IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION AT CLEVELAND

IN RE: SONIC CORP. CUSTOMER DATA BREACH LITIGATION (Financial Institutions)	)	MDL Case No. 1:17-md-02807-JSG
	)	Hon. District Judge James Gwin
THIS DOCUMENT RELATES TO ALL FINANCIAL INSTITUTION ACTIONS	)	Hon. Magistrate Judge Jonathan Greenberg

SONIC DEFENDANTS' OPPOSITION TO FINANCIAL INSTITUTION PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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Defendants Sonic Corp. (n/k/a Sonic LLC), Sonic Franchising LLC, Sonic Industries LLC, Sonic Industries Services Inc., Sonic Restaurants, Inc., and Sonic Capital LLC ("Sonic"), respectfully submit this Opposition to the Motion for Class Certification (Dkt. 240-1) ("Mot.") filed by Plaintiffs American Airlines Federal Credit Union ("AAFCU"), Redstone Federal Credit Union ("Redstone"), and Arkansas Federal Credit Union ("AFCU") ("Plaintiff Banks").

STATEMENT OF ISSUES PRESENTED

1. Whether the Plaintiff Banks' proposed class definition is ascertainable?

2. Whether the Plaintiff Banks have established classwide injury common to all putative class members sufficient to satisfy the 'Commonality' prong under Fed. R. Civ. P. 23(a)(2)?

3. Whether the Plaintiff Banks have established a sufficient relationship between their alleged injuries and conduct affecting putative class members sufficient to satisfy the 'Typicality' prong under Fed. R. Civ. P. 23(a)(3)?

4. Whether the Plaintiff Banks have proven they will fairly and adequately protect the interests of the putative class sufficient to satisfy 'Adequacy' prong under Fed. R. Civ. P. 23(a)(4)?

5. Whether the Plaintiff Banks have established that questions common to the class predominate over individualized inquiries relating to causation, damages and the Sonic's affirmative defenses in order to satisfy Fed. R. Civ. P. 23(b)(3)?

6. Whether the Plaintiff Banks have proven that a common classwide method for calculating individual damages exists sufficient to satisfy Fed. R. Civ. P. 23(b)(3)?

7. Whether the class action device is a superior method of adjudication under Fed. R. Civ. P. 23(b)(3)?

SUMMARY OF ARGUMENTS PRESENTED

For the reasons discussed below and in detail in Parts II thru IV, *infra*, the Court should deny class certification because Plaintiffs fail to prove all elements of Fed. R. Civ. P. 23(a), and also fail to prove the predominance and superiority requirements of Fed. R. Civ. P. 23(b)(3).

1. Plaintiffs' proposed class definition is impermissibly vague and broad because, among other things, it includes putative class members who have not been injured and, therefore, does not facilitate the court's ability to ascertain the members of the class without individualized inquiry of the merits of each member's claim. *See* Part II.

2. Plaintiffs cannot satisfy commonality under Fed. R. Civ. P. 23(a)(2) because the actions

financial institutions take based on receipt of CAMS alerts are discretionary, variable, and based on internal business processes and managerial decisions, and, therefore, no proof of a common injury across the class exists; furthermore, such individualized inquiry into the discretion each financial institution exercised necessarily implicates individualized issues of comparative negligence, causation, and damages.

3. Plaintiffs fail to satisfy the 'typicality' prong under Fed. R. Civ. P. 23(a)(3) because, among other things, Plaintiffs cannot individually prove they experienced damages "proximately caused" by the Sonic Breach (instead of another data breach) and they cannot establish that their actions taken in response to receipt of a CAMS alert was typical of that taken by class members, such as mega-banks like Wells Fargo or Bank of America.

4. Plaintiffs fail to satisfy the 'adequacy' prong under Fed. R. Civ. P. 23(a)(4) because conflicts of interest exist among the class members and Plaintiffs cannot overcome the antagonism arising from these conflicts (*i.e.*, some class members will be undercompensated according to Plaintiffs' proposed damages model, while others will be significantly overcompensated).

5. Like in a similar financial institution data breach case, *S. Indep. Bank v. Fred's Inc.*, 2019 WL 1179396, at *20 (M.D. Ala. Mar. 13, 2019), individualized inquiries of liability relating to causation, damages and the Sonic's affirmative defenses overwhelm the common issues and, therefore, Plaintiffs fail to satisfy the predominance requirement under Fed. R. Civ. P. 23(b)(3).

6. As in *Fred's Inc.*, the CAMS alert-based model propounded by Plaintiffs will not suffice to prove the full extent of damages for every class member, and Plaintiffs have failed to identify a sound and definite damages model that can reasonably quantify damages on a classwide basis sufficient to satisfy Fed. R. Civ. P. 23(b)(3)?

7. When compounded with individualized issues of liability and damages, the class action device is not a superior method of adjudication under Fed. R. Civ. P. 23(b)(3) because Plaintiffs each allegedly sustained damages ranging from tens of thousands to millions of dollars and thereby have the ability and incentive to individually control the prosecution of separate actions.

STATEMENT OF FACTS

For ease of reference, pertinent facts and citation to evidence are included in each of the corresponding sections below to the extent relevant for consideration of Defendants' argument.

ARGUMENT

I. LEGAL STANDARD FOR FED. R. CIV. P. 23.

The Supreme Court has affirmed that "[t]he class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979));

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011). "Rule 23 does not set forth a mere pleading standard." *Id.* The movant "must not only 'be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact,' typicality of claims or defenses, and adequacy of representation, as required by Rule 23(a)," it "must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Comcast*, 569 U.S. at 33 (quoting *Dukes*, 564 U.S. at 350) (emphasis in original). In the Sixth Circuit, "[s]uch compliance must be checked through a 'rigorous analysis.'" *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 537 (6th Cir. 2012) (quoting *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982)). "Ordinarily, this means the class determination should be predicated on evidence the parties present concerning the maintainability of the class action." *Id.* (citation omitted). Mere allegations will not suffice. *Id.*

To ensure fidelity to these principles, the Supreme Court "ha[s] emphasized that it 'may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.'" *Comcast*, 569 U.S. at 33 (quoting *Dukes*, 564 U.S. at 350); *see also Falcon*, 457 U.S. at 160. As such, rigorous analysis of the "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Comcast*, 569 U.S. at 34 (quoting *Falcon*, 457 U.S. at 160); *see also Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 417 (6th Cir. 2012).

Rule 23(a) sets forth four threshold requirements that must be satisfied to certify a class: (1) numerosity ("a class [so large] that joinder of all members is impracticable"); (2) commonality ("questions of law or fact common to the class"); (3) typicality (named parties' claims or defenses "are typical … of the class"); and (4) adequacy of representation (named parties "will fairly and adequately protect the interests of the class"). Fed. R. Civ. P. 23(a)(1)–(4); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997). Here, Plaintiff Banks seek monetary damages on behalf of

the putative class, and thus, they must also establish the two requirements under Rule 23(b)(3): predominance ("questions of law or fact common to class members predominate over any questions affecting only individual members") and superiority ("a class action is superior to other available methods for fairly and efficiently adjudicating the controversy"). The Supreme Court has characterized Rule 23(b)(3) as "an adventuresome innovation" that is "designed for situations in which class-action treatment is not as clearly called for." *Comcast*, 569 U.S. at 34; *Dukes*, 564 U.S. at 362. Failure to satisfy both predominance and superiority requires denial of certification.

II. PLAINTIFF BANKS' PROPOSED CLASS DEFINITION IS INADEQUATE & OVERBROAD.

Before evaluating Rule 23(a)'s four enumerated elements, the Court must first ensure that Plaintiffs' proposed class definition is ascertainable and adequately defined. *See, e.g.*, *Barrett v. ADT Corp.*, No. 2:15-cv-1348, 2016 WL 865672, at *8 (S.D. Ohio Mar. 7, 2016) ("The existence of an ascertainable class of persons to be represented by the proposed class representative[s] is an implied prerequisite of [Rule 23]."). This Court has held that "[i]n determining whether a class has been properly defined, a court considers whether the class definition specifies a 'particular group that was harmed during a particular time frame, in a particular location, in a particular way'; and whether the definition facilitates the court's 'ability to ascertain its members in some objective manner.'" *Carter v. PJS of Parma, Inc.*, No. 1:15 CV 1545, 2016 WL 3387597, at *2 (N.D. Ohio June 20, 2016) (quoting *Givens v. Van Devere, Inc.*, 2012 WL 4092738, at *4–5 (N.D. Ohio Sept. 17, 2012)). A class definition is "inadequate" "[i]f a court must make a determination of the merits of individual claims to decide if a particular individual is a member of the class." *Id.*

"A class definition also fails as overbroad if it 'would include members who have not suffered harm at the hands of the defendant and are not at risk to suffer such harm.'" *Id.* (quoting *Givens*, *supra*); *see also McGee v. E. Ohio Gas Co.*, 200 F.R.D. 382, 388 (S.D. Ohio 2001). The

necessity that a class definition not include any *uninjured* entities stems from Article III's standing requirement. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring) ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, *class action or not*." (emphasis added)); *see also Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006). A class cannot be certified if it contains members that have not been injured and, thus, lack standing.

Plaintiff Banks seek to certify a class that comprises "[a]ll banks, credit unions, financial institutions, and other entities in the United States that received an alert of a potentially compromised account from any card brand in the Sonic Breach." Mot. at 1. From the face of this definition problems abound. First, the class definition is irreconcilably vague because it does not define "financial institution" or what is meant by "other entities" that "received an alert" of "a potentially compromised account" from any card brand in the Sonic Breach. The class definition also does not specify a definite time period, nor any type of harm that must be sustained by class members to merit inclusion. These facial omissions render the class definition hopelessly vague and, thus, not ascertainable under Rule 23. *See Carter*, 2016 WL 3387597, at *2.

In addition to this indefiniteness, the class definition also suffers from overbreadth. Plaintiffs insist the ascertainability requirement "is easily met because the Card Brands have provided documents identifying the financial institutions who received alerts," (Mot. at 10 n.5), but they do not specify which documents. In context, it is apparent that Plaintiffs mean to refer to the voluminous list of entities that received a compromised management account system (CAMS) alert related to the Sonic Breach. *See* VISA-SONIC00044-146. Plaintiffs assume this list of CAMS alert recipients, without more, satisfies ascertainability. But they are wrong. In fact, CAMS alerts only identify cards that the payment networks believe *may* be "at risk" of

compromise or that *may* have been "exposed" during the period of the Sonic Breach. *See* [redacted] *S. Indep. Bank v. Fred's, Inc.*, No. 2:15-CV-799, 2019 WL 1179396, at *3 (M.D. Ala. Mar. 13, 2019) ("CAMS alerts do not say whether fraud activity occurred on a card; they merely give notice that payment data has been exposed."); [redacted] As the alerts themselves state, [redacted]

Additionally, it is undisputed that "CAMS alerts are intentionally broad so as to capture the largest possible swath of cards" that were *potentially* compromised. [redacted] As a result, CAMS alerts are plagued by uncertainty. Here, for example, evidence shows that [redacted] Beyond this variability, cards included in CAMS alerts also were not limited to only those cards that were used at one of the 325 impacted Sonic Drive-In locations; that means, a CAMS alerts could include cards that were *never* used at an impacted Sonic Drive-In location and, therefore, were *never* at risk of unauthorized acquisition, compromise, or fraud.

And the Plaintiff Banks are well aware of this overbreadth and uncertainty. For example, [redacted] As Plaintiffs acknowledged, [redacted]

[redacted]

Indeed, given the purpose of the CAMS alerts—to "alert" financial institutions to cards that "may have been" exposed—and their corresponding overbreadth, it is indisputable that CAMS alerts could be entirely comprised of payment cards that (i) did not suffer any actual fraud, (ii) were never cancelled and reissued, (iii) triggered no action by the Plaintiff Banks, and/or (iv) were never used at one of the 325 impacted Sonic Drive-In locations and thereby were never "at risk."

If a financial institution received a CAMS alert but **none** of the payment cards on the CAMS alert experienced actual fraud, **none** were cancelled and reissued, and/or **none** were used at one of the 325 impacted Sonic Drive-In locations, then that the financial institution could **not** have sustained any financial harm **as a result of** the Sonic Breach. And formerly named Plaintiff, Alcoa Community Federal Credit Union ("Alcoa") highlights this point. Before Alcoa was strategically dropped from this litigation, Alcoa disclosed that it had only *one* (1) card that was included on any CAMS alert related to the Sonic Breach. *See* Plaintiffs' Initial Disclosures (Dkt. 176) at 7. That card did not suffer any fraud loss. *See supra*. Without harm, the financial institution could not be injured and, thus, could not be part of the putative class consistent with Article III standing. *See Tyson*, 136 S. Ct. at 1053 (Roberts, C.J., concurring) ("The Judiciary's role is limited 'to provid[ing] relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm.'" (quoting *Lewis v. Casey*, 518 U.S. 343, 349 (1996))).

Plaintiffs' use of the CAMS-recipient list as the sole metric by which to determine class

[redacted]

membership does not account for these Article III concerns. And Plaintiffs do not propose a method to exclude from the class those financial institutions that received CAMS alerts with payment cards that were *only* exposed without more (*i.e.* without attendant fraud, without attendant replacement by the banks, etc.). Therefore, the class definition is impermissibly overbroad because it includes uninjured members that lack Article III standing. *See Tyson*, 136 S. Ct. at 1053 ("[I]f there is no way to ensure that the jury's damages award goes only to injured class members, that award cannot stand."); *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006) (affirming denial of certification due to overbroad class definition that included members who "could not show any damage"); *Branch v. Gov't Emp. Ins. Co.*, 323 F.R.D. 539, 552 (E.D. Va. 2018) (accepting argument that "no class may be certified that contains members lacking Article III standing").

Here, membership in Plaintiffs' proposed class requires only that a financial institution received an alert related to the Sonic Breach; but, as discussed above, receipt of a CAMS alert does not establish that the financial institution sustained any injury. Thus, the class could include hundreds of financial institutions which never experienced any injury or actual fraud as a result of the Sonic Breach. And hence, "ascertaining class members will require detailed fact finding to determine" whether a financial institution did *anything* in response to an alert and/or whether any of the payment cards on a particular alert were actually misused. *Streater v. Sarchione Chevrolet, Inc.*, No. 5:18-cv-643, 2019 WL 2903955, at *4 (N.D. Ohio July 5, 2019) (holding proposed class was not ascertainable). There is no proposed method to ascertain this information or to cure such overbreadth. Because the Plaintiffs have "not met [their] obligation of establishing the requisite injury-in-fact for the absent class members," it follows that they have "not met [their] burden of showing the putative class members have Article III standing." *Burton v. Nationstar Mortg., LLC*,

No. 1:13-cv-307, 2014 WL 5035163, at *8 (E.D. Cal. Oct. 8, 2014). Thus, the class is not ascertainable, and certification should be denied. *See Carter*, 2016 WL 3387597, at *2 ("The class definition thus fails because it is overbroad and does not facilitate the court's ability to ascertain the members of the class.").

III. PLAINTIFF BANKS FAIL TO SATISFY THE COMMONALITY, TYPICALITY AND ADEQUACY PRONGS OF RULE 23(A).

Failure to satisfy all four elements of Rule 23(a) requires denial of class certification. Here, Plaintiffs have not submitted evidence to meet their burden of proof on commonality, typicality or adequacy of representation.

A. Plaintiffs Do Not Establish Questions of Law or Fact Common to the Class.

To establish commonality, Plaintiffs must prove "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The Supreme Court in *Dukes* stated "[t]his does not mean merely that [plaintiffs] have all suffered a violation of the same provision of law." *Dukes*, 564 U.S. at 350. Rather, the class members' claims "must depend upon a common contention" and "[t]hat common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* The holding of *Dukes* makes it more difficult for Plaintiffs to satisfy commonality. *See, e.g., Brown v. Nucor Corp.*, 785 F.2d 895, 903 (4th Cir. 2015); *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 839 (5th Cir. 2012).

Plaintiffs' cursory discussion of commonality does not satisfy Rule 23(a)(2). The language of this provision can easily be misread since "[a]ny competently crafted class complaint literally raises common 'questions.'" *Dukes*, 564 U.S. at 349 (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 131–32 (2009)). Plaintiffs succumb to this trap by simply framing five questions that amount to whether Sonic acted negligently and whether Sonic's

alleged conduct "caused FI Plaintiffs' and the Class's injuries." Mot. at 11. In this case, however, "[r]eciting these questions is not sufficient to obtain class certification." *Dukes*, 564 U.S. at 349. Even if Plaintiffs proved that Sonic acted negligently, that would not be dispositive on the issue of liability as to the entire class because the overbroad class definition includes financial institutions that may not have sustained any actual damages as a result of the Sonic Breach. Further, because Plaintiffs seek classwide damages, "[c]ommonality requires [them] to demonstrate that the class members 'have suffered the same injury.'" *Id.* at 349–50 (citation omitted). Plaintiffs cannot satisfy commonality here because no proof of a common injury across the class exists.

Here, proof as to negligence and negligence per se will vary from class member to class member because financial institutions do not follow a common set of procedures in terms of how they respond to data breach incidents. Instead, the actions financial institutions take based on receipt of CAMS alerts are discretionary and based on internal business processes and managerial decisions which, at a minimum, require detailed individualized inquiries into their business processes. *See* Hitt Rpt. ¶ 30. As Plaintiffs' own expert Neil Librock explains, [redacted] There is no industry-accepted or regulatory playbook a financial institution must follow in response to a CAMS alert.

Each class member would be required to testify to determine what steps, if any, it took to address the Sonic Breach (as opposed to any of the other myriad data breaches). And, thus, the liability inquiry will necessarily implicate whether each class member sustained the same type of injury based on each class member's discretionary reaction to the Sonic Breach, which raises several individualized questions. *See In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1081 (6th Cir. 1996)

(holding proof as to negligence varied from plaintiff to plaintiff because class representatives' theories of relief depended on a variety of individualized factors); *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 398 (6th Cir. 1998) (en banc) (examining "myriad variations" in plaintiffs' claims and finding they "clearly lacked commonality"); *Schechner v. Whirlpool Corp.*, No. 2:16-cv-12409, 2019 WL 4891192, at *4–5 (E.D. Mich. Aug. 13, 2019) (holding no commonality because "Plaintiffs do not show that the evidence can be resolved in one stroke").

Additionally, such individualized inquiry into the discretion each financial institution exercised in response to receipt of the CAMS alerts necessarily implicates individualized issues of comparative negligence, causation, and damages. For example, if a financial institution failed to take action (*i.e.*, cancel and reissue cards) in response to a CAMS alert, and cards thereon subsequently experienced fraud or other compromise, then, under Oklahoma law, the financial institution may be found to be contributorily negligent;[1] and such contributory negligence may, depending on the degree of negligence, operate to bar recovery or reduce it by the amount of comparative fault. *See Graham v. Keuchel*, 847 P.2d 342, 361 (Okla. 1993); 23 Okl. St. §§ 13-14.

As in *Dukes*, Plaintiffs "have not identified a common mode of exercising discretion that pervades the entire" putative class of financial institutions. *Dukes*, 564 U.S. at 356. Given the nationwide scope of the class members, which vary drastically in size and available resources, "it is simply unbelievable" that all financial institutions would exercise their discretion "in a common way without some common direction." *Id.* This is fatal to commonality. "Because each plaintiff's claim depend[s] upon facts and circumstances peculiar to that plaintiff, class-wide relief [is] not

[1] By way of additional example, a financial institution's decision not to implement EMV chip technology across all of its payment cards could similarly form the basis of a claim for contributory negligence spurring individualized inquiry of each financial institution's decision to implement EMV chip technology and the effects thereof.

appropriate." *Sprague*, 133 F.3d at 398; *see also In re Am. Med. Sys.*, 75 F.3d at 1081 ("In the absence of more specific allegations and/or proof of commonality on any factual or legal claims, plaintiffs have failed to meet their burden of proof on Rule 23(a)(2)."). Plaintiffs will be unable to show that all of the financial institutions' negligence claims will, in fact, depend on common answers to common questions. *See Dukes*, 564 U.S. at 356. Commonality is not satisfied here.

B. The Plaintiff Banks Cannot Establish That Their Negligence Claims Are Typical Of The Class Because Such Claims Depend On Individualized Facts.

Due to the wide variation among financial institutions regarding their responses to data breaches *in general*—much less the particular *Sonic Breach* at issue here—the three Plaintiff Banks cannot serve as typical class representatives as required by Rule 23(a)(3). The typicality requirement "determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." *In re Am. Med. Sys.*, 75 F.3d at 1082 (citation omitted). "The premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class." *Sprague*, 133 F.3d at 399. Typicality will be satisfied if the claims of the class members are "fairly encompassed by the named plaintiffs' claims." *Id.* Conversely, "[w]here the substantive claims depend on individual permutations, … the claims of the named plaintiffs who have the same general complaint against the defendant as the class are not typical." *Jones v. Allercare*, 203 F.R.D. 290, 299 (N.D. Ohio 2001). Here, even if the Plaintiffs prove their individual claims, Sonic's liability as to the rest of the putative class will *not* be proven, which makes it impossible for Plaintiffs to establish typicality.

First, Plaintiffs assert that the "FI Plaintiffs and the Class seek redress for the same, uniform, wrongful conduct, namely, Sonic's creation of vulnerabilities at its franchise-owned restaurants that led to the Data Breach." Mot. at 12. This statement does not establish typicality

here, however, "because each member of the proposed class must prove individual facts," including a causal connection between the Sonic Breach and alleged injury. *Jones*, 203 F.R.D. at 299. Meaning, for example, that both Plaintiffs and individual class members will have to prove the cards for which they are claiming damages suffered fraud or were replaced as a *direct* result of the Sonic Breach—*i.e.*, that the cards were used at one of the 325 impacted Sonic Drive-In locations (and not the overly-broad universe reflected in the CAMS alerts) and/or that the fraud suffered by the card was *not* the result of another data breach for which the financial institution received prior or contemporaneous CAMS alerts. As such, "damages and defenses will also have to be adjudicated individually." *Id.*

This is evident just with respect to the three Plaintiffs, none of which have been able to prove a causal link between the Sonic Breach and their alleged damages. [redacted]

Indeed, if the three Named Plaintiffs cannot *individually* prove that they experienced damages "proximately caused" by the Sonic Breach (instead of another data breach), this fact renders their claims *atypical* of the thousands of class members' claims. *See Jones*, 203 F.R.D. at 300 ("The named plaintiffs' claims are typical only if what is needed to prove them is the same as

what is needed to prove the claims of the proposed class." (citation omitted)). Proving causation and resultant damages for class member's negligence claim will depend on individual permutations unique to each financial institution. *See Sprague*, 133 F.3d at 399 (holding typicality was not met because "taken as a whole the class claims were based on wildly divergent facts").

Plaintiffs' remaining argument for typicality also misses the mark. Plaintiffs claim that "FI Plaintiffs and the Class suffered the *same types of injuries* incurred in responding to Card Brand alerts related to the Data Breach" (Mot. at 12 (emphasis added)), but Plaintiffs ignore the fact that participation in Plaintiffs' putative class does not require any injury—much less the same types of injuries. And while Plaintiffs allege various types of damages resulting from the Sonic Breach, they seek only to certify a class of all financial institutions that "received an alert" of an "exposed" or *potentially* compromised payment card. What is more, the broadly defined class encompasses thousands of financial institutions across the United States of varying size, wealth and concomitant resources, including mega-banks such as Wells Fargo, JPMorgan Chase, and Bank of America. *See* VISA-SONIC00044. Depending on their card replacement costs, fraud monitoring capabilities, the scale of payment cards potentially affected, and myriad other factors, financial institutions vary wildly in terms of how they respond to CAMS alerts and data incidents. *See* Hitt Rpt. ¶¶ 94-100. Thus, the particular course of action that each Named Plaintiff followed in response to the Sonic Breach is not necessarily typical of the approach taken by any of the mega-banks that have assets over $1 billion and considerably more resources at their disposal. *See* Librock Dep. at 97:15–22.

As discussed above, mere receipt of a CAMS alert, without more, does not necessarily cause actual harm. *See* Librock Decl. ¶ 39. Therefore, even if, for example, the Plaintiffs prove that the Sonic Breach caused them to incur actual damages as a result fraud losses or reissuance of

cards exposed, that will not necessarily prove the same for the proposed class, which Plaintiffs define to encompass financial institutions that: (A) experienced no harm, or (B) experienced different types of harm (*e.g.*, no reissuance costs). *See Streater*, 2019 WL 2903955, at *5 (holding plaintiff who allegedly suffered actual harm was not typical of class members who may have only claims of technical violations). Here, the class claims are not "fairly encompassed by the named plaintiffs' claims" because each claim depends on proof of causation and each financial institution's discretionary response to the Sonic Breach. *Sprague*, 133 F.3d at 399. Thus, as in *Sprague*, "[a] named plaintiff who proved his own claim would not necessarily have proved anyone else's claim." 133 F.3d at 399; *see also In re Am. Med. Sys.*, 75 F.3d at 1082 (noting each plaintiff "experienced a distinct difficulty" and "[t]hese allegations fail to establish a claim typical to each other, let alone a class"); *Jones*, 203 F.R.D. at 302.

C. Plaintiff Banks Are Inadequate Class Representatives That Will Not Fairly And Adequately Protect The Interests Of The Class.

Plaintiffs' inability to satisfy typicality seriously undermines their ability to satisfy Rule 23(a)(4). Specifically, "[t]he adequate representation requirement overlaps with the typicality requirement because in the absence of typical claims, the class representative has no incentives to pursue the claims of the other class members." *In re Am. Med. Sys.*, 75 F.3d at 1083. However, "the adequacy of representation requirement is broader than the typicality requirement" insofar as "[a] representative plaintiff may have typical claims but not be an adequate representative because of some kind of antagonism or conflict of interest with the class." *Jones*, 203 F.R.D. at 302.

Further, the adequacy prerequisite "is essential to due process, because a final judgment in a class action is binding on all class members." *Id.* (citing *Hansberry v. Lee*, 311 U.S. 32 (1940)); *see also Smith v. Babcock*, 19 F.3d 257, 264 n.13 (6th Cir. 1994) ("No class should be certified where the interests of the members are antagonistic, because the preclusive effect of the verdict

may deprive unnamed class members of their right to be heard."). The Sixth Circuit has articulated two criteria for determining adequacy under Rule 23(a)(4): "(1) the representative must have common interests with unnamed members of the class, and (2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *In re Am. Med. Sys.*, 75 F.3d at 1083 (quoting *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976)). Plaintiffs fail the first adequacy prong because conflicts of interest exist among the class members and they cannot overcome the antagonism arising from these conflicts.

In this case, "the key determinants underlying the adequacy of representation relate to the issues of conflicts of interest, common interest, and common injury." *Rutherford v. City of Cleveland*, 137 F.3d 905, 909 (6th Cir. 1998). Plaintiffs insist "FI Plaintiffs' interests are aligned with the Class's because they seek to recover the same type of damages arising out of the same incident, the Data Breach." Mot. at 13. But evidence has demonstrated that is not so.

As explained in Section III.A, *supra*, there is no common injury affecting the entire class, and this disparity creates several class conflicts. First, the Plaintiffs seek monetary damages while also seeking to certify a class that includes financial institutions that were only *potentially* injured and, thus, did not sustain damages. *See, e.g.*, *Modern Holdings, LLC v. Corning, Inc.*, No. 5:13-cv-405, 2018 WL 1546355, at *10 & n.7 (E.D. Ky. Mar. 29, 2018) (finding no adequacy where "[t]hose who already suffer injuries seek immediate payments, while those complaining only of exposure may require different forms of damages"); *Rink v. Cheminova, Inc.*, 203 F.R.D. 648, 663–64 (M.D. Fla. Oct. 31, 2001) (holding adequacy was not met given potential conflict between plaintiffs who alleged present injuries and class members whose injury was only potential). Second, Plaintiffs' insistence that they recover the full amount of their damages while the class receives compensation based on, at best, an aggregate estimate predicated on a partially-formed,

untested damages theory places them in an antagonistic position to the class members. As explained by Professor Hitt, Plaintiffs' proposed damages expert, Mr. Ratner, proffers a method for calculating classwide damages that will overcompensate some class members while undercompensating others, and each class member will be incentivized to inflate its alleged "damages" so as to maximize its own recovery. *See Hooks v. Gen. Fin. Corp.*, 652 F.2d 651 (6th Cir. 1981) (finding plaintiffs' interests antagonistic to class members where plaintiff sought full recovery while class members' damages would be limited to a pro-rata share).

Take the case of financial institutions that received a CAMS alert but neither reissued cards nor had customers that experienced fraud. Those class members would still be entitled to damages under Plaintiffs' theory of classwide relief just the same as class members that allege hundreds of thousands of dollars in damages. This potential for such inequitable outcomes highlights Plaintiffs' inadequacy. *See Stout v. J.D. Byrider*, 228 F.3d 709, 717–18 (6th Cir. 2000) (holding plaintiffs had interests antagonistic to the class which "caus[ed] absent class members to potentially lose the benefit of having the facts of their separate cases adequately presented").

Antagonism between the Named Plaintiffs and class members also stems from Plaintiffs' ability to obtain reimbursements and chargebacks on cards they claim suffered fraud as a result of the Sonic Breach which other class members may not be able or entitled to receive. [redacted]

[redacted] Further, none of the Plaintiffs quantify "reputational harm" and, thus, they have no motivation to pursue such damages on behalf of class members. *See Streater*, 2019 WL 2903955, at *6 (finding no adequacy because "it is conceivable that, to the detriment of the class, [plaintiff] would be more motivated to recover his own actual damages than mere statutory damages on behalf of himself and the class"). These dissimilarities among the Named Plaintiffs make their interests antagonistic to class members that were *not* reimbursed through the GCAR program and/or did *not* receive chargebacks. [redacted] "In the absence of commonality and the presence of conflict," the Plaintiffs do "not meet the adequate representation requirements under Rule 23." *Rutherford*, 137 F.3d at 910.

IV. THE PLAINTIFF BANKS DO NOT SATISFY THE PREDOMINANCE AND SUPERIORITY REQUIREMENTS OF RULE 23(B)(3).

Even if the Court determines that Plaintiffs satisfy all the elements of Rule 23(a)—and they most certainly do *not*—class certification should still be denied because they fail to meet the requirements of Rule 23(b)(3). Under Rule 23(b)(3), "a class must meet two requirements beyond the Rule 23(a) prerequisites: Common questions must 'predominate over any issues affecting only individual members'; and class resolution must be 'superior to other available methods for the fair and efficient adjudication of the controversy.'" *Amchem Prods.*, 521 U.S. at 615 (quoting Fed. R. Civ. P. 23(b)(3)). Rule 23(b)(3) includes a nonexhaustive list of four factors pertinent to a court's "close look" at the predominance and superiority criteria:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the

> litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Amchem, 521 U.S. at 615–16.

A. The Proposed Class Is Not Sufficiently Cohesive To Warrant Adjudication By Representation And Fails The Predominance Test.

The Supreme Court has stressed that "Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)." *Comcast*, 569 U.S. at 34 (citing *Amchem*, 521 U.S. at 623–24); *see also In re Am. Med. Sys.*, 75 F.3d at 1084. The predominance inquiry tests "whether the proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. To that end, "[d]etermining whether the plaintiffs can clear the predominance hurdle set by Rule 23(b)(3) also requires [courts] to consider how a trial on the merits would be conducted if a class were certified." *Rodney v. Nw. Airlines, Inc.*, 146 F. App'x 783, 786 (6th Cir. 2005) (citation omitted). Further, "[b]ecause a defendant's evidence may be probative of class cohesiveness and may be such as to cause the class to degenerate into a series of individual trials, . . . a court performing a 'predominance' inquiry under Rule 23(b)(3) may consider not only the evidence presented in the plaintiff's case-in-chief but the defendant's likely rebuttal evidence." *Id.* at 786–87; *see also In re Am. Med. Sys.*, 75 F.3d at 1079.

Based on the evidence before this Court, Plaintiffs cannot satisfy predominance here. First, classwide evidence will not determine liability on Plaintiffs' negligence or negligence per se claims because individualized questions relating to causation, damages, and Sonic's affirmative defenses will overwhelm common issues. Second, Plaintiffs' proposed damages model is incomplete and based on faulty "survey" data that does not establish a common method for calculating damages on a classwide basis.

1. Individualized Issues of Causation, Injury, and Sonic's Affirmative Defenses Will Overwhelm Adjudicating Liability On a Classwide Basis.

It is well-established that "[p]redominance is a qualitative rather than a quantitative concept." *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014). As defined by the Supreme Court, "[a]n individual question is one where 'members of a proposed class will need to present evidence that varies from member to member,' while a common question is one where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.'" *Tyson Foods*, 136 S. Ct. at 1045 (quoting 2 W. Rubenstein, Newberg On Class Actions § 4:50, at 196–97 (5th ed. 2012)). Considering predominance "begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011). This inquiry "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's causes of action." *Comcast*, 569 U.S. at 34. Consideration of Plaintiffs' negligence and negligence per se claims shows that those claims cannot be adjudicated without becoming bogged down in individualized inquiries.

A class member in this litigation will not prevail on a negligence claim unless it can prove that the Sonic Breach *caused* it to experience actual damages. It is not enough that a financial institution had to reissue payments cards or bear the costs of fraudulent transactions on alerted-on cards issued to its customers without showing that such costs were directly caused by the Breach. Unlike a mass tort action arising out of a single accident, in a financial institution data breach litigation of the sort involved here, the factual and legal issues will differ dramatically from entity to entity. As noted in another similar data breach class action, "[w]hen credit-card fraud occurs, it is rarely clear, in the immediate aftermath, how the card was compromised" and thus, "[m]ore investigation is almost always needed." *Fred's, Inc.*, 2019 WL 1179396, at *20. As a result, "whether the full amount of the issuing banks' purported damages was caused by the [Sonic] breach is a question requiring individual resolution." *Id.*

The case of Plaintiff AFCU illustrates this empirical dilemma. [redacted]

[redacted]

As discussed in earlier sections, further complicating the causation inquiry is the ubiquity of data breaches and the fact that payment card information over a discrete window of time may be simultaneously exposed or acquired by bad actors as a result of *multiple* breaches. *See* Hitt Rpt. ¶ 44. The evidence shows that payment cards that were exposed in the Sonic Breach were also exposed by numerous other data breach incidents. *Id.* [redacted] that means receipt of a CAMS alert alone does not establish a causal link between the breach and resulting damages. Indeed, Plaintiffs' own expert, Mr. Ratner, acknowledged [redacted]

Here, it is simply "not possible to ascertain the causal chain of events from a specific data breach incidence to the exposure of payment card information, acquisition of payment card information, fraudulent activity involving payment card information, and financial institutions responses to the data breach." *Id.* ¶ 41. Therefore, "proof of general causation as to the named plaintiffs will not necessarily establish general causation for the entire proposed class because the named plaintiffs are not typical." *Jones*, 203 F.R.D. at 304; *see also Taylor v. CSX Transp., Inc.*, 264 F.R.D. 281, 295 (N.D. Ohio 2007) (holding no predominance where "individual issues pertain not only to the amount of damages, but also to causation, defenses, and negligence elements").

Defining the class based on receipt of a CAMS alert also does not establish damages for liability purposes. Plaintiffs insist that "each Class Member was injured upon receipt of an alert of a compromised card," but they provide no evidentiary support for this claim aside from a general citation to the Librock Declaration. Mot. at 19 n.7. "To the extent Plaintiffs believe Rule 23 does not require some minimal form of evidentiary support, they are wrong." *Grubb v. Nucor Steel Marion, Inc.*, No. 3:14-cv-158, 2015 WL 5023030, at *2 (N.D. Ohio Aug. 24, 2015). As the *Fred's, Inc.* court explained, "CAMS alerts merely identify the card numbers that were processed during the time frame of the breach; they do not indicate whether they were actually captured by the malware." 2019 WL 1179396, at *20. As discussed in Part II, *supra*, an "exposed" card does not automatically give rise to an Article III injury, nor does it establish damages for purposes of claims brought by Plaintiffs individually or on behalf of the class. No classwide evidence indicates that the fraud incurred on payment cards identified by a CAMS alert was caused by the Sonic Breach, or alternatively, "by something other than the [Sonic] breach." *Id.* Only individualized inquires can produce answers to these vexing questions of harm, causation, and damages. *See Snow v. Atofina Chems., Inc.*, 2004 WL 3768120, at *7 (E.D. Mich. Mar. 18, 2004) (holding "no basis for the Court to find that the sole common issue of liability predominates over the three other issues [*i.e.*, harm, proximate cause, and damages] that will require claimant-specific proofs").

Sonic's affirmative defenses to Plaintiffs' negligence claims also present intractable problems for adjudication of those claims on a classwide basis. As discussed in Part II, *supra*, Oklahoma has adopted a "modified" comparative negligence standard whereby Plaintiffs' own negligence, depending on degree, could operate to bar recovery or reduce it by the amount of comparative fault attributable to the Plaintiffs. *See Graham*, 847 P.2d at 361; 23 Okla. Stat. §§ 13-14. And the evidence shows that Sonic has more than simply a possibility of prevailing on the

affirmative defenses of contributory negligence and failure to mitigate damages. For example, [redacted]

None of these affirmative defenses are amenable to classwide proof. Rather, "[t]he response of each issuing bank to the [Sonic] breach, the amount of fraud incurred on each card, and lost revenue necessarily requires an inquiry into the circumstances of each card reissuance and reimbursement." *Fred's, Inc.*, 2019 WL 2019 WL 1179396, at *19 (holding "Defendant's damages-related defenses of contributory negligence and failure to mitigate" "involve individualized questions" and finding no predominance); *see also Siding & Insulation Co. v. Alco Vending, Inc.*, No. 1:11-cv-1060, 2017 WL 3686552, at *14 (N.D. Ohio Aug. 25, 2017) (holding that individualized investigations into potential affirmative defenses affecting thousands of class members "would still be daunting" and finding no predominance); *Jones*, 203 F.R.D. at 303–05 (same). Such evidence "will necessarily be of an individual nature, as issuing banks differ with regard to how they conducted their affairs both before and after they learned of the data breach." *In re TJX Co. Retail Sec. Breach Litig.*, 246 F.R.D. 389, 397 (D. Mass. 2007). And "[t]he Seventh Amendment requires evidence relating to the individualized issue of comparative fault be presented at the same time as evidence relating to [Sonic's] liability." *Id.*; *see also Castano v. Am. Tobacco Co.*, 84 F.3d 734, 750 (5th Cir. 1996).

2. Plaintiffs Have Failed to Propose a Common Method to Calculate Damages Reliably On a Classwide Basis.

In addition to the foregoing individualized issues of *liability* that overwhelm common questions, individualized inquiries are necessary to determine each class member's *damages*. It is well-established that "[a] plaintiff seeking class certification must present a damages model that functions on a class-wide basis." *Rodney*, 146 F. App'x at 791 (citation omitted). Class treatment

is not appropriate "where the calculation of damages is not susceptible to a mathematical or formulaic calculation, or where the formula by which the parties propose to calculate individual damages is clearly inadequate." *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 303 (2003). While Plaintiffs need not calculate a specific damages figure, they must still propose "an acceptable method for calculating damages." *Rodney*, 146 F. App'x at 791. Even if the Court determines that liability to the class is a common question (it is not), a class cannot be certified if determinations as to what damages are owed to the class as a whole, or to individual class members, are too complex and fact-specific. *See, e.g.*, *Ibe v. Jones*, 836 F.3d 516, 531 (5th Cir. 2016) ("[I]ndividual damages issues predominated over the common issues of breach because [class members] incurred vastly different expenses, which would essentially necessitate mini-trials to adjudicate damages for each [class member]."); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 192–93 (3d Cir. 2001) ("Because injury determinations must be made on an individual basis in this case, adjudicating the claims as a class will not reduce litigation or save scarce judicial resources."). Here, Plaintiffs' proposed methodology for calculating damages suffers from incurable flaws.

a. Plaintiffs' Theory Of Damages Depends On Future Ad Hoc Collection Of Unreliable and Unscientific Information That Will Not Enable Plaintiffs To Measure Damages On an Aggregate Basis.

Plaintiffs allege three types of damages attributable to the breach: (1) actual fraud losses (*i.e.*, the amount of total fraudulent transactions on compromised cards); (2) card reissuance costs; and (3) "ancillary costs" (*e.g.*, "labor related to investigating the breach, contacting customers and special reporting"). *See* Ratner Decl. ¶ 61. Plaintiffs' expert, Mr. Ratner, claims he can quantify these alleged damages on a classwide basis using a common methodology. *Id.* Specifically, Plaintiffs claim that by "[u]sing evidence obtained from the Card Brands, surveys of impacted financial institutions, and published data breach statistics, Mr. Ratner's model would calculate

within a degree of statistical significance the cost of having to respond to an alert of [a] card compromised by the Data Breach on a per card basis." Mot. at 19. But, if Plaintiffs' damages model "is vague, indefinite, and unspecific, or simply asserts … that there are unspecified 'tools' available to measure damages, the model amounts to 'no damages model at all,' and the class cannot be certified." *Ohio Pub. Emp. Ret. Sys. v. Fed. Home Loan Mortg. Corp.*, No. 4:08-cv-160, 2018 WL 3861840, at *19 (N.D. Ohio Aug. 14, 2018) (quoting *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 552 (C.D. Cal. 2014)). As discussed below, Plaintiffs have failed to identify a sound and definite damages model that can reasonably quantify damages on a classwide basis.

First, with respect to "actual fraud losses," Mr. Ratner has failed to demonstrate that any losses generated by his methodology can be directly linked to the Sonic Breach. *See* Hitt Rpt. ¶ 21. Based on the preliminary analysis he performed for Named Plaintiffs and his deposition testimony, [redacted] Even assuming he could identify cards that were acquired during the Sonic Breach, to properly calculate these damages, Mr. Ratner would need to isolate those cards (if any) that incurred fraudulent charges as a *direct* result of their theft during the Sonic Breach (as opposed to fraudulent charges on an acquired card that may have been the result, for example, of another prior or contemporaneous data breach experienced by that card). *Id.* To account for this, Mr. Ratner contends that [redacted]

[redacted]

The first potential source Mr. Ratner proposes are analyses [redacted] Further, in another data breach action brought by financial institutions, the court held that calculation of a "baseline" for fraud based on card brand records was not "appropriate for use in a court of law." *In re TJX*, 246 F.R.D. at 399 ("[T]he ADCR methodology, as implemented by Visa, does not require the establishment of a causal connection between the data breach and any particular fraud."). In *TJX*, the issuing bank plaintiffs "assert[ed] that damages can be determined in the aggregate" and proposed that the court use the ADCR process to do so. *Id.* In rejecting this proposed methodology, the court was also "concerned that it perhaps would not provide an adequate estimation of losses given the timeline of the events in question and the fact that, according to plaintiff's counsel, fraud losses possibly attributable to the data breach are still being reported." *Id.*

The second potential source Mr. Ratner proposes involves [redacted]

analysis on *finding* a relevant study."). And even if Mr. Ratner finds a study, recent research has lamented the lack of high-quality aggregate data pertaining to data breach costs incurred by financial institutions. *See id.*

Most troubling is the third potential source Mr. Ratner proposes—[redacted]

[redacted]Further, Mr. Ratner is not a trained statistician and his declaration provides no description of the specific statistical methodology he plans to use, including the metrics he would rely upon to calculate aggregate damages on a classwide basis. *See* Hitt Rpt. ¶ 87. Finally, as shown by[redacted] And Mr. Ratner does not explain how he would identify a representative sample or conduct the survey so as to ensure the capture of only reliable data.

[redacted]

[redacted] As a result, Plaintiffs would not be able to attribute a given fraudulent charge to the acquisition of payment card information during the Sonic Breach, and the information Mr. Ratner would need to link a fraudulent charge to the Sonic Breach would be unattainable or would have to be produced for the purposes of this litigation via individualized inquiry. *See* Hitt Rpt. ¶ 58.

For the reasons expressed above, [redacted] is clearly not a reliable method for determining aggregate damages to the class arising from fraudulent transactions caused by the Sonic Breach. *See, e.g.*, *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 774 (7th Cir. 2013) ("There is no suggestion that sampling methods used in statistical analysis were employed to create a random sample of class members to be the witnesses, or more precisely random samples, each one composed of victims of a particular type of alleged violation."); *Marlo v. United Parcel Serv., Inc.*, 639 F.3d 942, 948–49 (9th Cir. 2011) (declining to rely on survey where survey designer "stated in her deposition that she did not know whether the sample was representative" and where the reliability of the survey was questionable); *Atkins v. United States*, No. 4:15-cv-933, 2016 WL 3878466, at *5 (E.D. Mo. July 18, 2016) (questioning use of "representative samplings" and finding no predominance of common issues "given the proposed development of adequate, individualized evidence").

Second, Mr. Ratner's proposed method for calculating reissuance costs and ancillary costs on a classwide basis also fails. Plaintiffs insist that because Mr. Ratner's "model will determine the damages on a per-card basis, the model is applicable to each Class Member by determining the

number of related compromised card alerts each Class Member received." Mot. at 19-20. However, the model's purported ability to "determine the damages on a per-card basis" rests on his use of the three types of unreliable and incomplete source materials just discussed above. Further, his per-card basis for calculating damages is wildly over-inclusive because it includes costs on all cards that were "exposed." This is problematic because not every exposed card on a CAMS alert was necessarily *acquired* in the Sonic Breach or thereafter used fraudulently and reissued. *See Fred's, Inc.*, 2019 WL 1179396, at *20. Thus, if Mr. Ratner attempts to apply his per-card estimate to class members for which he has not undertaken an individualized inquiry, he will likely attribute reissuance costs to cards that were either (a) not acquired during the Sonic Breach, (b) exposed or acquired during a previous or contemporaneous data breach, or (c) never actually reissued. *See* Hitt Rpt. ¶ 60. This exercise for computing a common measure of reissuance costs is further complicated by the fact that the reasons for card reissuance vary by financial institution (as discussed in Part II, *supra*) and may have nothing to do with any data breach—*e.g.*, cards that are lost, stolen, damaged, or about to expire. *See id.* ¶ 64 & n.96.

The shortcomings of Mr. Ratner's CAMS alert-based model for calculating class damages on a per-card basis are also highlighted by information he elicited from the Named Plaintiffs using [redacted]' Specifically, the evidence shows that [redacted] And substantial variation is found [redacted]

[redacted] This lack of uniformity among the *three* Named Plaintiffs does not bode well for calculating classwide reissuance costs for *thousands* of class members using a formulaic or mathematical method.

The same is true for the inherently individualized "ancillary costs" that depend on each class member's discretionary decisions to take measures [redacted] Aside from the varied nature and costs of these ancillary damages, there is no indication that class members calculate such damages based on a reliable or common method. [redacted] What is more, as evidence makes clear, these ancillary costs necessarily included [redacted]

For the reasons explained above, "[t]here is therefore ***not one*** of those cases where damages can be computed according to some formula, statistical analysis, or other easy or essentially mechanical methods." *Fred's, Inc.*, 2019 WL 1179396, at *20 (emphasis added).

b. With No Common Method To Calculate Classwide Damages, Thousands of Individualized "Mini-Trials" Will Be Necessary to Determine Each Class Member's Damages

Due to Plaintiffs' inability to compute individual damages formulaically, class certification

should be denied for lack of predominance under Rule 23(b)(3). The time and resources that would have to be devoted to determining common questions would pale in comparison to the time and resources spent trying to determine (A) whether each putative class member was actually injured, and (B) the nature and amount of such injury. Because Plaintiffs "fail[ ] to establish that damages can be measured on a class-wide basis in a manner consistent with [their] theories of liability," Rule 23(b)(3) cannot authorize treating all financial institutions that received a CAMS alert related to the Sonic Breach as members of a single class. *Ohio Pub. Emp. Ret. Sys.*, 2018 WL 3861840, at *19; *see also Comcast*, 569 U.S. at 37 (holding no predominance where plaintiff only offers "a methodology that identifies damages that are not the result of the wrong"); *In re ConAgra Foods, Inc.*, 302 F.R.D. at 552 ("Although the methodologies [plaintiff] describes may very well be capable of calculating damages in this action, [plaintiffs' economic expert] has made no showing that this is the case."); *In re Dial Complete Mktg. & Sales Practices Litig.*, 312 F.R.D. 36, 77 (D.N.H. 2015) ("[P]laintiffs have provided insufficient detail regarding their proposed methodologies for calculating classwide damages.").

Such result would be in accord with other data breach cases initiated by issuing banks where courts have denied class certification due to individualized damages issues. *See Fred's, Inc.*, 2019 WL 1179396, at *20 (holding plaintiff bank did not satisfy predominance because "[t]he CAMS alert-based model will not suffice to prove the full extent of damages for every class member, and so individualized damages questions persist"); *In re TJX*, 246 F.R.D. at 399 (finding no predominance because "determining damages must be fact-intensive and individualized, which is yet another point against class certification given the predominance of individual issues with regard to liability"). This case warrants the same result. Considering the varying types of damages alleged by each of the Named Plaintiffs and Plaintiffs' unreliable and unscientific damages model,

"there is simply no way to reasonably estimate classwide damages, therefore militating strongly against Plaintiff[s] meeting the Rule 23(b)(3) requirement that class issues predominate over individual issues." *Treviso v. Nat'l Football Museum, Inc.*, 2018 WL 4608197, at *10 (N.D. Ohio Sept. 25, 2018). Plaintiffs fail to satisfy their burden under Rule 23(b)(3)'s predominance requirement, and therefore, their motion for class certification should be denied. *See also Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1366 (11th Cir. 2002) (holding no predominance due to "extensive individualized inquiries on the issues of injury and damages").

At the end of the day, the Court should reject Plaintiffs' attempt at an impermissible "Trial by Formula" litigation based on an unrepresentative sample of class members where an unreliable damages methodology is used to extrapolate damages across the entire class. The CAMS alert-based damages model is over-inclusive insofar as it includes financial institutions that suffered ***no actual injuries*** and/or did not suffer the same types of damages as the Named Plaintiffs, and "the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right[.]" *Dukes*, 564 U.S. at 367 (quoting 28 U.S.C. § 2072(b)).

B. The Class Action Device Is Not a Superior Method of Adjudication.

Rule 23(b)(3) also requires Plaintiffs to show that a class action is a superior method of adjudicating class claims. *See Taylor*, 264 F.R.D. at 295 ("The class device must be the 'best' way, not merely one way, to resolve claims."). Furthermore, "[w]hile the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'" *Amchem*, 521 U.S. at 617 (citation omitted). This admonition is especially salient in a case such as this one where each of the Named Plaintiffs alleges substantial damage amounts ranging from four to six-figures.

As with their predominance analysis, Plaintiffs devote very little argument to superiority.

They assert "the Class consists of thousands of financial institutions that, should they be required to bring individual cases, would submit identical factual evidence in support of Sonic's liability and seek redress for the same types of injuries." Mot. at 20. Additionally, Plaintiffs claim that "[a]ddressing those issues commonly, rather than in thousands of individual actions, achieves the economies of time, effort, and expenses that support superiority." *Id.* Plaintiffs are wrong and flatly ignore the sizable body of precedent concluding that superiority is not satisfied where the evidence shows the class members each have ample incentive to sue on an individual basis.

As this Court has noted, "the most compelling rationale for finding superiority in a class action is the existence of a 'negative value suit,' . . . one in which the costs of enforcement in an individual action would exceed the expected individual recovery." *Pfaff v. Whole Foods Mtk. Grp. Inc.*, 2010 WL 3834240, at *7 (N.D. Ohio Sept. 29, 2010). In determining whether a particular class action is a negative-value case, federal courts compare the monetary value of the claims at issue with the costs of pursuing individual litigation. "There is no magic number below which claims are automatically small enough and above which class certification would be inappropriate." *Fisher v. United States*, 69 Fed. Cl. 193, 205 (2006) (finding that class treatment was not superior where claims would require individualized assessments and there was no evidence that individual claims were so small that they would not otherwise be pursued). Rather, "[t]he relevant inquiry is whether the class members would pursue their individual claims if the class were not certified." *Id.*; s*ee also Christopher Village v. U.S., LP*, 50 Fed. Cl. 635, 644 (2001) (claims seeking $500,000 to $2 million were likely to be maintained as separate actions if not certified).

This is not a negative-value suit. Each Named Plaintiff has compelling motivation to bring their actions on an individual basis. [redacted]

[redacted] While *Amchem* notes that large individual damages claims do not automatically preclude class treatment, where, as here, the other Rule 23(b)(3) factors weigh against a finding of superiority—in particular, where class treatment would tend to require the resolution of individualized issues—large individual claims have been found to weigh against class certification. *See, e.g., Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Mich.*, 654 F.3d 618, 632 (6th Cir. 2011) (finding superiority not met where claims required individualized determinations and the potential damages awards in excess of $280,000 were "not the types of awards that would preclude individual class members from seeking relief through litigation"); *see also Monteleone v. Auto Club Group Memberselect Ins. Co.*, 2014 WL 1652219, at *6 (E.D. Mich. Apr. 23, 2014); *Valdez v. Air Line Pilots Association, Int'l*, 2017 WL 1394638, at *10 (W.D. Tenn. Jan. 9, 2017).

The Named Plaintiffs (and the members of the proposed class) are all sophisticated financial institutions that are capable of bringing individual claims; indeed, before intervention by the Judicial Panel on Multidistrict Litigation, the now-consolidated actions were being pursued separately by Named Plaintiffs. What is more, the ever growing line of financial institution data breach litigation, brought by myriad financial institutions, is proof that such financial institutions are not only capable, but willing, to pursue their claims separately. Thus, the "most compelling" factor underlying the superiority requirement is absent. *See also Fred's, Inc.*, 2019 WL 1179396, at *21 ("Since common questions do not predominate, it follows *a fortiori* that a class action is not 'superior to other available methods for the fair and efficient adjudication of the controversy.'" (quoting Fed. R. Civ. P. 23(b)(3)).

CONCLUSION

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

[redacted]

Dated: March 17, 2020

Respectfully submitted,

s/ David M. Poell

Kari M. Rollins
SHEPPARD MULLIN RICHTER & HAMPTON LLP
30 Rockefeller Plaza
New York, NY 10112
Telephone: 212.634.3077
Fax: 917.438.6173
krollins@sheppardmullin.com

Craig Cardon
SHEPPARD MULLIN RICHTER & HAMPTON LLP
1901 Avenue of the Stars, Suite 1600
Los Angeles, CA 90067
Telephone: 310.228.3749
Fax: 310.228.3701
ccardon@sheppardmullin.com

Liisa M. Thomas
David M. Poell
SHEPPARD MULLIN RICHTER & HAMPTON LLP
70 West Madison Street, 48th Floor
Chicago, IL 60602
Telephone: 312.499.6300
Fax: 312.499.6301
lthomas@sheppardmullin.com
dpoell@sheppardmullin.com

Counsel for Sonic Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION AT CLEVELAND

IN RE: SONIC CORP. CUSTOMER DATA BREACH LITIGATION (Financial Institutions)	)	MDL Case No. 1:17-md-02807-JSG
	)	Hon. District Judge James Gwin
THIS DOCUMENT RELATES TO ALL FINANCIAL INSTITUTION ACTIONS	)	Hon. Magistrate Judge Jonathan Greenberg

DECLARATION OF DAVID M. POELL IN SUPPORT OF SONIC DEFENDANTS' OPPOSITION TO FINANCIAL INSTITUTION PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I, David M. Poell, hereby declare as follows:

1. I am a Senior Associate at the law firm of Sheppard Mullin Richter & Hampton LLP and one of the counsel of record for the Sonic Defendants in this action.

2. I submit this declaration in support of the Sonic Defendants' Opposition to the Financial Institution Plaintiffs' Motion for Class Certification ("Opposition").

3. Attached hereto are true and correct copies of the following exhibits to the Sonic Defendants' Opposition, all of which have been designated as "Confidential" or "Confidential – Attorneys' Eyes Only" and/or contain references to information that has been previously filed under seal in this action by the Financial Institution Plaintiffs. Therefore, the following exhibits will be filed under seal pursuant to the Protective in this action (Dkt. 189):

i. Exhibit 1: VISA-SONIC00044–146

ii. Exhibit 2: AAFCU000251–255

iii. Exhibit 3: AAFCU000358

iv. Exhibit 4: REDSTONE000904

v. Exhibit 5: Deposition Transcript of Arkansas Federal Credit Union's Fed. R. Civ. P. 30(b)(6) Representative, Jonathan Adams (Feb. 13, 2020) ("Adams Dep.")

vi. Exhibit 6: Deposition Transcript of Redstone Federal Credit Union's Fed. R. Civ. P. 30(b)(6) Representative, Brian Smith (Feb. 11, 2020) ("Smith Dep.")

vii. Exhibit 7: Deposition Transcript of American Airlines Federal Credit Union's Fed. R. Civ. P. 30(b)(6) Representative, Christopher Danvers (Feb. 18, 2020) ("Danvers Dep.")

viii. Exhibit 8: Deposition Transcript of Plaintiffs' Proposed Expert, Neil Librock (Feb. 7, 2020) ("Librock Dep.")

ix. Exhibit 9: Redstone Federal Credit Union's Answers to Sonic Defendants' First Set of Interrogatories

x. Exhibit 10: AFCU0000187–416

xi. Exhibit 11: SONIC0006370–6430

xii. Exhibit 12: Deposition Transcript of Plaintiffs' Proposed Expert, Ian Ratner (Mar. 10, 2020) ("Ratner Dep.")

xiii. Exhibit 13: American Airlines Federal Credit Union and Alcoa Community Federal Credit Union Initial Disclosures

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

Dated: March 17, 2020

/s *David M. Poell*
Counsel for Sonic Defendants

Exhibit 1

PLACEHOLDER - FILED UNDER SEAL

Exhibit 2

PLACEHOLDER - FILED UNDER SEAL

Exhibit 3

PLACEHOLDER - FILED UNDER SEAL

Exhibit 4

PLACEHOLDER - FILED UNDER SEAL

Exhibit 5

FILED UNDER SEAL

Exhibit 6

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Exhibit 7

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Exhibit 8

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Exhibit 9

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Exhibit 10

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Exhibit 11

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Exhibit 12

PLACEHOLDER - FILED UNDER SEAL

Exhibit 13

PLACEHOLDER - FILED UNDER SEAL