UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BRENDA WONG, PARKER JERRELL, JOSE BOX, AMBER PALMER, Individually and on Behalf of all Others Similarly Situated,	§	
Plaintiffs,	§	**CASE NO. 4:21-cv-04169**
v.	§	
MAGIC MONEY LLC, SCOREMORE HOLDINGS, LLC, LIVE NATION WORLDWIDE, INC., LIVE NATION ENTERTAINMENT, INC., CEREMONY OF ROSES, LLC, and COR MERCHANDISING, LLC,	§	**JURY TRIAL DEMANDED**
Defendants.	§	

UNOPPOSED PLAINTIFFS' MOTION FOR CERTIFICATION OF CLASS AND PROPOSED NOTICE AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Rules

Plaintiffs Brenda Wong, Parker Jerrell, Jose Box, Amber Palmer (collectively "Representative Plaintiffs"), Individually and on Behalf of all Others Similarly Situated, (collectively "Plaintiffs"), by and through the undersigned counsel (proposed "Settlement Class Counsel"), hereby submit this Unopposed Plaintiffs' Motion for Certification of Class and Proposed Notice and Incorporated Memorandum of Law in Support and show as follows:

I. THE LITIGATION AND SETTLEMENT

Plaintiffs seek refunds for their Magic Money purchases related to the Astroworld Festival ("festival"), which was scheduled to take place over two days from November 5 to 6, 2021, in Houston, Texas. Magic Money was the exclusive means to pay for the festival's rides and carnival games. Plaintiffs allege, in main part, that, due to the festival's cancellation, those that purchased Magic Money should be refunded for such purchases. The festival's second day was officially cancelled after a mass casualty event occurred on the evening of November 5, 2021. Hundreds of festivalgoers claim to have sought medical attention, and ten died.

On November 10, 2021, Plaintiffs first filed a putative class action in Texas state court and eventually nonsuited the state court action prior to refiling in federal court. Then, on December 23, 2021, Plaintiffs brought forth a putative class action before this Court. *See* Dkt. 1. Plaintiffs set forth causes of action for breach of contract, violations of the Texas Deceptive Trade Practices Act ("DTPA"), negligent misrepresentation, conversion, and unjust enrichment.

Plaintiffs sued six entities that were involved with the festival (collectively "Defendants"). Magic Money LLC ("Defendant Magic Money") provided the software and technological platform to purchase and issue Magic Money cards for use at the festival. Ceremony of Roses, LLC and Cor Merchandising, LLC (collectively "Defendant Ceremony of Roses") planned the festival's rides and carnival games. Scoremore Holdings, LLC, Live Nation Worldwide, Inc., and Live

Nation Entertainment, Inc. (collectively "Defendant Live Nation") organized the festival and were involved in the design, marketing, and promotion of Magic Money related to the festival.

Plaintiffs purchased Magic Money, which was loaded onto Magic Money cards and was intended to be redeemed at the festival to participate in the festival's rides and carnival games. Plaintiffs could purchase Magic Money in two ways: on a website prior to the festival and at one of the Magic Money kiosks at the festival. Nearly all Plaintiffs purchased Magic Money via credit or debit card. Some Plaintiffs paid with cash, Venmo, or PayPal. Upon purchasing Magic Money, Plaintiffs' money passed through Defendant Magic Money's platform to Defendant Ceremony of Roses' account utilizing a payment processing service operated by First Data Merchant Services LLC ("First Data"). Defendant Ceremony of Roses contracted with First Data for its merchant services. First Data has represented that its transaction records, as maintained and provided by First Data, delineate each of the Magic Money transactions paid via credit and debit card and some of the Magic Money transactions paid by other means. Its records include the amount of each of the transactions and the credit, debit, and account numbers used. Based on its records, it is understood that approximately 5,257 transactions occurred for a total transaction amount of approximately $284,951.59. The total transaction amount does not account for Magic Money that was redeemed at the festival or any credit or debit card chargebacks or refunds previously received by any Plaintiffs.

Early in the litigation process, Plaintiffs and Defendants (collectively "parties") began extensive settlement discussions. The Rule 16 Conference was held on March 30, 2022, and the parties requested that limited discovery be conducted to aid in reaching settlement. *See* Dkt. 45. After conducting limited discovery, including the deposition of the corporate representative of Ceremony of Roses, LLC, at the end of May 2022, Plaintiffs' and Defendant Live Nation's

counsels agreed to certain terms of a Memorandum of Understanding. On June 1, 2022, the parties attended a status conference and informed the Court of their intention to settle and move forward with class certification. *See* Dkt. 50. The Court set a motion, briefing, and hearing schedule to proceed with class certification. *Id*. Thereafter, to facilitate class certification, Defendant Ceremony of Roses subpoenaed and obtained certain records from First Data related to the Magic Money transactions for the festival. The Court granted additional time for Plaintiffs to proceed with class certification, allowing for the parties to obtain more accurate records and information from First Data. *See* Dkt. 54, 60.

The Court likewise granted additional time in order for the parties to finalize and execute a proposed settlement agreement. *See* Dkt. 66, 69. During this time, Defendant Ceremony of Roses and First Data negotiated and executed an agreement and first amendment thereof, *in toto* referred to as the Revival of Merchant Processing Agreement and Indemnification and Hold Harmless Agreement, solely between the two entities to reopen the merchant account that processed Magic Money purchases for the festival.

A proposed settlement agreement has been reached after arms-length negotiations. *See* Settlement Agreement ("Settlement Agreement"), Ex. **A**. The Settlement Agreement is intended to resolve all claims arising from Magic Money purchases for the festival and provide for a specified refund or reimbursement of such purchases to Settlement Class[1] members. Importantly, Settlement Class members are not releasing any claims for personal injuries or other injuries or damages not pertaining to Magic Money purchases for the festival. Defendants continue to deny the claims and allegations asserted against them. For settlement purposes, the parties agree to the certification of the Settlement Class. The Settlement Agreement provides, in main part, for:

[1] When used, "Settlement Class" refers to the definition of "Settlement Class" as provided below.

1. Defendant Live Nation to provide a total settlement fund of $335,000 ("Total Settlement Fund"). (Ex. A ¶ 2.1);

2. Eligible Settlement Class members to receive specified refund amounts of their Magic Money purchases for the festival when paid with debit and credit cards and not issued a chargeback or refund on the purchases. Refunds are to be remitted via the original payment method. (Ex. A ¶ 2.2);

3. Eligible Settlement Class members to receive specified reimbursement amounts of their Magic Money purchases for the festival when paid with cash or any payment means other than debit or credit card. Reimbursements are to be remitted via check after undergoing a claim review process. (Ex. A ¶ 2.3);

4. Defendant Ceremony of Roses to facilitate the refund process to eligible Settlement Class members, which consists of First Data issuing specified refunds via the original payment method. (Ex. A ¶ 2.2);

5. Settlement Class Counsel to facilitate the reimbursement process to eligible Settlement Class members, which consists of issuing specified reimbursements via check for valid claims after a claim review process. (Ex. A ¶ 2.3);

6. Settlement Class Counsel to be paid fair and reasonable attorney fees, costs, and expenses, including expenses related to class notice and administration, out of the Total Settlement Fund. (Ex. A ¶¶ 7.1, 7.2);

7. Representative Plaintiffs to receive an incentive award of $200 each out of the Total Settlement Fund. (Ex. A ¶ 7.2);

8. Settlement Class Counsel and Defendants to fully cooperate, when necessary, to resolve any dispute regarding a refund or reimbursement of a valid claim. (Ex. A ¶ 8.3); and

9. Respective parties to cooperate to effectuate and implement the terms and conditions of the Settlement Agreement (*See, e.g.,* Ex. A ¶¶ 8.4, 10.1).

A preliminary approval and fairness hearing has been set for July 27, 2023. *See* Dkt. 71.

The parties seek the Court's approval for the proposed settlement. *See* Fed. R. Civ. P. 23(e). Obtaining approval is typically a two step process. *See McNamara v. Bre-X Minerals, Ltd.*, 214 F.R.D. 424, 426–32 (E.D. Tex. 2002). First, the Court evaluates the proposed settlement by

determining whether the Rule 23(a) and (b)[2] requirements are satisfied and the proposed settlement meets the fairness standard. *Id*. at 428–31. Second, the Court directs that notice be given to class members of a Final Fairness Hearing. *Id*. at 426. At the Final Fairness Hearing, the Court determines whether the proposed settlement is "fair, reasonable, and adequate . . . ." Fed. R. Civ. P. 23(e)(2).

II. THE REQUIREMENTS FOR CLASS CERTIFICATION ARE SATISFIED

Class action certification is particularly appropriate given that class actions are ideal when redressing common claims for uniform legal violations that impact many people in a similar way. *See, e.g., Vine v. PLS Fin. Services, Inc.*, 331 F.R.D. 325, 328 (E.D. Tex. 2019) (certifying a class action alleging DTPA violations for payday loans); *In re Heartland Payment Systems, Inc.*, 851 F. Supp. 2d 1040, 1041 (S.D. Tex. 2012) (C.J. Rosenthal) (certifying a consumer class action); *In re Universal Access Inc.*, 209 F.R.D. 379, 385 (E.D. Tex. 2002) (finding the class certification standard to have been met in a securities case); *In re Prudential Sec. Ltd. P'ship Litig.*, 163 F.R.D. 200, 205 (S.D.N.Y. 1995) ("The settlement class device has been recognized throughout the country as the best, most practical way to effectuate settlements involving large numbers of claims by relatively small claimants."). The DTPA explicitly contemplates and permits class actions as a mechanism to protect consumers. *See* Tex. Bus. & Com. Code §17.501.

Under the Federal Rules of Civil Procedure, a class should be certified when it is definable and Plaintiffs meet all four requirements of Rule 23(a) and one of the requirements of Rule 23(b). *See generally Wal-Mart Stores v. Dukes*, 564 U.S. 338, 345 (2011). Here, Plaintiffs invoke Rule 23(b)(3). Rule 23 should be construed liberally in favor of the maintenance of class actions. *See In re Enron Corp. Sec.*, 529 F. Supp. 2d 644, 670 (S.D. Tex. 2006). Further, when evaluating a motion

[2] When used, "Rule 23" refers to the Federal Rule of Civil Procedure 23.

for class certification, the Court should accept as true the allegations in support of certification and refrain from examining the merits of the case. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177–78 (1974); *see also Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 466 (2013) ("Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage."). Importantly, when evaluating certification in the context of a proposed settlement, questions regarding the manageability of the case for trial purposes need not be considered. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619 (1997). As demonstrated below, Plaintiffs meet all the necessary requirements to certify the class action.

1. There is a Definable Class

Plaintiffs have proposed a class that is adequately defined and clearly ascertainable. *See generally John v. Nat'l Sec. Fire and Cas. Co.*, 501 F.3d 443, 445 n.3 (5th Cir. 2007) ("The existence of an ascertainable class of persons to be represented by the proposed class representative is an implied prerequisite of [Rule 23]."). The Court and parties can easily ascertain whether an individual falls into the proposed class that Plaintiffs seek to certify ("Settlement Class"):

> All Persons who purchased Magic Money for the Astroworld Festival 2021 and were not issued a chargeback or refund for the Magic Money transaction. Excluded from the definition of Settlement Class are Defendants and their officers and directors, and those Persons who timely and validly request exclusion from the Settlement Class.

Ex. A ¶ 1.10. In short, the Settlement Class captures those who purchased Magic Money for the festival and were not issued a chargeback or refund for their Magic Money transaction.

The Settlement Class is unlikely to include a significant number of minors. A minor is typically an individual under 18 years of age whose disability has not been removed. *See, e.g.,* Tex. Civ. Prac. & Rem. Code § 129.001 (defining the age of majority). It is commonly accepted

that only adults can lawfully agree to a binding credit card contract.[3] A minor may be an authorized user on an adult's credit card.[4] There are circumstances in which a minor-aged individual can open a bank account, but even then, an adult generally has control over the account.[5] In most situations, a minor maintains a joint or custodial account with an adult.[6] In any case, if any minor-aged individuals were to be Settlement Class members, then their rights and interests would be adequately represented by the Representative Plaintiffs and protected by Settlement Class Counsel.

2. The Four Requirements of Rule 23(a) are Met

To proceed with the settlement, the Court must certify the proposed Settlement Class. The proposed Settlement Class satisfies the threshold requirements for certification under Rule 23(a):

a. Numerosity

Numerosity requires that "the class is so numerous that joinder of all members is impracticable[.]" Fed. R. Civ. P. 23(a)(1). "The precise number and identity of class members need not be shown for certification of the class; good faith and common sense estimates suffice." *In re Universal Access*, 209 F.R.D. at 385 (citation omitted); *see also Zeidman v. Jay Ray McDermott & Co.*, 651 F.2d 1030, 1038 (5th Cir. 1981) (clarifying that numerosity need not be determined by the "actual number of class members"). Courts have found numerosity to be met when a proposed

[3] *See, e.*g., *How old do you have to be get a credit card?* CHASE (last visited Sept. 28, 2022), https://www.chase.com/personal/credit-cards/education/build-credit/how-old-to-get-credit-card#:~:text=You'll%20need%20to%20be,source%20of%20income%20to%20qualify; *How Old Do You Have to be to Get a Credit Card?* DISCOVER (last visited Sept. 28, 2022), https://www.discover.com/credit-cards/resources/whats-the-right-age-to-get-a-credit-card; *see also* Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit CARD Act), 15 U.S.C. § 1637(c)(8) (imposing requirements for issuing credit cards to those under 21 years old).

[4] *See id*.

[5] *See, e.g.,* Tex. Fin. Code § 34.305 (removing a minor-aged individual's disability for bank accounts); *Can a minor open a bank account without a parent?* WELLS FARGO (last visited Sept. 28, 2022), https://www.wellsfargo.com/checking/clear-access-banking.

[6] *See id*.

class consists of at least forty members. *See Vine*, 331 F.R.D. 325, 332 (citing *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (citation omitted)).

Here, the Settlement Class meets the numerosity standard. The Settlement Class consists of nearly all Magic Money purchasers for the festival. The Settlement Class excludes those Magic Money purchasers who were issued a chargeback or refund. It has been reported that approximately 50,000 individuals attended the festival. First Data's records indicate that approximately 5,257 Magic Money transactions transpired, totaling approximately $284,951.59. Defendant Magic Money's records estimate 1,522 individuals account for 1,605 transactions for Magic Money purchased in advance of the festival via the website. Finally, First Data's records also reveal that approximately 151 transactions were issued a chargeback, totaling approximately $15,424.50. Given these numbers, the numerosity requirement has been met.

b. Commonality

Commonality requires that "there are questions of law or fact common to the class[.]" Fed. R. Civ. P. 23(a)(2). "The threshold of 'commonality' is not high." *Vine*, 331 F.R.D. at 328 (citing *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472 (5th Cir. 1986)). Commonality requires "only that resolution of the common questions affect all or a substantial number of the class members." *Id.*; *see also In re Heartland Payment Systems*, 851 F. Supp. 2d at 1052 (citing to various cases to determine commonality).

Defendants acted uniformly towards Plaintiffs, and Plaintiffs submit that the questions of law and fact common to the Settlement Class include but are not limited to:

1. whether Defendants breached their contracts or were unjustly enriched as a result of the Magic Money purchases for the festival;

2. whether Defendants converted money received from the Magic Money purchases for the festival;

3. whether Defendants violated the DTPA when misleading Plaintiffs and Settlement Class members into purchasing Magic Money for the festival;

4. whether Defendants negligently misrepresented Magic Money for its intended use at the festival;

5. whether Plaintiffs and Settlement Class members were harmed or damaged by Defendants' actions; and

6. whether Defendants should be subject to a declaratory judgment and statutory and other damages.

The same legal and factual questions exist for each Settlement Class member, and the resolution of these issues will resolve them for all members. Accordingly, the commonality prerequisite is satisfied.

c. Typicality

Typicality requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class[.]" Fed. R. Civ. P. 23(a)(3). "'Like commonality, the test for typicality is not demanding. It focuses on the similarity between the named plaintiffs' legal and remedial theories and the theories of those whom they purport to represent.'" *Vine*, 331 F.R.D. at 333 (citing *Mullen*, 186 F.3d at 625). Typicality focuses on the generalized nature of claims. *See In re Universal Access*, 209 F.R.D. at 385 ("The requirement that the proposed class representatives' claims be typical of the claims of the class does not mean, however, that the claims must be identical.").

The Representative Plaintiffs have the same interests and have suffered the same general damages and injuries as the Settlement Class members. The claims arise both from the same event and course of conduct related to the purchase of Magic Money for the festival that was cancelled and implicate the same legal theories and remedies. Therefore, the Representative Plaintiffs' overall experiences are typical of those of the Settlement Class members.

d. Adequacy

Adequacy requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Adequacy is met by: "(1) the absence of potential conflict between the named plaintiffs and the class members and (2) the class representatives' choice of counsel who is qualified, experienced and able to vigorously conduct the proposed litigation." *In re Universal Access*, 209 F.R.D. at 386. The Fifth Circuit "'mandates an inquiry into the zeal and competence of the representative[s'] counsel and into the willingness and ability of the representative[s] to take an active role in and control the litigation and to protect the interests of absentees.'" *Vine*, 331 F.R.D. at 334 (citing *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 484 (5th Cir. 1982)).

The Representative Plaintiffs' interests do not conflict with the Settlement Class's interests, as they seek to be compensated for their Magic Money purchases related to the festival. Further, as demonstrated by their efforts, Plaintiffs' counsel has competently and vigorously protected the Settlement Class's interests and will continue to do so. Plaintiffs' counsel possesses the requisite skill, ability, and qualifications to represent the Settlement Class. Plaintiffs' counsel is well-versed in class action and other complex litigation, particularly in federal court and when representing consumers who have suffered losses.

Plaintiffs' lead counsel, Derek H. Potts, is a highly qualified and experienced attorney who has been regularly appointed to serve in leadership capacities in complex mass actions in federal courts across the United States. This has included being appointed as Co-Lead Counsel in multiple federal Multidistrict Litigations, including *In Re: C.R. Bard, Inc., Pelvic Repair System Products Liability Litigation*, 2:10-md-02187, in the United States District Court for the Southern District of West Virginia, *In Re: Mentor Corp. Obtape Transobturator Sling Products Liability Litigation*,

4:08-md-02004, in the United States District Court for the Middle District of Georgia, and *In Re: Downstream Addicks and Barker (Texas) Flood Control Reservoirs v. USA*, 17-9002, in the United States Court of Federal Claims. He regularly practices before the federal Judicial Panel on Multidistrict Litigation establishing new federal court consolidations. He was recently appointed as Co-Lead Counsel in a consolidated class action case, *In Re: Generali COVID-19 Travel Insurance Litigation*, 1:20-md-02968, in the United States District Court for the Southern District of New York. He also served as class counsel for the states of New York, New Jersey, and Arkansas in *In Re: AT&T Mobility Wireless Data Services Sales Tax Litigation*, 1:10-cv-02278, in the United States District Court for the Northern District of Illinois, a national class action related to reimbursements to cell phone users nationwide. He most recently pursued a class action case in *J&M Plastics, Inc., et al. v. MidAmerican Energy Services, LLC*, 2:21-cv-00206, in the United States District Court for the Eastern District of Texas, related to overcharges of electricity to customers during Winter Storm Uri.

3. The Requirements of Rule 23(b)(3) are Met

Under Rule 23(b)(3), class certification may only proceed if predominance and superiority have been established. The Settlement Class satisfies both:

a. Predominance

Predominance requires that the Court "find[] that the questions of law or fact common to class members predominate over any questions affecting only individual members . . . ." Fed. R. Civ. P. 23(b)(3); *see also Vine*, 331 F.R.D. at 332–33 (citing *Gene and Gene LLC v. BioPay LLC*, 541 F.3d 318, 326 (5th Cir. 2008) (explaining that predominance is a more demanding version of commonality)). The "inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Vine*, 331 F.R.D. at 336 (internal citation omitted). "[O]ne or more

of the central issues in the action are common to the class can be said to predominate." *Id*. at 337. Predominance is not necessarily negated when class members' claims present individualized damages or are challenged by affirmative defenses. *Id*. at 337–39 (finding predominance to be satisfied in the DTPA context).

Common questions predominate over any individual issues that may exist, including but not limited to whether: Defendants' conduct was improper, such conduct violated the laws as set forth in the Plaintiffs' Original Class Action Complaint (*see* Dkt. 1), and such conduct harmed or damaged the Settlement Class members. For instance, if each Settlement Class member was to pursue an individual suit against Defendants, then most of the evidence necessary to support the individual suits would be identical. After resolving the common liability question, any calculation of damages would be mechanical in nature. Therefore, predominance is evident in this case.

b. Superiority

Superiority requires that the Court "find[] . . . that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Consumer actions, like the one at hand, are particularly amenable to class certification since they aim to "achieve economies of time, effort, and expense, and promote . . . uniformity of decisions as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem*, 521 U.S. at 615 (citation omitted). Here, class treatment would prevent unnecessary duplication of lawsuits and the risk of inconsistent rulings.

In *Vine*, the district court assessed each of the factors listed within Rule 23(b)(3) and found in favor of superiority. *See Vine*, 331 F.R.D. at 341. By applying the same analysis to the present case, the Court should come to a similar conclusion. First, individual class members would be unlikely to pursue individual lawsuits since relatively small amounts of money are at issue. *Id.*

Low damage amounts also mitigate the risk of individual control. *Id*. Indeed, "[t]he most compelling rationale for finding superiority in a class action is the existence of a negative value suit." *In re Heartland Payment Systems*, 851 F. Supp. 2d at 1060 (citing *Castano v. Am. Tobacco Co.,* 84 F.3d 734, 748 (5th Cir.1996)) (internal quotes omitted). Second, this is the only litigation the parties are aware of that is related to Magic Money purchased for the festival. *Id*. Third, the festival occurred in Texas, and the Court is the appropriate forum. *Id*. Ultimately, a class action would be ideal for Plaintiffs and Settlement Class members to have their day in court.

III. THE SETTLEMENT MEETS THE FAIRNESS STANDARD

The Settlement Agreement has been filed. *See* Fed. R. Civ. P. 23(e)(3); Ex. A. The Court should preliminarily approve the settlement because it falls within the range of possible judicial approval and has no obvious deficiencies. *See In re Shell Oil Refinery*, 155 F.R.D. 552, 555 (E.D. Tex. 1993); *McNamara*, 14 F.R.D. at 430. The parties engaged in serious, informed, and noncollusive negotiations in arriving at the settlement. The parties are aware of the relative strengths and weaknesses of their case and believe that the settlement is advantageous given the expenses and challenges of litigation. Accordingly, the Court should approve the settlement, such that notice may be provided to Settlement Class members.

Lastly, at a Final Fairness Hearing, the Court should find the settlement to be fair, reasonable, and adequate. *See* Fed. R. Civ. P. 23(e)(2). The Court's opinion in *In re Heartland Payment System* delineates the relevant case law and demonstrates the analysis to make such a finding. *See* 851 F. Supp. 2d at 1063–69. There is a strong presumption in favor of finding that a settlement is fair, reasonable, and adequate. *Id*. at 1063. The settlement further comports with the Fifth Circuit's six *Reed* factors:

1. Existence of Fraud or Collusion

The parties have negotiated at arm's length, first agreeing to certain terms of a Memorandum of Understanding and then entering into the settlement. The parties have not agreed to the amounts of attorney fees, costs, and expenses but have agreed that such amounts would be paid out of the Total Settlement Fund. Pursuant to the Settlement Agreement, Settlement Class Counsel has proposed the amounts for its attorney fees, costs, and expenses to be reviewed and approved by the Court. *See* Ex. A ¶ 7. First Data has also expressed its intention to submit a request for its attorney fees, costs, and expenses to be reviewed and approved by the Court. *See id.* ¶ 7.3.

2. The Complexity, Expense, and Likely Duration of Litigation

Continued litigation would be time-consuming and result in high costs and expenses. The litigation would consist of complex discovery and motion practice, particularly with each Defendant filing dispositive motions. Moreover, the litigation would have to survive trial and appeal to confer a benefit onto the Settlement Class.

3. Stage of Proceedings and Amount of Discovery Completed

"The key issue is whether 'the parties and the district court possess ample information with which to evaluate the merits of the competing positions.'" *In re Heartland Payment Systems*, 851 F. Supp. 2d at 1066 (citing *Ayers v. Thompson*, 358 F.3d 356, 369 (5th Cir. 2009)). Formal discovery is not necessary to establish this factor. *See id*. The parties engaged in initial discovery specifically aimed at reaching a settlement. Defendants provided documents and answers responsive to discovery requests, and, in addition, Ceremony of Roses, LLC presented its corporate representative for deposition. The parties also received certain records subpoenaed from First Data. Both the Court and the parties possess sufficient information to evaluate the litigation.

4. Probability of Plaintiffs' Success on the Merits

The litigation would have to overcome many obstacles to succeed on the merits, including, in all likelihood, motions to dismiss aimed at substantially narrowing the causes of actions asserted against Defendants. The settlement confers significant benefits to the Settlement Class because it provides for a recovery without the risks or delays of continued litigation. The settlement allows for most of the Settlement Class members to attain nearly full refunds or reimbursements of their Magic Money purchases for the festival.

5. The Range of Possible Recovery

The litigation's potential range of recovery is difficult to precisely define. On the lowest end, Plaintiffs may not receive any damages. On the highest end, Plaintiffs may receive treble their damages plus attorney fees, costs, and expenses upon succeeding on a DTPA claim. It is important to recognize that, under a viable breach of contract claim, Plaintiffs would likely be compensated for the unused portion of their Magic Money purchases for the festival, plus attorney fees, costs, and expenses. To most Settlement Class members, the settlement intends to provide for nearly full refunds of Magic Money purchases for the festival when accounting for Settlement Class Counsel's proposal for attorney fees, costs, expenses, and incentive awards. It is estimated that, optimally under such a proposal, a typical refund or reimbursement would account for 90.9% of the transaction amount, with a First Data refund at 89.6% of the transaction amount. If any request by First Data for attorney fees, costs, and expenses was to be approved by the Court, then the percentages of the transaction amount as calculated would decrease.

6. Opinion of Class Counsel and Representatives and Absent Class Members

Settlement Class Counsel endorses the settlement because it provides compensation for the Settlement Class members for their Magic Money purchases for the festival. The Representative

Plaintiffs have agreed to the settlement, and it is believed that their views accurately reflect the views of the absent class members. Because all six *Reed* factors favor settlement, the Court should approve the settlement.

IV. NOTICE

Upon granting preliminary settlement approval, the Court should direct notice that affords the Settlement Class members the opportunity to opt-out of or object to the settlement. *See* Fed. R. Civ. P. 23(e)(1),(5). Notice must be provided in a manner that is "reasonable" and "practicable under the circumstance." *See* Fed. R. Civ. P. 23(c)(2)(B), (e)(1)(B). There are no rigid rules for settlement notice. *See In re Heartland Payment Systems, Inc.*, 851 F. Supp. 2d at 1060. Notice need "only satisfy the broad reasonableness standards imposed by due process[,]" and provide Settlement Class members with the "information reasonably necessary for them to make a decision whether to object to the settlement." *Id*. (citing *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 197 (5th Cir. 2010)). Moreover, individual notice is not required under the circumstances. *Id*. at 1062 ("Individual notice could not be provided through reasonable efforts. Heartland did not have the names and addresses of those affected by the data breach . . . ."). The proposed notice plan and notice have been tailored to meet the standards set forth above.

1. Scope of Notice

The proposed notice plan includes various types of notices aimed at reaching the greatest number of Settlement Class members practicable. The parties have limited access to individual names and email addresses for Settlement Class members. However, per the settlement, refunds and reimbursements will be mostly issued according to the credit and debit card and account numbers in First Data's records and, only when unavoidable, through a claim review process.

Summary notices will be distributed in two ways. *See* Summary Notice, Ex. **B**. First, Settlement Class Counsel will send notice via email to those Settlement Class members whom the parties have email addresses for. Defendant Magic Money's records list approximately 1,522 emails for individuals who purchased Magic Money in advance of the festival via the website. Defendant Live Nation also provided approximately 40 email requests for refunds that contain email addresses. Second, notice will be published in the Houston Chronicle on three separate days. *See id;* Banner, Ex. **C**. The summary notice will direct individuals to a website that will feature a detailed notice containing further information. *See* Detailed Noticed, Ex. **D**.

The website will also feature an easy to remember domain name and be a point of access for individuals to obtain documents containing information about the settlement and contact information for Settlement Class Counsel. Settlement Class Counsel will also provide copies of notices to individuals and Spanish language assistance upon request. Lastly, Settlement Class Counsel will publish a press release, for distribution in Texas, about the settlement that directs individuals to the website to obtain further information. *See* Press Release, Ex. **E**.

2. Contents of Notice

The notices will include: a fair summary of the action and the parties' respective litigation positions; the definition of the Settlement Class and other identifying information; the general terms of the settlement as set forth in the Settlement Agreement; instructions for opting-out of or objecting to the settlement; the process and instructions for receiving settlement benefits and making a claim; an explanation that a Settlement Class member may enter an appearance through an attorney; a reminder of the binding effect of a class judgment on Settlement Class members; and the date, time, and place of the Final Fairness Hearing. *See* Fed. R. Civ. P. 23(c)(2)(B); Ex. B; Ex. D.

The date that the Court sets for the Final Fairness Hearing should permit sufficient time to implement notice publication and to satisfy the Class Action Fairness Act ("CAFA") requirement that "[a]n order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice required under [28 U.S.C. § 1715(b)]". 28 U.S.C. § 1715(d). Defendants have not yet served CAFA notice.

The Settlement Agreement and notices include instructions on opt-out and objection procedures. Each Settlement Class member who wishes to opt-out of the Settlement Class must individually sign and timely submit written notice clearly manifesting an intent to be excluded from the Settlement Class. *See* Ex. A ¶ 4.1. The written notice must be submitted to Settlement Class Counsel by mail or email, postmarked or timestamped, at least 21 days prior to the Final Fairness Hearing. *Id.* ¶ 4.2.

Each Settlement Class member who wishes to object to the settlement must submit a timely written notice of objection, which must set forth the grounds for the objection, and further state whether the objector intends to appear at the Final Fairness Hearing. *See* Ex. A ¶ 5.1. To be timely, proper written notice of an objection must be filed with the Clerk of the United States District Court for the Southern District of Texas and served on counsels for the parties at least 21 days prior to the Final Fairness Hearing. *Id.*

V. ATTORNEY FEES, COSTS, AND EXPENSES, AND INCENTIVE AWARDS

Plaintiffs propose that the Court award to Settlement Class Counsel $78,725.00 in attorney fees and $7,200.00 in costs and expenses and to each Representative Plaintiff $200 in incentive awards. *See* Ex. A ¶ 7.2. Defendant Live Nation has provided for a Total Settlement Fund that would account for such amounts, which are subject to review and approval by the Court. Moreover,

the proposed award of attorney fees, costs, and expenses is fair and reasonable, given the total benefits to the Settlement Class. Settlement Class Counsel will brief the issue further for the Final Fairness Hearing. Lastly, First Data has expressed its intention to submit a request for its attorney fees, costs, and expenses to be reviewed and approved by the Court. *See* Ex. A ¶ 7.3.

VI. CONCLUSION

Representative Plaintiffs and Settlement Class Counsel respectfully move the Court for entry of an order:

1. Preliminarily approving the settlement set forth in the Settlement Agreement;
2. Certifying the Settlement Class;
3. Appointing Brenda Wong, Parker Jerrell, Jose Box, and Amber Palmer as Representative Plaintiffs;
4. Appointing Derek H. Potts, Potts Law Firm, LLP as Settlement Class Counsel;
5. Approving the proposed notices and plan substantially in the form and manner set forth therein, and authorizing dissemination of the notices;
6. Setting a date for a Final Fairness Hearing to consider entry of a final order approving the Settlement Agreement and Settlement Class Counsel's request for attorney fees, costs, and expenses, and incentive awards; and
7. Granting such other relief as the Court may deem just and appropriate.

April 12, 2023

Respectfully submitted,

THE POTTS LAW FIRM, LLP

By: /s/ Derek H. Potts

Derek H. Potts
Texas Bar No. 24073727
J. Ryan Fowler
Texas Bar No. 24058357
Batami Baskin
Texas Bar No. 24078206

POTTS LAW FIRM, LLP
3737 Buffalo Speedway, Suite 1900
Houston, Texas 77098
Tel: (713) 963-8881
Email: dpotts@potts-law.com

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on this the 12th day of April 2023 to all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system per Local Rule 5.3.

/s/ Derek H. Potts
Derek H. Potts