

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA

MARIE ABDELMESSIH, individually and on  
behalf of all others similarly situated,

Plaintiff,

v.

FIVE BELOW INC.

Defendant.

Case No.: 2:19-cv-1487

**[PROPOSED] ORDER CERTIFYING  
SETTLEMENT CLASS,  
PRELIMINARILY APPROVING  
CLASS ACTION SETTLEMENT, AND  
DIRECTING NOTICE TO THE  
SETTLEMENT CLASS**

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PRELIMINARILY APPROVING CLASS ACTION SETTLEMENT,  
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This matter came before the Court on Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement.

Plaintiff Marie Abdelmessih ("Plaintiff" or "Representative Plaintiff") brought this class action case against Five Below Inc. ("Defendant") (together with Plaintiff, "the Parties") on April 8, 2019. (Class Action Complaint, Doc. No. 1.) In the Class Action Complaint ("Complaint"), Plaintiff asserted claims for negligence, invasion of privacy, breach of implied contract, negligence per se, breach of fiduciary duty, violation of Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. §§ 501.201, *et seq* ("FDUTPA"), and breach of confidence. According to the Complaint, Five Below failed both to properly secure and safeguard the payment card data ("PCD") and personally identifiable information ("PII") (collectively "Customer Data") of its on-line customers and to provide them timely, accurate and adequate notice when such information had been compromised by a third party ("the Security Incident").

The Parties, through their counsel, entered into a Settlement Agreement providing relief on a class-wide basis, after good faith, arm's-length negotiations overseen by mediator Bennett G.

Picker, Esq. The Parties have agreed to settle this action, pursuant to the terms of the Settlement Agreement, and subject to the approval and determination of the Court as to the fairness, reasonableness, and adequacy of the settlement which, if approved, will result in dismissal of this action with prejudice.

The Settlement provides for reimbursement of up to \$250.00 per class member, including amounts for unreimbursed charges and fees, postage, costs for credit reports, and documented time spent dealing with the Security Incident. Defendant has also agreed to confirm its data security business practices, including hiring a dedicated IT security employee and, on an annual basis, implementing penetration testing, employee training related to data security, and an audit conducted by a Qualified Security Assessor for compliance with the Payment Card Industry Data Security Standard.

Having reviewed the Settlement Agreement and Release, including the exhibits attached thereto (together, the “Settlement Agreement” or “Settlement”), and all prior proceedings herein, and for good cause shown, it is hereby ordered that Plaintiff’s Motion for Preliminary Approval is granted as set forth herein.<sup>1</sup>

1. **Class Certification for Settlement Purposes Only.** For settlement purposes only and pursuant to Federal Rule of Civil Procedure 23(b)(3) and (e), the Court provisionally certifies a class in this matter defined as follows:

All persons residing in the United States who used a payment card to make a purchase on the Five Below website checkout page during the Security Incident.

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<sup>1</sup> Unless otherwise indicated, capitalized terms used herein have the same meaning as in the Settlement Agreement.

The Settlement Class specifically excludes: (i) Five Below and its officers and directors; (ii) all Settlement Class Members who timely and validly request exclusion from the Settlement Class; (iii) the Judge assigned to evaluate the fairness of this settlement; (iv) the attorneys representing the Parties in the Litigation; and (v) any other Person found by a court of competent jurisdiction to be guilty under criminal law of initiating, causing, aiding or abetting the criminal activity occurrence of the Security Incident or who pleads *nolo contendere* to any such charge. The Court provisionally finds, for settlement purposes only, that: (a) the Settlement Class is so numerous that joinder of all Settlement Class Members would be impracticable; (b) there are issues of law and fact common to the Settlement Class; (c) the claims of the Settlement Class Representative are typical of and arise from the same operative facts and seek similar relief as the claims of the Settlement Class Members; (d) the Settlement Class Representative and Settlement Class Counsel will fairly and adequately protect the interests of the Settlement Class as the Settlement Class Representative has no interests antagonistic to or in conflict with the Settlement Class and has retained experienced and competent counsel to prosecute this matter on behalf of the Settlement Class; (e) questions of law or fact common to Settlement Class Members predominate over any questions affecting only individual members; and (f) a class action and class settlement is superior to other methods available for a fair and efficient resolution of this controversy.

**2. Settlement Class Representative and Settlement Class Counsel.**

Plaintiff Marie Abdelmessih is hereby provisionally designated and appointed as the Settlement Class Representative. The Court provisionally finds that the Settlement Class Representative is similarly situated to absent Class Members and therefore typical of the Class and that she will be an adequate Settlement Class Representative.

The Court finds that the following counsel are experienced and adequate counsel and are hereby provisionally designated as Settlement Class Counsel pursuant to Federal Rule of Civil Procedure 23(g): Patrick A Barthle of Morgan & Morgan Complex Litigation Group, and Charles E. Schaffer and Daniel C. Levin of Levin Sedran & Berman LLP.

3. **Preliminary Settlement Approval.** Upon preliminary review, the Court concludes that the proposed Settlement is fair, reasonable, and adequate to warrant providing notice of the Settlement to the Settlement Class and that the Court will likely be able to grant final approval and accordingly it is preliminarily approved. Specifically, the Court in reaching this conclusion, has considered the factors set forth in Fed. R. Civ. P. 23(e), to determine whether the Settlement Agreement is “fair, reasonable, and adequate,” and hence whether the Court “will likely be able to” finally approve the Settlement, by considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm’s length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney’s fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

4. **Jurisdiction.** The Court concludes that it has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d)(2), and personal jurisdiction over the Parties before it for the purposes of the Settlement. Additionally, venue is proper in this District pursuant to 28 U.S.C. § 1391(a).

5. **Final Approval Hearing.** A Final Approval Hearing shall be held on \_\_\_\_\_ at \_\_\_\_\_ in Courtroom 17-B of the James A. Byrne U.S. Courthouse, 601

Market Street, Philadelphia, PA 19106, to determine, among other things, whether: (1) this matter should be finally certified as a class action for settlement purposes pursuant to Federal Rule of Civil Procedure 23(b)(3) and (e); (2) the Settlement should be finally approved as fair, reasonable, and adequate pursuant to Federal Rule of Civil Procedure 23(e); (3) the action should be dismissed with prejudice pursuant to the terms of the Settlement Agreement; (4) Settlement Class Members should be bound by the releases set forth in the Settlement Agreement; (5) the motion of Settlement Class Counsel for an award of attorneys' fees, costs, and expenses (the "Fee Request") should be approved pursuant to Federal Rule of Civil Procedure 23(h); and (6) the motion of Settlement Class Representative for a Service Award (the "Service Award Request") should be approved.

Plaintiffs' motion for final approval of the Settlement, Fee Request, and Service Award Request shall be filed with the Court at least **14 days prior to the deadline for submission of objections** specified in the Notice. By no later than **7 days prior to the Final Approval Hearing**, the Parties shall file responses, if any, to any objections, and any replies in support of final approval of the Settlement and/or the Service Award Request and Fee Request.

6. **Administration.** The Court appoints RG2 as the Settlement Administrator, with responsibility for class notice and claims administration. Defendant shall pay all costs and expenses associated with providing notice to Settlement Class Members including, but not limited to, the Settlement Administrator's fees. These payments shall be made separate and apart from the Settlement Fund.

7. **Notice to the Class.** The proposed Notice Program set forth in the Settlement Agreement, and the Email Notice, Long Form Notice, and Claim Form attached to the Settlement Agreement satisfy the requirements of Federal Rule of Civil Procedure 23(c)(2)(B) and (e)(1) and are hereby approved. Non-material modifications to these Exhibits may be made without further

order of the Court. The Settlement Administrator is directed to carry out the Notice Program in conformance with the Settlement Agreement.

By **30 days from the date of this Order** (the “Notice Deadline”), the Settlement Administrator shall complete the Notice Program, which shall be completed in the manner set forth in Section IV.3 and Exhibit C of the Settlement Agreement.

8. **Findings and Conclusions Concerning Notice.** The Court finds that the form, content, and method of giving notice to the Settlement Class as described in Paragraph 7 of this Order and the Settlement Agreement (including the exhibits thereto): (a) will constitute the best practicable notice to the Settlement Class; (b) are reasonably calculated to apprise Settlement Class Members of the pendency of the action, the terms of the proposed settlement, and their rights under the proposed settlement, including but not limited to their rights to object to or exclude themselves from the proposed settlement and other rights under the terms of the Settlement Agreement; (c) are reasonable and constitute due, adequate, and sufficient notice to all Class Members and other persons entitled to receive notice; and (d) meet all applicable requirements of law, including Federal Rule of Civil Procedure 23(c) and (e), and the Due Process Clause(s) of the United States Constitution. The Court further finds that the Notice is written in plain language, uses simple terminology, and is designed to be readily understandable by Class Members.

9. **Class Action Fairness Act Notice.** Within **10 days after the filing of the motion for preliminary approval**, the Settlement Administrator shall have served or have caused to be served a notice of the proposed Settlement on appropriate officials in accordance with the requirements under the Class Action Fairness Act (“CAFA”), 28 U.S.C. § 1715(b).

10. **Exclusion from Class.** Any Settlement Class Member who wishes to be excluded from the Settlement Class must mail a written notification of the intent to exclude himself or herself

from the Settlement Class to the Settlement Administrator at the address provided in the Notice, postmarked no later than **90 days after the Notice Deadline** (the “Opt-Out Deadline”). The written notification must include the individual’s name and address; a statement that he or she wants to be excluded from the Action; and the individual’s signature.

The Settlement Administrator shall provide the Parties with copies of all completed opt-out notifications, and a final list of all who have timely and validly excluded themselves from the Settlement Class, which Settlement Class Counsel may move to file under seal with the Court no later than **10 days prior to the Final Approval Hearing**.

Any Settlement Class Member who does not timely and validly exclude herself or himself from the Settlement shall be bound by the terms of the Settlement. If Final Judgment is entered, any Settlement Class Member who has not submitted a timely, valid written notice of exclusion from the Settlement Class shall be bound by all proceedings, orders, and judgments in this matter, including but not limited to the Release, including Settlement Class Members who have previously initiated or who subsequently initiate any litigation against any or all of the Released Parties relating to the claims and transactions released in the Settlement Agreement. All Class Members who submit valid and timely notices of exclusion from the Settlement Class shall not be entitled to receive any benefits of the Settlement.

11. **Objections and Appearances.** A Settlement Class Member who complies with the requirements of this paragraph may object to the Settlement, the Service Award Request, or the Fee Request.

No Settlement Class Member shall be heard, and no papers, briefs, pleadings, or other documents submitted by any Settlement Class Member shall be received and considered by the Court, unless the objection is (a) electronically filed with the Court on or before **90 days after the**

**Notice Deadline** (the “Objection Deadline”); or (b) mailed first-class postage prepaid to the Clerk of Court, Plaintiffs’ Counsel, and Defendant’s Counsel, at the addresses listed in the Notice, and postmarked by no later than on or before the Objection Deadline, as specified in the Notice. For an objection to be considered by the Court, the objection must also set forth:

- a. the objector’s full name, address, email address, and telephone number;
- b. contain the Settlement Class Member’s original signature;
- c. state that the Settlement Class Member objects to the Settlement, in whole or in part;
- d. set forth a statement of the legal and factual basis for the Objection;
- e. provide copies of any documents that the Settlement Class Member wishes to submit in support of his/her position; and
- f. list, by case name, court, and docket number, all other cases in which the objector and/or the objector’s counsel has filed an objection to any proposed class action settlement within the last three (3) years.

Any Settlement Class Member who fails to comply with the provisions in this Paragraph may waive and forfeit any and all rights he or she may have to object, and shall be bound by all the terms of the Settlement Agreement, this Order, and by all proceedings, orders, and judgments in this matter, including, but not limited to, the Release in the Settlement Agreement if Final Judgment is entered.

Any Settlement Class Member, including a Settlement Class Member who files and serves a written objection, as described above, may appear at the Final Approval Hearing, either in person or through counsel hired at the Settlement Class Member’s expense, to object to or comment on the fairness, reasonableness, or adequacy of the Settlement, the Service Award Request, or the Fee Request. If an objecting Settlement Class Member intends to appear at the Final Approval Hearing, either with or without counsel, he or she must also file a notice of appearance with the

Court (as well as serve on Class Counsel and Defendant's Counsel) by the Objection Deadline. If the objecting Settlement Class Member intends to appear at the Final Approval Hearing through counsel, he or she must also identify the attorney(s) representing the objecting Settlement Class Member who will appear at the Final Approval Hearing and include the attorney(s) name, address, phone number, e-mail address, and state bar(s) to which counsel is admitted, as well as the associated state bar numbers.

If Final Judgment is entered, any Settlement Class Member who fails to object in the manner prescribed herein shall be deemed to have waived his or her objections and shall be forever barred from making any such objections in this action or in any other proceeding or from challenging or opposing, or seeking to reverse, vacate, or modify any approval of the Settlement Agreement, the Service Award Request, or the Fee Request.

12. **Claims Process and Distribution and Allocation Plan.** Settlement Class Representative and Defendant have created a process for assessing and determining the validity and value of claims and a payment methodology to Settlement Class Members who submit a timely, valid claim form. The Court preliminarily approves the plan for remuneration described in Section IV.2 of the Settlement Agreement, and directs that the Settlement Administrator effectuate the distribution of settlement consideration according to the terms of the Settlement Agreement, should the Settlement be finally approved.

Settlement Class Members who qualify for and wish to submit a claim form shall do so in accordance with the requirements and procedures specified in the Notice and the Claim Form. If Final Judgment is entered, all Settlement Class Members who qualify for any benefit under the Settlement but fail to submit a claim in accordance with the requirements and procedures specified in the Notice and the Claim Form shall be forever barred from receiving any such benefit, but will

in all other respects be subject to and bound by the provisions in the Settlement Agreement, the Release included in that Agreement, and the Final Judgment.

13. **Termination of Settlement.** This Order shall become null and void and shall be without prejudice to the rights of the Parties, all of whom shall be restored to their respective positions existing immediately before this Court entered this Order, if the Settlement is not finally approved by the Court or is terminated in accordance with the Settlement Agreement. In such event, the Settlement and Settlement Agreement shall become null and void and be of no further force and effect, and neither the Settlement Agreement nor the Court's orders, including this Order, relating to the Settlement shall be used or referred to for any purpose whatsoever.

14. **Use of Order.** This Order shall be of no force or effect if Final Judgment is not entered or there is no Effective Date and shall not be construed or used as an admission, concession, or declaration by or against Defendant of any fault, wrongdoing, breach, liability, or the certifiability of any class. Nor shall this Order be construed or used as an admission, concession, or declaration by or against the Settlement Class Representative or any other Settlement Class Member that his or her claim lacks merit or that the relief requested is inappropriate, improper, unavailable, or as a waiver by any Party of any defense or claim he, she, or it may have in this litigation or in any other lawsuit.

15. **Stay of Proceedings.** Except as necessary to effectuate this Order, all proceedings and deadlines in this matter are stayed and suspended pending the Final Approval Hearing and issuance of the Final Judgment, or until further order of this Court.

16. **Continuance of Hearing.** The Court reserves the right to adjourn or continue the Final Approval Hearing and related deadlines without further written notice to the Class. If the

Court alters any of those dates or times, the revised dates and times shall be posted on the website maintained by the Settlement Administrator.

17. **Summary of Deadlines.** The preliminarily approved Settlement shall be administered according to its terms pending the Final Approval Hearing. Deadlines arising under the Settlement Agreement and this Order include but are not limited to:

**Notice Deadline:** 30 days after Preliminary Approval

**Motion for Final Approval:** 14 days before Objection Deadline

**Motion for Service Awards, Attorneys' Fees and Costs:** 14 days before Objection Deadline

**Opt-Out and Objection Deadlines:** 90 days after Notice Deadline

**Responses to Objections and Replies in Support of Final Approval, Service Awards and Fee Requests:** 7 days before Final Approval Hearing

**Claims Deadline:** 120 days after Notice Deadline

**Final Approval Hearing:** At least 110 days after Notice Deadline

IT IS SO ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 2020.

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John R. Padova  
United States District Court Judge