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19
20 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
21 **SAN JOSE DIVISION**

22 *In Re Anthem, Inc. Data Breach Litigation*

Case No: 15-md-02617-LHK (NC)

23 **PLAINTIFFS' SUPPLEMENTAL BRIEF**
REGARDING *HYUNDAI* IN SUPPORT OF
24 **FINAL APPROVAL**

25 Date: February 1, 2018

Time: 1:30 p.m.

26 Judge: Lucy H. Koh

Crtrm: 8, 4th Floor

1 The decision in *In re Hyundai and Kia Fuel Econ. Litig.*, 2018 WL 505343 (9th Cir. Jan. 23,
2 2018) reiterates that a court considering a nationwide class “must consider the impact of potentially
3 varying state laws,” but, following long-standing precedent, “[v]ariations in state law do not
4 necessarily preclude a 23(b)(3) action.” *Id.* at *3 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,
5 1022 (9th Cir. 1998)); *see also Just Film, Inc. v. Buono*, 847 F.3d 1108, 1122 (9th Cir. 2017). The
6 Court confirmed that the predominance standard that applies in the context of a multi-state class action
7 is the same as in any other case, asking whether “the common, aggregation-enabling, issues in the case
8 are more prevalent or important than the non-common, aggregation-defeating, individual issues.” *Id.*
9 at *12 (quoting *Tyson Foods, Inc. v. Bouaphakeo*, -- U.S. --, 136 S.Ct. 1036, 1045 (2016)).

10 The district court in *Hyundai* “granted class certification without ever addressing variations in
11 state law.” *Id.* at *11. In so doing, the Ninth Circuit held that the court committed two legal errors.
12 First, the court “fail[ed] to apply California choice of law rules,” including examining variations in
13 state law, to determine whether one state’s law could apply nationwide. *Id.* at *12. Second, it failed to
14 analyze *at all* whether applicable state laws materially differed or to consider those differences for
15 purposes of predominance. *Id.*¹

16 The first error has no application here because, unlike in *Hyundai*, Plaintiffs have never
17 contended here that the law of a single state should apply nationwide. ECF 714-4, 743-11. And the
18 second error can be easily avoided when this Court, which is familiar with the issues in this litigation,
19 conducts its predominance analysis to assess whether the common legal and factual issues outweigh
20 any “questions affecting only individual members.” F.R.C.P. 23(b)(3). That analysis is governed by
21 familiar standards, which *Hyundai* did not change. Here, as in in *Hanlon*, “a common nucleus of facts
22 and potential legal remedies dominate this litigation.” 150 F.3d at 1022. Thus, any variations in state
23 law do not outweigh the predominance of factual and legal issues with respect to the constellation of
24 claims in this case. *Id.* at 1022–23 (holding that “idiosyncratic differences between state consumer
25 protection laws are not sufficiently substantive to predominate over the shared claims”).

26 _____
27 ¹ *Hyundai* also addressed attorneys’ fees, but focused on the district court’s use of the lodestar
28 methodology without any comparison to the value of the settlement, an issue Plaintiffs have invited this
Court to consider (and thereby avoid any concern addressed in *Hyundai*). 2018 WL 505343 at *15.

1 This Court has closely managed this litigation and is well-positioned to determine that the
2 important and prevalent factual and legal issues raised by class members' common law and statutory
3 claims are common, and far outweigh any issues affecting only individuals. This case involves a single
4 event that impacted all class members in this case whose data was stolen at once, giving rise to claims
5 under state law that *all* share the same common nucleus of facts and law pertaining to the duty of care
6 and whether Anthem violated it. ECF 743-12 at 2-5 (collecting evidence) & 6-7; *see also* ECF 903 at
7 3.² Those central issues are by far the most important factual and legal issues here. In contrast, in
8 *Hyundai*, defendants had previously identified material differences across states that the trial court
9 tentatively held undermined class certification, and the Ninth Circuit was concerned that liability might
10 turn on issues affecting individual class members differently. 2018 WL 505343 at *7-8, 12.

11 As previously approved by the Ninth Circuit, this Court can address whether any variations in
12 state law impact the balance of common versus individualized issues categorically. *Hanlon*, 150 F.3d
13 at 1022; *Just Film*, 847 F.3d at 1122.³ First, Plaintiffs assert two common law claims that blanket the
14 class: breach of contract and negligence. The basic elements of contract law are the same across states.
15 *See In re Conseco Life Ins. Co. LifeTrend Ins. Sales and Mktg. Litig.*, 2010 WL 3931096 (N.D. Cal. Oct
16 6, 2010); *cf. American Airlines v. Wolens*, 513 U.S. 219, 233 n.8 (1995) ("Because contract law is not
17 at its core 'diverse, nonuniform, and confusing,' we see no large risk of nonuniform adjudication....")
18 (citations omitted). The contract dispute across the state law claims focuses on issues of contract
19 interpretation and breach, both of which are subject to common proof. ECF 743-12 at 2-5, 8-9, 11, 19-
20 25; ECF 832-5 at 2-3, 9-10, 22. There are no material differences in state law with respect to
21 interpretation or breach that would require *individualized* adjudication. *Just Film*, 847 F.3d at 1123.

22 ² Consistent with this Court's scheduling orders, fact discovery closed for *all* claims prior to the class
23 certification briefing. The record before the Court supporting Plaintiffs' motion for class certification
24 with respect to the four selected bellwether claims therefore contains significant evidence that applies
25 nationwide, including all of the evidence pertaining to Anthem's alleged security failures. ECF 743-12
at 2-5; ECF 832-5 at 2-4.

26 ³ Had this Court needed to proceed with its efficient plan to consider first selected claims and then
27 resolve certification for the remaining claims, Plaintiffs would have presented a manageable,
28 categorical approach that relied heavily on the common evidence already before this Court, and sorted
the various claims and classes according to type and issues raised.

1 As with contract law, the commonalities with respect to the important facts and legal issues
2 relevant to Plaintiffs' negligence claims greatly outweigh any individualized differences. The evidence
3 pertaining to Defendants' duty and breach is already in the record on class certification, and all entirely
4 common. This case does not raise the types of individualized proximate cause issues, for example, that
5 can plague other negligence actions. *E.g., Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1231 (9th
6 Cir. 1996) (contrasting products liability with mass tort cases involving a "single catastrophic event");
7 *cf. Sterling v. Velsicol Chem.*, 855 F.2d 1188, 1197 (6th Cir. 1988) ("In mass tort accidents, the factual
8 and legal issues of a defendant's liability do not differ dramatically from one plaintiff to the next.").

9 Like the common law claims, the primary and most important issues pertaining to Plaintiffs'
10 statutory claims are the common issues of the legal and factual questions regarding Anthem's duty of
11 care and alleged violations. In light of the common factual evidence, this Court can conclude that
12 "common, aggregation-enabling, issues in the case are more prevalent or important" (*Tyson Foods*, 136
13 S.Ct. at 1045) even if there are variations between the state statutory claims, particularly where much of
14 that variation applies statewide rather than individually. For all of these claims, variations in state law
15 that apply statewide, or to other large sub-groups of the class, do not pose individualized issues at all,
16 and raise only questions of manageability irrelevant to settlement under governing law. *Hyundai*, 2018
17 WL 505343 at *12; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). Likewise, *Hyundai* did
18 not alter the long-standing rule that any individualized damages issues do not defeat predominance.
19 *Tyson Foods*, 136 S.Ct. 1036 at 1045; *Vaquero v. Ashley Furn.*, 824 F.3d 1150, 1155 (9th Cir. 2016).

20 Given the common experience of every individual in this class with respect to the single
21 catastrophic event of the Anthem data breach, the common evidence pertaining to data security and the
22 breach, the common legal issues across the common law claims and statutory claims here at issue, the
23 record before the Court demonstrates the proposed class is "sufficiently cohesive to warrant
24 adjudication by representation." *Amchem Prods.*, 521 U.S. at 623.

1 Respectfully Submitted,

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8 Dated: January 31, 2018

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