103 Cal. Rptr. 3d 376 (2009). Under such law, the Movants' theory is not viable. *In*
23 *re Equifax, Inc., Customer Data Sec. Breach Litig.*, 362 F. Supp. 3d 1295 (N.D. Ga. 2019) ("The
24 Plaintiffs have failed to show that they conferred a thing of value, namely their personally
25 identifiable information, upon the Defendants with the expectation that Equifax would be
26 responsible for the cost.").

27
28 *(b) Commonality*

Although the text of Civil Rule 23(a)(2) requires only the presence of common questions,
these questions must nevertheless be capable of "generat[ing] common answers apt to drive the
resolution of the litigation." *Wal-Mart*, 546 U.S. at 350. Civil Rule 23(a)(2) is satisfied when there

1 is a “common contention . . . of such a nature that it is capable of classwide resolution—which
2 means that determination of its truth or falsity will resolve an issue that is central to the validity of
3 each one of the claims in one stroke.” *Id.* at 350. “To meet this standard, the class members must
4 not only ‘have all suffered a violation of the same provision of law’ but must ‘have suffered the
5 same injury.’” *Humes v. First Student, Inc.*, No. 17-17072, 2019 WL 413687, at *1 (9th Cir. Feb.
6 1, 2019) (citing *Wal-Mart*, 546 U.S. at 350).

7 Proof is required to satisfy commonality under Civil Rule 23(a). *See Hanlon v. Chrysler*
8 *Corp.*, 150 F.3d 1011, 1019–20 (9th Cir. 1998). As *Wal-Mart* made clear, Rule 23(a) is not a
9 pleading standard; rather, it requires proof that there is ‘*in fact* ... common questions of law or
10 fact.’” *Parsons v. Ryan*, 754 F.3d 657, 683 (9th Cir. 2014) (citing *Wal-Mart*, 546 U.S. at 350).
11 Further, “the [...] court [is] required to resolve any factual disputes necessary to determine whether
12 there was a common pattern and practice that could affect the class as a whole. If there is no
13 evidence that the entire class was subject to the same allegedly [prohibited] practice, there is no
14 question common to the class.” *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 (9th Cir. 2011).

15 Movants seem to allege that the one overarching violation was Verity’s allegedly deficient
16 policy to safeguard employee personal information. However, they have failed to demonstrate, as
17 opposed to generally allege, that there was any such deficient policy.

18 Furthermore, as established in *Humes* and *Wal-Mart*, the proposed class members must have
19 suffered the same injury. If the only cognizable injury is out of pocket expenses—some arising out
20 of fraudulent tax filings and according to the allegations, many that are only assumed, such as
21 fraudulent account charges—as explained above and supported by the Movants’ allegations, the
22 only common conduct is that of the third-party criminal. To implicate Verity, the Movants must
23 provide and demonstrate a common theory for how Verity’s conduct was improper and how that
24 conduct could be legally traced in common to these varied harms. The Movants have provided no
25 evidence regarding their expectations when handing over personal information or establishing a
26 policy that failed when the disclosure was made. Indeed, there is dispute over what information
27
28

1 has been implicated. Furthermore, Verity's contemporary notices reveal that the breach was
2 unexpected and the work of a third-party criminal.¹⁰

3 At a minimum, the Movants have failed to provide support for a common theory as to
4 Verity's liability toward dependents and spouses. They allege only two incidents involving child
5 information and extrapolate to conclusory allegations that such information was disclosed so
6 therefore there is some kind of liability to dependents and spouses. These alleged incidents,
7 however, do not make a class.

8 (c) *Typicality*

9 "The purpose of the typicality requirement is to assure that the interest of the named
10 representative aligns with the interests of the class." *Hanon v. Dataproducts Corp.*, 976 F.2d 497,
11 508 (9th Cir. 1992). "The test of typicality is whether other members have the same or similar
12 injury, whether the action is based on conduct which is not unique to the named plaintiffs, and
13 whether other class members have been injured by the same course of conduct." *Id.* (citation and
14 internal quotation marks omitted). "[R]epresentative claims are 'typical' if they are reasonably co-
15 extensive with those of absent class members." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020
16 (9th Cir. 1998). "[A] named plaintiff's motion for class certification should not be granted if 'there
17 is a danger that absent class members will suffer if their representative is preoccupied with defenses
18 unique to it.'" *Hanon*, 976 F.2d at 508.

19 A further failing is that Movants have failed to establish that their three claims are typical
20 of absent class members. Movants do not provide any showing regarding the nature of their or
21 other employees' injuries. This means, at minimum, neither Verity cannot scrutinize the Movants'
22 allegations to see if the Movants' were generally protective of their personal information or whether
23 the fraudulent tax filing was equally or more likely to be the result of another breach. *See, e.g.*,

24
25 ¹⁰ As explored at length above, many of the Movants' "common legal and factual issues" listed in
26 their Complaint are legally insufficient and should not be considered as a practical matter,
27 especially when Verity has not had a chance to narrow the claims through a motion to dismiss.
28 Furthermore, the practical path for this case if it were to merit class treatment is very much
relevant for the Court's consideration as to whether bankruptcy procedures would be more
appropriate.

1 *Stollenwerk v. Tri-West Health Care Alliance*, 254 F. App'x 664, 667-668 (9th Cir. 2007);
2 *Falkenberg v. Alere Home Monitoring Inc.*, 2015 WL 800378, at *4 (N.D. Cal. Feb. 23, 2015);
3 *Sony*, 996 F. Supp. 2d at 970 (“Although Howe alleges that he was forced to close two bank
4 accounts, Howe does not allege when he closed these accounts, why he closed these accounts, or
5 whether he has ever been a victim of identity theft in the past.”).

6 They similarly provide no detail as to the composition of the class. As such, the Court
7 cannot find that there were legally cognizable uniform policies, whether these policies would affect
8 all employees, whether employees would suffer similar injury thereby, and whether Claimants’
9 injuries and claims are “reasonably co-extensive” with employees in general. *See, e.g., Chavez v.*
10 *AmeriGas Propane, Inc.*, 2015 WL 12859721, at *18 (C.D. Cal. Feb. 11, 2015) (“Chavez has
11 adduced no evidence that he worked more than ten hours in any one day, however. Consequently,
12 he cannot show that he was unlawfully denied a third rest break. Chavez’s failure to demonstrate
13 that he was personally injured by the allegedly unlawful policy set forth in the CBA leads the court
14 to conclude that he lacks standing to represent the proposed CBA rest period subclass.”). Without
15 such facts, the Motion must fail.

16 Even if the Court were to take the factual allegations at face value (which it should not),
17 Movants’ claims show that class members’ injuries will vary and that will have legal implications.
18 The Movants allegedly experienced the inconvenience of fraudulent tax returns, but they allege
19 they and others possibly also experienced a variety of other forms of harm, including other
20 fraudulent charges, the risk of future harm, diminution of value of their personal information, time
21 and productivity lost to mitigation, additional identity protection, insufficient identity protection,
22 etc. Importantly, they cannot claim that all class members experienced uniform injury or uniformly
23 experienced *any* injury. A more narrow and focused class could perhaps satisfy typicality. *See*
24 *Giroux v. Essex Prop. Tr., Inc.*, 2018 WL 2463107, at *1, 3 (N.D. Cal. June 1, 2018) (certifying a
25 W-2 disclosure class action settlement in part because “Plaintiff ha[d] not alleged any individual
26 claims,” and the settlement provided only for free identity theft protection and a uniform \$70
27 payout). As detailed above, however, based on the Movants’ theories of liability and damages,
28 many individual claims will rise and fall based on the type of injury an individual class member

1 would be able to claim—whether due to legal cognizability such as the unavailability of damages
2 for future harm or due to a causation requirement for every individual to connect the conduct at
3 issue to his or her purported harm.

4 Contrary to Movants’ naked assertions, Verity’s preliminary investigation shows that the
5 Movants’ claims are not typical. The three Movants allegedly experienced fraudulent tax returns,
6 which appear to involve out-of-pocket costs, which, as explained above, may be cognizable but can
7 be resolved easily with individual claims against the applicable Debtor(s). However, the number
8 of affected employees who suffered similar alleged harm appears miniscule. In fact, Verity knows
9 of only a small group of employees (less than thirty or 0.4%) who experienced issues like fraudulent
10 tax returns. The vast majority of affected employees (approximately 80%) never complained of
11 any harm and did not even sign up for free identity protection despite Verity’s urging. One
12 employee complained of an attempt to take out a credit card and another complained of an attempt
13 to extract equity from his house. All these represent different availabilities of damages under the
14 various causes of action and represent different individual burdens to demonstrate that these harms
15 were caused by Verity’s disclosure. For example, the many (approximately 20%) who received
16 identity protection would have to rely on tenuous legal arguments that monitoring in itself or future
17 harm are cognizable injuries. As such, Movants represent a very discrete and small group who do
18 not hold claims typical of the class and as such, the Motion should be denied. *See Pena v. Taylor*
19 *Farms Pac., Inc.*, 305 F.R.D. 197, 223 (E.D. Cal. 2015) (“Because plaintiff Hernandez’s experience
20 is not typical, certification of any non-derivative waiting time subclass must be denied.”), *order*
21 *clarified sub nom. Carmen Pena v. Taylor Farms Pac., Inc.*, No. 2:13-CV-01282-KJM-AC, 2015
22 WL 12550898 (E.D. Cal. Mar. 30, 2015), *and aff’d*, 690 F. App’x 526 (9th Cir. 2017); *Mateo v.*
23 *V.F. Corp.*, No. C 08-05313 CW, 2009 WL 3561539, at *4 (N.D. Cal. Oct. 27, 2009) (“Plaintiff
24 does not satisfy typicality because [defendant] can assert unique defenses against her.”)

25 (d) *Adequacy*

26 Civil Rule 23(a)(4)’s “adequacy requirement ensures that absent class members are afforded
27 competent representation before entry of a judgment which binds them.” *Hanlon*, 150 F.3d at 1020.
28 “Class representation is inadequate if the named plaintiff fails to prosecute the action vigorously

1 on behalf of the entire class or has an insurmountable conflict of interest with other class members.”
2 *Hesse v. Sprint Corp.*, 598 F.3d 581, 589 (9th Cir.2010) (*citing Hanlon*, 150 F.3d at 1020). There
3 is reason to believe, based on the few facts alleged, that Movants would be inadequate
4 representatives for many parts of the class.

5 First, Llera is a former employee. She should not be a class representative on behalf of
6 current employees regarding the relief to which current employees would be far more interested.
7 This would include the injunctive relief requested, which would allegedly safeguard against further
8 breaches, but would inherently benefit current employees far more. *See* Compl. ¶¶ 87, 129. In
9 contrast to currently employed members of the class or subclasses, Claimants will have no incentive
10 or interest to pursue such relief and would likely be turned off more by relief that requires a
11 continuing relationship. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 986 (9th Cir. 2011)
12 (“As former employees, Ellis and Horstman would not share an interest with class members whose
13 primary goal is to obtain injunctive relief. Thus, as the class currently stands, Ellis and Horstman
14 will not adequately protect the interests of the class as a whole.”).

15 Second, none of the Movants are spouses or beneficiaries. As explained above, Verity’s
16 liability to these groups of proposed class members is on far shakier footing than for employees,
17 with some claims having no basis whatsoever.

18 Third, Movants would have an irreconcilable conflict for the reasons discussed above for
19 typicality. As victims of fraudulent of tax filings, Movants appear to have a theoretically “better”
20 (but not necessarily colorable) claim to cognizable out-of-pocket damages than what a preliminary
21 investigation shows to be 99.6% of affected employees who likely have no cognizable damages
22 under most, if not all, causes of action. As such, Movants would not be incentivized to pursue the
23 more speculative damages.

24 These conflicts are exacerbated by the presence of the limited estate fund. Representing
25 prepetition claims, these are likely to be of low value and the Movants would have little if not
26 negative incentive to develop the proposed class’s various types of claims.

(e) Civil Rule 23(b)(1)

Moving off the prerequisites of Civil Rule 23(a), the Movants look to certify a class under Rule 23(b)(1), which is appropriate if “prosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.”

Here, there is no true danger of incompatible standards for Verity under Civil Rule 23(b)(1)(A). As discussed above, proposed class members’ claims are too contingent on their own esoteric circumstances to create a true danger. Furthermore, Verity’s preliminary investigation and likely low value of claims mean that the risk of multiple separate lawsuits is low. The bar date has passed and bankruptcy procedure can readily handle any incoming claims. This is not a situation where another court could issue an inconsistent decision. *See Ballas v. Anthem Blue Cross Life & Health Ins. Co.*, 2013 WL 12119569, at *14 (C.D. Cal. Apr. 29, 2013); *Kamar v. Radio Shack Corp.*, 254 F.R.D. 387, 398 (C.D. Cal. 2008) (noting that “[t]he Ninth Circuit has adopted an extremely conservative view” of certifying 23(b)(1) classes”).

While Civil Rule 23(b)(1)(B) certification may be appropriate in some hypothetical case under *In re First All. Mortg. Co.*, 269 B.R. 428, 448 (C.D. Cal. 2001), there does not seem to be any reason for such treatment. Indeed, the Second Circuit has advised that “[w]ith respect to aggregate claims in excess of a fixed sum of money, a (b)(1)(B) class action is appropriate to avoid an unfair preference for the early claimants at the expense of later claimants. With respect to an insolvent entity, however, bankruptcy law is normally the source of protection to assure a fair and orderly distribution of assets insufficient to meet claims.” *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 735 (2d Cir. 1992), *opinion modified on reh’g*, 993 F.2d 7 (2d Cir. 1993).

(f) Predominance/Superiority

As certification under Civil Rule 23(b)(1) is inappropriate, the Movants must satisfy Civil Rule 23(b)(3). In ruling on a motion for class certification based on Civil Rule 23(b)(3), a district

1 court must conduct a rigorous analysis to determine whether the class representatives have satisfied
2 both the predominance and superiority requirements. *See Zinser v. Accufix Research Inst., Inc.*, 253
3 F.3d 1180, 1186 (9th Cir. 2001). The predominance analysis focuses on “the legal or factual
4 questions that qualify each class member’s case as a genuine controversy” to determine “whether
5 proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Amchem*
6 *Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

7 As discussed above, there are many individualized issues regarding causation and the fact
8 of injury—whether class members suffered any cognizable harm and whether that harm was caused
9 by Verity’s disclosure (or short delay in notice).¹¹ The Movants have alleged numerous types of
10 damage that would vary among all individuals and vary in cognizability. According to well-
11 established Ninth Circuit precedent, this should defeat predominance. *See Zinser*, 253 F.3d at
12 1189–90 (affirming class certification denial for lack of predominance due to individualized
13 causation and damages issues); *Abed v. A.H. Robins Co. (In re N. Dist. of California, Dalkon Shield*
14 *IUD Prod. Liab. Litig.)*, 693 F.2d 847, 853 (9th Cir. 1982) (same); *Poulos v. Caesars World, Inc.*,
15 379 F.3d 654, 668 (9th Cir. 2004) (same).

16 Ninth Circuit courts have routinely found that the existence of individualized issues relative
17 to causation and fact of injury must defeat class certification whether in the context of breach of
18 contract or the breach of the implied covenant of good faith. *See, e.g., Herskowitz v. Apple, Inc.*,
19 301 F.R.D. 460, 470–71 (N.D. Cal. 2014); *Bruce v. Teleflora, LLC*, No. 2:13–cv–03279–ODW,
20 2013 WL 6709939, at *3 (C.D. Cal. Dec. 18, 2013); *Martinez v. Welk Grp., Inc.*, No. 09CV2883
21 AJB, 2012 WL 2888536, at *4 (S.D. Cal. July 13, 2012); *Campion v. Old Republic Home Prot.*
22 *Co.*, 272 F.R.D. 517, 531 (S.D. Cal. 2011); *Am. W. Door & Trim v. Arch Specialty Ins. Co.*, No.
23 CV 15-00153 BRO SPX, 2015 WL 1266787, at *9 (C.D. Cal. Mar. 18, 2015); *Gustafson v.*

24 ¹¹ The fact of injury should not be confused with differences in the amount or nature of injury.
25 “[T]here is a distinction between the ‘fact of damages,’ which is essentially a threshold question
26 of causation and injury in fact, and the ‘amount of damages,’ which involves an assessment of
27 damages due after resolution of common questions of liability.” *Lucas v. Breg, Inc.*, 212 F. Supp.
28 3d 950, 970 (S.D. Cal. 2016) (citing *Catlin v. Wash. Energy Co.*, 791 F.2d 1343, 1350 (9th Cir.
1986)); *see Gonzales v. Comcast Corp.*, No. 10–cv–01010–LJO–BAM, 2012 WL 10621, at *18–
19 (E.D. Cal. Jan. 3, 2012) (same).

1 *Goodman Mfg. Co. LP*, No. CV-13-08274-PCT-JAT, 2016 WL 1029333, at *12 (D. Ariz. Mar. 14,
2 2016); *Rader v. Teva Parenteral Medicines, Inc.*, 276 F.R.D. 524, 529–30 (D. Nev. 2011).

3 Another challenge for predominance is that Verity is entitled to assert affirmative defenses
4 like questioning class members’ alleged harm and whether it was truly a result of Verity’s
5 disclosure. This can defeat predominance since individualized inquiries would overwhelm
6 common issues. *Dukes*, 564 U.S. at 367; *Zinser*, 253 F.3d at 1189 (finding class action
7 inappropriate where case required “separate adjudication of each class member’s individual claim
8 or defense”). Furthermore, though individualized damage calculation issues alone may not defeat
9 class certification, Movant must provide a damages model attributing damages to his theories of
10 liability and establishing that damages are susceptible to class-wide measurement. *Comcast*, 569
11 U.S. at 35 (the Court must conduct a “rigorous analysis” to make sure this obligation is met). The
12 Movants do neither.

13 Finally, the Movants’ claims do not meet superiority. The superiority requirement tests
14 whether “class litigation of common issues will reduce litigation costs and promote greater
15 efficiency.” *Valentino v. Carter–Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). For all of the
16 above reasons that make each individual claim unique and the fact that not many claims are
17 expected, bankruptcy procedure seems eminently superior to class treatment here. After an initial
18 narrowing of claims to those that are legally supportable, the claims would be dominated by
19 causation and injury issues. Individual claim processes are most appropriate there.

20 **B. The Alternative Collective Adjudication Proposed By Movants Should Be**
21 **Denied.**

22 Perhaps knowing their class claims are on weak ground, Movants propose, in the alternative,
23 that the Court “establish a practical process of for [sic] ascertaining and collectively adjudicating
24 the claims.” Motion at 14. Specifically, Movants propose that Verity give notice to all potential
25 claimants and execute a consent to sue so the named claimants can prosecute all the claims together.
26 This is a distinction without a difference and there is no basis for the Court to deviate from standard
27 bankruptcy procedures to permit this suggested remedy.
28

Moreover, as cited above, various bankruptcy courts have found bankruptcy's simplified procedures for individual claims to be in many ways better than class treatment. While Claimants point to the procedure ordered in *In re Buffets, LLC*, No. 16-50557-RBK (Bankr. W. D. Tex.), the case is not analogous. The parties moving for that relief had been pursuing an FLSA action for three years prior to the order. See Motion for Relief from Stay Pursuant to 11 U.S.C. § 362(d)(1), *In re Buffets, LLC*, No. 16-50557-RBK (Bankr. W. D. Tex.), Docket No. 628, ¶ 2.02. After conditional certification and five days before it was required to produce a list of class members, the debtor filed for bankruptcy. *Id.* ¶¶ 2.08–11. Alleging that the debtor engaged in bad faith, the movants secured similar relief as to which they were entitled were it not for the bankruptcy. *Id.* ¶ 3.05. There is nothing near that justification for such treatment here.

C. Bankruptcy Code's Plan And Plan Confirmation Process Provide The Best Solution For Any Employee Redress From The Data Breach.

The Bankruptcy Code's plan and plan confirmation process provide the best solution for any employee redress from the data breach, not the class certification sought by the Movants. This is supported by precedent by debtors and parties who utilized §§ 1122 and 1129's flexibility to give employee classes relief and finality through a plan, not through litigation.

For instance, in *In re Ownit Mortgage Solutions, Inc.*, Case No. :06-bk-12579 (Bankr. C.D. Cal.) ("*Ownit*"), the debtor faced accusations from certain employees regarding Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-2009 ("*WARN*") liability, and some employees moved for a class certification/action. Instead of certifying a class to address these issues, the Debtors instead confirmed a plan which created a reserve for WARN claims to be handled through a liquidating trustee, treated the WARN claimants as a class *in the plan itself* and which then allowed claimants who actually filed a proof of claim (and subject to other conditions) to maintain the class action. *Id.* at Docket Nos. 1233 (Nov. 21 2007) (confirmed plan), 1467 (Jan. 16, 2018) (confirmation order).

Also, in *In re LMCHH PCP LLC*, Case 17-10353 (Bankr. E.D. La.) (“*Louisiana Medical*”) a class of employees filed class claims in an adversary proceedings¹² based on WARN Act liability. The Debtors confirmed a plan which treated these WARN claims as a class *in the plan itself* and disposed of these claims through a reserve for payment to employees. *Id.* at Docket Nos. 470 (Aug. 1, 2017) (confirmed plan); 566 (Oct. 2, 2017) (confirmation order). The plan explained (at 12-13):

As of the Petition Date, Employees held various Employee Claims ... including Claims arising out of the WARN Act ... against the Debtors ... Although the Debtors dispute their liability for many of the Employee Claims ... The Plan proposes to resolve all Employee Claims against the Debtors ... In order to avoid what is anticipated to be expensive and protracted litigation associated with the Employee Claims, especially the Uncertified WARN Class Actions [through an Employee Settlement Amount that] is the product of lengthy arms'-length negotiations between Debtors and other Plan Proponents and counsel ...

While at this stage in their cases the Debtors do not have exact plan language, they intend to propose similar provisions for their liquidating plans as those in *Louisiana Medical* and *Ownit* for the data breach to provide affected employees with additional identification protection and identity theft services. This proposed course of action is well suited for bankruptcy practice and will provide employees, to the extent they need it, relief. This is a superior route to allowing a class action to proceed now.

As the above examples demonstrate, §§ 1122 and 1129 are specifically designed for situations like here and allow parties to craft flexible, creative solutions to handle and satisfy similar groups of claims through the plan and confirmation process before engaging in protracted litigation. *See In re Loop 76, LLC*, 465 B.R. 525, 539 (B.A.P. 9th Cir. 2012), *aff'd*, 578 Fed. Appx. 644 (9th Cir. 2014) (citing William Blair, “Classification of Unsecured Claims in Chapter 11 Reorganization,” 58 AM. BANKR. L.J. 197, 217 (1984)) (“Classification and treatment of claims under Chapter XI allow[] the debtor broad latitude in developing its plan.”); *In re Ne. Dairy Co-op. Fed'n, Inc.*, 73 B.R. 239, 250 (Bankr. N.D.N.Y. 1987) (“the flexible view of classification more

¹² (Adv. Proc. No. 17-01021 Bankr. E.D. La.); (Adv. Pro. No. 17-01024 Bankr. E.D. La.).

1 fully realizes Congressional intent and expectation [through the passage of] § 1122(a)) (citing
2 *Barnes v. Whelan*, 689 F.2d 193, 201 (D.C. Cir.1982)).

3 **D. Claims (If They Exist) Are Solely Prepetition.**

4 Finally, it should be noted that because the transfer that allegedly caused the subject claim
5 occurred in 2016, any claim is prepetition. *In re Abercrombie*, 139 F.3d 755, 757 (9th Cir. 1998).
6 Moreover, because such a claim is prepetition, the Ninth Circuit Court of Appeals has repeatedly
7 held that any attorney's fees related thereto, if allowable, would also be prepetition. *See id.* at 758
8 (holding that creditors' post-petition attorneys' fees incurred in litigation over a contract entered
9 into before the petition date are not entitled to administrative priority); *see also Christian Life Ctr.*
10 *Litig. Defense Comm. v. Silva (In re Christian Life Ctr.)*, 821 F.2d 525, 533 (9th Cir. 1987)
11 (disallowing administrative priority to indemnitee for post-petition attorneys' fees covered by
12 corporate indemnity). In this case, Movant's attorneys' fees do not fit into any category of
13 administrative expense enumerated by the Bankruptcy Code. *See* 11 U.S.C. § 503; *see also*
14 *Abercrombie*, 139 F.3d at 757 (stating "[n]o § 503 concerns are triggered" by attorneys' fees for
15 prepetition claim). Of course, because there is no claim, this issue should be moot.

16
17 **IV.**

18 **CONCLUSION**

19 For the above reasons, the Court (i) enter an order denying Motion in its entirety and (ii)
20 granting such further relief as necessary.

21 Dated: April 24, 2019

DENTONS US LLP
SAMUEL R. MAIZEL
TANIA M. MOYRON

22
23
24 By /s/ Tania M. Moyron
Tania M. Moyron

25
26 Attorneys for the Chapter 11 Debtors and
Debtors In Possession

DECLARATION OF PASCALE SONIA-ROY

I, Pascale Sonia-Roy, hereby declare as follows:

1. I am Associate General Counsel for Verity Health System of California, Inc. (“Verity”) and the above-referenced affiliated debtors, the debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the “Debtors”). In 2012, I was Senior Employment Counsel for the Daughters of Charity Health System (“DCHS”), the Debtors’ predecessor. On November 2013, I was promoted to General Counsel for DCHS. On January 2016, following the management transition to the Debtors, I joined the senior leadership team as Associate General Counsel Labor and Employment.

2. I file this Declaration in support of Debtors’ opposition (the “Opposition”) to the *Motion of Iris Lara, Tanya Llera, and Jarmaine Johns for Authorization to File a Class Proof of Claim on Behalf of Claimants Similarly Situated* [Docket No. 2025]. All capitalized terms not otherwise defined herein shall have the same meaning as in the Opposition.

3. In 1988, I completed my Common Law degree at the University of Moncton in New Brunswick, Canada, and, in 1982, I completed my Civil Law degree at the University of Sherbrooke in Quebec, Canada. In 1983, I became a member of the Quebec Bar. In 1989, I became a member of the Manitoba Bar, and, in 1995, I became a member of the Law Society of Upper Canada (Ontario Bar). Prior to relocating to California, I was in private practice representing unions in different provinces (Common Law and Civil Law) in grievance arbitrations and hearings before various administrative tribunals, including federal and provincial labor boards. In 2002, I was the General Counsel for the Canada Industrial Relations Board. In that capacity, I advised the chairperson, vice-chairs, board members, and senior staff on complex legal national matters, ensuring consistency of Board decisions and continuity of applicable precedents. In 2006, I became a member of the California State Bar. I joined the firms of Burke Williams Sorensen, LLP, and K&L Gates, LLP and practiced primarily in the areas of labor and employment law.

4. In my role as Associate General Counsel for the Verity health system, I manage and oversee all VHS pending litigation.

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

General Background

5. Verity and its affiliated debtors operate a nonprofit health care system that had approximately 7,385 employees, on the petition date. Approximately 74% of these employees were represented by various unions and associations.

6. At all relevant material times, nurses at O'Connor Hospital, St. Louise Regional Hospital, were represented by the California Nurses Association. Nurses at Seton Medical Center and St. Vincent Medical Center (collectively, the "Hospitals") are represented by the California Nurses Association. Nurses at St. Francis Medical Center are represented by St. Francis Registered Nurse Association ("SFRNA"), which is affiliated with the United Nurses Association of California / Union of Health Care Professionals ("UNAC"). Other employees at the Hospitals are represented by Service Employee International Union-United Healthcare workers ("SEIU/UHW"), by the National Union Healthcare Workers ("NUWH"), by the International Union of Operating Engineers and Stationary Engineers, Local 39, and by Engineers and Scientists IFPTE Local 20.

The 2016 Data Breach

7. On April 27, 2016, Verity was targeted with an isolated email phishing scam. Specifically, an individual outside of Verity impersonated a Verity executive requesting certain information for Verity employees.

8. As a result of this scam, files containing information for W-2 forms for employees employed between January 1, 2015 and December 31, 2015 were inadvertently sent to a third party. The information included names, addresses, Social Security numbers, earnings and withholding information for employees who were issued a W-2 for the 2015 tax year. No other information was compromised.

9. Employees on the Verity (Corporate) and Verity Medical Foundation payrolls were not affected. No patient information was involved.

Verity's Immediate Response to the Data Breach Upon Discovery.

10. On May 22, 2016, Verity's senior leadership discovered that the breach had occurred.

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1 11. On Monday May 23, 2016, Mitch Creem, the Chief Executive Officer of Verity at
2 that time, sent a memorandum to all employees and physicians alerting them to the breach and
3 advising them that Verity would provide a formal notification letter, identity protection systems,
4 and a hotline for questions. A true and correct copy of the memorandum is attached hereto as
5 Exhibit “A.”

6 12. On May 26, 2016, Mr. Creem provided an update to employees, advising them that
7 Verity contracted with Epiq, a national firm, to notify individuals affected by the breach and to
8 provide identity protection services, establish a call center, and provide other information and
9 advice. A true and correct copy of the memorandum is attached hereto as Exhibit “B” (the
10 “Second Memorandum”).

11 13. On June 1, 2016, on behalf of Verity, Epiq mailed a notice (the “Notice of Data
12 Breach”) to affected employees providing them with, among other things, information regarding
13 the breach and Verity’s plan of action and advice. To further aid employees, Verity offered every
14 employee two (2) years of free identity protection services through Equifax, which included an
15 “early warning system” to alert participants of changes to their credit, \$1 million in identity theft
16 insurance coverage, and credit and educational materials. A true and correct copy of an
17 “unaddressed” Notice of Data Breach is attached hereto as Exhibit “C.”

18 14. The Second Memorandum and the Notice of Data Breach to employees included a
19 “Steps You Can Take to Further Protect Your Information” sheet that advised employees that the
20 compromised information could be used to file a fraudulent tax return and to contact the IRS or
21 state tax agency as appropriate. The Second Memorandum recommended filing IRS Form 14039
22 to alert the IRS and advised that employees would not be penalized even if the IRS paid a
23 fraudulent refund.

24 15. On June 20, 2016, Jane Brust, Vice President for Marketing and Communications
25 at Verity at that time, sent another memorandum to advise employees and physicians to “urg[e]
26 each of our employees to take action in their own best interest by enrolling in the free services
27 provided by Equifax.” A true and correct copy of the memorandum is attached hereto as Exhibit
28 “D.” Ms. Brust also provided further detail regarding potential tax return issues.

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601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1 16. On February 9, 2017, a “Questions and Answers” sheet regarding the “Employee
2 Data Incident 2016” was sent to employees. A true and correct copy of the sheet is attached
3 hereto as Exhibit “E.”

4 17. The cut-off date for employees to enroll in the free identity protection services was
5 September 16, 2017.

6 18. In total, 7,604 employees were affected by the disclosure of the information on
7 April 27, 2016. These employees received formal notice of the same.

8 19. 112 individuals called Verity’s hotline, of which 13 were determined to be affected
9 by the disclosure and eligible for services. However, only 1,627 employees ever subscribed to the
10 identity theft protection.

11 20. None of the Lara Claimants signed up for the free identity services.

12 21. According to a preliminary investigation, Verity management was directly or
13 indirectly made aware of less than 30 complaints and practical issues from employees as a result
14 of the disclosure on April 27, 2016. Of these employees, certain ones reported fraudulent tax
15 return filings. Moreover, of these same employees, one employee reported the use of a credit
16 card; one employee reported a fraudulent request for a second credit card; one employee reported
17 an attempt by a third party to re-finance a mortgage and draw on equity; and one employee
18 reported a false request for a mortgage payment refund.

19 22. To Verity’s knowledge, none of the foregoing attempts were successful. All
20 employees received their tax returns and suffered no direct damages.

21 23. Verity received only two claims for reimbursement of out-of-pocket expenses: (i) a
22 request by six (6) nurses employed at St. Francis Medical Center for compensation for time and
23 mileage to meet in-person with the IRS; and (ii) a thirty (30) dollars reimbursement request by
24 another employee purchasing additional identity theft protection.

25 24. As declared above, St. Francis Medical Center nurses are represented by UNAC.
26 St. Francis Medical Center Human Resources Vice-President and Verity Labor Counsel and
27 Outside Counsel met regularly with UNAC to discuss labor issues. UNAC requested that Verity
28 compensate nurses who had to attend IRS meetings to resolve alleged fraudulent filing of tax

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1 reports. Verity agreed to pay nurses their hourly rate for all hours claimed for attending IRS
2 meetings and their mileage. None of the other unions representing Verity employees presented
3 claims on behalf of their members.

4 **The Litigation Procedural History**

5 (i) *The Lara/Llera Litigation*

6 25. On May 12, 2017, Iris Lara and Tanya Llera filed a class action complaint in Los
7 Angeles County Superior Court against Verity Health System of California, Inc., alleging
8 negligence, breach of implied contract, violation of the California Customer Records Act
9 (“CRA”), and violation of the Unfair Competition Law (“UCL”), California Business &
10 Professions Code section 17200, et seq. (Complaint, Lara, et al. v. Verity Health Sys. Of Cal., No.
11 BC661000 (Cal. Super. Ct., Los Angeles Cty. May 12, 2017)).

12 26. At all relevant times, Iris Lara was a clerk in the Radiology Department at St.
13 Francis Medical Center and was represented by the Service Employees International Union/United
14 Healthcare Workers West (“SEIU-UHW”). In January 2018, Ms. Lara was promoted to Patient
15 Scheduler for the Radiology Department at St. Francis Medical Center. Ms. Lara continues to be
16 represented by SEIU/UHW.

17 27. Until October 20, 2017, Tanya Llera was a St. Francis Medical Center Nurse and
18 was represented by UNAC. Ms. Llera resigned after being placed on investigatory suspension for
19 her medication administration practice.

20 (ii) *The Johns Litigation*

21 28. On May 19, 2017, Jarmaine Johns filed a class action complaint in San Mateo
22 County Superior Court against Verity Health System of California, Inc., alleging violation of the
23 California Confidentiality of Medical Information Act (Cal. Civil Code §§ 56, et seq., “CMIA”),
24 invasion of privacy, breach of contract, negligence per se, negligence, and breach of implied
25 contract. (Complaint, Johns v. Verity Health Sys. Of Cal., No. 17CIV02216 (Cal. Super. Ct., San
26 Mateo Cty. May 19, 2017)). On September 18, 2017, Mr. Johns filed an amended complaint,
27 dropping the claims for breach of contract and negligence per se and adding a claim for violation
28

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601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1 of the UCL. Verity filed a demurrer to Johns' First Amended Complaint on October 18, 2017,
2 moving to dismiss all but the implied contract claim for failure to state a claim.

3 29. On November 21, 2017, the court sustained Verity's demurrer, dismissing Mr.
4 Johns' claims for violation of the CMIA, invasion of privacy, and violation of the UCL with leave
5 to amend.

6 30. On December 6, 2017, Mr. Johns filed a Second Amended Complaint, re-alleging
7 his five previous causes of action and adding allegations regarding his own alleged injury, but
8 little else. Before Verity could respond to the Second Amended Complaint, the action was
9 consolidated with the Lara action in Los Angeles Superior Court.

10 31. At all relevant times, Mr. Johns has been and remains a St. Francis Medical Center
11 nurse and is represented by UNAC.

12 (iii) *The Consolidation of the Lara/Llera Litigation and the Johns Litigation*

13 32. Verity moved to consolidate the Lara/Llera litigation with the Johns litigation in
14 Los Angeles Superior Court. On May 9, 2018, after hearing, the Coordination Motion Judge
15 granted the consolidation.

16 33. On June 8, 2018, the Lara Claimants filed a Consolidated Class Action Complaint
17 (the "Complaint") alleging negligence, breach of implied contract, violation of the CRA, violation
18 of the CMIA, violation of the UCL, and invasion of privacy, as well as a wholly new claim for
19 unjust enrichment. The Motion is based on the Complaint.

20 I declare under penalty of perjury under the laws of the United States of America that the
21 foregoing is true and correct.

22 Executed this 24th day of April, 2019 in Palo Alto, California.

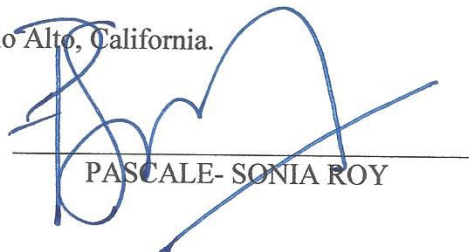
23
24 
25 PASCALE- SONIA ROY
26
27
28

Exhibit A



203 Redwood Shores Parkway
#800
Redwood Shores, CA 94065-1199
verity.org

M E M O R A N D U M

DATE: May 23, 2016
TO: Employees and Physicians
FROM: Mitch Creem, Chief Executive Officer *MC*
RE: Information Security Incident

I regret to inform you of an information security incident that came to the attention of our senior leadership team yesterday. While we actively investigate this matter, we want to make you aware of this as promptly as possible so that you may take steps to protect yourself.

Personally identifiable information (PII) was released in error in response to an email request from an unknown party (also known as phishing). Specifically, 2015 W-2 files, which include employee names, addresses, Social Security numbers, earnings and withholding information, were released. Affected employees include all current and former hospital personnel and Verity Business Services staff employed at any time between January 1, 2015, and December 31, 2015.

Employees on the Verity Health System and Verity Medical Foundation payrolls are not affected; 1099 contractors also are not affected. No patient information such as Protected Health Information (PHI) or other information related to our patients was involved in this incident.

While our investigation continues, we do not yet know if the information actually reached the individual or individuals who requested it, nor do we know how this information might be used by that individual or individuals.

We have begun implementation of an immediate action plan in response to this incident. We are working with appropriate law enforcement authorities, and we are taking steps to assist our employees.

A formal notification letter will be sent to the home addresses of individuals whose PII was released. This communication will include a more detailed description of the information released, recommended personal security measures, and referral

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information for identity protection services, which Verity Health System will provide at no charge to our employees. These services will help detect possible misuse of your personal information and provide you with identity protection services focused on immediate identification and resolution of identity theft. Instructions for enrolling in and activating these services will be provided in the formal notification letter.

In the meantime, we recommend that you review your account statements and credit reports closely. If you detect any suspicious activity on an account, you should promptly notify the financial institution or company with which the account is maintained. You may contact one of the national credit reporting agencies listed below to place a fraud alert and/or a security freeze.

Equifax
(800) 685-1111
www.equifax.com
P.O. Box 740241
Atlanta, GA 30374

Experian
(888) 397-3742
www.experian.com
535 Anton Blvd., Suite 100
Costa Mesa, CA 92626

TransUnion
(800) 680-7289
www.transunion.com
P.O. Box 2,000
Chester, PA 19016

We are working to set up a hotline for you to call to ask any immediate questions that you may have. We will communicate with you again as soon as that service is in place.

We appreciate your prompt consideration of this matter so that you may take action as appropriate. Our leadership team and I deeply regret any concern and inconvenience this may cause you, and we are committed to taking all steps possible to ensure that this does not occur again.

Exhibit B




203 Redwood Shores Parkway
#800
Redwood Shores, CA 94065-1199
verity.org

M E M O R A N D U M

DATE: May 26, 2016

TO: All Employees and Physicians

FROM: Mitch Creem, Chief Executive Officer 

RE: Information Security Incident Update

Since communicating with you on Monday, we have continued implementation of an immediate action plan in response to the information security incident that came to our attention Sunday. Following are some key updates for your information:

1. We have partnered with Epiq, a national firm that has experience helping many companies quickly notify individuals and provide call center services. We also have retained Equifax to provide identity protection services to our employees whose personal information was disclosed in this incident. These services will be available to you for two years, at no cost to you. These services will help detect possible misuse of your personal information and provide you with identity protection services focused on immediate identification and resolution of identity theft. **Detailed instructions for enrolling in and activating these services will be provided in a formal notification letter to be mailed to your home next week.**
2. We have established a call center that you may call beginning **tomorrow, Friday, May 27**, to ask any questions you may have. **The Employee Incident Response Line, 888-243-6510, will be operational from 6 a.m. to 6 p.m. PT, Monday through Friday.** It will not be operational on the Memorial Day holiday, Monday, May 30.
3. We have concluded an internal investigation of how the incident occurred, and we are collaborating with law enforcement authorities in their investigation.
4. We are well under way with a thorough review of our IT security systems. A task force has been established to review and update all organizational policies and procedures pertaining to IT security.

In addition, we have prepared some Frequently Asked Questions (FAQs), which are attached to this memorandum. Also attached is a handout with "Steps You Can Take to Further Protect Your Information." I hope this information will offer some guidance and reassurance in a situation that may cause concern.

To review, personally identifiable information (PII) was released in error in response to an email request from an unknown party (also known as phishing). Specifically, 2015 W-2 files, which include employee names, addresses, Social Security numbers, earnings and withholding information, were released. Affected employees include all current and former hospital personnel and Verity Business Services staff employed at any time between January 1, 2015, and December 31, 2015.

Employees on the Verity Health System and Verity Medical Foundation payrolls are not affected; 1099 contractors also are not affected. No patient information such as Protected Health Information (PHI) or other information related to our patients was involved in this incident.

We recommend that you review your account statements and credit reports closely. If you detect any suspicious activity on an account, you should promptly notify the financial institution or company with which the account is maintained.

I want to reiterate my regret for any concern this has caused you. I know that you give of yourself each day in the care and healing of our patients, and I am very sorry that you have been put in this situation. I will continue to update you on the steps we are taking to ensure that this kind of incident does not happen again.

Attachments:

- FAQs
- Steps You Can Take to Further Protect Your Information



Information Security Incident

Frequently Asked Questions for May 26, 2016

1. How do I know if my personal information was disclosed in this incident?

Affected employees include all current and former hospital personnel and Verity Business Services staff employed at any time between January 1, 2015, and December 31, 2015.

Employees on the Verity Health System and Verity Medical Foundation payrolls are not affected; 1099 contractors also are not affected. Official notification letters will be mailed to the homes of all affected employees next week. Beginning tomorrow, you may call the Incident Response Line to confirm if your name is on our list of affected employees.

2. What information was disclosed?

Personally identifiable information (PII) was released in 2015 W-2 files, including employee names, addresses, Social Security numbers, earnings and withholding information.

3. How did this incident occur?

The information was released in error in response to someone impersonating an executive, also known as a phishing scam.

4. When did this incident occur and when did Verity Health System learn about it?

The phishing incident occurred on April 27, 2016. We first learned of the incident on Sunday, May 22, 2016. We notified our employees via internal memorandum on Monday, May 23.

5. Why didn't I learn about this sooner?

Verity Health System is committed to protecting the security and confidentiality of the information entrusted to us. Before we could notify you, we needed to investigate the incident, determine the scope of the information disclosed, and notify law enforcement. Once we determined the scope of the disclosure, we notified you as quickly as possible. We promptly took steps to investigate the matter and contact affected individuals.

6. Can someone use my information to commit tax fraud? Can someone file a fraudulent tax return on my behalf?

Some of the information released in this incident could be used to file a fraudulent tax return. If you believe you are the victim of tax fraud or that somebody has filed or accessed your tax information, you should immediately contact the IRS or state tax agency as



appropriate. Additional contact information will be provided in the letter being mailed to your home.

7. Who do I contact to report federal tax fraud or to put an alert on my tax file?

The IRS requires that each individual report the problem directly. The IRS will not financially penalize you even if they paid a fraudulent refund. Accordingly, as an additional measure of precaution, we recommend you (and, if applicable, your spouse or domestic partner) complete IRS Form 14039 and then mail or fax that form to the IRS. A copy of that form can be obtained by going to <https://www.irs.gov/pub/irs-pdf/f14039.pdf>. You may also call the IRS at 800-908-4490 (Identity Theft Hotline) to learn whether you are a victim of this fraudulent scheme. For additional information from the IRS about identity theft, you may visit <https://www.irs.gov/uac/Taxpayer-Guide-to-Identity-Theft>. Additional contact information is provided in the letter being mailed to your home.

8. What can I do to help myself in light of this incident?

As a precaution, we urge you to sign up for the free credit monitoring and identity theft protection services by following the steps outlined in the letter coming to your home address. This will help to identify any potentially fraudulent use of your information.

9. What steps has Verity Health System taken in response to this incident?

Immediately upon learning of this incident, we promptly took action to undertake an investigation of the nature and scope of the incident. We notified appropriate law enforcement authorities. We have implemented several initiatives to enhance existing security controls, and we are establishing a task force to review and update all policies and procedures related to IT security. We are committed to protecting the security and confidentiality of our employees' information, and we are working to ensure this does not happen again.

Steps You Can Take to Further Protect Your Information

Review Your Account Statements and Notify Law Enforcement of Suspicious Activity

As a precautionary measure, we recommend that you remain vigilant by reviewing your account statements and credit reports closely. If you detect any suspicious activity on an account, you should promptly notify the financial institution or company with which the account is maintained. You also should promptly report any fraudulent activity or any suspected incidence of identity theft to proper law enforcement authorities, your state attorney general, and/or the Federal Trade Commission.

To file a report with the FTC, go to www.ftc.gov/idtheft or call 1-877-ID-THEFT (877-438-4338). Reports filed with the FTC will be added to the FTC's Identity Theft Data Clearinghouse, which is a database made available to law enforcement agencies.

Copy of Credit Report

You may obtain a free copy of your credit report from each of the three major credit reporting agencies once every 12 months by visiting www.annualcreditreport.com, calling toll-free 877-322-8228, or by completing an Annual Credit Report Request Form and mailing it to Annual Credit Report Request Service, P.O. Box 105281, Atlanta, GA 30348. You can print a copy of the request form at <https://www.annualcreditreport.com/cra/requestformfinal.pdf>. Or you can elect to purchase a copy of your credit report by contacting one of the three national credit reporting agencies. Contact information for the three national credit reporting agencies for the purpose of requesting a copy of your credit report or for general inquiries is provided below:

Equifax
(800) 685-1111
www.equifax.com
P.O. Box 740241
Atlanta, GA 30374

Experian
(888) 397-3742
www.experian.com
535 Anton Blvd., Suite 100
Costa Mesa, CA 92626

TransUnion
(800) 680-7289
www.transunion.com
P.O. Box 2000
Chester, PA 19016

Fraud Alert

We recommend placing a fraud alert on your credit report. An initial fraud alert is free and will stay on your credit file for at least 90 days. The alert informs creditors of possible fraudulent activity within your report and requests that the creditor contact you prior to establishing any accounts in your name. To place a fraud alert on your credit report, contact any of the three credit reporting agencies identified above. Additional information is available at www.annualcreditreport.com.

Security Freeze

In some US states, you have the right to put a security freeze on your credit file. This will prevent new credit from being opened in your name without the use of a PIN number that is issued to you when you initiate the freeze. A security freeze is designed to prevent potential creditors from accessing your credit report without your consent. As a result, using a security freeze may interfere with or delay your ability to obtain credit. You must separately place a security freeze on your credit file with each of credit reporting agencies listed above. Additionally, if you request a security freeze from a consumer reporting agency there may be a fee to place, lift or remove the security freeze, which may vary by state. However, if you are a victim of identity theft and have filed a report with your local law enforcement agency or submitted an ID Complaint Form with the FTC, there may be no charge to place the security freeze. In order to place a security freeze, you may be required to provide the consumer reporting agency with information that identifies you including your full name, Social Security number, date of birth, current and previous addresses, a copy of your state-issued identification card, and a recent utility bill, bank statement or insurance statement.

Federal Trade Commission and State Attorneys General Offices.

If you believe you are the victim of identity theft or have reason to believe your personal information has been misused, you should immediately contact the Federal Trade Commission and/or the Attorney General's office in your home state. You may also contact these agencies for information on how to prevent or avoid identity theft.

Federal Trade Commission: You may wish to review the tips provided by the Federal Trade Commission on how to avoid identity theft. For more information, please visit www.ftc.gov/idtheft or call 1-877-ID-THEFT (877-438-4338). A copy of Taking Charge: What to Do if Your Identity is Stolen, a comprehensive guide from the FTC to help you guard against and deal with identity theft, can be found on the FTC's website at www.ftc.gov/bcp/edu/microsites/idtheft/.

For North Carolina residents: North Carolina residents may wish to review information provided by the North Carolina Attorney General, Consumer Protection Division at www.ncdoj.gov, by calling 877-566-7226, or writing to 9001 Mail Service Center, Raleigh, NC 27699.

For California residents: California residents may wish to review the information provided by the California Attorney General at <https://oag.ca.gov/idtheft>.

Reporting of identity theft and obtaining a policy report.

For Iowa residents: You are advised to report any suspected identity theft to law enforcement or to the Iowa Attorney General.

For Oregon residents: You are advised to report any suspected identity theft to law enforcement, the Federal Trade Commission, and the Oregon Attorney General.

Taxes

Some of the information affected by this incident could be used to file a fraudulent tax return. If you believe you are the victim of tax fraud or that somebody has filed or accessed your tax information, you should immediately contact the IRS or state tax agency as appropriate.

For Federal Taxes: The IRS requires that each individual report the problem to them. The IRS will not financially penalize you even if they paid a fraudulent refund. Accordingly, as an additional measure of precaution, we recommend you (and, if applicable, your spouse or domestic partner) complete IRS Form 14039 and then mail or fax that form to the IRS. A copy of that form can be obtained by going to <https://www.irs.gov/pub/irs-pdf/f14039.pdf>. You may also call the IRS at 800-908-4490 (Identity Theft Hotline) to learn whether you are a victim of this fraudulent scheme. For additional information from the IRS about identity theft, you may visit <https://www.irs.gov/uac/Taxpayer-Guide-to-Identity-Theft>.

For State Taxes: There may be similar resources and forms for each state, so we recommend that you contact your state department of revenue directly for more information. Additional information on how to contact your state department of revenue may be found by going to <http://www.taxadmin.org/state-tax-agencies>.

Exhibit C

Verity Health System

Return Mail Processing Center
P.O. Box 6336
Portland, OR 97228-6336

<<mail id>>
<<mail id>>
<<First Name>> <<Last Name>>
<<Street Address>>
<<City>> <<State>> <<Zip>>

<<Date>>

NOTICE OF DATA BREACH

Dear <<First Name>> <<Last Name>>:

As communicated in a memo emailed to you on Monday, May 23, 2016, Verity Health System was targeted with an isolated email phishing scam in which a scammer impersonated a Verity executive and requested that certain employee information be sent via email. This scam did not affect any patient information or the delivery of healthcare to our patients.

While we actively investigate this matter, we notified you via memo the day after this incident came to our attention. We also emailed a follow up communication on Thursday, May 26, 2016, with steps you can take to protect yourself. Now we want to give you additional information in this formal notification. We truly apologize for any inconvenience this may cause you.

We have arranged for you to receive identity protection services for two years at no cost to you. Instructions for enrolling and activation in these services can be found in the "[What We Are Doing](#)" Section below.

WHAT HAPPENED

While this matter is still under investigation, we want to report this preliminary information. On May 22, 2016, we learned that a Verity employee was targeted on April 27, 2016, by an isolated email phishing scam in which an individual outside of Verity impersonated a Verity executive requesting certain information for Verity employees. The result of this scam was that certain information related to current and former employees who would have received a W-2 for 2015 was disclosed.

None of our systems were breached, and no other information was accessed or obtained. We are truly sorry for the occurrence of this incident, and we are doing everything we can to work with our staff to prevent any similar incident from happening in the future. State and Federal law enforcement officials have been notified about this incident. We are offering to all affected current and former employees free identity-theft monitoring and insurance for two years. You will find instructions on how to sign up under the "[What We Are Doing](#)" Section below.

WHAT INFORMATION WAS INVOLVED

The information involved in this incident includes names, addresses, Social Security numbers, earnings and withholding information for employees who were issued a W-2 for the 2015 tax year.

WHAT WE ARE DOING

Verity values your privacy and deeply regrets that this incident occurred. We are conducting a thorough review of the events surrounding this scam, and we will notify you if there are any significant developments. We are implementing additional security measures designed to prevent a recurrence of such an event. In addition, we have contacted state and federal law enforcement, and we are cooperating fully with them. We also will be working with outside subject matter experts in this investigation to avoid any similar incidents.

To help protect your information, Verity is offering you two years of free identity protection services through Equifax. The Equifax Credit Watch™ Gold with 3-in-1 Monitoring identity theft protection product will provide you with an “early warning system” to changes to your credit file and help you to understand the content of your credit file at the three major credit-reporting agencies, access to educational materials, and up to \$1 million in identity theft insurance with a \$0 deductible, all at no additional cost to you and it will not impact your credit score.

WHAT YOU CAN DO

In addition to enrolling in the two years of Equifax’s Credit Watch™ Gold with 3-in-1 Monitoring identity theft protection product, there are additional actions you can take to mitigate the chances of fraud or identity theft. Detailed information about the Equifax Credit Watch™ Gold with 3-in-1 Monitoring identity theft protection product and instructions on how to enroll are enclosed in this letter. Please also review the attachment to this letter (Steps You Can Take to Further Protect Your Information) for further information on ways you can protect yourself.

We strongly encourage you to enroll in this free service. If, however, you choose not to, we encourage you to monitor your credit reports and other financial records for fraudulent transactions as well as review the information included in the attachment to this letter (Steps You Can Take to Further Protect Your Information) for further information on steps you can take to protect your information.

FOR MORE INFORMATION

We have arranged a dedicated call center run by a third party, Epiq, to assist with questions about how to protect your identity following this incident. You may call Epiq at 888-243-6510, from 6:00 a.m. to 6:00 p.m. Pacific Daylight Time, Monday through Friday.

We are truly sorry that so many of our employees and former employees have been affected by this unfortunate incident. We are available to answer your questions and to help you find solutions to any problems that arise.

Sincerely,



Mitchell R. Creem
Chief Executive Officer

Enclosure(s): Steps You Can Take to Further Protect Your Information
Equifax Enrollment Instructions

Steps You Can Take to Further Protect Your Information**Review Your Account Statements and Notify Law Enforcement of Suspicious Activity**

As a precautionary measure, we recommend that you remain vigilant by reviewing your account statements and credit reports closely. If you detect any suspicious activity on an account, you should promptly notify the financial institution or company with which the account is maintained. You also should promptly report any fraudulent activity or any suspected incidence of identity theft to proper law enforcement authorities, your state attorney general, and/or the Federal Trade Commission.

To file a report with the FTC, go to www.ftc.gov/idtheft or call 1-877-ID-THEFT (877-438-4338). Reports filed with the FTC will be added to the FTC's Identity Theft Data Clearinghouse, which is a database made available to law enforcement agencies.

Copy of Credit Report

You may obtain a free copy of your credit report from each of the three major credit reporting agencies once every 12 months by visiting www.annualcreditreport.com, calling toll-free 877-322-8228, or by completing an Annual Credit Report Request Form and mailing it to Annual Credit Report Request Service, P.O. Box 105281, Atlanta, GA 30348. You can print a copy of the request form at <https://www.annualcreditreport.com/cra/requestformfinal.pdf>. Or you can elect to purchase a copy of your credit report by contacting one of the three national credit reporting agencies. Contact information for the three national credit reporting agencies for the purpose of requesting a copy of your credit report or for general inquiries is provided below:

Equifax
(800) 685-1111
www.equifax.com
P.O. Box 740241
Atlanta, GA 30374

Experian
(888) 397-3742
www.experian.com
535 Anton Blvd., Suite 100
Costa Mesa, CA 92626

TransUnion
(800) 680-7289
www.transunion.com
P.O. Box 2000
Chester, PA 19016

Fraud Alert

We recommend placing a fraud alert on your credit report. An initial fraud alert is free and will stay on your credit file for at least 90 days. The alert informs creditors of possible fraudulent activity within your report and requests that the creditor contact you prior to establishing any accounts in your name. To place a fraud alert on your credit report, contact any of the three credit reporting agencies identified above. Additional information is available at www.annualcreditreport.com.

Security Freeze

In some US states, you have the right to put a security freeze on your credit file. This will prevent new credit from being opened in your name without the use of a PIN number that is issued to you when you initiate the freeze. A security freeze is designed to prevent potential creditors from accessing your credit report without your consent. As a result, using a security freeze may interfere with or delay your ability to obtain credit. You must separately place a security freeze on your credit file with each of credit reporting agencies listed above. Additionally, if you request a security freeze from a consumer reporting agency there may be a fee to place, lift or remove the security freeze, which may vary by state. However, if you are a victim of identity theft and have filed a report with your local law enforcement agency or submitted an ID Complaint Form with the FTC, there may be no charge to place the security freeze. In order to place a security freeze, you may be required to provide the consumer reporting agency with information that identifies you including your full name, Social Security number, date of birth, current and previous addresses, a copy of your state-issued identification card, and a recent utility bill, bank statement or insurance statement.

Federal Trade Commission and State Attorneys General Offices.

If you believe you are the victim of identity theft or have reason to believe your personal information has been misused, you should immediately contact the Federal Trade Commission and/or the Attorney General's office in your home state. You may also contact these agencies for information on how to prevent or avoid identity theft.

Federal Trade Commission: You may wish to review the tips provided by the Federal Trade Commission on how to avoid identity theft. For more information, please visit www.ftc.gov/idtheft or call 1-877-ID-THEFT (877-438-4338). A copy of Taking Charge: What to Do if Your Identity is Stolen, a comprehensive guide from the FTC to help you guard against and deal with identity theft, can be found on the FTC's website at www.ftc.gov/bcp/edu/microsites/idtheft/.

For North Carolina residents: North Carolina residents may wish to review information provided by the North Carolina Attorney General, Consumer Protection Division at www.ncdoj.gov, by calling 877-566-7226, or writing to 9001 Mail Service Center, Raleigh, NC 27699.

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Reporting of identity theft and obtaining a policy report.

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For Oregon residents: You are advised to report any suspected identity theft to law enforcement, the Federal Trade Commission, and the Oregon Attorney General.

Taxes

Some of the information affected by this incident could be used to file a fraudulent tax return. If you believe you are the victim of tax fraud or that somebody has filed or accessed your tax information, you should immediately contact the IRS or state tax agency as appropriate.

For Federal Taxes: The IRS requires that each individual report the problem to them. The IRS will not financially penalize you even if they paid a fraudulent refund. Accordingly, as an additional measure of precaution, we recommend you (and, if applicable, your spouse or domestic partner) complete IRS Form 14039 and then mail or fax that form to the IRS. A copy of that form can be obtained by going to <https://www.irs.gov/pub/irs-pdf/f14039.pdf>. You may also call the IRS at 800-908-4490 (Identity Theft Hotline) to learn whether you are a victim of this fraudulent scheme. For additional information from the IRS about identity theft, you may visit <https://www.irs.gov/uac/Taxpayer-Guide-to-Identity-Theft>.

For State Taxes: There may be similar resources and forms for each state, so we recommend that you contact your state department of revenue directly for more information. Additional information on how to contact your state department of revenue may be found by going to <http://www.taxadmin.org/state-tax-agencies>.



Activation Code: <<Account Code>>

About the Equifax Credit Watch™ Gold with 3-in-1 Monitoring identity theft protection product

Equifax Credit Watch will provide you with an “early warning system” to changes to your credit file and help you to understand the content of your credit file at the three major credit-reporting agencies. Note: You must be over age 18 with a credit file in order to take advantage of the product.

Equifax Credit Watch provides you with the following key features and benefits:

- Comprehensive credit file monitoring and automated alerts of key changes to your **Equifax, Experian, and TransUnion** credit reports
- Wireless alerts and customizable alerts available (available online only)
- One 3-in-1 Credit Report and access to your Equifax Credit Report™
- Up to \$1 million in identity theft insurance¹ with \$0 deductible, at no additional cost to you
- 24 by 7 live agent Customer Service to assist you in understanding the content of your Equifax credit information, to provide personalized identity theft victim assistance and in initiating an investigation of inaccurate information.
- 90 day Fraud Alert² placement with automatic renewal functionality* (available online only)

How to Enroll: You can sign up online or over the phone

To sign up online for **online delivery** go to www.myservices.equifax.com/tri

1. **Welcome Page:** Enter the Activation Code provided at the top of this page in the “Activation Code” box and click the “Submit” button.
2. **Register:** Complete the form with your contact information (name, gender, home address, date of birth, Social Security Number and telephone number) and click the “Continue” button.
3. **Create Account:** Complete the form with your email address, create a User Name and Password, check the box to accept the Terms of Use and click the “Continue” button.
4. **Verify ID:** The system will then ask you up to four security questions to verify your identity. Please answer the questions and click the “Submit Order” button.
5. **Order Confirmation:** This page shows you your completed enrollment. Please click the “View My Product” button to access the product features.

To sign up for **US Mail delivery**, dial 1-866-937-8432 for access to the Equifax Credit Watch automated enrollment process. Note that all credit reports and alerts will be sent to you via US Mail only.

1. **Activation Code:** You will be asked to enter your enrollment code as provided at the top of this letter.
2. **Customer Information:** You will be asked to enter your home telephone number, home address, name, date of birth and Social Security Number.
3. **Permissible Purpose:** You will be asked to provide Equifax with your permission to access your credit file and to monitor your file. Without your agreement, Equifax cannot process your enrollment.
4. **Order Confirmation:** Equifax will provide a confirmation number with an explanation that you will receive your Fulfillment Kit via the US Mail (when Equifax is able to verify your identity) or a Customer Care letter with further instructions (if your identity can not be verified using the information provided). Please allow up to 10 business days to receive this information.

Directions for placing a Fraud Alert

A fraud alert is a consumer statement added to your credit report. This statement alerts creditors of possible fraudulent activity within your report as well as requests that they contact you prior to establishing any accounts in your name. Once the fraud alert is added to your credit report, all creditors should contact you prior to establishing any account in your name. To place a fraud alert on your credit file, visit: www.fraudalerts.equifax.com or you may contact the Equifax auto fraud line at 1-877-478-7625, and follow the simple prompts. Once the fraud alert has been placed with Equifax, a notification will be sent to the other two credit reporting agencies, Experian and Trans Union, on your behalf.

1 - Identity Theft Insurance underwritten by insurance company subsidiaries or affiliates of American International Group, Inc. The description herein is a summary and intended for informational purposes only and does not include all terms, conditions and exclusions of the policies described. Please refer to the actual policies for terms, conditions, and exclusions of coverage. Coverage may not be available in all jurisdictions. This product is not intended for minors (under 18 years of age).

2 - The Automatic Fraud Alert feature made available to consumers by Equifax Information Services LLC and fulfilled on its behalf by Equifax Consumer Services LLC

Exhibit D



203 Redwood Shores Parkway
#800
Redwood Shores, CA 94065-1199
verity.org

MEMORANDUM

DATE: June 20, 2016

A handwritten signature in dark ink, appearing to be "JB" or similar initials, located between the date and the recipient.

TO: All Employees and Physicians

FROM: Jane Brust, Vice President for Marketing and Communications

RE: Information Security Incident Update

Following the data incident that came to our attention May 22, we have communicated to you about the incident in various ways. On June 1, official notification letters were mailed to the homes of all affected employees. This communication explained the **two years of identity protection services that we are making available to you free of charge**. All you have to do is enroll online with your assigned code that was provided in the letter; the online enrollment process takes about 10 minutes.

In recent weeks we have heard many good questions and understandable concerns from our employees across the health system. To date, 2000 of the 7,000 affected employees have signed up for the identity protection services. The service includes free credit monitoring (so that if anyone with your personal information opens a new credit card or tries to take out a loan or other activity, you will be notified) as well as identity restoration services, should that need arise. If someone does, in fact, steal your identity, you will have up to \$1 million in insurance available to you and assistance in theft remediation.

The Verity Health System leadership team is urging each of our employees to take action in their own best interest by enrolling in the free services provided by Equifax, a national firm with expertise in this field.

In the meantime, know that we have been working to enhance our IT security measures while planning and implementing enhanced training, policies and procedures for our employees. Each of us needs to be a wise steward of our resources, including the vital information resources that we handle in the course of our work.

Please find attached some Frequently Asked Questions that have surfaced since the data incident came to light. I hope this information will be helpful to you, and I urge you to enroll in the identity protection services offered at no charge to you for two years.

Attachments

Frequently Asked Questions

IRS Form

Exhibit E



Questions and Answers

Employee Data Incident 2016

February 9, 2017

Background

Following the data incident that came to our attention May 22, 2016, we communicated to the affected employees in various ways. In recent weeks we have heard from concerned employees who may be the victims of IRS tax fraud. We are providing this information to answer questions you may have and to provide you with additional resources. Verity Health leadership regrets that this incident occurred and created concern and inconvenience for our valued employees, including you.

1. What can I do to prevent or correct IRS tax fraud as a result of my personal protected information being released in the 2016 phishing scam?

The best thing an individual can do to prevent or correct an IRS tax fraud issue is to complete and file the attached IRS Form 14039. A copy of that form also may be obtained by going to <https://www.irs.gov/pub/irs-pdf/f14039.pdf>. For all incidents of identity theft /fraudulent tax filing with the IRS, the IRS will require that the situation be handled this way, regardless of who contacts the IRS. **In other words, hiring an attorney or a service provider generally will not yield any different results and may delay resolution of the issue.** In fact, it may result in less of or no resolution as the IRS requires that the affected individual complete and file the affidavit. **(See attached form)**

2. Will the IRS penalize me if they paid a fraudulent refund associated with me?

The IRS will not financially penalize someone, even where the IRS has paid a fraudulent refund, if the individual files an affidavit with the IRS to report the fraud. By filing the affidavit, the affected individual will either prevent or reverse any inconvenience or harm.

3. How will the IRS contact me?

When the IRS stops a suspicious tax return filing, even absent your filing a completed Form 14039, the IRS may send a letter called "Letter 5071C" (<https://www.irs.gov/individuals/employees/understanding-your-5071c-letter>) asking that you verify your identity. You should respond to any notice you receive in writing from the IRS.



The notice will include a couple ways to verify it: via a phone number or through the IRS's Identity Verification Service (<https://idverify.irs.gov>).

This online service is the quickest method to address this issue. You will be asked multiple-choice questions to verify whether or not the tax return flagged for further identity verification was filed by you or by someone else. The IRS sends such notices only by **mail**. The IRS **will not** request that you verify your identity by contacting you by phone or through email. If you receive such calls or emails, they are likely a scam.

If you can't confirm your identity using the IRS' online Identity Verification Service (<https://idverify.irs.gov/IE/e-authenticate/welcome.do>), you may call the IRS at the phone number included in the letter sent from the IRS.

When confirming your identity, you will need:

1. Your name, date of birth and contact information
2. Social security number (SSN) or individual taxpayer identification number (ITIN)
3. Your prior year tax return along with supporting documents such as W-2s, 1099s and Schedules A and C if you filed them

4. Regarding the free identity protection services offered by Verity for two years to the affected employees, what happens at the end of two years?

You will be notified by Equifax that the free service is ending, and you will have the option of renewing the service at your own expense.

5. What should I do if I discover that my personal information has been misused?

We would encourage you to file a complaint with the Federal Trade Commission at www.ftc.gov/idtheft or at 1-877-ID-THEFT (877-438-4338). Notification to the IRS regarding an incident is by the affected individual by the filing of form 14039. You

may also call the local office of the FBI or file a complaint online with the FBI's Internet Crime Complaint Center or by using the FBI's online Tips and Public Leads form.

6. How do I report tax fraud to state agencies?

In California, you may contact the California Franchise Tax Board direct at 800-540-3453 (M-F 8:30 a.m. - 4 p.m. PT). In addition, the California Franchise Tax Board maintains an identity theft web page with additional instructions and helpful information. You also may report an incident of suspected identity theft or tax fraud directly through this site: www.ftb.ca.gov/individuals/id_theft.shtml#ID.



To report an incident of identity theft, please follow the instructions in FTB 3552 Identity Theft Affidavit (<https://www.ftb.ca.gov/forms/misc/3552.pdf>).

Generally, each state has either a telephone hotline or an address where an individual can file one's report, if not both. To report income tax fraud, either call a tax hotline or contact the department of taxation via the specified address. Some states require you to fill out a form to mail. If you are not a California resident, you may find information on how to contact your state department of revenue may be found by going to <http://www.taxadmin.org/state-tax-agencies>.

7. Should I also report identity theft to Social Security if it occurs?

Yes.

Social Security Administration

www.socialsecurity.gov

1-800-772-1213

####

DECLARATION OF ANDRES A. ESTRADA

I, Andres A. Estrada, declare, that if called as a witness, I would and could competently testify thereto, of my own personal knowledge, as follows:

1. I am a Senior Managing Consultant at Kurtzman Carson Consultants, LLC (“KCC”), the claims and noticing agent for Verity Health System of California, Inc. (“VHS”) and the above-referenced affiliated debtors, the debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the “Debtors”), in the referenced chapter 11 bankruptcy cases (the “Chapter 11 Cases”).

2. I submit this declaration (“Declaration”) in support of the *Debtors’ Opposition to Motion of Iris Lara, Tanya Llera and Jarmaine Jonhs for Authorization to File a Class Proof of Claim on Behalf of Claimants Similarly Situation* (the “Objection”). All capitalized terms not defined herein have the meaning ascribed to them in the Objection.

3. Except as otherwise indicated herein, this Declaration is based upon my personal knowledge, my review of relevant documents, information provided to me by KCC and employees of the Debtors or the Debtors’ legal and financial advisors, or my opinion based upon my experience, knowledge, and information concerning the Debtors’ operations and the bankruptcy claims service industry. If called upon to testify, I would testify competently to the facts set forth in this Declaration.

4. KCC served the Debtors’ current employees, the Lara Claimants and employees potentially holding a claim against the Debtors with written notice of the Bar Date on February 19, 2019 and/or March 2, 2019. [Docket Nos. 1864, 2001].

5. Additionally, the Bar Date Notice was published (i) on March 1, 2019, in the Los Angeles Times, San Francisco Chronicle, San Jose Mercury News, and (ii) USA Today on March 4, 2019.

6. The Bar Date Notice was also posted on the KCC website on the Important Date, Deadlines & Documents section of the website with a link to the order and remains there at www.kccclcc.net/verityhealth.


DENTONS US LLP
300 SOUTH GRAND AVENUE, 14TH FLOOR
LOS ANGELES, CALIFORNIA 90071-3124
(213) 688-1000

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300 SOUTH GRAND AVENUE, 14TH FLOOR
LOS ANGELES, CALIFORNIA 90071-3124
(213) 688-1000

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I declare under penalty of perjury and of the laws in the United States of America, the foregoing is true and correct.

Executed this 24th day of April, 2019, at El Segundo, California.



Andres A Estrada