

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA**

WILLARD BAYS,
individually and on behalf of all
others similarly situated,

Plaintiff,

v.

WALMART INC., a Delaware
corporation, WAL-MART STORES
EAST, L.P., a Delaware corporation,
and NEC NETWORKS, LLC,
a Texas corporation,

Defendants.

Case No.: 3:21-cv-00460

(Mason County Circuit Court CIVIL
ACTION NO. CC-26-2021-C-49)

**DEFENDANTS WALMART INC. AND
WAL-MART STORES EAST, LP'S
NOTICE OF REMOVAL**

NOTICE OF REMOVAL

Defendants Walmart Inc. and Wal-Mart Stores East, LP (collectively, the “Walmart Defendants”) hereby remove the above-captioned action, *Willard Bays v. Walmart Inc., Wal-Mart Stores East, L.P., and NEC Networks, LLC*, Civil Action No. CC-26-2021-C-49 (the “State Court Action”), from the Circuit Court of Mason County, West Virginia, to the United States District Court for the Southern District of West Virginia pursuant to 28 U.S.C. §§ 1332(d), 1441, 1446, and 1453. The Walmart Defendants hereby provide “a short and plain statement of the grounds for removal” pursuant to 28 U.S.C. § 1446(a) and *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 87 (2014).

1. This Court has original jurisdiction over this action under the Class Action Fairness Act of 2005 (“CAFA”). See Pub. L. No. 109–2, 119 Stat. 4 (codified at 28 U.S.C. §§ 1332(d), 1453, 1711-1715). In relevant part, CAFA grants district courts original jurisdiction over civil

class actions filed under federal or state law in which any member of a class of plaintiffs is a citizen of a state different from any defendant and where the amount in controversy for the putative class members in the aggregate exceeds the sum or value of \$5,000,000, exclusive of interest and costs. As set forth below, this case meets all of CAFA's requirements for original jurisdiction and removal.

2. As set forth below, this case is timely and properly removed by the filing of this Notice of Removal. Under CAFA, a class action "may be removed by any defendant without the consent of all defendants." 28 U.S.C. § 1453(b); *Jackson v. Home Depot U.S.A., Inc.*, 880 F.3d 165, 168 (4th Cir. 2018), *aff'd*, 139 S. Ct. 1743 (2019) (explaining that CAFA "eliminates the rule requiring unanimous consent of all defendants for removal").

VENUE

3. The State Court Action was filed in Mason County, West Virginia. Therefore, venue properly lies in the United States District Court for the Southern District of West Virginia, pursuant to 28 U.S.C. §§ 129(b) and 1391(a).

PLEADINGS, PROCESS, AND ORDERS

4. On July 19, 2021, Plaintiff served the Complaint ("Complaint" or "Compl.") on the Walmart Defendants. In accordance with 28 U.S.C. § 1446(a), true and correct copies of the Summons and Complaint in the State Court Action, which is the only process, pleadings, and orders served upon the Walmart Defendants in the State Court Action, are attached as **Exhibit A**. A copy of the docket in the State Court Action is attached as **Exhibit B**. Copies of all process, pleadings, and orders filed in the State Court Action are attached together as **Exhibit C**.

5. According to the allegations in the Complaint, Plaintiff and the putative class he purports to represent are patients of Defendants whose "sensitive information in the possession of

Defendants was compromised as a result of a security breach which occurred on or around February 6, 2021” (the “Data Breach”). Compl. ¶ 20. Defendant NEC Networks, LLC notified Plaintiff of the Data Breach through a medical data breach notice (the “Breach Notice”). *See id.* ¶ 16.

6. Plaintiff served the Walmart Defendants with the Summons and Complaint on July 19, 2021.

7. The Complaint alleges five counts for: (1) breach of the duty of confidentiality; (2) unjust enrichment; (3) breach of contract; (4) negligence; and (5) invasion of privacy. *See* Compl. ¶¶ 23-62.

SERVICE ON THE STATE COURT

8. Pursuant to 28 U.S.C. § 1446(d), promptly after the filing of this Notice of Removal in the United States District Court for the Southern District of West Virginia, written notice of such filing will be given by the undersigned to Plaintiff’s counsel of record, and a copy of the Notice of Removal will be filed with the Clerk of the Circuit Court of Mason County, West Virginia.

TIMELINESS OF REMOVAL

9. The Walmart Defendants were served with a copy of Plaintiff’s Summons and Complaint on July 19, 2021. This Notice of Removal has been filed within thirty (30) days after the Walmart Defendants were served with a copy of Plaintiff’s Summons and Complaint. This Notice of Removal is therefore timely as it is filed within the time period provided by 28 U.S.C. § 1446(b).

ORIGINAL JURISDICTION PURSUANT TO CAFA

10. This putative class action is within the Court’s original jurisdiction pursuant to CAFA.

11. The Supreme Court has instructed that “no antiremoval presumption attends cases invoking CAFA” *Dart Cherokee Basin Operating Co.*, 547 U.S. at 89. Rather, courts “are obliged to construe and apply CAFA’s grant of federal court jurisdiction broadly” *Dominion Energy, Inc. v. City of Warren Police & Fire Ret. Sys.*, 928 F.3d 325, 336 (4th Cir. 2019); *Jackson*, 880 F.3d at 168 (explaining that “CAFA, and in particular 28 U.S.C. § 1453(b), was adopted to extend removal authority beyond the traditional rules”); *Cox v. Air Methods Corp.*, Case No. 1:17-04610, 2018 WL 2437056, at *2 (S.D.W. Va. May 30, 2018) (explaining that there is no antiremoval presumption under CAFA and that a “defendant’s notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold”).

12. This Court has jurisdiction over this action under CAFA (*see* 28 U.S.C. § 1332(d)), and this action may be removed pursuant to the provisions of 28 U.S.C. § 1441(a), in that it is a civil putative class action wherein: (1) the proposed class contains at least 100 members in the aggregate; (2) there is minimal diversity; (3) no defendant is a state, state official, or other governmental entity; (4) the total amount in controversy for all class members exceeds \$5 million, exclusive of interest and costs; and (5) none of the exceptions to CAFA jurisdiction applies. CAFA authorizes removal of such actions. *See* 28 U.S.C. §§ 1441, 1446, 1453. As discussed below, this action meets each CAFA requirement for removal.

The Proposed Class Contains At Least 100 Members.

13. Plaintiff's proposed class consists of "[a]ll persons whose sensitive information in the possession of Defendants was compromised as a result of a security breach which occurred on or around February 6, 2021." Compl. ¶ 20.

14. Plaintiff initiated this class action lawsuit after he received the Breach Notice, which according to Plaintiff "describe[ed] activity wherein third parties unlawfully accessed Plaintiff's sensitive medical and personal identity information" *Id.* ¶ 16. It is the unauthorized access of Plaintiff's information described in the Breach Notice that gives rise to Plaintiff's claims and which forms the basis for Plaintiff's membership in the proposed class he seeks to represent.

15. More than 25,000 individuals were sent the Breach Notice and are therefore members of the proposed class. As a result, the proposed class contains at least 100 members, and this element of CAFA jurisdiction is satisfied.

Minimal Diversity Exists.

16. CAFA's diversity requirement is satisfied when at least one plaintiff is a citizen of a state different from any defendant. *See* 28 U.S.C. §§ 1332(d)(2)(A), 1453(b). Plaintiff alleges that at all times relevant to the suit he resided in Mason County, West Virginia. *See* Compl. ¶ 1. Accordingly, Plaintiff is a citizen of West Virginia.

17. Defendant Walmart Inc. is a corporation organized under the laws of Delaware with its principal place of business in Bentonville, Arkansas. Thus, Defendant Walmart Inc. is a citizen of Delaware and Arkansas. *See* 28 U.S.C. § 1332(c)(1) (for diversity purposes, a corporation "shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business").

18. Defendant Wal-Mart Stores East, LP is a limited partnership organized and existing under the laws of the State of Delaware. For diversity purposes, a limited partnership's citizenship is deemed to be that of "all of its limited and general partners." *Martinez v. Duke Energy Corp.*, 130 F. App'x 629, 633 (4th Cir. 2005) (citing *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195–96 (1990)). WSE Management, LLC is the general partner of Wal-Mart Stores East, LP, and WSE Investment, LLC is the limited partner of Wal-Mart Stores East, LP. (There are no other partners of Wal-Mart Stores East, LP.) "For purposes of diversity jurisdiction, the citizenship of a limited liability company . . . is determined by the citizenship of all of its members . . ." *Cent. W. Va. Energy Co., Inc. v. Mountain State Carbon, LLC*, 636 F.3d 101, 103 (4th Cir. 2011). The sole member of WSE Management, LLC and WSE Investment, LLC is Wal-Mart Stores East, LLC (f/k/a Wal-Mart Stores East, Inc.), an Arkansas limited liability company. The sole member of Wal-Mart Stores East, LLC (f/k/a Wal-Mart Stores East, Inc.) is Walmart Inc. As stated above, Walmart Inc. is a corporation organized under the laws of Delaware with its principal place of business in Bentonville, Arkansas, and is, therefore, a citizen of Delaware and Arkansas. Accordingly, Walmart Stores East, LP, is a citizen of Delaware and Arkansas for purposes of diversity jurisdiction. *See id.*

19. Plaintiff alleges that Defendant NEC Networks, LLC is a Texas LLC, and there are no allegations that it is a citizen of West Virginia. *See* Compl. ¶ 4.

20. Because at least one member of the putative class, namely Plaintiff, is a citizen of West Virginia, and both of the Walmart Defendants (i.e., Walmart Inc. and Wal-Mart Stores East, LP) are citizens of Delaware and Arkansas, CAFA's minimal diversity requirement is met.

No Defendant Is a Governmental Entity.

21. None of the Defendants is a state, state official, or other governmental entity. All Defendants are for-profit companies.

The Amount in Controversy Exceeds \$5,000,000, Exclusive of Interest and Costs.

22. To meet CAFA's amount-in-controversy requirement, "a defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold" of five million dollars. *Scott v. Cricket Communications, LLC*, 865 F.3d 189, 194 (4th Cir. 2017) (quoting *Dart Cherokee Basin Operating Co.*, 547 U.S. at 89). "The key inquiry in determining whether the amount-in-controversy requirement is met is not what the plaintiff will actually recover but an estimate of the amount that will be put at issue in the course of the litigation." *Scott*, 865 F.3d at 196 (internal quotation marks omitted). In other words, "the amount in controversy is what the plaintiff claims to be entitled to or demands." *Scaralto v. Ferrell*, 826 F. Supp. 2d 960, 967 (S.D.W. Va. 2011).

23. On removal, a defendant is not required to establish the amount in controversy "to a legal certainty." *Sayre v. Westlake Services, LLC*, No. ELH-15-687, 2015 WL 4716207, at *7-8 (D. Md. Aug. 7, 2015) (internal quotation marks omitted). Rather, the defendant need only provide a "reasonable basis to support its assertion as to the amount in controversy" *Id.* "Thus, a defendant may estimate the amount in controversy based on the nature of the claims, the number of defendants, and the damages plead." *Chamberlain v. 7-Eleven, Inc.*, No. 5:15CV95, 2015 WL 6555429, at *3 (N.D.W. Va. Oct. 29, 2015).

24. Although the Walmart Defendants concede no liability on Plaintiff's claims and dispute that a class action could ever be certified here, assuming Plaintiff's allegations to be true

for purposes of removal only, Plaintiff's class claims place in controversy a sum greater than \$5,000,000, exclusive of interest and costs.

25. The Complaint seeks "an order providing consumer credit protection and monitoring services for Plaintiff [and] maintenance of consumer credit insurance to provide coverage for unauthorized use of Plaintiff's personal information, medical information, and financial information." Compl. at Prayer for Relief ¶ C. The advertised monthly rates of credit monitoring services and insurance provided by the three national credit-reporting bureaus can be used to approximate the cost to Defendants of providing the relief that Plaintiff requests. As of August 2021, the cost to purchase credit monitoring services of the type requested by the Complaint from those credit-reporting agencies ranges from \$9.95 to \$19.95 per month at Equifax (*see* Exhibit D), \$24.95 per month at TransUnion (*see* Exhibit E), and from \$9.99 to \$29.99 per month at Experian (*see* Exhibit F). The lowest price for credit monitoring services for these three national credit reporting bureaus is \$9.95 per month.

26. In addition, the Complaint seeks "[m]onetary damages in a sufficient amount to provide, to the furthest extent possible, adequate credit and identity protection and monitoring for an extended period of years." Compl. at Prayer for Relief ¶ D. That is, Plaintiff seeks to recover in the form of "monetary damages" the cost of providing these services to the putative class for at least two years. At least one federal district court has concluded that, for purposes of determining the amount in controversy in a case alleging the theft of personal information, it is "not unreasonable" to use "three years [of credit monitoring] as a conservative estimate [to calculate the amount in controversy]." *Porras v. Sprouts Farmers Mkt., LLC*, No. EDCV 16-1005 JGB (KKx), 2016 WL 4051265, at *3 (C.D. Cal. July 25, 2016).

27. As noted above, there are at least 25,000 individuals in the putative class (see Paragraphs 13-15). Using the minimum number of putative class members (25,000), and multiplying that number times the lowest advertised monthly rate for credit monitoring services (\$9.95) for a two year period, places the amount in controversy at \$5,970,000, exclusive of interest and costs, which is well above CAFA's \$5 million threshold.¹ Since these are services Plaintiff claims to be entitled to, this amount is properly included in the amount in controversy when assessing whether CAFA's jurisdictional requirements are satisfied.

28. Plaintiff also seeks "compensatory and/or punitive damages . . . which will fairly and adequately compensate Plaintiff and others similarly situated for the . . . damages and injuries." Compl. at Prayer for Relief ¶ E. These requests increase the amount in controversy even further.

29. Plaintiff also seeks damages to compensate for the alleged "permanent lack of security and loss of privacy that they have experienced to date and will continue to suffer in the future." Compl. at Prayer for Relief ¶ G. These requests increase the amount in controversy even further.

30. Finally, the Complaint also seeks relief that would require the Walmart Defendants to "establish a specific device encryption security program to protect against the unauthorized disclosure of confidential information of its patients." Compl. at Prayer for Relief ¶ C. The Walmart Defendants deny that their data security practices are deficient in any respect. Nevertheless, the cost of complying with Plaintiff's demands in the Complaint must be included in the amount in controversy and is further evidence that CAFA's jurisdictional threshold is satisfied. *See JTH Tax, Inc. v. Frashier*, 624 F.3d 635, 639 (4th Cir. 2010); *Ferrell*, 826 F. Supp.

¹ Specifically, [25,000 putative class members] x [\$9.95/month for credit monitoring services] x [24 months] = \$5,970,000.

2d at 967; *Arthur v. Homesite Ins. Co.*, No. 2:16-cv-00150, 2016 WL 1717222, at *2 (S.D.W. Va. Apr. 28, 2016).

31. The Walmart Defendants deny that they have any liability to Plaintiff or to the putative class that he seeks to represent and deny that Plaintiff or the putative class members are entitled to recover any damages, fees, or the other relief requested in the Complaint. The Walmart Defendants also submit that this action does not satisfy the requirements for class certification under Fed. R. Civ. P. 23. Nevertheless, the Complaint places over \$5 million in controversy exclusive of interest and costs for the reasons set forth above.

The Exceptions to CAFA Do Not Apply

32. None of the exceptions to CAFA jurisdiction applies here. *See* 28 U.S.C. §§ 1332(d)(3)-(4). In any event, the burden to prove the applicability of an exception to jurisdiction under CAFA rests with the party opposing removal. *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 698 (2003) (finding that once a defendant establishes removal is proper, “the burden is on a plaintiff to find an express exception”). Accordingly, it is not the Walmart Defendants’ burden to demonstrate that any exception to CAFA does not apply.

33. Accordingly, this Court has original subject matter jurisdiction pursuant to CAFA.

34. The Walmart Defendants hereby reserve the right to amend this Notice of Removal.

WHEREFORE, the Walmart Defendants remove this action from the Circuit Court of Mason County, West Virginia, to this Court.

Respectfully submitted this 17th day of August, 2021.

WALMART INC. and WAL-MART STORES
EAST, LP

/s/ Neva G. Lusk

Neva G. Lusk (WV State Bar #2274)

Tai Shadrick Kluemper (WV State Bar #12261)

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*Counsel for Walmart Inc. and Wal-Mart
Stores East, LP*

CERTIFICATE OF SERVICE

I certify that on August 17, 2021, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and further certify that the foregoing is also being served via First Class United States Mail, postage pre-paid, addressed as follows:

William M. Tiano, Esquire (#4308)
Tony L. Odell, Esquire (#5770)
Cheryl A. Fisher, Esquire (#6379)
TIANO O'DELL, PLLC
P.O. Box 11830
Charleston, WV 25339
(304) 720-6700
Email: wtiano@tolawfirm.com

By: /s/ Neva G. Lusk
Neva G. Lusk (WV Bar #2274)

EXHIBIT A

Office of the Secretary of State
Building 1 Suite 157-K
1900 Kanawha Blvd E.
Charleston, WV 25305



Mac Warner
Secretary of State
State of West Virginia
Phone: 304-558-6000
886-767-8883
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9214 8901 1251 3410 0003 1469 20

WALMART INC.
C. T. Corporation System
5098 WEST WASHINGTON STREET
SUITE 407
CHARLESTON, WV 25313

Control Number: 277330

Defendant: WALMART INC.
5098 WEST WASHINGTON STREET
SUITE 407
CHARLESTON, WV 25313 US

Agent: C. T. Corporation System

County: Mason

Civil Action: 21-C-49

Certified Number: 92148901125134100003146920

Service Date: 7/19/2021

I am enclosing:

1 summons and complaint

which was served on the Secretary at the State Capitol as your statutory attorney-in-fact. According to law, I have accepted service of process in the name and on behalf of your corporation.

Please note that this office has no connection whatsoever with the enclosed documents other than to accept service of process in the name and on behalf of your corporation as your attorney-in-fact. Please address any questions about this document directly to the court or the plaintiff's attorney, shown in the enclosed paper, not to the Secretary of State's office.

Sincerely,

A handwritten signature in cursive script that reads "Mac Warner".

Mac Warner
Secretary of State

SUMMONS

E-FILED | 7/15/2021 11:25 AM
CC-26-2021-C-49
Mason County Circuit Clerk
Elizabeth Jones

IN THE CIRCUIT OF MASON WEST VIRGINIA

Willard Bays v. Walmart Inc.

Service Type: Plaintiff - Secretary of State

NOTICE TO: Walmart Inc., CT Corporation, 5098 Washington St., West, Suite 407, Charleston, WV 25313

THE COMPLAINT WHICH IS ATTACHED TO THIS SUMMONS IS IMPORTANT AND YOU MUST TAKE IMMEDIATE ACTION TO PROTECT YOUR RIGHTS. YOU OR YOUR ATTORNEY ARE REQUIRED TO FILE THE ORIGINAL OF YOUR WRITTEN ANSWER, EITHER ADMITTING OR DENYING EACH ALLEGATION IN THE COMPLAINT WITH THE CLERK OF THIS COURT. A COPY OF YOUR ANSWER MUST BE MAILED OR HAND DELIVERED BY YOU OR YOUR ATTORNEY TO THE OPPOSING PARTY'S ATTORNEY:

William Tiano, PO Box 11830, Charleston, WV 25339

THE ANSWER MUST BE MAILED WITHIN 30 DAYS AFTER THIS SUMMONS AND COMPLAINT WERE DELIVERED TO YOU OR A JUDGMENT BY DEFAULT MAY BE ENTERED AGAINST YOU FOR THE MONEY OR OTHER THINGS DEMANDED IN THE COMPLAINT.

SERVICE:

7/15/2021 11:25:06 AM

/s/ Elizabeth Jones

Date

Clerk

ACCEPTED FOR
SERVICE OF PROCESS
2021 JUL 19 P 4: 31
SECRETARY OF STATE
STATE OF WEST VIRGINIA

RETURN ON SERVICE:

Return receipt of certified mail received in this office on _____

I certify that I personally delivered a copy of the Summons and Complaint to _____

Not Found in Bailiwick

Date

Server's Signature

E-FILED | 7/15/2021 11:25 AM
CC-26-2021-C-49
Mason County Circuit Clerk
Elizabeth Jones

IN THE CIRCUIT COURT OF MASON COUNTY, WEST VIRGINIA

WILLARD BAYS,
individually and on behalf of all
others similarly situated,

Plaintiff,

v.

CIVIL ACTION NO. _____
Judge _____

WALMART INC., a Delaware
corporation, **WAL-MART STORES**
EAST, LP, a Delaware corporation,
and **NEC NETWORKS, LLC,**
a Texas corporation,

Defendants.

COMPLAINT

COMES NOW the Plaintiff, Willard Bays, by counsel, Tiano O'Dell, PLLC, and brings this action against Defendants, Walmart Inc., and NEC Networks, LLC, to obtain class action relief, damages, restitution, and equitable relief for himself and others similarly situated.

1. Plaintiff, Willard Bays, is an individual who at all times relevant herein resided in Mason County, West Virginia

2. Defendant, Walmart Inc., is a Delaware corporation with its headquarters in Bentonville, Arkansas, and it provides healthcare services to West Virginia residents. This entity owned and operated pharmacies located in West Virginia at all times as alleged herein, and does business in Mason County, West Virginia, at all times as alleged herein.

3. Defendant, Wal-Mart Stores East, LP, is a limited partnership with its headquarters in Bentonville, Arkansas, and it provides healthcare services to West Virginia residents. This entity owned and operated pharmacies located in West Virginia at all times as alleged herein. Upon information and belief, Wal-Mart Stores East, LP, is comprised of several layers of business entities of Walmart, Inc. This Defendant does business in Mason County, West Virginia, at all times as alleged herein.

4. Defendant, NEC Networks, LLC, is a corporation organized and existing under the laws of the State of Texas and doing business in the State of West Virginia at all times as alleged herein. This entity does business as CaptureRx at all relevant times. CaptureRx, along with Walmart Inc., was entrusted with Plaintiff's sensitive personal information.¹

5. Plaintiff is a patient and customer of the Defendants. Defendants collect and maintain possession, custody, and control of a wide variety of Plaintiff's medical, financial, and sensitive information in the regular course of business.

6. Defendants had a legal and fiduciary obligation to protect Plaintiff's sensitive information as a condition of their relationship with Plaintiff and right to conduct business.

7. The obligation to protect Plaintiff's sensitive information was included as a material term, with value, in the services provided by the Defendants and was considered a benefit of the bargain for which Defendants and the Plaintiff exchanged consideration. Upon information and belief, a portion of the consideration accepted by the Defendants was done so upon condition of and in recognition of Defendants' obligation to protect and secure sensitive information and ensuring legal compliance. This allocation was made for the purpose of offering

¹Sensitive information includes full name, Social Security Number, date of birth, home address, account number, insurance information, extremely sensitive medical diagnoses and treatment records, private treatment information, diagnosis codes, and other legally protected information.

patients and customers, such as Plaintiff, value added to the services provided by agreeing to protect Sensitive Information.

8. Defendants failed to take reasonable and adequate actions to protect Plaintiff's sensitive information from reasonably foreseeable invasion of privacy risks.

9. Defendants stored Plaintiff's sensitive information in an electronic location and format that was not reasonably protected, guarded, secured, and/or was otherwise unreasonably accessible in an unprotected electronic and/or physical location. Defendants also failed to sufficiently invest in privacy protection safeguards, failed to properly train, audit, test, and supervise employees to safeguard devices and systems containing Plaintiff's Sensitive Information. Further Defendants failed to reasonably audit, monitor, and maintain the security of its software, systems, and access to Plaintiff's Sensitive Information.

10. Defendant did not adequately protect Plaintiff's Sensitive Information, and Plaintiff's financial, insurance, health information, and physician-patient confidential relationship has been breached.

11. Defendant did not provide adequate security measures or appropriate employee supervision to protect Plaintiff's Sensitive Information.

12. Plaintiff's personal and sensitive information was viewed by individuals who did not have a business need to access the information. While Plaintiff's sensitive information was accessed on or about February 6, 2021, Plaintiff did not receive notice of the breach until nearly three months later.

13. Defendants failed to take reasonable actions to timely disclose and provide notice of the breach to Plaintiff. Defendants placed its own interests and needs before Plaintiff's interests in responding to and investigating the breach.

14. Defendants designed and implemented their policies and procedures regarding the security of protected health information and Sensitive Information. These policies and procedures failed to adhere to reasonable and best industry practices in safeguarding protected health information and other Sensitive Information. Further, Defendants failed to have proper security on computer servers or other storage devices or software to protect the Plaintiff's Sensitive Information.

15. Willard Bays' most intimate, private, and severely personal medical records were breached due to the Defendant's above described failures and Plaintiff has suffered significant loss, injury and damages.

16. On or about May 5, 2021, Defendant, NEC Networks, LLC, sent a medical data breach notice to Plaintiff describing activity wherein third parties unlawfully accessed Plaintiff's sensitive medical and personal identity information without a business need and which resulted in Plaintiff's personal sensitive information being unlawfully exposed to third party or parties. Defendant, Walmart Inc., owes a duty to the Plaintiffs to safeguard this information and upon information and belief contracted with the Defendant NEC Networks, LLC d/b/a CaptureRx for electronic medical record provider services and storage.

17. CaptureRx failed to reasonably monitor its employees' conduct and failed to reasonably monitor systems to safeguard Plaintiff's personal sensitive information entrusted to it for protection.

18. As a result of Defendants' failure to follow contractually agreed upon, legally required, industry-standard security procedures, Plaintiff received only diminished value of the services which the Defendants provided. Plaintiff contracted for services that included a guarantee by Defendants to safeguard his personal and Sensitive Information. Instead, Plaintiff

received services devoid of these very important protections. Accordingly, the Plaintiff seeks claims for breach of contract, breach of implied contract, unjust enrichment, negligence, invasion of privacy, and breach of confidentiality, and violation of the West Virginia Consumer and Protection Credit Act.

19. The Plaintiff, Willard Bays, brings this suit on behalf of himself and all other persons who were similarly situated related to a breach of security and disclosure of sensitive information to unauthorized third parties by Defendants.

20. The Plaintiff brings this action and further seeks certification on behalf of himself and the putative class members she seeks to represent under West Virginia Rule of Civil Procedure, Rule 23(b)(3), the class is defined as follows:

All persons whose sensitive information in the possession of Defendants was compromised as a result of a security breach which occurred on or around February 6, 2021.

21. This action is properly brought as a class action for the following reasons:

a. The class is numerous and includes a significant number of patients living in and around West Virginia. Joining each class member as a co-plaintiff would be unreasonable and impracticable.

b. There are common questions of law and of fact to the members of the class that predominate over any individual questions affecting individual class members. The theories of liability and questions of Defendants' wrongful conduct related to the security breach apply to all class members. Plaintiff requests common theories of liability against the Defendants which are common to the class as a whole and do not turn on any particular aspect of

an individual class member's situation. Defendants acted in a manner that affected all putative class members similarly.

c. The claims asserted by Plaintiff are typical of the members of the class.

d. The Plaintiff will fairly and adequately protect the interests of the members of the class. The interests of the members of the class are coincident with and not antagonistic to Plaintiff. Further, Plaintiff is represented by experienced class action counsel with adequate resources to prosecute the case.

e. This class action is an appropriate method of the fair and efficient adjudication of this controversy because:

i. There is no special interest by class members in individually controlling the prosecution of separate actions;

ii. When Defendants' liability has been adjudicated, claims of all class members can be administered efficiently under the direction of/or as determined by the Court;

iii. This action will promote an orderly and expeditious administration and adjudication of the class claims, economies of time, effort, and resources will be fostered, and uniformity of decisions will be insured;

iv. Without a class action, Plaintiff and the class will suffer damages and Defendants' violations of law will proceed without remedy while Defendants reap and retain the substantial proceeds of its misleading and wrongful conduct; and

v. There will be no insurmountable difficulty in the management of this lawsuit as a class action.

vi. The conduct of this action conserves the resources of the parties and the court system, protects the rights of each member of the class, and meets all due process requirements.

vii. Certification of the class with respect to particular common factual and legal issues concerning liability, as well as the necessary and appropriate quantum of punitive damages, or ratio of punitive damages to actual harm, is appropriate under West Virginia Rule of Civil Procedure 23(c)(4).

viii. The particular common issues of liability, damages, and the quantum of punitive damages or ratio of punitive damages to actual harm, are common to all Class Members.

22. The liability arising from Defendants' conduct may be tried on a class-wide basis, as the trial will focus upon only common questions applicable to the entire class.

COUNT I

BREACH OF THE DUTY OF CONFIDENTIALITY

23. Plaintiff adopts and re-alleges all paragraphs set forth hereinabove as is fully set out herein.

24. Defendants owed the Plaintiff a duty of confidentiality pursuant to the terms of its legal and fiduciary relationship with Plaintiff as a health care provider and entity storing and maintaining health care and private sensitive information.

25. Included in this duty owed by Defendants is one of undivided secrecy and loyalty to Plaintiff as a patient and protector of health care information. This duty is critical to encourage the free exchange of information between patients and their

healthcare providers.

26. The minimum standard of care imposed on Defendants in maintaining the confidentiality of Plaintiff's sensitive information is expressed in multiple statutes, regulations, and judicial decisions of the State of West Virginia.

27. The Defendants breached its duty to the Plaintiff through the unauthorized disclosure, breach, and/or publication of personal and private information, and thus violated the Plaintiff's right to have this information kept confidential.

28. Such a violation breaches the trust that represents the core of the fiduciary relationship between Plaintiff as a patient and Defendants as healthcare provider, and entity storing and maintaining health care information.

29. As a direct and proximate result of Defendants' breach of the duty of confidentiality, Plaintiff and all others similarly situated have suffered damages and breach of the confidential physician-patient relationship.

30. Defendants' actions were committed willfully, wantonly, and with reckless indifference to the rights of others, including Plaintiff and all others similarly situated.

31. As a direct and proximate result of Defendants' willful, wanton, and reckless conduct, Plaintiff and all others similarly situated are entitled to compensatory and punitive damages and hereby demand the same.

COUNT II

UNJUST ENRICHMENT

32. Plaintiff adopts and re-alleges all paragraphs set forth hereinabove as is fully set out herein.

33. Defendants, Walmart Inc., and its contractual entity, Defendant NEC Networks, received payment to perform services that included protecting Plaintiff's Sensitive Information.

34. Defendants did not protect Plaintiff's highly sensitive information but retained payments for services to Plaintiff.

35. Defendants have knowledge of said benefit.

36. Defendants have been unjustly enriched and it would be inequitable for Defendant to retain payments for services to Plaintiff.

37. As a direct and proximate result, Plaintiff and all others similarly situated have been harmed and/or injured.

COUNT III

BREACH OF CONTRACT (express and implied)

38. Plaintiff adopts and re-alleges all paragraphs set forth hereinabove as is fully set out herein.

39. Defendants were legally and contractually obligated to protect Plaintiff's health information and Sensitive Information as a condition of conducting business and engaging in their contractual relationships with regard to the services provided to Plaintiff.

40. Defendants promised and contracted to only disclose health information when required to do so by law or with express consent by Plaintiff. Defendants further contracted and promised to protect Plaintiff's Sensitive Information.

41. Defendants promised to comply with all legal standards and to make sure that Plaintiff's health information and sensitive information were protected.

42. Defendants' promises to comply with all legal standards and to make sure that Plaintiff's health information and sensitive information were protected created an implied contract.

43. To the extent that it was not expressed, an implied contract was created whereby Defendants promised to safeguard Plaintiff's health information and sensitive information from being accessed, copied, and transferred by unauthorized third parties.

44. Under the implied contract, Defendants were further obligated to provide Plaintiff and those similarly situated with prompt and sufficient notice of any and all unauthorized access and/or theft of their Sensitive Information.

45. Defendants did not safeguard Plaintiff's health information and sensitive information and, therefore, breached its contract with Plaintiff.

46. Defendants allowed a third party without a business need to access Plaintiff's health information and sensitive information and, therefore, breached its contract with Plaintiff.

47. Furthermore, Defendants' failure to satisfy their confidentiality and privacy obligations resulted in Defendants providing services to Plaintiff that were of a diminished value.

48. As a direct and proximate result, Plaintiff and all others similarly situated have been harmed and/or injured.

COUNT IV

NEGLIGENCE

49. Plaintiff adopts and re-alleges all paragraphs set forth hereinabove as is fully set out herein.

50. Pursuant to the common law of West Virginia, the Defendants owed the Plaintiff a duty of reasonable care in protecting the confidentiality of the personal and private

information that Plaintiff provided to Defendants as a patient of a healthcare facility.

51. The minimum standard of reasonable care imposed on the Defendants is established and defined by multiple statutes, regulations, and judicial decisions of the State of West Virginia.

52. By permitting the unauthorized theft and access of Plaintiff's confidential and private information within its possession, Defendants were negligent in that they breached the duty of reasonable care they owed to the Plaintiff.

53. Furthermore, the Defendants' failure to reasonably encrypt its software, systems, and devices containing its consumers' sensitive information further evidences a breach of the duty of reasonable care that it owed the Plaintiff.

54. Defendants failed to timely inform Plaintiff of the breach and invasion of privacy. Defendants knew of the breach and invasion and took multiple actions to protect themselves and their own interests before protecting Plaintiff's interests or timely informing Plaintiff of the breach and invasion of privacy. Even when Defendants finally disclosed the breach and invasion to Plaintiff, Defendants failed to provide Plaintiff with all the important information needed to take all actions necessary to protect his interests and respond to the invasion and breach. Defendants have negligently, willfully, and recklessly withheld important information from the disclosure made to Plaintiff.

55. As a direct and proximate result of the Defendants' negligence, the Plaintiff and all others similarly situated have suffered damages, some of which are articulated throughout this Complaint.

56. Defendants' actions rose to the level beyond negligence and were committed willfully, wantonly, and with reckless indifference to the rights of others,

including Plaintiff and all others similarly situated.

57. As a direct and proximate result of Defendants' negligent, willful, wanton, and reckless conduct, Plaintiff and all others similarly situated are entitled to compensatory and punitive damages and hereby demand the same.

COUNT V

INVASION OF PRIVACY

58. Plaintiff adopts and re-alleges all paragraphs set forth hereinabove as is fully set out herein.

59. By disclosing Plaintiff's personal and sensitive medical information, the Defendants committed the tort of invasion of privacy.

60. Defendants invaded Plaintiff's privacy by, *inter alia*, unlawfully breaching and failing to reasonably protect Plaintiff's personal and highly Sensitive Information from reasonably foreseeable breach and invasion.

61. Defendants further invaded Plaintiff's privacy and extended the risks, damages and injuries to Plaintiff by failing to timely and fully disclose the breach and invasion of Plaintiff's privacy and failing to provide Plaintiff all the important information Plaintiff needs to know about the privacy and invasion.

62. As a proximate result, Plaintiff and all others similarly situated have been harmed and/or injured.

WHEREFORE, Plaintiff prays to this Court for the following relief for himself and those similarly situated against the Defendants:

- A. Class certification pursuant to Rule 23 of the *West Virginia Rules of Civil Procedure*.
- B. Find that Defendants are liable under all legal claims asserted herein for their failure to safeguard Plaintiff's and others similarly situated's Sensitive Information;
- C. Equitable relief as is necessary to protect Willard Bays' and others similarly situated's interests, including: (i) an order providing consumer credit protection and monitoring services for Plaintiff; (ii) maintenance of consumer credit insurance to provide coverage for unauthorized use of Plaintiff's personal information, medical information, and financial information; (iii) relief requiring that Defendant establish a specific device encryption security program to protect against the unauthorized disclosure of confidential information of its patients;
- D. Monetary damages in a sufficient amount to provide, to the furthest extent possible, adequate credit and identity protection and monitoring for an extended period of years, the length of which can be determined at trial;
- E. Plaintiff demands judgment against Defendants, jointly and severally, for compensatory and/or punitive damages, the sum to be determined by a jury, which will fairly and adequately compensate Plaintiff and others similarly situated for the above-described damages and injuries, together with interest from the

date of the incident and the costs of the proceeding, including attorney's fees;

- F. Monetary damages for the substantial annoyance, embarrassment and emotional distress suffered thus far, and that will inevitably continue to suffer as a result of the Defendants' actions, in amount to be determined at trial;
- G. Monetary damages to compensate for the permanent lack of security and loss of privacy that they have experienced to date and will continue to suffer in the future as a result of the Defendants' offensive conduct, in amount to be determined at trial;
- H. Award restitution for any identity theft, including, but not limited to payment of any other costs, including attorneys' fees incurred by the victim in clearing the victim's credit history or credit rating, or any costs incurred in connection with any civil or administrative proceeding to satisfy any debt, lien, or other obligation of the victim arising as the result of Defendants' actions;
- I. Award restitution in an amount to be determined by an accounting of the difference between the price Plaintiff paid in reliance upon Defendants' duty/promise to secure its members' Sensitive Information, and the actual services – devoid of proper protection mechanisms – rendered by Defendants;
- J. Prejudgment and post-judgment interest on any and all damages,

as provided by applicable law;

- K. Award Plaintiff his reasonable litigation expenses and attorneys' fees; and
- L. Such other and further relief as this Court deems appropriate.

PLAINTIFF DEMANDS A TRIAL BY JURY.

Willard Bays

By Counsel

/s/ William M. Tiano

William M. Tiano, Esquire (#4308)

Tony L. O'Dell, Esquire (#5770)

Cheryl A. Fisher, Esquire (#6379)

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Counsel for Plaintiffs

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Mac Warner
Secretary of State
State of West Virginia
Phone: 304-558-6000
886-767-8683
Visit us online:
www.wvsos.com

WAL-MART STORES EAST, LP
C. T. Corporation System
5098 WEST WASHINGTON STREET
SUITE 407
CHARLESTON, WV 25313

Control Number: 277331

Defendant: WAL-MART STORES EAST, LP
5098 WEST WASHINGTON STREET
SUITE 407
CHARLESTON, WV 25313 US

Agent: C. T. Corporation System

County: Mason

Civil Action: 21-C-49

Certified Number: 92148901125134100003146937

Service Date: 7/19/2021

I am enclosing:

1 summons and complaint

which was served on the Secretary at the State Capitol as your statutory attorney-in-fact. According to law, I have accepted service of process in your name and on your behalf.

Please note that this office has no connection whatsoever with the enclosed documents other than to accept service of process in your name and on your behalf as your attorney-in-fact. Please address any questions about this document directly to the court or the plaintiff's attorney, shown in the enclosed paper, not to the Secretary of State's office.

Sincerely,

A handwritten signature in cursive script that reads "Mac Warner".

Mac Warner
Secretary of State

SUMMONS

E-FILED: 7/15/2021 11:25 AM
CC: 26-2021-G-49
Mason County Circuit Clerk
Elizabeth Jones

IN THE CIRCUIT OF MASON WEST VIRGINIA
Willard Bays v. Walmart Inc.

Service Type: Plaintiff - Secretary of State

NOTICE TO: Wal-Mart Stores East, LP, CT Corporation, 5098 Washington St., W., Suite 407, Charleston, WV 25313
THE COMPLAINT WHICH IS ATTACHED TO THIS SUMMONS IS IMPORTANT AND YOU MUST TAKE IMMEDIATE ACTION TO PROTECT YOUR RIGHTS. YOU OR YOUR ATTORNEY ARE REQUIRED TO FILE THE ORIGINAL OF YOUR WRITTEN ANSWER, EITHER ADMITTING OR DENYING EACH ALLEGATION IN THE COMPLAINT WITH THE CLERK OF THIS COURT. A COPY OF YOUR ANSWER MUST BE MAILED OR HAND DELIVERED BY YOU OR YOUR ATTORNEY TO THE OPPOSING PARTY'S ATTORNEY:

William Tiano, PO Box 11830, Charleston, WV 25339

THE ANSWER MUST BE MAILED WITHIN 30 DAYS AFTER THIS SUMMONS AND COMPLAINT WERE DELIVERED TO YOU OR A JUDGMENT BY DEFAULT MAY BE ENTERED AGAINST YOU FOR THE MONEY OR OTHER THINGS DEMANDED IN THE COMPLAINT.

SERVICE:

7/15/2021 11:25:06 AM

Date

/s/ Elizabeth Jones

Clerk

ACCEPTED FOR SERVICE OF PROCESS
2021 JUL 19 P 4:31
SECRETARY OF STATE
STATE OF WEST VIRGINIA

RETURN ON SERVICE:

- Return receipt of certified mail received in this office on _____
- I certify that I personally delivered a copy of the Summons and Complaint to _____

Not Found in Bailiwick

Date

Server's Signature



IN THE CIRCUIT COURT OF MASON COUNTY, WEST VIRGINIA

WILLARD BAYS,
individually and on behalf of all
others similarly situated,

Plaintiff,

v.

CIVIL ACTION NO. _____

Judge _____

WALMART INC., a Delaware
corporation, WAL-MART STORES
EAST, LP, a Delaware corporation,
and NEC NETWORKS, LLC,
a Texas corporation,

Defendants.

COMPLAINT

COMES NOW the Plaintiff, Willard Bays, by counsel, Tiano O'Dell, PLLC, and brings this action against Defendants, Walmart Inc., and NEC Networks, LLC, to obtain class action relief, damages, restitution, and equitable relief for himself and others similarly situated.

1. Plaintiff, Willard Bays, is an individual who at all times relevant herein resided in Mason County, West Virginia

2. Defendant, Walmart Inc., is a Delaware corporation with its headquarters in Bentonville, Arkansas, and it provides healthcare services to West Virginia residents. This entity owned and operated pharmacies located in West Virginia at all times as alleged herein, and does business in Mason County, West Virginia, at all times as alleged herein.

3. Defendant, Wal-Mart Stores East, LP, is a limited partnership with its headquarters in Bentonville, Arkansas, and it provides healthcare services to West Virginia residents. This entity owned and operated pharmacies located in West Virginia at all times as alleged herein. Upon information and belief, Wal-Mart Stores East, LP, is comprised of several layers of business entities of Walmart, Inc. This Defendant does business in Mason County, West Virginia, at all times as alleged herein.

4. Defendant, NEC Networks, LLC, is a corporation organized and existing under the laws of the State of Texas and doing business in the State of West Virginia at all times as alleged herein. This entity does business as CaptureRx at all relevant times. CaptureRx, along with Walmart Inc., was entrusted with Plaintiff's sensitive personal information.¹

5. Plaintiff is a patient and customer of the Defendants. Defendants collect and maintain possession, custody, and control of a wide variety of Plaintiff's medical, financial, and sensitive information in the regular course of business.

6. Defendants had a legal and fiduciary obligation to protect Plaintiff's sensitive information as a condition of their relationship with Plaintiff and right to conduct business.

7. The obligation to protect Plaintiff's sensitive information was included as a material term, with value, in the services provided by the Defendants and was considered a benefit of the bargain for which Defendants and the Plaintiff exchanged consideration. Upon information and belief, a portion of the consideration accepted by the Defendants was done so upon condition of and in recognition of Defendants' obligation to protect and secure sensitive information and ensuring legal compliance. This allocation was made for the purpose of offering

¹ Sensitive information includes full name, Social Security Number, date of birth, home address, account number, insurance information, extremely sensitive medical diagnoses and treatment records, private treatment information, diagnosis codes, and other legally protected information.

patients and customers, such as Plaintiff, value added to the services provided by agreeing to protect Sensitive Information.

8. Defendants failed to take reasonable and adequate actions to protect Plaintiff's sensitive information from reasonably foreseeable invasion of privacy risks.

9. Defendants stored Plaintiff's sensitive information in an electronic location and format that was not reasonably protected, guarded, secured, and/or was otherwise unreasonably accessible in an unprotected electronic and/or physical location. Defendants also failed to sufficiently invest in privacy protection safeguards, failed to properly train, audit, test, and supervise employees to safeguard devices and systems containing Plaintiff's Sensitive Information. Further Defendants failed to reasonably audit, monitor, and maintain the security of its software, systems, and access to Plaintiff's Sensitive Information.

10. Defendant did not adequately protect Plaintiff's Sensitive Information, and Plaintiff's financial, insurance, health information, and physician-patient confidential relationship has been breached.

11. Defendant did not provide adequate security measures or appropriate employee supervision to protect Plaintiff's Sensitive Information.

12. Plaintiff's personal and sensitive information was viewed by individuals who did not have a business need to access the information. While Plaintiff's sensitive information was accessed on or about February 6, 2021, Plaintiff did not receive notice of the breach until nearly three months later.

13. Defendants failed to take reasonable actions to timely disclose and provide notice of the breach to Plaintiff. Defendants placed its own interests and needs before Plaintiff's interests in responding to and investigating the breach.

14. Defendants designed and implemented their policies and procedures regarding the security of protected health information and Sensitive Information. These policies and procedures failed to adhere to reasonable and best industry practices in safeguarding protected health information and other Sensitive Information. Further, Defendants failed to have proper security on computer servers or other storage devices or software to protect the Plaintiff's Sensitive Information.

15. Willard Bays' most intimate, private, and severely personal medical records were breached due to the Defendant's above described failures and Plaintiff has suffered significant loss, injury and damages.

16. On or about May 5, 2021, Defendant, NEC Networks, LLC, sent a medical data breach notice to Plaintiff describing activity wherein third parties unlawfully accessed Plaintiff's sensitive medical and personal identity information without a business need and which resulted in Plaintiff's personal sensitive information being unlawfully exposed to third party or parties. Defendant, Walmart Inc., owes a duty to the Plaintiffs to safeguard this information and upon information and belief contracted with the Defendant NEC Networks, LLC d/b/a CaptureRx for electronic medical record provider services and storage.

17. CaptureRx failed to reasonably monitor its employees' conduct and failed to reasonably monitor systems to safeguard Plaintiff's personal sensitive information entrusted to it for protection.

18. As a result of Defendants' failure to follow contractually agreed upon, legally required, industry-standard security procedures, Plaintiff received only diminished value of the services which the Defendants provided. Plaintiff contracted for services that included a guarantee by Defendants to safeguard his personal and Sensitive Information. Instead, Plaintiff

received services devoid of these very important protections. Accordingly, the Plaintiff seeks claims for breach of contract, breach of implied contract, unjust enrichment, negligence, invasion of privacy, and breach of confidentiality, and violation of the West Virginia Consumer and Protection Credit Act.

19. The Plaintiff, Willard Bays, brings this suit on behalf of himself and all other persons who were similarly situated related to a breach of security and disclosure of sensitive information to unauthorized third parties by Defendants.

20. The Plaintiff brings this action and further seeks certification on behalf of herself and the putative class members she seeks to represent under West Virginia Rule of Civil Procedure, Rule 23(b)(3), the class is defined as follows:

All persons whose sensitive information in the possession of Defendants was compromised as a result of a security breach which occurred on or around February 6, 2021.

21. This action is properly brought as a class action for the following reasons:

a. The class is numerous and includes a significant number of patients living in and around West Virginia. Joining each class member as a co-plaintiff would be unreasonable and impracticable.

b. There are common questions of law and of fact to the members of the class that predominate over any individual questions affecting individual class members. The theories of liability and questions of Defendants' wrongful conduct related to the security breach apply to all class members. Plaintiff requests common theories of liability against the Defendants which are common to the class as a whole and do not turn on any particular aspect of

an individual class member's situation. Defendants acted in a manner that affected all putative class members similarly.

c. The claims asserted by Plaintiff are typical of the members of the class.

d. The Plaintiff will fairly and adequately protect the interests of the members of the class. The interests of the members of the class are coincident with and not antagonistic to Plaintiff. Further, Plaintiff is represented by experienced class action counsel with adequate resources to prosecute the case.

e. This class action is an appropriate method of the fair and efficient adjudication of this controversy because:

i. There is no special interest by class members in individually controlling the prosecution of separate actions;

ii. When Defendants' liability has been adjudicated, claims of all class members can be administered efficiently under the direction of/or as determined by the Court;

iii. This action will promote an orderly and expeditious administration and adjudication of the class claims, economies of time, effort, and resources will be fostered, and uniformity of decisions will be insured;

iv. Without a class action, Plaintiff and the class will suffer damages and Defendants' violations of law will proceed without remedy while Defendants reap and retain the substantial proceeds of its misleading and wrongful conduct; and

v. There will be no insurmountable difficulty in the management of this lawsuit as a class action.

vi. The conduct of this action conserves the resources of the parties and the court system, protects the rights of each member of the class, and meets all due process requirements.

vii. Certification of the class with respect to particular common factual and legal issues concerning liability, as well as the necessary and appropriate quantum of punitive damages, or ratio of punitive damages to actual harm, is appropriate under West Virginia Rule of Civil Procedure 23(c)(4).

viii. The particular common issues of liability, damages, and the quantum of punitive damages or ratio of punitive damages to actual harm, are common to all Class Members.

22. The liability arising from Defendants' conduct may be tried on a class-wide basis, as the trial will focus upon only common questions applicable to the entire class.

COUNT I

BREACH OF THE DUTY OF CONFIDENTIALITY

23. Plaintiff adopts and re-alleges all paragraphs set forth hereinabove as is fully set out herein.

24. Defendants owed the Plaintiff a duty of confidentiality pursuant to the terms of its legal and fiduciary relationship with Plaintiff as a health care provider and entity storing and maintaining health care and private sensitive information.

25. Included in this duty owed by Defendants is one of undivided secrecy and loyalty to Plaintiff as a patient and protector of health care information. This duty is critical to encourage the free exchange of information between patients and their

healthcare providers.

26. The minimum standard of care imposed on Defendants in maintaining the confidentiality of Plaintiff's sensitive information is expressed in multiple statutes, regulations, and judicial decisions of the State of West Virginia.

27. The Defendants breached its duty to the Plaintiff through the unauthorized disclosure, breach, and/or publication of personal and private information, and thus violated the Plaintiff's right to have this information kept confidential.

28. Such a violation breaches the trust that represents the core of the fiduciary relationship between Plaintiff as a patient and Defendants as healthcare provider, and entity storing and maintaining health care information.

29. As a direct and proximate result of Defendants' breach of the duty of confidentiality, Plaintiff and all others similarly situated have suffered damages and breach of the confidential physician-patient relationship.

30. Defendants' actions were committed willfully, wantonly, and with reckless indifference to the rights of others, including Plaintiff and all others similarly situated.

31. As a direct and proximate result of Defendants' willful, wanton, and reckless conduct, Plaintiff and all others similarly situated are entitled to compensatory and punitive damages and hereby demand the same.

COUNT II

UNJUST ENRICHMENT

32. Plaintiff adopts and re-alleges all paragraphs set forth hereinabove as is fully set out herein.

33. Defendants, Walmart Inc., and its contractual entity, Defendant NEC Networks, received payment to perform services that included protecting Plaintiff's Sensitive Information.

34. Defendants did not protect Plaintiff's highly sensitive information but retained payments for services to Plaintiff.

35. Defendants have knowledge of said benefit.

36. Defendants have been unjustly enriched and it would be inequitable for Defendant to retain payments for services to Plaintiff.

37. As a direct and proximate result, Plaintiff and all others similarly situated have been harmed and/or injured.

COUNT III

BREACH OF CONTRACT (express and implied)

38. Plaintiff adopts and re-alleges all paragraphs set forth hereinabove as is fully set out herein.

39. Defendants were legally and contractually obligated to protect Plaintiff's health information and Sensitive Information as a condition of conducting business and engaging in their contractual relationships with regard to the services provided to Plaintiff.

40. Defendants promised and contracted to only disclose health information when required to do so by law or with express consent by Plaintiff. Defendants further contracted and promised to protect Plaintiff's Sensitive Information.

41. Defendants promised to comply with all legal standards and to make sure that Plaintiff's health information and sensitive information were protected.

42. Defendants' promises to comply with all legal standards and to make sure that Plaintiff's health information and sensitive information were protected created an implied contract.

43. To the extent that it was not expressed, an implied contract was created whereby Defendants promised to safeguard Plaintiff's health information and sensitive information from being accessed, copied, and transferred by unauthorized third parties.

44. Under the implied contract, Defendants were further obligated to provide Plaintiff and those similarly situated with prompt and sufficient notice of any and all unauthorized access and/or theft of their Sensitive Information.

45. Defendants did not safeguard Plaintiff's health information and sensitive information and, therefore, breached its contract with Plaintiff.

46. Defendants allowed a third party without a business need to access Plaintiff's health information and sensitive information and, therefore, breached its contract with Plaintiff.

47. Furthermore, Defendants' failure to satisfy their confidentiality and privacy obligations resulted in Defendants providing services to Plaintiff that were of a diminished value.

48. As a direct and proximate result, Plaintiff and all others similarly situated have been harmed and/or injured.

COUNT IV

NEGLIGENCE

49. Plaintiff adopts and re-alleges all paragraphs set forth hereinabove as is fully set out herein.

50. Pursuant to the common law of West Virginia, the Defendants owed the Plaintiff a duty of reasonable care in protecting the confidentiality of the personal and private

information that Plaintiff provided to Defendants as a patient of a healthcare facility.

51. The minimum standard of reasonable care imposed on the Defendants is established and defined by multiple statutes, regulations, and judicial decisions of the State of West Virginia.

52. By permitting the unauthorized theft and access of Plaintiff's confidential and private information within its possession, Defendants were negligent in that they breached the duty of reasonable care they owed to the Plaintiff.

53. Furthermore, the Defendants' failure to reasonably encrypt its software, systems, and devices containing its consumers' sensitive information further evidences a breach of the duty of reasonable care that it owed the Plaintiff.

54. Defendants failed to timely inform Plaintiff of the breach and invasion of privacy. Defendants knew of the breach and invasion and took multiple actions to protect themselves and their own interests before protecting Plaintiff's interests or timely informing Plaintiff of the breach and invasion of privacy. Even when Defendants finally disclosed the breach and invasion to Plaintiff, Defendants failed to provide Plaintiff with all the important information needed to take all actions necessary to protect his interests and respond to the invasion and breach. Defendants have negligently, willfully, and recklessly withheld important information from the disclosure made to Plaintiff.

55. As a direct and proximate result of the Defendants' negligence, the Plaintiff and all others similarly situated have suffered damages, some of which are articulated throughout this Complaint.

56. Defendants' actions rose to the level beyond negligence and were committed willfully, wantonly, and with reckless indifference to the rights of others,

including Plaintiff and all others similarly situated.

57. As a direct and proximate result of Defendants' negligent, willful, wanton, and reckless conduct, Plaintiff and all others similarly situated are entitled to compensatory and punitive damages and hereby demand the same.

COUNT V

INVASION OF PRIVACY

58. Plaintiff adopts and re-alleges all paragraphs set forth hereinabove as is fully set out herein.

59. By disclosing Plaintiff's personal and sensitive medical information, the Defendants committed the tort of invasion of privacy.

60. Defendants invaded Plaintiff's privacy by, *inter alia*, unlawfully breaching and failing to reasonably protect Plaintiff's personal and highly Sensitive Information from reasonably foreseeable breach and invasion.

61. Defendants further invaded Plaintiff's privacy and extended the risks, damages and injuries to Plaintiff by failing to timely and fully disclose the breach and invasion of Plaintiff's privacy and failing to provide Plaintiff all the important information Plaintiff needs to know about the privacy and invasion.

62. As a proximate result, Plaintiff and all others similarly situated have been harmed and/or injured.

WHEREFORE, Plaintiff prays to this Court for the following relief for himself and those similarly situated against the Defendants:

- A. Class certification pursuant to Rule 23 of the *West Virginia Rules of Civil Procedure*.
- B. Find that Defendants are liable under all legal claims asserted herein for their failure to safeguard Plaintiff's and others similarly situated's Sensitive Information;
- C. Equitable relief as is necessary to protect Willard Bays' and others similarly situated's interests, including: (i) an order providing consumer credit protection and monitoring services for Plaintiff; (ii) maintenance of consumer credit insurance to provide coverage for unauthorized use of Plaintiff's personal information, medical information, and financial information; (iii) relief requiring that Defendant establish a specific device encryption security program to protect against the unauthorized disclosure of confidential information of its patients;
- D. Monetary damages in a sufficient amount to provide, to the furthest extent possible, adequate credit and identity protection and monitoring for an extended period of years, the length of which can be determined at trial;
- E. Plaintiff demands judgment against Defendants, jointly and severally, for compensatory and/or punitive damages, the sum to be determined by a jury, which will fairly and adequately compensate Plaintiff and others similarly situated for the above-described damages and injuries, together with interest from the

date of the incident and the costs of the proceeding, including attorney's fees;

- F. Monetary damages for the substantial annoyance, embarrassment and emotional distress suffered thus far, and that will inevitably continue to suffer as a result of the Defendants' actions, in amount to be determined at trial;
- G. Monetary damages to compensate for the permanent lack of security and loss of privacy that they have experienced to date and will continue to suffer in the future as a result of the Defendants' offensive conduct, in amount to be determined at trial;
- H. Award restitution for any identity theft, including, but not limited to payment of any other costs, including attorneys' fees incurred by the victim in clearing the victim's credit history or credit rating, or any costs incurred in connection with any civil or administrative proceeding to satisfy any debt, lien, or other obligation of the victim arising as the result of Defendants' actions;
- I. Award restitution in an amount to be determined by an accounting of the difference between the price Plaintiff paid in reliance upon Defendants' duty/promise to secure its members' Sensitive Information, and the actual services – devoid of proper protection mechanisms – rendered by Defendants;
- J. Prejudgment and post-judgment interest on any and all damages,

as provided by applicable law;

- K. Award Plaintiff his reasonable litigation expenses and attorneys' fees; and
- L. Such other and further relief as this Court deems appropriate.

PLAINTIFF DEMANDS A TRIAL BY JURY.

Willard Bays

By Counsel

/s/ William M. Tiano
William M. Tiano, Esquire (#4308)
Tony L. O'Dell, Esquire (#5770)
Cheryl A. Fisher, Esquire (#6379)
TIANO O'DELL, PLLC
P.O. Box 11830
Charleston, WV 25339
(304) 720-6700
wtiano@tolawfirm.com
Counsel for Plaintiffs

EXHIBIT B

Court: Circuit County: 26 - Mason Case Number: CC-26-2021-C-49
 Judge: Richard Tatterson Created Date: 7/15/2021 Status: Open
 Case Type: Civil Case Sub-Type: Other Security Level: Public
 Style: Willard Bays v. Walmart Inc.

	Entered Date	Event	Ref. Code	Description
1	7/15/2021 11:25:08 AM	E-Filed		Complaint
2	7/15/2021 11:25:08 AM	Judge Assigned	J-26002	Richard Tatterson
3	7/15/2021 11:25:08 AM	Party Added	P-001	Willard Bays
4	7/15/2021 11:25:08 AM	Party Added	D-001	Walmart Inc.
5	7/15/2021 11:25:08 AM	Party Added	D-002	Wal-Mart Stores East, LP
6	7/15/2021 11:25:08 AM	Party Added	D-003	NEC Networks, LLC
7	7/15/2021 11:25:08 AM	Attorney Listed	P-001	A-4308 - William M. Tiano
8	7/15/2021 11:25:08 AM	Service Requested	D-001	Plaintiff - Secretary of State
9	7/15/2021 11:25:08 AM	Service Requested	D-002	Plaintiff - Secretary of State
10	7/15/2021 11:25:08 AM	Service Requested	D-003	Plaintiff - Secretary of State
11	7/20/2021 9:00:43 AM	Document Emailed		Court user emailed aammons@mlclaw.com document 1-2 - Complaint - Complaint
12	7/23/2021 1:26:11 PM	E-Docketed		Service Return - SERVICE RETURN -WV SECRETARY OF STATE SERVED WALMART INC.,1 SUMMONS AND COMPLAINT-SERVICE DATE 07/19/2021-92148901125134100003146920.
13	7/23/2021 1:39:59 PM	E-Docketed		Service Return - SERVICE RETURN -WV SECRETARY OF STATE SERVED WALMART STORES EAST, LP,1 SUMMONS AND COMPLAINT-SERVICE DATE 07/19/2021 - 92148901125134100003146937.
14	7/23/2021 1:43:29 PM	E-Docketed		Supporting Documents - SERVICE RETURN -WV SECRETARY OF STATE SERVED NEC NETWORKS,LLC, 1 SUMMONS AND COMPLAINT-SERVICE DATE 07/19/2021 - 92148901125134100003146944.
15	8/2/2021 4:04:30 PM	Miscellaneous Fee Paid	D-003	Paid Miscellaneous Fee - Clerk's Fees - Copies/ARL, Amount: \$18.00

TRUE COPY TESTE Elizabeth A. Jones
 MASON COUNTY CIRCUIT CLERK

EXHIBIT C

IN THE CIRCUIT COURT OF MASON COUNTY, WEST VIRGINIA

**WILLARD BAYS,
individually and on behalf of all
others similarly situated,**

Plaintiff,

v.

CIVIL ACTION NO. _____

Judge _____

**WALMART INC., a Delaware
corporation, WAL-MART STORES
EAST, LP, a Delaware corporation,
and NEC NETWORKS, LLC,
a Texas corporation,**

Defendants.

COMPLAINT

COMES NOW the Plaintiff, Willard Bays, by counsel, Tiano O'Dell, PLLC, and brings this action against Defendants, Walmart Inc., and NEC Networks, LLC, to obtain class action relief, damages, restitution, and equitable relief for himself and others similarly situated.

1. Plaintiff, Willard Bays, is an individual who at all times relevant herein resided in Mason County, West Virginia

2. Defendant, Walmart Inc., is a Delaware corporation with its headquarters in Bentonville, Arkansas, and it provides healthcare services to West Virginia residents. This entity owned and operated pharmacies located in West Virginia at all times as alleged herein, and does business in Mason County, West Virginia, at all times as alleged herein.

3. Defendant, Wal-Mart Stores East, LP, is a limited partnership with its headquarters in Bentonville, Arkansas, and it provides healthcare services to West Virginia residents. This entity owned and operated pharmacies located in West Virginia at all times as alleged herein. Upon information and belief, Wal-Mart Stores East, LP, is comprised of several layers of business entities of Walmart, Inc. This Defendant does business in Mason County, West Virginia, at all times as alleged herein.

4. Defendant, NEC Networks, LLC, is a corporation organized and existing under the laws of the State of Texas and doing business in the State of West Virginia at all times as alleged herein. This entity does business as CaptureRx at all relevant times. CaptureRx, along with Walmart Inc., was entrusted with Plaintiff's sensitive personal information.¹

5. Plaintiff is a patient and customer of the Defendants. Defendants collect and maintain possession, custody, and control of a wide variety of Plaintiff's medical, financial, and sensitive information in the regular course of business.

6. Defendants had a legal and fiduciary obligation to protect Plaintiff's sensitive information as a condition of their relationship with Plaintiff and right to conduct business.

7. The obligation to protect Plaintiff's sensitive information was included as a material term, with value, in the services provided by the Defendants and was considered a benefit of the bargain for which Defendants and the Plaintiff exchanged consideration. Upon information and belief, a portion of the consideration accepted by the Defendants was done so upon condition of and in recognition of Defendants' obligation to protect and secure sensitive information and ensuring legal compliance. This allocation was made for the purpose of offering

¹ Sensitive information includes full name, Social Security Number, date of birth, home address, account number, insurance information, extremely sensitive medical diagnoses and treatment records, private treatment information, diagnosis codes, and other legally protected information.

patients and customers, such as Plaintiff, value added to the services provided by agreeing to protect Sensitive Information.

8. Defendants failed to take reasonable and adequate actions to protect Plaintiff's sensitive information from reasonably foreseeable invasion of privacy risks.

9. Defendants stored Plaintiff's sensitive information in an electronic location and format that was not reasonably protected, guarded, secured, and/or was otherwise unreasonably accessible in an unprotected electronic and/or physical location. Defendants also failed to sufficiently invest in privacy protection safeguards, failed to properly train, audit, test, and supervise employees to safeguard devices and systems containing Plaintiff's Sensitive Information. Further Defendants failed to reasonably audit, monitor, and maintain the security of its software, systems, and access to Plaintiff's Sensitive Information.

10. Defendant did not adequately protect Plaintiff's Sensitive Information, and Plaintiff's financial, insurance, health information, and physician-patient confidential relationship has been breached.

11. Defendant did not provide adequate security measures or appropriate employee supervision to protect Plaintiff's Sensitive Information.

12. Plaintiff's personal and sensitive information was viewed by individuals who did not have a business need to access the information. While Plaintiff's sensitive information was accessed on or about February 6, 2021, Plaintiff did not receive notice of the breach until nearly three months later.

13. Defendants failed to take reasonable actions to timely disclose and provide notice of the breach to Plaintiff. Defendants placed its own interests and needs before Plaintiff's interests in responding to and investigating the breach.

14. Defendants designed and implemented their policies and procedures regarding the security of protected health information and Sensitive Information. These policies and procedures failed to adhere to reasonable and best industry practices in safeguarding protected health information and other Sensitive Information. Further, Defendants failed to have proper security on computer servers or other storage devices or software to protect the Plaintiff's Sensitive Information.

15. Willard Bays' most intimate, private, and severely personal medical records were breached due to the Defendant's above described failures and Plaintiff has suffered significant loss, injury and damages.

16. On or about May 5, 2021, Defendant, NEC Networks, LLC, sent a medical data breach notice to Plaintiff describing activity wherein third parties unlawfully accessed Plaintiff's sensitive medical and personal identity information without a business need and which resulted in Plaintiff's personal sensitive information being unlawfully exposed to third party or parties. Defendant, Walmart Inc., owes a duty to the Plaintiffs to safeguard this information and upon information and belief contracted with the Defendant NEC Networks, LLC d/b/a CaptureRx for electronic medical record provider services and storage.

17. CaptureRx failed to reasonably monitor its employees' conduct and failed to reasonably monitor systems to safeguard Plaintiff's personal sensitive information entrusted to it for protection.

18. As a result of Defendants' failure to follow contractually agreed upon, legally required, industry-standard security procedures, Plaintiff received only diminished value of the services which the Defendants provided. Plaintiff contracted for services that included a guarantee by Defendants to safeguard his personal and Sensitive Information. Instead, Plaintiff

received services devoid of these very important protections. Accordingly, the Plaintiff seeks claims for breach of contract, breach of implied contract, unjust enrichment, negligence, invasion of privacy, and breach of confidentiality, and violation of the West Virginia Consumer and Protection Credit Act.

19. The Plaintiff, Willard Bays, brings this suit on behalf of himself and all other persons who were similarly situated related to a breach of security and disclosure of sensitive information to unauthorized third parties by Defendants.

20. The Plaintiff brings this action and further seeks certification on behalf of himself and the putative class members she seeks to represent under West Virginia Rule of Civil Procedure, Rule 23(b)(3), the class is defined as follows:

All persons whose sensitive information in the possession of Defendants was compromised as a result of a security breach which occurred on or around February 6, 2021.

21. This action is properly brought as a class action for the following reasons:

a. The class is numerous and includes a significant number of patients living in and around West Virginia. Joining each class member as a co-plaintiff would be unreasonable and impracticable.

b. There are common questions of law and of fact to the members of the class that predominate over any individual questions affecting individual class members. The theories of liability and questions of Defendants' wrongful conduct related to the security breach apply to all class members. Plaintiff requests common theories of liability against the Defendants which are common to the class as a whole and do not turn on any particular aspect of

an individual class member's situation. Defendants acted in a manner that affected all putative class members similarly.

c. The claims asserted by Plaintiff are typical of the members of the class.

d. The Plaintiff will fairly and adequately protect the interests of the members of the class. The interests of the members of the class are coincident with and not antagonistic to Plaintiff. Further, Plaintiff is represented by experienced class action counsel with adequate resources to prosecute the case.

e. This class action is an appropriate method of the fair and efficient adjudication of this controversy because:

i. There is no special interest by class members in individually controlling the prosecution of separate actions;

ii. When Defendants' liability has been adjudicated, claims of all class members can be administered efficiently under the direction of/or as determined by the Court;

iii. This action will promote an orderly and expeditious administration and adjudication of the class claims, economies of time, effort, and resources will be fostered, and uniformity of decisions will be insured;

iv. Without a class action, Plaintiff and the class will suffer damages and Defendants' violations of law will proceed without remedy while Defendants reap and retain the substantial proceeds of its misleading and wrongful conduct; and

v. There will be no insurmountable difficulty in the management of this lawsuit as a class action.

vi. The conduct of this action conserves the resources of the parties and the court system, protects the rights of each member of the class, and meets all due process requirements.

vii. Certification of the class with respect to particular common factual and legal issues concerning liability, as well as the necessary and appropriate quantum of punitive damages, or ratio of punitive damages to actual harm, is appropriate under West Virginia Rule of Civil Procedure 23(c)(4).

viii. The particular common issues of liability, damages, and the quantum of punitive damages or ratio of punitive damages to actual harm, are common to all Class Members.

22. The liability arising from Defendants' conduct may be tried on a class-wide basis, as the trial will focus upon only common questions applicable to the entire class.

COUNT I

BREACH OF THE DUTY OF CONFIDENTIALITY

23. Plaintiff adopts and re-alleges all paragraphs set forth hereinabove as is fully set out herein.

24. Defendants owed the Plaintiff a duty of confidentiality pursuant to the terms of its legal and fiduciary relationship with Plaintiff as a health care provider and entity storing and maintaining health care and private sensitive information.

25. Included in this duty owed by Defendants is one of undivided secrecy and loyalty to Plaintiff as a patient and protector of health care information. This duty is critical to encourage the free exchange of information between patients and their

healthcare providers.

26. The minimum standard of care imposed on Defendants in maintaining the confidentiality of Plaintiff's sensitive information is expressed in multiple statutes, regulations, and judicial decisions of the State of West Virginia.

27. The Defendants breached its duty to the Plaintiff through the unauthorized disclosure, breach, and/or publication of personal and private information, and thus violated the Plaintiff's right to have this information kept confidential.

28. Such a violation breaches the trust that represents the core of the fiduciary relationship between Plaintiff as a patient and Defendants as healthcare provider, and entity storing and maintaining health care information.

29. As a direct and proximate result of Defendants' breach of the duty of confidentiality, Plaintiff and all others similarly situated have suffered damages and breach of the confidential physician-patient relationship.

30. Defendants' actions were committed willfully, wantonly, and with reckless indifference to the rights of others, including Plaintiff and all others similarly situated.

31. As a direct and proximate result of Defendants' willful, wanton, and reckless conduct, Plaintiff and all others similarly situated are entitled to compensatory and punitive damages and hereby demand the same.

COUNT II

UNJUST ENRICHMENT

32. Plaintiff adopts and re-alleges all paragraphs set forth hereinabove as is fully set out herein.

33. Defendants, Walmart Inc., and its contractual entity, Defendant NEC Networks, received payment to perform services that included protecting Plaintiff's Sensitive Information.

34. Defendants did not protect Plaintiff's highly sensitive information but retained payments for services to Plaintiff.

35. Defendants have knowledge of said benefit.

36. Defendants have been unjustly enriched and it would be inequitable for Defendant to retain payments for services to Plaintiff.

37. As a direct and proximate result, Plaintiff and all others similarly situated have been harmed and/or injured.

COUNT III

BREACH OF CONTRACT (express and implied)

38. Plaintiff adopts and re-alleges all paragraphs set forth hereinabove as is fully set out herein.

39. Defendants were legally and contractually obligated to protect Plaintiff's health information and Sensitive Information as a condition of conducting business and engaging in their contractual relationships with regard to the services provided to Plaintiff.

40. Defendants promised and contracted to only disclose health information when required to do so by law or with express consent by Plaintiff. Defendants further contracted and promised to protect Plaintiff's Sensitive Information.

41. Defendants promised to comply with all legal standards and to make sure that Plaintiff's health information and sensitive information were protected.

42. Defendants' promises to comply with all legal standards and to make sure that Plaintiff's health information and sensitive information were protected created an implied contract.

43. To the extent that it was not expressed, an implied contract was created whereby Defendants promised to safeguard Plaintiff's health information and sensitive information from being accessed, copied, and transferred by unauthorized third parties.

44. Under the implied contract, Defendants were further obligated to provide Plaintiff and those similarly situated with prompt and sufficient notice of any and all unauthorized access and/or theft of their Sensitive Information.

45. Defendants did not safeguard Plaintiff's health information and sensitive information and, therefore, breached its contract with Plaintiff.

46. Defendants allowed a third party without a business need to access Plaintiff's health information and sensitive information and, therefore, breached its contract with Plaintiff.

47. Furthermore, Defendants' failure to satisfy their confidentiality and privacy obligations resulted in Defendants providing services to Plaintiff that were of a diminished value.

48. As a direct and proximate result, Plaintiff and all others similarly situated have been harmed and/or injured.

COUNT IV

NEGLIGENCE

49. Plaintiff adopts and re-alleges all paragraphs set forth hereinabove as is fully set out herein.

50. Pursuant to the common law of West Virginia, the Defendants owed the Plaintiff a duty of reasonable care in protecting the confidentiality of the personal and private

information that Plaintiff provided to Defendants as a patient of a healthcare facility.

51. The minimum standard of reasonable care imposed on the Defendants is established and defined by multiple statutes, regulations, and judicial decisions of the State of West Virginia.

52. By permitting the unauthorized theft and access of Plaintiff's confidential and private information within its possession, Defendants were negligent in that they breached the duty of reasonable care they owed to the Plaintiff.

53. Furthermore, the Defendants' failure to reasonably encrypt its software, systems, and devices containing its consumers' sensitive information further evidences a breach of the duty of reasonable care that it owed the Plaintiff.

54. Defendants failed to timely inform Plaintiff of the breach and invasion of privacy. Defendants knew of the breach and invasion and took multiple actions to protect themselves and their own interests before protecting Plaintiff's interests or timely informing Plaintiff of the breach and invasion of privacy. Even when Defendants finally disclosed the breach and invasion to Plaintiff, Defendants failed to provide Plaintiff with all the important information needed to take all actions necessary to protect his interests and respond to the invasion and breach. Defendants have negligently, willfully, and recklessly withheld important information from the disclosure made to Plaintiff.

55. As a direct and proximate result of the Defendants' negligence, the Plaintiff and all others similarly situated have suffered damages, some of which are articulated throughout this Complaint.

56. Defendants' actions rose to the level beyond negligence and were committed willfully, wantonly, and with reckless indifference to the rights of others,

including Plaintiff and all others similarly situated.

57. As a direct and proximate result of Defendants' negligent, willful, wanton, and reckless conduct, Plaintiff and all others similarly situated are entitled to compensatory and punitive damages and hereby demand the same.

COUNT V

INVASION OF PRIVACY

58. Plaintiff adopts and re-alleges all paragraphs set forth hereinabove as is fully set out herein.

59. By disclosing Plaintiff's personal and sensitive medical information, the Defendants committed the tort of invasion of privacy.

60. Defendants invaded Plaintiff's privacy by, *inter alia*, unlawfully breaching and failing to reasonably protect Plaintiff's personal and highly Sensitive Information from reasonably foreseeable breach and invasion.

61. Defendants further invaded Plaintiff's privacy and extended the risks, damages and injuries to Plaintiff by failing to timely and fully disclose the breach and invasion of Plaintiff's privacy and failing to provide Plaintiff all the important information Plaintiff needs to know about the privacy and invasion.

62. As a proximate result, Plaintiff and all others similarly situated have been harmed and/or injured.

WHEREFORE, Plaintiff prays to this Court for the following relief for himself and those similarly situated against the Defendants:

- A. Class certification pursuant to Rule 23 of the *West Virginia Rules of Civil Procedure*.
- B. Find that Defendants are liable under all legal claims asserted herein for their failure to safeguard Plaintiff's and others similarly situated's Sensitive Information;
- C. Equitable relief as is necessary to protect Willard Bays' and others similarly situated's interests, including: (i) an order providing consumer credit protection and monitoring services for Plaintiff; (ii) maintenance of consumer credit insurance to provide coverage for unauthorized use of Plaintiff's personal information, medical information, and financial information; (iii) relief requiring that Defendant establish a specific device encryption security program to protect against the unauthorized disclosure of confidential information of its patients;
- D. Monetary damages in a sufficient amount to provide, to the furthest extent possible, adequate credit and identity protection and monitoring for an extended period of years, the length of which can be determined at trial;
- E. Plaintiff demands judgment against Defendants, jointly and severally, for compensatory and/or punitive damages, the sum to be determined by a jury, which will fairly and adequately compensate Plaintiff and others similarly situated for the above-described damages and injuries, together with interest from the

date of the incident and the costs of the proceeding, including attorney's fees;

- F. Monetary damages for the substantial annoyance, embarrassment and emotional distress suffered thus far, and that will inevitably continue to suffer as a result of the Defendants' actions, in amount to be determined at trial;
- G. Monetary damages to compensate for the permanent lack of security and loss of privacy that they have experienced to date and will continue to suffer in the future as a result of the Defendants' offensive conduct, in amount to be determined at trial;
- H. Award restitution for any identity theft, including, but not limited to payment of any other costs, including attorneys' fees incurred by the victim in clearing the victim's credit history or credit rating, or any costs incurred in connection with any civil or administrative proceeding to satisfy any debt, lien, or other obligation of the victim arising as the result of Defendants' actions;
- I. Award restitution in an amount to be determined by an accounting of the difference between the price Plaintiff paid in reliance upon Defendants' duty/promise to secure its members' Sensitive Information, and the actual services – devoid of proper protection mechanisms – rendered by Defendants;
- J. Prejudgment and post-judgment interest on any and all damages,

as provided by applicable law;

- K. Award Plaintiff his reasonable litigation expenses and attorneys' fees; and
- L. Such other and further relief as this Court deems appropriate.

PLAINTIFF DEMANDS A TRIAL BY JURY.

Willard Bays

By Counsel

/s/ William M. Tiano

William M. Tiano, Esquire (#4308)

Tony L. O'Dell, Esquire (#5770)

Cheryl A. Fisher, Esquire (#6379)

TIANO O'DELL, PLLC

P.O. Box 11830

Charleston, WV 25339

(304) 720-6700

wtiano@tolawfirm.com

Counsel for Plaintiffs

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MASON COUNTY CIRCUIT CLERK

SUMMONS

E-FILED | 7/15/2021 11:25 AM
CC-26-2021-C-49
Mason County Circuit Clerk
Elizabeth Jones

IN THE CIRCUIT OF MASON WEST VIRGINIA
Willard Bays v. Walmart Inc.

Service Type: Plaintiff - Secretary of State

NOTICE TO: Walmart Inc., CT Corporation, 5098 Washington St., West, Suite 407, Charleston, WV 25313

THE COMPLAINT WHICH IS ATTACHED TO THIS SUMMONS IS IMPORTANT AND YOU MUST TAKE IMMEDIATE ACTION TO PROTECT YOUR RIGHTS. YOU OR YOUR ATTORNEY ARE REQUIRED TO FILE THE ORIGINAL OF YOUR WRITTEN ANSWER, EITHER ADMITTING OR DENYING EACH ALLEGATION IN THE COMPLAINT WITH THE CLERK OF THIS COURT. A COPY OF YOUR ANSWER MUST BE MAILED OR HAND DELIVERED BY YOU OR YOUR ATTORNEY TO THE OPPOSING PARTY'S ATTORNEY:

William Tiano, PO Box 11830, Charleston, WV 25339

THE ANSWER MUST BE MAILED WITHIN 30 DAYS AFTER THIS SUMMONS AND COMPLAINT WERE DELIVERED TO YOU OR A JUDGMENT BY DEFAULT MAY BE ENTERED AGAINST YOU FOR THE MONEY OR OTHER THINGS DEMANDED IN THE COMPLAINT.

SERVICE:

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/s/ Elizabeth Jones
Clerk

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IN THE CIRCUIT OF MASON WEST VIRGINIA
Willard Bays v. Walmart Inc.

Service Type: Plaintiff - Secretary of State

NOTICE TO: Walmart Inc., CT Corporation, 5098 Washington St., West, Suite 407, Charleston, WV 25313
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/s/ Elizabeth Jones

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STATE OF WEST VIRGINIA

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IN THE CIRCUIT OF MASON WEST VIRGINIA
Willard Bays v. Walmart Inc.

Service Type: Plaintiff - Secretary of State

NOTICE TO: Wal-Mart Stores East, LP, CT Corporation, 5098 Washington St., W., Suite 407, Charleston, WV 25313
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William Tiano, PO Box 11830, Charleston, WV 25339

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IN THE CIRCUIT OF MASON WEST VIRGINIA
Willard Bays v. Walmart Inc.

Service Type: Plaintiff - Secretary of State

NOTICE TO: Wal-Mart Stores East, LP, CT Corporation, 5098 Washington St., W., Suite 407, Charleston, WV 25313
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OF WEST VIRGINIA

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Office of the Secretary of State
Building 1 Suite 157-K
1900 Kanawha Blvd E.
Charleston, WV 25305

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Mac Warner
Secretary of State
State of West Virginia
Phone: 304-558-6000
886-767-8683
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MASON COUNTY CIRCUIT COURT ELIZABETH A JONES
CLERK
200 6TH STREET
SUITE 9
Point Pleasant, WV 25550-1131

Control Number: 277331

Defendant: WAL-MART STORES EAST, LP
5098 WEST WASHINGTON STREET
SUITE 407
CHARLESTON, WV 25313 US

Agent: C. T. Corporation System

County: Mason

Civil Action: 21-C-49

Certified Number: 92148901125134100003146937

Service Date: 7/19/2021

I am enclosing:

1 summons and complaint

which was served on the Secretary at the State Capitol as your statutory attorney-in-fact. According to law, I have accepted service of process in your name and on your behalf.

*Please note that this office has no connection whatsoever with the enclosed documents other than to accept service of process in your name and on your behalf as your attorney-in-fact. Please address any questions about this document directly to the court or the plaintiff's attorney, shown in the enclosed paper, **not to the Secretary of State's office.***

Sincerely,

A handwritten signature in cursive script that reads "Mac Warner".

Mac Warner
Secretary of State

SUMMONS

E-FILED | 7/15/2021 11:25 AM
CC-26-2021-C-49
Mason County Circuit Clerk
Elizabeth Jones

IN THE CIRCUIT OF MASON WEST VIRGINIA
Willard Bays v. Walmart Inc.

Service Type: Plaintiff - Secretary of State

NOTICE TO: NEC Networks, LLC, c/o Christopher Hatchkiss, 10100 Reunion Road, Suite 700, San Antonio, TX 78216
THE COMPLAINT WHICH IS ATTACHED TO THIS SUMMONS IS IMPORTANT AND YOU MUST TAKE IMMEDIATE ACTION TO PROTECT YOUR RIGHTS. YOU OR YOUR ATTORNEY ARE REQUIRED TO FILE THE ORIGINAL OF YOUR WRITTEN ANSWER, EITHER ADMITTING OR DENYING EACH ALLEGATION IN THE COMPLAINT WITH THE CLERK OF THIS COURT. A COPY OF YOUR ANSWER MUST BE MAILED OR HAND DELIVERED BY YOU OR YOUR ATTORNEY TO THE OPPOSING PARTY'S ATTORNEY:

William Tiano, PO Box 11830, Charleston, WV 25339

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Date

/s/ Elizabeth Jones
Clerk

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Elizabeth Jones

IN THE CIRCUIT OF MASON WEST VIRGINIA
Willard Bays v. Walmart Inc.

Service Type: Plaintiff - Secretary of State

NOTICE TO: NEC Networks, LLC, c/o Christopher Hatchkiss, 10100 Reunion Road, Suite 700, San Antonio, TX 78216
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William Tiano, PO Box 11830, Charleston, WV 25339

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Date Clerk

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STATE OF WEST VIRGINIA

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MASON COUNTY CIRCUIT CLERK

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State of West Virginia
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MASON COUNTY CIRCUIT COURT ELIZABETH A JONES
CLERK
200 6TH STREET
SUITE 9
Point Pleasant, WV 25550-1131

Control Number: 277332

Defendant: NEC NETWORKS, LLC
10100 REUNION ROAD
SUITE 700
SAN ANTONIO , TX 78216 US

Agent: CHRISTOPHER HATCHKISS

County: Mason

Civil Action: 21-C-49

Certified Number: 92148901125134100003146944

Service Date: 7/19/2021

I am enclosing:

1 summons and complaint

which was served on the Secretary at the State Capitol as your statutory attorney-in-fact. According to law, I have accepted service of process in your name and on your behalf.

*Please note that this office has no connection whatsoever with the enclosed documents other than to accept service of process in your name and on your behalf as your attorney-in-fact. Please address any questions about this document directly to the court or the plaintiff's attorney, shown in the enclosed paper, **not to the Secretary of State's office.***

Sincerely,

A handwritten signature in cursive script that reads "Mac Warner".

Mac Warner
Secretary of State

Office of the Secretary of State
Building 1 Suite 157-K
1900 Kanawha Blvd E.
Charleston, WV 25305

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MASON COUNTY CIRCUIT COURT ELIZABETH A JONES
CLERK
200 6TH STREET
SUITE 9
Point Pleasant, WV 25550-1131

Control Number: 277330

Defendant: WALMART INC.
5098 WEST WASHINGTON STREET
SUITE 407
CHARLESTON, WV 25313 US

Agent: C. T. Corporation System

County: Mason

Civil Action: 21-C-49

Certified Number: 92148901125134100003146920

Service Date: 7/19/2021

I am enclosing:

1 summons and complaint

which was served on the Secretary at the State Capitol as your statutory attorney-in-fact. According to law, I have accepted service of process in the name and on behalf of your corporation.

Please note that this office has no connection whatsoever with the enclosed documents other than to accept service of process in the name and on behalf of your corporation as your attorney-in-fact. Please address any questions about this document directly to the court or the plaintiff's attorney, shown in the enclosed paper, not to the Secretary of State's office.

Sincerely,

A handwritten signature in cursive script that reads "Mac Warner".

Mac Warner
Secretary of State

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1. We will require you to provide your payment information when you sign up. We will immediately charge your card the price stated and will charge the card the price stated for each month you continue your subscription. You may cancel at any time; however, we do not provide partial month refunds.
2. Credit monitoring from Experian and TransUnion will take several days to begin.
3. Under certain circumstances, access to your Equifax Credit Report may not be available as certain consumer credit files maintained by Equifax contain credit histories, multiple trade accounts, and/or an extraordinary number of inquiries of a nature that prevents or delays the delivery of your Equifax Credit Report. If a remedy for the failure is not available, the product subscription will be cancelled and a full refund will be made.
4. WebScan searches for your Social Security Number, up to 5 passport numbers, up to 6 bank account numbers, up to 6 credit/debit card numbers, up to 6 email addresses, and up to 10 medical ID numbers. WebScan searches thousands of Internet sites where consumers' personal information is suspected of being bought and sold, and regularly adds new sites to the list of those it searches. However, the Internet addresses of these suspected Internet trading sites are not published and frequently change, so there is no guarantee that we are able to locate and search every possible Internet site where consumers' personal information is at risk of being traded.
5. The Automatic Fraud Alert feature is made available to consumers by Equifax Information Services LLC and fulfilled on its behalf by Equifax Consumer Services LLC.
6. Locking your Equifax credit report will prevent access to it by certain third parties. Locking your Equifax credit report will not prevent access to your credit report at any other credit reporting agency. Entities that may still have access to your Equifax credit report include: companies like Equifax Global Consumer Solutions, which provide you with access to your credit report or credit score, or monitor your credit report as part of a subscription or similar service; companies that provide you with a copy of your credit report or credit score, upon your request; federal, state and local government agencies and courts in certain circumstances; companies using the information in connection with the underwriting of insurance, or for employment, tenant or background screening purposes; companies that have a current account or relationship with you, and collection agencies acting on behalf of those whom you owe; companies that authenticate a consumer's identity for purposes other than granting credit, or for investigating or preventing actual or potential fraud; and companies that wish to make pre-approved offers of credit or insurance to you. To opt out of such pre-approved offers, visit www.optoutprescreen.com.
7. The Identity Theft Insurance benefit is underwritten and administered by American Bankers Insurance Company of Florida, an Assurant company, under group or blanket policies issued to Equifax, Inc., or its respective affiliates for the benefit of its Members. Please refer to the actual policies for terms, conditions, and exclusions of coverage. Coverage may not be available in all jurisdictions.

WHO WE ARE
About Equifax

Score Watch[®]

Know where you stand with Equifax credit report monitoring and access to your FICO[®] score.

\$14.95 per month. Cancel at any time; no partial month refunds.¹



The FICO[®] Score provided is based on the FICO[®] Score 8 using Equifax data. Third parties may use a different FICO[®] Score or a different type of credit score to assess your creditworthiness.²

Product includes:

Access your FICO[®] score and Equifax credit report four times each year

Help better protect your identity with credit monitoring and alerts

See how your FICO[®] score trends over time

Take control of your credit

Credit score and report features include:



FICO[®] credit score²

Your FICO[®] credit score can fluctuate but it's important to know where you stand. We give you access to your FICO[®] score four times each year, so you can keep tabs on your credit.



FICO[®] credit score monitoring

Your FICO[®] credit score is monitored and in the event key changes occur, we'll notify you with customizable alerts.



Equifax credit report

Your credit report provides a summary of your credit history. Feel more confident with the ability to check your Equifax credit report four times each year.



Equifax credit report monitoring

You'll know if key changes occur to your Equifax credit report, because we'll be monitoring it and notify you with alerts.

Help better protect yourself from identity theft

Identity theft protection features include:



Automatic fraud alerts³

If you believe you're a victim of fraud, you can activate automatic fraud alerts and we'll place an initial alert on your credit report. This alert encourages lenders to take extra steps to verify your identity before extending credit. On an annual basis, we'll automatically renew your fraud alert, so you don't have to.



Equifax credit report lock⁴

Feel more secure knowing your Equifax credit report is locked down from being accessed (with certain exceptions) for the purposes of extending credit.



Equifax blocked inquiry alerts

When your Equifax credit report is locked, we'll alert you if an attempt to access it is blocked.



Up to \$500k identity theft insurance⁵

If you're a victim of ID theft, we have your back. We provide up to \$500,000 in coverage for certain out-of-pocket expenses you may face as a result of having your identity stolen.

Score Watch[®]
\$14⁹⁵ / MONTH

Cancel at any time, no partial month refunds.¹

[GET STARTED](#)

SIMILAR PRODUCTS



Equifax Complete[™] Premier

Take control with a one-stop credit monitoring⁶ and identity theft protection solution for one adult

\$19⁹⁵ / MONTH

Cancel at any time, no partial month refunds.¹

[DETAILS](#)

[COMPARE PRODUCTS](#)

Equifax Complete™

Don't let identity theft catch you off guard. Get better prepared to monitor your credit and help better protect your identity with Equifax Complete™.

\$9.95 per month. Cancel at any time; no partial month refunds.¹

GET STARTED

What you need to know:

The credit score provided is a VantageScore® 3.0 credit score based on Equifax data. Third parties use many different types of credit scores and are likely to use a different type of credit score to assess your creditworthiness.

Product includes:

Receive alerts of key changes to your Equifax credit report

Should you become a victim of identity theft, our dedicated ID Restoration Specialists will work on your behalf to help you recover

Plus, with up to \$500k in ID theft insurance², we'll help pay certain out-of-pocket expenses

Take control of your credit

Credit score and report features include:



Daily access to your credit score

Your credit scores can fluctuate, and it's important to know where you stand. Stay in the know with daily access to your VantageScore® credit score.



Daily credit score monitoring

You'll know if key changes occur to your VantageScore credit score, because we'll be monitoring it and notifying you with custom alerts.



Daily access to your Equifax credit report³

Your credit reports are a summary of your credit history. Feel confident with the ability to check your Equifax credit report anywhere, anytime.



Equifax credit report monitoring

You'll know if key changes occur to your Equifax credit report, because we'll be monitoring it and notifying you with custom alerts.

Help better protect yourself from identity theft

Identity theft protection features include:



Automatic fraud alerts⁴

If you believe you're a victim of fraud, you can activate automatic fraud alerts and we'll place an initial alert on your credit report. This alert encourages lenders to take extra steps to verify your identity before extending credit. On an annual basis, we'll automatically renew your fraud alert, so you don't have to.



Equifax credit report lock⁵

Feel more secure knowing your Equifax credit report is locked down from being accessed (with certain exceptions) for the purposes of extending credit.



Equifax blocked inquiry alerts

When your Equifax credit report is locked, we'll alert you if an attempt to access it is blocked.



Identity restoration

Should you become a victim of identity theft, our dedicated ID Restoration Specialists will work on your behalf to help you recover.



Up to \$500,000 identity theft insurance²

If you're a victim of ID theft, we have your back. We provide up to \$500,000 in coverage for certain out-of-pocket expenses you may face as a result of having your identity stolen.

Equifax Complete™
\$9⁹⁵ / MONTH

Cancel at any time, no partial month refunds.¹



SIMILAR PRODUCTS



Equifax Complete™ Premier

Take control with a one-stop credit monitoring⁶ and identity theft protection solution for one adult

/ MONTH

EXHIBIT E

- UNLIMITED Score & Report access – updates available daily
- CreditCompass™, which helps you point your score in the right direction
- Email updates of critical changes for ALL 3 bureaus
- INSTANT email alerts sent as soon as TransUnion finds out someone's applied for credit in your name
- Lock and Unlock your TransUnion and Equifax Credit Reports
- Personalized Debt Analysis & Credit Score Trending
- UNLIMITED toll-free access to ID theft specialists
- Up to \$1,000,000 ID theft insurance



What you'll instantly receive:

Score:
832

Sample score

You have chosen:

Credit Monitoring for \$24.95/month

(plus tax where applicable).

You'll soon enjoy:

- **UNLIMITED** Score & Report access – updates available daily
- CreditCompass™, which helps you point your score in the right direction
- Email updates of critical changes for ALL 3 bureaus
- INSTANT email alerts sent as soon as TransUnion finds out someone's applied for credit in your name
- Lock and Unlock your TransUnion and Equifax Credit Reports
- Personalized Debt Analysis & Credit Score Trending
- UNLIMITED toll-free access to ID theft specialists
- Up to \$1,000,000 ID theft insurance

What you need to know

There are various types of credit scores, and lenders use a variety of different types of credit scores to make lending decisions. The credit score you receive is based on the VantageScore 3.0 model and may not be the credit score model used by your lender.

There's nothing you need to do to have your membership continue without interruption. If you'd like to get more information about cancellation, simply [contact us here](#) anytime.

Sign up
Member login
About us
Support
Terms of Service
Privacy



Information for GoodSM

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EXHIBIT F

Step 1

Who are you protecting?



One adult



One adult
(and up to 10 children)



Two adults
(and up to 10 children)

Step 2

Choose your plan level

IdentityWorksSM Plus

Free 30-day trial

then just \$9.99 /month†

A full-featured plan that provides better identity theft detection, protection and resolution.

[Compare benefits](#)

Best value

IdentityWorksSM Premium

Free 30-day trial

then just \$19.99 /month†

Our best identity protection solution with 3-bureau credit monitoring and premium identity alerts.

[Compare benefits](#)

†IMPORTANT INFORMATION

A credit card is required to start your free 30-day trial membership[‡] in Experian IdentityWorksSM Plus or Experian IdentityWorksSM Premium. You may cancel your trial membership at any time within 30 days without charge. If you decide not to cancel, your membership will continue and you will be billed \$9.99 each month for Experian IdentityWorksSM Plus or \$19.99 each month for Experian IdentityWorksSM Premium.

Billed Monthly

Billed Annually
(Save 17% annually)

Plus

Premium

Coverage

Adult Identity Protection	One adult	One adult
Child Identity Protection 		
Social Security Number Trace		
Social Network Monitoring		
Dark Web Surveillance		
Fraud Resolution Services		
Identity Theft Insurance [※]		

Identity Theft Monitoring & Protection

Dark Web Surveillance	✓	✓
Identity Theft Insurance [※]	Up to \$500,000	Up to \$1,000,000
U.S.-Based Fraud Resolution Specialist	✓	✓
Lost Wallet Assistance	✓	✓
Identity Theft Monitoring & Alerts 	✓	✓
Social Security Number Monitoring	✓	✓
Address Change Verification	✓	✓

Financial Account Activity	✓
Identity Validation Alerts	✓
Payday Loan Monitoring	✓
Court Records	✓
Sex Offender Registry	✓
File-Sharing Network Monitoring	✓
Social Network Monitoring	✓

Experian CreditLock

Lock and Unlock Your Experian Credit File	✓	✓
Real-time Alerts on Attempted Credit Inquiries	✓	✓

Credit Monitoring & Alerts

Credit Bureaus Monitored 	Experian	Experian, Equifax®, TransUnion®
New Credit Inquiries	✓	✓
New Accounts	✓	✓
Large Account Balance Changes	✓	✓
Credit Utilization	✓	✓
Positive Activity	✓	✓
Dormant Accounts	✓	✓
FICO® Score* Alerts	✓	✓

Credit Scores

3-Bureau FICO® Scores*		Quarterly
FICO® Scores* based on Experian data	Daily	Daily

Score Tracking	✓	✓
FICO® Score* Simulator	✓	✓
Additional FICO® Scores*(Auto, Home & Bankcard)	✓	✓

‡Monitoring with Experian begins within 48 hours of enrollment in your trial. Monitoring with Equifax® and TransUnion® takes approximately 4 days to begin, though in some cases cannot be initiated during your trial period. You may cancel your trial membership in IdentityWorksSM any time within 30 days of enrollment without charge.

※Identity Theft Insurance underwritten by insurance company subsidiaries or affiliates of American International Group, Inc. (AIG). The description herein is a summary and intended for informational purposes only and does not include all terms, conditions and exclusions of the policies described. Please refer to the actual policies for terms, conditions, and exclusions of coverage. Coverage may not be available in all jurisdictions. Review the Summary of Benefits for [Experian IdentityWorksSM Premium](#) or [Experian IdentityWorksSM Plus](#).

*Credit score is calculated based on FICO® Score 8 model, unless otherwise noted. In addition to the FICO® Score 8, we may offer and provide other base or industry-specific FICO® Scores (such as FICO® Auto Scores and FICO® Bankcard Scores). Your lender or insurer may use a different FICO® Score than FICO® Score 8 or such other base or industry-specific FICO® Score (if available), or another type of credit score altogether. [Learn more.](#)

Step 1

Who are you protecting?



One adult



One adult
(and up to 10 children)



Two adults
(and up to 10 children)



Step 2

Choose your plan level

IdentityWorksSM Plus

\$14.99

/month

A full-featured plan that provides better identity theft detection, protection and resolution.

[Compare benefits](#)

Best value

IdentityWorksSM Premium

\$24.99

/month

Our best identity protection solution with 3-bureau credit monitoring and premium identity alerts.

[Compare benefits](#)

Billed Monthly

Billed Annually
(Save 17% annually)

Plus

Premium

Coverage

	Plus	Premium
Adult Identity Protection	One adult	One adult
Child Identity Protection	Up to 10	Up to 10
Social Security Number Trace	✓	✓
Social Network Monitoring	✓	✓
Dark Web Surveillance	✓	✓
Fraud Resolution Services	✓	✓
Identity Theft Insurance*	Up to \$500,000	Up to \$1,000,000

Identity Theft Monitoring & Protection

	Plus	Premium
Dark Web Surveillance	✓	✓
Identity Theft Insurance*	Up to \$500,000	Up to \$1,000,000
U.S.-Based Fraud Resolution Specialist	✓	✓
Lost Wallet Assistance	✓	✓
Identity Theft Monitoring & Alerts	✓	✓
Social Security Number Monitoring	✓	✓
Address Change Verification	✓	✓
Financial Account Activity		✓

Identity Validation Alerts	✓
Payday Loan Monitoring	✓
Court Records	✓
Sex Offender Registry	✓
File-Sharing Network Monitoring	✓
Social Network Monitoring	✓

Experian CreditLock

Lock and Unlock Your Experian Credit File	✓	✓
Real-time Alerts on Attempted Credit Inquiries	✓	✓

Credit Monitoring & Alerts

Credit Bureaus Monitored ☺	Experian	Experian, Equifax®, TransUnion®
New Credit Inquiries	✓	✓
New Accounts	✓	✓
Large Account Balance Changes	✓	✓
Credit Utilization	✓	✓
Positive Activity	✓	✓
Dormant Accounts	✓	✓
FICO® Score* Alerts	✓	✓

Credit Scores

3-Bureau FICO® Scores*		Quarterly
FICO® Scores* based on Experian data	Daily	Daily
Score Tracking	✓	✓

FICO® Score* Simulator	✓	✓
Additional FICO® Scores*(Auto, Home & Bankcard)	✓	✓

‡Monitoring with Experian begins within 48 hours of enrollment in your trial. Monitoring with Equifax® and TransUnion® takes approximately 4 days to begin, though in some cases cannot be initiated during your trial period. You may cancel your trial membership in IdentityWorksSM any time within 30 days of enrollment without charge.

※Identity Theft Insurance underwritten by insurance company subsidiaries or affiliates of American International Group, Inc. (AIG). The description herein is a summary and intended for informational purposes only and does not include all terms, conditions and exclusions of the policies described. Please refer to the actual policies for terms, conditions, and exclusions of coverage. Coverage may not be available in all jurisdictions. Review the Summary of Benefits for [Experian IdentityWorksSM Premium](#) or [Experian IdentityWorksSM Plus](#).

*Credit score is calculated based on FICO® Score 8 model, unless otherwise noted. In addition to the FICO® Score 8, we may offer and provide other base or industry-specific FICO® Scores (such as FICO® Auto Scores and FICO® Bankcard Scores). Your lender or insurer may use a different FICO® Score than FICO® Score 8 or such other base or industry-specific FICO® Score (if available), or another type of credit score altogether. [Learn more.](#)

Step 1

Who are you protecting?



One adult



One adult
(and up to 10 children)



Two adults
(and up to 10 children)



Step 2

Choose your plan level

IdentityWorksSM Plus

\$19.99

/month

A full-featured plan that provides better identity theft detection, protection and resolution.

[Compare benefits](#)

Best value

IdentityWorksSM Premium

\$29.99

/month

Our best identity protection solution with 3-bureau credit monitoring and premium identity alerts.

[Compare benefits](#)

Billed Monthly

Billed Annually
(Save 17% annually)

Plus

Premium

Coverage

	Two adults	Two adults
Adult Identity Protection	Two adults	Two adults
Child Identity Protection ☺	Up to 10	Up to 10
Social Security Number Trace	✓	✓
Social Network Monitoring	✓	✓
Dark Web Surveillance	✓	✓
Fraud Resolution Services	✓	✓
Identity Theft Insurance*	Up to \$500,000	Up to \$1,000,000

Identity Theft Monitoring & Protection

Dark Web Surveillance	✓	✓
Identity Theft Insurance*	Up to \$500,000	Up to \$1,000,000
U.S.-Based Fraud Resolution Specialist	✓	✓
Lost Wallet Assistance	✓	✓
Identity Theft Monitoring & Alerts ☺	✓	✓
Social Security Number Monitoring	✓	✓
Address Change Verification	✓	✓
Financial Account Activity		✓

Identity Validation Alerts	✓
Payday Loan Monitoring	✓
Court Records	✓
Sex Offender Registry	✓
File-Sharing Network Monitoring	✓
Social Network Monitoring	✓

Experian CreditLock

Lock and Unlock Your Experian Credit File	✓	✓
Real-time Alerts on Attempted Credit Inquiries	✓	✓

Credit Monitoring & Alerts

Credit Bureaus Monitored ☺	Experian	Experian, Equifax®, TransUnion®
New Credit Inquiries	✓	✓
New Accounts	✓	✓
Large Account Balance Changes	✓	✓
Credit Utilization	✓	✓
Positive Activity	✓	✓
Dormant Accounts	✓	✓
FICO® Score* Alerts	✓	✓

Credit Scores

3-Bureau FICO® Scores*		Quarterly
FICO® Scores* based on Experian data	Daily	Daily
Score Tracking	✓	✓

FICO® Score* Simulator	✓	✓
Additional FICO® Scores*(Auto, Home & Bankcard)	✓	✓

‡Monitoring with Experian begins within 48 hours of enrollment in your trial. Monitoring with Equifax® and TransUnion® takes approximately 4 days to begin, though in some cases cannot be initiated during your trial period. You may cancel your trial membership in IdentityWorksSM any time within 30 days of enrollment without charge.

※Identity Theft Insurance underwritten by insurance company subsidiaries or affiliates of American International Group, Inc. (AIG). The description herein is a summary and intended for informational purposes only and does not include all terms, conditions and exclusions of the policies described. Please refer to the actual policies for terms, conditions, and exclusions of coverage. Coverage may not be available in all jurisdictions. Review the Summary of Benefits for [Experian IdentityWorksSM Premium](#) or [Experian IdentityWorksSM Plus](#).

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JS 44 (Rev. 04/21)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

<p>I. (a) PLAINTIFFS Willard Bays, individually and on behalf of all others similarly situated</p> <p>(b) County of Residence of First Listed Plaintiff <u>Mason County, WV</u> <i>(EXCEPT IN U.S. PLAINTIFF CASES)</i></p> <p>(c) Attorneys <i>(Firm Name, Address, and Telephone Number)</i> William M. Tiano, Esq. (#4308) Tony L. O'Dell, Esq. (#5770) Cheryl A. Fisher, Esq. (#6379)</p>	<p>DEFENDANTS WALMART INC., a Delaware corporation, WAL-MART STORES EAST, L.P., a Delaware corporation, and NEC County of Residence of First Listed Defendant <u>Benton County, AR</u> <i>(IN U.S. PLAINTIFF CASES ONLY)</i></p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.</p> <p>Attorneys <i>(If Known)</i> Neva G. Lusk - Spilman Thomas & Battle, PLLC 300 Kanawha Boulevard, East, 25301; Post Office Box 273; Charleston, WV 25321-0273; 304.340.3866</p>
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<p>II. BASIS OF JURISDICTION <i>(Place an "X" in One Box Only)</i></p> <p><input type="checkbox"/> 1 U.S. Government Plaintiff</p> <p><input type="checkbox"/> 2 U.S. Government Defendant</p> <p><input type="checkbox"/> 3 Federal Question <i>(U.S. Government Not a Party)</i></p> <p><input checked="" type="checkbox"/> 4 Diversity <i>(Indicate Citizenship of Parties in Item III)</i></p>	<p>III. CITIZENSHIP OF PRINCIPAL PARTIES <i>(Place an "X" in One Box for Plaintiff and One Box for Defendant)</i></p> <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td></td> <td>PTF</td> <td>DEF</td> <td></td> <td>PTF</td> <td>DEF</td> </tr> <tr> <td>Citizen of This State</td> <td><input checked="" type="checkbox"/> 1</td> <td><input type="checkbox"/> 1</td> <td>Incorporated or Principal Place of Business In This State</td> <td><input type="checkbox"/> 4</td> <td><input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td><input type="checkbox"/> 2</td> <td><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business In Another State</td> <td><input type="checkbox"/> 5</td> <td><input checked="" type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td><input type="checkbox"/> 3</td> <td><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td><input type="checkbox"/> 6</td> <td><input type="checkbox"/> 6</td> </tr> </table>		PTF	DEF		PTF	DEF	Citizen of This State	<input checked="" type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input checked="" type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
	PTF	DEF		PTF	DEF																				
Citizen of This State	<input checked="" type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4																				
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input checked="" type="checkbox"/> 5																				
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6																				

<p>IV. NATURE OF SUIT <i>(Place an "X" in One Box Only)</i></p>				<p>Click here for: Nature of Suit Code Descriptions.</p>			
CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES		
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input checked="" type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice		<input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 INTELLECTUAL PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark <input type="checkbox"/> 880 Defend Trade Secrets Act of 2016 SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit (15 USC 1681 or 1692) <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes	
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS					
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement					

V. ORIGIN *(Place an "X" in One Box Only)*

1 Original Proceeding
 2 Removed from State Court
 3 Remanded from Appellate Court
 4 Reinstated or Reopened
 5 Transferred from Another District *(specify)*
 6 Multidistrict Litigation - Transfer
 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity):*
 28 U.S.C. § 1332(d), 1441, 1446, and 1453.

Brief description of cause:
 Putative class action regarding security breach of personal information

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ _____

CHECK YES only if demanded in complaint:
 JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY *(See instructions):*

JUDGE _____ DOCKET NUMBER _____

DATE: August 17, 2021 SIGNATURE OF ATTORNEY OF RECORD: /s/ Neva G. Lusk,

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA**

WILLARD BAYS,
individually and on behalf of all
others similarly situated,

Plaintiff,

v.

WALMART INC., a Delaware
corporation, WAL-MART STORES
EAST, L.P., a Delaware corporation,
and NEC NETWORKS, LLC,
a Texas corporation,

Defendants.

Case No.: 3:21-cv-00460

(Mason County Circuit Court CIVIL
ACTION NO. CC-26-2021-C-49)

**DEFENDANTS WALMART INC. AND
WAL-MART STORES EAST, LP'S
NOTICE OF REMOVAL**

NOTICE OF REMOVAL

Defendants Walmart Inc. and Wal-Mart Stores East, LP (collectively, the “Walmart Defendants”) hereby remove the above-captioned action, *Willard Bays v. Walmart Inc., Wal-Mart Stores East, L.P., and NEC Networks, LLC*, Civil Action No. CC-26-2021-C-49 (the “State Court Action”), from the Circuit Court of Mason County, West Virginia, to the United States District Court for the Southern District of West Virginia pursuant to 28 U.S.C. §§ 1332(d), 1441, 1446, and 1453. The Walmart Defendants hereby provide “a short and plain statement of the grounds for removal” pursuant to 28 U.S.C. § 1446(a) and *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 87 (2014).

1. This Court has original jurisdiction over this action under the Class Action Fairness Act of 2005 (“CAFA”). See Pub. L. No. 109–2, 119 Stat. 4 (codified at 28 U.S.C. §§ 1332(d), 1453, 1711-1715). In relevant part, CAFA grants district courts original jurisdiction over civil

class actions filed under federal or state law in which any member of a class of plaintiffs is a citizen of a state different from any defendant and where the amount in controversy for the putative class members in the aggregate exceeds the sum or value of \$5,000,000, exclusive of interest and costs. As set forth below, this case meets all of CAFA's requirements for original jurisdiction and removal.

2. As set forth below, this case is timely and properly removed by the filing of this Notice of Removal. Under CAFA, a class action "may be removed by any defendant without the consent of all defendants." 28 U.S.C. § 1453(b); *Jackson v. Home Depot U.S.A., Inc.*, 880 F.3d 165, 168 (4th Cir. 2018), *aff'd*, 139 S. Ct. 1743 (2019) (explaining that CAFA "eliminates the rule requiring unanimous consent of all defendants for removal").

VENUE

3. The State Court Action was filed in Mason County, West Virginia. Therefore, venue properly lies in the United States District Court for the Southern District of West Virginia, pursuant to 28 U.S.C. §§ 129(b) and 1391(a).

PLEADINGS, PROCESS, AND ORDERS

4. On July 19, 2021, Plaintiff served the Complaint ("Complaint" or "Compl.") on the Walmart Defendants. In accordance with 28 U.S.C. § 1446(a), true and correct copies of the Summons and Complaint in the State Court Action, which is the only process, pleadings, and orders served upon the Walmart Defendants in the State Court Action, are attached as **Exhibit A**. A copy of the docket in the State Court Action is attached as **Exhibit B**. Copies of all process, pleadings, and orders filed in the State Court Action are attached together as **Exhibit C**.

5. According to the allegations in the Complaint, Plaintiff and the putative class he purports to represent are patients of Defendants whose "sensitive information in the possession of

Defendants was compromised as a result of a security breach which occurred on or around February 6, 2021” (the “Data Breach”). Compl. ¶ 20. Defendant NEC Networks, LLC notified Plaintiff of the Data Breach through a medical data breach notice (the “Breach Notice”). *See id.* ¶ 16.

6. Plaintiff served the Walmart Defendants with the Summons and Complaint on July 19, 2021.

7. The Complaint alleges five counts for: (1) breach of the duty of confidentiality; (2) unjust enrichment; (3) breach of contract; (4) negligence; and (5) invasion of privacy. *See* Compl. ¶¶ 23-62.

SERVICE ON THE STATE COURT

8. Pursuant to 28 U.S.C. § 1446(d), promptly after the filing of this Notice of Removal in the United States District Court for the Southern District of West Virginia, written notice of such filing will be given by the undersigned to Plaintiff’s counsel of record, and a copy of the Notice of Removal will be filed with the Clerk of the Circuit Court of Mason County, West Virginia.

TIMELINESS OF REMOVAL

9. The Walmart Defendants were served with a copy of Plaintiff’s Summons and Complaint on July 19, 2021. This Notice of Removal has been filed within thirty (30) days after the Walmart Defendants were served with a copy of Plaintiff’s Summons and Complaint. This Notice of Removal is therefore timely as it is filed within the time period provided by 28 U.S.C. § 1446(b).

ORIGINAL JURISDICTION PURSUANT TO CAFA

10. This putative class action is within the Court’s original jurisdiction pursuant to CAFA.

11. The Supreme Court has instructed that “no antiremoval presumption attends cases invoking CAFA” *Dart Cherokee Basin Operating Co.*, 547 U.S. at 89. Rather, courts “are obliged to construe and apply CAFA’s grant of federal court jurisdiction broadly” *Dominion Energy, Inc. v. City of Warren Police & Fire Ret. Sys.*, 928 F.3d 325, 336 (4th Cir. 2019); *Jackson*, 880 F.3d at 168 (explaining that “CAFA, and in particular 28 U.S.C. § 1453(b), was adopted to extend removal authority beyond the traditional rules”); *Cox v. Air Methods Corp.*, Case No. 1:17-04610, 2018 WL 2437056, at *2 (S.D.W. Va. May 30, 2018) (explaining that there is no antiremoval presumption under CAFA and that a “defendant’s notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold”).

12. This Court has jurisdiction over this action under CAFA (*see* 28 U.S.C. § 1332(d)), and this action may be removed pursuant to the provisions of 28 U.S.C. § 1441(a), in that it is a civil putative class action wherein: (1) the proposed class contains at least 100 members in the aggregate; (2) there is minimal diversity; (3) no defendant is a state, state official, or other governmental entity; (4) the total amount in controversy for all class members exceeds \$5 million, exclusive of interest and costs; and (5) none of the exceptions to CAFA jurisdiction applies. CAFA authorizes removal of such actions. *See* 28 U.S.C. §§ 1441, 1446, 1453. As discussed below, this action meets each CAFA requirement for removal.

The Proposed Class Contains At Least 100 Members.

13. Plaintiff's proposed class consists of "[a]ll persons whose sensitive information in the possession of Defendants was compromised as a result of a security breach which occurred on or around February 6, 2021." Compl. ¶ 20.

14. Plaintiff initiated this class action lawsuit after he received the Breach Notice, which according to Plaintiff "describe[ed] activity wherein third parties unlawfully accessed Plaintiff's sensitive medical and personal identity information" *Id.* ¶ 16. It is the unauthorized access of Plaintiff's information described in the Breach Notice that gives rise to Plaintiff's claims and which forms the basis for Plaintiff's membership in the proposed class he seeks to represent.

15. More than 25,000 individuals were sent the Breach Notice and are therefore members of the proposed class. As a result, the proposed class contains at least 100 members, and this element of CAFA jurisdiction is satisfied.

Minimal Diversity Exists.

16. CAFA's diversity requirement is satisfied when at least one plaintiff is a citizen of a state different from any defendant. *See* 28 U.S.C. §§ 1332(d)(2)(A), 1453(b). Plaintiff alleges that at all times relevant to the suit he resided in Mason County, West Virginia. *See* Compl. ¶ 1. Accordingly, Plaintiff is a citizen of West Virginia.

17. Defendant Walmart Inc. is a corporation organized under the laws of Delaware with its principal place of business in Bentonville, Arkansas. Thus, Defendant Walmart Inc. is a citizen of Delaware and Arkansas. *See* 28 U.S.C. § 1332(c)(1) (for diversity purposes, a corporation "shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business").

18. Defendant Wal-Mart Stores East, LP is a limited partnership organized and existing under the laws of the State of Delaware. For diversity purposes, a limited partnership's citizenship is deemed to be that of "all of its limited and general partners." *Martinez v. Duke Energy Corp.*, 130 F. App'x 629, 633 (4th Cir. 2005) (citing *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195–96 (1990)). WSE Management, LLC is the general partner of Wal-Mart Stores East, LP, and WSE Investment, LLC is the limited partner of Wal-Mart Stores East, LP. (There are no other partners of Wal-Mart Stores East, LP.) "For purposes of diversity jurisdiction, the citizenship of a limited liability company . . . is determined by the citizenship of all of its members . . ." *Cent. W. Va. Energy Co., Inc. v. Mountain State Carbon, LLC*, 636 F.3d 101, 103 (4th Cir. 2011). The sole member of WSE Management, LLC and WSE Investment, LLC is Wal-Mart Stores East, LLC (f/k/a Wal-Mart Stores East, Inc.), an Arkansas limited liability company. The sole member of Wal-Mart Stores East, LLC (f/k/a Wal-Mart Stores East, Inc.) is Walmart Inc. As stated above, Walmart Inc. is a corporation organized under the laws of Delaware with its principal place of business in Bentonville, Arkansas, and is, therefore, a citizen of Delaware and Arkansas. Accordingly, Walmart Stores East, LP, is a citizen of Delaware and Arkansas for purposes of diversity jurisdiction. *See id.*

19. Plaintiff alleges that Defendant NEC Networks, LLC is a Texas LLC, and there are no allegations that it is a citizen of West Virginia. *See* Compl. ¶ 4.

20. Because at least one member of the putative class, namely Plaintiff, is a citizen of West Virginia, and both of the Walmart Defendants (i.e., Walmart Inc. and Wal-Mart Stores East, LP) are citizens of Delaware and Arkansas, CAFA's minimal diversity requirement is met.

No Defendant Is a Governmental Entity.

21. None of the Defendants is a state, state official, or other governmental entity. All Defendants are for-profit companies.

The Amount in Controversy Exceeds \$5,000,000, Exclusive of Interest and Costs.

22. To meet CAFA's amount-in-controversy requirement, "a defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold" of five million dollars. *Scott v. Cricket Communications, LLC*, 865 F.3d 189, 194 (4th Cir. 2017) (quoting *Dart Cherokee Basin Operating Co.*, 547 U.S. at 89). "The key inquiry in determining whether the amount-in-controversy requirement is met is not what the plaintiff will actually recover but an estimate of the amount that will be put at issue in the course of the litigation." *Scott*, 865 F.3d at 196 (internal quotation marks omitted). In other words, "the amount in controversy is what the plaintiff claims to be entitled to or demands." *Scaralto v. Ferrell*, 826 F. Supp. 2d 960, 967 (S.D.W. Va. 2011).

23. On removal, a defendant is not required to establish the amount in controversy "to a legal certainty." *Sayre v. Westlake Services, LLC*, No. ELH-15-687, 2015 WL 4716207, at *7-8 (D. Md. Aug. 7, 2015) (internal quotation marks omitted). Rather, the defendant need only provide a "reasonable basis to support its assertion as to the amount in controversy" *Id.* "Thus, a defendant may estimate the amount in controversy based on the nature of the claims, the number of defendants, and the damages plead." *Chamberlain v. 7-Eleven, Inc.*, No. 5:15CV95, 2015 WL 6555429, at *3 (N.D.W. Va. Oct. 29, 2015).

24. Although the Walmart Defendants concede no liability on Plaintiff's claims and dispute that a class action could ever be certified here, assuming Plaintiff's allegations to be true

for purposes of removal only, Plaintiff's class claims place in controversy a sum greater than \$5,000,000, exclusive of interest and costs.

25. The Complaint seeks "an order providing consumer credit protection and monitoring services for Plaintiff [and] maintenance of consumer credit insurance to provide coverage for unauthorized use of Plaintiff's personal information, medical information, and financial information." Compl. at Prayer for Relief ¶ C. The advertised monthly rates of credit monitoring services and insurance provided by the three national credit-reporting bureaus can be used to approximate the cost to Defendants of providing the relief that Plaintiff requests. As of August 2021, the cost to purchase credit monitoring services of the type requested by the Complaint from those credit-reporting agencies ranges from \$9.95 to \$19.95 per month at Equifax (*see* Exhibit D), \$24.95 per month at TransUnion (*see* Exhibit E), and from \$9.99 to \$29.99 per month at Experian (*see* Exhibit F). The lowest price for credit monitoring services for these three national credit reporting bureaus is \$9.95 per month.

26. In addition, the Complaint seeks "[m]onetary damages in a sufficient amount to provide, to the furthest extent possible, adequate credit and identity protection and monitoring for an extended period of years." Compl. at Prayer for Relief ¶ D. That is, Plaintiff seeks to recover in the form of "monetary damages" the cost of providing these services to the putative class for at least two years. At least one federal district court has concluded that, for purposes of determining the amount in controversy in a case alleging the theft of personal information, it is "not unreasonable" to use "three years [of credit monitoring] as a conservative estimate [to calculate the amount in controversy]." *Porras v. Sprouts Farmers Mkt., LLC*, No. EDCV 16-1005 JGB (KKx), 2016 WL 4051265, at *3 (C.D. Cal. July 25, 2016).

27. As noted above, there are at least 25,000 individuals in the putative class (see Paragraphs 13-15). Using the minimum number of putative class members (25,000), and multiplying that number times the lowest advertised monthly rate for credit monitoring services (\$9.95) for a two year period, places the amount in controversy at \$5,970,000, exclusive of interest and costs, which is well above CAFA's \$5 million threshold.¹ Since these are services Plaintiff claims to be entitled to, this amount is properly included in the amount in controversy when assessing whether CAFA's jurisdictional requirements are satisfied.

28. Plaintiff also seeks "compensatory and/or punitive damages . . . which will fairly and adequately compensate Plaintiff and others similarly situated for the . . . damages and injuries." Compl. at Prayer for Relief ¶ E. These requests increase the amount in controversy even further.

29. Plaintiff also seeks damages to compensate for the alleged "permanent lack of security and loss of privacy that they have experienced to date and will continue to suffer in the future." Compl. at Prayer for Relief ¶ G. These requests increase the amount in controversy even further.

30. Finally, the Complaint also seeks relief that would require the Walmart Defendants to "establish a specific device encryption security program to protect against the unauthorized disclosure of confidential information of its patients." Compl. at Prayer for Relief ¶ C. The Walmart Defendants deny that their data security practices are deficient in any respect. Nevertheless, the cost of complying with Plaintiff's demands in the Complaint must be included in the amount in controversy and is further evidence that CAFA's jurisdictional threshold is satisfied. *See JTH Tax, Inc. v. Frashier*, 624 F.3d 635, 639 (4th Cir. 2010); *Ferrell*, 826 F. Supp.

¹ Specifically, [25,000 putative class members] x [\$9.95/month for credit monitoring services] x [24 months] = \$5,970,000.

2d at 967; *Arthur v. Homesite Ins. Co.*, No. 2:16-cv-00150, 2016 WL 1717222, at *2 (S.D.W. Va. Apr. 28, 2016).

31. The Walmart Defendants deny that they have any liability to Plaintiff or to the putative class that he seeks to represent and deny that Plaintiff or the putative class members are entitled to recover any damages, fees, or the other relief requested in the Complaint. The Walmart Defendants also submit that this action does not satisfy the requirements for class certification under Fed. R. Civ. P. 23. Nevertheless, the Complaint places over \$5 million in controversy exclusive of interest and costs for the reasons set forth above.

The Exceptions to CAFA Do Not Apply

32. None of the exceptions to CAFA jurisdiction applies here. *See* 28 U.S.C. §§ 1332(d)(3)-(4). In any event, the burden to prove the applicability of an exception to jurisdiction under CAFA rests with the party opposing removal. *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 698 (2003) (finding that once a defendant establishes removal is proper, “the burden is on a plaintiff to find an express exception”). Accordingly, it is not the Walmart Defendants’ burden to demonstrate that any exception to CAFA does not apply.

33. Accordingly, this Court has original subject matter jurisdiction pursuant to CAFA.

34. The Walmart Defendants hereby reserve the right to amend this Notice of Removal.

WHEREFORE, the Walmart Defendants remove this action from the Circuit Court of Mason County, West Virginia, to this Court.

Respectfully submitted this 17th day of August, 2021.

WALMART INC. and WAL-MART STORES
EAST, LP

/s/ Neva G. Lusk

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*Counsel for Walmart Inc. and Wal-Mart
Stores East, LP*

CERTIFICATE OF SERVICE

I certify that on August 17, 2021, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and further certify that the foregoing is also being served via First Class United States Mail, postage pre-paid, addressed as follows:

William M. Tiano, Esquire (#4308)
Tony L. Odell, Esquire (#5770)
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By: /s/ Neva G. Lusk
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ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Walmart, CaptureRx Hit with Class Action Over Feb. 2021 Data Breach Affecting Pharmacy Customers](#)
